

Interview with Peter Wallensteen*

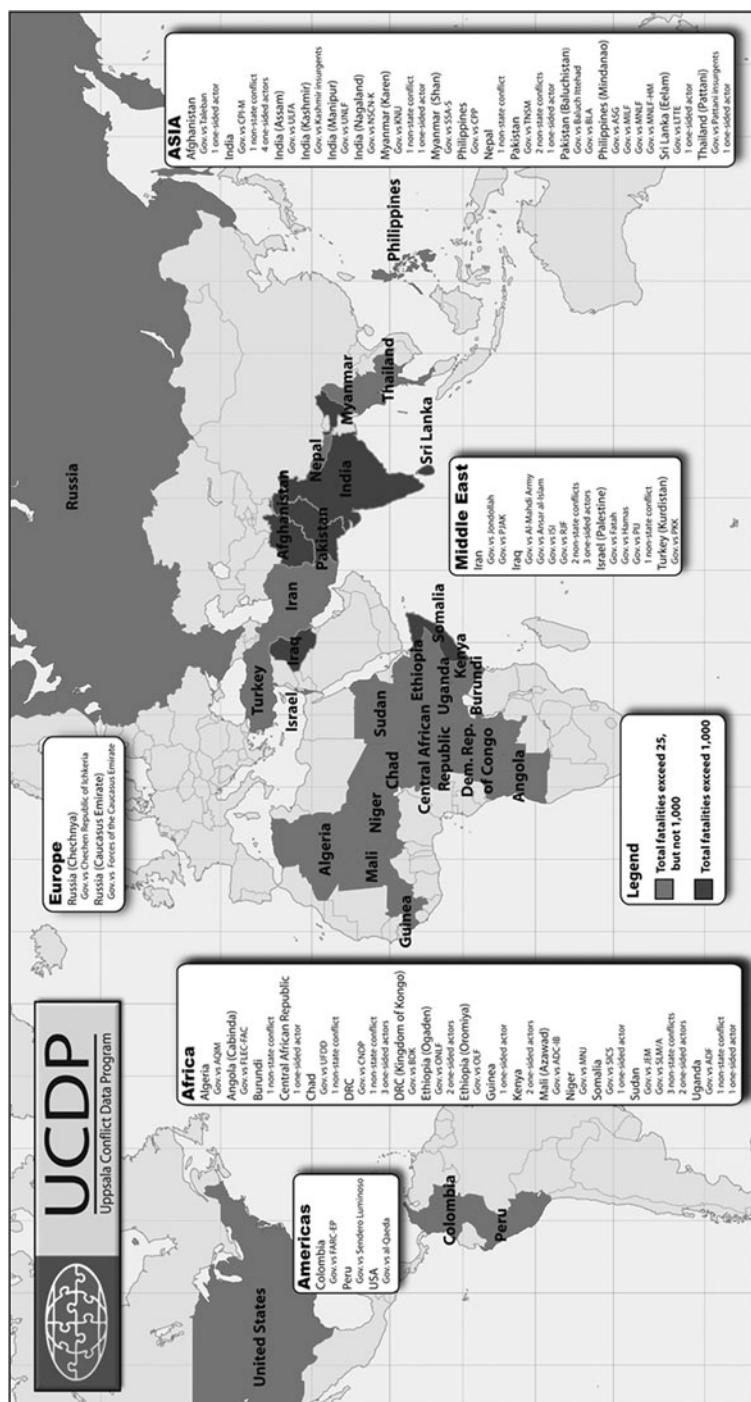
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What types of conflict are taken into account in the Uppsala Conflict Data Program and how do you define armed conflicts?

We try to distinguish three different types of organized violence, which we think are often mixed together, causing a lack of necessary clarity. The first basic type is armed conflict, which is defined as a political disagreement between one actor (a state) and another actor (which could be a state or an organization). That conflict must have arrived at a certain magnitude, and that we measure in terms of 25 people being killed during a year. It means we monitor all kinds of situations and see how they develop; when they reach the threshold of 25 deaths, we include them. That's our basic concept of armed conflict. The key word here is actually the disagreement, or as we call it in slightly more academic terms, 'incompatibility' – there must really be a political disagreement here. We would not include, for instance, skirmishes, guards shooting at the border and situations like that, when there seems to be more of an accident, or where it is definitely not tied to a political strategy.

* The interview was held on 28 April 2009 by Toni Pfanner, Editor-in-Chief of the *International Review of the Red Cross*.



What if you had, for instance, shootings between the armed forces at the border between states – would that be considered, in your concept, an armed conflict?

Perhaps – we would look at it to make sure that it really comes from a political design, and that the guard did not just happen to be shooting. And, of course, there have to be more than 25 people killed. This threshold means a number of smaller incidents are not included on our annual list of armed conflicts.

Apart from this basic concept of armed conflict, what are the two other types of conflict that you examine?

There are many conflicts going on between non-state actors: communal violence, tribes attacking each other, gangs of various sorts, etc. We try to capture these, but as a separate category, which we call non-state conflict. It is often unclear what motivates this violence, or how political it is – therefore, we see this as a different category from armed conflict, which is clearly a politically directed fight about controlling the government or the territory.

This type of violence is not against the state, but really inter-communal violence – would the case of Somalia fall under this category?

For quite a long period of time, yes. It varies depending on when there is a government, and when there is not. But a lot of the violence in Somalia would be of this non-state type, warlords fighting each other.

And the third type of conflict?

The third category, we call one-sided violence – that is, when violence is aimed at particular populations which are not organized. This would cover, for example, genocide, many acts of terrorism and so on. This violence can be perpetrated by a state or by a non-state actor.

We find that these three definitions are fairly distinct from each other. This makes it possible to analyse whether the three categories combine or influence each other. This is how we try to capture a number of the issues, which are not regular armed conflict, in a significant way.

When dealing with terrorism, you have the acts of terrorism, which would be classified as 'one-sided violence', as you defined it. On the other hand, there are counter-terrorism mechanisms. Would counter-terrorism activities fall under the first category of armed conflict, or would they also fall under the third category of one-sided violence?

Most counter-terrorism would probably be under the first category, because normally – for instance, with Al Qaeda – a government is fighting an organized non-state actor. So we would define the United States fighting Al Qaeda, wherever the fighting is located, as an armed conflict.

The starting point of distinction between your different categories is the concept of armed conflict. Would you say that this is very close to interstate conflict?

The history is important. I was studying a project at the University of Michigan called 'Correlates of War', which focused on interstate conflict. At first, it defined different types of interstate conflict, but then later created a separate definition for internal conflict. I felt that there should be one definition of armed conflict, so we at Uppsala tried to integrate them so that they became comparable. You can do this with our current definition. If you have an armed conflict, involving one state against another state, that's an interstate conflict. If you have a conflict involving one state or government versus a rebel movement, that's an internal conflict. In that way, we have the same definition for an armed conflict. It's based on the same criteria whether it is interstate or internal.

The question of occupation is obviously a political disagreement or incompatibility – would that fall under your definition of armed conflict?

Well, that would depend on who the fighting actors are. For instance, Israel versus PLO – that's not an interstate conflict because Palestine is recognized by some but still not an independent state. It is classified as a state versus a non-state actor, which definitely falls under our first category of armed conflict.

This first category would be very close to what is actually foreseen in the international law of armed conflict, where there are basically two types of conflict – international and non-international.

Yes, that's true. The idea is that you should not have very strongly differentiated criteria for what is an armed conflict. Today, when things are much more mixed, it's helpful to have this definition, which looks at which parties are fighting. The problem is, of course, the international law system is still very interstate-oriented.

In the first category, a political disagreement is required. However, there is now often a mingling between political factors and criminal elements which are linked to the conflict – for example, drug-related criminality – which fuels the conflict, like in Colombia or in some African countries. Would such a situation, where there is an intertwining of political and criminal motives, still be considered an armed conflict?

There it becomes really very tricky. For us, the key thing is the disagreement, the incompatibility. Do these criminal groups aspire to take control over the government, or not? Do they aspire to take control over a particular piece of territory? If they do, then we would include them. Some drug-related conflicts, in Colombia for instance, are conducted to influence the political process. But a lot of it is not politically motivated – sometimes actors are not fighting there for political power, but for criminal gain of various sorts. We would not call this an armed conflict, as the actors do not want to exert political power. We would separate political conflict from criminal activities – we don't want to have pure criminal activity in the category of armed conflict.

Let us take an example of drug cartels who are violently opposing military forces, but who clearly do not have political aspirations, at least at this stage. Would you consider this to be in the first category?

Generally, no. When for instance looking at Mexico, we consider it more as non-state violence: two gangs fighting each other for control over a particular trade in a particular city, for example. I don't think we have seen any of it, as yet, really politically challenging the state. Drug lords are not trying to take power, they do not want to be running the state. Maybe they want to impact on the state, in the sense of making sure it does not interfere with their business, but it's not the same as trying to take political control. We try to distinguish this violence according to what kind of aspirations these groups have.

So it doesn't matter if groups are fighting for, let's say, religious or economic reasons – the determining factor would be their actual or desired impact on the political system.

Yes, that would be the key issue. We are not saying anything about the causes of the conflict. We are basically just presenting organized violence which can be caused by many different factors. Sometimes it can have an ethnic background, sometimes a class background, etc. The cause is separate from the actual phenomenon of the fighting.

This still seems a rather traditional international law approach: a distinction between the laws regulating the reasons for going to war (jus ad bellum) and the situation of war afterwards (jus in bello).

That's right, and I think there is clarity to this – it is much more intellectually satisfying to separate the causes. Many people say, for example, that conflicts are all ethnic conflicts, but when you start to look at them, a conflict is rarely related to only one factor. They are always a mixture of issues, but there is still a conflict going on that we can record. To understand its origins, functions and solutions is an analytical issue that is separate from recording the phenomenon.

You mentioned that you include both interstate conflict and conflicts between a state and a non-state actor, which must involve a political disagreement. Do you make any distinction between international, non-international and internationalized armed conflicts in this category, or is it the criterion of political disagreement which interests you primarily?

The information we have available can be used according to the analysis you want to do. For instance, we can also record which other actors are involved in a conflict. There would be the primary parties (the state and the opposing state or organization actually fighting). Of course either party can have support from other actors, which we call secondary parties. You could have a secondary warring party sending troops to the area – if this party is another state, then the conflict is internationalized. There are a quite a number of such conflicts. We have done a separate study on this. The secondary parties may not necessarily be involved in a war using their own troops, but supporting one or the other actor financially, politically, or in

other ways. You could have a whole set of secondary actors involved, and we record that.

In our database, we have about 120 different dimensions available – for free – for anybody to do his or her own analysis. For instance, in the *Journal of Peace Research* we regularly publish categories such as interstate, internationalized, and purely internal conflicts. We want this to be easily accessible, for whatever categorization you want to make as an analyst. However, we are not saying that a particular conflict is only of one particular nature. To me, every conflict is very multi-faceted. What we can do – intellectually honestly – is not to say: ‘this is an internationalized conflict’, but rather to give the information and let the analysts make up their own minds.

In the second category – non-state violence – what are the major types of situations you look at?

Well, these would be situations where the state is not strong or not directly involved. The typical example, as you mentioned, would be Somalia. Another example would be Nigeria, where one confrontation is normally described as taking place between Christian and Moslem groups; or in India, what is known as communal violence. These events can be very devastating and affect people very strongly. But our record shows that they often do not continue for long. There are outbursts of violence that will last for a couple of days, or maybe weeks, but they are not protracted and do not go on like a war. They are often stopped or contained. They have different dynamics, but they definitely should be part of our picture of political violence.

Could this also include violence in favelas, in Rio for example?

That’s the kind of issue we have been debating – exactly what to do there – but in principle that should be included, if we can determine that the groups are clearly organized in a comparable way. That is a non-state conflict. Or for example, if you have armed gangs moving in towards the native population, that may be more like one-sided violence.

In the third category – one-sided violence – the most striking example is certainly the case of genocide, but you mention that acts of terrorism could also qualify. Would these be Al Qaeda-type situations?

Yes, the idea here is that it is not necessarily a political battle between organized actors on each side. One side is organized and deliberately targeting civilians. The typical example is, of course, the attack on the World Trade Centre in New York in September 2001. The victims were civilians with no military function, and who were not part of the political administration of the United States. They were doing their regular business and were suddenly exposed to this attack and killed. Terrorism is really very much of this nature – an attack on civilians who are not necessarily involved in a political battle. The same with genocides – for instance, in Rwanda, in 1993–1994: there was a small armed conflict going on, but then there was a huge genocide, which we view as a separate issue. The genocide, of course,

killed maybe 800,000 people, whereas the armed conflict was very limited. The odd thing, however, was that the United Nations, for instance, basically focused on the armed conflict rather than the genocide.

At one stage at least, before the attacks of 9/11, Al Qaeda was an organized entity – at least in Afghanistan itself, where they had clearly organized structures. Now, it's probably a rather loose network, with merely individuals acting. Would that then move from the first category to the third category?

Yes, we look at each situation, and even divide it up. If you have battles between the armed forces and an organization like Al Qaeda in Mesopotamia, this would probably be an armed conflict. If the same organization is doing suicide bombings on civilians, that would be the terrorist part of it.

It's particularly important concerning the jurisprudence in the United States, where the Supreme Court clearly said in Hamdan decision that there was an armed conflict going on between the United States and Al Qaeda.

We have defined the US and Al Qaeda as the opposites in one-armed conflict, because that fits with *our* armed conflict definition.

Battles do take place between the two organizations in Afghanistan, but if the same happened in Yemen, for example, could you talk about an armed conflict there?

Yes, because the key thing is that they are in a disagreement. There is an incompatibility, so it doesn't really matter where the battle in itself takes place; it's the same organizations fighting on different battlegrounds, so to speak.

But even so, the individual actors in such situations may have a very loose, maybe only philosophical, link to Al Qaeda, and may not actually be organized under a central command.

Now we are into the key thing. That's what we would like to try to determine – is this really organized by the centre, Bin Laden, wherever he is? Or is Al Qaeda just a sort of inspiration for these other groups? In principle, we look at who is acting, and whether they are really a part of Al Qaeda or a separate body. Sometimes, like Al Qaeda in Mesopotamia, we will define it as a separate new body, rather than part of any strongly centralized structure.

So it depends on the situation – for example, the classification may be different in Afghanistan, where the group is more organized, as opposed to the Madrid attacks, where the attackers were acting more individually?

Probably these groups are separate, but inspired by Al Qaeda. You find this with many actors. There is a real problem, for instance, with Palestinian groups. New ones appear now and then, and it is very difficult to know if they are part of Hamas, part of Al Fatah, or on their own. That's always a difficulty in some of these situations where opposition groups are fairly fragmented. It's also hard to determine how centralized some of these organizations are. The idea for us is to try to

include as much of this organized armed violence as possible. We have no reason to exclude it for any other concern except wanting our definitions to be applied strictly.

In the course of your studies on conflict, did you note new types of conflict emerging, or that some types were becoming more prominent?

That was our idea in the beginning. Many people were saying that we no longer have this old kind of armed conflict, and that now we have new wars which are more of the non-state or terrorism type. What we are trying to do in the project right now is to gather data on the latter for the past 20 years to see if there is such a difference. From some of these results, we have found that armed conflicts are special, because they are politically driven by the state, have a longer duration, and are mostly better financed. They are more continual and consistent than non-state violence – which tends to flare up and disappear much more rapidly – or one-sided violence which is about targeting and trying to get spectacular effects, making people fearful but without continuously fighting in the same way as in an armed conflict. It seems these three categories capture different kinds of conflict phenomena. Still, the finding is that armed conflicts are really those drawing in the most resources, resulting in more deaths and having the largest effects on the security of people.

Is this mainly due to the protracted nature of these conflicts?

Yes, and the resources involved. Take the war this year in Sri Lanka, which is the most devastating we have seen for several years. You can see that the parties are two strongly armed actors who have been fighting each other for more than 25 years, and the devastation seems to be tremendous. Even with terrorist deeds like the World Trade Centre, you don't come up to these enormous numbers. The fear effect of terrorism is very strong, but the actual killing is probably less than in armed conflict.

However, the budgets reserved for dealing with traditional threats and conventional warfare are often decreasing while the part of the military budget reserved for unconventional warfare steadily increases.

Yes, and I think it has to do with the fact that the psychological impact of terror is so strong, because of the unpredictability. I'm going on an aeroplane: will there be a bomb? That makes people insecure, in a direct way. If there's a war going on, you know where the war zone is, and you know how to keep out of it. Politically, I think most of the terrorists have not actually achieved their goals – their actions have mostly been counter-productive and strengthened their opposition. But indeed, they do have a strong psychological impact.

It may also be argued that in the scenario of a major terrorist attack, with dirty weapons or such, the impact could be tremendous and even exceed what you have in some traditional armed conflicts.

Exactly, yes, fear sparks budget increases.

In the study, you measure what you call 'battle-related deaths' in a defined area as part of determining the existence of a conflict. While measurement is probably quite feasible in a situation like Israel and Palestine, or in Sri Lanka, it may be much more difficult when you have a global network which is acting. Do you split that up into different situations? Or do you make a global assessment?

We try to do the same assessment for all conflicts, to treat them equally. We do a strict identification of battle events, and see whether we can find the evidence of battles taking place; how many people were involved; how many were killed; who the sides were, and so forth. The main objection is often that there are lots of people dying as a result of secondary effects of the war – the breakdown of the healthcare system, for instance – which is definitely true. But that is not what we include – we look strictly at battle-related casualties. We believe that the health impact is also worth examining; however, it often depends on a number of other factors unrelated to the war, for example the state of the health system before the war.

Do you focus only on the people killed, or also on missing, injured or displaced people?

Yes, we basically focus only on the deaths, because that's often where you have the best information. How many people are wounded will depend on very different understandings of what wounded is, but death is a clear status.

Do you also collect information concerning these other categories of possible victims?

No, not for publication. We may receive that information in various ways, but to go through that systematically – to record how many people were wounded, how many houses destroyed, etc. – would be a huge research project in itself.

Even in that narrow scope of people killed, there are sometimes figures coming out that are quite contradictory, especially regarding the number of people killed in Iraq. How do you measure the numbers, and what sources do you use?

I think that's where much of the debate is right now. These studies are based on epidemiological methodologies: you go in and interview people and try to make them estimate how many people died – then you get these varying estimates. What we do is really try to analyse the battles, the events that take place, and we try to find them by using all kinds of sources. We use a database called 'Factiva' quite extensively, which has news information from about 25,000 sources, a lot of information translated from local languages into English, for instance. We also study government reports to congresses or parliaments, amongst others. We try to find researchers writing about situations they have been in, or information they have gathered. Non-governmental organizations also provide very useful information.

We try to get all these versions of sources to establish that these battles actually took place and that there actually were people killed. The epidemiological approach, on the other hand, is often based on what people say happened. I think that can sometimes be a source of exaggeration, as there may not be any inquiry into why people died, whether it really was part of the battle, etc. This is how you get these rather divergent estimates.

So in the case of the two major studies which were done on Iraq, you would tend towards the Iraq Body Count which took a similar approach, rather than the Lancet report which was done based on epidemiological data?

Yes. There is the same debate on the Congo, where researchers – similarly to the *Lancet* report – also located various spots, went down there to interview people, and then tried to extrapolate from that to the entire nation. In the Congo, it's very difficult, because you don't know how many people there were at the beginning, as the censuses are unreliable. In Iraq the population census might be a bit more reliable. These studies are estimates, more than anything. We just tried to determine where people were killed – you could say that this is maybe underestimating, but over the long term, we have found that our methods work very well. For instance, in Bosnia, from 1991 to 1995, it was constantly estimated that about 250,000 people died. Now, in the big database which has been made by the Research and Documentation Center in Sarajevo, the number is around 100,000, which is much closer to what we reported ourselves. In all these kinds of conflicts, there are reasons for people to want to have very large numbers of victims, but we want to be as accurate as possible.

You use varying outside sources – you don't have your own people in the field measuring?

That's right, we cannot really do field studies ourselves. Over the years, we have learnt to read the material very carefully. You learn, after a while, how many people it is possible to kill with particular weapons, etc. So in that sense, you learn to understand what probably happened.

Do you also take information from humanitarian organizations?

These organisations are very, very crucial, as well as human rights organizations, whose reports are very important sources for us. Definitely, humanitarian organizations have people on the ground who can give very good estimates. Over the last ten years, information on what goes on in various trouble spots around the world has become so much better. Going back in history, it's much harder. Even in the early 1980s, it was difficult to know what happened in Afghanistan, whereas we have a much better account of what happens today. Or think about Indonesia, in the 1950s, or Burma in the 1950s and 1960s. Today we even have more insight into Burma, thanks to various techniques – you can look at satellite imagery, and see whether villages were actually destroyed or not. So I think the world has become somewhat more transparent, in terms of what goes on in organized violence.

The International Committee of the Red Cross is very conservative about giving out figures. Firstly, we don't necessarily have the information, because it's very difficult to estimate the number of people affected by violence, even if you know the situation well. Additionally, we fear that the information we publish may be instrumentalized for political purposes.

I agree with a very prudent approach – that's what we try to do. We have an advantage being at the university – the autonomy of the university is very well respected. However, I'm told there are groups and governments who will dispute the figures or definitions. They may have their agendas. We have no other agenda than just reporting these armed conflicts, as comparably and reliably as possible, to provide a basis for research on the causes of conflict or on conflict resolution. The autonomy we have as a university-based organization really saves us. If we were part of the UN, we would be under enormous political pressure. In that sense, we cherish an autonomy that is similar to the ICRC's, and we think that this kind of reputation is what really benefits the world in the long-term.

You mentioned in the beginning that the minimum threshold for categorizing a situation as a conflict was 25 people killed in a year. Isn't that a very low figure in light of the major conflicts going on? In many countries, one could probably come up with examples of inter-communal violence with 25 people killed in a year.

It is a very low one, and deliberately so. The tradition was to have a cut-off point at 1000 deaths. Other studies were using 200 or 100, but we wanted to have a low number, in order to capture conflicts when they were fairly small. It works because this makes prevention studies possible, as well as opening the way for new kinds of studies to determine how many of these small conflicts will actually escalate and become big conflicts. Surprisingly few actually do, which is good news. A low threshold also enables us to show that conflicts actually do fluctuate substantially.

Now, of course, as we try to span the whole world, it is not always easy to find information. There are several conflicts where the number of deaths is hovering around the borderline of 25. If we are not sure whether there are 25 dead, or 30, or 20, what do we do? Any cut-off point will have that problem; however, you cannot have just one person killed. For example, the Swedish foreign minister was killed six years ago – that was a one-man thing – but that assassination, we felt, was a different kind of dynamic than what an armed conflict is all about. An armed conflict means that groups are organizing to actually have a political impact, and they're prepared to kill. And if they manage to wage battles with more than 25 people killed during a year, it means that they have a sufficient degree of organization to be counted.

Do you make a distinction, nevertheless, between minor and major conflicts?

We refer to a minor armed conflict when there are more than 25 and less than 999 deaths. From 1000 deaths onwards, we refer to a 'war'. Clearly, there is a difference, and in the latest report we are doing, we show that there are five such wars in the

world, with more than 1000 killed: Sri Lanka, Afghanistan, Iraq, Somalia and Pakistan. When I explain this to people, they are often very surprised – the way the media works, it seems that there are far more than that. But there aren't ... of course, 'wars' and 'minor armed conflicts' is a sub-classification that we only use in our first category of armed conflict, to which we give priority and on which we have the data right now. For this reason, our concept of 'war' does not capture the huge number of casualties in Congo, where a lot of fighting will probably be classified under the non-state category.

Do you find that non-state violence fluctuates more?

What we see is that it is more sporadic. It flares up and then is contained. One of the really interesting issues is to ask what happens to these non-state conflicts: why don't they turn into sustained battles? What is being done locally to deal with them? There seems to be a lot of local peace-making going on, which never gets into the headlines, but which is probably very, very significant in managing non-state conflicts.

Would you say it is possible to have a situation where all three categories of violence are going on at once in the same country? For example, in Iraq, where there is a politically driven armed conflict, inter-communal violence, and even acts of one-sided violence?

You can have them in the same place, absolutely. For example, in India, you would have the same: a number of smaller wars going on in North-east India, inter-communal violence in other parts of the country, and the terrorist attacks in Bombay, which are of course in a different category. We think it helps, analytically, to sort them out, to show that they are not necessarily the same and that they would probably need to be dealt with through very different political measures. For armed conflicts, maybe you need political discussion; for non-state conflicts, maybe you need to engage the communal leadership. Terrorism is a separate thing to deal with: how do you deal with suicide bombers, or the organizations supporting them? We think that our classification helps, also politically, in order to get ideas on how to handle the different kinds of conflicts.

You mentioned that presently, there are five situations classified as wars (i.e. an armed conflict with more than 1000 deaths). Do you also have summary figures on the other two categories?

We do our analyses year by year – that figure is for 2008, and we have not yet been able to put together all the data for that year. However, at this point I can indicate the data for 2007 (see map).

Could you indicate some of the trends you have observed within the different categories, or even across different categories?

There are a number. The first one is that there are now surprisingly very, very few inter-state conflicts. I think that's good news. It means that since the end of the cold war, the incidents of serious international armed conflict have decreased.

However, when they happen, they can become very serious, like Ethiopia/Eritrea. You may have had the beginning of such an event in Georgia in 2008, but it was contained very quickly – there was an interest in doing so, as everybody realized that this really could turn into a major interstate conflict.

We have also seen a general reduction in the number of armed conflicts, and that created a lot of headlines. In 1991–1992, there were about 50 armed conflicts, but by 2003, there were 29. Now the number is up to 35 again, so it's escalated – but many of them are smaller conflicts, of which very few have really become big wars. Again, this seems to identify some kind of ability to keep conflicts smaller at least.

What do you believe are the reasons for the reduction in the number of major armed conflicts?

The total numbers now are nowhere near those of the early 1990s. You can attribute that, I think, to increased international activity: the work of the UN, much earlier attention to conflicts, the involvement of additional bodies such as the EU. I also think that the presence of NGOs, who sound the alarms quite early, has an impact.

Another theory on the reduction of conflicts is that democratization and the opening up of societies leads to fewer conflicts actually escalating. I think that's a little too optimistic, but there is a whole debate about democracy and peace. Another argument that has been made is that economic growth in a number of countries has provided the incentive to earn money in other ways than fighting in wars. This strikes me as important. It implies that with this present financial crisis, one should be worried that this may lead to an increase in armed conflict. Maybe that's a sour note to end on.

The impurity of war

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Abstract

Progressive democratization, the presence of a military superpower and the dream of an international order maintained by an international authority do not enhance the appearance of conventional armed conflicts. However, the discovery of new frailties that can be exploited by aggressors, the proliferation of motives – including ideological motives – for waging war, and the spread of technologies that can be used in new forms of warfare have led to war and armed conflicts breaking out of their classic mould, becoming hybrid and going beyond their previous boundaries. The author argues for an updated polemology which endeavours to explain the mechanisms of these new types of warfare.

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There was once a time, perhaps a very brief moment in European history, when it hardly made sense to ask the question ‘Who is at war?’; every individual was inevitably a member of a state which was either at peace or at war¹ and was either a civilian or a member of the armed forces. If someone bore weapons, it had to be to fight a private enemy (possibly to commit a crime) or to fight the enemy designated by politics. Death – of one soldier at the hands of another, if possible – was expected to occur during certain periods (the duration of the conflict) and in accordance with standards that were rightly called the laws of war. The recent clash between Russia and Georgia, involving tanks, uniforms, front lines, an armistice and negotiations, bears little resemblance to that model (the demise of which one should perhaps not be too hasty to proclaim).

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Declaring war and peace

War used to be a matter for authorized entities – that is, sovereign states. In a rather roundabout way, the authority to declare war and to designate the enemy was one of the attributes of the sovereign power. Those entities took the requirement of clarity so far as to surround the act of violence with acts of communication.² They declared war (or even mobilization) at the beginning and peace when the hostilities were over. The period of bloodshed in between gave rise to various documents and reminiscent items ranging from peace treaties affirming a decision (submission by the defeated party or compromise), accounts and chronicles, monuments to commemorate ‘our’ victory or ‘our dead’ and ‘their’ defeat, songs and so on.

The gates of the temple of Janus in Rome used to be open in wartime and were closed again when peace was declared. In twentieth-century France, a certain type of poster and a particular typography were reserved for general mobilizations, and the victory parade followed a standard scenario. The paradoxical objective of so much codified ostentation was to enforce silence – that of the weapons and that of the defeated party, which would cease to speak to posterity and to state its political claims. Wartime and peacetime were punctuated by symbolic marks: people fought to change History with a capital ‘H’ and it rewarded them by preserving their histories with a small ‘h’.

The temple of war

The emergence of new sub-state players, new types of weapons and new ideological representations (among both the strong and the weak) overturned those features and encouraged the multiplication of hybrid or indeterminate conflicts, a matter which can only be understood if one goes back to the basic definition of war.

The will

The will to impose one’s law on another (war as a ‘clash of wills’, as Clausewitz put it)³ is an inherent aspect of war relations: at least one party issues claims (to a territory, a resource, a political change, the ascendancy of a set of values or the disappearance of an ethnic group) and attempts to force its adversary to agree or retreat. If the will is clear (and what could be clearer than a declaration by the sovereign?) and the objective is known (the claim or the disagreement), the other elements fit into place.

1 Alberico Gentili (*De jure belli*, 1585) defined war as ‘armorum publicorum justa contentio’, or ‘war is an armed conflict that is public and just’ (just in the eyes of those practising it, of course).

2 Including ‘performative’ statements which create a new situation merely by virtue of having been pronounced. See John Langshaw Austin, *How to Do Things with Words*, Oxford University Press, Oxford, 1962.

3 Carl von Clausewitz, *On War*, trans. Michael Eliot Howard and Peter Paret, Princeton University Press, Princeton, 1989.

Lethality

After all, war has long been the time ‘when fathers buried their sons’, or the time when the death rate associated with organized violence changes demographic balances.⁴ The possibility of collectively meting out or being put to death is a constitutive element of war; it takes place according to certain prescribed forms and within a particular relationship with unknown men that are recognized only between enemies.

Technicity

There can be no warfare without weapons – that is, without specific tools. Although a weapon may be used for other purposes – such as hunting, training or displaying – it is first and foremost a tool made to kill or at least to overcome. Weapons have an impact on flesh but also on the mind, on which they have a constraining impact (in that sense, what weapons and the media have in common is that they are both tools which work on the human brain).

Symbolicity

Here, the notion of ‘symbol’ is to be taken in the broadest sense: men believe jointly in ideas that are given substance through performances. Flags or uniforms which exist merely to represent the homeland or adherence to the army are the most visible components of a vast construction. There can be no war unless there is a community which is first convinced of its own existence as a historical force, has its own picture of the enemy and is sure that there are reasons to kill or to die. Those reasons may be extremely varied: to add to its collection of skulls (which is proof of prestige in some civilizations), to overthrow the new Hitler (Milošević, Saddam, etc.) or to establish universal democratic peace in other cultures. In all those cases, complex devices are needed to organize those common beliefs in opposition to the beliefs and symbols of the adversary.

What we have just described is obviously a standardized ideal which is not always manifested in practice with that degree of clarity. Hence, even at the height of ‘classic’ European warfare, the fighting became ‘civilian’ or ‘partisan’ and toppled those fine binary ways of thinking. One of the two parties concerned aspired to a quality that the other denied it (liberation army or legitimate popular resistance). It claimed to be at war in a situation in which the other party – possibly the colonial or occupying state – perceived nothing but disorder, pillaging, insurrection and banditry. However, things were finally resolved: either the state won (and was then able to speak of a victorious counter-insurrection) or the other party won and, in doing so, justified its aspiration to assume legitimate authority or to proclaim the independence of a state with its own territory. A war for the state became *a posteriori* a war of and by the state.

4 Gaston Bouthoul, *L’infanticide différé*, Hachette, Paris, 1970.

War is a chameleon

As everyone can see, those fine certainties have melted away. For example, a French national, like the author of this text, or another European simply has to ask the people around him ‘Are we at war in Afghanistan?’ to obtain the most diverse answers. There are those who think that an international peacekeeping operation has nothing in common with a war and those who assert that we are carrying out a colonial war in the service of American imperialism – not forgetting the pragmatists who maintain that if the Taliban killed ten French soldiers in August 2008 and are winning over whole provinces in advance of NATO, it is beginning to look more like a war than an international police initiative.

The uncertainty in that case is reinforced by the many different criteria of war (which Clausewitz described as a ‘chameleon’):⁵

- Criterion relating to the parties involved. What does ‘the Taliban’ mean – is it an army, a guerrilla force or a band of terrorists? At what stage in the organization or legitimacy does one of the two parties deserve to be called an army? When does it cease to be considered as a disruptive factor and attain the dignity of a possible contributor to History? And when does it stop being a force of repression and assume the prestigious status of a recognized enemy?
- Criterion associated with the means employed. When some use missiles and others mortars, it becomes difficult to refer to private or marginal violence.
- Criterion of the degree of violence, or of the mortality rate, which is anything but negligible in Afghanistan, especially if the civilian victims are taken into account.
- Criterion of the awareness of the belligerents of being ‘at war’ or of the political category under which they operate. However, in that case, those who claim to be engaged in a *jihad* are certain that they are at war, whereas the Westerners deny the reality of war – unless they resort to using acronyms and neologisms such as ‘military assistance’, ‘peacekeeping’ or, to use NATO jargon, ‘operations other than war’ (OOTW) in an attempt to conceal a reality whose official acknowledgement would give too much prestige to the adversary. That a nation can be at war ‘without knowing it’ – in other words without paying too much attention to the sometimes perilous policing tasks carried out on its behalf by professionals on the fringe of the Empire – is hardly something to boast about.
- Criterion of the objectives of the armed forces. It is well known that ‘the purpose of all war is peace’ (Saint Augustine) and that ‘war is the pursuit of politics by other means’ (Clausewitz⁶). Clearly, even if war can be used for private purposes (the Prince’s fantasies or the interests of cannon-mongers), it only has a meaning when viewed from the perspective of the type of peace sought, and hence the stable order which is to ensue and which it is pursuing. In this case, maintaining the Karzai regime, the stabilization of the country and the removal

⁵ Clausewitz, above note 3, I, ch.1.

⁶ *Ibid.*

of the *jihadist* bases seem to form an objective that is entirely political and likely to imply bloodshed.

New forms of armed violence

At this point, the reader is justified in questioning the interest of an ontology of war, in wondering whether the interest of the category goes beyond exercising the ingenuity of philosophers and lawyers, and ultimately, whether what counts is deaths or words. That way of thinking is that of schools such as 'irenology' or 'peace research',⁷ which empty the concept of war of all meaning (leaving them suspecting those who use it of being at least 'fatalists', if not complacent about the repeated recurrence of vast collective massacres). War is thus said to be just one form of violence among others and one that has merged with all the great tragedies of humanity, including environmental disasters, and that it is more urgent to diagnose than classify. At the other end of the ideological spectrum, strategists have a growing tendency to blur the 'archaic' category of war from the perspective of security in the face of criminal activities, technological dangers, disasters, terrorism and so on.

Reviewing the concept of war

However, we consider it indispensable to review the concept of war, regardless of how threatened and improbable that concept may seem today. First of all, it is a fundamental anthropological experience, as inscribed in our mythology and in our subconscious, reflected in our institutions and sometimes also in the law. All are free to be annoyed that there is still a right 'to' war (just or unjust warfare) or a right in war, but it is better for those rights to exist and protect the combatants than not.

To give just one example, it may be of great importance to recognize the status of enemy combatants. When the United States interned *jihadists* at Guantánamo, they labelled the detainees 'unlawful combatants' to avoid having to apply the Geneva Conventions and/or US penal law to them. That bizarre status was that of German saboteurs during the Second World War (neither combatants who had to be treated in accordance with the laws of war nor civilians who had to be protected and who were *a priori* innocent)⁸ and of the soldiers (particularly those who were black) of the North fighting the South in the American Civil War.

The second good reason to retain the concept of war is that it has the advantage of implying the opposite concept of peace. If we do not know whether we are at war and whether we have enemies, we run the risk of never being at peace.

7 Johan Galtung, 'Violence, peace and peace research', *Journal of Peace Research*, Vol. 6 (3) (1969), pp. 167–91.

8 *Ex parte Quirin* 317 US 1 1942.

New forms of war

Without even mentioning the Cold War, whose chief characteristic was that it remained in force or at risk throughout the second half of the twentieth century, new types of conflict have occurred, some of which are virtual or imagined. This includes fighting between the state entity and combatants who claim to be a liberation or revolutionary army or one with a similar designation. For instance, in the 1950s there was no war, but there were ‘events in Algeria’. Forty years later, the Algerian state was left wondering whether it was at war with underground Islamist fighters or whether it was called upon to maintain order in the face of bandits.

The question becomes crucial when there are a number of different armed entities involved, as was the case with the growing number of militias in Lebanon in the 1980s, or when it is almost impossible to distinguish between politics and criminal activities. In Latin America or in the golden triangle close to Myanmar, it is not easy to tell the difference between an armed band of drug dealers and a guerrilla force.

The distinction between military and civilian⁹ is called into question by the tendency to mobilize non-uniformed combatants, who may be children, and the growing propensity of conflicts to kill more civilians than members of the military forces. When militias massacre groups of people who, as in Darfur, hardly do anything to defend themselves, can we still speak of war? Taking another issue, when a member of a private military company carries out a security mission, is he assisting a ‘real’ army and when does he start to ‘make’ war? Where is the borderline between terrorism, secret warfare, the poor man’s war and guerrilla warfare?

These tensions and contradictions reached their peak on the day when the United States declared a ‘global war on terror’. That leads to the complementary notion of ‘pre-emptive war’¹⁰ which authorizes cross-border armed interventions against terrorist groups or against tyrants who may be supporting those groups and/or possess weapons of mass destruction.

‘Global War on Terror’

The ‘global war on terror’ brings together all the contradictions of new wars:

- The impossibility of defining the adversary: what is terrorism – an ideology, a practice, a crime?
- The difficulty of defining the criterion of victory: the day when there are no more terrorists and no one who wants to attack the United States? When no one is making weapons of mass destruction any longer? When no state is

9 Martin van Creveld, *The Transformation of War*, Free Press, New York, 1991.

10 On the notion of ‘pre-emptive’ (rather than preventive) war, see François-Bernard Huyghe, *Quatrième guerre mondiale – Faire mourir et faire croire*, Éditions du Rocher, Paris, 2004.

sheltering clandestine armed groups wittingly or against its will? Is there such a thing as war without victory – that is, ‘infinite’ warfare?¹¹

- The inability to pinpoint the start or the end of the war, the place where it is fought and the status of the combatants.
- The difficulty of distinguishing between acts of war (or terrorism), threats, negotiations and so on, as was traditionally the case in relations between belligerents.

In defence of the United States it must be admitted that the challenge issued by the adversary or posed by acts (attacks) and messages (proclamations, communiqués and *fatwas*) exacerbates the ambiguities of terrorist practice.

There is no such thing as terrorism¹² in itself but there are terrorist practices characterized by the secret nature of the organization (the day when a terrorist puts on a uniform and parades without masking his face is the day he has joined a militia), by sporadic strikes (otherwise one would have to speak of battles, of territory won or lost, and so on) and by the choice of symbolic military or civilian objectives. As Camus put it, ‘when a terrorist kills a man, he wants to kill an idea’. They are also characterized by the will to resort to destruction as a means of proclaiming their existence (terrorists want to show who they are, the cause that they represent, their claims, their enemy, their objective and many other things – sometimes with just one bomb).

Terrorism is still a compromise between a ‘poor man’s war’ and ‘propaganda by deed’. Its impure character is made even more complex by two factors. First, terrorists believe themselves to be fighting a religious war in reference to a specific theological category: the defensive *jihad* that they believe is compulsory for every good Muslim. They are convinced, as Bin Laden puts it, that the natural law that prompts everyone to defend his own family by force as well as the rules of the Koran make him a warrior in a state of legitimate defence, a true believer destined for martyrdom, and in no way a terrorist who kills innocent civilians. An organization that is said to be terrorist may at different times launch attacks, fight in a territory like a guerrilla fighter, control a sanctified area and have official status (like the *jihadists* in Afghanistan prior to October 2001), assume a legal façade, even stand for election, accede to power, and so on. It is by definition transitory (just as the war that it wages and is waged against it mutates): it is supposed to lead to revolution, the insurrection of the entire nation or the constitution of a real army.

Second, a recent study by the Rand Corporation examined the question of ‘how terrorist groups end’¹³ and what has happened to 648 terrorist groups since

11 Giulietto Chiesa, *La guerra infinita*, Feltrinelli, Milan, 2002.

12 Catherine Bertho Lavenir and François-Bernard Huyghe (eds.), *La scène terroriste*, Cahiers de médiologie No. 13, Editions Gallimard, Paris, 2002, available at www.mediologie.org/collection/13_terrorisme/sommaire13.html (last visited 13 February 2009).

13 *How Terrorist Groups End: Lessons for Countering al Qa’ida*, 2008, Rand Monograph Report, available at www.rand.org/pubs/monographs/MG741 (last visited 13 February 2009).

1968 in all countries and across all ideologies. More than half disappeared in just a few years; 43 per cent of the organizations were disbanded quite simply by becoming 'legal' political forces. And when they are able to move on to the insurrection stage (that is, more hard-line partisan warfare than clandestine terrorism), in half of the cases they end up negotiating with a government – although it is difficult to imagine al Qaeda one day discussing the establishment of a planetary caliphate with its Jewish and crusading adversaries. Attacks, guerrilla warfare, political action and diplomatic negotiations constitute an ongoing process in which it becomes difficult to separate the military phases from the political phases.

The strong, the weak and planetary control

In the preceding examples, the difficulty of differentiating between wars which comply with the traditional definition and pseudo-wars or 'para-wars' is related to a form of disorder or a shortage of means on the part of the weak entity. These conflicts, which some consider archaic (although they may well be the conflicts of the future), occur because there is no 'real' state or a 'real' army.

However, in other cases, war is transformed by the powerful entity, either as the generator of ideological and political structures or as the possessor of new instruments. That tends to deprive the war that it wages of certain previously held characteristics of ostensible violence, territoriality and circumscribed duration.

A revolution or transformation in military affairs

Theories for several of those changes have been developed, particularly in the United States – including the 'Revolution in Military Affairs' (RMA).¹⁴ The RMA, proclaimed after the collapse of the USSR (although its origins go back far further), was revelatory of a paradigm shift. It revolves around the vast US military superiority and a technicist view. The predominance of US forces must also be expressed in the use of information technologies – regardless of whether this applies to intelligence, 'making the battlefield transparent', striking where force is effective, coordinating its own forces perfectly, responding instantaneously from the 'captor' which detects the targets to the gunner without having to go through the cumbersome traditional chain of military command – with the advocates of the RMA ultimately thinking of the army as a 'system of systems'. The RMA is open to the full range of speculation on future weapons based on nanotechnologies, guided energy, and so on against a background of the explosion of information technology. Some dream of an automated conflict fought by robots and where there will be little place for outdated devices such as tanks or aircraft carriers.

14 Andrew Latham, *Understanding the RMA: Brandelian Insights into the transformation of Warfare*, No. 2, PSIS, Geneva, 1999.

The pioneers of the RMA – followed by their successors in the 2000s, who returned to a more realistic vision and prefer to speak of ‘transformation’ rather than revolution – continue to extol the merits of a very ‘high-tech’ vision, according to which the United States would be able to destroy any conventional force as if punishment fell from heaven. However, they have understood that the enemy of the future will ‘cheat’. It will position itself in an asymmetrical logic and endeavour to transform its own weaknesses into strengths, particularly with regard to the media and public opinion. The ‘strong’ will have to resolve problems of low-intensity conflicts, terrorism and guerrilla warfare with civilian adversaries in a context which increasingly resembles policing on a planetary scale.

Multiple-objective armed intervention

In parallel, the international system – to avoid saying the West – has invented new armed interventions covering reprisals, sanctions and even humanitarian interventions. They have to keep the protagonists apart or protect populations. The language used by the powers involved emphasizes that they are conducting an ‘altruistic’ war which does not place them at any advantage. They say that they are combating criminals or enemies of humankind, leaders and not people, their task being, conversely, to save them.

This leads to the right to take action justifying the use of armed force to stave off unacceptable violence or ethnic purging. There is an increase in the number of military operations, which we refer to as ‘control operations’, carried out to prevent armed violence on the part of the poor and archaic (ethnic clashes, for example). In this case, war merges, at least in its rhetoric, with police operations (which should essentially be reserved for maintaining internal order but which globalization has extended to the dimension of the planet).

Asymmetrical warfare

Of the categories used to describe new forms of armed conflict, that of asymmetrical warfare is particularly revelatory.¹⁵ It is based on the means used (the poor man’s war as opposed to the excessively armed rich man’s high-tech war), on strategy (attrition as opposed to control) and also on the objectives. For the strong, the rule is to stop or limit the activities of the weak, who can hardly hope to take its capital or force it to sign a surrender document or a treaty. For the weak, the rule is to hold on, impose a loss in the moral sphere or in the area of public opinion, demoralize where it is impossible to disarm, and make the continuation of the conflict unbearable. Asymmetrical warfare is based more on the use of information than on the use of power and is therefore out of line with all classic conceptions. It suggests that strategic victory is not the sum of tactical victories; it does not shift

15 See Steven Metz, ‘La guerre asymétrique et l’avenir de l’Occident’, *Politique Etrangère*, No. 1 (2003), pp. 26–40.

the question of the legitimacy of war (and hence of the beliefs behind it) as a preliminary issue, but makes it its very objective.

Three-block and fourth-generation warfare

Variants of the concept of asymmetrical warfare have emerged recently. Many hold firm to the utopia of a Revolution in Military Affairs but allow the emergence of new categories of strategic thinking.

For instance, ‘three-block warfare’, a term coined by General Charles Krulak: ‘In one moment in time, our service members will be feeding and clothing displaced refugees, providing humanitarian assistance. In the next moment, they will be holding two warring tribes apart – conducting peacekeeping operations – and, finally, they will be fighting a highly lethal mid-intensity battle – all on the same day ... all within three city blocks.’¹⁶ A possible scenario of that kind requires the command to be decentralized (a mere corporal must be able to decide if the environment is hostile, neutral or friendly and the degree of violence to apply).

With regard to ‘fourth-generation warfare’, an idea that has been debated since 1989,¹⁷ it represents the outcome of a historical evolution. The first generation was based on the human mass arranged in lines and columns on the battlefield. The second depended on firepower – early on, that of machine gun and then of aircraft – and mobilized upstream a vast industrial machine. The third implied manoeuvrability, such as the *blitzkrieg* in the Second World War.

What about fourth-generation warfare? It is said to correspond to the information revolution. However, most of all it would mobilize entire populations in hostility that would spread to all areas – political, economic, social and cultural – and that would be directed against the enemy’s mental and organizational system. Totally asymmetrical, it would pit against each other two entities with nothing in common. On the one hand, high-tech powers. On the other, scattered transnational or infranational players, religious, ethnic or special interest groups attacking indiscriminately the market, symbols of Western society, its communications. Its advocates like to present that warfare as global, granular (an allusion to the size and large number of different forms or motivations of the groups involved in the conflict), technological and media-based.

Tools of victory

Of course, all that theoretical output corresponds in the realm of ideas to a relation of power, confrontation between the ‘strong’ – a superpower which is sure that it no longer has to fear a competitor that can measure up to it and which takes charge

16 General Charles Krulak, Commandant US Marine Corps, Remarks at the National Press Club, Washington Transcript Series, 10 October 1997.

17 William S. Lind *et al.*, ‘The changing face of war: into the fourth generation’, *Marine Corps Gazette*, October 1989, available at www.d-n-i.net/fcs/4th_gen_war_gazette.htm (last visited 19 February 2009).

of the world order – and several kinds of ‘weak’ entities determined to exploit the deficiencies of the system, particularly those of the media. However, the transformation of war is not due merely to the evolution of relations of force and ideas (some will say of ideologies); it is also due to technical change.

Smart weapons

To a large extent, strategists have dreamed up new weapons that are intelligent (packed with computer technology), precise (the famous surgical strikes), controlled from a distance (probably from a ‘war chamber’ full of monitors), equipped with the quasi-omniscience of satellite observation, economical in terms of both destructive force and human lives, set more against the organization or the enemy means of co-ordination than human lives, and capable of ‘shocking and appalling’ an enemy that is completely out of its depth.

Whereas the idea of a ‘zero casualty’ war has been a journalistic invention rather than a real doctrine formulated by the Pentagon, the notion is spreading of a technically perfect war in which the use of violence would be reduced to what is strictly necessary and implemented at the most effective point. From there, there have been two significant developments.

Non-lethal weapons and information weapons

Popularized back in the 1980s and then thanks to a marked expansion of research since the 1990s, the weapon that does not kill or even cause any irreversible damage has truly taken its place in the strategists’ mental universe. Various types of weapons that are said to be non-lethal or barely lethal exist (they are designed not to kill, but there is nothing that – when used in a particular way or in particular circumstances – does not have the potential to kill a human being). These include kinetic energy missiles (such as rubber bullets), chemical irritants or ‘incapacitating’ chemical products, weapons that use electronic impulses to paralyse, as well as sophisticated systems intended to neutralize vehicles, disrupt communication systems, make buildings uninhabitable and so on. And that is without referring to science-fiction devices such as types of radar equipment which emit waves that produce burning sensations or sounds that are unbearable to the human ear, etc.¹⁸

All those weapons correspond to a double finality. The first issue is to avoid displaying – particularly on international television – any form of brutality in the maintenance of internal order when dealing with demonstrators or rioters or externally during clashes with the occupied civilian population. The second notion is that the modern soldier will have a weapon that is both ‘rheostatic’ (its impact can be adjusted depending on the degree of dangerousness of the target) and an intermediary means for situations in which threats or authority are not enough but where it is not yet appropriate to release the full destructive force of ‘real weapons’.

18 David Fidler, ‘The meaning of Moscow: “non-lethal” weapons and international law in the early 21st century’, *International Review of the Red Cross*, Vol. 87 (859) (2005), pp. 525–52.

Those near-wars in which the strong wants above all to keep its violence in check (and not display it to the public), in which it distinguishes between criminal enemies such as terrorists and enemies that are ‘potentially friendly’ or ‘virtually hostile’ (such as the local people whose apparent neutrality at least needs to be guaranteed as action is only taken in their area for their good), and the notions behind them are scarcely in line with the canonical system. Everything is aimed at maintaining an acceptable level of the use of force, both because that is in keeping with how public opinion sees things and because the aim of the military operations is less to win a conflict than to maintain the international order as the internal order, assuming that globalization allows the difference to remain.

Random threats and remote attacks

One of the problems of confusing order/peace and war/disorder is that the strong becomes more aware of random threats. We have referred to terrorism, but there are forms of aggression to which a modern state may be subjected and whose nature it is hard put to define, let alone to define as acts of war justifying retaliation. That is the case of the famous ‘cyber war’ or computer war, an unlikely designation which covers all acts of aggression that can be carried out from a distance, generally with the anonymity of a computer or network of computers. It is an example of the confusion of genres and mixed conflicts that are typical of the present era.

Such attacks may transmit propaganda (accessing a government website to make fun of it or to tag on a vengeful slogan, for example), they may be a form of espionage (to obtain confidential data, to intercept messages) but they may also constitute a form of sabotage: paralysing a government website, attacking a strategically important enterprise, or disrupting what the Americans call vital infrastructures (emergency services, the water or electricity supply, road or air traffic, etc.).

All that involves the use of ‘malware’ and taking control of remote machines. However, when a ‘cyber attack’ is launched on a state, as was recently the case in Estonia or Georgia, that state is immediately confronted with the problem of tracing the aggression (where does the attack come from and who is actually in charge of the websites and servers from which it seems to come?) and with the question of the extent of the damage suffered. Who is leading the attack? A government service? Mercenaries that can be ‘hired’ on the Internet? A private militant, criminal or terrorist group? How can the damage be assessed and when is it to be defined as an act of war, particularly if no one is killed? What is private or public in the matter?

Similarly, a cyber attack raises the issue of how to interpret the attacker’s intentions. The attack may be intended to prepare or accompany a conventional military attack, but it may also act as a warning – an act of sabotage as a message to support a claim or a threat. It becomes difficult to decide how to respond (difficult, for example, to respond to malware by a volley of bombs and even more difficult to

justify the action in the United Nations). The entire issue is further complicated by the fact that as a cyber attack follows the logic of chaos (the greater disorder it creates and consequently the more time, energy and money is wasted, the more effective it is), the relation between the desired effect and the effect obtained will never be known.

The same reasoning would probably apply to economic attacks carried out by means of stock-market rumours or manipulations and to health or environmental attacks, which are just as difficult to prove (especially thanks to the media coverage of economic, criminal, ideological or terrorist groups acting as mercenaries or executants).

The image of war

While sabotaging information systems (the vectors and containers) or theft or manipulation of data (the content) can be referred to as 'information warfare', there is a third aspect, which concerns public opinion: everything that has less to do with the availability or the functionality of a useful piece of information than with the dissemination of an emotional message. Hence the information war consists of ensuring that one's own version of the facts, images, values, dissatisfaction and antipathies are given greater prominence than those of the other party.¹⁹

Viewed from that perspective, the relationship between the strong and the weak has changed since the Vietnam War (a period when the United States was losing the war of images because it had no control over them) and the first Gulf war (a period when the United States was winning the war of images thanks to CNN's monopoly of the visible war). Now anyone can paint their own picture. While the United States produces a thoroughly Hollywood-style version of the war in Iraq (with heroic soldiers, the statue of the dictator falling from its pedestal, etc.), the *jihadists* give their public a digital version of the occupation of Iraq, with video testimonies of future martyrs and traitors being punished, filmed while they were being executed. When the Palestinians train their cameras on their victim or when Hezbollah launches its own television channel, the pro-Israelis produce whole programmes on the Internet or on television to show that everything is faked and that Tsahal is the least bloodthirsty army in the world.

Since wars have ceased to be fought on the battlefield alone but are also fought in cyberspace and on all the television sets in the world, the war of representations, which targets 'hearts and minds', has become at least as important as the real military successes.

19 See definition in François-Bernard Huyghe, *Maîtres du faire croire. De la propagande à l'influence*, Vuibert, Paris, 2008.

Conclusion

Should we give up trying to understand war or to define it? We have discussed new symbolic and technical acts of violence and have argued in favour of an updated polemology²⁰ that would endeavour to explain the mechanisms of war by taking appropriate account of signs and symbols.

At the end of the Cold War, many people believed that if peace was not sure, at least war would be restricted by two trends: the conversion of the planet or of a majority of its inhabitants to democratic values (people have not stopped repeating since Kant that republics do not go to war with each other)²¹ and the immense superiority of the superpower. Those are certainly factors that militate against conventional conflicts between nation-states. However, that new fact has not prevented the discovery of new frailties that are open to exploitation by aggressors, the increase in the range of reasons, including ideological, for going to war, or the spread of technologies that can be used in new forms of conflict. The dream is of an international order maintained by an international police force, which is, if possible, virtuous and altruistic. However, war – or conflict – tends to break out of its classic mould and all boundaries²² in every meaning of the word: limits in time and space, the limitations of the traditional instruments of war as well as the borders that used to separate war from other forms of political, economic or ideological conflict. War is becoming hybrid, but that is no reason to give up trying to understand it.

20 Myriam Klinger, *Héritage et actualité de la polémologie*, Téraèdre, 2007; see also F. B. Huyghe, *Anthologie de textes sur la polémologie*, 2008, available at www.huyghe.fr/actu_482.htm (last visited 13 February 2009); 'Polemology'; Ervin Laszlo, Linus Pauling and Chong-nyol Yu, *World Encyclopedia of Peace*, Pergamon Press, New York, 1986.

21 Immanuel Kant, *Practical Philosophy*, trans. and ed. Mary Gregor, Cambridge University Press, Cambridge, 1996, p. 12.

22 Lang Qiai and Xiangsui Wang, *Unrestricted Warfare*, Pan-American Publishing Company, Panama City, 2002.

Timelines, borderlines and conflicts

The historical evolution of the legal divide between international and non-international armed conflicts

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Abstract

Calls have been made in recent years for the legal distinction between international and non-international armed conflicts to be removed. Also as of late, confusion regarding the applicable legal regime has been created by so-called transnational conflicts involving non-state entities. These situations do not fit naturally into the two traditional types of armed conflict recognized by IHL from 1949 onwards. The present article centres on how the legal divide that still exists between international and non-international armed conflict can be explained historically. It aims to further the discussion on whether such a distinction is still relevant, as well as on how certain situations could be classified in the existing typology of IHL.

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* The views expressed in this article are those of the author and do not necessarily reflect the position of the institutions mentioned above. The author wishes to thank Natalie Wagner and Yasmin Naqvi for their valuable comments on an earlier version and to stress that any errors in the article are his alone.

March on, march on, since we are up in arms;
If not to fight with foreign enemies,
Yet to beat down these rebels here at home.

Shakespeare, *Richard III*, IV.iv. 459–461

In the summer of 2006, the world witnessed a situation that undoubtedly reached the threshold of armed conflict. As yet, however, the conflict between Israel and Hezbollah (or according to some, the conflict between Israel and Lebanon) has not conclusively been identified as one of the two (existing) types of conflict under international humanitarian law (IHL): as either an international armed conflict (IAC) or a non-international armed conflict (NIAC).¹ Nor have the incursions by Turkish armed forces into northern Iraqi territory to carry out raids on Kurdish strongholds been defined as one of the two types of conflict.

Whilst calls have been made in recent years for the legal distinction between international and non-international armed conflicts to be removed,² confusion as to the applicable legal regime has been created even more recently by the type of conflict situation referred to above, i.e. against non-state entities that operate beyond the borders of a single state. These so-called transnational armed conflicts do not fit naturally into the two traditional types of armed conflict recognized by IHL. In *Hamdan v. Rumsfeld*, the Supreme Court of the United States ruled that the fight against Al Qaeda, which is not limited to Afghanistan or Iraq but is conducted in essence outside the United States, is covered by Common Article 3 that applies to NIACs.³ This case is a striking example of the problems the present classification poses not only for lawyers but also for policymakers and potentially for members of the military.⁴

1 Neither Israel nor Lebanon took the standpoint that the hostilities constituted a non-international armed conflict. See Geoffrey S. Corn, 'Hamdan, Lebanon, and the regulation of hostilities: The need to recognize a hybrid category of armed conflict', *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2, 2007, p. 305. The International Committee of the Red Cross (ICRC) has not publicly qualified the conflict as either international or non-international in character, whereas the United Nations Commission of Inquiry on Lebanon named the situation a *sui generis* international armed conflict – *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, paras 8–9 and 57.

2 e.g. James Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict', *International Review of the Red Cross*, Vol. 85, No. 850, 2003; Deidre Willmott, 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court', *Melbourne Journal of International Law*, Vol. 5, Issue 1, 2004; Emily Crawford, 'Unequal before the law: The case for the elimination of the distinction between international and non-international armed conflict', *Leiden Journal of International Law*, Vol. 20, Issue 2, 2007.

3 United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), pp. 66–69.

4 Anthony Rogers notes that the division into international and non-international armed conflicts is important for practitioners, for example the 'military lawyer who has to advise a commander or the military chain of command [on the] applicable law'. See Anthony P.V. Rogers, 'International humanitarian law and today's armed conflicts', in Cindy Hannard, Stéphanie Marques dos Santos and Oliver Fox (eds), *Proceedings of the Bruges Colloquium: Current Challenges in International Humanitarian Law*, Collegium No. 21, ICRC/College of Europe, Bruges, October 2001, p. 20.

The present article aims to explain the legal divide that (still) exists between international and non-international armed conflict. How did this division come about, and was it meant to be exclusive? Did it not take into account situations now seen as problematic in terms of the legal regime applicable? This analysis is intended to further the discussion on whether such a distinction is still needed, and which situations should be classified as which (existing) types of conflict under IHL.

It starts with a short overview of what constitutes armed conflict, and more specifically what constitutes an international and a non-international armed conflict in present-day treaty law, and examines whether this distinction between the two can nowadays still be considered relevant. The discussion then centres on how this distinction can be explained historically and in particular whether, as Malcolm Shaw notes, it is historically ‘founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation.’⁵

The logical point of departure in this regard obviously seems to be the emergence of the nation-state with the Peace of Westphalia. First, however, a look is taken at the period before 1648 and the influence of religion on the determination of types of armed conflict at that time. The various stages of NIAC prior to 1949, namely rebellion, insurgency and belligerency, are discussed next, followed by a survey of the practical implications of the non-regulation of non-international conflict situations by international law (except in situations in which belligerency was recognized), with reference to the American, Finnish and Spanish civil wars.

An in-depth overview is then given of the drafting history of Common Article 3, including negotiation of it at the 1949 Diplomatic Conference which illustrates what the drafters at that time understood as being an armed conflict not of an international character, and thus the difference between international and non-international armed conflicts. Finally, the relevance of state sovereignty in the distinction between international and non-international armed conflicts is put into perspective.

What is an armed conflict?

The key instruments of IHL, i.e. the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, distinguish between international and non-international armed conflicts by specifically prescribing which rules apply in which type of armed conflict. According to Common Article 2 of the Geneva Conventions, the provisions relating to international armed conflicts apply to ‘all cases of declared war or of any other armed conflict which may arise between two or more

5 Malcolm N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2002, pp. 1068–1069.

of the High Contracting Parties’ and to ‘all cases of partial or total occupation’. Article 1 of Additional Protocol I further specifies that the said provisions also apply to ‘conflicts in which peoples are fighting against colonial domination [...] alien occupation and [...] racist regimes’; thus to situations that may seem to be of a non-international nature and were indeed regarded as such until 1977. However, neither the Geneva Conventions nor Protocol I contain a real definition of the expression ‘armed conflict’.⁶

Pictet provides some guidance by explaining in the *Commentary* on the Geneva Conventions that ‘any difference arising between States and leading to the intervention of members of armed forces is an armed conflict’.⁷ However, this phrase applies to international armed conflicts only. The International Criminal Tribunal for the former Yugoslavia (ICTY) furthermore established, in its *Tadić* ruling, that ‘resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ is to be considered an armed conflict.⁸ This wording does address both IACs and NIACs and has been used by many as a definition when qualifying a situation as an armed conflict. It does not distinguish clearly, however, between the two types of conflict.

For its part, Common Article 3 lays down minimum humanitarian standards that apply in the case of ‘armed conflict not of an international character’, but without defining what is to be understood by this term.⁹ The minimum standards of this ‘convention within a convention’, or ‘mini-convention’,¹⁰ were later developed in greater detail by Protocol II because of the need to ensure better

6 The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), includes an article on ‘Definitions’ (Article 2), as well as one on ‘Terminology’ (Article 8), but the term ‘armed conflict’ is not defined therein.

7 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 relative to the Treatment of Prisoners of War* (hereinafter *Commentary on GC III*), ICRC, Geneva, 1958, p. 23.

8 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995, para 70. In *Haradinaj*, the Trial Chamber clarified the definition of non-international armed conflict that has been used by the ICTY since *Tadić* (see ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), Case No. IT-04-84-T, 3 April 2008). In *Boskoski*, the Trial Chamber elaborated on this, gave a detailed overview of what constitutes such a conflict, and reviewed how the relevant elements of Common Article 3 that were recognized in *Tadić*, namely ‘intensity’ and ‘organisation of the armed group’ are to be understood (see ICTY, *Prosecutor v. Boskoski and Tarculovski*, Judgement (Trial Chamber), Case No. IT-04-82-T, 10 July 2008, paras 175–206).

9 Jelena Pejic writes: ‘What is known is that the omission of a definition in Article 3 was deliberate and that there is a “no-definition” school of thought which considers this to be a “blessing in disguise”’ (Jelena Pejic, ‘Status of conflict’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 85; see also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 32. According to Erik Castrén, who was present at the Diplomatic Conference in 1949, the omission of a definition in Common Article 3 was deliberate, because it was believed that such a definition could lead to a restrictive interpretation (Erik Castrén, *Civil War*, Suomalainen Tiedeakatemia, Helsinki, 1966, p. 85).

10 Pictet, *Commentary on GC III*, above note 7, p. 48.

protection for victims of NIACs.¹¹ Although it deals specifically with NIACs,¹² Protocol II does not define the term ‘non-international armed conflict’ either, but it limits the scope of application to conflicts:

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Additional Protocol II].¹³

The San Remo Manual on NIACs, a document compiled to clarify the rules applicable to NIACs, implicitly acknowledges the ambiguity resulting from a general lack of definition of such conflicts by first and foremost providing one. It seems to be a combination of the various ‘definitions’ discussed above:

Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government. ...¹⁴

The diverse ways in which the said type of conflict is defined above, using the terms ‘within a State’, ‘in the territory of one of the High Contracting Parties’, ‘in the territory of a High Contracting Party’ and ‘within the territory of a single State’, all create a restriction;¹⁵ some seem more restrictive (e.g. ‘a single State’) than others (‘a State’).¹⁶ In *Haradinaj*, the ICTY Trial Chamber elucidated the definition of NIAC used by the Tribunal since *Tadić*.¹⁷ In *Boskoski*, the Trial Chamber spelt it out further by giving a detailed overview of what constitutes an NIAC and reviewing how the relevant elements of Common Article 3 recognized in *Tadić*, namely ‘intensity’ and ‘organisation of the armed group’ are to be understood.¹⁸

11 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Preamble.

12 In IHL treaties, the term ‘non-international armed conflict’ (Protocol II) and the wording ‘not of an international character’ (Common Article 3) are used. The term ‘internal armed conflict’ is not found in any of the IHL instruments. In some cases, such as EU Council Directive 2004/83/EC, 29 April 2004, the latter is unfortunately used. Also some authors and some courts use the term ‘internal armed conflict’, which creates unnecessary confusion.

13 Protocol II, Article 1(1).

14 International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, San Remo, 2006, p. 2, available at <http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf> (visited 20 May 2009).

15 Particularly as regards the transnational situations mentioned above as being hard to qualify. Those situations, i.e. transnational armed conflicts, seem incompatible with the various aforesaid ‘definitions’ of the scope of application of international and non-international armed conflicts, and thus to be outside the established categories of armed conflict. Transnational armed conflicts thus seem *prima facie* not to be regulated by IHL, and people affected by these conflicts seem to fall outside the protection afforded by this body of law. This was in fact the position of the US government before the US Supreme Court ruled in *Hamdan* that as a minimum, Common Article 3 is applicable to these situations (see above note 3).

16 The fact that according to the said Manual NIACs do not ‘encompass conflicts extending to the territory of two or more States’ (p. 2) further illustrates the narrowness of the definition given in it.

17 See ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, above note 8.

18 See ICTY, *Prosecutor v. Boskoski and Tarculovski*, above note 8, paras 175–206.

These clarifications by the Tribunal help to determine when a situation reaches the threshold of NIAC and has to be considered a situation of armed conflict instead of e.g. internal disturbances. Despite the lack of a formal treaty-given definition, it seems reasonably clear nowadays what is to be considered an IAC or an NIAC, and thus what constitutes the distinction between the two types.

Is the distinction between the two categories still relevant?

Some authors have commented that the distinction between IAC and NIAC is ‘truly artificial’,¹⁹ ‘arbitrary’, ‘undesirable’ and ‘difficult to justify’, and that it ‘frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs’.²⁰ It can in fact be argued that the determination of an armed conflict as international or non-international is less important today. For example, almost all war crimes in both IAC and NIAC are included in the ICRC study of customary international humanitarian law²¹ and in the Rome Statute. The jurisprudence of the international tribunals and courts also seems to lessen the need for a distinction between the two types of armed conflict. Liesbeth Zegveld explains that:

... it is common practice for international bodies to read substantive norms of Protocol I and the Geneva Conventions into Common Article 3 and Protocol II. Common Article 3 and Protocol II contain few and simple provisions, which are not always suited to the complex realities of internal conflicts. International bodies have therefore resorted to Protocol I and the Geneva Conventions, which serve as a standard of interpretation of Common Article 3 and Additional Protocol II.²²

She concludes that international practice ‘thus demonstrates a trend to diminish the relevance of the distinction between the law applicable to international and internal armed conflicts’.²³

19 Rosemary Abi-Saab, ‘Humanitarian law and internal conflicts: The evolution of legal concern’, in Astrid J.M. Delissen and Gerard J. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 209.

20 Stewart, above note 2, p. 313, quoting respectively René Jean Dupuy and Antoine Leonetti, ‘La notion de conflit armé à caractère non international’ in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1971, p. 258; Ingrid Detter, *The Law of War*, Cambridge University Press, Cambridge, 2002, p. 49; Colin Warbrick and Peter Rowe, ‘The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadić case’, *International & Comparative Law Quarterly*, Vol. 45, Issue 3, 1996, p. 698; W. Michael Reisman and James Silk, ‘Which law applies to the Afghan conflict?’, *American Journal of International Law*, Vol. 82, 1988, p. 465.

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

22 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 33.

23 *Ibid.*, p. 34.

Some scholars also see proof of a convergence between the two types of armed conflict in the international agreements on weapon regulation and disarmament.²⁴ Such practice and writings, together with what is often referred to as the changing nature of armed conflicts, have led a number of authors to call for the distinction between IAC and NIAC to be removed altogether.²⁵

At present, however, it remains in place. Some authors, including Jelena Pejic, note that 'the distinction between international and non-international armed conflicts remains relevant'.²⁶ The treaty rules applicable to IACs are vastly more developed than those that govern NIACs. Moreover, she notes, the status of the fighting parties is different.²⁷ The ICRC's customary IHL study does not discuss the definition of armed conflict, and whilst many rules were found to be applicable in times of both international and non-international armed conflict, the progressive development of customary law as laid down in the study 'has not led to a complete amalgamation'²⁸ of the rules for both types of conflict. Specific distinctions between the two still remain.²⁹

A similar argument can be advanced with regard to the weapons and disarmament conventions: stating specifically that a certain weapon is also inhumane in times of non-international armed conflict says more about the weapon than it does about the status of the conflict. If anything, this last observation seems to confirm that the distinction in question still remains.³⁰ Moreover, whilst some have argued that there should be only one type of armed conflict, others have even proposed a third, new type of armed conflict.³¹ Clearly, the distinction remains relevant today, but is not only of recent date. *Inter alia* religion created distinctions between various types of war and the ensuing application of rules or norms, as examined below.

24 See e.g. Christine Byron, 'Armed conflicts: International or non-international?', *Journal of Conflict and Security Law*, Vol. 6, No. 1, 2001; Frits Kalshoven, 'From international humanitarian law to international criminal law', *Chinese Journal of International Law*, Vol. 151, Issue 3, 2004.

25 See note 2 above.

26 Jelena Pejic, 'Status of conflict', see above note 9, p. 77. See further, *inter alia*, Heike Spieker, 'The International Criminal Court and non-international armed conflicts', *Leiden Journal of International Law*, Vol. 13, No. 2, 2000; Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008.

27 Pejic, 'Status of conflict', above note 9, p. 77.

28 Fleck (ed), above note 26, p. 627; Henckaerts and Doswald-Beck, above note 21.

29 *Ibid.*

30 See e.g. the amendment to Article 1 of the Convention on Certain Conventional Weapons, concluded on 21 December 2001 during the Second Review Conference of States Parties. Those particular weapons have been recognized as inhumane. The fact that the regulation of their use should therefore also apply in non-international armed conflict seems to follow from the inhumane effect of the weapons and not from the current state of IHL relating to the distinction between international and non-international conflict. Acts such as torture and collective punishment are prohibited in both types of conflict (see Protocol I, Art. 75; Common Article 3; Protocol II, Art. 4).

31 In particular, the difficulties in qualifying the situations mentioned at the outset have led to writings about so-called transnational armed conflicts, e.g. Corn, above note 1; Roy S. Schöndorf, 'Extra-state armed conflicts: Is there a need for a new legal regime?', *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004; Robert D. Sloane, 'Prologue to a voluntarist war convention', *Michigan Law Review*, Vol. 106, 2007.

Before 1648 – the influence of religion

Religion was not just a reason to wage war³² – it was also influential in regulating the way that wars were to be waged. The Christian Church sought to impose limitations on wars – the Pax Dei movement, for example, can be seen as representing ‘an attempt to make sure that the treatment meted out to Christians would not resemble that reserved for heretics or heathens.’³³ This led to the Church taking an interest in the type of weapons used; indeed, it was ‘the Second Lateran Council, not some court of chivalry, that in 1139 banned the crossbow as suitable for use only against heathens.’³⁴

The power believed to be vested in the rulers by God, together with the belief in the inequality between Christians and heathens, structured the types of war identified by the scholars of that day and age. The Italian canonist Henricus de Segusio, better known by the name Hostiensis, wrote between 1239 and 1253 about the various types of war in his commentary *Summa aurea*. The section ‘*De treuga et pace*’ (On Truce and Peace) distinguishes seven types of war that can be divided into external wars, i.e. those fought by the Christians against ‘infidels’, and internal wars, i.e. those fought by Christian princes against each other. External wars were considered legitimate by Hostiensis, whilst internal wars would be legitimate only if waged to uphold the decision of a judge or, more generally, the authority of the law, or in self-defence against unwarranted attacks.³⁵

In the years that followed, the Christian tradition remained instrumental in developing rules for situations that could be qualified as international armed conflict; such a contribution was less apparent, however, for non-international armed conflicts.³⁶ The theory of just war imposed some constraints on the conduct of international wars,³⁷ but these could not easily be extended to non-international armed conflicts, as it was difficult for such situations to meet the conditions laid down by the just war theory. Furthermore, the interpretation of Biblical texts that served to justify support for an unlimited fight, or for constraints placed only upon rebels in situations of non-international violence, were also used for political purposes. A difference thus has to be made between a genuine Christian belief and a political reading of the relevant passages from the Bible.³⁸

Whilst Protestantism caused a shift in the way the Scriptures were interpreted, owing to the changing political context, the distinction between war

32 Religion was a reason to go to war both before and after 1648.

33 Martin van Creveld, *The Transformation of War*, Free Press, New York, 1991, p. 137.

34 *Ibid.*, p. 138.

35 ‘Hostiensis (ca 1200–1271): A typology of internal and external war’, in Gregory M. Reichberg, Henrik Syse and Endre Begby (eds), *The Ethics of War: Classic and Contemporary Readings*, Blackwell Publishing, Oxford, 2006, pp. 160–161.

36 Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts*, Martinus Nijhoff, Leiden/Boston, 2006, p. 2.

37 This theory was developed by Christian authors, such as St Augustine and Thomas Aquinas. See Perna, *ibid.*, p. 3.

38 *Ibid.*, p. 2.

(i.e. the use of force at the international level) and what was not to be considered a war and thus not subject to constraints (i.e. the use of force in internal situations, such as suppressing rebellion) was similar to that of earlier Christian times.³⁹ Martin Luther wrote in his *Open Letter on the Harsh Book against Peasants* that a 'rebel is not worth rational arguments' and that it is 'God's will that the king be honored and the rebels destroyed'.⁴⁰ He refused to consider the possibility of establishing rules, and even suggested conduct against rebels that at present would be considered as extrajudicial and as summary executions.⁴¹ Similarly, John Calvin held that rebellion could be justified as an extreme measure, and one of his followers, John Knox, further developed a theory that allowed the persecuted to wage war against their oppressors. It did not, however, lead to the development of any rules for this non-international conflict situation; the rebellion was, 'at least on the part of the "justified" rebels [...] subject to no limitations.'⁴²

Further east, a view similar to that of Hostiensis prevailed (i.e. relating to the distinction between believers and non-believers). Islam was initially meant to spread until the whole of the earth was under Muslim rule. Consequently *jihad* was the only kind of relationship that could exist between those who believed in Islam and those who did not. However, as time passed, it became clear that the Muslim world would have to accept that non-Muslim states and empires would remain as neighbours, resulting in the appearance of other forms of war.⁴³ From the twelfth century on, an entire body of literature (partly religious, partly legal) that attempted 'to define what Muslims might do to non-Muslims under what circumstances'⁴⁴ came into being.

When the Muslim world broke up into states that often professed different versions of Islam and fought each another, it became necessary to distinguish not only between war against unbelievers and war against fellow Muslims, but also between Muslims themselves. In the tenth century, a scholar from Baghdad, al-Mawardi, divided war against Muslims into three categories: first, war against those who had abandoned faith (*ahl al ridda*); second, against rebels (*ahl al baghi*); and third, war against those who had renounced the authority of the spiritual leader (*al muharabin*). In each of these categories of war, different methods of warfare and a different set of obligations towards the enemy were prescribed. In the third category, for example, which concerned people considered to be part of the House of Islam (*dar al Islam*), the prisoners were not to be executed; nor were their houses to be burnt.⁴⁵

39 *Ibid.*, p. 7.

40 Martin Luther, 'An open letter on the harsh book against the peasants', reprinted in Albert Marrin (ed), *War and the Christian conscience: From Augustine to Martin Luther King, Jr*, Henry Regnery Company, Chicago, 1971, pp. 101–102.

41 Perna, above note 36, p. 7.

42 *Ibid.*, p. 8.

43 Van Creveld, above note 33, p. 139.

44 *Ibid.*

45 *Ibid.*, p. 140.

Religion thus created a distinction between wars fought against those of the same religion (e.g. Christian or Muslim) and against those of a different one. Wars fought within Christendom or within the Muslim world were subject to certain rules, whereas situations that were not considered to be wars lacked such rules. Quite remarkably, this much can also be learned from someone who was neither a theologian nor a lawyer, but for whom the distinction was quite apparent. The quotation from Shakespeare's *Richard III* reproduced at the outset⁴⁶ is an interesting demonstration of the fact that:

both at the time of the events Shakespeare described and at the time he wrote, the normative and legal rules in force recognized and highlighted the dichotomy between [internal and international] conflicts.⁴⁷

The famous playwright often dealt with armed violence in his various historical works, and produced:

an elaborate and well-defined enunciation of the legal distinctions between internal and international conflict and the different normative principles and chivalric obligations, or lack thereof, involved.⁴⁸

The words of Richard III encapsulate these differences: in international wars, one 'fights' against 'enemies' that are 'foreign'. In internal 'wars' that take place 'at home', one 'beats down' the 'rebels'.⁴⁹

The view that theologians should deal with moral questions rather than with legal and political ones emerged along with the nascent concept of state sovereignty at the end of the sixteenth century.⁵⁰ This is aptly illustrated by words used by a contemporary of Shakespeare, the Italian legal scholar and writer Alberico Gentili, who played a crucial part in the emergence of international law as an independent legal discipline:⁵¹ *Silite theologi in munere alieno*.⁵²

The Peace of Westphalia – the emergence of state sovereignty

The influence of religious ideas further declined after the Peace of Westphalia in 1648, the point in time that is generally considered to mark the inception of the

46 'March on, march on, since we are up in arms; If not to fight with foreign enemies, Yet to beat down these rebels here at home.' – Shakespeare, *Richard III*, IV.iv. 459–461.

47 Laurie Rosensweig Blank, 'The laws of war in Shakespeare: International vs. internal armed conflict', *NYU Journal of International Law and Politics*, Vol. 30, No. 1/2, 1998, p. 252.

48 *Ibid.*, p. 254.

49 *Ibid.*, p. 259.

50 Perna, above note 36, p. 8.

51 See *inter alia* Diego Panizza, 'Political theory and jurisprudence in Gentili's *De Iure Belli*: The great debate between "theological" and "humanist" perspectives from Vitoria to Grotius', Institute for International Law and Justice, *History and Theory of International Law Series*, Working Paper 15, 2005, available at <http://www.iilj.org/publications/documents/2005.15Panizza.pdf> (visited 20 May 2009).

52 Which can be translated as 'Theologians should keep silent in matters that concern others.'

modern sovereign nation-state.⁵³ Once the treaties were signed, the European rulers 'mostly abandoned religion in favour of more enlightened reasons for slaughtering each other.'⁵⁴ Samuel von Pufendorf was one of the first post-Westphalian writers of his time to address war-related matters, and quickly became one of the most influential.⁵⁵ In his work *On the Duty of Man and Citizen*, he drew attention to the need for 'prudential limits to what one should do in war'⁵⁶ by stressing that humanity requires⁵⁷ that '[o]ne should limit acts of violence to those that are actually necessary'.⁵⁸ Von Pufendorf determines that wars can normally be divided in two forms: declared and undeclared wars. While he does not denounce the latter category as unjust, he specifies that an '[u]ndeclared war is either war waged without formal declaration or war against private citizens. Civil wars also are in this category.'⁵⁹ He classified non-international situations as undeclared wars, but left open the option that the limits should also extend to this type of fighting.

That the Peace of Westphalia did not constitute a dramatic change in the way wars were perceived by international scholars is illustrated by comparing what Gentili wrote at the end of the sixteenth century with the writings of Hugo Grotius shortly before the Peace of Westphalia and those of Emmerich de Vattel during the eighteenth century.

Alberico Gentili, who taught at Oxford, observed in 1589 that the applications of the norms of international law stemmed from the presence of a sovereign power on each side. A legitimate 'enemy' had to meet requirements that are similar to those for today's statehood or the criteria for United Nations membership.⁶⁰ Those who did not meet the requirements were not proper enemies, and thus 'such men [did] not come under the laws of war'.⁶¹ He wrote in his *De Iure Belli Libri Tres* that:

those who do not have a [public cause] are not properly enemies, even although they conduct themselves as soldiers and commanders and meet the

53 See, *inter alia*, Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective*, Transnational Publishers, New York, 1998, p. 4. The idea that the Peace of Westphalia ordained something new in terms of sovereignty is criticized by a number of authors – see e.g. Stéphane Beaulac, 'The Westphalian model in defining international law: Challenging the myth', *Australian Journal of Legal History*, Vol. 8, 2004; Andreas Osiander, 'Sovereignty, international relations, and the Westphalian myth' *International Organization*, Vol. 55, No. 2, 2001.

54 Van Creveld, above note 33, pp. 139, 141. The two Westphalian treaties, i.e. the Treaty of Osnabrück and the Treaty of Münster (24 October 1648) do both mention in their preambles that the agreement on the articles was reached partly 'to the Glory of God'. Treaty texts available at http://avalon.law.yale.edu/17th_century/westphal.asp (visited 20 May 2009).

55 'Samuel von Pufendorf (1632–1694); War in an emerging system of states', in Reichberg, Syse and Begby (eds), above note 35, p. 454.

56 *Ibid.*, p. 455.

57 *Ibid.*, p. 458 (Section 6 of Book 2, Chapter 16, of *On the Duty of Man and Citizen*).

58 *Ibid.*, p. 455.

59 *Ibid.*, p. 458 (Section 7 of Book 2, Chapter 16, of *On the Duty of Man and Citizen*).

60 Rosenzweig Blank, above note 47, p. 258.

61 Alberico Gentili, 'The three books on the laws of war', in J.B. Scott (ed), *The Classics of International Law*, Clarendon Press, Oxford, 1933, p. 22.

attack of commanders of opposing legions. He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace. [...] For the word *hostis*, ‘enemy’, while it implies equality, like the word ‘war’ [...] is sometimes extended to those who are not equal, namely, to pirates, proscribed persons and rebels; nevertheless it cannot confer the rights due to enemies, properly called so, and the privileges of regular warfare.⁶²

Similarly, the Dutch scholar Hugo Grotius discussed the old division between public and private wars in his seminal work *De Jure Belli ac Pacis* in 1625.⁶³ Public wars (i.e. between sovereign powers) were to be fought in accordance with the constraints imposed by the laws of war:

The name of lawful war is commonly given to what is here called formal [war]. [...] Now to give a war the formality required by the law of nations, two things are necessary. In the first place it must be made on both sides, by the sovereign power of the state, and in the next place it must be accompanied with certain formalities. Both of which are so essential that one is insufficient without the other.⁶⁴

He went on to say that a war against private people ‘may be made without those formalities.’⁶⁵ One author observes that Grotius did not see the emerging theory of state sovereignty as precluding the possibility of regulation of situations of non-international armed conflict by international law. Grotius thus left open the possibility for the doctrine of natural law to shape the evolution of norms relating to non-international armed conflicts.⁶⁶

For his part, Emmerich de Vattel, a Swiss scholar who lived in the eighteenth century, held that an internal uprising that challenged the sovereignty of the state was the worst evil for an independent body. Thus when engaged in fighting the rebels, the sovereign did not have to respect the laws of war.⁶⁷ He wrote in his work *Droit des Gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, that those ‘who rise up against their prince without cause deserve the severest punishment.’⁶⁸ The influence of the doctrine of natural law resulted in his advice not to conduct unlimited repression of rebels and to refrain from excessive and cruel punishments.⁶⁹ He furthermore recognized that

62 *Ibid.*, pp. 24–25.

63 Perna, above note 36, p. 17. Grotius described war in a general definition as ‘the state of contending parties’ – in this definition he included public as well as private wars. See Hugo Grotius, *On the Law of War and Peace*, (transl. A.C. Campbell), Batoche Books, Kitchener, 2001, p. 6.

64 Grotius, *ibid.*, p. 40.

65 *Ibid.*

66 See Perna, above note 36, p. 18.

67 *Ibid.*, p. 20.

68 Emmerich de Vattel, *The Law of Nations and the Principles of Natural Law*, Book III, Chapter XVIII, quoted in Perna, above note 36, p. 21.

69 Perna, *ibid.*, pp. 20–22.

in situations of such an intensity that it resembled an international war, the laws of war were to apply. In his chapter titled 'Civil wars', Vattel writes that:

When the nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and war between the two parties falls, in all respects, in the class of public war between two different Nations. [...] The obligation upon the two parties to observe towards each other the customary laws of war is therefore absolute and indispensable, and the same which the natural law imposes upon all Nations in contests between State and State. [...] [I]t is perfectly clear that the common laws of war, those principles of humanity, forbearance, truthfulness, and honor [...] should be observed by both sides in a civil war.⁷⁰

The situation described above is similar to those that led about a hundred years later to recognition of the non-state party to conflict as a belligerent. The doctrine of belligerency may be seen as an encroachment on state sovereignty, because it would place a non-state party on the same level as a state if the conflict were sustained enough to resemble an international war. In essence, however, it seems to strengthen the concept of state sovereignty when the criteria that the enemy had to fulfil (as explained earlier by Gentili) are taken into account. Indeed, in the years after Vattel further developments in international law led to the doctrine of belligerency.⁷¹

This is further illustrated by the writings of Lassa Oppenheim, who at the beginning of the twentieth century still distinguished clearly between international wars and non-international conflict situations. Whilst the former were wars, Oppenheim did not consider the latter as such (unless the non-state party was recognized as a belligerent). His definition of war is often quoted and reads as follows:

War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.⁷²

He stated that neither a civil war⁷³ nor a guerrilla war were 'real war[s] in the strict sense of the term in International Law'⁷⁴ because '[t]o be considered war, the contention must be going on *between States*.'⁷⁵ As such:

a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of

70 'Emer de Vattel (1714–1767); War in due form', in Reichberg, Syse and Begby (eds), above note 35, pp. 516–517.

71 Perna, above note 36, p. 23.

72 Lassa Oppenheim, *International Law: A Treatise*, Vol. II, *War and Neutrality*, Longmans, Green and Co., London, 1906, p. 56.

73 Oppenheim described a civil war as a situation 'when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government.' (*Ibid.*, p. 65.)

74 *Ibid.*, p. 67.

75 *Ibid.*, p. 58 (emphasis in original).

each of the contending parties or of the insurgents, as the case may be, as a belligerent Power.⁷⁶

The state-centric approach explains that a conflict between a state and a non-state entity (that nowadays could qualify as a non-international armed conflict) was not considered to constitute a war. This phenomenon, which according to Oppenheim did not exist in his time, did not qualify as a war in his view. He says that:

in the Middle Ages wars were known between private individuals, so-called private wars, and wars between corporations, as the Hansa for instance, and between States.⁷⁷ But such wars have totally disappeared in modern times. It may, of course, happen that a contention arises between the armed forces of a State and a body of armed individuals, but such contention is not war.⁷⁸

Before the adoption of Common Article 3 (and later the Additional Protocols) as part of international law, a non-international contention could thus only come within the scope of international (humanitarian) law if the insurgents were recognized as belligerents.⁷⁹ The recognition of belligerency and the preceding stages of civil strife will be discussed in the following section.

Various stages of non-international armed conflict prior to 1949⁸⁰

As mentioned above, a non-international armed conflict prior to the adoption of the 1949 Geneva Conventions only came within the scope of international law if those taking up arms against the government were recognized as belligerents. Before reaching the stage of belligerency, the law and practice distinguished two other stages in civil strife: rebellion and insurgency.⁸¹

Rebellion

In traditional international law, rebellion (or upheaval) was considered to be a situation of domestic violence in which only a sporadic challenge to the legitimate

⁷⁶ *Ibid.*, p. 65.

⁷⁷ The fourth and later editions have a slightly different but clearer phrasing: '[in] the Middle Ages wars between private individuals, so-called private wars, were known, and wars between corporations – ... the Hansa, for instance – and States.' (4th edition, p. 117, and 7th edition, p. 203.)

⁷⁸ Oppenheim, above note 72, p. 58.

⁷⁹ Dietrich Schindler, 'The different types of armed conflicts according to the Geneva Conventions and Protocols', *Recueil des cours*, Vol. 163, Issue 2, 1979, p. 145.

⁸⁰ For a well-structured outline of the three stages, see Anthony Cullen, 'Key developments affecting the scope of internal armed conflict in international humanitarian law', *Military Law Review*, Vol. 183, 2005, pp. 69–79.

⁸¹ Lothar Kotsch, *The Concept of War in Contemporary History and International Law*, Thesis No. 105, University of Geneva, Geneva, 1956, p. 230.

government was noticeable.⁸² The situation was only a short-lived insurrection against the authority of the state⁸³ and within the ability of its police force to 'reduce the seditious party to respect the municipal legal order'.⁸⁴ If the government was rapidly able to suppress the rebel faction 'by normal procedures of internal security',⁸⁵ the situation did not fall within the scope of international law.⁸⁶ The rebels challenging the *de jure* government had no legal rights or protection under traditional international law,⁸⁷ and whilst foreign States were entitled to assist the government in its efforts to suppress the rebels, they were to refrain from giving support to the rebel party, for to do so would constitute illegal intervention.⁸⁸

The ICTY observed in *Tadić* that States:

preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.⁸⁹

So under traditional international law 'a rebellion within the borders of a sovereign State is the exclusive concern of that State'⁹⁰ and was not considered subject to the laws of war.⁹¹

Insurgency

Whereas a rebellion is 'a sporadic challenge to the legitimate government, [...] insurgency and belligerency are intended to apply to situations of sustained conflict'.⁹² Consequently, when a rebellion is able to 'survive' suppression and cause longer-lasting and more substantial intrastate violence, its status duly changes into that of an insurgency.⁹³ The recognition of insurgency can be seen as an indication that the government granting it 'regards the insurgents as legal contestants, and not

82 Heather A. Wilson, *International Law and the Use of Force by Liberation Movements*, Oxford University Press, Oxford, 1988, p. 23.

83 Richard A. Falk, 'Janus tormented: The international law of internal war', in James N. Rosenau (ed), *International Aspects of Civil Strife*, Princeton University Press, Princeton, 1964, pp. 197–199.

84 Kotsch, above note 81, p. 230.

85 Falk, above note 83, p. 199.

86 See New York District Court, *United States v. Ambrose Light*, 25 Fed. 408 (1885).

87 Kotsch, above note 80, p. 231, and Cullen, above note 80, p. 69.

88 Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, p. 230; Falk, above note 83, p. 197.

89 ICTY, *Prosecutor v. Dusko Tadić*, above note 8, para 96.

90 Wilson, above note 82, p. 23.

91 Falk, above note 83, p. 198.

92 *Ibid.*, p. 199.

93 Cullen, above note 80, p. 71; Falk, above note 83, p. 199.

as mere lawbreakers'.⁹⁴ In traditional international law, the recognition of insurgency did not require the application of humanitarian norms unless these were expressly conceded by the legitimate government.⁹⁵ The state concerned was free to determine the consequences of this acknowledgement.⁹⁶ As such, it seems that the recognition of insurgency was more relevant to states than to the insurgents themselves.

During the Spanish Civil War, for example, the major European powers demonstrated the limitations that are meant to be set by the recognition of insurgency. On the high seas, both sides were barred from exercising belligerent rights against foreign ships and an international convention prohibited the export of war-related materials to either side.⁹⁷ Foreign states also played a role in the Spanish Civil War. This can be explained by Richard Falk's observation that:

the recognition of insurgency serves as a partial internationalisation of the conflict, without bringing the state of belligerency into being. This permits third states to participate in an internal war without finding themselves 'at war', which would be the consequence of intervention on either side once the internal war had been identified as a state of belligerency.⁹⁸

Whereas a recognition of insurgency served as a partial internationalization of the conflict, recognition of that same party as a belligerent would lead to a full internationalization of it.

Belligerency

When a non-international armed conflict reached such a sustained level that both sides should be treated alike as belligerents, the parent government or a third state could, by declaration, grant the insurgents recognition as a belligerent party.⁹⁹ Oppenheim notes that whilst insurgents might not legally be able to wage a war, their actual ability to do so explains why insurgents may become belligerents. He goes on to say that any state can recognize insurgents as a belligerent power as long as the following three criteria are met: (1) the insurgents have taken possession of part of the territory of the (legitimate) government; (2) they have set up a government (system) of their own; (3) they fight in accordance with the laws of war.¹⁰⁰

94 Rosalyn Higgins, 'Internal war and international law', in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order*, Princeton University Press, Princeton, 1971, p. 88.

95 Anthony Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law*, unpublished PhD thesis, 2007, p. 20 (to be available from Cambridge University Press at the end of 2009), referring to Castrén, above note 10, pp. 207–223. Hersch Lauterpacht explains that States can intercede with insurgents to ensure measures for a humane conduct of hostilities. See Lauterpacht, above note 88, pp. 270–271.

96 Higgins, above note 94, p. 88.

97 Kotzsch, above note 81, p. 233.

98 Falk, above note 83, p. 200.

99 Moir, above note 9, p. 5.

100 Oppenheim, above note 72, p. 86. See also the 'Règlement' that was adopted by the Institut de Droit International, in *Annuaire de l'Institut de droit international*, 1900, p. 227.

Lauterpacht held that four criteria existed, the fourth of which stated that 'there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency', and was a real additional requirement to those just mentioned.¹⁰¹

International law treated an internal war with the status of belligerency in essentially the same way as a war between sovereign states. When recognized as a belligerent, the non-state party to a non-international conflict was consequently under traditional international law, to be treated essentially like a state at war,¹⁰² and had the same rights and duties. The obligation to ensure respect for the humanitarian norms was then equally binding for the non-state party (i.e. the insurgents). The laws of war were applicable both to the authorities of the *de jure* government and to the insurgents. So the legitimate government's recognition of belligerency brought the entire body of the laws of war into effect between the government and the insurgents,¹⁰³ and not only the rules governing the conduct of hostilities but also those for all other war-related activities, such as care for the sick and wounded and respect for prisoners of war.¹⁰⁴

The doctrine of belligerency thus extended the humanitarian norms of international law to a situation of non-international conflict. Anthony Cullen comments that there appears to have been little consensus among scholars as to whether the recognition of belligerency, and hence of the application of the international humanitarian norms, constituted a duty when certain objective conditions (such as the above-mentioned criteria) were fulfilled, or whether it was purely up to the discretion of the state authorities concerned.¹⁰⁵

Recognition of belligerency by the United States and the United Kingdom occurred on a number of occasions in relation to (former) Spanish colonies in South and Central America. A famous situation in which belligerency was recognized is of course, the American Civil War. In the twentieth century, however, the doctrine seemed to have become obsolete. For example, the non-recognition of the insurgents in the Spanish Civil War as belligerents is proof to many of the demise of the concept of belligerency.¹⁰⁶ There were some situations that came close to recognition of the insurgents as belligerents, for instance the Nigeria-Biafra

101 Lauterpacht's first criterion deals with the scale of the conflict, whilst his second combines Oppenheim's first and second criteria: '[F]irst, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.' (Lauterpacht, above note 88, p. 176)

102 Falk, above note 83, p. 203.

103 Moir, above note 9, p. 5.

104 See *inter alia* Daoud L. Khairallah, *Insurrection under International Law: With Emphasis on the Rights and Duties of Insurgents*, Lebanese University, Beirut, 1973.

105 Cullen, above note 95, p. 31. In *United States v. the Three Friends*, a case concerning aid given to Cuban insurgents, the US Supreme Court stated that 'it belongs to the political department to determine when belligerency shall be recognized'. (United States Supreme Court, *United States v. The Three Friends et al.* (1897) 166 U.S.1, p. 63).

106 Cullen, above note 95, p. 34.

conflict in 1967 or the Algerian War, but the states concerned held that these were not formal recognitions.¹⁰⁷ As will be shown below, the doctrine of belligerency and the accompanying criteria nevertheless proved to be of great importance during the negotiations on the 1949 Conventions.

Civil wars

The following three civil wars show how the stages of non-international armed conflict set forth above were applied in practice before 1949. These and other civil wars in the latter half of the nineteenth and the first half of the twentieth century helped shape the law governing such conflicts.

The American Civil War

The American Civil War (1861–1865) began after first seven and then another four states declared their secession from the Union, the federal state, to form the Confederate States of America. The Federal government opposed the secession and a large army was mobilized to suppress the rebellion.¹⁰⁸ The conflict that followed undeniably had features of an international war.¹⁰⁹ Oppenheim held that although according to the constitution of a federal state, a war between member states or between one or more member states and the federal state would be illegal (and from the constitutional standpoint, a rebellion), these conflicts were nevertheless wars for the purposes of international law.¹¹⁰ He also considered that the ‘War of Secession within the United States between Northern and Southern member-States in 1861–1865 was [a] real war’.¹¹¹ However, David Turns explains that in using the term ‘civil war’ in the designation most widely given to the conflict, i.e. the American Civil War, history and the English language ‘have unequivocally confirmed it as a conflict that was fundamentally non-international in nature.’¹¹²

Soon after the outbreak of hostilities, President Lincoln imposed a naval blockade on the entire Southern coast; this was seen as an implied recognition of belligerency vis-à-vis the South.¹¹³ It was followed by proclamations of neutrality

107 Schindler, above note 79, pp. 145–146.

108 See Michael Harris Hoffman, ‘The customary law of non-international armed conflict: Evidence from the United States Civil War’, *International Review of the Red Cross*, No. 277, 1990, pp. 322–344.

109 David Turns, ‘At the “vanishing point” of international humanitarian law: Methods and means of warfare in non-international armed conflicts’, *German Yearbook of International Law*, Vol. 45, 2002, p. 118.

110 Oppenheim, above note 72, p. 59.

111 *Ibid.* David Turns notes that to this day, the US states that were formerly part of the Confederacy rarely refer to the conflict as the American Civil War. Substitutes include the ‘War between States’, ‘War of Secession’, and War for Southern Independence’. (Turns, above note 109, p. 118)

112 Turns, above note 109, p. 118.

113 This was confirmed by the US Supreme Court in December 1862. See Quincy Wright, ‘The American Civil War, 1861–65’, in Richard A. Falk (ed), *The International Law of Civil War*, John Hopkins Press, Baltimore, 1971, p. 42.

and recognitions of the Confederate States by the United Kingdom and a number of other countries. During a discussion some months later the British government voiced the opinion that '[a]n insurrection extending over nine States in space, and ten months in duration, can only be considered as a civil war, and that persons taken prisoners on either side should be regarded as prisoners of war.'¹¹⁴ By virtue of the recognition of belligerency during the Civil War, both parties were bound to respect the laws of war,¹¹⁵ and they were in fact generally observed.¹¹⁶ Members of both armies were given prisoner-of-war status and distinction was made between military objectives and civilian objects.¹¹⁷

Besides the effect the conflict had on world politics and issues such as slavery, it also helped to shape the laws of war. It is even affirmed that '[t]his war was unquestionably the critical incident for the development of a full and complete law of civil conflict.'¹¹⁸ The recognition of the Confederate States as belligerents led to numerous court cases, thereby contributing to the doctrine of belligerency; it has also been widely discussed in legal doctrine and state practice, which in turn contributed to the development of the law of non-international armed conflict.¹¹⁹

It was moreover during the American Civil War that Professor Francis Lieber drew up the famous Lieber Code, which is regarded as a foundation of contemporary international humanitarian law.¹²⁰ Together with a board of Union officers he prepared a set of rules concerning the conduct of hostilities on land, the *Instructions for the Government of Armies of the United States in the Field – General Orders No. 100*,¹²¹ which were issued to the Union's armed forces by President Lincoln. The Code has served as a basis for later treaties dealing with international conflicts, such as the Hague Regulations, the wording of which sometimes closely follows the articles of the Lieber Code. It is often called ironic that the first set of rules of modern IHL was drafted for a non-international armed conflict,¹²² but the Code was essentially drafted for an international situation, or at least a situation rendered 'international' by the recognition of belligerency. Lieber was hesitant to include the nine articles of Section X entitled 'Insurrection – civil war – rebellion', wanting to avoid giving the impression that the Code was

114 *Fontes* No. 2469, quoted in Kotzsch, above note 81, p. 228.

115 Perna, above note 36, p. 31.

116 Moir, above note 9, p. 24. Leslie Green observed that the parties in the American Civil War 'behaved *inter se* as if they were involved in an international conflict.' (in *The Contemporary Law of Armed Conflict*, Juris Publishing, New York, 2008, p. 66).

117 Hoffman, above note 108, pp. 322–344.

118 Roscoe Ralph Oglesby, *International War and the Search for Normative Order*, Martinus Nijhoff, The Hague, 1969, p. iv. The same author further held that '[p]revious civil wars such as the American Revolution, and the Spanish Colonial Wars for Independence provided the needed experimental background for the development of norms governing such conflicts, but it remained for the American Civil War to give them definitive form.' (pp. vi–vii).

119 Lauterpacht, above note 88, p. 187; Kotzsch, above note 81, p. 226.

120 Turns, above note 109, p. 118.

121 Full text of the Lieber Code available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (visited 20 May 2009).

122 Turns, above note 109, p. 118.

applicable only to such situations rather than to international wars.¹²³ In that section it is stated that applicability of the rules of war to rebels in times of war within a state is induced by humanity,¹²⁴ as opposed to obligations under international law.¹²⁵

The Finnish Civil War

On 6 December 1917 Finland, until then part of Russia, declared its independence. In the weeks that followed it was recognized as an independent state by the Bolshevik government of Russia and by Sweden, Germany, France, Norway and Denmark.¹²⁶ The political situation in Finland was tense: the revolutionary Reds, representing the lower classes, opposed the Whites, representing the bourgeois political forces.¹²⁷ The Red rebellion succeeded in taking over power in the urban south (including the capital Helsinki) and the White government and army withdrew north. Finland – and its population – were divided, with both regimes enjoying considerable support.¹²⁸

The Finnish Civil War certainly reached the modern threshold for an armed conflict. Essentially non-international in nature, Germany's intervention on the side of the government, and – more importantly – that of Russia on the rebel side would by present-day standards have internationalized the conflict.¹²⁹ However, the White government did not recognize the Reds as insurgents or belligerents; instead it 'treated them merely as criminals and traitors' and viewed the situation as a purely internal matter.¹³⁰ Although the term 'civil war' would thus not have been applicable officially, this was *de facto* clearly a situation that would have met the criteria.¹³¹

123 Theodor Meron, *War Crimes Law Comes of Age: Essays*, Oxford University Press, Oxford, 1998, p. 138. Rosemary Abi-Saab explains, however, that at that time in Europe the Lieber Code was seen as closely associated only with the American Civil War. As such, 'it was seen as a Code that could apply only in similar cases of civil war.' Rosemary Abi-Saab, 'Humanitarian law and internal conflicts: The evolution of legal concern', in Delissen and Tanja, above note 19, p. 209.

124 Lieber Code, Article 152.

125 Perna, above note 36, p. 32.

126 Lauri Hannikainen, Raija Hanski and Alan Rosas, *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland*, Martinus Nijhoff, The Hague, 1992, p. 8.

127 *Ibid.*, pp. 8–9.

128 *Ibid.*, pp. 9–10. For a general account see Anthony F. Upton, *The Finnish Revolution 1917–1918*, University of Minnesota Press, Minneapolis, 1980.

129 Germany contributed some 12,000 soldiers to the White government's war effort. Russia did not officially authorize its soldiers to fight on the side of the Reds, but called upon volunteers to do so. In addition, Russia gave assistance to the Reds in the form of military equipment – it is maintained that the Reds fought primarily with weapons given by Russia. See Hannikainen, Hanski and Rosas, above note 126, p. 11.

130 *Ibid.*, pp. 13, 28. Hannikainen, Hanski and Rosas note that based on the factual situation and the criteria for recognition of belligerency, it would have been lawful for third states to recognize the Reds as a belligerent party (p. 13).

131 cf. Schindler, above note 79, p. 145.

There was great loss of life during the conflict, but only partly at the front: a large number of people were either executed or died in prison camps.¹³² The crimes committed during the civil war are referred to as the 'White terror' and 'Red terror', respectively. Most of the crimes committed by the Whites were out of revenge and feelings of hatred for those who had 'betrayed' Finland. Dubious orders were issued by the military staff, including orders on many occasions that no quarter be given.¹³³ It is, however, also reported that both parties sometimes referred to international law when condemning acts by the adversary, for instance when both the Whites and the Reds alleged that the other side had violated the 1868 St Petersburg Declaration by using a prohibited type of explosive bullet.¹³⁴ In addition, some of the prisoners (on both sides) were granted prisoner-of-war status, and ambulances, field hospitals and Red Cross workers seemed to be respected by both parties.¹³⁵ As a young nation, Finland had not yet ratified any of the relevant law of war treaties, but the reference to provisions dealing with protection and means and methods of warfare shows that the parties felt a certain need for regulation of the conflict. As with most conflicts in which a government fights against an opposition group, the refusal to see the opponent as entitled to protection under the laws of war showed the heart of the problem of non-international armed conflicts occurring before 1949.¹³⁶

The Spanish Civil War

The Spanish Civil War (1936–1939) was fought between the Republican government and the Nationalists under the command of General Franco. Like the Finnish Civil War, it can be considered internationalized by present-day standards because of foreign involvement.¹³⁷ It was a bitter and savage 'non-international conflict', in which no recognition of belligerency was given to the Nationalist rebels. However, while not legally obliged to do so, both parties claimed that they would respect the laws of war.¹³⁸ The Republican government stated, for example, that it would treat

132 See Finnish National Archives, *War Victims of Finland 1914–1922*, available at <http://vesta.narc.fi/cgi-bin/db2www/sotasurmaetusivu/main?lang=en> (visited 20 May 2009).

133 See Hannikainen, Hanski and Rosas, above note 126, pp. 16–24. Contrary to IHL today, the Lieber Code actually also held in Article 60 that the ban on ordering that no quarter be given was not absolute, but was subject to military necessity. See Meron, above note 123, p. 137.

134 Hannikainen, Hanski and Rosas, above note 126, p. 16.

135 *Ibid.*, pp. 27–31.

136 Since 1949, many governments have continued to refuse to accept that such a situation should be qualified as a non-international armed conflict, but – at least for the legal qualification – the test is now only a factual one. The test can be applied whether or not a government accepts the existence of an armed conflict within its territory.

137 For example, Germany and Italy provided troops and material support to the Nationalists, whilst Portugal allowed the Nationalists to use its territory and ports and provided them with arms and troops. At the same time Russia and Mexico, and for a short period France too, gave material support to the Republicans (see e.g. Ann van Wynen Thomas and A.J. Thomas Jr, 'The civil war in Spain', in Richard A. Falk (ed), above note 113, pp. 113–120).

138 Perna, above note 36, p. 39.

the captured opponents according to the military code for prisoners of war,¹³⁹ and the Nationalists declared that they would respect the laws and customs of war ‘with the utmost scrupulousness’.¹⁴⁰

It should be noted that a few years earlier Spain had signed and ratified the 1929 Geneva Convention relative to the Treatment of Prisoners of War.¹⁴¹ During the war the American scholar Padelford remarked that the announcements made by the government with regard to prisoners, as well as the designation of certain areas as zones of war and subject to blockades, constituted a recognition of belligerency of the Nationalists.¹⁴² If that was so, the 1929 Geneva Convention would have been applicable to the prisoners.

The use of safety or demilitarized zones, which was later codified in international humanitarian law in Articles 23 and 14, respectively, of the First and Fourth Geneva Conventions of 1949, first occurred during the Spanish Civil War.¹⁴³ Yet there were ‘only a few bright spots’ as regards compliance with humanitarian law.¹⁴⁴ In 1938, the League of Nations passed a resolution condemning the bombing of open towns and described this conduct as contrary to international law,¹⁴⁵ and Nationalist air raids on the civilian population were denounced by the League as contrary ‘to the conscience of mankind and to the principles of international law.’ Notwithstanding the ‘uncivilized and inhuman practices’ that were the order of the day, the references made by the parties and the League of Nations show an emerging concept of international rules being applicable to a non-international conflict despite the lack of recognition of belligerency.¹⁴⁶

These three civil wars illustrate the problems surrounding the recognition of belligerency and the resulting absence of any formal application of international rules regulating such wars. The *de facto* situation showed a need for the laws of war to be applied, and at the same time the statements by and agreements between the parties (and with international and humanitarian organizations) showed an understanding that extension of the rules to the situations discussed above was indeed necessary.

139 Van Wynen Thomas and Thomas, above note 137, p. 122.

140 *Ibid.*, p. 124.

141 Spain signed the Convention on the day of its adoption, 27 July 1929, and was the first state to ratify it (on 6 August 1930). See <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=300&ps=P> (visited 20 May 2009).

142 Van Wynen Thomas and Thomas, above note 137, p. 140.

143 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, p. 143.

144 Van Wynen Thomas and Thomas, above note 137, p. 135.

145 League of Nations, *Official Journal*, 19th Assembly – Plenary Meetings, Special Supplement No. 183, 1938, pp. 135–136.

146 For further details see Antonio Cassese, ‘The Spanish Civil War and the development of customary law concerning internal armed conflict’, in Antonio Cassese (ed), *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict*, 1975.

From formal to factual application

The applicability of the laws of war was subject to formal declarations, e.g. declarations of war and belligerency. Situations in dire need of application of these rules were not regulated by treaty law unless formally recognized by such declarations as being within the scope of the laws of war, thus as an (international) war. This system was replaced by inclusion of the notion of ‘armed conflict’ in the 1949 Geneva Conventions, which addressed the actual situation on the ground. Humanitarian law thus became applicable on the basis of material aspects of conflict instead of formalities.

Prior to the adoption of the 1949 Geneva Conventions, no substantive provision specifically dealing with situations of non-international armed conflict existed in IHL.¹⁴⁷ This changed in 1949 with ‘the embodiment of [the idea on which the Red Cross is based] in international obligations’.¹⁴⁸ The inclusion – primarily in response to the brutal civil wars in the years between the two world wars, such as that in Spain,¹⁴⁹ – of Common Article 3 ‘in which the whole of the rules applying to non-international conflicts are concentrated’ was ‘almost unhoped-for’.¹⁵⁰ This important development, not only for the protection of people affected by armed conflict but also for the legal distinction between the two types of armed conflict, is discussed in the following section.

The drafting history of Common Article 3

As Pictet points out in his *Commentary*, until 1949 the Conventions were designed ‘to assist only the victims of wars between States.’ In 1864, for example, the first-ever Geneva Convention for the protection of wounded or sick soldiers was brought into being on the initiative of the Geneva Committee, the future International Committee of the Red Cross. ‘[I]n logical application of its fundamental principle’, the Red Cross later called for the law to be extended to other categories of victims of war, i.e. prisoners of war and civilians,¹⁵¹ for ‘[t]he same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character.’¹⁵²

The Red Cross had long before tried to help ‘the victims of internal conflicts, the horrors of which sometimes surpass the horrors of international wars

147 Cullen, above note 95, p. 36.

148 Pictet, *Commentary on GC III*, above note 7, p. 28.

149 Corn, above note 1, p. 305.

150 Pictet, *Commentary on GC III*, above note 7, p. 28.

151 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (hereinafter *Commentary on GC I*), ICRC, Geneva, 1952, p. 38.

152 *Ibid.*

by reason of the fratricidal hatred which they engender.’¹⁵³ However, its work was often hampered by domestic politics: in non-international conflicts the lawful government sometimes viewed the relief it gave to victims on the insurgents’ side as aid to criminals. Indeed, applications by a foreign Red Cross Society or by the ICRC were more than once treated as interference in the internal affairs of the state concerned.¹⁵⁴ At the 9th International Conference of the Red Cross, held in 1912, a draft convention on the role of the Red Cross in times of civil war or insurgencies was submitted, but the subject eluded any discussion whatsoever.¹⁵⁵

The ICRC was more successful in this regard after World War I. In 1921 it was able to include the issue on the agenda of the 10th International Conference of the Red Cross, and this time a resolution was passed ‘affirming the right to relief of all victims of civil wars or social or revolutionary disturbances in accordance with the general principles of the Red Cross.’¹⁵⁶ In the uprising that followed the plebiscite in Upper Silesia that same year and during the Spanish Civil War, this resolution enabled the ICRC ‘to induce both sides to undertake more or less to respect the principles of the Geneva Convention.’¹⁵⁷

At the 14th International Conference of the Red Cross in 1938, a resolution was passed that supplemented and strengthened the resolution of 1921. By adopting the 1938 resolution, the International Conference ‘was [...] envisaging, explicitly and for the first time, the application to a civil war, if not of all the provisions of the Geneva Conventions, at any rate of their essential principles.’¹⁵⁸ This development, together with the results achieved in the non-international armed conflicts in Upper Silesia and Spain, encouraged reconsideration by the ICRC of possibly inserting into the Conventions provisions relating to civil war.¹⁵⁹

At various conferences leading up to the 1949 Conference, the Red Cross Movement tried to have the provisions of the proposed new conventions applied to armed conflicts ‘within the borders of a State’,¹⁶⁰ but there proved to be a divergence of interests between the Movement, which advocated individual rights and protections, and the states that wanted to protect their sovereign rights.¹⁶¹ As was feared by the ICRC, the latter objected to the imposition on states of international obligations relating to their internal affairs.¹⁶² After a proposal by the Conference of

153 *Ibid.*, p. 39. The *Commentary on GC III* uses slightly different wording, namely, ‘to aid the victims of *civil wars and internal armed conflict*’ (Pictet, above note 7, p. 28, emphasis added).

154 Pictet, *Commentary on GC I*, above note 151, p. 39.

155 *Ibid.*

156 *Ibid.*, p. 40. One author notes in relation to the categories of conflict mentioned (i.e. civil wars, social or revolutionary disturbances), that: ‘Given the timeframe, the ICRC doubtless had in mind, inter alia, the violent events in post-World War I Germany and the Bolshevik Revolution (and ensuing civil war) in Russia when it drafted the 1921 resolution; hence, the terms used.’ Robert Weston Ash, ‘Square pegs and round holes: Al-Qaeda detainees and Common Article 3’, *Indiana International & Comparative Law Review*, Vol. 17, Issue 2, 2007, p. 279.

157 Pictet, *Commentary on GC I*, above note 151, p. 40.

158 *Ibid.*, p. 41.

159 *Ibid.*

160 *Ibid.*, pp. 41–42.

161 Ash, above note 156, p. 280.

162 Pictet, *Commentary on GC I*, above note 151, p. 42.

Government Experts,¹⁶³ the ICRC then submitted to the 17th International Conference of the Red Cross, held in Stockholm in 1948, a revised version of the article in question of the Draft Conventions for the Protection of War Victims. Interestingly, Pictet's *Commentary* states that the text submitted by the ICRC was as follows:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the *principles* of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status.¹⁶⁴

The revised text was approved at the Stockholm Conference with the omission of the words 'especially cases of civil war, colonial conflicts, or wars of religion'.

However, rather than weakening the text, the said omission actually enlarged its scope.¹⁶⁵ Whilst Pictet notes that '[i]t was in this form that the proposal came before the Diplomatic Conference of 1949',¹⁶⁶ the text of the Final Record reveals that the wording of the proposal actually read:

In all cases of armed conflict which are not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the *provisions* of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.¹⁶⁷

The *Commentary* fails to mention that 'important change',¹⁶⁸ which would entail a more elaborate protection in conflicts not of an international character. This latter proposal – in line with the Movement's earlier view – thus suggests a full

163 In 1947, the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims had drafted an article that proposed that 'the principles of the Convention were to be applied in civil wars by the Contracting Party, provided that the adverse Party did the same'. (*Ibid.*)

164 *Ibid.*, pp. 42–43 (emphasis added).

165 *Ibid.*, p. 43.

166 *Ibid.*

167 *Final Record of the Diplomatic Conference of Geneva of 1949* (hereinafter *Final Record*), Vol. I, p. 47 (emphasis added). This was paragraph 4 of the Draft Common Article 2. A separate Common Article 3 only came into existence later, i.e. during the Diplomatic Conference. All volumes of the *Final Record* can be viewed online at http://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec-Dipl-Conf-1949.html (visited 22 May 2009).

168 Moir, above note 9, p. 23. Moir notes that the *Commentary* 'fail[s] to mention this [...] change – an important one, returning to the original proposal of the Preliminary Conference.' David A. Elder pointed this oversight out in 1979 – see David A. Elder, 'The historical background of Common Article 3 of the Geneva Convention of 1949', *Case Western Reserve Journal of International Law*, Vol. 11, 1979, p. 43.

application of the Conventions to such conflicts.¹⁶⁹ For the present analysis it is relevant to observe that up to the convening of the Diplomatic Conference, the aim of those taking part in it (i.e. the Red Cross Movement and importantly, states) was for the new Conventions as a whole to extend to non-international armed conflicts. Essentially, this would have meant that the distinction that existed between the two types of conflict prior to 1949 would (in effect) have been eliminated. Whereas before the distinction lay not so much in the legal framework (since the latter did not officially apply to non-international armed conflicts), this meant *de facto* that a clear distinction did exist: between those conflicts that were governed by IHL, namely real wars – international armed conflicts; and those that were not, namely non-international armed conflicts. Extending the application of IHL to the latter would create a single category: situations to which IHL applied, i.e. armed conflicts, be they international or non-international in nature.

In light of the contemporary challenges to IHL, another phrase also becomes relevant.¹⁷⁰ Both the wording of the *Commentary* and that of the Final Record contain the phrase ‘in the territory of one or more of the High Contracting Parties’.¹⁷¹ Common Article 3, as it finally appeared in the Geneva Conventions of 1949, uses the well-known wording ‘[i]n case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. The meaning of ‘one’ in this phrase of Common Article 3 is rather ambiguous and was a subject of the debate surrounding the ‘war’ waged by the United States against Al Qaeda.

In *Hamdan v. Rumsfeld* the US Supreme Court considered whether ‘one’ should be read in its literal sense (which was the then view of the Bush administration) and ruled that it should not. In agreeing with this finding by the Court, Marco Sassòli explains that ‘[i]f such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not “non-international armed conflicts”, there would be a gap in protection.’¹⁷² The present prevailing view seems to be that ‘one’ should be read as ‘a’.¹⁷³ The question

169 Cullen, above note 95, p. 40.

170 See Pictet, *Commentary on GC I*, above note 151, p. 42 and *Final Record*, Vol. I, p. 47.

171 Emphasis added.

172 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, p. 9. In a 2008 opinion paper, the ICRC, proposed – as part of a definition reflecting ‘the strong prevailing legal opinion’ – that non-international armed conflicts arise ‘on the territory of a State’. See ICRC, ‘How is the term “armed conflict” defined in international humanitarian law?’, Opinion Paper, March 2008, p. 5, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (visited 22 May 2009).

173 Article 1 of Protocol II uses the wording: ‘the territory of a High Contracting Party’. Treaties can only be signed by states and only apply to states that are party to them. The wording of Common Article 3 and Protocol II seems to express only that the place where the conflict takes place needs to come within the formal scope of application of IHL. ‘As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur “in the territory of one of the High Contracting Parties” has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.’ (ICRC, *ibid.*, p. 3).

as to whether the difference between the draft that was submitted and the final article was in fact intentional is dealt with below.

The Diplomatic Conference (1949)

The Diplomatic Conference convened in 1949 to revise the existing Geneva Conventions and established four primary committees, each of which focused on a different issue. One of these issues was 'Provisions common to all four Conventions'. As this phrase suggests, the relevant committee (the so-called Joint Committee) also dealt with what was to become Common Article 3.¹⁷⁴ The text of that article was one of the most controversial sections of the draft prepared by the ICRC.¹⁷⁵ The content of the debate in Geneva shows what type of conflict the drafters understood to be an 'armed conflict not of an international character'.

The Joint Committee was composed of delegates from all states present at the Diplomatic Conference. A divergence of views immediately became apparent.¹⁷⁶ The United Kingdom delegation was strongly against the adoption of draft Article 2 as it stood, because it would 'strike at the root of national sovereignty' and pose a threat to national security. The UK also held that Article 2(4) would extend the application of the Conventions to situations that 'were not war'.¹⁷⁷ In similar fashion, the French delegation feared that it would be possible for 'forms of disorder, anarchy, or brigandage to claim protection under the Convention'¹⁷⁸ and thus proposed an amendment to protect the rights of the state. In particular, it tabled the following alternative to the fourth paragraph of Article 2:

In all cases of armed conflict not of an international character which may occur on the territory of one or more High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, if the adverse Party possesses an organized military force, an authority responsible for its acts acting within a defined territory and having the means of observing and enforcing the Convention.¹⁷⁹

This French proposal still made use of the wording 'on the territory of one or more High Contracting Parties', and was supported by Spain, Italy and Monaco.¹⁸⁰

However, the ICRC was of the opinion that it set too high a threshold: on earlier occasions the total or partial application of the Conventions had been achieved, but those same situations would not have reached the threshold set by the

174 Pictet, *Commentary on GC III*, above note 7, p. 7. See also *Final Record*, Vol II-A, Minutes of Plenary Meetings, 4th meeting (25 April 1949), pp. 71–74.

175 See, *inter alia*, Ash, above note 156, p. 281.

176 Pictet, *Commentary on GC I*, above note 151, p. 43.

177 *Final Record*, Vol. II-B, Summary Records of the Joint Committee, 1st Meeting (26 April 1949), p. 10.

178 *Ibid.*

179 *Final Record*, Vol. III, Amendment proposed by France (26 April 1949), Annex 12, p. 27.

180 *Final Record*, Vol. II-B, above note 177, pp. 11–14.

amendment.¹⁸¹ It considered that the most practical and straightforward approach would be to have uniform application of the Conventions to all types of armed conflict and not to set an additional threshold.¹⁸²

Whilst the French proposal implicitly stated the condition for recognition of belligerency, the American, Australian and Greek delegations felt that this did not go far enough and proposed (in various forms) that the material conditions warranting the recognition of belligerency and thus the application of IHL be specifically stated.¹⁸³ The Greek proposal went so far as to say that the majority of the UN Security Council would need to recognize the belligerency.¹⁸⁴

Canada agreed that recognition of belligerency should be the criterion, while a second group accepted that the draft article might be less than perfect, but supported its inclusion on the basis of humanitarian considerations.¹⁸⁵ Norway (backed by the Soviet Union, Romania, Mexico, Denmark and Hungary) expressed its support for draft Article 2 because it would constitute a step forward in international law. It commented, too, that the term ‘armed conflict in a situation of civil war’ should not be understood as ‘individual conflict’ or ‘uprising’, but as ‘a form of conflict resembling international war, but taking place inside the territory of a State.’¹⁸⁶ It furthermore hoped for agreement at that Conference ‘that purely humanitarian rules should be applied in armed conflicts independently of any recognition of belligerency.’¹⁸⁷

It became clear in the Joint Committee that no easy conclusion could be reached. Pursuant to the Swiss delegation’s proposal, a sub-committee (the ‘Special Committee’) was therefore created to deal with the definition of armed conflict and the provision on non-international armed conflicts. Its meetings lasted for eleven weeks, but ended without any real agreement.¹⁸⁸

Given the clear divergence of views on draft Article 2, the Special Committee took two votes before starting its discussions. These showed that the delegations were in favour: (1) of extending the application of the Conventions to armed conflicts not of an international character; and (2) of rejecting the Stockholm draft of Article 2 and determining more clearly the non-international cases to which the Conventions were to apply.¹⁸⁹ The Committee felt that it had

181 *Ibid.*, Vol. II-B, Summary Records of Special Committee of the Joint Committee, 3rd Meeting (9 May 1949), p. 43.

182 Cullen, above note 95, p. 44.

183 *Ibid.*, p. 46, referring to James E. Bond, *The Rules of Riot: Internal Conflict and the Law of War*, Princeton University Press, Princeton, 1974, pp. 52–53. For the various proposals see *Final Record*, Vol. II-B, Summary Records of the Joint Committee, 2nd Meeting (27 April 1949), pp. 12–16.

184 *Final Record*, Vol. II-B, above note 177, p. 16.

185 Moir, above note 9, p. 24.

186 *Final Record*, Vol. II-B, above note 177, p. 11.

187 *Ibid.*

188 Cullen, above note 95, p. 50. The Special Committee consisted of Australia, Burma, France, Greece, Italy, Monaco, Norway, the Soviet Union, Switzerland, the United Kingdom, the United States of America and Uruguay.

189 *Final Record*, Vol. II-B, Summary Records of the Special Committee of the Joint Committee, 3rd and 4th Meetings (11 May 1949), p. 45.

two options: it could either limit the situations of non-international violence to which the Conventions were to apply, or it could limit the amount or extent of the provisions that would be applicable to conflicts not of an international character.¹⁹⁰

Over the weeks that followed, smaller working groups (so-called Working Parties) were formed from the delegations taking part in the Special Committee. A total of three proposals for what was meanwhile called Article 2A were put forward, but none of them gained enough support, so all three were submitted to the Joint Committee.

While the French proposal before the Joint Committee at the end of April still contained the wording 'one or more High Contracting Parties', by May and June the three aforesaid proposals drafted during the Special Committee meetings all used the wording 'one of the High Contracting Parties' (or, in the case of the Soviet proposal, 'one of the States Parties').¹⁹¹ The records do not show any deliberation on this subject and no mention is made of the reason for omitting 'or more'. It is possible that so-called off-the-record 'hallway diplomacy' gave rise to this change, but it seems more plausible, in view of the recorded discussion in the Special Committee, that at some point the words 'or more' were felt to be void because everyone seemed to agree that the type of armed conflict being discussed was purely internal in character.

The draft Article 2A completed by the second Working Party, consisting of the exact wording of the present Common Article 3, received the most support in the Joint Committee and was then submitted to the Plenary Assembly. This latest draft text did not include any reference to the criteria for recognition of belligerency; delegations previously wanting these criteria included thus either underwent a radical change of opinion, or the recognition of belligerency was deemed to be an implicit condition for the provision's application to non-international armed conflicts.¹⁹²

The report on the work of the Joint Committee, submitted together with the draft articles to the Plenary Assembly, gives a good overview of what the delegations considered to be the type of conflict mentioned in this draft Article 2A. As for what was to be understood by 'armed conflict not of an international character', the report states that:

It was clear that this referred to civil war, and not to a mere riot or disturbances caused by bandits. States could not be obliged, as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied.¹⁹³

190 *Final Record*, Vol. II-B, Seventh Report drawn up by the Special Committee of the Joint Committee (16 July 1949), p. 122.

191 *Ibid.*, pp. 123–127.

192 Cullen, above note 95, p. 57.

193 *Final Record*, Vol. II-B, Report drawn up by the Joint Committee and presented to the Plenary Assembly, p. 129.

Anthony Cullen notes that the terms ‘civil war’ and ‘armed conflict not of an international character’ were thus understood by the drafters as having an equivalent threshold. The former presupposes the existence of hostilities that are similar to an international conflict and, for the purposes of applicability of the Conventions, thus requires the same scale and intensity.¹⁹⁴ If the report submitted to the Plenary Assembly accurately describes the views held by the delegates, there must then have been broad agreement that the threshold required for the application of IHL (as laid down in the Conventions) was similar to the level that was traditionally set for recognition of belligerency.¹⁹⁵

The debate on Article 2A continued at the Plenary Assembly, but it was finally adopted unchanged as Common Article 3 by 34 votes to 12 (with one abstention). According to the Swiss delegation, the text represented the only possible balance between the claims of idealism and the rights of realism,¹⁹⁶ and was a compromise between the Asian bloc (represented by Burma), which was still opposed to the inclusion of a provision on non-international situations, and the Soviet view that the humanitarian protection afforded by this article was too limited.¹⁹⁷

The ICRC would have preferred the more extensive protection of the Stockholm draft, but accepted that a compromise was inevitable. It gave its full support to the article, which contained a simple and clear text and ‘has the merit of ensuring, in the case of a civil war, at least the application of the humanitarian rules which are recognized by all civilized peoples’, provides at least a minimum of protection and at the same time gives humanitarian organizations, such as the ICRC, the means for intervention.¹⁹⁸

After several years in preparation and many weeks of negotiation, the extension of treaty law to non-international armed conflicts was thus accomplished. While this was a great achievement insofar as it extended a number of provisions to such conflicts and – as the ICRC noted – allowed humanitarian agency bodies to offer their services, it also created a legal distinction between those conflicts and the situations referred to in Common Article 2, i.e. international armed conflicts, to which the Conventions applied in their entirety.¹⁹⁹

Concluding remarks

Differences between situations of armed conflict existed even before the rise of the nation-state as a concept in international law. Religion was a reason to treat enemies of another religion differently, and also to accord those daring to challenge

¹⁹⁴ Cullen, above note 95, pp. 57–58.

¹⁹⁵ *Ibid.*, p. 58.

¹⁹⁶ *Final Record*, Vol. II-B, Minutes of 19th Plenary Meeting (29 July 1949), p. 336.

¹⁹⁷ Moir, above note 9, p. 24.

¹⁹⁸ *Final Record*, Vol. II-B, Minutes of 19th Plenary Meeting, above note 196, pp. 336–337.

¹⁹⁹ It can also be said that the distinction was confirmed rather than created. See the discussion below on this issue.

the power of the sovereign a treatment outside the confines of any law. Wars against other sovereigns belonging to the same religion i.e. wars between equals, were the only 'real wars' and therefore the only situations subject to regulation.²⁰⁰

With the rise of the nation-state, war came to be characterized as an inherent sovereign right. Indeed, the right to wage war was even believed to be the main characteristic of sovereignty. Yoram Dinstein comments in this regard that:

When observed through the lens of legal theory, the freedom to indulge in war without thereby violating international law seemed to create an egregious anomaly. It did not make sense for the international legal system to be based on respect for the sovereignty of States, while each State had a sovereign right to destroy the sovereignty of others.²⁰¹

He explains, too, that the states (and statesmen concerned) did not consider the freedom of waging war to constitute a problem in relation to international law; nor did they find it inconceivable that each state could – in the name of sovereignty – legitimately challenge the sovereignty of other states.²⁰² The ambiguity of sovereignty is also illustrated by the doctrine of belligerency. Since only sovereign States could wage war, a non-international armed conflict was considered to fall within the realm of international law (and thus the laws of war) only in cases where it actually resembled an international war. The recognition of belligerency was thus the only way to make the laws of war applicable to non-international situations, but if such was the case, the fighting parties were placed on an equal footing – the sovereign state and the insurgents who received recognition as belligerents.

Similarly, the Geneva Conventions were only meant to apply in non-international situations that closely resembled international armed conflicts. The 1949 Geneva Conventions expanded the frontiers of IHL: the first three Conventions updated existing treaties and the fourth broke new ground by making detailed provisions for the treatment of civilians, but '[t]he major novelty was Article 3 common to all four Conventions, which for the first time introduced the principles of the Geneva Conventions into the domain of non-international conflicts.'²⁰³ While it is also said that the Geneva Conventions marginalize non-international armed conflicts,²⁰⁴ they did break 'through the obstacle posed by considerations of national sovereignty to impose a legal framework on internal conflicts.'²⁰⁵

200 It is interesting to note that the present-day jihadist philosophy, in referring to the other party as a sort of 'modern-day heathens', denies those belonging to that party basic rights (under IHL). It can be argued that to some extent the counter-terrorism strategy does the same when denying the application of IHL to those described as 'terrorists'.

201 Dinstein, Yoram, 'The legal status of war', in David Kinsella and Craig L. Carr (eds), *The Morality of War: A Reader*, Lynne Rienner Publishers, London, 2007, p. 101.

202 *Ibid.*

203 ICRC, 'The ICRC since 1945: The Geneva Conventions of 1949', 2005, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/icrc-genevaconventions-revision-1949> (visited 22 May 2009).

204 Heather Alexander, 'Justice for Rwanda: Toward a universal law of armed conflict', *Golden State University Law Review*, Vol. 34, 2004, p. 435.

205 ICRC, above note 203.

However, this divergence from the original scope of application has not created a completely new distinction between international and non-international armed conflicts. As mentioned above, this distinction existed long before 1949. The non-regulation of situations of a non-international nature in itself creates a distinction: between situations that fall under the protection of humanitarian law and situations outside the scope of that body of law. The international community had a chance to nullify this distinction in 1949, but rather than making the whole of IHL applicable to all types of armed conflict (international and non-international), the states that negotiated the Conventions not only decided to retain the previously existing distinction by creating two separate regimes instead, but also – given the fact that the situations to be governed by Common Article 3 were similar to those that could previously have received a recognition of belligerency – inadvertently created a situation in which less protection and fewer laws would be in place than before.

In addition, a fundamental difficulty that arose after creation of that distinction was how to classify conflicts into one of the two categories, since a new dimension was added to simply differentiating prior to 1949 between ‘wartime’ and ‘peacetime’.²⁰⁶

On the one hand, situations that in earlier times fell short of belligerency (which required a party to be able to engage in sustained violence), and would thus probably have been called rebellion, today come under headings such as internal disturbances and tensions and isolated and sporadic acts of violence and are still considered to be outside the scope of IHL protection.²⁰⁷ Article 1(2) of Additional Protocol II and Article 8(2)(d) of the Rome Statute of the International Criminal Court have adopted wording that is very similar to how rebellion falling short of insurgency or belligerency could be described.

Situations not clearly coming within one of the two categories, e.g. transnational situations, were never discussed when the distinction between international and non-international armed conflicts came into being. Because non-state groups were not a sovereign power and would never be able to meet the criteria for recognition of belligerency,²⁰⁸ those situations were outside the scope of traditional international law. During the drafting process of Common Article 3, at no time was reference made to a potential transnational situation. The only reference that could have indicated that the drafters had considered the possibility of such a situation, namely ‘or more’, was omitted without explanation. The drafting and negotiations dealt exclusively with the use of internal armed force within a State.²⁰⁹

Conversely, the scope of application of Common Article 3 has nowadays been extended. As one author notes, that article is being distorted and applied in

206 Christophe Swinarski, ‘On the classification of conflicts as a factor of their dynamics’, in Hannard, Marques dos Santos and Fox (eds), above note 4, p. 30.

207 This does not mean that those situations are beyond any form of law. National law and, unlike in earlier times, human rights law does apply to them.

208 For example, control of part of the territory of the state against whose government such a group has taken up arms. If a non-state entity in a transnational conflict has control over any territory, this is (normally) not in the state against which it is fighting.

209 cf. Ash, above note 156, p. 275.

direct contradiction to what the drafters anticipated and agreed upon in 1949,²¹⁰ for whereas it was meant to apply in situations that were similar to the other type of conflict referred to in the Conventions, i.e. international armed conflicts, it now applies as a minimum yardstick to all situations of armed conflict that are not international in character.²¹¹

The sensitivity of states to third-party interference in matters to do with their internal security and sovereignty is cited as the reason why the law of non-international armed conflict has been neglected and under-regulated for so long.²¹² The sovereignty of states remains an important international value, but at the same time the prerogatives it confers have been limited. Insistence upon a traditional concept of state sovereignty would thus be anachronistic. Sovereignty has been redefined to accommodate newly recognized values of international human rights²¹³ and a number of international legal developments, including the appearance of international tribunals and courts.²¹⁴ In its first case of one of these tribunals, the ICTY showed its desire to extend humanitarian protection in like measure to victims of non-international armed conflicts,²¹⁵ but in its subsequent case-law it has time and again confirmed the existence of a legal distinction between non-international and international armed conflicts. In order to make this distinction, it has developed criteria to assess whether a given situation corresponds to one type of conflict or the other.

At present, the distinction between the two types of conflict still forms part of positive law, for the states negotiating the 1949 Geneva Conventions (and later the 1977 Additional Protocols) were not willing to place a situation that concerned their internal affairs, and thus their sovereignty, on an equal footing with international armed conflicts. The willingness of judicial bodies to extend the scope of application of the law of non-international armed conflicts can hence be viewed as a promising development. However, for international humanitarian law to achieve its aim of providing the best possible protection for those affected by armed conflict, the desired outcome in resolving the question of application of this branch of law is naturally the one that brings into play the largest set of rules – those related to international armed conflict – that protect *all* victims of war.

210 *Ibid.*

211 See International Court of Justice, *Nicaragua v. United States of America*, Judgment, ICJ Reports 1986, p. 14; United States Supreme Court, *Hamdan v. Rumsfeld*, above note 4. Pictet's commentary states that Common Article 3 should be applied as widely as possible – Pictet, *Commentary to GC I*, above note 151, p. 50.

212 As in, among others, Kolb and Hyde, above note 143, p. 257.

213 Bartram S. Brown, 'Nationality and internationality in international humanitarian law', *Stanford Journal of International Law*, Vol. 34, 1998, p. 395.

214 Natalie Wagner, 'The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia', *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 374–375.

215 The Trial Chamber noted that 'what is inhumane, and consequently prohibited, in international wars, cannot but be inhumane and inadmissible in civil strife.' ICTY, *Prosecutor v. Dusko Tadić*, Judgment (Trial Chamber), Case No. IT-94-1-AR72, 2 October 1995, para 119.

Typology of armed conflicts in international humanitarian law: legal concepts and actual situations

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Abstract

Although international humanitarian law has as its aim the limitation of the effects of armed conflict, it does not include a full definition of those situations which fall within its material field of application. While it is true that the relevant conventions refer to various types of armed conflict and therefore afford a glimpse of the legal outlines of this multifaceted concept, these instruments do not propose criteria that are precise enough to determine the content of those categories unequivocally. A certain amount of clarity is nonetheless needed. In fact, depending on how the situations are legally defined, the rules that apply vary from one case to the next. By proposing a typology of armed conflicts from the perspective of international humanitarian law, this article seeks to show how the different categories of armed conflict anticipated by that legal regime can be interpreted in the light of recent developments in international legal practice. It also reviews some actual situations whose categorization under existing legal concepts has been debated.

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Introduction

Although international humanitarian law has as its aim the limitation of the effects of armed conflict, it does not include a full definition of those situations that fall within its material field of application. While it is true that the relevant conventions refer to various types of armed conflict and therefore afford a glimpse of the legal outlines of this multifaceted concept, these instruments do not propose criteria that are precise enough to determine the content of those categories unequivocally. A certain amount of clarity is nonetheless needed. In fact, depending on how the situations are legally defined, the rules that apply vary from one case to the next. The legal regimes that need to be taken into account are thus not always the same and depend on whether the situations constitute, for example, an international or a non-international armed conflict. Similarly, some forms of violence, referred to as ‘internal tensions’ or ‘internal disturbances’, do not reach the threshold of applicability of international humanitarian law and therefore fall within the scope of other normative frameworks.

This article proposes a typology of armed conflicts from the perspective of international humanitarian law. It sets out, first, to show how the different categories of armed conflict anticipated by that law can be interpreted in the light of recent developments in international legal practice. In that respect, it is appropriate to refer to the conceptualization efforts relating firstly to the law of international armed conflict and secondly to the law of non-international armed conflict. This article then goes on to examine various controversial cases of application. The reality of armed conflict is actually more complex than the model described in international humanitarian law – to the extent that today some observers question the adequacy of the legal categories.

The law of international armed conflict

The history of the law of international armed conflict shows that the field of application of this legal regime has been progressively extended as treaty law developed. Whereas a narrow formalistic concept of war was predominant initially, the reform of the system with the revision of the Geneva Conventions in 1949 gave precedence to a broader approach, based on the more objective concept of armed conflict. Moreover, that extension was subsequently taken up with the adoption of Additional Protocol I in 1977. That instrument added another type of conflict to the field of the law of international armed conflict, that of wars of national liberation. This legal regime also comprises a specific body of rules whose field of application is determined on the basis of an autonomous concept, that of occupation.

War and international armed conflict

By virtue of common Article 2(1), the 1949 Geneva Conventions apply to ‘all cases of declared war or of any other armed conflict which may arise between two or

more of the High Contracting Parties, even if the state of war is not recognized by one of them'.¹ The situations referred to here are conflicts between States. The 'High Contracting Parties' mentioned in this text are sovereign entities. Depending on the case in question, these situations may take the form of a direct conflict between States or of intervention in a previously existing internal conflict. In the latter hypothesis, the conflict is 'internationalized'. That is the case if a foreign Power sends troops into a territory to support a movement opposing the local government. Intervention may also take place by proxy when that Power merely supports and guides the uprising from a distance.² In that case, it is then vital to determine the level of control that makes it possible to classify the armed conflict as international. Not every form of influence necessarily leads to the conflict becoming internationalized. On that point, the International Criminal Tribunal for the former Yugoslavia (ICTY) pointed out that 'control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation'.³ The criterion of 'overall control' is achieved when the foreign State '*has a role in organising, co-ordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group' (emphasis added).⁴ Involvement must therefore go beyond mere logistical support, but that involvement does not imply that everything done by the group concerned is directed by the State taking part from a distance.

The situations referred to in Article 2(1) common to the 1949 Geneva Conventions are viewed from the twin viewpoints of formalism and effectiveness.

- 1 The same field of application was also retained for other instruments of international humanitarian law, in particular Additional Protocol I (see Art. 1(3)).
- 2 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para 84: 'It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.'
- 3 *Ibid.*, para 137. On this point, see also International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 26 February 2007, para 404. Without adopting a definitive position on the matter, the Court accepted that the criterion of overall control may be 'applicable and suitable' as a means of determining whether or not an armed conflict is international. For a discussion of this issue, see A. Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law*, Vol. 18, No. 4, 2007, pp. 649–668.
- 4 ICTY, *Prosecutor v. Tadic*, Judgment (Appeals Chamber), above note 2, para 137; see also paras 120 and 131. See also ICTY, *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para 198. For an analysis of this case law, see J.G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict', *International Review of the Red Cross*, Vol. 85, No. 850, pp. 323 ff.; A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law: A Study on Thresholds of Applicability*, Thesis, University College, Galway, 2007, pp. 229 ff.

First, there are declared wars, implying that the state of war is recognized officially by the parties concerned. Second, there are other forms of inter-State armed conflict, whose existence does not depend on how the parties define them. While the concept of war already exists in the oldest treaties of international humanitarian law,⁵ the 1949 Conventions introduced the concept of armed conflict into this legal regime for the first time. Through this semantic contribution, those who drafted those instruments wanted to show that the applicability of international humanitarian law was henceforth to be unrelated to the will of governments. It was no longer based solely on the subjectivity inherent in the recognition of the state of war, but was to depend on verifiable facts in accordance with objective criteria. Thanks to that contribution in 1949, international armed conflict thus became established as a concept governed by the principle of effectiveness. The relevant rules apply when certain specific factual conditions are met.⁶

As for the nature of those conditions, it is generally acknowledged that it must be evaluated freely, as the level of intensity required for a conflict to be subject to the law of international armed conflict is very low.⁷ Situations envisaged by the relative instruments merely need to exist. Thus ‘as soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention’.⁸ It is, however, not necessary for the conflict to extend over time or for it to create a certain number of victims.⁹ In other words, an international armed conflict exists, as recalled by the ICTY, ‘whenever there is a resort to armed force between States’.¹⁰ To be more precise, it might be said that that is the case when the circumstances are characterized by hostility between the parties. The attack must be motivated by the intention to harm the enemy, thus

5 See, for example, Arts. 4, 5 and 6 of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.

6 See J. Pictet *et al.* (eds), *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, Geneva, ICRC, 1952, p. 32; R. Kolb, *Ius in bello, Le droit international des conflits armés*, Basel/Brussels, Helbing and Lichtenhahn/Bruylant, 2003, pp. 72 ff.

7 J. Pictet *et al.* (eds), above note 6, p. 34; see also D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *The Hague Academy Collected Courses*, Vol. 63, 1979-II, p. 131; H.-P. Gasser, ‘International Humanitarian Law: an Introduction’, separate print from *Humanity for All: the International Red Cross and Red Crescent Movement*, Henri Dunant Institute, Geneva, 1993, p. 24; E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2008, p. 122; Kolb, above note 6, p. 73.

8 H.-P. Gasser, above note 7, pp. 22–23.

9 Some authors argue, however, that a distinction must be established between international armed conflict (reaching a certain level of intensity) and other forms of hostile actions amounting to ‘incidents’, ‘border clashes’ or ‘skirmishes’ only. See International Law Association, *Draft Report, Initial Report on the Meaning of Armed Conflict in International Law*, Rio de Janeiro Conference, 2008, pp. 9–10 and 23–24.

10 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70. See also ICTY, *Prosecutor v. Mucić et al. (Čelebići Camp)*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, para 184: ‘le recours à la force armée entre États suffit en soi à déclencher l’application du droit international humanitaire’. This definition has since been taken up by other international bodies. See for example: Commission of Inquiry on Lebanon, *Report pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2*, 23 November 2006, para 51.

ruling out cases in which the use of force is the result of an error (involuntary incursion into foreign territory, wrongly identifying the target, etc.). Similarly, an international armed conflict does not exist when the targeted State has given its consent for a third State to take action in its territory (for example, to fight a non-governmental armed group).¹¹

Since the adoption of Additional Protocol I of 1977, the field of application of the law of international armed conflict has ceased to be limited to inter-State conflicts *stricto sensu* and also encompasses conflicts between government forces and some non-governmental groups, i.e. peoples fighting in the exercise of their right of self-determination. The Protocol stipulates that the situations targeted by Article 2 common to the 1949 Geneva Conventions include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes 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'.¹²

The scope of this provision raises a number of questions of interpretation, beginning with the precise definition of the 'peoples' concerned and the criteria which make it possible to distinguish those situations of armed conflict from that covered by Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II.¹³ The two instruments referred to in Article 1(4) of Additional Protocol I are actually couched in terms that are too general to allow fully satisfactory answers to be derived from them. Moreover, it is difficult to find additional clarification in actual practice because the scenario referred to in that Article has never been officially recognized, particularly as the States that might be concerned did not ratify Additional Protocol I. The interested reader can make useful reference to the commentaries already devoted to that particular type of armed conflict.¹⁴

Occupation

When one of the belligerents succeeds in gaining the upper hand over his adversary, an international armed conflict may take the form of occupation.¹⁵ In the words of Article 42 of the 1907 Hague Regulations, 'territory is considered occupied

11 For the opposite view, see David, above note 7, p. 127.

12 Additional Protocol I, Art. 1(4).

13 See the section on the law of non-international armed conflicts below. See also M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 45–52.

14 See, in particular, D. Schindler, above note 7, pp. 133–144; Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, paras 66–118; E. David, above note 7, pp. 184–198.

15 For a more detailed study of the notion and the law of occupation, see Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009; R. Kolb, S. Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, The Hague, 2009.

when it is actually *placed under the authority of the hostile army*’ (our emphasis). For occupation in the meaning of this provision to exist, two conditions must be fulfilled: (a) the occupier is able to exercise effective control over a territory that does not belong to it; (b) its intervention has not been approved by the legitimate sovereign.¹⁶ Effective territorial control, which is at the heart of the concept of occupation, implies that a substitution of powers may take effect. That condition is fulfilled when, first, the overthrown government is unable to exercise its authority and, second, the occupying Power is in a position to fill that gap by exerting its own power.¹⁷ This condition implies in principle that enemy troops should be deployed in the territory concerned and succeed in imposing the minimum stability that will allow them to exercise their responsibilities deriving from the law of occupation. As for the second criterion, the absence of consent, it must be understood in fairly broad terms. In particular, it is not limited to cases in which power is seized as a result of hostilities. Article 2(2) of the Fourth Geneva Convention of 1949 complements the 1907 definition by clarifying that the relevant rules apply even if the occupation ‘meets with no armed resistance’.

In some cases, territorial control is not exercised directly by the occupation forces but via a puppet government or another form of subordinate local power.¹⁸ However, it is difficult to evaluate on a case-by-case basis the degree of influence required for this scenario to actually constitute occupation, as any interference in the affairs of a third State does not necessarily mean that occupation exists. Relations between the local authorities and the foreign forces vary in intensity depending on the circumstances and always reveal a certain reciprocal influence – or even a degree of consultation – in the decision-making process. To resolve this question, the ICTY retains – in this case, too – the criterion of ‘overall control’. Occupation exists when a State has ‘overall control’ of the local agents actually exercising ‘effective control’ over the territory in question.¹⁹ This is, for example, the pattern of the present situation in Nagorno-Karabakh. Azerbaijan has no longer been able to exercise its sovereignty in that area since the war with its

16 See, in particular: M. Bothe, ‘Beginning and End of Occupation’, *Current Challenges to the Law of Occupation, Proceedings of the Bruges Colloquium*, 20–21 October 2005, No. 34, Autumn 2004, pp. 28–32. See also E. Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 4. The author defines occupation as ‘the effective control of power (be it one or more states or an international organisation, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory’.

17 See, in particular, United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, para 11.3; ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para 173; ICTY, *Prosecutor v. Naletilic*, above note 4, para 217; A. Roberts, ‘What is Military Occupation?’, *British Yearbook of International Law*, Vol. 55, 1984, pp. 249 and 300.

18 See United Kingdom Ministry of Defence, above note 17, para 11.3.1. See also ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para 584: ‘the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power “occupies” or operates in certain territory solely through the acts of local de facto organs or agents’ (our emphasis).

19 ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para 149; ICTY, *Prosecutor v. Naletilic*, above note 4, paras 181–188, 197–202.

secessionist forces (supported by the Armenian army) which ended in its defeat in 1994. That territory is governed in practice (effective territorial control) by the government of the 'Nagorno-Karabakh Republic', as it proclaimed itself on 6 January 1992 following a locally held referendum. To date, however, no State has recognized the sovereignty of the new authority. Moreover, several aspects indicate that the republic is actually in a relation of subordination to Armenia (overall control). The military structures in the region include, in particular, a sizeable number of conscripts and officers from that country. The role of Armenia is not therefore restricted to mere logistic support but implies that it has a hand in the organization, co-ordination and planning of the power established in Nagorno-Karabakh. It may be therefore considered that that territory is *de facto* in a situation of occupation.²⁰ Therefore, the test that determines whether the situation is one of occupation by proxy, namely that of overall control, is the same as the test that needs to be carried out to determine whether an internal conflict is internationalized. In both situations, it is a case of evaluating the intensity of the control exercised by a State over a group or authority in the territory of another State.

The law of non-international armed conflict

The concept of non-international armed conflict in humanitarian law must be analysed on the basis of two main treaty texts: Article 3 common to the 1949 Geneva Conventions and Article 1 of Additional Protocol II of 1977. This section will shed light on the criteria in each of these provisions and will show how these criteria may be interpreted in the light of practice. Moreover, the concept of non-international armed conflict is discussed in connection with the determination of the jurisdiction of the International Criminal Court (ICC). It is appropriate to refer briefly to the terms of that discussion by examining the relevant provisions of the Court's Statute.

Article 3 common to the 1949 Geneva Conventions

Article 3 common to the 1949 Geneva Conventions applies in the case of 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.²¹

This provision begins with a negative expression, dealing with armed conflict 'not of an international character'. It thus refers back implicitly to common Article 2, which, as stated above, deals with conflicts between States. Armed conflicts that are not of an international character are those in which at least one of the parties involved is not governmental. Depending on the case in question, hostilities

20 See, in particular: United Nations Security Council, Res. 884, 12 November 1993; United Nations General Assembly, Res. 62/243, 14 March 2008; Council of Europe Parliamentary Assembly, Res. 1416 (2005).

21 Common Article 3(1).

take place either between one (or more) armed group(s) and government forces or solely between armed groups.²²

Common Article 3 also assumes that an ‘armed conflict’ exists, i.e. that the situation reaches a level that distinguishes it from other forms of violence to which international humanitarian law does not apply, namely ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’.²³ The threshold of intensity required in that case is higher than for an international armed conflict. Actual practice, in particular that of the ICTY, reveals that this threshold is reached every time that the situation can be defined as ‘protracted armed violence’.²⁴ This condition needs to be assessed against the yardstick of two fundamental criteria: (a) the intensity of the violence and (b) the organization of the parties.²⁵ These two components of the concept of non-international armed conflict cannot be described in abstract terms and must be evaluated on a case-by-case basis by weighing up a host of indicative data.²⁶ With regard to the criterion of intensity, these data can be, for example, the collective nature of the fighting or the fact that the State is obliged to resort to its army as its police forces are no longer able to deal with the situation on their own. The duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded, displaced persons, etc.) are also pieces of information that may be taken into account.²⁷ However, these are

22 See ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 10, para 70.

23 Additional Protocol II, Art. 1(2). Although this quote is taken from Additional Protocol II, it is accepted that the threshold established is also valid for conflicts covered by common Art. 3. See ICRC, *How is the term ‘Armed Conflict’ defined in international humanitarian law?*, Opinion Paper, March 2008, p. 3. See also ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para 84.

24 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 10, para 70.

25 See ICTY, *Prosecutor v. Tadić*, Judgment (Trial Chamber), above note 18, para 561–568, especially para 562. See also ICTY, *Prosecutor v. Limaj*, above note 23, para 84; ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, para 175. These criteria have since been taken up by other international bodies. See, in particular, International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment (Trial Chamber I), 6 December 1999, para 93; International Commission of Inquiry on Darfur, *Report Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005, para 74–76. In the *Haradinaj* case, the ICTY adopted a slightly different position, stating that the notion of ‘protracted armed violence’ must therefore be understood broadly. It does not cover the duration of the violence only, but also covers all aspects that would enable the degree of intensity to be evaluated. The ICTY also seems to equate this notion with that of intensity. (ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para 49. For a doctrinal consideration of this point, see A. Cullen, above note 4, pp. 179 ff.

26 ICTY, *Prosecutor v. Haradinaj*, above note 25, para 49; ICTR, *Prosecutor v. Rutaganda*, above note 25, para 93. In his Commentary on the Geneva Conventions, Pictet suggests, by way of indication, a series of criteria that may be taken into account in this evaluation (see Pictet, above note 6, pp. 49–50).

27 See R. Pinto (rapporteur), ‘Report of the Commission of experts for the study of the question of aid to the victims of internal conflicts’, *International Review of the Red Cross*, February 1963, especially pp. 82–83: ‘The existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against the legal government, is of a collective character and consists of a minimum amount of organisation. In this respect and without these circumstances being necessarily cumulative,

assessment factors that make it possible to state whether the threshold of intensity has been reached in each case; they are not conditions that need to exist concurrently. As for the second criterion, those involved in the armed violence must have a minimum level of organization. With regard to government forces, it is presumed that they meet that requirement without it being necessary to carry out an evaluation in each case.²⁸ As for non-governmental armed groups, the indicative elements that need to be taken into account include, for example, the existence of an organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.²⁹

When one or other of these two conditions is not met, a situation of violence may well be defined as internal disturbances or internal tensions. These two concepts, which designate types of social instability that do not pertain to armed conflict, have never been defined in law, despite the fact that they are referred to explicitly in Additional Protocol II.³⁰ In its background documents in preparation for the drafting of that instrument, the ICRC considered that internal disturbances are situations in which 'there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order'.³¹ As for internal tensions, they cover less violent circumstances involving, for example, mass arrests, a large number of 'political' detainees, torture or other kinds of ill-treatment, forced disappearance and/or the suspension of fundamental judicial guarantees.³²

one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action a part of the territory, the degree of insecurity, the existence of victims, the methods employed by the legal government to re-establish order, etc.' For a review of the indicative factors taken into account by the ICTY in its case law, see ICTY, *Prosecutor v. Boskoski*, above note 25, para 177. See also ICTY, *Prosecutor v. Limaj*, above note 23, para 168; ICTY, *Prosecutor v. Haradinaj*, above note 25, para 49.

28 ICTY, *Prosecutor v. Haradinaj*, above note 25, para 60.

29 For a review of the indicative factors taken into account by the ICTY in its case law, see ICTY, *Prosecutor v. Boskoski*, above note 25, paras 199–203. See also ICTY, *Prosecutor v. Limaj*, above note 23, paras 94–134; ICTY, *Prosecutor v. Haradinaj*, above note 25, para 60.

30 Additional Protocol II, Art. 1(2).

31 ICRC, *Protection of Victims of Non-International Armed Conflicts*, Document presented at the Conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Vol. V, Geneva, 24 May–12 June 1971, p. 79. This definition was also taken up in the Commentary on the Additional Protocols: see Y. Sandoz *et al.* (eds), above note 14, para 4475.

32 Y. Sandoz *et al.* (eds), above note 14, para 4476. For a further review of internal disturbances and internal tensions, see especially A. Eide, 'Internal Disturbances and Tensions', *International Dimensions of Humanitarian Law*, UNESCO, Paris, 1988, pp. 279–295; H.-P. Gasser, 'Humanitarian Standards for Internal Strife – A Brief Review of New Developments', *International Review of the Red Cross*, No. 294, May–June 1993, pp. 221–226; F. Ni Aolain, 'The Relationship between Situations of Emergency and

Lastly, common Article 3 applies to armed conflicts ‘occurring in the territory of one of the High Contracting Parties’. The meaning of this element may be controversial. Is it to be understood as a condition excluding non-international armed conflicts taking place in two or even more State territories, or rather as a simple reminder of the field of application of common Article 3? According to the latter hypothesis, it is argued that this specific point was included in order to make it clear that common Article 3 may only be applied in relation to the territory of States that have ratified the 1949 Geneva Conventions. We shall go on to see that it is probably best to tend towards that interpretation.³³

Some observers add a further condition to the notion of non-international armed conflict. They suggest that account needs to be taken of the motives of the non-governmental groups involved. This type of conflict would thus cover only groups endeavouring to achieve a political objective. ‘Purely criminal’ organizations such as mafia groups or territorial gangs would thus be eliminated from that category and could in no way then be considered as parties to a non-international armed conflict.³⁴ However, in the current state of humanitarian law, this additional condition has no legal basis. The ICTY had occasion to recall this when considering the nature of the fighting that took place in 1998 between Serbian forces and the Kosovo Liberation Army (UCK). In the *Limaj* case, the defence had challenged the idea that the fighting could constitute an armed conflict, arguing that the operations carried out by the Serbian forces were not intended to defeat the enemy army but to carry out ‘ethnic cleansing’ in Kosovo. The Tribunal rejected that argument by pointing out, in particular, that ‘the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, *the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant*’ (our emphasis).³⁵ The reverse position would, moreover, raise problems that it would be difficult to resolve in practice. The motives of armed groups are never uniform and cannot always be clearly identified. Many of them often carry out criminal activities such as extortion or drug-trafficking, while at the same time pursuing a political objective. Conversely, on occasion criminal organizations also exercise a power pertaining to the political sphere or at the very least to the management of populations.

Low-Intensity Armed Conflict’, *Israel Yearbook on Human Rights*, Vol. 28, 1998, pp. 97–106; R. Abi-Saab, ‘Le droit humanitaire et les troubles internes’, *Liber Amicorum Georges Abi-Saab*, Martinus Nijhoff, The Hague, 2001, pp. 477–493.

33 See the subsection on “‘Exported’ non-international armed conflicts” below.

34 Bruderlein retains, for example, three main characteristics for the definition of an armed group, i.e. (a) a basic command structure; (b) recourse to violence for political ends; (c) independence from State control (C. Bruderlein, *The Role of Non-state Actors in Building Human Security: The case of Armed Groups in Intra-state Wars*, Centre for Humanitarian Dialogue, Geneva, May 2000). See also D. Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Geneva, 2000, p. 5.

35 ICTY, *Prosecutor v. Limaj*, above note 23, para 170.

Article 1 of Additional Protocol II

Additional Protocol II applies to non-international armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. However, this instrument does not apply to wars of national liberation, which are equated with international armed conflicts by virtue of Article 1(4) of Additional Protocol I.

As in the case of common Article 3, a non-international armed conflict within the meaning of Additional Protocol II can only exist if the situation attains a degree of violence that sets it apart from cases of internal tensions or disturbances.³⁶ That instrument nonetheless defines a more limited field of application than that of common Article 3. It requires non-governmental forces to have a particularly high level of organization, in the sense that they must be placed 'under responsible command' and exercise territorial control, allowing them 'to carry out sustained and concerted military operations and to implement this Protocol'.³⁷ Although common Article 3 also presumes that armed groups are able to demonstrate a degree of organization, it does not stipulate that these groups should be able to control part of a territory. In practice, a conflict may therefore fall within the material field of application of common Article 3 without fulfilling the conditions determined by Additional Protocol II. Conversely, all the armed conflicts covered by Additional Protocol II are also covered by common Article 3.

In practice, it is often difficult to identify situations that meet the criteria of application established by Additional Protocol II. The required degree of territorial control, in particular, may be perceived differently from one case to another. If a broad interpretation is adopted, the concept of non-international armed conflict within the meaning of that instrument comes close to that of common Article 3. Even temporary control that is geographically limited would suffice in that case to justify the application of Additional Protocol II.³⁸ Conversely, if Article 1(1) is interpreted strictly, the situations covered are restricted to those in which the non-governmental party exercises similar control to that of a State and the nature of the conflict is similar to that of an international armed conflict.³⁹ In its Commentary on the Additional Protocols, the ICRC seems to adopt an intermediate position on

36 Additional Protocol II, Art. 1(2).

37 Additional Protocol II, Art. 1(1). On this point, see M. Bothe, K.J. Partsch, W.A. Solf, above note 13, pp. 626 ff.

38 Momtaz considers that it is not necessary for the parties concerned to set up an administrative structure similar to that of a State. He adds that the criterion of territorial control must be evaluated in accordance with the nature of the envisaged obligations. For some of those obligations that are related to respect for fundamental rights, 'control of part of the territory could prove to be unnecessary' (D. Momtaz, 'Le droit international humanitaire applicable aux conflits armés non internationaux', *The Hague Academy Collected Courses*, No. 292, 2002, p. 50, ICRC translation).

39 L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 106.

this issue, accepting that territorial control can sometimes be ‘relative, for example, when urban centres remain in government hands while rural areas escape their authority’.⁴⁰ It nonetheless adds that the very nature of the obligations presented in Protocol II implies that there is ‘some degree of stability in the control of even a modest area of land’.⁴¹

Additional Protocol II also restricts its field of application to armed conflict between governmental forces and dissident armed forces or other organized armed groups. That means that – contrary to common Article 3, which does not provide for that restriction – it does not extend to conflicts solely between non-governmental groups.⁴²

Lastly, Additional Protocol II repeats the *ratione loci* criterion already formulated in common Article 3, i.e. that it only covers non-international armed conflicts ‘occurring in the territory of one of the High Contracting Parties’. The previous comments on this subject also apply here. The Protocol also stipulates that the conflicts concerned are those taking place on the territory of a High Contracting Party between ‘its’ armed forces and opposition movements. A narrow reading of this passage would make this instrument inapplicable to the troops of a government intervening abroad in support of the local authorities. The forces involved in that case are not those of the State in which the conflict is taking place. An interpretation in keeping with the spirit of humanitarian law indicates, however, that the expression ‘its armed forces’ should in this case cover not only the troops of the territorial State, but also those of any other State intervening on behalf of the government.

As for the scope of the new points introduced in Additional Protocol II, it should be recalled that that instrument expands and supplements common Article 3 but that it does not change its conditions of application.⁴³ The additional restrictions provided for in Article 1(1) therefore only define the field of application of the Protocol and do not extend to the entire law of non-international armed conflict. Common Article 3 thus preserves its autonomy and covers a larger number of situations.⁴⁴

The Rome Statute of the International Criminal Court (ICC)

The Rome Statute of the ICC distinguishes between two categories of crimes that occur during ‘armed conflicts not of an international character’: (a) serious violations of common Article 3, and (b) other serious violations of the laws and customs of war that are applicable in those situations.⁴⁵ In both cases, the Statute indicates the lowest level of applicability of the relevant provisions by stipulating that they

40 Y. Sandoz *et al.* (eds), above note 14, para 4467.

41 *Ibid.*

42 *Ibid.*, para 4461; Bothe, Partsch and Solf, above note 13, p. 627.

43 Additional Protocol II, Art. 1(1).

44 Y. Sandoz *et al.* (eds), above note 14, para 4454; L. Moir, above note 39, p. 101.

45 Rome Statute of the ICC, Art. 8(2)(c) and (e), respectively.

do not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.⁴⁶ Moreover, whereas this instrument does not give a more precise definition of the material field of application of the rules pertaining to 'serious violations of common Article 3' (Article 8(2)(d)), it clarifies the notion of non-international armed conflict in the case of 'other serious violations'. Article 8(2)(f) stipulates in that case that the rules must apply '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'.⁴⁷ The question that then arises is whether, in referring explicitly to the criterion of duration ('protracted armed conflict'), paragraph (2)(f) merely clarifies the terms of paragraph (2)(d), without creating a separate category of conflict, or whether it proposes a different type of non-international armed conflict, thus defining a new field of application. That question is the subject of controversy and has not yet been finally resolved.

Some observers consider that the two paragraphs deal with one and the same situation.⁴⁸ They consider, in particular, that the intention of those negotiating the Statute was not to create a separate category of non-international armed conflict. Rather, the reference to duration in paragraph (2)(f) was intended to prevent the restrictive notion in Additional Protocol II from being incorporated into the Statute. It was, in a way, an effort to achieve a compromise between the original draft, which made no distinction between paragraphs (2)(d) and (2)(f), and the desire of some States to include the restrictions of Additional Protocol II in that second paragraph.⁴⁹ Moreover, those who maintain that position claim that their interpretation is the only one that is in keeping with the evolution

46 Rome Statute of the ICC, Arts. 8(2)(d) and (f), respectively.

47 This definition is based on the case law of the ICTY, which deemed that 'an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State' (ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 11, para 70 (our emphasis)).

48 T. Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law*, Vol. 94, 2000, p. 260; M. Bothe, 'War Crimes', in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 423; A. Cullen, 'The Definition of Non-international Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)', *Journal of Conflict and Security Law*, Vol. 12, No. 3, 2007, p. 445.

49 The wording of paragraph (2)(f) is the outcome of an initiative launched by Sierra Leone, the aim of which was to reach a compromise between delegations in favour of introducing a list of war crimes applicable to non-international armed conflicts and those against it. An initial proposal in that direction, submitted by the 'Bureau of the Committee of the Whole', consisted of limiting the field of application of the crimes in para (2)(e) by taking up the criteria elaborated in Art. 1(2) of Additional Protocol II (A/CONF.183/C.1/L.59). As agreement could not be reached on that proposal, Sierra Leone suggested the text that was ultimately retained. The aim was to appease the delegations that were opposed to introducing war crimes into the law of non-international armed conflict, while avoiding a threshold as high as that in Additional Protocol II (A/CONF.183/C.1/SR.35, para 8). See A. Cullen, above note 48, pp. 419–445.

of customary law, which makes no distinction between different types of non-international armed conflict.

By contrast, other authors⁵⁰ consider that if the concept of non-international armed conflict in paragraph (2)(d) refers directly to that of common Article 3, the notion in paragraph (2)(f) adds a time criterion. A non-international armed conflict within the meaning of paragraph (2)(f) exists when that conflict is 'protracted'. Whereas from the point of view of paragraph (2)(d), duration is a factor that may perhaps be taken into account when evaluating the situation but does not constitute a compulsory criterion, it is nonetheless an integral part of the very concept of paragraph (2)(f). This notion does not therefore seem to constitute an extension of the field of application of paragraph (2)(d) but creates a separate category of non-international armed conflict with a view to criminalizing, within the context of the Statute of the ICC, additional violations of international humanitarian law, i.e. violations of rules in Additional Protocol II. The need to achieve a compromise when preparing that provision seems to indicate that the intention was to reach agreement on a different category from that referred to in paragraph (2)(d).

Case law tends to provide support for the second interpretation. In the *Lubanga Dyilo* case, the ICC Pre-Trial Chamber referred to Additional Protocol II in order to interpret paragraph (2)(f) of the Statute. It thus apparently wanted to confer a distinct meaning on this provision, defining a specific threshold of applicability. The Chamber made it clear that this threshold is characterized by two conditions: (a) the violence must achieve a certain intensity and be protracted; (b) an armed group with a degree of organization, particularly the 'ability to plan and carry out military operations for a prolonged period of time' must be involved.⁵¹ Worded like that, this definition therefore seems to define a field of application that is stricter than that of common Article 3, as it requires the fighting to take place over a certain period of time. It is, however, broader than that of Additional Protocol II as it does not require the armed group(s) concerned to exercise territorial control.⁵² The category of conflict targeted here is therefore half way between the categories referred to in common Article 3 and in Additional Protocol II.

50 A. Bouvier, M. Sassòli (eds), *How Does Law Protect in War?*, Vol. 1, Geneva, ICRC, 2006, p. 110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, pp. 268 f.; W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2007 (3rd edn), p. 116. See also the more balanced position of E. David, who considers that, strictly speaking, para (2)(f) does not create a third category of non-international armed conflict, but 'that broader concept of armed conflict replaces that of Additional Protocol II by way of *lex posterior*' (David, above note 7, p. 137, ICRC translation).

51 International Criminal Court, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges (Pre-Trial Chamber I), 29 January 2007, paras 229–237, especially 234.

52 This new category also poses certain problems. There is no objective criterion that makes it possible to state when the required minimum duration is reached. In addition, the question is raised of the legal regime to be applied during the period in which the fighting may not yet be considered 'sufficiently protracted' for it to be classified as a non-international armed conflict within the meaning of that definition. Must a retroactive application of international humanitarian law be envisaged in that case?

In sum, the Rome Statute of the ICC seems to identify two types of non-international armed conflict: firstly, conflicts within the meaning of common Article 3 (paras (2)(c)–(d)); and secondly, ‘protracted’ non-international armed conflicts (paras (2)(e)–(f)). It should nonetheless be recalled that this innovation in the Statute does not create a new concept of non-international armed conflict in international humanitarian law, but simply aims at determining the ICC’s jurisdiction. It therefore applies only to the exercise of that jurisdiction and does not establish a category that is more generally applicable.

Controversial classification of certain armed conflicts

Armed conflicts are in reality not as clearly defined as the legal categories. Some of them may not exactly tally with any of the concepts envisaged in international humanitarian law. This raises the question of whether those categories need to be supplemented or adapted with a view to ensuring that these situations do not end up in a legal vacuum. Without claiming to be exhaustive, this chapter will examine some dilemmas encountered in practice by referring to three types of situation whose qualifications are controversial: control of a territory without military presence on the ground; foreign intervention in non-international armed conflict; and non-international armed conflicts on the territory of several States.

Control of a territory without military presence on the ground

Despite the clarifications contributed by the 1907 Hague Regulations and the 1949 Geneva Convention to the notion of occupation, it is not always easy in practice to identify the situations that are covered by that concept. As Roberts points out, ‘the core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear’.⁵³

The example of the Gaza Strip following the Israeli withdrawal illustrates those difficulties with particular acuity. On 12 September 2005, the last Israeli troops finished withdrawing from that region in which they had maintained a continuous presence since the Six-Day War in 1967. In doing so, they were helping to implement a ‘Disengagement Plan’ adopted by the Israeli government on 6 June 2004 and endorsed by parliament on 25 October of that same year.⁵⁴ By virtue of that plan, the authorities’ intention was to put an end to their responsibilities vis-à-vis the people living in that territory.⁵⁵ Should it therefore be concluded that those measures marked the end of the occupation of the region in question? In other

⁵³ Roberts, above note 17, p. 249.

⁵⁴ Israeli Prime Minister’s Office, *Cabinet Resolution Regarding the Disengagement Plan: Addendum A – Revised Disengagement Plan – Main Principles*, 6 June 2004, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm#A> (last visited 9 July 2009).

⁵⁵ *Ibid.*

words, was the physical withdrawal of the Israeli forces enough to admit that effective territorial control characteristic of occupation did not exist any longer at that time?

Some observers answer that question in the negative. It was thus recalled that Israel retained substantial control over the Gaza Strip, although its troops were no longer physically deployed in that area.⁵⁶ The Disengagement Plan clearly stated that Israel was to continue to exercise control over the borders of that territory, as well as over its air space and coastal region.⁵⁷ Moreover, Israel has the advantage of being able to enter Palestinian territory at any time in order to maintain public order.⁵⁸ This power is made greater by the small size of the territory of Gaza and the military means available. That interpretation would also find some support in Article 42(2) of the 1907 Hague Regulations, which makes it clear that occupation exists when the authority of the hostile army 'has been established *and can be exercised*' (our emphasis). That 'ability' could be interpreted as meaning that potential authority would suffice as confirmation of the reality of occupation. The United Nations Secretary General thus considered that 'the actions of IDF in respect of Gaza have clearly demonstrated that modern technology allows an occupying Power to effectively control a territory even without a military presence'.⁵⁹ According to that position, occupation of the Gaza Strip would therefore not have ceased with the withdrawal of troops in 2005, as Israel could be said to continue to exercise from a distance a power equivalent to the 'effective control' required under the law of occupation.

However, other observers consider that a closer study of the treaty texts shows that the ability of an occupier to impose its authority cannot be separated from its physical presence in the territory under its control.⁶⁰ While Article 42 of

56 See the Note by the United Nations Secretary-General: *Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/61/470, 27 September 2006, para 6. See also *Report on the situation of human rights in the Palestinian Territories occupied by Israel since 1967*, J. Dugard, Special Rapporteur, E/CN.4/2006/29, 17 January 2006, paras 6 ff.

57 Israeli Prime Minister's Office, above note 54, Chapter 1: *Background – Political and Security Implications*.

58 For a more detailed analysis of the powers still being exercised by Israel following its withdrawal from Gaza, see Gisha – Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza*, January 2007, pp. 29 ff, available at: <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf> (last visited 13 July 2009).

59 *Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/61/470, 27 September 2006, para 7. See also the *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian Territories occupied by Israel since 1967* (E/CN.4/2006/29, 17 January 2006). See also C. Bruderlein, 'Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law', *Legal and Policy Brief*, Harvard University Program on Humanitarian Policy and Conflict Research, November 2004, pp. 10–11; A. Bockel, 'Le retrait israélien de Gaza et ses conséquences sur le droit international' *Annuaire Français de Droit International*, Vol. 50, 2005, p. 23; I. Scobbie, 'Is Gaza Still Occupied Territory?', *Forced Migration Review*, Vol. 26, 2006, p. 18.

60 See Y. Shany, *Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement*, The Hebrew University of Jerusalem International Law Forum, Research Paper No. 12-06, August 2006, p. 19. See also Roberts, above note 17, p. 300; H.-P. Gasser, 'Belligerent Occupation', in *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck (ed), Oxford University Press, Oxford, 1995, p. 243; M. Bothe, 'Occupation, Belligerent', *Encyclopedia of Public International Law*, Vol. 3, Elsevier, Amsterdam, 1997, p. 764.

the 1907 Hague Regulations accepts that occupation exists when the adversary's authority 'can be exercised', it makes it clear that that authority must first be 'established'. It thus forges an indissociable link between the establishment of authority, implying the deployment of a presence in the territory in question, and the ability to extend that authority to the entire territory. As was recalled by the International Court of Justice, effective control becomes apparent as a result of a substitution of powers.⁶¹ Obviously, a similar threshold of application cannot be achieved if the foreign forces are located outside the region in question. Moreover, it is impossible to conceive of the implementation of most of the rules of occupation unless there is a presence in the territory.⁶² It is actually impossible to ensure public order and life in a territory, as required by Article 43 of the 1907 Hague Regulations, from outside. It would thus be paradoxical to require a State to fulfil its international obligations if it is unable to do so because it is not present in the area concerned. A similar interpretation would run counter to the basic tenets of the law of occupation.

The example of Gaza shows to what extent the concept of occupation poses difficulties of interpretation when it comes to applying it in practice. It would be impossible within the limited framework of this article to deal with all the issues associated with that concept. The ICRC is currently carrying out a consultation process that will help to clarify a number of still controversial points.

Foreign intervention in non-international armed conflict

Two different forms of intervention may be distinguished here: (a) when one (or more) third State(s) become involved in a non-international armed conflict in support of one or other of the parties to the conflict; (b) when multinational forces become involved in a non-international armed conflict in the course of a peace-keeping operation.

The intervention of one or more third States in a non-international armed conflict

This scenario, which is sometimes referred to as a 'mixed conflict', combines characteristics which may derive from both international armed conflicts and non-international armed conflicts. Depending on the configuration of the parties involved, fighting in the field may be between the forces of the territorial State and those of an intervening State, between intervening States taking action on both sides of the front line, between government forces (of the territorial State or of a third State) and non-governmental armed groups or between armed groups

61 ICJ, *Case concerning Armed Activities on the Territory of the Congo*, above note 17, para 173.

62 By way of example, see Art. 43 of the 1907 Hague Regulations and Arts. 55, 56 and 59 of the Fourth Geneva Convention.

only. This raises the issue of the legal definition of those situations that do not fit into the standard categories of conflicts established by international humanitarian law.

In its work, the ICRC considers that, depending on the warring parties, the law that applies in such situations varies from one case to the next. Inter-State relations are governed by the law of international armed conflict, whereas other scenarios are subject to the law of non-international armed conflict.⁶³ Thus intervention by a third State in support of a non-governmental armed group opposed to State forces results in the ‘internationalization’ of the existing internal conflict. This fragmented application of international humanitarian law was implicitly favoured by the International Court of Justice in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*: in its analysis of the conflict, the Court differentiated between, on the one hand, the conflict between the Nicaraguan government and the contras, and, on the other, the conflict between that same government and the government of the United States.⁶⁴ However, this differentiated approach also raises certain practical problems. In many cases, the distinction between conflicts deriving from one or other of the two types of armed conflict is artificial or leads to results that are difficult to accept. When there is an alliance of foreign government forces and rebel troops, the following questions are raised, for example: What status needs to be given to civilians taken captive by foreign forces and then handed over to the local group? Are the relevant rules of the Fourth Geneva Convention to be applied to them (to the extent that there is an armed conflict between the intervening State and the territorial State) or the rules stemming from the law of non-international armed conflict (since they are held by a non-governmental armed group)? In other words, does a different set of rules need to be applied depending on whether those persons were arrested by the foreign forces or directly by the local group?

In the light of these difficulties, the question is then raised of whether it is desirable to envisage an adaptation of international humanitarian law as applicable to non-international armed conflicts characterized by foreign military intervention. Some observers suggest as much, requiring the law of international armed conflict to be applicable in every case in which a foreign Power takes action on behalf of one or other of the parties.⁶⁵ This was the nature, in particular, of one of the proposals made by the ICRC in its 1971 Report on the Protection of Victims of Non-International Armed Conflicts.⁶⁶ That proposal was nonetheless rejected by the experts who studied the ICRC’s draft. It was suggested that it would tend to make these conflicts worse, as the non-governmental groups would try to attract

63 See D. Schindler, ‘International Humanitarian Law and Internationalized Internal Armed Conflicts’, *International Review of the Red Cross*, No. 230, 1982, pp. 255–264.

64 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para 219.

65 I. Dettner, *The Law of War*, Cambridge University Press, Cambridge, 2000, p. 49; E. David, above note 8, p. 175.

66 ICRC, *Protection of Victims of Non-International Armed Conflicts*, above note 31, pp. 17 ff.

third States in order to benefit from application of the law of international armed conflict.⁶⁷

The intervention of multinational forces in a non-international armed conflict

We need to begin by recalling that the presence of multinational forces in this context does not necessarily transform them into parties to the conflict. Usually, these troops are not there to take part in the fighting, but are deployed with the aim of conventional peace-keeping. Their mandate does not authorize them in that case to provide support for one or other of the adversaries, but is limited to interposition or observation. Moreover, they may only resort to using armed force in the case of self-defence. Multinational forces must, however, be considered parties to the conflict in two hypotheses. First, it may so happen that they take part directly in the ongoing hostilities by supporting one of the warring entities. The United Nations Organization Mission in the Democratic Republic of Congo (MONUC), for example, provided military support for the government of the Democratic Republic of the Congo in order to repel the offensives launched by the armed opposition.⁶⁸ Secondly, when international troops are deployed without supporting one of the warring camps, their status will be determined in accordance with the criteria normally used to evaluate the existence of a non-international armed conflict. Those troops must be considered as a party to the conflict if their level of involvement reaches the required degree of intensity.⁶⁹ This is not the case if recourse to force is limited to the context of self-defence.

The nature of the armed conflicts considered here is controversial. For most authors,⁷⁰ these situations are to be equated with international armed conflicts. To the extent that the operations concerned are decided, defined and carried out by international organizations, they are by nature included in that category. It is of little relevance in that case whether the opposing party is a State or a

67 ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, ICRC, Geneva, August 1971, pp. 50 ff., especially paras 301 ff.

68 See, for example: United Nations Secretary-General, *Fourth special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2008/728, 21 November 2008, paras 13 and 25.

69 See the subsection on 'War and international armed conflict' above.

70 See, in particular, D. Shrager, 'The UN as an Actor Bound by International Humanitarian Law', in L. Condorelli et al. (eds), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1996, p. 333; P. Benvenuti, 'The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping', in European Commission Humanitarian Office, *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Office for the Official Publications of the European Communities, Luxembourg, 1995, pp. 96 f.; C. Emanuelli, 'United Nations forces and humanitarian law', in L. Condorelli et al. (eds), *The United Nations and international humanitarian law*, Paris, Pedone, 1996, pp. 357 ff.; R. Kolb, *Droit humanitaire et opérations de paix internationales*, Bruylant, Brussels, 2006, pp. 57 ff.

non-governmental group. In accordance with that doctrinal position, the hypothesis envisaged constitutes an international armed conflict *sui generis*, the particular status of the organization involved being enough to qualify it as such. Nonetheless, the application of the law of international armed conflict in this case does pose certain problems. In the hypothesis in which the conflict is between multinational forces and unstructured armed groups, it seems, in particular, difficult to require the parties to comply with the Third Geneva Convention of 1949. Taking another approach, which is that followed by the ICRC, a differentiated application of international humanitarian law must be followed in that case, depending on the parties to the conflict in each individual case in the field. The law of international armed conflict must therefore be applicable when international troops clash with government forces. By contrast, if fighting is between those troops and non-governmental groups, it is the law of non-international armed conflict which must prevail. The legal regime applicable in the same conflict thus varies depending on the adversaries present in each situation.⁷¹

Non-international armed conflicts taking place on the territory of several States

Both Article 3 common to the Geneva Conventions and Additional Protocol II specify their respective fields of application by clearly stating that the conflict in question takes place on the territory of a State party to those instruments. However, many conflicts between a government and an armed group are in practice carried out on the territory of two or even of several States. Some authors consider that this is a new type of conflict that is not taken into account in the texts currently in force. They refer to such conflicts as ‘transnational armed conflicts’ or ‘extra-State conflicts’ and consider that a specific type of international humanitarian law must apply to them.⁷² It is useful in this respect to differentiate between various scenarios.

71 H. McCoubrey, N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth, Aldershot, 1996, p. 172; L. Condorelli, ‘Le statut des forces des Nations Unies et le droit international humanitaire’, in *Les casques bleus: policiers ou combattants?*, C. Emanuelli (ed), Wilson et Lafleur Itée, Montreal, 1997, p. 110; B. Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’, *Stanford Journal of International Law*, Vol. 33, 1997, p. 110; J. Pejic, ‘Status of Armed Conflicts’, in E. Wilmschurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 94. Some authors also suggest that international humanitarian law be revisited with a view to adapting it to the distinctive characteristics of multinational forces. For an attempt to do so, see R. Kolb, above note 70, pp. 65 ff.

72 See, in particular, R.S. Schöndorf, ‘Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?’, *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004, pp. 61–75; G.S. Corn, ‘Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict’, *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2, March 2007.

'Exported' non-international armed conflicts

The parties to a classic non-international armed conflict (within the meaning of common Article 3 or of Additional Protocol II) may well continue their fighting on the territory of one or more third States with the explicit or tacit consent of the government(s) concerned (These are known as 'exported' or 'delocalized' conflicts, or 'extraterritorial' non-international armed conflicts.) In principle, the government forces involved are pursuing the armed group seeking refuge in the territory of a neighbouring State. In that kind of situation, an international armed conflict does not exist since there is no conflict between two or more States (as required by Article 2 common to the Geneva Conventions), given that the intervening State acts with the consent of the territorial sovereign.

The law applicable in this case gives rise to controversy. Some authors consider that what is being dealt with here is a different form of conflict and recommend working out a new form of international humanitarian law, which would constitute a third legal system alongside the law of international armed conflict and the law of non-international armed conflict. They consider that, from the perspective of the parties involved, these armed conflicts are very similar to non-international armed conflicts, as they involve government forces in conflict with armed groups. However, from the territorial point of view, these conflicts are characterized by 'internationalization', as they are not confined within the borders of a single State but concern two or more States.⁷³ A new legal regime specially adapted to that third category might lead, for example, as Schöndorf suggests, to a combination of, on the one hand, the 'law of non-combatants of inter-State armed conflicts' (treatment of civilians in enemy hands, principle of distinction) with, on the other, the 'law of combatants of intra-State armed conflicts' (protection and treatment of the wounded, sick and shipwrecked, no status for adversaries taken captive, etc.).⁷⁴ The author thus considers that there is nothing to justify a different kind of protection for non-combatants (in the sense of civilians not taking part directly in hostilities) depending on whether the conflict is inter-State or intra-State. However, this kind of distinction would be acceptable for combatants as, in the case of an intra-State conflict, the members of armed groups do not benefit from the privilege granted to soldiers taking part in international armed conflicts. This solution would allow account to be taken of both the internal (nature of the parties to the conflict) and international (extraterritoriality) aspects of those armed conflicts.

It is nonetheless not certain whether the territorial aspect is indeed a constitutive factor of non-international armed conflict. It may actually be maintained that the reference to the territory of a High Contracting Party in common Article 3 and in Additional Protocol II was simply intended to ensure that the application of the relevant rules is linked to the jurisdiction of a State that has

73 See, in particular, Schöndorf, above note 72, pp. 41 ff.

74 *Ibid.*, pp. 45 ff.

ratified the treaties in question. The aim of this reference would therefore not be to remove ‘exported conflicts’ from the field of application of international humanitarian law. Rather, it can be seen as a reminder – in the context of the law of non-international armed conflict – of the principle according to which the international conventions are only binding upon those States that have submitted to them.⁷⁵ There is then nothing to stop this legal regime being applied, even if hostilities extend beyond the borders of a single State. Moreover, given that the four Geneva Conventions have now been ratified universally, the ICRC adds that, in practice, the territorial criterion in Article 3 has lost its importance. Indeed, as that organization points out, ‘any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention’.⁷⁶

Cross-border non-international armed conflicts

Another possibility is that State forces enter into conflict with a non-governmental armed group located in the territory of a neighbouring State. In that case, there is thus no spillover or exportation of a pre-existing conflict. The hostilities take place on a cross-border basis. If the armed group acts under the control of its State of residence, the fighting falls within the definition of an international armed conflict between the two States concerned. If, however, this group acts on its own initiative, without being at the service of a government party, it becomes more difficult to categorize the situation. Does an international armed conflict necessarily exist because a State uses armed force on the territory of another State? If that is so, should members of the armed group be considered to be civilians taking part directly in the hostilities? Is it more appropriate to consider that situation to be a cross-border non-international armed conflict even if a parallel international armed conflict between the two States may also be taking place? By contrast, must a non-international armed conflict be deemed to exist solely in the hypothesis according to which the State of residence of the armed group accepts or tolerates intervention by its neighbouring State, the absence of consent leading it to be classified as an international armed conflict?⁷⁷ Lastly, should this be considered a new type of conflict, requiring a specific legal regime that has yet to be defined?⁷⁸

75 See D. Jinks, ‘September 11 and the Laws of War’, *Yale Journal of International Law*, Vol. 28, 2003, pp. 36 f.; M. Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’, *Occasional Paper Series*, Harvard University, Winter 2006, Number 6, p. 9; J. Cerone, ‘Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context’, *Israel Law Review*, Vol. 40, No. 2, 2007.

76 ICRC, *How is the term ‘Armed Conflict’ defined in international humanitarian law?*, above note 23, p. 3. See also Moir, above note 39, p. 31.

77 David considers that an international armed conflict exists when the armed group claims to represent the State and has the support of a section of the population (David, above note 7, p. 127).

78 Corn refers to these situations as ‘transnational armed conflicts’ and suggests that the ‘foundational principles of the law of armed conflict’ be applied to them, i.e. essentially, common Article 3 and some principles governing the conduct of hostilities (Corn, above note 72).

One recent example is that of Lebanon in the summer of 2006. It may be recalled that a high-intensity armed conflict had begun on 12 July following various attacks by Hezbollah's military component on positions and villages in Israeli territory. For instance, eight Israeli soldiers had been killed in the course of those operations and two others taken captive. The Israeli authorities retaliated by launching a ground, air and sea offensive on Lebanon. The hostilities continued until 14 August, when a ceasefire that had been agreed by the two governments concerned entered into effect.⁷⁹

The Commission of Inquiry set up by the United Nations Human Rights Council considered that an international armed conflict had taken place, although, in its view, the Lebanese armed forces had never taken part in the fighting. In its report dated November 2006, it considered that Hezbollah should be considered a militia 'belonging to a Party to the conflict', within the meaning of Article 4A(2) of the Third Geneva Convention of 1949. In support of that position, it stressed that Hezbollah, as a legally established political party, was represented in parliament and in the Lebanese government. In addition, for several years Hezbollah had assumed the role of an anti-Israeli resistance movement in southern Lebanon, a fact acknowledged by the President of Lebanon himself, who had called the armed branches of that group 'national resistance fighters'.⁸⁰ According to the Commission, the war in 2006 thus assumed an international character by virtue of the organic link existing between Hezbollah and the State of Lebanon at that time.

There is nonetheless some doubt about whether the arguments put forward by the Commission really do allow the conclusion to be reached that the hypothesis of Article 4A(2) of the Third Geneva Convention had been realized in the case in point. Actually, those arguments are not enough to show a sufficiently narrow link between the Hezbollah combatants and the Lebanese government. For that link to exist, those combatants need to have been acting 'on behalf of' the latter.⁸¹ Expressed differently, '[i]n order for irregulars to qualify as lawful combatants, it appears that international rules and State practice [...] require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict'.⁸² This is how the expression 'belonging to a Party to the conflict' must be understood in Article 4A(2) of the Third Geneva Convention.⁸³ In the case in question, it seems that the required degree of control was not achieved. On the contrary, the Lebanese authorities stated on several occasions that they had not been aware of the attacks that were at the origin of the conflict and that they did not approve of them. They made this statement officially in a letter addressed to the

79 For more details of the circumstances and the course of this conflict, see Commission of Inquiry on Lebanon, *Report pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2*, 23 November 2006.

80 *Ibid.*, paras 50–62.

81 J. Pictet *et al.* (eds), *Geneva Convention III Relative to the Treatment of the Prisoners of War: Commentary*, ICRC, Geneva, 1960, p. 57.

82 ICTY, *Prosecutor v. Tadić*, Judgment (Appeals Chamber), above note 2, para 94.

83 *Ibid.*

Secretary General and the Security Council of the United Nations.⁸⁴ Consequently, in this case a double legal classification probably needs to be retained. Alongside an international armed conflict between Israel and Lebanon, the war in 2006 constituted a non-international armed conflict between Israel and Hezbollah, whose distinctive feature was that it took place across a border.⁸⁵ It is therefore the nature of the belligerents rather than the transborder character of the situation which in this case constitutes the decisive criterion for classifying the conflict.⁸⁶

That position nonetheless raises certain questions about the application of the law, particularly in connection with combatants who are taken captive. It implies that the Fourth Geneva Convention would have to apply to detained members of Hezbollah to the extent that they were nationals of Lebanon or of a State not entertaining diplomatic relations with Israel.⁸⁷ However, the Israeli soldiers detained by the armed group would benefit only from the protection granted by the law of non-international armed conflicts. That position therefore raises a problem with regard to the equality of the belligerents. If, however, one considers that the law of non-international armed conflict also applies to those detained in Israeli hands, equality has been upheld, but at the cost of a weakening of the applicable standards.

Other observers propose further different readings of the Lebanese conflict. Some of them consider, for instance, that this example is illustrative of a new type of armed conflict, which cannot be classified as an international armed conflict or as a non-international armed conflict, and which, hence, implies the application of a specific international humanitarian law.⁸⁸

The question of the international fight against terrorism

The debate about the nature of cross-border armed conflicts prompts questions about the current clash between some States and Al Qaeda. In the case in point, this conflict takes the form of a series of terrorist attacks and anti-terrorist operations in several countries. Can the sum total of these events then be considered as a (cross-border global) armed conflict to which international humanitarian law would apply?⁸⁹ Does it constitute a new type of armed conflict giving rise to the

84 See, in particular, *Identical letters dated 13 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council*, A/60/938-S/2006/518, 13 July 2006.

85 See David, above note 7, p. 156.

86 L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 136.

87 Fourth Geneva Convention, Art. 4(1) and (2).

88 See note 78 above.

89 See J.C. Yoo, J.C. Ho, 'The Status of Terrorists', *UC Berkeley School of Law, Public Law and Legal Theory Research Paper No. 136*, 2003. Jinks also considers that the attacks of 11 September 2001 constitute a non-international armed conflict between the United States of America and Al Qaeda and that common Article 3 is therefore applicable in this case (Jinks, above note 75, pp. 11 f. and 30 ff.).

application of a legal regime that has yet to be established?⁹⁰ Or is it a phenomenon that is not related to armed conflict? The same question could also be asked with regard to transnational criminal groups. Some observers do not hesitate to refer, for example, to the existence of a 'global war on drugs'.⁹¹

The key issues in the matter have already been discussed at length.⁹² It is enough to recall at this juncture that the answer needs to be flexible enough to take account of the different types of armed conflict provided for under international humanitarian law. Basically, Al Qaeda's way of operating probably excludes it from being defined as an armed group that could be classified as a party to a global non-international armed conflict. In accordance with the current state of intelligence, it appears, rather, to be a loosely connected, clandestine network of cells.⁹³ These cells do not meet the organization criterion for the existence of a non-international armed conflict within the meaning of humanitarian law. Some experts nonetheless think that it is not impossible for a conflict between one or more States and a transnational armed group to reach that level one day.⁹⁴ In the *Hamdan v. Rumsfeld* case, the United States Supreme Court seems to take that view, considering that Article 3 common to the 1949 Geneva Conventions is applicable to the members of Al Qaeda, and to the persons associated with that organization, who were taken captive during the fight against terrorism.⁹⁵

Apart from that particular problem, in certain contexts the fight against terrorism may also take the form of an armed conflict. That is the case when it results in a clash between States, as was the case when the United States of America attacked Afghanistan in October 2001. That fight may also be the equivalent of a classic (internationalized) non-international armed conflict, as was the case in Afghanistan from 19 June 2002 onwards, on which date a transition government was established. With the support of the international coalition, the newly established authorities were to deal with high-intensity fighting against organized non-government troops, i.e. those of the Taliban.

90 See Schöndorf, above note 72; Corn, above note 72; R.D. Sloane, 'Prologue to a Voluntarist War Convention', *Boston University School of Law*, Working Paper No. 07-09. Balendra seems to suggest an additional option that would consist of having recourse to a variable definition of armed conflict: that definition would be narrow when international humanitarian law and the international human rights law do not concur and broad when they do (N. Balendra, 'Defining Armed Conflict', *Cardozo Law Review*, Vol. 29, No. 6, 2008).

91 M. Kenney, 'The Challenge of Eradicating Transnational Criminal Networks: Lessons from the War on Drugs', Paper prepared for delivery at the 2002 annual meeting of the American Political Science Association; D.M. Luna, 'Narco-Trafficking: What Is the Nexus With the War on Terror?', 8 October 2008, available at <http://merln.ndu.edu/archivepdf/terrorism/state/110828.pdf> (last visited 9 July 2009).

92 See J. Pejic, 'Terrorist Acts and Groups: a Role for International Law?', *British Yearbook of International Law*, 2004, pp. 85 ff.

93 See, in particular, ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Excerpt of the Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003, pp. 232 ff. See also Pejic, above note 92, pp. 85 ff.; Sassöli, above note 75, pp. 10–11.

94 Sassöli, above note 75, p. 9.

95 Supreme Court of the United States, *Hamdan v. Rumsfeld*, 548 US 557 (2006), pp. 65–69.

Conclusion

This review of the different forms of armed conflict in international humanitarian law has shown just how difficult it can be to classify situations of violence and hence to determine the rules that apply. These difficulties are partly related to the legal categories themselves, whose content is often imprecise in the treaty texts establishing them. In that respect, the development of international practice is essential as it enables those categories to be gradually expressed in concrete terms by assessing them in the light of real situations. The most outstanding contribution in this regard is probably that of the ICTY with regard to the concept of non-international armed conflict. The ICTY's case law has not only identified the two constitutive elements of that concept, but has also put forward a wide range of indicative criteria making it possible to verify, on a case-by-case basis, whether each of these components has been achieved. Other elements deriving from the typology of armed conflicts would, however, deserve additional clarification. The case of the Gaza Strip is just one example of the difficulty of taking account of all the dimensions of the concept of occupation. Other uncertainties persist, in particular, about the criteria enabling the beginning or the end of an occupation to be determined.

The classification of situations of armed violence is also often linked to political considerations, as the parties involved endeavour to interpret the facts in accordance with their interests. On the basis of the margin of discretion allowed by the general terms of the legal categories, it is not unusual, for instance, for States to refuse to admit that they are involved in an armed conflict. They prefer to play down the intensity of the situation by claiming to carry out an operation to maintain public order. In so doing, they deny the applicability of humanitarian law. This tendency is encouraged by the fact that there is no independent international body authorized to decide systematically on cases that are likely to relate to one or other form of armed conflict. It is true that the ICRC, whose work is based primarily on international humanitarian law, informs the parties concerned of its assessment of situations, unless it would not be in the interest of the victims to do so. However, those who receive that assessment are not bound by the ICRC's view. Under those conditions, it seems even more important to clarify the relevant concepts, with a view to reducing the scope for interpretation, thus reinforcing the predictability of international humanitarian law.

Asymmetrical war and the notion of armed conflict – a tentative conceptualization

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Abstract

States across the globe are increasingly involved in violent conflicts with non-state groups both within and across borders. This new situation challenges the classic distinction in international humanitarian law between international and non-international armed conflicts. However, the changing face of warfare does not diminish the importance of IHL. The essence of this body of law – to protect civilians and persons hors de combat and to lessen unnecessary harm during armed conflict – remains the same. The applicability of IHL must therefore be determined according to objective criteria and must not be left to the discretion of the warring parties. This article seeks to conceptualize the notion of armed conflict and examines the extent to which the existing body of humanitarian law applies to the new asymmetrical conflicts. It finds that the definition given by the ICTY Appeals Chamber in its Tadić Decision on Jurisdiction, which was taken up by Article 8(2)(f) of the Rome Statute, is a useful starting point for an analysis of the ‘triggering mechanism’ of international humanitarian law in asymmetrical conflicts.

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One of the main purposes of the laws of war has been to tame the ‘dogs of war’ to ensure political control of the use of armed force. This was also the main purpose

behind Clausewitz's often misconstrued claim that war was 'the continuation of politics by other means'.¹ But does this logic also apply in non-international armed conflict or in 'asymmetrical' conflicts² between the armed forces of a state and non-state groups, or even terrorists? Are the mechanisms of the 'classic' law of war, and international humanitarian law (IHL) in particular, still suited to the current situation, where states often only go to war against each other through the 'proxy' of non-state groups, or are involved in battles with such groups within and across borders?

When the Chinese president visited his counterpart in the White House during the heyday of the Bush administration, he brought with him some gift-wrapped advice;³ while Bush was fighting an increasingly ferocious insurgency in Iraq, it was reported that Hu Jintao presented him with a copy of Sun Tzu's *The Art of War*.⁴ The point was subtle, but the allusion clear: while Bush had sent a conventional army to Iraq to topple Saddam Hussein, the insurgency was waging another kind of war. Thus Clausewitz was dethroned by Sun Tzu and conventional battle by insurgency tactics – a kind of warfare with which a classical army trained in the spirit of Clausewitz could not cope. Similarly, when Western critics chastised Israel for its conduct in the Lebanon war in 2006, the political scientist Herfried Münkler responded that Israel could not be expected to apply the rules of IHL to a conflict in which the other party violated IHL as a means of combating the superior forces of a regular army.⁵ In the Gaza war of January 2009, the legal branch of the Israeli Defense Forces apparently condoned attacks on Hamas policemen because

- 1 Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, Princeton University Press, Princeton, 1976, p. 87; see also Hugh Smith, *On Clausewitz. A Study of Military and Political Ideas*, Palgrave, Basingstoke, 2004, pp. 104–10. Münkler regards the theory of war, but not the control by politics, as indicative for the future – see Herfried Münkler, *Clausewitz' Theorie des Krieges*, Nomos, Baden-Baden, 2003, pp. 25–6.
- 2 On asymmetrical conflicts see Herfried Münkler, 'The wars of the 21st century', *International Review of the Red Cross*, No. 849 (2003), pp. 7–22; 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; Robin Geiss, 'Asymmetric conflict structures', *International Review of the Red Cross*, No. 864 (2006), pp. 757–77; Kenneth Watkin, '21st century conflicts and international humanitarian law: status quo or change?', in Michael N. Schmitt and Jelena Pejić (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, Koninklijke Brill BV, Leiden, 2007, pp. 265–96; Geoffrey S. Corn, 'Hamdan, Lebanon, and the regulation of hostilities: the need to recognize a hybrid category of armed conflict', *Vanderbilt Journal of Transnational Law*, Vol. 40 (2) (2007), pp. 295–355; Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, Weilerwist, Velbrück Wissenschaft, 2006; Michael N. Schmitt, '21st century conflict: Can the law survive?', *Melbourne Journal of International Law*, Vol. 8 (2) (2007), pp. 443–76; Michael N. Schmitt, 'Asymmetrical warfare and international humanitarian law', *Air Force Law Review*, Vol. 62 (2008), pp. 1–42; Knut Ipsen, 'Humanitäres Völkerrecht und asymmetrische Konfliktparteien – ein Ausschlussbefund?', in Andreas Fischer-Lescano et al. (eds.), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag*, Nomos, Baden-Baden, 2008, pp. 445–63.
- 3 Peter Kammerer, 'The art of negotiation', *South China Morning Post*, 21 April 2006, p. 15; Bronwen Maddox, 'Ancient sage opens the way to peace of modern powers', *The Times*, 20 April 2006, p. 40.
- 4 Sun Tzu, *The Art of War*, Oxford University Press, Oxford, 1971.
- 5 At least this is the logical consequence of the argument by Herfried Münkler, 'Asymmetrie und Kriegsvölkerrecht: Die Lehren des Sommerkrieges 2006', *Friedens-Warte Journal of International Peace and Organization*, Vol. 81, No. 2 (2006), pp. 62–5.

Hamas was using the civilian infrastructure for attacks against Israeli civilians.⁶ What can we expect from international humanitarian law in such situations? Is it, and should it be, applicable?

Indeed, one of the glaring gaps in international humanitarian law concerns its very foundation – namely the question of the definition of war, or rather ‘armed conflict’ in the more objective sense given to the term by Article 2 common to the four 1949 Geneva Conventions. IHL does not provide a clear definition of armed conflict.⁷ This raises questions as to the threshold at which IHL comes into operation.⁸ A single definition may not encompass all variants of contemporary armed conflict. On the other hand, a definition appears necessary in order to ensure an effective extension of basic humanitarian guarantees to new types of armed conflict.⁹

The distinction between international and non-international armed conflicts

Do the conditions triggering the application of IHL differ for international (inter-state) and non-international (internal) armed conflicts? How should the threshold for the application of IHL be determined for new types of armed conflicts – in particular, asymmetrical wars involving non-state entities?

In earlier times, the existence of a ‘war’ in the legal sense was made dependent on an official declaration of war.¹⁰ Since the Second World War, formal declarations of war have been virtually non-existent.¹¹ Instead, the 1949 Geneva

6 Yotam Feldman and Uri Blau, ‘Consent and advise’, *Haaretz*, 29 January 2009, available at www.haaretz.com/hasen/spages/1059925.html (last visited 10 March 2009).

7 For an outline of prevailing legal opinion, see International Committee of the Red Cross (ICRC), *How is the term “armed conflict” defined in international humanitarian law?*; Opinion Paper, March 2008, available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (last visited 7 May 2009). See also the International Law Association Committee on the Use of Force, ‘Initial report on the meaning of armed conflict in international law’, 2008, available at www.ila-hq.org/en/committees/index.cfm/cid/1022 (last visited 28 April 2009); Mary Ellen O’Connell, ‘Defining armed conflict’, *Journal of Conflict and Security Law*, Vol. 13 (2009), pp. 393–400.

8 Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Dartmouth Publishing Company Limited, Aldershot, 1992, p. 318: ‘[T]he “grey area” of categorization remains an issue of serious potential concern.’ For earlier assessments of the legal situation, see Dietrich Schindler, ‘The different types of armed conflicts according to the Geneva Conventions and Protocols’, *Recueil des Cours*, Vol. 163 (1979), p. 119.

9 James G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict’, *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 313–50; but see Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 32; Jelena Pejić, ‘Status of armed conflicts’, in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 85.

10 See Article 1 of Convention III relative to the Opening of Hostilities (Hague Convention III), 18 October 1907.

11 Christopher Greenwood, ‘The concept of war in modern international law’, *International and Comparative Law Quarterly*, Vol. 36 (1987), pp. 283–306; Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, para. 203; Elihu Lauterpacht,

Conventions used the concept of ‘armed conflict’ to convey the idea that humanitarian law needed to apply whenever armed forces battled with each other, regardless of official classification.¹² The International Court of Justice has confirmed as much in its *Wall Advisory Opinion*.¹³ Apparently, in cases of inter-state war the identification of an armed conflict did not create major problems; instead, the objective nature of the term ‘armed conflict’ guaranteed that lack of official recognition would not impede an application of international humanitarian law as long as at least two contracting states were involved. Pictet’s commentary emphasizes that even one wounded soldier may trigger the application of the Geneva Conventions in international armed conflicts.¹⁴

The situation was different, even in 1949, for non-international armed conflicts. While Common Article 3 took pains to specify that its application ‘shall not affect the legal status of the Parties to the conflict’, states were loath to recognize the existence of an internal armed conflict on their territory because this might be viewed as an acknowledgement of the government’s inability to prevent a civil war.¹⁵ Thus practice suggests a higher threshold for the application of Common Article 3, in particular the requirement of the willingness and capacity of non-state groups, evidenced by their possession of some level of organization and an identifiable internal structure, to abide by Common Article 3.

In defining its sphere of application, 1977 Protocol II additional to the Geneva Conventions, unlike its sister protocol, further narrowed the scope of non-international armed conflict by stressing the requirements to be met by groups involved in it and by specifying that such a conflict did not include ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’. This has led some scholars to conclude that a unified concept of armed conflict does not exist, and that, instead, international armed conflict and non-international armed conflict were fundamentally distinct.¹⁶

Conversely, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) proclaimed, in its very first judgment, that ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.¹⁷ The most recent comprehensive

“The legal irrelevance of the “state of war””, *Proceedings of the American Society of International Law*, Vol. 62 (1968), p. 58.

12 See Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1952, p. 32; see also Greenwood, above note 11, p. 283.

13 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 95.

14 Pictet, above note 12, p. 32. However, there are attempts to apply the intensity criterion restrictively and not to regard small-scale military confrontations between states as a triggering event for international armed conflicts. See O’Connell, above note 7, pp. 393–400.

15 Ibid., p. 395.

16 Cf. Moir, above note 9, pp. 33–4. For an argument in favour of the application of the same rules, see Fleck, above note 11, para. 1201, p. 611 and *passim*.

17 ICTY, *Prosecutor v. Tadić*, Case No. IT-91-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (hereinafter Interlocutory Appeal on Jurisdiction), 2 October

effort to codify violations of international humanitarian law of a criminal nature, the Rome Statute of the International Criminal Court (ICC), follows this approach, at least partially, while maintaining the distinction in principle.¹⁸ Article 8(2)(f) of the ICC Statute extends war crimes provisions to non-international armed conflicts, namely 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'.

If the triggering event for the applicability of *jus in bello* – that is, the existence of an international or non-international armed conflict – is not clearly defined, states can more easily claim that international humanitarian law is inapplicable, especially in conflicts involving non-state groups. Such a situation would be reminiscent of the obsolete notion of recognition of belligerency, which made the applicability of IHL dependent on recognition of rebels by the government.¹⁹ The necessity of such recognition was contrary to the humanitarian purpose of contemporary IHL, which is therefore in need of a coherent concept of armed conflict.

Transnational armed conflict

In its *Hamdan* decision, the US Supreme Court ruled that the minimum rules of Common Article 3 of the Geneva Conventions apply to a conflict with a transnational enemy of a non-state character.²⁰ In its *Tadić* jurisdiction decision, the ICTY Appeals Chamber proposed a comprehensive definition of armed conflict in both international and non-international armed conflicts, finding that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.²¹ This test was subsequently endorsed by the International Committee of the Red Cross²² and the Rome Statute of the International Criminal Court.²³ While assessing the legal status of violence on a case-by-case basis, the scale and intensity of the conflict as well as the identity and level of organization of the parties should be taken into consideration. These criteria

1995, para. 119. See also Steven R. Ratner, 'The schizophrenias of international criminal law', *Texas International Law Journal*, Vol. 33 (1998), pp. 237, 239, 240, 249.

18 See Article 8(2)(c)–(f) on war crimes in non-international armed conflicts.

19 On the history and decline of the recognition of belligerency, see Moir, above note 9, pp. 4–21.

20 US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006). Cf. the implicit criticism in Michael N. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict: With Commentary*, International Institute of Humanitarian Law, San Remo, 2006, p. 2, with the approval of Fleck, above note 11, p. 607, para. 1201(3)(b); Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, p. 8.

21 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

22 ICRC, above note 7, p. 5.

23 See Article 8(2)(f) of the Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002).

should make it possible to ‘distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law’.²⁴ Though the definition makes it clear that armed groups may be parties to conflict, it does not specify the characteristics of such armed groups. It establishes situations that are to be characterized as armed conflict rather than as a merely internal riot without military connotations.

In this article we seek to conceptualize the notion of armed conflict, focusing on the question as to how far the existing body of humanitarian law applies to the new asymmetrical wars, and examine whether and how this conceptualization can serve to accommodate such conflicts within that body of law. The first section outlines the present regulation of ‘armed conflict’ in international humanitarian law, from Common Article 2 and Additional Protocol I in international armed conflict to Common Article 3 and Additional Protocol II relating to non-international armed conflicts. In the second section, we consider contemporary ‘asymmetrical’ conflicts and the applicability of international humanitarian law to them. We show that the traditional dichotomy between international and non-international (internal) armed conflict does not quite match the complexity of modern-day constellations, including, in particular, situations in which non-state groups operate transnationally or across the borders of occupied territories. Nevertheless, we show that IHL can deal with these cases convincingly. The purpose of this article is to clarify the scope of IHL and to defend its applicability to asymmetrical conflicts such as those in Gaza and in Afghanistan that involve not only a disparity of military capabilities²⁵ but also both state and non-state parties. We conclude that the scope of application of IHL would not be overstretched thereby. We thus reject the claim of the demise of IHL in the face of asymmetrical warfare.

The concept of armed conflict in international humanitarian law

The concept of international armed conflict

Common Article 2 of the Geneva Conventions defines the notion of inter-state armed conflict that extends to all cases of ‘declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’. According to the ICRC Commentary on the Geneva Conventions,

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of

24 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber II), 7 May 1997, para. 562.

25 For an analysis of such asymmetrical conflicts, see Geiss, above note 2, pp. 757–77; Münkler, ‘Wars of the 21st century’, above note 2, p. 7; Pfanner, above note 2, pp. 149–174.

Article 2 ... It makes no difference how long the conflict lasts, or how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.²⁶

Opinions on whether the present definition should be maintained diverge. Some authors argue that 'in practice, it would seem that the absence of a precise definition of "international armed conflict" has not proven harmful, but has favoured a very flexible and liberal interpretation of the notion, and thereby ensured a wide application of humanitarian law'.²⁷ In the majority of cases the existence of an international armed conflict within the meaning of IHL can hardly be denied. Moreover, the threshold for violence to qualify as armed conflict is relatively low; even short-lived cross-border armed clashes may trigger the existence of an international armed conflict. However, recent state practice suggests that mere incidents, in particular an isolated confrontation of little impact between members of different armed forces, do not qualify as international armed conflict.²⁸

Another relevant issue to be raised in this context is whether and from which level onwards foreign intervention may internationalize an internal armed conflict.²⁹ In general, an armed conflict may be internationalized when military support is rendered to armed groups in their fight against an effective government.³⁰ Military support offered to the government in question does not trigger the beginning of an international armed conflict as long as the government maintains control of the situation. Under certain circumstances, a war fought between proxies may also be seen as an international armed conflict.

26 Pictet, above note 12, p. 23.

27 Nils Melzer, *Targeted Killings in International Law*, Oxford University Press, Oxford, 2008, p. 252.

28 O'Connell, above note 7, p. 397.

29 Stewart, above note 9; Dietrich Schindler, 'International humanitarian law and internationalized internal armed conflicts', *International Review of the Red Cross*, No. 230 (1982), p. 255; Hans-Peter Gasser, 'Internationalized non-international armed conflicts: case studies of Afghanistan, Kampuchea, and Lebanon', *American University Law Review*, Vol. 33 (1983), p. 157; Christine Byron, 'Armed conflicts: international or non-international?', *Journal of Conflict and Security Law*, Vol. 6, No. 1 (2001), pp. 63–90.

30 Schmitt, Garraway and Dinstein, above note 20, p. 2. On the level of military support required to attribute an armed group's conduct to a state (thus internationalizing the conflict), see ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 115 (where the state was required to have 'effective control' over the group – financing, organizing, training, supplying and equipping of the group, the selection of targets and planning of its operations were insufficient to constitute this). Cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 120, 145, where it was held that the standard was 'overall control' by the state, which does not require the issuance of specific instructions or orders. See, however, ICJ, *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)*, Judgment, ICJ Reports 2007, where the ICJ separated the issues of attributing internationally wrongful acts to a state and classifying a conflict. It held that for the former, the armed group must be in a relationship of 'complete dependence' on the state (para. 392), or else that the state must have had 'effective control' over the group and actually exercised this by giving instructions in respect of specific operations (para. 404). However, it held that for the separate issue of classifying a conflict, *Tadić's* standard of 'overall control' may well be appropriate (para. 404).

According to Common Article 2, an international armed conflict has an inter-state character. Therefore a conflict between a state and a non-state group is only internationalized when the military action of such groups is clearly attributable to the respective (host or other) state. The Israeli Supreme Court, however, has maintained that

In today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.³¹

However, the 'privileges' accorded to states in international conflicts are not due to the transboundary character of these conflicts, but to the conformity in principle of the state armed forces with internal laws. Terrorist activity, on the other hand, is inherently illegal under both international and domestic law. Of course, this debate also hinges on a generally acceptable definition of terrorism, something that has so far remained elusive.

The concept of non-international armed conflict

Common Article 3 of the Geneva Conventions does not clarify the notion of 'an armed conflict not of an international character'. Some authors argue that 'no definition would be capable of capturing the factual situations that reality throws up and that a definition would thus risk undermining the protective ambit of humanitarian law'.³² First of all, it is not clear what level of violence must be reached and how protracted the hostilities must be. On the one hand, internal situations with a very high level of violence are often regarded, mainly for political reasons, as banditry not reaching the threshold of armed conflict.³³ On the other hand, there are situations where a much lower level of violence that is not protracted is seen as armed conflict for the purposes of humanitarian law.³⁴ Moreover, it seems problematic to assess the ability of armed groups to implement international humanitarian law and whether this should be seen as a criterion for identifying these groups as parties to conflict at all.

While stretching Common Article 3 to include anti-terrorist measures may serve humanitarian purposes in some situations, its application to ordinary (even wide-spread) human rights violations would not be a desirable result,

31 Supreme Court of Israel, *Public Committee Against Torture v. Israel*, Judgment, HCJ 769/02, 13 Dec. 2006, para. 21.

32 Pejić, above note 9, p. 85.

33 See 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. 754, with further references.

34 Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, IACHR Report No. 55/97, 30 October 1997; see also Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada case', *International Review of the Red Cross*, No. 324, September 1998, pp. 505–511.

because human rights – which remain applicable – generally provide more protection and are better tailored to situations that do not amount to an armed conflict.

As a rule, states are hesitant to admit the existence of an armed conflict within their borders. The case of Chechnya demonstrates that states will deny that there is an armed conflict even in cases where its existence appears obvious.³⁵ It follows that an objective criterion is necessary to determine the applicability of IHL, thus providing a clear basis for assessing the norms applicable to the conflict in question, both for the participants involved and the international community in general.

The concept of armed conflict, the 1977 Additional Protocols and the 1998 Rome Statute

The two 1977 Additional Protocols contain updates on the substantive law and the first comprehensive regulation of the conduct of hostilities in international armed conflict. While Protocol I extended the range of international armed conflicts to which it applies by including ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination’,³⁶ Protocol II on non-international armed conflicts introduced stringent requirements for the applicability of its rules and a minimum threshold below which it should not apply. It also included wording in Article 1 clarifying the continued validity of Article 3 common to the Geneva Conventions.³⁷

Recent developments have, however, somewhat reduced the significance of the triggering provisions of the 1977 Additional Protocols; while most of the countries involved in recent conflicts, such as India, Iraq, Israel and the United States, have not become party to Protocol I precisely because they were opposed to the inclusion of non-state entities and the loosening of requirements for armed forces,³⁸ Protocol II has seldom been applicable to recent internal conflicts because insurgent groups rarely, if ever, meet the requirements of its Article 1.³⁹ For a conflict to rise above the minimum threshold laid down in Article 1(2) of Protocol

35 Cf. Bakhtiyar Tuzmukhamedov, ‘The implementation of international humanitarian law in the Russian Federation’, *International Review of the Red Cross*, Vol. 85, No. 850 (2003), p. 395.

36 Protocol I, Article 1(4).

37 For details of the drafting history see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, para. 4457.

38 On the US position at the time see ‘Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Noninternational Armed Conflicts’, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted in *American Journal of International Law*, Vol. 81 (1987), p. 910. The Senate has since failed to act on this submission. See also George Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’, *American Journal of International Law*, Vol. 85 (1991), p. 1; Abraham D. Sofaer, ‘The Rationale for the United States Decision’, *American Journal of International Law*, Vol. 82 (1988), p. 784.

39 Similarly Fleck, above note 11, p. 610, para. 1201.

II, such armed groups need to have a responsible command, exercise sufficient control over territory to enable them to carry out sustained and concerted military operations and possess the ability to implement the Protocol. Some of these requirements are also part of the definition of non-international armed conflict as contained in Common Article 3, but not all – in particular, the control over territory requirement⁴⁰ would disregard humanitarian needs in conflicts in which insurgents vanish ‘like a fish in the water’ within the local population or in which control regularly switches from one day to the next. In these cases, as in ‘internal disturbances and tensions’, the protection laid down in Common Article 3 remains necessary. Moreover, states are reluctant to recognize that any use of armed force on their territory might go beyond mere ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ that Protocol II excluded from its scope of application.⁴¹ While the provisions of Protocol I on the conduct of hostilities have nevertheless entered customary law to an extent well beyond the treaty’s scope of application,⁴² Common Article 3 of the Geneva Conventions has remained the central focus of the law of non-international armed conflict.⁴³ In its own words, Protocol II ‘develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application’.⁴⁴

From the beginning, the amendment to the ‘armed conflict’ provision in Article 1 of Protocol I was a departure from the underlying principle of the

40 International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 233 (no connection to control of territory in Art. 8(2)(f) of the Rome Statute); ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 236; cf. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor’s Application for a Warrant of Arrest (Pre-Trial Chamber I), 4 March 2009, para. 60 (control over territory as ‘key factor’ for ability to carry out military operations’); ICTY, *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-T, Judgment (Trial Chamber), 26 February 2009, para. 791; ICTY, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 Apr. 2008, paras. 37–60, with an extensive review of ICTY case-law, applying an intensity test regardless of territorial control; similarly, International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998, paras. 619–620 (intensity and organization required). See, in particular, ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

41 Fleck, above note 11, p. 613, para. 1202, adding that the distinction between combatants and civilians is particularly difficult in internal conflicts; but see Article 13(3) of Protocol II (applying the same rule as Article 51, Protocol I to civilians taking part in hostilities).

42 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, ICRC/Cambridge University Press, Cambridge, 2005. The rules of Protocol I and II are listed under the headings of international and non-international conflicts, respectively, with not much difference regarding their contents. See also p. xxix for the assertion that many rules of IHL apply in both types of conflicts. For a practical example, see Supreme Court of Israel, *Public Committee Against Torture v. Israel*, above note 31, para. 11, applying Article 51 of Protocol I to targeted killings of alleged terrorists regardless of the classification of the conflict. See also Fleck, above note 11, p. 608, paras. 1201(3)(c), 1204 (reducing the difference between IHL of international and non-international armed conflicts to the status of the fighters).

43 Sandoz, Swinarski and Zimmermann (eds.), above note 37, para. 4461.

44 Protocol II, Article 1(1).

definition of 'armed conflict' in the Geneva Conventions, namely to distinguish between *jus ad bellum* and *jus in bello*. The rationale for introducing an 'objective' determination of the existence of an armed conflict lies in the purely factual nature of the analysis that eschews more ideological or politically sensitive questions and is intended to guarantee the equal application of IHL to all parties to the conflict. Alas, Article 1(4) of Protocol I appears to have brought issues of *jus ad bellum* back into the scope of applicability of IHL. In practice, the provision has provided arguments against ratifying Protocol I, thus hampering its universality. No party to any conflict will accept that the other party is 'fighting against colonial domination and alien occupation and against racist régimes in the exercise of [the] right to self-determination', as little as any party will admit to waging a war of aggression or to violating the prohibition on the use of force.⁴⁵ The best one can say is that the provision has remained mute because – with the possible exception of a declaration by the Palestine Liberation Organization (PLO) for Palestine⁴⁶ – declarations of acceptance by peoples under Article 96(3) of Protocol I have not been forthcoming, and have so far never been accepted by a state party to a conflict.⁴⁷

The most disappointing aspect of the two Protocols, however, relates to the absence of clarifications as to the minimum threshold for the existence of an international armed conflict and, with regard to non-international armed conflicts, the complication due to the split applicability of the provisions of Protocol II and Common Article 3. The conclusion to be drawn from this shortcoming of the Additional Protocols is that the Geneva Conventions' definition of armed conflict remains in place,⁴⁸ but that for Protocol II to apply, internal armed conflicts need to fulfil the additional requirements of Article 1 thereof.

The Rome Statute of the ICC exacerbates the problem by introducing additional categories and maintaining a distinction between Common Article 3

45 One of the current authors has concluded that this argument counsels against efforts to bring the crime of aggression under the jurisdiction of the ICC. See Andreas L. Paulus, 'Peace through justice? The future of the crime of aggression in a time of crisis', *Wayne Law Review*, Vol. 50, No. 1 (2004), p. 1.

46 Letter of 21 June 1989 from the Permanent Observer of Palestine to the United Nations Office at Geneva, stating that 'the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto', available at www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS (last visited 10 March 2009). This declaration was, however, probably an attempt at an ordinary ratification rather than a declaration under Article 96(3).

47 Similarly, Christopher Greenwood, 'Customary law status of the 1977 Geneva Protocols', in Astrid J. M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 112; Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Fleck (ed.), above note 11, para. 202, n. 4; but see Georges Abi-Saab, 'The 1977 Additional Protocols and general international law: some preliminary reflections', *ibid.*, p. 120; Georges Abi-Saab, 'Wars of national liberation in the Geneva Conventions and Protocols', *Recueil des Cours*, Vol. 165 (IV) (1979), pp. 371–2, referring to the principle of self-determination. For an example of an attempt to invoke Article 96(3), see National Democratic Front of the Philippines, Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, available at www.hartford-hwp.com/archives/54a/036.html (last visited 10 March 2009).

48 See Protocol II, Article 1(1), and Sandoz, Swinarski and Zimmermann, above note 37, para. 4359, 4453 and *passim*.

and other serious violations of IHL in armed conflicts not of an international character. In its definition of war crimes, Article 8(2)(c) of the Rome Statute criminalizes the violation of Common Article 3. However, in Article 8(2)(d) the minimum threshold of Protocol II is added to the Statute's requirements for the existence of an armed conflict.⁴⁹ It thus seems to confirm a development according to which the minimum threshold of Protocol II is of general applicability,⁵⁰ whereas the additional elements of its Article 1 cannot be transferred to the interpretation of Common Article 3.⁵¹ For other serious violations of IHL, Article 8(2)(f) takes up the requirements of the *Tadić* definition, namely the existence of an 'armed conflict that takes place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.⁵² It thus somewhat lowers the threshold for the existence of an armed conflict as compared with Article 1(1) of Protocol II.

Some criticism has been voiced against this definition, partly because of its apparent limitation of the scope of non-international armed conflict⁵³ and partly because the reference to the length of the conflict would exclude isolated warlike acts – hence the definition would, it is claimed, render early identification of an armed conflict impossible and thus endanger the protection of the victims.⁵⁴ However, addressing the first concern would lead to the inclusion of additional war crimes in the law of non-international armed conflict, a proposal that, as the Rome Statute shows, does not yet enjoy the support needed from states to become customary law. The second concern can be accommodated by a contextual interpretation of the 'protracted' character of an armed conflict that also takes the intensity of a conflict into account. By itself, the word 'protracted' refers only to length, not intensity,⁵⁵ but in the relevant paragraph of its *Tadić* jurisdiction decision, the ICTY also speaks of the 'intensity requirements applicable to both international and internal armed conflicts'⁵⁶ – the *Tadić* 'protracted armed violence' criterion has been interpreted in the subsequent ICTY decisions as referring to the intensity of the conflict rather than to its duration only.⁵⁷ The International Criminal Tribunal for Rwanda (ICTR) largely shared the definition of armed conflict given in the *Tadić*

49 In Article 8(2)(d), the inclusion of an 'or' instead of an 'and' seems to have been inadvertent; see Andreas Zimmermann 'Article 8: War Crimes' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck, Munich, 2008, para. 299.

50 In line with Fleck, above note 11, p. 616, para. 1205.

51 Zimmermann, above note 49, para. 300. See also Fleck, above note 11, p. 610, para. 1201.

52 Cf. ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

53 See in particular Fleck, above note 11, p. 611, para. 1201 (5)(c); see also Claus Kress, 'War crimes committed in non-international armed conflict and the emerging system of international criminal justice', *Israel Yearbook on Human Rights*, Vol. 30 (2000), pp. 117–20.

54 Jean-François Quéguiner, 'Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 278–81; Sassòli, above note 20, pp. 6–7.

55 Catherine Soanes and Angus Stevenson (eds.), *Oxford Dictionary of English*, Oxford University Press, Oxford, 2005, p. 1416, according to whom 'protracted' means 'lasting for a long time or longer than expected or usual'.

56 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

57 ICTY, *Prosecutor v. Ramush Haradinaj*, above note 40, para. 49.

case: in *Akayesu*, its Appeals Chamber emphasized that there should be a test evaluating the intensity of the violence and the organization of the parties involved. Moreover, it stressed that the intensity criterion did not depend on the assessment of the conflicting parties and should be objective in character.⁵⁸ While the criterion of intensity may give a broader scope to IHL than mere temporal 'protractedness', it remains doubtful, however, whether it conforms to the *Tadić* decision.

While the inclusion of an additional element such as 'protracted' may warrant some criticism, the provision should rather be lauded for contributing to the definition of (non-international) armed conflicts.⁵⁹ By applying this definition only for the application of customary rules beyond Common Article 3, and thus preserving the latter's character as a minimum rule for all conflicts,⁶⁰ the Rome Statute contributes to extending the customary international law of non-international armed conflict beyond the undue restrictions of Protocol II's Article 1.⁶¹ An understanding of 'protracted' in that article as being less than 'sustained', because it allows for temporary periods of calm,⁶² further confirms that the ICTY definition taken up by the Rome Statute is not unnecessarily restrictive.

The ICRC made several attempts to derive a list of customary rules from the Additional Protocols that would be applicable to non-international armed conflicts.⁶³ The whole issue of the scope of application of IHL seems to be so controversial that the ICRC customary law study⁶⁴ presupposes the applicability of IHL in international and non-international armed conflict, but does not define the terms. However, the existence of minimum rules such as those in Common Article 3 and also Article 75 of Protocol I, which contains fundamental guarantees and lists certain acts 'that are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents', does not seem to be in doubt, at least in principle.⁶⁵ By maintaining the equal application of the most

58 ICTR, *Prosecutor v. Akayesu*, above note 40, para. 603: 'It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfils their respective pre-determined criteria'.

59 Cf. Zimmermann, above note 49, paras. 347–348.

60 As in the ICTY precedents; see Kress, above note 53, p. 118. However, we do not agree that this definition should be read into Article 8(2)(c) as well. Arguments from the drafting history appear unconvincing, owing to the different wording; see Article 32 entitled 'Supplementary means of interpretation' of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980).

61 Similarly, Kress, above note 53, p. 121.

62 Zimmermann, above note 49, para. 348.

63 See in particular Henckaerts and Doswald-Beck, above note 42. See also René Kosirnik, 'The 1977 Protocols: A landmark in the development of international humanitarian law', *International Review of the Red Cross*, No. 320 (1997), pp. 483–505; Greenwood, above note 47, pp. 93–144.

64 Henckaerts and Doswald-Beck, above note 42.

65 US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006) (Stevens, J., plurality opinion); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v.*

important rules for both kinds of conflicts, the ICRC study on custom, in line with the Rome Statute of the ICC, seems to submit that the main differences between international and non-international armed conflict relate to the status of the fighters, but not to the substance of the applicable rules of IHL.⁶⁶ In any event, when there is an uncertainty as to whether the armed conflict is internal or international in character, as was the case in the conflicts in the former Yugoslavia,⁶⁷ the ‘hard core’ of humanitarian law provisions will be applicable.⁶⁸

Asymmetrical conflicts and the concept of armed conflict

The so-called ‘global war on terror’⁶⁹ as well as the conflicts between Israel and non-state groups in the occupied territories and in Lebanon (Hamas and Hezbollah), and the conflict between US-led coalitions and insurgent groups in Iraq and Afghanistan (Al Qaeda and the Taliban), have cast new light on the problem of the applicability of international humanitarian law.

The notion of asymmetrical conflict cannot be restricted to armed conflicts between states and non-state entities, for such a conflict may involve states in an international armed conflict within the meaning of IHL. However, most problematic legal questions do arise in armed conflicts between states and various non-state entities. Asymmetry becomes a problem for IHL when it does not merely refer to a factual difference of military capacity – which may exist in any armed conflict⁷⁰ – but when both parties to an armed conflict are unequal and differently

Uganda), Separate Opinion of Judge Simma, ICJ Reports 2005, paras. 26–28; Council of Europe, Venice Commission of the European Commission for Democracy through Law, Opinion No. 245/2003, at its 57th Plenary Session, Venice, 12–13 December 2003, Doc. No. CDL-AD (2003) 18, para. 38; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, para. 9.2 with further references; but see also the scepticism regarding Article 75 of Protocol I in US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, p. 2809 (Kennedy, J. concurring; arguing that this was for the executive branch to decide). See also the 1990 Turku Declaration of Minimum Humanitarian Standards, in ‘Report of the Secretary-General prepared pursuant to Commission resolution 1995/29’, E/CN.4/1996/80 of 28 November 1995, Annex, to which only Mexico objected (p. 3); cf. Asbjørn Eide, Allan Rosas and Theodor Meron, ‘Combating lawlessness in gray zone conflicts through minimum humanitarian standards’, *American Journal of International Law*, Vol. 89 (1995), pp. 215–18.

66 See Fleck, above note 11, para. 1204, presenting the conclusion as a ‘trend’.

67 Theodor Meron, ‘The humanization of humanitarian law’, *American Journal of International Law*, Vol. 94 (2000), p. 261.

68 See Fleck, above note 11, at 611, para. 1201, n. 6.

69 ‘Global war on terror’ is the label attached by the Bush administration to the struggle against al Qaeda and other terrorist groups. See John B. Bellinger, ‘Prisoners in war: contemporary challenges to the Geneva Conventions’, lecture at the University of Oxford, 10 December 2007, available at www.state.gov/s/l/rls/96687.htm (last visited 10 March 2009). Recently the British Foreign Secretary distanced himself from the term – see David Miliband, ‘“War on terror” was wrong’, *Guardian*, 15 January 2009, available at www.guardian.co.uk/commentisfree/2009/jan/15/david-miliband-war-terror (last visited 25 May 2009). The Obama administration appears to use the term only sparingly, if at all – see Howard LaFranchi and Gordon Lubold, ‘Obama redefines war on terror’, *Christian Science Monitor*, 29 January 2009, available at features.csmonitor.com/politics/2009/01/29/obama-redefines-war-on-terror/ (last visited 25 May 2009).

70 See Pfanner, above note 2, pp. 149–74.

structured in a legal sense, in other words, when a state fights a non-state entity that does not fulfil the criteria of Article 1 of Protocol II, but instead consists of armed bands without any hierarchical command structure that ignore both domestic law and IHL altogether. In such a case one party to the conflict is fighting a conventional war and has a regular army at its disposal but is also setting the legal rules, whereas the other party, according to domestic law, is bound by the rules established by the state but recognizes neither those rules nor in most cases IHL. While the members of these groups are criminals according to domestic law, the main point is whether the minimum rules of IHL nevertheless apply to them. Some observers have even questioned the very existence of international legal rules in these cases, pointing to the lack of reciprocity between regular armed forces and insurgent groups that neither conduct their operations in accordance with international humanitarian law nor claim to do so.⁷¹

We clearly think otherwise. Reciprocity, especially in terms of the obligations involved,⁷² has always been an important part of international humanitarian law.⁷³ However, the application of IHL is not predicated on reciprocity. On the contrary, the rules on minimum treatment as contained in Common Article 3 and Article 75 of Protocol I are applicable regardless of reciprocity. While the provisions of the Third Geneva Convention defining the personal scope of the Convention require membership of armed forces, or at least of militias fulfilling a similar set of criteria,⁷⁴ Common Article 3 is unconditional and applicable to all parties alike.⁷⁵ In the words of the Pictet *Commentary*: 'What Government would dare to claim before the world, in a case of civil disturbances ... that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?'⁷⁶ Alas, this appeal to the civilized nature of governments seems to have been forgotten after the fateful day of 11 September 2001.⁷⁷ In the words of the now infamous Bush statement of 7 February 2002 on the

71 See the description in Münkler, 'The wars of the 21st century', above note 2, p. 7; Schmitt, above note 2.

72 For the importance of such expectations of reciprocity in international law, see Fleck, above note 11, p. 607, para. 1201(3)(b); Bruno Simma, 'Reciprocity', in Rüdiger Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, para. 8.

73 Jean de Preux, 'The Geneva Conventions and reciprocity', *International Review of the Red Cross*, No. 244 (1985), pp. 25–29.

74 Third Geneva Convention, Article 4(A)(2).

75 A clause requiring reciprocity was explicitly dropped in the course of the negotiations – see Pictet, above note 12, p. 37.

76 *Ibid.*, p. 36.

77 See Michael A. Fletcher, 'Bush defends CIA's clandestine prisons', *Washington Post*, 8 November 2005, p. A15, a statement that has recently been contradicted by Susan Crawford, the head of the military tribunals at Guantánamo Bay – see Bob Woodward, 'Detainee tortured, says US official', *Washington Post*, 14 January 2009, p. A1. On the infamous 'Torture memos' justifying the use of 'coercive methods' on alleged terrorists, see Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, Cambridge, 2005. For a collection of some unpublished memos, see Office of Legal Counsel Memoranda at www.usdoj.gov/opa/documents/olc-memos.htm (last visited 10 March 2009). For the repudiation of these and other memos in the late days of the Bush administration, see Office of Legal Counsel, 'Memorandum for the Files', 15 January 2009, p. 3, available at www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf (last visited 10 March 2009). For the Executive Order by President Barack Obama prohibiting the use of torture generally, see

non-applicability of IHL to the Taliban fighters and Al Qaeda terrorists in Guantánamo and elsewhere: ‘As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.’⁷⁸ We have it all here: non-applicability of ‘humane treatment’ in law, but only ‘as a matter of policy’; consistency not with ‘Geneva’, but only with its ‘principles’; and, finally, only ‘to the extent appropriate and consistent with military necessity’.

With the Orders of the new President, Barack Obama, to dissolve Guantánamo and to end US practices of torture, which he signed two days after his inauguration, the United States has repudiated this particular Bush legacy.⁷⁹ However, a recent filing to the US District Court for the District of Columbia suggests that the Obama administration maintains that the conflict with the Al Qaeda terrorist organization is of an international nature and bases its authority to detain alleged terrorists on the international ‘laws of war’.⁸⁰

Nevertheless, there is little doubt that the applicability of IHL to non-state groups creates a considerable number of problems, and that classic IHL appears ill-prepared at times for today’s armed conflicts. While IHL provides two sets of rules, there are three potential combinations of warring parties and territory: a conflict may be a classic international armed conflict between states, a non-international conflict between a state and one or more non-state groups and, lastly, a ‘transnational’ conflict between a state and a non-state group (or between non-state groups) on the territory of more than one state.

Common Article 3, however, does not provide for this last possibility, as its territorial scope is limited to conflicts taking place ‘on the territory of a State party’ – that is, on one territory only. In 1949 this omission may have been due to the relative obscurity of such conflicts. But since 11 September 2001 at the latest, they are at the forefront of international debate. In the presidential statement cited above, the Bush administration seemed to imply that transnational conflicts could

Executive Order No. 13491 – Ensuring Lawful Interrogations, 22 January 2009, 74 FR 4893. For an overview of the ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, which certainly fits the designation of ‘torture’ under any terminology, see Mark Danner ‘US torture: voices from the black site’, *New York Review of Books*, Vol. 56 (6) (2009), available at www.nybooks.com/articles/22530 (last visited 11 May 2009).

78 George W. Bush, ‘Humane treatment of Taliban and al Qaeda detainees’, 7 February 2002, available at www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 10 March 2009).

79 Executive Order 13492 (2009) – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 FR 4897; see also Executive Order No. 13491 – Ensuring Lawful Interrogations, above note 77.

80 See *In re: Guantánamo Detainee Litigation*, Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, Misc. No. 08–442 (TFH), 13 March 2009, available at www.usdoj.gov/opa/documents/memo-re-det-auth.pdf (last visited 16 March 2009), pp. 1, 3, 6. See also D.C. District Court, *Gherebi v. Obama*, Civil Action No. 04–1164, 2009 WL 1068955, 22 April 2009, p. 21, available at www.unhcr.org/refworld/docid/4a0bcd162.html (last visited 25 May 2009), endorsing the administration’s position, but correctly basing the authority for detention on domestic law rather than IHL – ‘The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it’ (p. 38).

amount to armed conflicts, but that IHL was not applicable to them.⁸¹ Others deny that transnational conflicts are armed conflicts at all, and thus conclude that only international human rights law applies to the use of lethal force against suspected terrorists, to the effect that force is permissible only when ‘absolutely necessary’ for the purposes of the right to life as enshrined in international and regional human rights instruments.⁸²

We shall now analyse and show how IHL applies to some of the ‘hybrid’ conflicts of the first decade of the twenty-first century – that is, conflicts that do not clearly fit into the traditional pattern of either inter-state or internal conflict. In many of these situations there are various defensible conclusions as to the applicability of international or non-international rules of IHL; but the implication is that in every case involving the use of military means, IHL should be applicable. This seems to suggest the necessity for a set of minimum rules applicable to every armed conflict.

International armed conflict and non-state groups (Hezbollah)

The need for the application of IHL to conflicts between states and non-state entities beyond their borders is demonstrated by the 2006 Lebanon war, in which Israel destroyed considerable areas of southern and central Lebanon by military means to ward off rocket attacks by the Shia Lebanon-based political and paramilitary organization, Hezbollah. It is also demonstrated by the 2009 conflict in Gaza, in which Israel launched an air and ground offensive against Hamas, the Palestinian militant Islamist organisation. Less obvious is the characterization of Georgia’s conflict(s) with its breakaway provinces of South Ossetia and Abkhazia before the Georgian attack on Tskhinvali on 7 August 2008 and the intervention of Russian forces, or of the conflict in Kosovo before the NATO intervention on 24 March 1999. But in all these cases it would be impossible – and unacceptable – from a certain point onwards to deny the existence of an armed conflict, whether internal or international in character.

Israel’s military operation against Hezbollah in summer 2006 was an asymmetrical armed conflict not only *de facto* but also *de jure*, as it involved state and non-state entities. However, Common Article 2 extends the notion of international armed conflict only to the ‘High Contracting Parties’ – that is, states. The relevant treaty law is not directly applicable to non-state entities.

If military operations undertaken by armed groups are clearly attributable to a state, this entails the applicability of the law of international armed conflict, and any structural asymmetry would be less problematic from an IHL point of view. The legal situation is otherwise much more complicated: when there is no indication that the actions of a non-state armed group can be attributed to the

81 Bush, above note 78.

82 For an example of how international human rights law applies, see European Court of Human Rights (ECHR), *McCann and Others v. United Kingdom*, Judgment, 27 September 1995, Series A, No. 324, para. 148.

respective state, the question arises whether the concept of international armed conflict under customary international law might cover non-state entities. However, there is no consistent state practice or *opinio juris* to support such an assertion. With regard to the Israeli war against Hezbollah in Lebanon, it was very doubtful whether Hezbollah's military operations were attributable to Lebanon or to any other state.⁸³ If the Lebanese government had consented to Israel's intervention on its territory, the conflict would have constituted a non-international armed conflict between the state of Israel and Hezbollah. However, the Israeli military intervention occurred without Lebanon's consent and resulted in large-scale destruction of the Lebanese infrastructure. Arguably, armed conflicts between a state's armed forces and transnational armed groups operating in the territory of another state without the latter's consent could be treated as international armed conflict because of the cross-border component. In this case, the law of international armed conflict, with its detailed humanitarian guarantees, would be applicable.

It nonetheless appears more appropriate to qualify a transnational armed conflict involving non-state parties not linked to another state as armed conflicts of a non-international character. In a conflict between states, the armed forces of both sides have the combatant's privilege, namely the right to kill enemy combatants (going along with the enemy's concomitant right to target and kill them if they are not *hors de combat*). Such rights are not accorded to non-state armed groups. Yet the geographical element should not determine whether a conflict is qualified as international: 'Internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.'⁸⁴ There is no reason why a state's cross-border conflict with a non-state group should not trigger the application of humanitarian law. The law of non-international armed conflict – at least Common Article 3 – and applicable customary law should therefore cover the conduct of hostilities in these conflicts.⁸⁵

Thus contrary to an 'internationalized' armed conflict, in which the actions of all participants can ultimately be measured against traditional humanitarian law applicable in international armed conflicts, a non-international armed conflict is much more difficult to handle because of the rudimentary legal regulation of such conflicts in Common Article 3 and also in Additional Protocol II. We shall return to this subject later.

83 Kirchner even argues that Hezbollah's attacks against Israel are attributable not only to Lebanon but also to Iran and Syria – see Stefan Kirchner, 'Third-party liability for Hezbollah attacks against Israel', *German Law Journal*, Vol. 7 (9) (2006), pp. 777–84. However, Kirchner seems to have confused attribution and complicity. On the conditions of attribution, see ICJ, *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)*, above note 30, paras. 396–412. For the application of these criteria to the Lebanon conflict with the (in our view correct) conclusion that attribution fails, see Andreas Zimmermann, 'The second Lebanon war: *jus ad bellum*, *jus in bello* and the issue of proportionality', *Max Planck Yearbook of United Nations Law*, Vol. 11 (2007), pp. 112–15.

84 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 136.

85 See, to the same effect, United States Supreme Court, *Hamdan v. Rumsfeld*, above note 20.

Occupation and armed conflict with non-state groups (Gaza, targeted killings)

First, however, we shall consider another case in which the law of international armed conflicts applies, namely situations of occupation, with particular reference to the Palestinian territories occupied by Israel since 1967 and the ongoing Palestinian resistance, especially in Gaza.

It is controversial whether the occupation of Gaza has continued since the Israeli withdrawal of 2005. If so, the international nature of the conflict is established, as Common Article 2 of the Geneva Conventions also covers occupation after an international armed conflict. But if the occupation has ended, the situation would be similar to the war in Lebanon between Israel and Hezbollah. Problems of applicability may arise when the occupying state takes military action against non-state opponents as part of the existing armed conflict (occupation) – in which case there is an ‘armed conflict within an armed conflict’.⁸⁶ Should the rules of international armed conflict apply? Or the rules governing non-international armed conflict – that is, between a state and a non-state entity? Or both?

The occupation in the West Bank and Gaza was the consequence of a classic inter-state armed conflict between Israel and its neighbouring states. But the occupied territories themselves had never been fully integrated into Jordan and Egypt respectively. However, as the ICJ has observed, this does not prevent the applicability of the law of international armed conflict, and therefore of the Fourth Geneva Convention, to the occupied territories.⁸⁷ Israel has concluded peace treaties with the former administrators of the West Bank and the Gaza Strip, namely Egypt and Jordan.⁸⁸ Nevertheless, as both the ICJ⁸⁹ and the Israeli Supreme Court⁹⁰ have pointed out, the occupation goes on, at least as far as the West Bank is concerned. Conversely, the Supreme Court has maintained that the occupation of Gaza ended with the Israeli withdrawal on 12 September 2005,⁹¹ whereas its critics⁹² are of the view that Israel retains sufficient control of the air space and borders, and of the humanitarian supplies, for the occupation to be deemed to go on.

86 Cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 84, 86ff. (separate analysis of different parts of the conflict).

87 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 13, paras. 90–101.

88 Treaty of Peace between the Arab Republic of Egypt and the Government of the State of Israel, 26 March 1979, entry into force 25 April 1979, 1136 UNTS 115; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, 26 October 1994, 2042 UNTS 351, entry into force 10 Nov. 1994.

89 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 13, para. 90, 93, 101.

90 Supreme Court of Israel, *Mara'abe v. Prime Minister*, HCJ 7957/04, Judgment, 15 September 2005, para. 14 (leaving open the question of *de jure* or *de facto* applicability of Fourth Geneva Convention).

91 Supreme Court of Israel, *Jaber Al-Bassiouni v. Prime Minister*, HCJ 9132/07, Judgment, 30 January 2008, para. 12; Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, Hebrew University International Law Research Paper, No. 13–09, 2009, pp. 6–8, available at <http://ssrn.com/abstract=1350307> (last visited 25 May 2009).

92 Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 276–79, paras. 664–670.

But this does not necessarily indicate which law applies to the continuing insurgency in the occupied territories. One suggestion would be to apply only the law of occupation, in particular Article 5 of the Fourth Geneva Convention that allows some restriction of the rights of persons in occupied territory who are ‘definitely suspected of or engaged in activities hostile to the security of the State’. But this provision is intended for ‘individuals’ – that is, a limited number of persons.⁹³ As the Pictet *Commentary* points out, ‘[t]he suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case.’⁹⁴ Therefore Article 5 cannot be used for active hostilities between the occupying power and organized armed groups of the occupied territory. For such conflicts we need different rules.

Let us first look at the terrorist activity against the Israeli population and at Israel’s ‘targeted killings’ in response. We are not concerned here with a definitive answer to the question whether such killings are admissible under IHL and human rights law.⁹⁵ Rather, we shall limit our analysis to the applicability of international humanitarian law. On the one hand, most of these killings concern individuals ‘definitely suspected or engaged in activities hostile to the security of the State’, which would render Article 5 of the Fourth Geneva Convention applicable to them; accordingly, such persons ‘shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State’. On the other hand, Israel claims to be engaged in a ‘hot’ armed conflict with armed groups in the occupied territories, such as Fatah or Hamas. The Israeli Supreme Court has based its judgment of 11 December 2005 on the premise that a situation of continuous armed conflict existed between Israel and ‘the various terrorist organizations active in Judea, Samaria, and the Gaza Strip’.⁹⁶ Among the various possible qualifications of the armed conflict with terrorist groups, the Court opted to characterize it as international, but added that ‘even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it’. The Court also referred to the case law of the ICTY⁹⁷ and of the US Supreme Court to the effect that minimum rules apply to both categories of conflict alike.⁹⁸

93 For details of the drafting history, see Pictet, above note 12, p. 54.

94 *Ibid.*, p. 55.

95 For a detailed analysis, see in particular Antonio Cassese, ‘On some merits of the Israeli judgment on targeted killings’, *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 339; Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2005, pp. 420–3; David Kretzmer, ‘Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?’ *European Journal of International Law*, Vol. 16 (2000), p. 171; Melzer, above note 28.

96 Supreme Court of Israel, *Public Committee Against Torture v. Israel*, above note 31, para. 16, with further references to previous case law of the Supreme Court.

97 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 127 (development of customary rules for internal conflict).

98 US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, para. 2795 (minimum rules contained in Common Article 3 for international and non-international conflicts, including transnational armed conflicts).

The classification of the conflict with insurgent groups in the occupied territories as international allows for two possible readings: one would emphasize the inherently cross-border nature of transnational conflicts, thus likening them to international armed conflicts. In the case of occupied territories, every armed conflict between the occupier and local forces could be deemed international as a consequence of the applicability of occupation law.⁹⁹ According to a second reading, the application of the law of non-international armed conflict to a situation of armed conflict within occupied territories may be appropriate where none of the armed groups in question is an occupier. For example, the law of non-international armed conflict may apply to an armed conflict between Hamas and the Palestinian Authority or Fatah; or to the conflict between Bosnian Muslims and Croats during the Bosnian conflict between Muslims and Serbs. But when the occupier itself is involved, as arguably in the Gaza situation, the law of international armed conflict should apply. Thus we would have a situation where the rules on international armed conflict and Common Article 3 apply to the same conflict concurrently, but each to a different set of actors. The same would be true for the situation in Lebanon in 2006 (with Common Article 3 applying to Israel/Hezbollah as far as the Hezbollah military actions are not attributable to Lebanon, and the rules on international armed conflict applying to Israel/Lebanon).

However, the Israeli occupation in the Palestinian territories is a special case. It seems as important to determine what happens in purely transnational conflicts when only one party is a state and the other is a non-state group that operates in another state. We shall now examine the applicability of international humanitarian law to transnational conflicts with non-state groups where there is no occupation or attribution of their conduct to a state.

International armed conflict with non-state groups ('war on terror')?

Terrorism as such cannot be a party to a conflict, but clearly identifiable terrorist groups can. However, many states, while launching military operations against such groups and organizations, are not ready to accept the existence of armed conflict within their boundaries. If they admit that there is an armed conflict, they tend to argue that the so-called war on terrorism constitutes a new type of armed conflict to which international humanitarian law does not apply.

However, on 29 June 2006 the US Supreme Court held Common Article 3 applicable to a 'conflict not of an international character between the United States and al-Qaida': it concluded that the term 'conflict not of an international character' in Article 3 is used in contradistinction to a conflict between states. The Court thus rejected the US government's reasoning that the conflict with Al Qaeda, being 'international in scope', does not qualify as a 'conflict not of an international

⁹⁹ Cassese, *International Law*, above note 95, p. 420: 'An armed conflict which takes place between an Occupying Power and rebel or insurgent groups ... in occupied territory, amounts to an international armed conflict.'

character'. According to this ruling, the concept of armed conflict is wide enough to include sustained armed violence between a state and a transnational non-state entity.

To identify the applicable law, objective criteria are necessary. Despite the rather careless use of the term 'war on terror' by the Bush administration, agreement on the concept of an armed conflict with a terrorist organization remains elusive. States cannot even agree on a definition of terrorism itself,¹⁰⁰ let alone on the legal regime applicable to it. On the contrary, the rules of international armed conflict are tailored to conflicts involving armed forces who have the combatant's 'privilege' of being allowed to kill the combatants of the other side, but can also be killed by them on the same basis. It is debatable whether non-state groups should have combatant status, except for those who may fall under Article I(4) of Protocol I. Hence only the rules of non-international armed conflict and applicable provisions of human rights law appear to be appropriate candidates for the regulation of anti-terrorist warfare by states.

In any case, certain objective criteria are needed to limit the government's discretionary power. What should the minimum conditions be for a situation to qualify as armed conflict? The use of armed forces by states to combat terrorism may be seen as one important indication of the existence of an armed conflict. The intensity and the degree of organization of the parties involved in hostilities should also be taken into account. However, the fact that some terrorist networks are not operating in an organized manner and lack the capacity to ensure respect for humanitarian law obligations during hostilities should not relieve the respective states (and their armed forces) of their international responsibility to respect minimum humanitarian guarantees. Otherwise a cycle of 'negative reciprocity' could ensue,¹⁰¹ which would deprive IHL of all its constraining effects. The principle of reciprocity therefore does not constitute a basis for the application of IHL.¹⁰²

A confrontation between a state and transnational non-state entities qualifies as armed conflict only when it clears the required threshold; in other words there must at least be an armed conflict between two organized groups. We would therefore suggest applying the *Tadić* criteria also to transnational armed conflicts. Whether or not an armed conflict transgresses international borders, the same minimum rules should apply. The growing (structural) asymmetries on the battlefield mean that inter-state armed conflict, with the fully developed body of IHL applicable to it, is likely to be the exception rather than the rule, whereas the

100 For the most comprehensive recent attempt, see the Draft Comprehensive Convention on International Terrorism, UN Doc. A/59/894, 12 August 2005, Appendix I. The most problematic issue to be resolved is the applicability of the Convention. See also Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), p. 1031; P. Klein, 'Le droit international à l'épreuve du terrorisme', *Recueil des Cours* 321 (2006), pp. 203, at pp. 231 ff. and pp. 305 ff.; Gilbert Guillaume, 'Terrorism and international law', *International & Comparative Law Quarterly*, Vol. 53 (2004), pp. 537, 541.

101 Geiss, above note 2, pp. 757–77.

102 See, however, Schmitt, above note 2, pp. 1–42.

minimum rules of Common Article 3, Article 75 of Protocol I and customary law should apply in any circumstances, including those of transnational armed conflicts. Moreover, in view of the recognition by the ICJ that the provisions of Article 3 emanate from general principles of law, namely ‘elementary considerations of humanity’, the territorial requirement of Article 3 can be regarded as obsolete.¹⁰³

Beyond these minimum rules, however, the main criterion for the applicability of the whole body of IHL relating to non-international armed conflicts, and in particular the conduct of hostilities, still needs to be determined, namely the characteristics of the groups involved in such a conflict. Article 1 of Protocol II lays down strict requirements, namely that non-state entities should be objectively identifiable, and sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict. Thus control of territory plays a special role in identifying the ability of non-state entities to perform their obligations for the purposes of Protocol II. Certain terrorist armed groups may, however, be loosely organized and internationally dispersed. More importantly, the whole point of the exercise is not to clarify matters for the non-state groups, but for the state fighting them – non-state groups using terrorist methods will hardly care whether or not IHL would in principle apply to them, even if this may play a part in the possible qualification of their acts as war crimes. In line with the ICTY case law, the parties to an armed conflict should therefore possess a ‘minimal degree of organization’ to ensure implementation of the basic humanitarian protections guaranteed by Common Article 3.¹⁰⁴ In the absence of any clearly identifiable agreement to the contrary, the *Tadić* criteria should also apply to transnational conflicts between states and non-state entities rather than the higher standard of Protocol II. Accordingly, to ensure the applicability of IHL to each use of armed force, the degree of organization required to engage in ‘protracted violence’ should be lower than the degree of organization required to carry out ‘sustained and concerted military operations’. As shown above, recent developments in the case law and also the text of the Rome Statute all point in this direction.

Thus an armed conflict would be deemed to exist when the requirements for a certain intensity of armed violence¹⁰⁵ and some level of organization¹⁰⁶ of the

103 The temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities: in international armed conflict to the whole territory of the state in question, in non-international armed conflict at least to the area in which the conflict takes place – see ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, paras. 67 and 70; see also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Separate Opinion of Judge Simma, above note 65, para. 23.

104 ICTY, *Prosecutor v. Ljube Bošković and Johan Tarculovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 197.

105 To assess the intensity of a conflict, the following factors have been taken into consideration: ‘the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed’. See ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 90.

106 See ICTY, *Prosecutor v. Ljube Bošković, Johan Tarculovski*, above note 104, para. 197.

non-state participants are fulfilled. The criterion of organization has been interpreted as referring to the existence of headquarters, designated zones of operations, the ability to procure, transport and distribute arms,¹⁰⁷ the existence of a command structure, disciplinary rules and mechanisms, control of territory, the existence of recruits, military training, military strategy and tactics, and the ability of the armed group to speak with one voice.¹⁰⁸

US practice after the terrorist attacks on the United States on 11 September 2001 has been to liken the military intensity of attacks to the existence of an armed conflict¹⁰⁹ – the more intense a conflict is, the less should be demanded of its length. Nevertheless, a single act, even an attack as ferocious as those of 9/11, should not trigger a shift from a human rights regime to a humanitarian law regime and render the whole body of the laws of armed conflict applicable. The US approach with regard to the military commission in Guantánamo should give us pause, because it mainly serves to introduce military rather than civilian court jurisdiction over terrorist acts. It should be remembered that the minimum standard is applicable independently of the existence of an armed conflict, and that human rights law applies in situations of armed conflicts and peace alike. Contrary to the ‘armed attack’ in Article 51 of the Charter of the United Nations,¹¹⁰ the term ‘armed conflict’ in the *Tadić* definition refers to a continuing situation, and thus has a temporal element. However, by lessening the requirement of ‘sustained’ military operations (from Protocol II, Art. 1) to ‘protracted’ military operations (maintained in Rome Statute, Art. 8(2)(f)), the *Tadić* definition allows for certain interruptions in a conflict and thus leads to an earlier applicability of IHL.

In addition, a non-international armed conflict needs to take place ‘in the territory of a State’. To avoid gaps in humanitarian law, Marco Sassòli has maintained that ‘[a]ccording to the aim and purpose of IHL, this provision must be understood as simply recalling that treaties apply only to their state parties.’¹¹¹ In view of the recognition by the ICJ of the provisions of Common Article 3 as an emanation of general principles of law, namely ‘elementary considerations of humanity’, the territorial requirement of Article 3 can indeed be regarded today as

107 ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, above note 105, para. 90.

108 ICTY, *Prosecutor v. Ramush Haradinaj*, above note 40, paras. 63–88.

109 Section 5(c) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, available at www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf (last visited 10 March 2009), approvingly cited by Sassòli, above note 20, p. 8. Cf. preambles to Security Council Resolutions 1368 and 1373 (2001), justifying self-defence against the perpetrators regardless of their origin. For the same confusion of *jus ad bellum* and *jus in bello*, see the Memorandum by the Obama administration regarding detention authority, above note 79, pp. 4–5.

110 Cf. *Definition of Aggression*, Res. 3314 (XXIX), 14 Dec. 1974, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974), Annex, Art. 3; Albrecht Randelzhofer, ‘Article 51’, in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford/New York, 2002, Art. 51 MN 17–20. For the second Lebanon war, see Zimmermann, above note 83, pp. 107–9; for the mining of a naval vessel, see *Oil Platforms (Iran v. United States of America)*, Judgement, ICJ Reports 2003, p. 161, para. 72 (one attack may be sufficient to constitute an armed attack triggering the right of self-defence, but not in the absence of the requisite evidence).

111 Sassòli, above note 20, p. 8.

less relevant for the applicability of the minimum rules of IHL.¹¹² Here, humanitarian law and human rights law come together. Beyond that, however, it appears insufficient to identify a single, globally operating non-state movement as a transnational group to render the IHL of non-international armed conflict applicable. For that, a geographically defined group with a quasi-military organization would be required, not a loose ‘terrorism franchise’. Thus Al Qaeda in Pakistan or the Taliban in Afghanistan may qualify, but Al Qaeda’s broad network does not. In the event of a protracted use of military force by and against concrete group, humanitarian law governing non-international armed conflict appears applicable. However, this threshold should not be applied too lightly.

As a result, the so-called ‘war on terror’ is not an armed conflict as such, independently of time and space.¹¹³ Conversely, a concrete transnational armed conflict that takes place between a state and a terrorist organization and meets the *Tadić* criteria can be accommodated within the existing body of IHL.

Internal armed conflicts and human rights

In internal armed conflict, the law of non-international armed conflict is not the only body of law that applies to the situation on the ground. In addition to IHL, domestic law and human rights standards apply. However, international humanitarian law does not offer a detailed legal regulation of such conflicts. The provisions of Common Article 3 contain minimum rules. In addition, there is an evolving body of customary law. Protocol II introduced a very high threshold of applicability and cannot easily be invoked in every conceivable scenario of internal armed conflict. Moreover, many non-state entities would not be capable of meeting the criteria. So the existing provisions of Protocol II are not very helpful in the majority of internal asymmetrical conflicts. All doubts with regard to threshold issues must be resolved for the sake of ensuring better humanitarian protection – in accordance with the rationale and underlying philosophy of IHL. Common Article 3 should therefore be applied as widely as possible.¹¹⁴

Whereas in international armed conflict many human rights norms will be subject to IHL, international human rights law will apply in non-international armed conflict, subject only to permissible derogations and exceptions. In other words, while the IHL of non-international armed conflicts does not confer any

112 Common Article 3; Protocol I, Article 75; and customary law – see Henckaerts and Doswald-Beck, above note 42, as well as the Turku Declaration, above note 65.

113 Similarly, Noëlle Quénivet, ‘The applicability of international humanitarian law to situations of a (counter-)terrorist nature’, in Roberta Arnold and Pierre-Antoine Hildbrand (eds.), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges*, Edis, Lausanne/Berne/Lugano, 2005, p. 27: ‘As international humanitarian law does not know of the legal category “terrorism”, one needs to assess, on a case-by-case basis, whether such situations of a terrorist nature can be considered as an armed conflict’; Roberta Arnold, ‘Terrorism and IHL: A common denominator?’, *ibid.*, p. 22.

114 ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement (Trial Chamber), 25 June 1999, para. 49.

privilege upon non-state fighters, they remain protected by human rights norms. Below the threshold for the application of IHL, human rights are their only protection, but are fully applicable. As the *McCann* ruling by the European Court of Human Rights shows,¹¹⁵ such protection goes beyond that provided by IHL. In particular, whereas most protections of IHL are not applicable to persons participating in hostilities (e.g. Protocol I, Art. 51(3); Protocol II, Art. 13(3)), terrorists in peacetime are protected by the right to life and thus by a proportionality standard.

There is a rising chorus of human rights scholars who want to do away with IHL altogether, at least in non-international conflicts, and merge IHL with human rights law.¹¹⁶ In its decisions on the internal conflict in Chechnya, the European Court of Human Rights has moreover managed to deal with a particularly egregious use of armed force against civilians without even mentioning IHL in the operative parts of its judgment, applying a general standard of proportionality instead.¹¹⁷ Indeed, if human rights standards were stricter than IHL, such a merger would be beneficial to the victims of non-international armed conflict.

Alas, this solution is far too easy. The main disadvantage of the applicability of human rights norms is their lack of precision regarding the conduct of hostilities, as well as their reliance on the indeterminate standard of proportionality.

Proportionality in IHL and in international human rights refers to two different concepts with different scopes of application. It appears questionable whether the principle of proportionality as applied in human rights law¹¹⁸ will have the same constraining effects on armed forces during hostilities. Although there are certain criteria for determining proportionality in human rights law¹¹⁹ that are applicable to armed forces while carrying out law enforcement duties, most human rights rules are not as specific as respective IHL provisions created for armed conflict. A chaos of different standards must be prevented that would work to the detriment rather than to the benefit of the victims of armed conflict.

115 ECHR, *McCann v. United Kingdom*, above note 82.

116 See Francisco Forrest Martin, 'Using international human rights law for establishing a unified use of force rule in the law of armed conflict', *Saskatchewan Law Review*, 2001, Vol. 64, No. 2, p. 347; Roberta Arnold and Noëlle Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Martinus Nijhoff, Leiden/Boston, 2008.

117 See ECHR, *Isayeva v. Russia*, Application No. 57950/00, Judgment (Chamber), 24 February 2005 (final 6 July 2005); ECHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Applications Nos. 57947/00, 57948/00, 57949/00, Judgment (Chamber), 24 Feb. 2005 (final 6 July 2005). For criticism see Andreas Paulus, 'The protection of human rights in internal armed conflict in Europe: Remarks on the *Isayeva* decisions of the European Court of Human Rights', *Uppsala Yearbook of East European Law*, 2006, p. 61; 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.

118 Human Rights Committee, *Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, paras. 13.2–13.3.

119 According to the Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, force can only be used 'in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.' Adopted by the UN General Assembly in Resolution 45/166, 18 December 1999.

Therefore IHL in internal conflicts cannot be simply substituted by human rights; rather, the existence of a protracted armed conflict between groups of a military nature and at a military scale require the application of IHL. Complementary to IHL, international human rights standards remain applicable.¹²⁰

Reciprocity

Finally, some political circles seem to have regarded the essential requirements of IHL as a luxury inapplicable at a time of existential threats stemming from terrorists who may acquire weapons of mass destruction sooner rather than later.¹²¹ They argue that IHL is technically inapplicable to situations of 'asymmetrical warfare' in which only one party to the conflict is willing to uphold the laws of war, on condition of reciprocity – a condition that is absent in 'anti-terrorist' warfare.¹²²

However, reciprocity in IHL was never meant to suspend the application of specific rules contained in it because of non-observance by the other side,¹²³ but was intended to guarantee the equal applicability of IHL to all parties to a conflict. This 'general' reciprocity has remained in place, under Common Article 2(3) of the Geneva Conventions, ever since that same article repudiated the general participation clause of the 1899/1907 Hague Convention IV, which had led to the technical inapplicability of the Hague Conventions in both world wars.¹²⁴ With regard to peoples exercising their right to self-determination pursuant to its Article 1(4), Protocol I insists on the same reciprocity by requiring from them, in Article 96(3), an explicit acceptance and application of IHL.

In non-international armed conflict, on the contrary, Common Article 3 does not contain such a requirement of reciprocity. As its Article 1 shows, however, Protocol II appears to regard some reciprocity between the armed forces involved as a precondition for the applicability of the Protocol. Certainly, both Protocol II and Common Article 3 are equally applicable to all parties to such a conflict.¹²⁵ But

120 See 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, No. 864 (2006), pp. 881–904.

121 For one of the most egregious examples see Alberto Gonzales (White House Legal Counsel and later US Attorney-General), Memorandum for the President, Draft, 25 Jan. 2002, in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, Cambridge, 2005, pp. 118–19: '[T]his new paradigm [the war against terrorism] renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.'

122 See in particular the claim by the Bush administration that the 'war on terror' was a transnational armed conflict to which the laws of war applied, in the sense that ordinary law was suspended, but did not protect 'illegal enemy combatants', aka terrorists, from any abuse such as waterboarding – see in particular Bellinger, above note 69. For a general analysis of asymmetry in modern armed conflict, see Schmitt, above note 2, pp. 13–15, 41–2.

123 See in particular Sandoz, Swinarski and Zimmermann, above note 37, paras. 49–51, who even speak of an 'absolute' 'prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law'. See also Article 60(5) of the Vienna Convention on the Law of Treaties, excluding treaties of a humanitarian character from the application of reciprocity in the event of a breach of those treaties.

124 For details, see Pictet, above note 12, Vol. 1, pp. 34–7, and Vol. 4, pp. 22–5.

125 Sylvie Junod, 'Scope of this protocol', in Sandoz, Swinarski and Zimmermann, above note 37, para. 4442–4444.

whereas Article 1(1) of Protocol II ensures that the forces of the non-state parties in question are similar to an army by requiring them to have a command structure and control a certain amount of territory, Common Article 3 does not contain any requirement of this sort. The guarantees contained therein are much more similar to those in Article 75 of Protocol I, in that the said articles contain minimum guarantees, regardless of reciprocity, for any person in the power of a party to conflict.¹²⁶ The ICJ has confirmed this interpretation in its *Nicaragua* judgment by deeming these rules to derive from ‘elementary considerations of humanity’, independently of any element of reciprocity.¹²⁷ Thus most rules of IHL – in particular those relating to non-international armed conflicts – are applicable regardless of reciprocity. Asymmetrical conflict consequently does not entail the non-applicability of the minimum requirements of IHL.

Conclusion

While the rise of transnational conflicts between states and non-state groups has created numerous problems for the identification of armed conflicts, evidence suggests that the situations to which IHL applies have become easier to identify thanks to the recent development of that body of law. Since the *Hamdan* and *Boumediene* rulings by the US Supreme Court, it seems universally accepted that armed conflicts with non-state groups do not constitute a ‘law-free zone’ or a ‘legal black hole’, but are subject to IHL or to human rights provided by international and/or domestic law.¹²⁸

As argued by some writers, the applicability in practice of the norms of non-international armed conflict depended on its identification as such by a state.¹²⁹ However, it was precisely that self-declaratory nature of the applicability of the laws of war that led the drafters of the Geneva Conventions towards an objective criterion for the existence of an international armed conflict. The deference to states to determine the existence of armed conflict should have its limits. Unlike some parts of the laws of war, such as the law of neutrality, the task of international humanitarian law is to protect those who do not, or no longer, take part in hostilities and to avoid unnecessary casualties. Such protection cannot depend on auto-interpretation by those whom IHL attempts to restrain.

126 On their customary nature see note 65 above.

127 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 30, para. 218. For the ‘elementary considerations of humanity’ as a source of international law, see ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), ICJ Reports 1949, p. 22.

128 On the attempt to create such a zone at Guantánamo Bay, see, famously, Johan Steyn, ‘Guantánamo Bay: the legal black hole’, *International & Comparative Law Quarterly*, Vol. 53 (2004), p. 1. The recent judgment of the US Supreme Court in *Boumediene* has apparently definitively laid this attempt to rest – see *Boumediene v. Bush*, 128 SCt 2229 (2008), reprinted in 47 ILM 650 (2008). On his second day in office, President Obama vowed to close Guantánamo – see LaFranchi and Lubold, above note 69.

129 See Lindsay Moir, ‘Towards the unification of international humanitarian law’, in Richard Burchill, Nigel D. White and Justin Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCouberty*, Cambridge University Press, Cambridge, 2005, pp. 108, 126; Pejić, above note 9.

In this article we have identified at least three reasons for optimism as to the development of a coherent framework of IHL for both international and non-international armed conflict. First, the recognition of a substantial amount of customary international law applicable to both international and non-international armed conflict¹³⁰ has somewhat reduced the significance of the differentiation between them, although even supporters of this development agree that the difference remains important with regard to the status of the parties to conflict and details of the applicable rules. Second, the apparent endorsement of the *Tadić* definition of armed conflict by Article 8(2)(f) of the Rome Statute, while formally applicable only under international criminal law, has somewhat lessened the requirements set for non-international armed conflicts by Article 1(1) of Protocol II. We would suggest a similar extension of the scope of applicability of the customary rules reflected in Protocol II. Finally, the recognition in the US Supreme Court's *Hamdan* judgment that Common Article 3 provides minimum rules for all armed conflicts, and the plurality opinion that Article 75 of Protocol I also applies,¹³¹ has reinforced earlier views to the same effect.¹³² To our mind, it does not matter much whether this solution is regarded as an innovative reading of the Geneva Conventions as a 'living document', or as a development of customary law in the direction of minimum humanitarian rules applicable in any situation, as already put forward by the Turku Declaration of 1990.¹³³

However, important divergences persist, in particular concerning the definition of 'armed conflict', which is of central importance as a clear and unequivocal 'trigger' for the application of IHL. While the *Tadić* definition has helped to find a common threshold for non-international armed conflicts, it remains unclear whether the definition of an international armed conflict should not be extended to each and every confrontation of armed forces.¹³⁴ In the meantime, Common Article 3 has developed into a minimum yardstick for any armed conflict. The separate treatment of Common Article 3 in Article 8(2)(c) and (d) of the Rome Statute suggests as much.

With this framework in mind, this article has attempted to show that the conflicts of the early twenty-first century can indeed be categorized more or less convincingly. We are faced not with a single confrontation with 'terrorism' as such, but with a range of warlike conflicts between states and non-state entities, some of them international (Afghanistan 2001–2, Iraq 2003–4 and Lebanon 2006 after the

130 See in particular ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, paras. 96, 97, 119; on the details see Henckaerts and Doswald-Beck, above note 42.

131 US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, paras. 2795 (majority opinion) and 2797 (Justice Stevens, plurality opinion).

132 ICJ, *Armed Activities on the Territory of the Congo*, Separate Opinion of Judge Simma, above note 65, paras. 26–28; Opinion of the European Commission for Democracy through Law (Venice Commission), adopted at its 57th Plenary Session, Venice, 12–13 December 2003, Opinion No. 245/2003, Council of Europe Doc. No. CDL-AD (2003) 18, para. 38.

133 Turku Declaration, above note 65.

134 Pictet, above note 12, pp. 20–1. See also Quéguiner, above note 54, p. 275: '[L]es critères de durée ou d'intensité des combats sont indifférents à la qualification d'un conflit armé international.'

attacks on government and public facilities), others non-international (US–Taliban and Al Qaeda in Afghanistan/Pakistan since 2002,¹³⁵ Gaza 2008–9), while others were probably not an armed conflict at all (Yemen 2002¹³⁶). It is particularly important to maintain the equal application of IHL despite the categorization of the parties to such a conflict according to *jus ad bellum* or domestic law. This is why Article 1(4) of Protocol I has turned out to be so problematic. Non-state groups continue to be unable to claim the ‘combatant’s privilege’ as lawful belligerents and hence a legal ‘right’ to use armed force against anybody. The applicability of IHL thus does not depend on ‘reciprocity’, but only on the binding nature of IHL for all parties to a conflict.

There is no legal notion of a general or global ‘war on terror’.¹³⁷ The struggle against terrorist groups does not constitute a new kind of war. Terrorist acts on any scale may occur outside situations of armed conflict. In the absence of activities amounting to an armed conflict, human rights law and domestic law apply to terrorist activity. The law of armed conflict provides a legal framework only if terrorism occurs within an armed conflict¹³⁸ or when terrorist groups have achieved a sufficient capacity to wage a protracted armed conflict. The threat of terrorism by a limited number of persons who do not constitute a distinct armed group able to fight a ‘protracted armed conflict’ should, when it occurs within the context of an existing armed conflict or occupation, be dealt with in accordance with Article 5 of the Fourth Geneva Convention.

As a matter of course IHL prohibits, in both international and non-international armed conflict, any act which could be classified as terrorist, especially attacks against civilians, indiscriminate attacks and the spreading of terror among the civilian population. As the independent expert of the UN Commission on Human Rights, Robert Goldman, has pointed out, ‘although humanitarian law proscribes terrorism, the fact that such acts are committed during an armed conflict does not alter either the legal status of the hostilities or of the parties involved or the duty of the parties to observe humanitarian law.’¹³⁹ But it is also unequivocally stated that ‘[t]here is no circumstance in which any person, however classified, can legally be placed beyond the protection of international

135 Mohammad-Mahmoud Ould Mohamedou, *Non-linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States*, Harvard University Program on Humanitarian Policy and Conflict Research, July 2005, available at www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf (last visited 8 March 2009).

136 See Mary Ellen O’Connell, ‘Ad hoc war’, in Horst Fischer, Ulrike Froissart and Wolff Heintschel von Heinegg (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, BWV, Berlin, 2004, pp. 415–16; Quéniwet, above note 112, p. 49.

137 Hans-Peter Gasser, ‘Acts of terror, “terrorism” and international humanitarian law’, *International Review of the Red Cross*, Vol. 84, No. 847 (2002), p. 556; Jelena Pejić, ‘Terrorist acts and groups: a role for international law?’, *British Yearbook of International Law*, Vol. 75 (2004), pp. 85–8, argues that beyond the case of the 2001–2 conflict in Afghanistan, the contemporary ‘war on terror’ is no armed conflict at all.

138 Gasser, above note 137, pp. 547–70.

139 *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, E/CN.4/2005/103, para. 18.

humanitarian law in *any* armed conflict. It has been ... rightly emphasized that new legal rules are not needed, but better respect for, and strict compliance with, existing law'.¹⁴⁰

So we may be quite a long way from a 'unification of international humanitarian law',¹⁴¹ but the all too fashionable fear of a 'fragmentation'¹⁴² of IHL is not justified either. Of course, the separation between international and non-international armed conflict may not always be satisfactory – why, for instance, should the international nature of the armed conflict in the Gaza Strip depend on whether or not the Israeli occupation had ended? Indeed, the very distinction between international and non-international conflict is unsatisfactory from a humanitarian standpoint, as the ICTY has convincingly pointed out in *Tadić*.¹⁴³ Rather, the distinction is a concession to states so that non-state groups will not take advantage of the applicability of IHL to engage in armed conflict in the first place.

But the humanitarian mission of IHL, namely the protection of the civilian population and all persons *hors de combat* and the avoidance of unnecessary suffering, remains as vital to alleviate the effects of armed conflict in the twenty-first century as it was in the battles that led to its inception in the nineteenth century. To carry out this mission, IHL continues to need a triggering mechanism that can be neutrally applied, irrespective of the deeper reasons and justifications for the armed conflict. By combining a criterion for the existence of a 'protracted armed conflict' with the assertion that certain humanitarian principles are applicable in any conflict, regardless of any 'trigger', such a mechanism is provided. At times, international humanitarian law may have to face the challenge of taming the last war. Whatever lies ahead, the observance of that law remains a precondition for ultimate success, in other words, peace. In Sun Tzu's words, 'those skilled in war cultivate the Tao and preserve the laws and are therefore able to formulate victorious policies'.¹⁴⁴

140 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, International Commission of Jurists, Geneva, 2009, p. 65.

141 Moir, above note 129, pp. 108–28.

142 On the 'fragmentation' of international law see Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 2006 (with an extensive bibliography).

143 See ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 119.

144 Sun Tzu, above note 4, p. 88, para. 15. The comment by Tu Mu explains: 'The Tao is the way of humanity and justice; "laws" are regulations and institutions.'

Armed violence in fragile states:

Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties

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Abstract

The gradual process of state failure is commonly accompanied by armed violence. Apart from occasional outbreaks, armed violence in fragile states tends to smoulder with relatively low intensity, often over an extended period of time. The actual level of violence may oscillate around the level of violence that is commonly accepted as triggering the application of international humanitarian law (IHL). In addition, because of the specific objectives typically – though not necessarily always – pursued by armed groups in failed state conflict scenarios, cross-border spillover effects are fairly frequent. The qualification of armed violence in such scenarios according to the conflict categories laid down in IHL thus raises some rather specific issues. Moreover, weak states, failing states, and ultimately failed states are increasingly perceived as a key threat to international security. States seem increasingly inclined to assume sporadic order maintenance functions in the place of disabled governments so as to maintain the perceived security threat at a tolerable level. Current efforts to repress acts of piracy off the coast of Somalia are an evident case in point. Since the Security Council, in Resolution 1851, at least implied the possibility of applying IHL in that specific

* The views expressed in this article reflect the author's opinion and not necessarily those of the ICRC.

context, the application of this legal regime to sporadic law enforcement operations by third parties also demands further scrutiny.



The complex process of what is commonly referred to as ‘state failure’ is usually accompanied by, and typically associated with, armed conflict. Indeed, the two phenomena all too often go hand in hand and mutually reinforce each other, with one frequently being the root cause of the other. The absence of effective government control and the inability to exercise basic state functions provide fertile ground for disorder, crime and ultimately armed conflict to thrive. Conversely, internal violence and armed conflict are causes of instability and potential catalysts of state failure. Once this downward spiral is set in motion, the likelihood of a protracted crisis is increased immensely. For more than a decade the situation in Somalia has continuously been qualified by the Security Council as a threat to peace. This creates innumerable humanitarian challenges and raises an array of complex legal questions at various levels ranging from *jus ad bellum* to *jus in bello*. The latter will be the primary focus of this contribution.

In an environment in which the state as the central addressee of international legal obligations, especially human rights obligations,¹ is largely inexistent, it is of crucial importance to determine the applicable framework of humanitarian law and work towards the creation of incentives for compliance. This compliance with IHL throughout the armed conflict may be a first and admittedly tentative step towards a return to the rule of law and reconciliation between warring factions in the aftermath of hostilities. Yet the complexity and specific dynamic of armed violence in fragile, failing and failed states and the diversity and relative volatility of players, often coupled with activities of transnational terrorist and criminal networks, render particularly difficult the very determination of which legal framework is applicable and whether the situation is to be qualified as an armed conflict within the meaning of IHL.

It is against this background that the following brief article considers whether, and if so, to what extent, the specific situation of failed and failing states (i.e. the absence of government control in a given state) influences the qualification of armed violence as an armed conflict under IHL. In addition, it will focus on two phenomena that typically, albeit not necessarily always, accompany conflicts in fragile states: (a) the spillover of armed clashes into neighbouring countries; and (b) the exercise of specific, very limited, law enforcement functions by third parties that aim to fill the void left by a disabled government. Regional spillover effects are frequent in failed state conflict scenarios: they increase the number of players involved in the conflict and they add an international, cross-border element that may complicate a precise qualification of the situation. What is more, in times of

1 But see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

transnational terrorism and powerful criminal networks operating on an international scale, states are ever more likely to perceive the absence of government control in a given state as a potential threat to their own security interests.² They may thus be increasingly inclined to step in and take over at least rudimentary, rather sporadic, order maintenance functions sufficient to maintain the perceived security threat at a tolerable level. Current efforts to repress acts of piracy and armed robbery at sea off the coast of Somalia are a case in point.³ Such law enforcement efforts by third parties may overlap with an ongoing armed conflict between local players and add another level of intricate questions pertaining to the identification of the legal framework applicable.

Fragile statehood: weak states, failing states and failed states

Fragile statehood can perhaps best be defined in terms of state structures and institutions with severe inadequacies in their performance of key tasks and functions vis-à-vis their citizens.⁴ In terms of public international law, the relevant criterion is the loss of government control, which may of course vary in form and extent.⁵ Obviously, this concept covers a broad spectrum of states.⁶ The loss of government control and the ability to exercise basic state functions is a gradual process; at times it may even be the result of calculated politics rather than 'weakness' in the true sense of the word.⁷ The inability of a state to effectively perform one or other of the basic state functions – namely to provide security and ensure well-being and the rule of law – is frequent,⁸ whereas the inability to perform any of them is rather exceptional. Similarly, while loss of control over certain delimited parts of a state's territory is not uncommon, total and protracted loss of central control over the entire territory is rare and arguably warrants the specific categorization and suggestive designation as a failed state, in view of the

2 See e.g. European Union, *A secure Europe in a better world: European Security Strategy* (hereinafter *European Security Strategy*), Brussels, December 2003, pp. 3ff., available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> (last visited 2 July 2009).

3 See SC Res. 1851, 16 December 2008.

4 Ulrich Schneekener, *Internationales Statebuilding: Dilemmata, Strategien und Anforderungen an die deutsche Politik*, SWP Research Paper, German Institute for International and Security Affairs (SWP), Berlin, October 2007, p. 7; available at http://www.swp-berlin.org/de/common/get_document.php?asset_id=3993 (last visited 2 July 2007).

5 Robin Geiß, 'Failed States', *Die normative Erfassung gescheiterter Staaten*, Duncker and Humblot, Berlin, 2005.

6 See Robert I. Rotberg, 'Failed states, collapsed states, weak states: Causes and indicators', in R. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Brookings Institution Press, Washington DC, 2003, pp. 1–25.

7 In order to consolidate their power in the capital, governments may opt to neglect the periphery, perhaps even to instigate erosion or conflict so as to divert tensions from the capital, and at the same time deliberately 'outsource' the performance of certain state functions to third parties. See A. Weber, *Kriege ohne Grenzen und das 'erfolgreiche Scheitern' der Staaten am Horn von Afrika*, SWP Research Paper, Berlin, September 2008, p. 6.

8 See U. Schneekener, 'States at risk: Zur analyse fragiler Staatlichkeit', in U. Schneekener (ed.), *Fragile Staatlichkeit*, Nomos, Baden-Baden, 2006, pp. 9–40.

various implications it entails at the international level. Even in weak, failed and failing states, chaos and anarchy are not necessarily the rule, nor do they necessarily prevail throughout the entire country.⁹ Contested forms of rudimentary political order, based on traditional structures of communal self-organization, often re-emerge as central structures fade. In that case, various non-state entities will claim or indeed possess a locally confined monopoly on the use of force and control access to natural resources, the remaining infrastructure and international humanitarian aid.¹⁰ Consequently, state-building attempts – by definition designed to re-install the central state monopoly on the use of force – will be perceived as hostile by those who have set up consolidated local power monopolies, as state-building in the classic sense would necessitate a redistribution of power to their disadvantage.

To give a better understanding of the broad range of fragile statehood, it is often suggested that a distinction be made between weak states, failing states and ultimately failed or collapsed states. With respect to the latter category, there seems to be widespread agreement that the only ‘failed state’ in this narrow sense is Somalia where, despite the inauguration of a Transitional National Government (TNG) in 2000 and sporadic periods of seemingly re-emerging stability, there has on the whole been hardly any government control ever since the former President Siad Barre was ousted in 1991. Nevertheless, even in this arguably most extreme case of protracted loss of government control, neither the country’s sovereignty nor its statehood – one of the defining criteria of statehood is, after all, the exercise of effective government control – has ever been seriously questioned.¹¹ For example, Security Council Resolutions 1816, 1833, 1846 and most recently 1851 dealing with the repression of piracy off the coast of Somalia, while acknowledging the inability of the Transitional Government to repress piracy in the region, explicitly reaffirm respect for the sovereignty, territorial integrity, political independence and unity of Somalia.¹² This affirmation may have to be ascribed to no more than the mere existence of the Transitional Government. In 1992, Security Council Resolutions 733 (1992) and 794 (1992) did not contain any such explicit affirmation of Somalia’s sovereignty,¹³ but nor did those resolutions, based on Chapter VII of the UN Charter, cast Somalia’s sovereignty or statehood in doubt. Indeed, throughout the entire period from 1992, despite an oftentimes vacant seat, Somalia has

9 U. Schneckener, *How transnational terrorists profit from fragile states*, SWP Research Paper, Berlin, 2004, pp. 5, 10; available at: http://www.swp-berlin.org/en/common/get_document.php?asset_id=2406 (last visited 9 July 2009).

10 U. Schneckener, ‘Fragile statehood, armed non-state actors and security governance’, in A. Bryden and M. Caparini (eds.), *Private Actors and Security Governance*, Berlin, 2006, pp. 23, 34.

11 Montevideo Convention on the Rights and Duties of States, 23 December 1933; LNTS Vol. CLXV, 25. According to Article 1 of the Montevideo Convention: ‘The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.’ But see also J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford, 2007.

12 SC Res. 1816, 2 June 2008; SC Res. 1838, 7 October 2008; SC Res. 1846, 2 December 2008; SC Res. 1851, 16 December 2008.

13 SC Res. 733, 23 January 1992; SC Res. 794, 3 December 1992.

undisputedly remained a member of the United Nations.¹⁴ Similarly, despite occasional suggestions in relation to failed states for certain limitations (by way of a teleological reduction) to the prohibition on the use of force laid down in Article 2(4) of the UN Charter and the non-intervention principle in its Article 2(7),¹⁵ the continuity of a state that lacks government control even over a prolonged period of time has not been questioned either.¹⁶

State failure: a problem of global reach

In 1992, Security Council Resolution 794 was considered a milestone resolution because, without explicit reference to any cross-border effects, it confirmed a threat to peace in the sense of the UN Charter's Article 39 solely on grounds of 'the magnitude of the human tragedy caused by the conflict in Somalia'.¹⁷ During the following years, failed and failing states were associated first of all with humanitarian catastrophes and, in view of the risk of local spillover effects, at the most were regarded as a regional problem. This perception has changed, at the latest since September 2001. Today, state failure in and of itself is understood – largely because of the attractiveness of weak states to transnational terror networks and transnational criminal organizations, and irrespective of an acute humanitarian crisis – as a concern of global reach.¹⁸ Afghanistan and Pakistan have become security priorities for the international community; both the US National Security Strategy (2002) report and the European Security Strategy (2003) report have identified state failure as a central threat to international security.¹⁹ In 2009, amid the turmoil of a global financial and economic crisis, the risk of further weakened state structures and occurrences of state failure is clearly as pertinent as ever.²⁰

14 According to Articles 3 and 4 of the UN Charter, membership in the United Nations is only open to states.

15 Matthias Herdegen, 'Der Wegfall effektiver Staatsgewalt', in *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34, 1996, p. 49 (pp. 58ff.).

16 See e.g. Daniel Thürer, 'The failed state and international law', *International Review of the Red Cross*, Nr. 836, 1999, pp. 731–761.

17 SC Res. 794, 3 December 1992.

18 It has been shown that weak and failing states, in which government supervision can be evaded, are generally – except for Afghanistan – more attractive to transnational terrorist networks that need a certain level of infrastructure than failed states and areas affected by a fully fledged armed conflict. See Schneckener, above note 4, p. 30.

19 The White House, *The National Security Strategy of the USA*, September 2002, p. 4, available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> (last visited 2 July 2009); European Union, *European Security Strategy*, above note 2, p. 5. See also *Report on the implementation of the European Security Strategy: Providing security in a changing world*, S407/08, Brussels, 11 December 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf (last visited 2 July 2009).

20 It is primarily against this background that the high-level so-called '3C Conference' – the 3Cs standing for a coherent, co-ordinated and complementary approach – was convened by the Swiss government in association with the OECD, the United Nations, the World Bank and NATO in March 2009. Document available at: http://www.3c-conference2009.ch/en/Home/Conference_Papers/media/Afghanistan%20paper%20final%20final.pdf (last visited 9 July 2009).

It remains to be seen whether the Security Council will follow through and one day consider state failure, as such, as a threat to peace in the sense of Article 39, irrespective of an impending humanitarian crisis. The better view may be to regard fragile statehood merely as a catalyst for potential threats to peace rather than as a threat *per se*.²¹ However, past experience has shown that once the potential threats commonly associated with fragile statehood start to materialize,²² the mutually reinforcing effects of fragile statehood and those various security threats will soon lead to a consolidated and persistent crisis that becomes more and more difficult to counter. Preambular paragraph 11 of Security Council Resolution 1851 notably determines ‘that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region’.²³ States may be increasingly inclined to seek avenues for more preventive and less costly action. Categorizing state failure – and more specifically, the absence of government control and the inability to perform basic law enforcement functions – as a threat to peace may pave the way for such a preventive approach.

Weak, failing and failed states: international relations

In a primarily state-centred international system that after two world wars was primarily designed to curb overly powerful states, the conceptualization and integration of overly weak states has proved quite problematic. States that lack a central government are not only incapable of exercising essential state functions domestically; they are also unable to operate on the international plane. This has far-reaching implications. Without a representative government, a state cannot enter into international agreements and may even be incapable of requesting and consenting to urgently required interventions by third parties; diplomatic channels lie dormant, and international representation – if any – will be reduced to a bare minimum.²⁴ Weak, failing and especially failed states, therefore, are prone to international isolation. In 1999, the Secretary-General of the United Nations noted that ‘the representation of the Somali people in intergovernmental and

21 See Schneckenner, above note 10, p. 24.

22 The US National Security Strategy report states: ‘America is now threatened less by conquering states than we are by failing ones’. See *The National Security Strategy of the United States of America*, Washington DC, September 2002. The European Union’s *European Security Strategy*, above note 2, p. 5, emphasizes that ‘[c]ollapse of the State can be associated with obvious threats, such as organised crime or terrorism. State failure is an alarming phenomenon, that undermines global governance, and adds to regional instability’. The report of the UN Secretary General’s High-Level Panel on Threats, Challenges and Change, *A more secure world*, initiated by UN Secretary-General Kofi Annan, emphasizes that the issue of fragile statehood is at the core of most of today’s relevant security problems and identifies six ‘clusters of threat’, but without designating as a threat failing and failed states as such – see UN Secretary General’s High-Level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations, New York, 2004, pp. 23ff.

23 SC Res. 1851, 16 December 2008.

24 Geiß, above note 5, pp. 129–150.

international fora [is] absent'.²⁵ What is more, the channels through which international assistance is commonly delivered are traditionally 'state-centred'. They focus on established and recognized state institutions such as the various ministries or – in the case of financial assistance – on central and national banks. It is telling, perhaps, that as early as 1999 the UN Secretary-General urged international financial institutions such as the World Bank and the European Development Fund to exercise flexibility in situations in which a central government and governmental institutions are absent.²⁶ The Cotonou Agreement in particular makes explicit provision for supporting states which, in the absence of normally established government institutions, have not even been able to sign or ratify the Agreement.²⁷ Still, governmental bodies often have a certain predisposition, based on their common *modus operandi*, to engage with other governmental bodies and recognized state institutions and it seems that the readiness to engage with a variety of different (non-state) entities at field level could still be improved, especially under the umbrella of a whole-of-government approach.²⁸

The legal qualification of armed violence within a failed state

The conflict scenario in a 'failed state' is typically (a legal analysis of these patterns demands some degree of generalization) made up of hostilities between various armed groups. In the absence of government forces, this scenario cannot be qualified as either an international armed conflict or a non-international armed conflict in the sense of Article 2(1) of Additional Protocol II.²⁹ Thus from the outset only Article 3 common to the four 1949 Geneva Conventions, which encompasses armed conflicts that take place between armed factions within a country and in which the government is not involved,³⁰ as well as those rules of customary

25 *Report of the Secretary General on the Situation in Somalia*, S/1999/882, 16 August 1999, para 63.

26 *Ibid.*, para 72.

27 This was a reaction to the fact that notably Somalia had not been able to sign the Lomé IV Convention, a requirement for entitlement to benefit from the 7th and 8th European Development Funds. According to Article 93(4) of the Cotonou Agreement, which replaced the Lomé Convention in 2000, the Council of Ministers may decide to accord special support to members of the African, Caribbean and Pacific group of states which, in the absence of normally established government institutions, have not been able to sign or ratify this Agreement.

28 See Organisation for Economic Co-operation and Development (OECD), *Whole of government approaches to fragile States*, Paris, 2006, available at: <http://www.oecd.org/dataoecd/15/24/37826256.pdf> (last visited 8 July 2005).

29 Protocol II Additional to the Geneva Conventions of 1949 and Relating to Non-International Armed Conflicts. In reality, of course, various armed groups maintain relations with and may receive support of some sort from states, and raging chaos may well be the result of calculated government policy. However, indirect support can take various forms, and in most instances states will be keen to keep such support secret and to avoid attribution which could possibly have an impact on the qualification of the armed conflict, even though it would still have to be qualified as a non-international armed conflict if states are only involved on one side of it.

30 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter Appeal on Jurisdiction), 2 October 1995, paras 67, 70.

international humanitarian law that become applicable at the specific threshold of Common Article 3, are potentially applicable.³¹

‘Low-intensity conflicts’

The decisive question in a failed state scenario without outside interference from third states is therefore whether the threshold of a non-international armed conflict has been reached. In *Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that a non-international armed conflict in the sense of Common Article 3 exists when there is protracted armed violence between organized armed groups within a state.³² Subsequent judgments of the ICTY, while using *Tadic* as a starting point,³³ have devoted particular attention to the intensity of the armed violence and have elaborated on the required degree of organization of the armed groups involved.³⁴ In *Limaj*, the ICTY confirmed that ‘the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and the organization of the parties ...’³⁵ In practice, ascertaining this particular threshold on a case-by-case basis, namely the intensity and existence of protracted armed violence as well as a certain minimum level of organization of the armed groups involved, may prove problematic. Especially in conflict situations in weak, failing and failed states the organizational structure of the parties involved commonly remains rather basic and the level of violence at times oscillates around the threshold of violence required by Common Article 3.

31 See also Geiß, above note 5, pp. 225–244.

32 ICTY, *Prosecutor v. Tadic*, Appeal on Jurisdiction, above note 30, para 70. See also Sonia Boelaert-Suominen, ‘The Yugoslav Tribunal and the common core of humanitarian law applicable to all armed conflicts’, *Leiden Journal of International Law*, Vol. 13, 2000, p. 619, at pp. 632ff.; Ch. Greenwood, ‘The development of international law by the International Criminal Tribunal for the former Yugoslavia’, *Max Planck Yearbook of United Nations Law*, Vol 2, 1998, p. 97, at p. 114.

33 For an in-depth analysis of this jurisprudence see Eve LaHaye, *War Crimes in Internal Armed Conflicts*, Cambridge 2008, pp. 9ff.

34 See e.g. ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, para 59; ICTY, *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, paras 567–69; ICTY, *Prosecutor v. Mucić et al. (Čelebići Camp)*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, paras 183–92; ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, paras 83–174.

35 ICTY, *Prosecutor v. Limaj*, above note 34, para 170. Various indicative criteria have been suggested in the literature and in international jurisprudence in order to facilitate the determination whether a given situation has met the required threshold to qualify as a non-international armed conflict: ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 49, 60; ICTY, *Prosecutor v. Limaj*, above note 34, paras 94–134; LaHaye, above note 33, pp. 5ff. With regard to the intensity of the armed violence the following factors have been taken into consideration: the recurrence and gravity of attacks, the temporal and territorial expansion of violence, the ‘collective character’ of hostilities, control over territory, the distribution and type of weapons employed, and whether the conflict received the attention of the Security Council or, going one step further, whether it was specifically addressed or even qualified as such by the Security Council; see G. Nolte, ‘The different functions of the Security Council with respect to humanitarian law’, in V. Lowe, A. Roberts *et al.* (eds.), *The Security Council and War*, Oxford University Press, Oxford, 2008, pp. 519–535. Conversely, the *Limaj* case has been particularly instructive in terms of the required degree of organization of an armed group.

Failed and failing states are often associated with ‘low-intensity conflicts’ in which fluctuating levels of violence and sporadic outbreaks of hostilities predominate over sustained combat operations and large-scale military operations. Small arms and crude tools such as machetes and axes are prevalent weapons in such conflict scenarios, and fighters, partly composed of child soldiers and other forced recruits, are often ill-trained, inexperienced and only rudimentarily organized at best. The absence of large-scale military confrontations is explained by the fact that conflicts in failed and failing states are characterized by a (changing) variety of warring factions which, unlike those in traditional anti-regime conflicts, are rarely out to gain central power and oust the central government; this would involve battling against more organized military forces. Instead they strive for regional control over individual strategic and economic focal points.³⁶ Motivated primarily by economic gain and – unlike guerrilla forces in anti-regime conflicts – largely independent from and relatively indifferent to acceptance by the local civilian population, these factions have little or no interest in exercising basic state functions or assuming responsibility over an extended part of the country’s territory.³⁷ Rather than overcoming the enemy, which is a notion inherent to the humanitarian law rules on the conduct of hostilities, it may be more important to them to create and maintain societal instability, to disrupt and dissolve traditional communal networks and, more generally, to prevent a re-emergence of effective state control over certain parts of the country. In 1992, when describing the situation in Somalia, the Security Council referred to a ‘proliferation of armed banditry’ and spoke of a ‘sporadic outbreak of hostilities’.³⁸ Against this background, some discussion could conceivably have arisen over the qualification of the situation in Somalia throughout the entire period from 1992 until 2009 as a non-international armed conflict. Yet in the past, even after the establishment of the Transitional National Government in 2000 and leaving aside interference by third states, the situation in Somalia has continuously been qualified as such, without any particular attention to the delineation of armed conflicts and situations of violence that remain below that threshold.³⁹

This qualification certainly appears to be maintainable, especially in view of the IACHR’s finding in the famous *Tablada* decision where the Court held

36 Schneckener, above note 4, p. 13.

37 Schneckener, above note 10, p. 23.

38 SC Res. 775, 28 August 1992; SC Res. 767, 24 July 1992; SC Res. 897, 4 February 1994.

39 According to the report of the UN Independent Expert for Somalia of 14 January 2002: ‘... international humanitarian law relating to non-international armed conflict applies in the whole territory of Somalia, irrespective of whether a specific area is engulfed in active fighting or not’; E/CN.4/2002/119, 14 January 2002, para 31. The report further stated that: ‘This application extends to the “Puntland” regional government in the north-east, which considers itself part of Somalia, as well as to “Somaliland”, which is asserting independence, although there is no international recognition of its separate status’ (*ibid.*). The previous independent expert had likewise been of the opinion that ‘... all parties to the conflict [in Somalia] are bound by the laws and customs applicable in armed conflicts not of an international nature’, E/CN.4/2000/110, 26 January 2000. For similar qualifications see also e.g. E/CN.4/1999/103, 18 February 1993, para 34; E/CN.4/1997/88, 3 March 1997, para 55; E/CN.4/1998/96, 16 January 1998, para 12.

that: ‘... it is important to understand that the application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory ...’⁴⁰, and in light of the decision of the ICTY Trial Chamber in *Limaj* that ‘some degree of organization by the parties will suffice to establish the existence of an armed conflict’.⁴¹ Nonetheless, the seemingly ready qualification of low-intensity conflicts in a failed state environment as situations of non-international armed conflict raises the question why potentially similar levels of violence, for example the violence in no/low-income urban areas of some major cities (especially in Latin America), involving criminal gangs and certain forms of militias more or less closely linked to the police, have not been qualified – and indeed have commonly not even been considered qualifiable – as such.⁴² On a more abstract level, this also raises the question whether (theoretically) similar levels of violence could be qualified differently depending on whether there is effective overall government control (Brazil) or not (Somalia).

Because a total loss of government control is so exceptional, too little state practice has evolved to reach a conclusive answer as to whether, in failed state situations, a somewhat lowered threshold of violence and organizational structure could suffice to meet the legal requirements for qualification as a non-international armed conflict. After all, in relation to Somalia the Security Council has continuously acknowledged the ‘extraordinary nature’ and ‘the unique character of the situation in Somalia’ from 1992 up until today.⁴³ Theoretically, of course, one could think of reasons why armed violence in failed state scenarios could more readily be qualified as an armed conflict in the sense of IHL. First, concerns that have traditionally supported a heightened threshold for non-international armed conflicts in contradistinction to internal disturbances and tensions, namely states’ concerns about outside interference in their internal affairs,⁴⁴ are attenuated in the absence of effective government control. Second, the application of IHL might

40 Inter-American Court of Human Rights, *Juan Carlos Abella v. Argentina (Tablada Case)*, No. 11.137, Report 55/97, para 152. The relatively high threshold identified by the ICTR in the *Akayesu* case, where it was held that Common Article 3 requires armed groups to be ‘organized as military in possession of a part of the national territory’ has not found widespread acceptance and is regarded as exceedingly high – see ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Chamber I), para 619.

41 ICTY, *Prosecutor v. Limaj*, above note 34, para 89.

42 See e.g. compilation prepared by OHCHR, *Brazil, A/HRC/WG.6/1/BRA/2*, 28 February 2008, available at: http://www.upr-info.org/IMG/pdf/Bra_UN_comp.pdf (last visited 9 July 2009); Human Rights Watch’s submission to the Human Rights Council, 8 April 2008, available at: <http://www.hrw.org/en/news/2008/04/06/universal-periodic-review-brazil> (last visited 9 July 2009).

43 Recent Security Council Resolutions 1816, 1846 and 1851 – albeit with regard to the repression of piracy – not only underscored the particularity of the situation in Somalia but explicitly emphasized that those resolutions shall not be considered as establishing customary international law. SC Res. 1851, 16 December 2008, para 10: ‘Affirms that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law’.

44 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports* 1986, p. 14, para 205.

simply seem politically desirable. In an environment in which the domestic legal order is dysfunctional, where the communitarian value system is indeed profoundly disturbed and the central addressee of human rights obligations no longer exists, IHL could provide an internationally accepted (lowest) common denominator on which the warring factions could potentially agree and which could serve as a starting point for attempts to regulate their behaviour.

However, disagreement over formerly common values and domestic rules is typical for warring parties in each and every armed conflict and hardly warrants any specific recognition in the case of armed conflicts in failed states. Rules relating to the actual conduct of hostilities are justified only if a certain level of hostilities is reached, and they can be credible and effective only if those involved in the hostilities show a minimum organizational structure that ensures an actual ability to comply. Moreover, it would appear premature to dispense with the traditional (sovereignty-based) distinction between armed conflict and internal disturbances in failed state situations, since there have been no indications in state practice that the sovereignty of a failed state is diminished and a government may, at least in theory, be reinstalled at any time. As regards the foregoing comparison between levels of violence in failed states and urban violence, there is already a notable difference in that urban violence is by definition territorially confined to a specific and relatively delimited (urban) area, whereas armed violence in failed states is prone to territorial expansion and even to regional spillover, as will be seen below. This does not mean that territorially confined urban violence could not eventually reach the threshold of an armed conflict, but it does show that in the said comparison, factually different – rather than similar – situations of violence have been qualified differently.

Thus rather than indicating the acceptance of a separate sub-category of armed conflicts specific to failed states, the unquestioned, decade-long qualification of the situation in Somalia as a non-international armed conflict may be more plausibly regarded as proof that the various aforesaid criteria for the existence of an armed conflict can be referred to somewhat interchangeably. It would seem that the duration, persistence and geographical expansion of armed violence may partly compensate for a lower level of intensity, perhaps even more so if despite relatively low or fluctuating levels of violence, repercussions on the civilian population are extremely severe.

Territorial spillover

In failed and failing state conflict scenarios, territorial spillover effects appear to be quite frequent. This is due at least in part to the fact that, unlike in traditional ‘civil wars’, territorial demarcations and international borders are of little relevance for armed groups that are striving for economic gain rather than regime change and government control. Evidently, cross-border activities are an additional component that must be considered when qualifying the armed conflict in terms of IHL. Common Article 3 of the four Geneva Conventions, drafted against the backdrop of the Spanish Civil War, was – at least when adopted – meant to cover

traditional forms of civil war in which an organized armed group would strive for regime change, and in so doing gradually establish control over increasing parts of territory within a single state.⁴⁵ This traditional concept found its way into Common Article 3 through the explicit reference to non-international armed conflicts ‘occurring in the territory of one of the High Contracting Parties’ and is reflected in Article 10(1) of the ILC Draft Articles on Responsibility of States, which refers to ‘an insurrectional movement which becomes the new Government of a State’.⁴⁶ The possibility of overcoming the presumed historical context of the territoriality criterion (namely, that it was originally introduced in Common Article 3 at a time when not all states were party to the Geneva Conventions, with the aim of ensuring that it would only apply in the territory of Contracting Parties) remains a moot point. In *Tadic*, the ICTY Appeals Chamber’s definition of international armed conflict still referred to protracted armed violence between organized armed groups *within a State*.⁴⁷ Clearly, a sweeping and global application of IHL without any territorial confines whatsoever is not maintainable owing to the unjustifiable worldwide derogations from human rights law this would bring about, and in light of the very object and purpose of IHL, i.e. to provide relatively basic but feasible standards in areas where the reality of armed conflict simply forestalls the application of more protective (human rights) standards. Discussions about the ‘territoriality criterion’ have mainly focused on what in modern parlance is now often termed ‘transnational armed conflicts’ (i.e. a situation in which a state targets an organized armed group on the territory of another state), and more generally on ‘overseas contingency operations’, formerly referred to as the ‘global war on terror’.⁴⁸ Far less attention has been given to qualifying situations in which a non-international armed conflict spills over into the territory of a neighbouring country. Problems in qualifying them often do arise, not only from the cross-border element as such, but also – though not always – from the subsequent increase in the number of parties to an already ongoing armed conflict. With regard to the territoriality issue it remains unclear, for want of significant relevant practice or jurisprudence, whether territorial spillover would necessitate a renewed assessment of whether the threshold of a non-international armed conflict has been reached in the neighbouring country, or whether the previously existing armed conflict could be considered as continuing unchanged after having crossed the border.

Of course, the practical differences in either approach will be minor if significant spillover allows the situation in the neighbouring country to be immediately qualified as a non-international armed conflict. At the same time,

45 Lindsay Moir, *The Law of Internal Armed Conflict*, pp. 52ff. Nevertheless, the Spanish Civil War did of course have far-reaching international implications.

46 Claus Krefß, ‘Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater?’, in G. Hankel (ed.), *Macht und Recht: Völkerrecht und Völkerstrafrecht zu Beginn des 21. Jahrhunderts*, Hamburger Edition, Hamburg, 2007, p. 357; Moir, above note 45, pp. 52ff.

47 *Prosecutor v. Tadic*, Appeal on Jurisdiction, above note 30, para 70 (emphasis added).

48 See e.g. *Hamdan v. Rumsfeld*, 548 U.S. (2006), p. 67.

despite the panoply of indicative criteria established in international jurisprudence to facilitate initial assessment of the existence of a non-international armed conflict, specific (factual) criteria to determine whether a third party has subsequently become a party to an already ongoing armed conflict do not yet seem sufficiently developed.

Law enforcement operations by third parties: the repression of piracy as a case in point

As has been noted above, in times of transnational terrorism and transnational criminal networks states increasingly perceive state failure as a direct threat to their security interests. They will thus probably be all the more inclined to partially fill the control gap and assume specific law enforcement functions in place of a disabled government so as to keep potential threats under control. Ongoing operations to repress piracy and armed robbery at sea off the coast of Somalia are a topical case in point. Piracy is certainly only one specific aspect of a far more complex crisis situation in Somalia, but one with particular global security implications. It has traditionally been viewed as a crime over which universal jurisdiction should be exercised and the fight against piracy has been seen as an act of law enforcement.⁴⁹ Yet Resolution 1851 of 16 December 2008, like previous resolutions on the subject, explicitly recognizes ‘the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia ...’⁵⁰ It is against this background that the Security Council, by virtue especially of Resolutions 1816, 1846 and 1851, has defined and extended the legal basis for the exercise of enforcement and adjudicative jurisdiction by third parties with regard to the repression of piracy in the area. Security Council Resolutions 1816 and 1846 relate to counter-piracy operations at sea, i.e. both on the high seas and within Somalia’s territorial waters. These resolutions are based on and have reaffirmed the regime of enforcement powers granted by the United Nations Convention for the Law of the Seas (UNCLOS). However, unlike previous resolutions that only concerned counter-piracy operations at sea, Security Council Resolution 1851 relating to counter-piracy operations on the Somali mainland also refers for the first time to IHL. In the relevant part of operative paragraph 6, the resolution provides that states ‘... may undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures

49 See e.g. Douglas Guilfoyle, ‘Piracy off Somalia: UN Security Council Resolution 1816 and IMO regional counter-piracy efforts’, *International and Comparative Law Quarterly*, Vol. 57, 2008, p. 696. Moreover, operative paragraph 5 of Security Council Resolution 1851 (16 December 2008) reflects this perception by encouraging states ‘to effectively investigate and prosecute piracy and armed robbery at sea offences’.

50 SC Res. 1851, 16 December 2008, preambular para 5. Similarly, preambular paragraph 7 of SC Res. 1816 (2 June 2008) took into account: ‘the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters’.

undertaken pursuant to the authority of this paragraph shall be undertaken consistent with *applicable international humanitarian and human rights law*.⁵¹ Of course, the wording ‘in Somalia’ could be understood at face value to mean not only Somalia’s mainland but also its territorial waters. However, given that Resolution 1851 explicitly confirms the continuing relevance of Resolution 1846, which specifically deals with the exercise of enforcement powers in Somalia’s territorial waters,⁵² a more restrictive interpretation, i.e. the application of Resolution 1851 only to the Somali mainland, appears appropriate.⁵³ Therefore, nothing in the regime of enforcement powers established by virtue of the various Security Council Resolutions to date suggests that IHL would be of relevance in the repression of piracy at sea.

Where the Somali mainland is concerned, however, Resolution 1851 clearly embraces this possibility, even though it does not, by merely speaking of the ‘applicable international humanitarian [...] law’, provide any clear-cut determination to this end. This general reference to IHL raises the question how its application could be construed in that specific context, in which third parties are conducting what appear to be law-enforcement operations in the territory of a failed state where a non-international armed conflict is in progress. As things stand, at least two interpretations seem possible. On the one hand, third states co-operating with the TFG in Somalia – as Resolution 1851 explicitly requests⁵⁴ – could become parties to the existing conflict there simply by collaborating with an entity that is already party to an ongoing non-international armed conflict.⁵⁵ On the other hand, Resolution 1851 could be read in such a way that the counter-piracy operations in and of themselves – independently of the ongoing conflict in Somalia – could eventually reach the threshold of a non-international armed conflict, thereby triggering the application of IHL. There is no indication that the Security Council considered either of these constellations in any detail during the discussions that led to the adoption of Resolution 1851.⁵⁶ It seems rather likely that through the general reference to the ‘applicable international humanitarian and human rights law’, the Security Council, while authorizing the use of ‘all necessary measures’, simultaneously simply wanted to emphasize that the exercise of enforcement jurisdiction vis-à-vis pirates is subject to certain legal restraints, i.e. to whichever of those bodies of law is applicable. There is thus no implication in Resolution 1851 that the failed-state situation prevailing in Somalia could or

51 *Ibid.*, para 6 (emphasis added).

52 SC Res. 1846, 2 December 2008, para 10.

53 Moreover, such a distinction between counter-piracy operations at sea and on land would seem to be in line with the fact that the Security Council qualified the situation in Somalia, and not the incidents of piracy, as a threat to international peace and security. Notably, the Security Council emphasized that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia only exacerbate the crisis situation prevailing in Somalia.

54 SC Res. 1851, 16 December 2008, para 6.

55 See e.g. SC Res. 1872, 26 May 2009.

56 See United Nations Department of Public Information, *Security Council authorizes States to use land-based operations in Somalia*, Press Release, 16 December 2008, available at <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm> (last visited 9 July 2009).

should have any bearing on identification of the applicable legal framework. For the time being, the unequivocally stated objectives of the operations conducted on the basis of Resolutions 1846 and 1851 are law enforcement and the repression of crime.⁵⁷ The Security Council has repeatedly confirmed this law enforcement paradigm, for example by referring to the overall aim of ensuring ‘the long-term security of international navigation off the coast of Somalia’⁵⁸ and calling upon states ‘to effectively investigate and prosecute piracy and armed robbery at sea offences’.⁵⁹ Even though the ‘pirates’ use weapons of war such as machine-guns and portable rocket-launchers, and despite an apparently persistently high number of hostages,⁶⁰ significant fighting between the ‘pirates’ and the units acting on the basis of these resolutions has not been reported. Indeed, the governments involved in the repression of piracy off the coast of Somalia are not seeking to overcome their ‘enemy’ militarily – the legitimate aim underlying the rules of IHL on the conduct of hostilities. Rather, as Security Council Resolution 1846 explicitly confirms, their operations are aimed at the ‘full eradication’⁶¹ or the ‘rooting out’ of piracy,⁶² a legitimate law enforcement objective which in its comprehensiveness cannot, however, be so readily reconciled with IHL’s legitimate aim, based on military necessity, to defeat the enemy militarily. The repression and eradication of crime – especially if intended to be full and effective – will not take place in accordance with the IHL distinction between civilian and military, but will on the contrary be directed against each and every person supposed to be somehow involved in piracy. The nature of a genuine law enforcement operation does not change simply because it is conducted in a failed state or in a territory where an armed conflict is in progress. In other words, the mere existence of an already high level of violence does not automatically transform each and every law enforcement operation into an involvement in a non-international armed conflict governed by IHL. After all, even a government already undisputedly involved in a non-international armed conflict may still carry out regular law enforcement operations unrelated to the armed conflict that are subject merely to human rights law. Consequently, the mere fact that Somalia’s Transitional Government, with which third parties are currently co-operating in the attempt to repress piracy, is engaged in an ongoing non-international armed conflict is not in and of itself a decisive criterion for legal qualification of the counter-piracy operations as part of such a conflict.

57 The mere use of military equipment does not change this assessment. It should be noted that where counter-operations at sea are concerned, UNCLOS explicitly mandates naval vessels to carry them out.

58 SC Res. 1851, 16 December 2008, para 4.

59 *Ibid.*, para 5.

60 See e.g. Amnesty International, *Somalia pirates hold 130 hostages after hijacking nine ships*, 10 September 2008, available at http://www.amnesty.org.uk/news_details.asp?NewsID=17875 (last visited 8 July 2009).

61 SC Res. 1846, 2 December 2008, para 10.

62 SC Res. 1851, 16 December 2008, para 6.

Conclusion

The term ‘failed state’ is not a term of art and certainly not a delineated category of armed conflict in the legal sense. Despite apparent insinuations here and there, the absence of government control as such has no bearing on the qualification of armed violence between non-governmental organized armed groups as a non-international armed conflict. State failure, however, is typically – though not necessarily always – accompanied by oscillating levels of violence, regional spillover effects, and a multitude of players striving for regional rather than central control, and seeking economic gain rather than legitimacy and government responsibility. It is these concomitant phenomena that often raise difficult questions not only for the initial qualification of a given situation as a non-international armed conflict, but also when hostilities cross national borders, and it must be determined whether a third party has subsequently become a party to an already ongoing armed conflict.

Classifying the conflict: a soldier's dilemma

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Abstract

Modern armed forces are employed in a wide array of operations that range from peacetime riot control to outright international armed conflict. Classifying these various scenarios to determine the applicable international law is rendered difficult by both the lack of clarity inherent in the law and the political factors that tend to enter the decision-making process. The author describes the major challenges of legal classification facing the military leadership, and proposes a solution to ensure that the intended beneficiaries of the law – from soldiers to civilians – do indeed receive its protection.

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The conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.

ICTY Appeals Chamber, Tadić Decision¹

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Great leaders are almost always great simplifiers, who can cut through argument, debate and doubt, to offer a solution everybody can understand.

General (ret'd) Colin Powell

The principles of the law of armed conflict, also known as the law of war or international humanitarian law (IHL), are simple to summarize for soldiers. Many militaries today carry pocket-sized codes of conduct that list the fundamentals: fight only enemy combatants and destroy only military objectives; collect and care for the wounded, whether friend or foe; do not attack or harm enemy personnel who surrender; do not kill, torture or abuse prisoners of war; treat all civilians humanely; do not engage in rape or looting.³ In the majority of cases, adherence to these sorts of simple and ostensibly obvious rules will guide a military commander and his subordinates towards a form of warfare that respects the fundamental tenets of IHL: humanity, military necessity, distinction, proportionality, precaution and the prevention of unnecessary suffering.

Unquestionably, these rules – which form the core legal component of modern soldier training – will serve as a useful humanitarian starting point for any conceivable military operation. Nevertheless, today's troops are assigned roles that range from riot control to domestic counter-insurgency to more traditional international armed conflict, and they are expected, and indeed required, to grasp the legal nuances associated with the sliding scale of conflict. Failure to do so may have drastic consequences for the implicated troops.

Although the finer points of legal classification can be absorbed through appropriate training, there are significant challenges to be overcome before armed forces can be expected to respect the legal framework objectively applicable to their operations. The first challenge for many militaries is to move beyond a training curriculum that emphasizes the law of armed conflict to the exclusion of other relevant law, including international human rights law (IHRL). The second challenge is for the military leadership to identify and assimilate the blurred and controversial line between mere internal disturbances and tensions, which are largely governed by a combination of domestic law and IHRL, and non-international armed conflict, where IHL becomes applicable. The third and most daunting challenge is to overcome the potential politicization of legal classification resulting from the intersection of the international law governing the use of force in international relations, or *jus ad bellum*, and the law protecting the potential and actual victims of armed conflict, or *jus in bello*. This paper examines several contexts in which this phenomenon is most likely to occur, from peace support operations to the 'war on terror'.

1 International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Merits (Appeals Chamber), 2 October 1995.

2 Oren Harari, *The Leadership Secrets of Colin Powell*, McGraw-Hill Professional, New York, 2003, p. 260.

3 This statement of rules is an excerpt from the South African National Defence Force's *Code of Conduct for Uniformed Members of the South African Defence Force*, adopted 15 February 2000, available at www.dcc.mil.za/Code_of_Conduct/Files/English.htm (visited 6 May 2009).

IHL and IHRL are not abstract bodies of law, and their successful application boils down to the will of political leaders and military commanders to apply their principles and influence the behaviour of troops on the ground. As such, this paper summarizes some of the most important challenges of legal classification facing the military leadership, and proposes a solution for simplifying the process in order to encourage lawful behaviour throughout the full range of military operations.

Military legal training and international humanitarian law

As a general rule, armed forces play a constitutional role that is predominantly based upon the defence of the realm against foreign adversaries, and their training reflects this reality. It is therefore unsurprising that their legal education, if any, is primarily focused on the law of armed conflict. This natural tendency is reinforced by states' legal obligation to ensure the practical application of this law within their forces. Article 87 of Additional Protocol I⁴ requires military commanders to

- (1) prevent, suppress and report to the chain of command breaches of IHL;
- (2) ensure that members of the armed forces are aware of their IHL obligations; and
- (3) in cases where they are aware that their subordinates have either committed or are about to commit a breach of IHL, to prevent such violations or initiate appropriate disciplinary or penal action.

Many of the world's militaries valiantly attempt to put these obligations into practice by disseminating IHL as widely as possible to the rank and file. Others have gone further and are pursuing the integration of IHL into all relevant aspects of their doctrine, education, field training and justice systems.⁵

However, despite the natural emphasis placed on IHL in modern military legal training, this body of law only becomes relevant at the point where armed conflict, as legally defined, begins. Prior to that point,⁶ the legal framework applicable to military operations is a combination of domestic law, IHRL⁷

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, entered into force 7 December 1978 (hereinafter 'Additional Protocol I').

5 For an overview of the International Committee of the Red Cross's approach to IHL integration in the military context, see *Integrating the Law*, ICRC, Geneva, May 2007, available at [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0900/\\$File/ICRC_002_0900.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0900/$File/ICRC_002_0900.PDF) (visited 5 May 2009).

6 As well as after the end of the armed conflict.

7 IHRL evidently binds the state within its national territory, but also applies in cases where its military exerts its power or effective control over individuals abroad: see for example International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 216. See also Cordula Droege, 'Elective affinities? Human rights and humanitarian law', *International Review of the Red Cross*, No. 871 (2008), pp. 509–20; Françoise Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', *International Review of the Red Cross*, No. 871 (2008), pp. 566–72.

and other specific international conventions.⁸ After that point, IHRL – as far as it is not derogable – continues to coexist with and even supplement IHL. However, the interaction between these two bodies of law, including the resolution of conflicts through the application of the *lex specialis* principle,⁹ is subject to ongoing legal controversy.¹⁰ The challenge for the military leadership is not only to identify the point at which one legal classification evolves into another, but to reconcile the competing bodies of law within the relevant classification. It is then incumbent upon the leadership to translate those legal obligations into practice.

A NATO platoon commander deployed to Afghanistan is expected to be well-acquainted with the law of targeting, and will understand the principles of proportionality and precaution by virtue of his standard law of armed conflict training. He will appreciate that if Taliban soldiers engage his patrol with small arms and rocket propelled grenades from within a village, his troops are required to ensure that any incidental loss to the civilian population or its infrastructure resulting from their armed reaction is not excessive in relation to the direct military advantage anticipated.¹¹

If that same officer is ordered six months later to quell a peacetime domestic riot in his home country and applies the principles of IHL, he might be inclined to order his subordinates to resort to their rifles against violent agitators, all the while diligently avoiding collateral damage to bystanders. In the absence of an imminent threat to the life of his troops or another person, that decision would represent a fundamental breach of international human rights law.¹² In most countries it would also land him before a court martial for charges up to and including murder. Accordingly, the importance of context- and mission-specific training – the appropriateness of which is contingent upon the legal classification of the conflict – cannot be overstated.

8 For example, the Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002 (applicable to states parties in the context of repression of the most serious international crimes); the United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994 (applicable to states parties in the context of the suppression of piracy on the high seas); and the International Convention for the Suppression of Terrorist Bombings, 15 December 1997, entered into force 23 May 2001 (applicable to states parties in the context of domestic anti-terror operations).

9 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106.

10 See Droege, above note 7, and Marco Sassòli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killings and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, No. 871 (2008), pp. 599–627.

11 Art. 51(5)(b), Additional Protocol I.

12 See, for example, Art. 6(1), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, entered into force 23 March 1976; *Guerrero v. Colombia* (R.11/45), ICCPR, A/37/40 (31 March 1982) 137, para. 13.2–13.3.

The legal spectrum of military operations

Situations other than armed conflict: reconciling IHRL and domestic law

Since the conclusion of the Cold War, armed forces have increased their operations outside the traditional armed conflict paradigm. There are various scenarios in which the state's police and security forces are likely to be overwhelmed by events on the ground, ranging from the relatively innocuous (e.g. security for an international summit) to outright national crisis. Accordingly, armed forces may be called into a limitless variety of domestic operations that fall short of armed conflict, including riot control, manning checkpoints, securing routes, cordon and search, escort duties, hostage rescue and anti-piracy, to cite but a few examples. Theoretically the domestic law governing such operations should reflect IHRL, but in practice the military leadership may be placed in the awkward position of reconciling the law of their political masters with the international obligations undertaken by the state.

Even in those states that genuinely attempt to abide by international law, doctrine, training and orders dictated in domestic operations must take into account 'hard law' treaties such as the International Covenant on Civil and Political Rights (ICCPR), their legal interpretations given by bodies such as the UN Human Rights Committee, the binding or persuasive case law of relevant regional human rights commissions and courts such as the European Court of Human Rights, and an ever-increasing body of non-binding 'soft law' that builds upon and provides detailed guidance for the implementation of 'hard law', such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹³ and the Code of Conduct for Law Enforcement Officials.¹⁴ During periods of serious internal tension, the military leadership will also have to grapple with internal and external pressure to eliminate civil rights such as habeas corpus. However, it is only in very limited cases of public emergency threatening the very life of the nation that the government may formally derogate from certain provisions of IHRL; even then, a core of the most fundamental rights must remain intact.¹⁵

Reconciling these wide-ranging and potentially conflicting sources of law can be a monumental task for even the most senior officers. Moreover, unlike police officers, soldiers are not as a rule rigorously trained regarding the nuances of escalation of force in situations such as riots and crowd control. Whereas military training is primarily geared towards the destruction of the enemy force's military capacity (hence the IHL emphasis), IHRL restricts the use of lethal force by law enforcement officials except as a last resort in order to protect lives.¹⁶ Switching

13 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990 (hereinafter BPUFF).

14 Adopted by General Assembly Resolution 34/169 of 17 December 1979.

15 Art. 4, ICCPR. For a regional example see Art. 15, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entered into force 21 September 1970).

16 *Ibid.*; Art. 9, BPUFF.

from 'war fighting' mode to a peacetime 'law enforcement' mode is a difficult task that requires a high degree of discipline and mission-specific training.

Armed conflict: the two regimes of IHL

In contrast to IHRL, which was developed to civilize the relationship between governments and the individuals within their power, IHL was born on the battlefield.¹⁷ It governs the exceptional circumstance of armed conflict, limiting means and methods of warfare to those that are necessary to weaken the enemy force, and providing protection for individuals who are not, or are no longer, taking part in hostilities.

Within IHL there are two separate legal regimes, one governing international and the other non-international armed conflict. In the case of the former, the rules are comprehensively stated in the four Geneva Conventions,¹⁸ Additional Protocol I¹⁹ and specific treaties touching on means and methods of warfare.²⁰ For example, an intelligence, military police or logistics officer can understand virtually the entire legal regime regulating the treatment of prisoners of war by opening the Third Geneva Convention.²¹ The international criminal law regime also benefits from provisions triggering universal jurisdiction in the case of grave breaches of the Conventions and Protocols.²²

In contrast, non-international armed conflict requires a thorough knowledge of the constitution and domestic law of the state in question, Article 3 common to the four Geneva Conventions, Additional Protocol II,²³ the customary law of IHL, IHRL and relevant articles of the Rome Statute of the International Criminal Court.²⁴ The development of customary IHL in the field of non-international armed conflict – especially regarding the conduct of

17 Indeed, the Geneva Convention of 1864 – the first IHL treaty – was the result of a diplomatic effort following Henry Dunant's horrific experience at the Battle of Solferino in 1859, where the military medical services of the battling French and Austrian troops were totally insufficient to deal with the scale of casualties in the field.

18 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (hereinafter GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (hereinafter GC II); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter GC IV); all of which entered into force 21 October 1950. Every state has ratified these Conventions.

19 Where the Additional Protocols are not applicable *qua* treaty, most of their substantive provisions are applicable in the form of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005.

20 Some provisions of these treaties have also taken on the status of customary international law.

21 As supplemented by Additional Protocol I. IHRL does, however, continue to play a role, with IHL remaining the *lex specialis*.

22 GCs I–IV, Arts. 49–50, 50–1, 129–30 and 146–7 respectively; Additional Protocol I, Art. 85.

23 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, entered into force 7 December 1978 (hereinafter Additional Protocol II).

24 Rome Statute, above note 8.

hostilities – continues to fill the gap left behind by the relatively thin treaty regime, although the extent of that development remains controversial.²⁵

Officers and soldiers will inevitably ask the question: why do we need two separate IHL regimes that thoroughly obfuscate the simple principles of the law? Should we not protect victims of armed conflict regardless of legal classification? To answer these seemingly simple questions, one must understand the international system itself and the nature of state sovereignty. Although the twentieth and early twenty-first centuries have witnessed a marked erosion of the Westphalian system of near-absolute state sovereignty, states have yet to abandon the notion that rebel movements within their borders are essentially criminals who are not entitled to the status and protection associated with the law of international armed conflict. Because states view internal conflict through the lens of criminal justice, there is no concept of a legally ‘protected person’ in the non-international regime.

Conclusion

In summary, although the legal framework applicable during international armed conflict is relatively straightforward, both non-international armed conflict and situations falling short of armed conflict require a very nuanced understanding of several sources of law. In practice, this means that the vast majority of activities carried out by today’s military forces are governed by a blurry combination of international and domestic laws that do not readily translate into clear and decisive operational orders and rules of engagement. However, these concerns pale in comparison with the challenge of defining the point at which non-international armed conflict actually begins.

The gateway to armed conflict

International armed conflict

The legal threshold for international armed conflict is unambiguous and almost beyond argument. It applies at the first resort to force between two state-armed forces,²⁶ triggering the application of the fullest breadth of detailed IHL provisions.²⁷ Bearing in mind that the first exchange of military fire may result in

25 See, for example, Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007.

26 See Art. 2 common to the four Geneva Conventions, and Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 32. See also Art. 1, Additional Protocol I.

27 As discussed above, states parties are bound by the four Geneva Conventions, Additional Protocol I, and a long list of treaties governing various limitations upon means and methods of warfare. Non-parties are bound by applicable customary IHL.

wounded soldiers, prisoners and the potential for collateral civilian damage, it is only logical that IHL should apply from the outset of armed hostilities. This body of law also applies in the case of foreign occupation that meets no armed resistance. However, traditional inter-state conflict is a relatively rare breed in the twenty-first century.

Non-international armed conflict

The situation is nowhere near as clear-cut in the more predominant case of non-international armed conflict. One of the most difficult legal determinations the political and military leadership must make is whether the situation within its borders has evolved from mere internal disturbances and tensions to an armed conflict to which IHL is applicable. The decision as to whether a situation has crossed that line is laden with political controversy, since a state will only reluctantly admit that it has lost its monopoly over the use of force, or that a group fundamentally opposed to the government's interest is entitled to the status associated with recognition as an armed belligerent. To complicate matters further, within the IHL of non-international armed conflict there are different thresholds for the application of the two principal instruments, Article 3 common to the four Geneva Conventions of 1949, and Additional Protocol II of 1977.

Common Article 3

Article 3 is the bedrock of IHL, recognized within customary law as the absolute minimum of humanitarian treatment applicable during armed conflict of any legal qualification.²⁸ The article applies 'in the case of armed conflict not of an international character' occurring on the territory of a state party to the Geneva Conventions,²⁹ but the article does not further define the threshold at which such a conflict begins. The most authoritative definition of armed conflict is contained in the ICTY Appeals Chamber's decision on jurisdiction in the *Tadić* case:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within the State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of

28 ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, para. 218.

29 The territorial component has lost its practical significance since currently every state in the world is party to the four Geneva Conventions of 1949.

internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.³⁰

From a temporal perspective, this test presents an irreconcilable contradiction for military commanders operating on the ground. If IHL applies 'from the initiation' of a non-international armed conflict, but a situation can only be gauged as an armed conflict at such time as the armed violence in question becomes 'protracted', how is the foot soldier to know at what point IHL begins to apply?³¹ Indeed, if the armed violence in question dies out before it becomes 'protracted', IHL will never have entered into the equation. Effectively, the law is asking commanders to make an *ex post facto* determination regarding a series of events that has yet to occur.

The term 'protracted' includes elements of both intensity and duration of violence, neither of which were controversial in the 1992–5 conflict in the former Yugoslavia, but which will remain contentious in lower-profile confrontations. In addition, as the Appeals Chamber suggests, the armed groups in question must reach a minimum level of organization. The Inter-American Commission on Human Rights held in its *La Tablada* decision that a mere thirty hours of intense and organized hostilities can be sufficient to justify invoking IHL,³² and other tribunals have made different determinations based on different circumstances. However, even if one accepts a particular international or domestic tribunal's approach, it is one thing for an independent legal body to look at the totality of the circumstances present within a national conflict and decide that it has crossed the threshold required by law, and quite another for the military leadership on the ground to make a similar determination regarding one or a series of violent acts attributed to a non-state actor.

Additional Protocol II

The second Additional Protocol develops and supplements the basic protections contained in Common Article 3. It also breaks new ground in the form of limited treaty provisions governing the conduct of hostilities.³³ However, the military leadership must grapple with a different, higher, legal threshold. The treaty only applies to non-international armed conflicts that take place on the territory of a party to the protocol, between its armed forces and an organized non-state armed group. Additionally, that armed group must be under 'responsible command' and

30 ICTY, *Prosecutor v. Dusho Tadić*, Appeals Chamber, decision of 2 October 1995, para. 70 (emphasis added). This test is reflected in Art. 8(2)(f) of the Rome Statute, above note 8.

31 Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, pp. 6–7, available at www.hpcr.org/pdfs/OccasionalPaper6.pdf (visited 6 May 2009).

32 Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, Doc. 38, 6 December 1997.

33 See Part IV, Additional Protocol II.

‘exercise such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol’.

Even a neutral and independent observer to an emerging armed conflict will have difficulty establishing the requisite nature and degree of control that a rebel faction must exercise to engage the application of the Protocol.³⁴ However, the reality is that neither the state’s military nor its civilian masters will normally be inclined to admit that they have lost control of a significant segment of their sovereign territory, regardless of the actual situation on the ground. The issues of responsible command and ability to implement the Protocol are equally subjective determinations.

Conclusion

In summary, the applicability of either Common Article 3 or Additional Protocol II is uncontroversial in only the most evident cases of non-international armed conflict. Arms carriers are therefore placed in the precarious position of adjusting their strategy and tactics to legal determinations that are both convoluted and politically influenced. Indeed, the consequences of an imprecise definition of armed conflict that is interpreted by state authorities predisposed to denying its existence are most likely to be felt by IHL’s intended beneficiaries.

Legal classification and the separation of *jus ad bellum* from *jus in bello*

One of the fundamental tenets of international law is the separation between the law governing the right of states to resort to the use of force against one another (*jus ad bellum*, the core of which is contained in the United Nations Charter),³⁵ and the law that protects victims and places limits upon means and methods of warfare (*jus in bello*, the core of which is contained in the Geneva Conventions and their Additional Protocols). The two must remain separate for the simple reason that despite the prohibition on the use of force between states at the heart of the UN Charter, armed conflicts do occur; and the politics of deciding who has breached that law (which is logically at least one side) should not have a bearing on the protection of war victims. As the preamble to Additional Protocol I clearly states,

the provisions of the Geneva Conventions and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any distinction based on the nature and the origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

34 Assistance can be derived from Sylvie-Stoyanka Junod, ‘Article 1 – Material Field of Application’, in Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1987, pp. 1347–56.

35 Charter of the United Nations, 26 June 1945, entered into force 24 October 1945.

Insofar as IHL is concerned, it is entirely irrelevant if a state decides to use force against another state without any title of legality under *jus ad bellum*: the humanitarian concerns remain the same on the ground, and the lack of legal justness of war claimed by one or both sides cannot be offered as an excuse for the subversion of those concerns.³⁶ Nevertheless, the process of legal classification to determine the applicable *jus in bello* – that is, the IHL of international or non-international armed conflict – sometimes requires an analysis of the *jus ad bellum*. Given the inherently political nature of such a determination, it would be naive to presume that states will undertake it with complete objectivity.

As the Trial Chamber of the International Criminal Tribunal for Rwanda aptly noted in its *Akayesu* decision,

It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto.³⁷

However, a core aspect of international law is its reliance upon states themselves to ensure its implementation. IHL is no exception to this tendency, and in the absence of a central judicial authority vested with the power independently to classify conflicts at their outset, the law depends upon the goodwill of its own subjects to ensure its objective application.³⁸ Moreover, by the time independent domestic or international tribunals are in a position to make an objective determination of the applicable law, the damage may already have been done by states that have set a lower standard for the protection of IHL's supposed beneficiaries.

In practical terms, the problematic intersection of *jus ad bellum* and *jus in bello* at the level of legal classification may take place in a variety of contexts, including proxy conflicts, wars of independence, peace support operations and the so-called 'war on terror'. In each of these cases, states are effectively being asked to make an objective qualification of a situation in which they maintain a strong political interest, leaving their armed forces in a precarious position of legal uncertainty.

36 For a more detailed analysis see François Bugnion, 'Jus ad bellum, jus in bello and non-international armed conflicts', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 167–198.

37 International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement (Trial Chamber I), 2 September 1998, para. 603.

38 As a neutral and independent humanitarian body, the ICRC is competent to classify conflicts to ensure that it maintains a legally consistent approach and protects the actual and potential victims of conflict. However, in order to preserve its neutrality, it will not generally publicize its findings in circumstances where it might be perceived as taking a controversial position regarding the *jus ad bellum*.

Proxy conflicts

It is strongly arguable that a conflict between a state and a non-state actor should be classified as non-international, regardless of where that conflict takes place.³⁹ If another state comes to the assistance of the host state, the non-international qualification does not change. If, on the other hand, the non-state actor is fighting as an agent or proxy for another state, the conflict will be qualified as international, since effectively one state is fighting against another.⁴⁰ This would be the case regardless of whether the non-state actor is fighting against the state on whose territory it is based, or whether it attacks a third state across borders.

The legal test for classification in this case is whether the state allegedly responsible for the conduct of the non-state armed group has 'effective'⁴¹ or 'overall'⁴² control of the latter, a complex determination based upon all aspects of the relationship. However, given the fact that states will rarely admit their responsibility for a third-party armed group, the exercise of classifying such a conflict can take place in a political minefield. Even if the requisite level of control is objectively established, the non-state actor will most likely have an incentive to deny that it is being controlled by the state in question, since an acknowledgement of that relationship could engage both the political and international legal responsibility of its closest allies. As such, the non-state actor would have a disincentive to publicly apply the more fulsome body of IHL related to international armed conflict, even if it is objectively applicable. The price of such a political decision might ultimately be paid by the parties to the conflict if they or their agents were *ex post facto* held to the higher international standard in a court of law, but the real price would likely be paid by the victims of conflict themselves.

Wars of independence

A similar politicization of IHL may be observed in the case of wars of independence, where a particular political or ethnic group is attempting to secede from its existing government and form a separate state. International armed conflict as defined in both treaty and customary IHL must engage two existing and internationally recognized states, and because state recognition is a political process intertwined with *jus ad bellum*, the two types of law may again cross paths at the level of legal qualification.

For example, towards the beginning of the conflict in the former Yugoslavia, classification of the conflict between the Yugoslav government and

39 For a discussion of this principle, which is not without controversy, see Sassoli, above note 31, pp. 8–9.

40 See Jonathan Somer, 'Acts of non-state groups and the law governing armed conflict', *American Society of International Law Insights*, Vol. 10, No. 21 (2006).

41 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, above note 28, para. 115 (regarding the alleged control of Nicaragua's Contras by the US).

42 *Prosecutor v. Dusho Tadic*, above note 1, para. 131 (regarding the alleged control of Bosnian Serbs by the Federal Republic of Yugoslavia).

Croatian forces required an analysis of the latter's political status vis-à-vis the former. Qualifying that conflict as international (as some states did by recognizing Croatia's independence as early as January 1992), and therefore applying at a minimum the customary IHL applicable to international armed conflicts, would have represented a political victory for Croatia, since its very objective was to seek political independence. Qualifying the conflict as non-international would have had the opposite effect. As such, the Federal Republic of Yugoslavia arguably had a political incentive to deny the formal applicability of the IHL of international armed conflict.⁴³

Peace support operations

The legal qualification of conflicts involving peacekeeping troops has been discussed elsewhere, and the debate continues.⁴⁴ However, it is perhaps useful to state here that the politicization of IHL, leading to dangerously mixed messages for the military, is possible even in this altruistic domain. When states send their blue-helmeted troops to foreign lands with the noble mission of maintaining or securing the peace, it is perhaps trite to note that they do not wish for their soldiers to be perceived as taking an active part in the very conflict that they seek to resolve.⁴⁵ As recently remarked by the president of the ICRC,

Indeed, practice shows that States and international organizations engaged in peace operations tend not to acknowledge that they are involved in an armed conflict and that IHL applies to their own actions or those of their agents. They sometimes erect sophisticated legal constructions to put across this view. Their denial is in line with their general reluctance to be perceived as a party to an armed conflict, especially when they are part of a peace operation.⁴⁶

Peacekeepers, as representatives of both their home states and the international organizations whose mandates they seek to fulfil, and as beneficiaries of

43 On 27 November 1991, representatives of various parties to the conflict including the Federal Republic of Yugoslavia and the Republic of Croatia agreed in a Memorandum of Understanding to implement the full range of Geneva Conventions and their Protocols, but the agreement explicitly stated that it would 'not affect the legal status of the parties to the conflict'. See Michele Mercier, *Without Punishment: Humanitarian Action in the Former Yugoslavia*, East Haven, London, 1995, Appendix: Document IV, pp. 195–8.

44 The latest discussions occurred at the 2008 Sanremo Round Table, the proceedings of which are reproduced in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations: 31st Round Table on Current Issues of International Humanitarian Law*, International Institute of Humanitarian Law, Sanremo, September 2008. See also A. Faite and J. L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations*, ICRC, Geneva, 11–12 December 2003.

45 The rare exception being robust Chapter VII peace enforcement missions where troops are mandated by the UN Security Council actively to engage a particular armed group, or to secure a territory in support of a government engaged in a conflict against rebel forces (e.g. International Security Assistance Force/NATO in Afghanistan).

46 Jakob Kellenberger, keynote address at the Sanremo Round Table, 4 September 2008, reproduced in Beruto (ed.), above note 45, p. 32.

specific international legal protection, fall into an unusual position that gives rise to controversy concerning their legal status and the consequent classification of conflict. Whatever the outcome of that debate, it should never lose sight of the distinction between *jus ad bellum* and *jus in bello*. Regardless of the Security Council mandate given to a UN or regional peacekeeping force, which falls under the rubric of *jus ad bellum*, and regardless of the special protection to which peacekeepers are rightfully entitled under the Convention on the Safety of United Nations and Associated Personnel,⁴⁷ the application of IHL must hinge upon the facts on the ground.

Bearing in mind that there will be victims in any armed conflict – irrespective of who is pulling the trigger – it is essential that peacekeepers who engage in such conflict be bound by IHL rights and obligations. The express wording of Common Articles 2 and 3 of the Geneva Conventions reaffirms this as a legal fact, as does the UN Secretary-General's bulletin, *Observance by United Nations Forces of International Humanitarian Law* from a policy perspective.⁴⁸ This is further confirmed by Article 8(2)(b)(iii) of the Rome Statute, which provides that it is a war crime to attack peacekeepers 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. The wording clearly implies that peacekeepers cease to be protected as civilians upon engagement in conflict, which is consistent with the IHL principles of equality between belligerents and separation of *jus ad bellum* from *jus in bello*.

For the military leadership, the challenge is to extricate itself from the state politics that surround this issue and remember the basics: that their peacekeeping forces carry rifles because of the eventuality of armed conflict,⁴⁹ even if it is solely in self-defence; that in the case of armed conflict their troops can only benefit from the application of IHL; and that they will stand on firm moral, political and legal ground if they ensure that their troops are well versed in IHL and its particular application in the peace support context, regardless of mandate.

The 'war on terror'

In recent years states have been drawn into highly politicized debates relating to the legal rights of 'terrorists' within their jurisdiction. The 'terrorist' label has allowed states to claim, without foundation in international law, that entire classes of individuals are devoid of meaningful international legal protection. Inevitably, the political stigma of terrorism has also entered the domain of legal classification.

The problem begins with the term 'war on terror' itself, which is no more of a legal category of conflict than the 'war on drugs' or the 'war against illiteracy'. In order to classify a conflict accurately, one must look beneath the terrorist label

47 9 December 1994, entered into force 15 January 1999.

48 United Nations Secretariat, UN Doc. ST/SGB/1999/13, 6 August 1999.

49 As has been graphically illustrated by recent armed conflicts between MONUC troops and armed factions in the eastern Democratic Republic of Congo.

and examine both the individual and his context. For example, in the case of the early (2001–2) Afghanistan war, the US-led Coalition was engaged in an international armed conflict with the Taliban's armed wing, since the latter were the armed forces of the de facto government of Afghanistan at that time.⁵⁰ As such, the Taliban's armed forces would have been legally qualified as combatants and, if captured, prisoners of war, whose treatment is governed by the Third Geneva Convention.⁵¹ If in the context of this conflict Taliban soldiers did indeed partake in acts commonly labelled as terrorist, for example intentionally killing civilians or destroying civilian objects, upon capture they could be tried and punished in accordance with specific customary IHL provisions,⁵² but their detailed humane treatment including fair trial would be legally guaranteed.⁵³

On the other hand, members of Al Qaeda fighting in this international armed conflict did not fall within the legal definition of 'combatant'. They were neither members of Afghanistan's armed forces nor a militia both belonging to the state and meeting the four defining military characteristics set out in article 4(A)(2) of the third Geneva Convention. They were therefore legally 'civilians'. However, that title would not have shielded those taking a direct part in hostilities from being targeted,⁵⁴ nor would it have prevented them being interned for imperative reasons of security⁵⁵ or from being tried and punished for the very fact of firing at Coalition soldiers.⁵⁶ Had these 'civilians' carried out traditional terrorist acts within the theatre of conflict, they could also have been prosecuted before an impartial court. However, they too were entitled to humane treatment in the hands of Coalition forces.⁵⁷

Conclusion

From the perspective of the military commander, the intersection of *jus ad bellum* and *jus in bello* at the level of legal classification means that his forces live with legal certainty in only the most clear-cut of cases. If the decision regarding classification is made on the advice of his political leadership rather than the objective facts

50 Both the Coalition states and Afghanistan were parties to the four Geneva Conventions, but neither Afghanistan nor the United States is party to Additional Protocol I.

51 Art. 4(A)(1) of GC III defines 'members of the armed forces of a Party to the conflict' as a category of individuals entitled to prisoner of war protection (i.e. combatants) without the requirement of fulfilling the four 'militia' prerequisites in 4(A)(2). To qualify as armed forces, they must have been under a command responsible to the Party and subject to an internal disciplinary structure per Art. 43(1) of Additional Protocol I. If we accept that the Taliban was the de facto government of Afghanistan at the time (they controlled 90 per cent of its territory), it is strongly arguable that their armed forces met all of these requirements and thus would have qualified as combatants.

52 For example, making the civilian population the object of an attack during an international armed conflict is a war crime to which universal jurisdiction applies. Henckaerts and Doswald-Beck, above note 19, Rules 156 and 157.

53 See Arts. 13, 99–108, GC III.

54 Henckaerts and Doswald-Beck, above note 19, Rule 6.

55 Arts. 4 and 78, GC IV.

56 Arts. 64–78, GC IV.

57 Arts. 27–34, GC IV.

on the ground, the potential for undermining the humanitarian impact of IHL increases dramatically.

Conclusion: military discipline and the law

The problems of legal classification of a potential armed conflict reflect the problems of international law itself, limited by its decentralized model of sovereign states. As Hersch Lauterpacht famously stated,

If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.⁵⁸

In contrast to domestic law, international law does not benefit from a central government with executive, legislative and judicial arms exercising mandatory jurisdiction. Accordingly, international law relies heavily upon states to ensure its objective application. Although states are generally inclined to abide by the legal obligations they have voluntarily undertaken, IHL represents the extreme end of the spectrum of international law, where the most fundamental interests and even the very existence of the state may be at stake. Accordingly, it is not entirely surprising that governments may be inclined to assert their sovereignty by denying either the existence or the particular nature of armed conflict in which their militaries or their proxies are implicated.

Despite this unfortunate tendency of international politics, no state will openly deny the humanitarian imperative in armed conflict. Indeed, every state on the planet is a party to the Geneva Conventions, and the vast majority are party to the two Additional Protocols. The challenge, then, is to entrench IHL within military institutions in such a way that it is least vulnerable to political manipulation. If it is impossible to separate *jus ad bellum* completely from *jus in bello* at the level of legal qualification, at least from a strict *de jure* perspective, the solution might lie in a practical approach to the issue.

On one level, militaries evaluate themselves – even define themselves – on the issue of discipline. At its heart, IHL is a matter of discipline. It is rarely difficult to persuade military leaders that they and their subordinates must avoid damage to civilian lives and property, must treat prisoners humanely, and must care for the wounded of any uniform on the battlefield. In elementary terms, any behaviour falling short of such basic principles of humanity amounts to a lack of discipline.

On another level, there is increasing international agreement, reflected in customary IHL, that the humanitarian legal protections applicable to traditional international armed conflict are broadly applicable within the context of non-international armed conflict. Putting aside important issues of state sovereignty,

58 Hersch Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952–3), pp. 381–2.

there is no reason in principle why victims of a non-international armed conflict should be treated any differently from the victims of an international armed conflict. Indeed, the very customary IHL that is steadily filling in the gaps between the two types of conflict is derived in part from the practice of militaries themselves, many of which have written manuals confirming the application of the full range of IHL protections in both.⁵⁹

As the servant of civilian government, the military leadership cannot completely shield itself from the political considerations that give rise to problems of legal classification during times of armed confrontation. Nevertheless, in peacetime a military may choose to build the fullest protections of IHL into its operational practice applicable to both types of armed conflict. The former UN Secretary-General apparently took a step in that direction when, in 1999, he directed that UN peacekeepers be bound by a series of concise rules reflecting the law of international armed conflict, applicable to all scenarios in which they are actively engaged as combatants.⁶⁰ If one accepts that fighting between UN troops and a non-state armed group which meets the requisite threshold is qualified as non-international armed conflict,⁶¹ then it can be deduced that the Secretary-General was deciding as a matter of policy to hold his forces to a standard that is, in some cases, higher than that required by the law. By doing so, he 'fortified' the strict legal protection surrounding victims of non-international armed conflict, and thereby helped to defuse some of the controversy concerning the issue of legal qualification. State militaries can follow this example.

Beyond writing manuals that confirm as a matter of policy⁶² the application of the full extent of IHL to non-international armed conflict, armed forces can integrate those legal provisions into their doctrine, education, field training and justice systems.⁶³ Ideally, the entire body of relevant law should permeate the military operational environment, from operational orders to standard operating procedures to rules of engagement. By entrenching the highest standard of law, such measures can at least insulate the military from the intended or unintended consequences of politically motivated legal classification. This strategy has the advantage of simplifying the otherwise complex process of interpreting the many legal sources governing non-international armed conflict. In the long term, it may also serve to consolidate and expand the customary IHL of non-international armed conflict. Lastly, promoting the highest standard of law is a form of legal risk management that protects the military chain of command from the consequences of politically motivated under-classification, from courts martial to the International Criminal Court.

However, the approach of 'fortifying' the formally applicable law through military doctrine does have its limitations. First, there are certain elements that

59 With such modifications as are required. See Henckaerts and Doswald-Beck, above note 19, Vol. II.

60 UN Secretary-General's Bulletin, above note 49.

61 Which is not a matter devoid of controversy: see Faite and Grenier, above note 45.

62 And, potentially, as a matter of *opinio juris*.

63 See *Integrating the Law*, above note 5.

cannot be completely reconciled between the international and non-international regimes. It is likely impossible to impose the international concepts of combatant privilege, protected persons and occupation on the non-international context (for example, no state will ever agree to rescind its right to prosecute non-state fighters who have fired at its military forces – for good reason).⁶⁴ Second, if the military's political masters decide to intervene directly in the legal classification process, for instance by creating their own category of detainees who are ostensibly bereft of any international legal protection, no amount of IHL-compliant military doctrine is going to override that decision. It is therefore incumbent upon the political authorities themselves to become conversant not only with the substantive provisions of IHL, but also the rationale of the law and its reciprocal benefits. In recent years the ICRC has promoted the development of national inter-ministerial IHL committees that can play a significant role in this process.

A similar strategy of 'fortification' could assist the military leadership in navigating the fine line between internal disturbances and non-international armed conflict. Following the same logic, since humane treatment within IHRL runs parallel to humane treatment in IHL, military doctrine and training can be built to promote a consistency of approach from one context to the other, regardless of the political controversies of classification. In borderline cases, where issues of targeting, collecting wounded and dealing with prisoners begin to take on relevance, military doctrine can ensure that the principles of IHL are effectively applied – irrespective of their formal legal application – all the while respecting the fundamental values of IHRL. However, the risk of such an approach is that there are indeed provisions of (wartime) IHL that fundamentally contradict the IHRL applicable during situations falling short of the legal definition of armed conflict.⁶⁵ In the absence of an objective classification, it will be impossible to determine which body of law should take precedence in cases of contradiction.

Finally, the shifting role of the military in society must be accompanied by a shift in legal emphasis. It is obvious that if the military is going to be employed in contexts other than armed conflict, it must be adequately trained outside the confines of IHL. In practice, this means that the IHRL concepts traditionally associated with civilian policing, from riot control to search and seizure, need to form part of the military vocabulary. Although IHRL can and should become the subject of mission-specific briefings, this law is far more likely to affect the behaviour of soldiers if, like IHL, it is systematically built into their doctrine, education, field training and justice systems.

Taken as a whole, the legal framework applicable to the spectrum of military operations is a patchwork of provisions that often overlap and occasionally conflict, and the formal application of those provisions is liable to political

64 Even if it chooses not to exercise that right in the name of peace: see Art. 6(5) of Additional Protocol II.

65 For example, IHL accepts that civilians can knowingly be killed as collateral damage as long as that damage is outweighed by the concrete and direct military advantage achieved in an attack (see Art. 51(5)(b) of Additional Protocol I). In the absence of a definite legal qualification, it is difficult to reconcile this provision of IHL with the right to life, as interpreted in peacetime, protected by IHRL.

interference. However, the substantive principles of the law are relatively straightforward, as long as context is grasped. From the perspectives of clarity and avoidance of political influence, it is essential that militaries build the fundamental principles of the law into their operations with durability.

As long as militaries associate the law of armed conflict and the principles of humanity with discipline, it will not be difficult to convince them to strive towards creating patterns of operational behaviour that are both lawful and substantially protected from the whims of political change. At the same time, political authorities must become conversant with the legal framework applicable to military operations if they are to respect the requirement for objective legal classification. Ultimately, civilian and military authorities must speak the same language and understand the rationale behind the state's voluntary decision to abide by IHL and non-derogable IHRL in even the most trying political circumstances. Only then can the theory of the law be genuinely applied in practice.

The absorption of grave breaches into war crimes law

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Abstract

This article compares the concepts, scopes of application and procedural regimes of war crimes and grave breaches, while considering what role remains for the latter in international criminal law. In addition to their original conception as international obligations to enact and enforce domestic crimes, grave breaches have taken on a new meaning as international crimes, similar to war crimes. Only in few regards does the scope of application of these new grave breaches surpass that of war crimes. The procedural regime of grave breaches differs in theory significantly from that of war crimes, though less so in practice. Although it is too early to discount grave breaches, they are likely to become confined to history.

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Originally, war crimes and grave breaches were distinct concepts in international law. War crimes were certain acts and omissions carried out in times of war and criminalized in international law. Grave breaches were a limited set of particularly serious violations of the Geneva Conventions of 1949 that gave rise to special obligations of the States Parties for the enactment and enforcement of domestic criminal law. Over time, the line between the two concepts blurred and they began to compete with each other. In 1979, the eminent legal scholar G.I.A.D. Draper

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wrote, “The trial of individuals for war crimes has been largely superseded by the modern system of the penal repression of “grave breaches””.¹ Thirty years later, the war crimes concept is the more dynamic of the two, to the point that one may wonder whether grave breaches will disappear from international law. The survival of grave breaches in law will depend in practice on whether they retain some advantage over war crimes. Possible advantages include a lesser burden of proof, a better procedural regime, greater recognition among states, or perception as a greater infamy. The fate of grave breaches will influence the shape of international criminal law. Meanwhile, it is useful for the legal practitioner to know the respective advantages and drawbacks of relying on one kind of rule or the other. By doing a comparative analysis of the grave breaches and war crimes regimes, this article will seek to fulfil that purpose while considering what role remains for grave breaches in international law. The first section examines how the ‘grave breach’ concept has gradually become increasingly similar to that of ‘war crime’. The second section outlines the present differences in their scopes of application. The third section contrasts their respective procedural regimes in contemporary international law.

The merging concepts of war crimes and grave breaches

While grave breaches and war crimes were originally of a fundamentally different nature, the passage of time has blurred the distinction between them.

The original difference between grave breaches and war crimes

It is difficult to define a ‘crime’, as its meaning varies in different legal systems. An acceptable summary definition is an act or omission that the law makes punishable.² A ‘breach’ is merely an act or omission that is contrary to a legal obligation. All crimes stem from breaches of the law, but not all breaches amount to crimes. While a crime necessarily entails consequences in criminal law, a breach may have legal consequences inside or outside criminal law. In international law, this difference applies to war crimes and grave breaches. War crimes, on the one hand, are acts and omissions that violate international humanitarian law and are criminalized in international criminal law.³ War crimes rose to prominence as

- 1 G.I.A.D. Draper, ‘The implementation and enforcement of the Geneva Conventions of 1949 and the two Additional Protocols of 1977’, *Collected Courses of the Hague Academy of International Law*, Vol. 164, 1979-III, p. 37.
- 2 Bryan A. Garner (ed.), *Black’s Law Dictionary*, Thomson West, St Paul, 2004, p. 399; G.I.A.D. Draper, ‘The modern pattern of war criminality’, in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff, Dordrecht, 1996, p. 157.
- 3 Georges Abi-Saab, ‘The concept of “war crimes”’, in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World*, Routledge, London, 2001, p. 112; Michael Cottier, ‘Article 8: War crimes – introduction/general remarks’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Beck, Munich, 2008, p. 283; Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 269, 280.

a result of the two world wars and the ensuing efforts to prosecute some of the people responsible for crimes committed then. Article 6 of the Charter of the Nuremberg International Military Tribunal of 8 August 1945 gave the Tribunal jurisdiction to try people who, acting in the interests of the European Axis countries, committed:

(b) War crimes: namely, violations of the laws or customs of war. Such violations 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.

This jurisdictional provision reflected the existence of substantive crimes of international law. Grave breaches followed in the Geneva Conventions of 1949. Article 147 of the Fourth Geneva Convention lists the following acts considered to be grave breaches of that convention:

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁴

The Geneva Conventions did not provide for any international criminal liability for grave breaches. Rather, grave breaches constituted a category of violations of those conventions considered so serious that states agreed to enact domestic penal legislation, search for suspects, and judge them or hand them over to another state for trial.⁵ As for other – non-grave – breaches of the Geneva Conventions, the nature of their sanction in domestic law was left open to the States Parties.⁶ These ‘other breaches’ are not a third category besides war crimes

4 Articles 50/51/130 of the First, Second and Third Geneva Conventions of 12 August 1949 omit some of these acts.

5 See note 92 below; also *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. II-B, p. 115.

6 Common Article 49(3)/50(3)/129(3)/146(3) of the four Geneva Conventions; *Final Record*, above note 5, pp. 31–33, 133. This was left unchanged by Article 86(1) of Protocol I – see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987, paras 3539, 3542; Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for the Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 524. See also Article 89 of Protocol I. However, the evolution of customary law has limited the option of suppressing through non-penal means ‘other breaches’ that amount to war crimes – see the text accompanying notes 92–108 below.

and grave breaches, they are merely the flipside of grave breaches within the Geneva Conventions. In general international law, they may amount to war crimes if they are serious enough.⁷

Not much clarity can be derived from the Geneva Conventions or their *travaux préparatoires* on the relationship between grave breaches and war crimes. The term ‘grave breach’ appeared for the first time in a proposal by the Dutch delegation.⁸ Despite Soviet-led efforts to use ‘crime’ instead, the term ‘grave breach’ was retained because the definition of ‘crime’ varied from one country to another, because war crimes were anyhow breaches of the laws of war, and because the 1949 Diplomatic Conference did not have a mandate to create international criminal law.⁹ According to the main promoter of the grave breaches provisions at the Geneva Conference, Captain Mouton of the Dutch delegation,¹⁰ ‘the aim was not to produce a penal code, but to make it obligatory for the Contracting Parties to include certain provisions in their own codes’.¹¹ The grave breaches provisions in the Geneva Conventions are indeed insufficiently detailed to work on their own as a criminal code, for they lack *mens rea* (although some grave breaches must be ‘wilful’), modes of liability (except commission and the ordering thereof), defences, penalties, rules of procedure, etc. Such indispensable parts of a proper criminal law were, in the absence of agreement among the delegations, ‘left to the judges who would apply the national laws’.¹² In 1977, Protocol I additional to the Geneva Conventions added some substance to the grave breaches regime, but the international treaty-based law on the topic still did not amount to an autonomous criminal code.¹³

In order to understand the original distinction between grave breaches and war crimes, it is necessary to conceive of international and domestic law as separate bodies of law. Whether a grave breach or a war crime is committed, in both cases a rule of international law is breached. However, whereas a grave breach should entail criminal consequences in domestic law, a war crime entails criminal consequences in international law. In more technical terms, grave breaches are violations of certain primary rules of international humanitarian law with penal consequences in domestic law, while war crimes consist of secondary rules of international

7 See note 47 below.

8 *Final Record*, above note 5, p. 85; Jean S. Pictet, *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 585–587.

9 *Final Record*, above note 5, Vol. II-A, pp. 100, 157, 177–178, 184, 349, 527, 645, 647, 673–674, 716, 718, 822; Vol. II-B, pp. 31–33, 85–87, 115–117, 132–133, 355–360, 363. See also Jean S. Pictet, *Commentary, I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 371.

10 *Final Record*, above note 5, p. 107; Pictet, above note 9, p. 360; Pictet, above note 8, p. 587.

11 *Final Record*, above note 5, p. 87. See also Abi-Saab, above note 3, p. 117.

12 *Final Record*, above note 5, p. 115.

13 According to the Philippines delegate, the proposal to adopt ‘a draft code and procedure applicable to crimes committed in breach of the Geneva Conventions of 1949 and their Additional Protocols [...] had met with fierce opposition from the great powers’ – see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974–1977*, Vol. IX, pp. 48–49, CDDH/I/SR.45, paras 19, 23.

criminal law that attach criminal sanctions to breaches of primary rules of international humanitarian law. However, this distinction became blurred as the meaning of 'grave breaches' began to evolve.

Convergence of the concepts of war crimes and grave breaches

There has been a fair deal of conceptual confusion between grave breaches and war crimes. One source of this may be that both constitute breaches of international humanitarian law and lead to the individual criminal liability of their perpetrators. Indeed, the grave breaches provisions were inspired both by Article 5 of the Genocide Convention,¹⁴ dealing with breaches, and Article 6(b) of the Nuremberg Statute,¹⁵ dealing with crimes. This confusion spread to international treaties. Grave breaches are construed as a particular type of war crime in both Article 1(a) of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and Article 1(2) of the 1974 European Convention on the same topic.

In the mid-1970s, the relationship between war crimes and grave breaches was hotly debated at the Diplomatic Conference on the draft Additional Protocols, following a proposal to describe grave breaches as war crimes.¹⁶ Some states considered grave breaches to be a category of war crimes,¹⁷ while others emphasized the differences between the two.¹⁸ Several delegations pointed out that if grave breaches were to be considered war crimes, they would need to be more precisely defined.¹⁹ In the end, Article 85(5) of Protocol I came to provide that 'grave breaches of [the Geneva Conventions and Protocol I] shall be regarded as war crimes'. By deciding that grave breaches constituted war crimes, the drafters gave the former a new additional meaning, providing them with criminal consequences in international law.²⁰

14 *Final Record*, above note 5, pp. 85, 115.

15 Based on a textual comparison between this provision and Articles 50(1)/51(1)/130(1)/147(1) of the four Geneva Conventions.

16 *Official Records*, above note 13, Vol. X, p. 127, CDDH/234/Rev.1, para 77; Sandoz *et al.*, above note 6, paras 3521–3522.

17 *Ibid.*, Vol. VI, p. 283, CDDH/SR.44, para 18 (United Kingdom); Vol. VI, p. 293, CDDH/SR.44, para 81, and Vol. IX, p. 317, CDDH/I/SR.64, para 69 (Poland); Vol. VI, p. 294, CDDH/SR.44, paras 88, 90, and Vol. IX, p. 282, CDDH/I/SR.61, para 85 (East Germany); Vol. VI, pp. 298–299, CDDH/SR.44 (Canada); Vol. VI, pp. 305–306, CDDH/SR.44, and Vol. IX, pp. 313–314, CDDH/I/SR.64, para 49 (Yugoslavia).

18 *Ibid.*, Vol. VI, p. 293, CDDH/SR.44, para 85, and Vol. IX, pp. 269–270, CDDH/I/SR.61, paras 4–5 (Indonesia); Vol. VI, p. 295, CDDH/SR.44, para 92 (Egypt); Vol. IX, p. 279, CDDH/I/SR.61, para 62 (Switzerland); Vol. IX, p. 280, CDDH/I/SR.61, para 69 (Netherlands); Vol. IX, p. 307, CDDH/I/SR.64, para 10 (Austria).

19 *Ibid.*, Vol. VI, p. 292, CDDH/SR.44, para 77 (Italy); Vol. VI, p. 295, CDDH/SR.44, para 97, and p. 301 (France); Vol. VI, p. 297, CDDH/SR.44, and Vol. IX, pp. 309–310, CDDH/I/SR.64, paras 27–28 (Australia); Vol. IX, p. 19, CDDH/I/SR.43, para 18; Vol. IX, p. 25, CDDH/I/SR.43, para 49 (USA); Vol. IX, p. 46, CDDH/I/SR.45, para 11 (West Germany); Vol. IX, p. 280, CDDH/I/SR.61, para 67 (United Kingdom); Vol. IX, p. 316, CDDH/I/SR.64, para 66 (Finland); but see also Vol. VI, p. 300, CDDH/SR.44 (Egypt).

20 *Ibid.*, Vol. IX, p. 46, CDDH/I/SR.45, para 11.

In 1993, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) included grave breaches in Article 2, separating them from war crimes, which were covered in Article 3. This confirmed, in an instrument of international criminal law, that grave breaches had become international crimes. Yet the Statute did not provide crucial content such as *mens rea* requirements and defences, leaving these areas to be filled in by the case-law.

At the preparatory meetings for the Rome Conference on the International Criminal Court (ICC) it was widely accepted by 1996 ‘that the definition of violations of laws and customs applicable in armed conflict should encompass both grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs of war.’²¹ Several state representatives suggested war crimes provisions that would combine grave breaches and war crimes.²² However, as the grave breaches provisions of the 1949 generation were easily identified and widely accepted, they were dealt with separately, quickly and painlessly, allowing the delegates to concentrate on other often more controversial crimes.²³ Indeed, the discussion focused on war crimes in Article 8(2)(b) rather than on grave breaches in Article 8(2)(a).²⁴ While the inclusion of the concept of war crimes in the ICC’s jurisdiction was not controversial, specific war crimes and their definitions were.²⁵ The grave breaches provisions hailing from Protocol I were included in the section on war crimes rather than that on grave breaches – an oddity that was noticed and questioned at the conference.²⁶ This choice stemmed from the difference between the almost universal ratification of the Geneva Conventions and the smaller number of states that had accepted Protocol I.²⁷ The Rome Conference thus showed that the grave breaches provisions of the 1949 generation, those of the 1977

21 ‘Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of “core crimes”’, Press Release L/2764, 26 March 1996. Similarly, ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’, A/50/22, 6 September 1995, para 73; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, A/51/22, 13 September 1996, para 76.

22 Press Release, above note 21; ‘Report of the Preparatory Committee’, above note 21, para 80.

23 ‘Report of the Ad Hoc Committee’, above note 21, paras 73, 75; ‘Report of the Preparatory Committee’, above note 21, paras 80–81; comments of the Egyptian delegate in Press Release, above note 21; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, ‘Summary Record of the 5th Meeting’, A/CONF.183/C.1/SR.5, 20 November 1998, para 71.

24 United Nations, above note 23, ‘5th Meeting’, 20 November 1998, A/CONF.183/C.1/SR.5, paras 75–76; Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’, in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer, The Hague, 1999, pp. 103–109.

25 United Nations, above note 23, ‘3rd Meeting’, A/CONF.183/C.1/SR.3, 20 November 1998, paras 8–9, 11; von Hebel and Robinson, above note 24, pp. 109ff.

26 ‘Draft consolidated text’, A/AC.249/1997/WG.1/CRP.2, 20 February 1997, note 2; United Nations (note 23 above), ‘4th Meeting’, A/CONF.183/C.1/SR.4, para 44, and ‘5th Meeting’, A/CONF.183/C.1/SR.5, paras 31, 91.

27 ‘Report of the Ad Hoc Committee’, above note 21, para 73; ‘Report of the Preparatory Committee’, above note 21, para 81; Cottier, above note 3, p. 288; Charles Garraway, ‘War crimes’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, New York, 2007, p. 388.

generation, and provisions relating to other war crimes enjoyed quite different levels of acceptance among states.

The ICC Statute, adopted in 1998, listed grave breaches as a category of war crimes under Article 8(2)(a). This confirmed, in an instrument of international criminal law, that grave breaches had become subsumed under war crimes. The transformation led to some strange results. Article 8(2)(a) defines criminal acts using wording that was not drafted for that purpose, since the grave breaches provisions were only guidelines for domestic criminal legislation.²⁸ Moreover, due to the different origins of the grave breaches provisions in Article 8(2)(a) and the war crimes provisions in the rest of Article 8, there is plenty of overlap between Articles 8(2)(a) and 8(2)(b).²⁹ Yet there is no logical or legal reason to separate the crimes in these articles, since the same rules in the ICC Statute apply to both types of crimes.³⁰ In any event, the ICC Statute provided the ICC with jurisdiction over a long list of war crimes drawn from customary law, including grave breaches. This illustrates how in recent years the concept of grave breaches has appeared in instruments of international criminal law rather than in international humanitarian law.³¹

In contemporary international law, there are therefore two kinds of grave breaches. The original grave breaches provisions are jurisdictional and procedural. They govern how domestic legislative and law enforcement bodies should ensure that justice is done for certain breaches of international law. We will call these 'procedural grave breaches'. The new grave breaches are substantive norms, and constitute a category of war crimes. They define behaviour that is considered to be criminal in international law. We will call these 'substantive grave breaches'.

Do grave breaches have any autonomous scope of application compared with war crimes?

If a grave breach and a similar war crime have different scopes of application, there may be situations in which only one or the other applies. This could perpetuate their dual existence in international law. Procedural grave breaches are hemmed in by their conventional thresholds of applicability. All procedural grave breaches now have equivalent (though not always identical) substantive grave breaches in

28 Michael Bothe, 'War crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, Oxford University Press, New York, 2002, pp. 391–392; Cottier, above note 3, p. 288; United Nations, above note 23, '4th Meeting', A/CONF.183/C.1/SR.4, para 49.

29 Bothe, above note 28, p. 396.

30 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p. 128.

31 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: The Experience of International and National Courts*, Kluwer, The Hague, 2000, pp. 69–70. His conclusions are equally valid today – see the example of the Extraordinary Chambers in the Courts of Cambodia at note 111 below.

customary law.³² The scope of the latter still depends on their treaty-based origins. Other war crimes are found exclusively in customary law.³³ This section will examine in general terms the respective scopes of substantive grave breaches and war crimes, reviewing their applicability to different types of armed conflict, their material, personal, geographical and temporal scopes, modes of liability and circumstances eliminating criminal liability. It will not cover procedural grave breaches, which are to be defined in domestic law and therefore lack content in international law beyond some general guidelines.

Types of armed conflict

It has been suggested that war crimes can only be committed during hostilities, while grave breaches can also be committed in their aftermath.³⁴ However, under the ICC Statute both substantive grave breaches and war crimes apply in international armed conflict, broadly defined to include occupation.³⁵ On the other hand, in contemporary international law, war crimes can be committed in both international and non-international armed conflict,³⁶ while grave breaches only apply to international armed conflict.³⁷ Article 1(4) of Protocol I extended the notion of international armed conflict to include wars of national liberation, thereby extending the scope of the 1977 generation of grave breaches. At the ICTY, substantive grave breaches have disappeared from indictments because they could generally be replaced by a war crime charge carrying a lesser burden of proof, in particular dispensing with the need to first establish the existence of an

32 Articles 50/51/130/147 of the four Geneva Conventions; Articles 11(4), 85(3) and (4) of Protocol I; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, pp. 574–580, 586, 588–590. The author is aware of criticisms of the study, but to examine its data and methodology would be beyond the scope of this article.

33 Not to be confused with the often treaty-based nature of the *primary* rules of international humanitarian law, the violation of which may constitute a war crime. The statutes of international courts and tribunals define their jurisdiction over war crimes, not the war crimes themselves.

34 e.g. Ghislaine Doucet, 'La qualification des infractions graves au droit international humanitaire', in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff, Dordrecht, 1989, p. 83.

35 Dörmann, above note 30, pp. 17–18, 128. See also Fischer, above note 31, pp. 81–83.

36 Article 8(2) of the ICC Statute; ICTY, *The Prosecutor v. Duško Tadić aka. 'Dule'*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 89; see also Christopher Greenwood, 'International humanitarian law and the *Tadić* case', *European Journal of International Law*, Vol. 7, 1996, pp. 280–281.

37 Neither the four Geneva Conventions nor Additional Protocol II of 1977 contain provisions relating to grave breaches in non-international armed conflict; Article 8 of the ICC Statute; Dörmann, above note 30, p. 18; *Tadić*, above note 36, paras 79–84 (but see Section IV of the separate opinion of Judge Abi-Saab); Henckaerts and Doswald-Beck, above note 32, p. 574; Sonja Boelaert-Suominen, 'Grave breaches, universal jurisdiction and international armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?', *Journal of Conflict and Security Law*, Vol. 5, 2000, pp. 63–103; Fischer, above note 31, pp. 78–80; Greenwood, above note 36, pp. 275–276; Marco Sassoli, 'La première décision de la chambre d'appel du tribunal pénal international pour l'ex-Yougoslavie: *Tadić* (compétence)', *Revue Générale de Droit International Public*, Vol. 100, 1996, pp. 122–124.

international armed conflict.³⁸ Also, unlike grave breaches, war crimes have come to apply to conflicts between organized armed groups.³⁹ Thus while grave breaches only apply to international armed conflict, war crimes extend further to non-international armed conflict, which in today's world covers the majority of armed conflicts. In this regard, it is thus always possible to charge an accused with a war crime rather than a substantive grave breach.

Material scope

Acts and omissions

Grave breaches cover a relatively limited set of violations of international humanitarian law, set out in the Geneva Conventions and expanded in Protocol I.⁴⁰ Some authors have argued that only violations of international humanitarian law amounting to grave breaches constitute war crimes.⁴¹ This view wrongly bases individual criminal responsibility on jurisdictional provisions.⁴² Yves Sandoz has argued that Article 85(5) of Protocol I shows that, *a contrario*, non-grave ('other') breaches are not war crimes.⁴³ However, while Article 85(5) provides that grave breaches are war crimes, it does not say what else is or is not a war crime. It is consistent with Article 85(5) to say that acts or omissions may qualify as war crimes even if they do not qualify as grave breaches. Indeed, this is the case, as reflected in Article 8 of the ICC Statute. G.I.A.D. Draper has argued that the fact that the Geneva Conventions allow for suppression of non-grave breaches implies that criminal sanctions may be used for this purpose, should the state so choose.⁴⁴ Of course, this does not necessarily mean that there are any such war crimes in international law, since the 'other breaches' provisions merely allow States Parties to enact domestic sanctions as they see fit.⁴⁵ Some authors have argued that the notion of war crimes is broader than that of grave breaches, although not so broad as to encompass all violations of international humanitarian law.⁴⁶ It is now clear

38 Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 59; John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, Transnational Publishers, Irvington-on-Hudson, 2000, p. 55. On 22 September 2008, the ICTY Prosecution submitted an amended indictment in the *Radovan Karadžić* case, which removed the count of grave breaches.

39 Article 8(2)(f) of the ICC Statute.

40 Articles 50/51/130/147 of the four Geneva Conventions; Articles 11(4), 85(3) and (4) of Protocol I.

41 Doucet, above note 34, p. 83; see references cited in Greenwood, above note 36, note 47.

42 Greenwood, above note 36, pp. 279–280.

43 Yves Sandoz, 'Penal aspects of international humanitarian law', in M. Cherif Bassiouni (ed), *International Criminal Law*, Transnational Publishers, Ardsley, 1999, p. 408.

44 Draper, above note 2, p. 164.

45 Henckaerts and Doswald-Beck, above note 32, p. 571; Garraway, above note 27, pp. 385–386, 389–390.

46 Cottier, above note 3, p. 283; Draper, above note 2, p. 156; Fischer, above note 31, p. 71; Bert V.A. Roling, 'Aspects of the criminal responsibility for violations of the laws of war', in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 212–213; Emmanuel J. Roucounas, 'Les infractions graves au droit humanitaire', *Revue hellénique de droit international*, Vol. 31, 1978, p. 132.

that all serious violations of international humanitarian law amount to war crimes, which is therefore a broader category than grave breaches.⁴⁷ What is meant by ‘serious violations’? The expression appears in Articles 89–90 of Protocol I, and Article 90(2)(C)(i) appears to conceive of grave breaches as a sub-category of serious violations.⁴⁸ According to the ICTY Appeals Chamber, for a violation to be ‘serious’,

it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’.⁴⁹

This makes the material scope of war crimes fuzzier than the treaty-law definitions of grave breaches, which amounts to an advantage of the latter over the former.⁵⁰ However, not much remains of this advantage today, following the clarification of the material scope of war crimes in the jurisprudence of the ICTY, the long list of war crimes in Article 8(2)(b) of the ICC Statute, and the Elements of Crimes.

A comparison of the ICC Statute’s Article 8(2)(a), on grave breaches, and Article 8(2)(b), on other war crimes, shows that there are factual situations to which both a grave breach and a war crime provision could apply. For instance, the grave breach of wilfully killing a prisoner of war in Article 8(2)(a)(i) is similar to the war crime of killing a combatant who has surrendered in Article 8(2)(b)(vi).⁵¹ However, there are many factual situations constituting grave breaches that would not correspond to the definition of any other war crimes in the ICC Statute. For instance, the grave breach of taking hostages under Article 8(2)(a)(viii) is quite different from any war crime listed in Article 8(2)(b). The ICC Prosecution has filed charges based on the grave breaches of wilful killing and inhuman treatment, which were a better match for the alleged facts than any of the other war crimes provisions in the ICC Statute.⁵² Consequently, as far as the *actus reus* of crimes is concerned, substantive grave breaches retain their relevance in comparison with other war crimes.

47 Henckaerts and Doswald-Beck, above note 32, p. 568 (Rule 156); *Tadić*, above note 36, para 94; Dörmann, above note 30, p. 128. Abi-Saab, above note 3, p. 112, contests the existence of a general rule incriminating all serious violations of international humanitarian law.

48 Sandoz *et al.*, above note 6, para 3621.

49 *Tadić*, above note 36, para 94. See also Henckaerts and Doswald-Beck, above note 32, pp. 569–570.

50 Abi-Saab, above note 3, p. 114. See also Meron, *The Humanization of International Law*, Martinus Nijhoff, Leiden, 2006, p. 117.

51 For more examples, see Bothe, above note 28, p. 396.

52 ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, amended document containing the charges pursuant to Article 61(3)(a) of the Statute, 26 June 2008, Annex 1A.

Mental state

Some grave breaches of the 1949 generation require that perpetration be 'wilful',⁵³ which is a less established legal term than 'intent', 'criminal negligence', etc. Protocol I applied the 'wilful' requirement to all new grave breaches.⁵⁴ At the Additional Protocols conference, the topic of *mens rea* for grave breaches was barely addressed.⁵⁵ This was in line with the original idea of leaving that matter to the domestic law of each state party to the Geneva Conventions.⁵⁶ The International Committee of the Red Cross (ICRC) has nevertheless posited that the term 'wilful' covers intentional and reckless conduct, but excludes negligence.⁵⁷ Certainly, with the adoption of Article 85(5) of Protocol I and the creation of substantive grave breaches, these had to have a *mens rea* in international law. Authors have disagreed on the interpretation of 'wilful'.⁵⁸ The ICTY Appeals Chamber has adopted the above-mentioned position of the ICRC.⁵⁹

In customary international law, war crimes generally require intentional or reckless conduct.⁶⁰ Article 30 of the ICC Statute, which applies both to the grave breaches provisions in Article 8(2)(a) and the other war crimes provisions in Article 8(2)(b), requires intent, defined broadly to include awareness that a consequence will occur in the ordinary course of events, and knowledge, meaning 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Notwithstanding the different terminology, this is hardly distinguishable from intent and recklessness.⁶¹ Under Article 30(1), this general rule of *mens rea* defers to specific rules contained elsewhere. Some grave breaches provisions do indeed provide otherwise, requiring that conduct be 'wilful'. At the ICC preparatory conference, there was a debate about whether 'wilful' had a broader meaning than the *mens rea* set forth in Article 30 of the ICC Statute, but the question remains for the case-law to answer.⁶² This variation in terminology should not translate into real differences between the *mens rea* of war crimes and that of substantive grave breaches, as there is no clear textual or logical reason why they should be different. It is preferable not to create distinctions where none are needed.

53 Articles 50/51/130/147 of the four Geneva Conventions.

54 Articles 11(4), 85(3) and (4) of Protocol I.

55 *Official Records*, above note 13, Vol. IX, p. 282, CDDH/I/SR.61, para 80.

56 See above note 12.

57 Sandoz *et al.*, above note 6, paras 493(a), 3474.

58 Bothe, above note 28, p. 392; Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2008, pp. 57–58, 92; Oren Gross, 'The grave breaches system and the armed conflict in the former Yugoslavia', *Michigan Journal of International Law*, Vol. 16, 1994–1995, p. 799; Mettraux, above note 38, p. 72; Gabriella Venturini, 'War crimes in international armed conflicts', in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Ashgate, Aldershot, 2001, p. 103; Werle, above note 3, p. 298.

59 ICTY, '*Čelebići case*', Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para 422.

60 Henckaerts and Doswald-Beck, above note 32, p. 574.

61 Cassese, above note 58, pp. 62, 73; but see Werle, above note 3, pp. 104–105, 114. The ICC case-law will clarify whether the ICC Statute departs from customary law on this matter.

62 Dörmann, above note 30, p. 39.

At the ICC, there is an additional mental element to be proven for grave breaches compared with war crimes – the perpetrator's awareness of the factual circumstances that established the protected status of the victim or property.⁶³ Due to this additional mental element, substantive grave breaches carry a heavier burden of proof than other war crimes. Thus there is little reason to rely on substantive grave breaches rather than other war crimes as far as *mens rea* is concerned.

Personal scope

All states throughout the world are today party to the four Geneva Conventions, while 26 states are not party to Protocol I.⁶⁴ All states are UN members and as such bound by the ICTY and ICTR Statutes, adopted by the UN Security Council.⁶⁵ At 1 June 2008, 108 states were party to the ICC Statute.⁶⁶ Customary international criminal law and the jurisdictional provisions of the ICC Statute overlap to a great extent, even though the latter are occasionally narrower than the corresponding substantive rules.⁶⁷ Nevertheless, states that are not bound by the ICC Statute may contend that certain of its jurisdictional provisions do not reflect war crimes under customary law, in particular those inspired by Protocol I if they are not party to that convention either. Whether or not that argument would be correct in law, this is a practical reason to prefer relying on grave breaches of the 1949 generation, which are now an undisputed part of international law, rather than other less-established grave breaches or war crimes.

In terms of victims, all grave breaches are limited by the definitions of 'protected persons' and 'protected property' of their respective conventions.⁶⁸ Protocol I expanded the content of these categories, but stopped short of including the state party's own nationals among the protected persons.⁶⁹ The ICTY, on the other hand, has allowed protected status for victims who owe allegiance to, and are under the control of, an adverse party to the conflict, even if they share the same

63 *Ibid.*, pp. 17, 29, 128.

64 ICRC, *The ICRC: promoter and guardian of international humanitarian law*, available at <http://www.icrc.org/ihl.nsf> (visited 8 April 2009).

65 United Nations, *Member States*, available at <http://www.un.org/members/list.shtml>, visited 8 April 2009; UN Security Council Resolution 827 (1993) on establishment of a tribunal (Former Yugoslavia), S/RES/827 (1993), 25 May 1993; UN Security Council Resolution on establishment of an international tribunal and adoption of the statute of the tribunal (Rwanda), S/RES/955 (1994), 8 November 1994; Article 25 of the UN Charter.

66 International Criminal Court, *The States Parties to the Rome Statute*, available at <http://www.icc-cpi.int/Menus/ASP/states+parties> (visited 8 April 2009).

67 Henckaerts and Doswald-Beck, above note 32, pp. 574–590; Articles 8(2)(a) and (b) of the ICC Statute; Bothe, above note 28, pp. 387, 396.

68 Articles 13/13/4/4 of the four Geneva Conventions define 'protected persons' in general – there are no general provisions defining 'protected property'; *Tadić*, above note 36, para 81; Mettraux, above note 38, pp. 54–55, 64–71; Julian J.E. Schutte, 'The system of repression of breaches of Additional Protocol I' in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff, Dordrecht, 1991, pp. 179–180; Werle, above note 3, pp. 299–300.

69 Articles 11(4) and 85(2) of Protocol I. See also Sandoz *et al.*, above note 6, paras 493(d), 3468–3470; Bothe *et al.*, above note 6, pp. 513–514; Fischer, above note 31, pp. 74–75; Roucouinas, above note 46, pp. 86–95; Schutte, above note 68, pp. 186–187, 189, 192.

nationality as the perpetrators.⁷⁰ Whether the ICC will follow this broad interpretation remains for the case-law to decide.⁷¹ The grave breaches provisions in the ICC Statute maintain the varying personal scopes of the original grave breaches provisions.⁷² This translates into an additional element to be proven at the ICC for grave breaches compared with war crimes, namely that the injured person or property was protected under the Geneva Conventions.⁷³ In contemporary customary international law, the range of potential victims of war crimes is therefore broader than for substantive grave breaches.⁷⁴ Hence, where victims are concerned, it is always possible to charge an accused with a war crime rather than a substantive grave breach.

In terms of perpetrators, any physical person can carry out a war crime or a grave breach.⁷⁵ It is clear from the Geneva Conventions that a grave breach can only be perpetrated by someone from the other side in an armed conflict.⁷⁶ While there are no explicit provisions to confirm that the same holds true for war crimes in customary law, this must be the case, since international humanitarian law regulates the behaviour between opposing parties.⁷⁷ At the Additional Protocols conference, some concern was expressed that the possible perpetrators should be identified.⁷⁸ At the Rome Conference on the establishment of the ICC the issue was debated, but the idea of listing the potential perpetrators was abandoned.⁷⁹ Hence there are no differences between war crimes and grave breaches in terms of perpetrators.

Geographical scope

According to the ICTY Appeals Chamber, the application of international humanitarian law extends to 'the whole territory of the warring States'.⁸⁰ This determines in principle the area in which war crimes may occur. The geographical scope of application of the Geneva Conventions covers, as can be seen for instance

70 ICTY, *The Prosecutor v. Duško Tadić aka 'Dule'*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, paras 163–169. See also Fischer, above note 31, pp. 84–87; Jean-François Quéguiner, 'Dix ans après la création du tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 299–303; Marco Sassoli and Laura M. Olson, 'The judgment of the ICTY Appeals Chamber in the *Tadić* case', *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 743–744.

71 Dörmann, above note 30, pp. 28–29.

72 *Ibid.*, pp. 17, 29–33; Bothe, above note 28, p. 391.

73 Dörmann, above note 30, pp. 17, 128.

74 Henckaerts and Doswald-Beck, above note 32, p. 574 ff.; Mettraux, above note 38, pp. 54–55.

75 Cassese, above note 58, pp. 53–54; Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, pp. 660–662; Dörmann, above note 30, pp. 34–37; Fischer, above note 31, pp. 88–89; Mettraux, above note 38, pp. 42, 272–278; Werle, above note 3, p. 296.

76 See note 70 above; Bothe *et al.*, above note 6, p. 115.

77 Henckaerts and Doswald-Beck, above note 32, p. 573; David, above note 75, pp. 674–676. See also Mettraux, above note 38, pp. 55, 275.

78 *Official Records*, above note 13, Vol. VI, p. 283, CDDH/SR.44, para 20.

79 'Report of the Preparatory Committee', above note 21, paras 53, 57; Dörmann, above note 30, p. 34.

80 *Tadić*, above note 36, para 70.

from Article 6(2) of the Fourth Geneva Convention and Article 3(b) of Protocol I, ‘the territory of Parties to the conflict’. This indicates in principle the geographical scope in which grave breaches may occur. While both war crimes and grave breaches can nevertheless, in certain circumstances, take place outside the territories of the opposing sides,⁸¹ it is sufficient for our purposes to conclude that there is no difference between war crimes and grave breaches in terms of their geographical scope.

Temporal scope

As regards the time of the violation, the Geneva Conventions and Protocol I thereto apply from the outset of a conflict or occupation as defined in these instruments until – depending on the rule concerned – the general close of military operations, termination of the occupation, or the final release, repatriation or re-establishment of protected persons in the hands of the enemy.⁸² Beyond this time, grave breaches are by definition excluded. As for war crimes, according to the ICTY Appeals Chamber international humanitarian law applies ‘from the initiation of [...] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached’.⁸³ This summary pronouncement should not be interpreted as differing in any significant way from the general rule laid down in the Geneva Conventions and Protocol I.⁸⁴ In other words, there are no general differences between war crimes and grave breaches in terms of their temporal application.

The situation is different as regards the time of applicability of the respective rules. Certain war crimes and grave breaches provisions may apply to the same acts insofar as both rules were in existence at the time the acts occurred. If they were not, that could create a significant difference between them. Indeed, the law of grave breaches and war crimes has not evolved in parallel. War crimes preceded grave breaches. The concept of war crime was introduced into multilateral international law in Article 228 of the 1919 Treaty of Versailles, but without a definition of these crimes.⁸⁵ In 1946, Article 5 of the Charter of the International Military Tribunal for the Far East took essentially the same approach, while Article 6 of the Charter of the Nuremberg International Military Tribunal provided a non-limitative list of war crimes but without further definition. Despite certain

81 See David, above note 75, pp. 230–231; Robert Kolb, *Ius in bello: le droit international des conflits armés*, Helbing & Lichtenhahn, Basel, 2003, p. 106.

82 Article 5 of the First and Third, and Article 6 of the Fourth Geneva Convention; Articles 3 and 75(6) of Protocol I. Article 6(3) of the Fourth Geneva Convention does not affect the applicability of the grave breaches regime – see note 35 above.

83 *Tadić*, above note 36, para 70.

84 David, above note 75, p. 236.

85 The article provided for criminal liability for persons who ‘committed acts in violation of the laws and customs of war’.

precursors,⁸⁶ the grave breaches provisions in the Geneva Conventions of 1949 were a novel idea.⁸⁷ They were supplemented in 1977 by Protocol I, and substantive grave breaches were created by virtue of Article 85(5) thereof. In 1993, Article 3 of the ICTY Statute featured a non-limitative list of war crimes that differed in part from that of Article 6 of the Nuremberg Charter. In 1998, the jurisdictional provisions of Article 8 of the ICC Statute reflected the minimum extent of the underlying customary crimes at the time.⁸⁸ Another major step was taken in 2005 with the publication of the ICRC's study on customary international humanitarian law, which also contained a section on war crimes in customary law.⁸⁹ Although theoretically it only laid out pre-existing law, in practice it greatly facilitated the practitioner's access to customary international criminal law. However, the study did not attempt to establish when these crimes appeared in customary law. All of this shows that certain acts or omissions committed at certain moments could qualify as war crimes but not grave breaches, or vice versa, due to the fact that only one of the two rules had evolved at that time. Above all, it shows the difficulty in establishing, for many points in time, whether a war crime or substantive grave breach existed in applicable law, given how hard it is to pinpoint when a customary rule comes into existence. In practice, the temporal scope is therefore unlikely to be a determining factor in deciding whether to charge an accused with a war crime or a substantive grave breach.

Modes of liability

The Geneva Conventions only provide for liability for the commission or ordering of procedural grave breaches.⁹⁰ Attempts were made to supplement these modes of liability in Protocol I.⁹¹ Article 86 ended up introducing liability for failure to act when under a duty to do so, and superior liability for a failure to take all feasible measures to prevent or repress a breach committed by a subordinate if the superior knew or should have known about the breach. Modes of liability for war crimes, as developed by the *ad hoc* Tribunals (the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda) and further expanded upon in Article 25 of the ICC Statute, are much more comprehensive. At least since the ICC Statute, substantive grave breaches have the same modes of liability as other war crimes, as Article 25 applies equally to both. The current trend in international criminal law is therefore to make no distinctions between substantive grave breaches and other war crimes with regard to modes of liability.

86 See Sandoz, above note 43, pp. 393–401.

87 Pictet, above note 9, p. 351; Draper, above note 2, especially p. 164.

88 See Bothe, above note 28, p. 381; Meron, above note 50, p. 149.

89 Henckaerts and Doswald-Beck, above note 32, pp. 568–621.

90 Articles 49/50/129/146 of the four Geneva Conventions.

91 *Official Records*, above note 13, Vol. III, p. 320, CDDH/I/304; Vol. IX, p. 51, CDDH/I/SR.45, para 35; and Vol. IX, p. 57, CDDH/I/SR.46, para 9.

Circumstances eliminating criminal liability

Circumstances eliminating criminal liability include justifications, excuses, amnesties, pardons, statutes of limitation, immunities, and the rule *non bis in idem*. There are no primary sources of international law suggesting any differences between grave breaches and war crimes in this regard, and there is no logical reason why there should be any. Notably, Articles 29 and 31–33 of the ICC Statute make no such distinctions. Consequently, there is no difference in international criminal law between grave breaches and war crimes when it comes to circumstances eliminating criminal liability.

As far as scope is concerned, there are thus few reasons to rely on grave breaches rather than war crimes. Substantive grave breaches cover some conduct not covered by other war crimes, but this is only relevant insofar as there are other differences in their respective legal regimes. Such differences do exist, but they favour war crimes. Only for substantive grave breaches must it be proven that the perpetrator knew that the victim belonged to an adverse party and that the injured person or property was protected under the Geneva Conventions. Grave breaches are also limited to international armed conflict, while many war crimes apply in other types of armed conflict as well. Substantive grave breaches of the 1949 generation have only one clear advantage, namely that the relevant provisions are accepted by, and clearly binding upon, all states. However, this has nothing to do with their origin as grave breaches, since several grave breaches of the 1977 generation remain highly controversial, while the qualification of many acts as war crimes is well accepted today. Procedural grave breaches are in many ways less fully formed in contemporary international law than substantive grave breaches and other war crimes, but this is because they are a mere skeleton to be fleshed out in domestic criminal law. Their procedural regime is, in comparison, well defined.

Does the procedural regime of grave breaches justify their maintenance?

The grave breaches procedural regime includes three basic obligations: (1) enact penal legislation; (2) search for suspects; and (3) judge them or hand them over for trial elsewhere.⁹² Does the procedural regime applicable to war crimes fall significantly short of this? In order to answer this question, we will examine in turn the respective rules on legislation, investigation and adjudication of grave breaches and war crimes.

92 Articles 49/50/129/146 of the four Geneva Conventions. On the use of the expression 'hand over' rather than 'extradite', see *Final Record*, above note 5, pp. 116–117. Additional Protocol I did not significantly change the procedural grave breaches regime of the Geneva Conventions, as evidenced in particular in the Protocol's Article 88.

Legislate

Under common Article 49/50/129/146 of the four Geneva Conventions, States 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’.⁹³ In contrast, there is a conspicuous absence in the ICC Statute of any provision obliging States Parties to enact domestic war crimes legislation corresponding to Article 8(2) of the Statute. However, if a state wishes to maintain jurisdiction over ‘its’ cases, it must avoid being deemed ‘unwilling or unable genuinely to carry out the investigation or prosecution’ by the ICC under Articles 17 and 18. To do so, it must incorporate the war crimes jurisdictional provisions of Article 8(2) in its own domestic legislation and make sure that it is able to effectively investigate and prosecute on this basis.⁹⁴ As a matter of law, there is a significant difference between the obligation to legislate for grave breaches and the option to do so for war crimes, although the state must at least provide active nationality and territorial jurisdiction for war crimes.⁹⁵ In practice, the perceived threat to the sovereignty of a state that the ICC might take over ‘its’ criminal cases appears to motivate states to enact war crimes legislation pursuant to the ICC Statute more fully than they were ever willing to enact grave breaches legislation pursuant to the Geneva Conventions and Protocol I thereto.⁹⁶ A state party to the ICC Statute would also need to include in its domestic legislation all the modes of liability contained in Article 25, which go well beyond the Geneva Conventions. Although Articles 17 and 18 do not explicitly require ‘effective penal sanctions’, this must be considered an implicit requirement in light of the object and purpose of the ICC Statute.⁹⁷ In practice, what prevents grave breaches from

93 A state’s criminal legislation could meet the requirements of the grave breaches provisions *ab initio*. See Michael Bothe, ‘The role of national law in the implementation of international humanitarian law’, in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 302–303, 305.

94 Darryl Robinson, ‘The Rome Statute and its impact on national law’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, Oxford University Press, New York, 2002, pp. 1860–1866; Flavia Lattanzi, ‘The International Criminal Court and national jurisdictions’, in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Ashgate, Aldershot, 2001, pp. 180–181.

95 See note 102 below; also Garraway, above note 27, p. 391.

96 See e.g. ICC Legal Tools National Implementation Legislation Database, at <http://www.icc-cpi.int/Menus/ICC/Legal%20Texts%20and%20Tools/Legal%20Tools%20Directory/09%20%20National%20implementing%20legislation/>; ICRC Database on the National Implementation of International Humanitarian Law, at <http://www.icrc.org/ihl-nat>; Boelaert-Suominen, above note 37, pp. 89–93; Richard van Elst, ‘Implementing universal jurisdiction over grave breaches of the Geneva Conventions’, *Leiden Journal of International Law*, Vol. 13, 2000, pp. 825–836, 840, 852. See also Bothe, above note 93, pp. 307–310.

97 In particular, see the affirmation in the preamble to the ICC Statute ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’; see also Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969.

becoming redundant as far as criminal legislation is concerned is that significantly fewer states are party to the ICC Statute than to the Geneva Conventions and Protocol I.⁹⁸ Furthermore, some grave breaches of the 1977 generation are not, or not fully, included in the ICC's jurisdiction, so the corresponding legislative obligations in Protocol I remain relevant.⁹⁹ These discrepancies are likely to diminish over time as more states become party to the ICC Statute and the ICC's jurisdiction is expanded through revisions of its Statute.

Search and investigate

With regard to grave breaches, common Article 49/50/129/146 of the four Geneva Conventions provides that States Parties 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches'.¹⁰⁰ With regard to war crimes, States party to the ICC Statute have, as seen above, a strong incentive to effectively investigate and prosecute.¹⁰¹ In contemporary customary international law, 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects'.¹⁰² Thus while customary law requires a criminal investigation into war crimes, the Geneva Conventions require a search for grave breaches suspects. This difference makes some sense in light of the different scopes of the two obligations. For war crimes, the obligation is potentially limited to active nationality and territorial jurisdiction (unless the state's law gives its courts jurisdiction on other bases too). The state exercising such jurisdiction will generally be an appropriate state for opening criminal investigations. By contrast, the procedural grave breaches regime extends the obligation to search to any state party, at least if and when the suspect is on its territory.¹⁰³ Not every state can, or should, open a criminal investigation, but it can keep a lookout for the suspect if he or she enters its territory. In this area, grave breaches therefore carry a broader but less demanding obligation than war crimes.

Judge or hand over

Common Article 49/50/129/146 of the four Geneva Conventions provides that states parties 'shall bring [persons alleged to have committed, or to have ordered to

98 See notes 64 and 66 above.

99 The grave breaches in Articles 85(3)(c) and 85(4)(b) and (c) of Protocol I are omitted in the ICC Statute. See Knut Dörmann, 'War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes', *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, pp. 345, 348; von Hebel and Robinson, above note 24, pp. 104, 124.

100 See also Article 88(1) of Protocol I.

101 See note 94 above.

102 Henckaerts and Doswald-Beck, above note 32, p. 607 (Rule 158); see also p. 618 (Rule 161). For a discussion of the meaning of 'appropriate', see Garraway, above note 27, p. 392.

103 Pictet, above note 8, p. 593. This applies equally to all four Geneva Conventions.

be committed, grave breaches], 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.¹⁰⁴ The state detaining a grave breaches suspect thus has a limited choice between either trying the suspect or handing him or her over to another state for the purpose of trial (*aut dedere aut judicare*). This system requires States Parties to incorporate universal jurisdiction over grave breaches in their domestic law.¹⁰⁵ In contemporary customary international law, 'States have the right to vest universal jurisdiction in their national courts over war crimes'.¹⁰⁶ If a state has jurisdiction over a war crimes suspect, it must prosecute him or her.¹⁰⁷ Thus from the perspective of domestic criminal jurisdiction, grave breaches carry mandatory universal jurisdiction, while other war crimes carry permissive universal jurisdiction. This is a significant difference in theory, as a state must prosecute or hand over a person accused of a grave breach, while the state would be legally entitled under international law not to assert jurisdiction over war crime suspects other than on the basis of territoriality or active nationality. In practice, however, states have often failed to give themselves the necessary bases for jurisdiction over procedural grave breaches. Where an international court has jurisdiction, this difference between grave breaches and war crimes disappears.¹⁰⁸

Conclusion

These procedural differences between war crimes and grave breaches might in theory maintain the importance of the latter in international law. However, the procedural grave breaches system of the Geneva Conventions and Protocol I was

104 See also Article 88(2) of Protocol I.

105 *Tadić*, above note 36, paras 79–80; van Elst, above note 96, pp. 819–822. The obligation to judge or hand over also applies to neutral states – *Final Record*, above note 5, p. 116; van Elst, above note 96, p. 823; Meron, above note 50, p. 127; but see also Roling, above note 46, p. 202; Roucouinas, above note 46, p. 67.

106 Henckaerts and Doswald-Beck, above note 32, p. 604 (Rule 157).

107 *Ibid.*, pp. 607–608 (Rule 158). The preamble to the ICC Statute recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

108 The grave breaches regime, as originally conceived, did not exclude that extradition could be directed to an international rather than a national court – Pictet, above note 8, p. 593; M. Cherif Bassiouni, 'Repression of breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949', *Rutgers Law Journal*, Vol. 8, 1977, pp. 196–197; Antonio Cassese, 'On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law', *European Journal of International Law*, Vol. 9, 1998, p. 7; van Elst, above note 96, pp. 844–845; Gross, above note 58, p. 794; Meron, above note 50, pp. 117–118; but see also Draper, above note 1, pp. 38, 42. When an international court has jurisdiction, its procedural regime replaces that of grave breaches – *Tadić*, above note 36, para 81; Gross, above note 58, p. 794; Mettraux, above note 38, p. 55; Venturini, above note 58, p. 97.

barely put into practice until the 1990s, owing to huge practical, legal and/or political difficulties regarding handover and prosecution.¹⁰⁹ At the same time, there was also scant war crimes litigation beyond the aftermath of the Second World War.

Things changed with the adoption of the ICTY Statute in 1993. Grave breaches came to serve as a major building block of international criminal law at a time when people were grasping at straws to put this body of law together. Once grave breaches had fulfilled this purpose, they were abandoned in ICTY practice. However, substantive grave breaches are not defunct before international or mixed courts. The ICC Prosecution has recently filed charges that include counts based on grave breaches provisions in the ICC Statute.¹¹⁰ Investigating judges of the Extraordinary Chambers in the Courts of Cambodia have recently charged Kaing Guek Eav ('Duch') with grave breaches rather than war crimes.¹¹¹

The ground swell initiated by the ICTY also revived the original intent of the grave breaches regime. For the first time, national courts heard cases based on grave breaches. Other charges brought before domestic courts were based on war crimes, which generally have a more practical legal regime. However, the idea that these courts could hear such cases with little or no link to the alleged crimes originated from the doctrine of universal jurisdiction over grave breaches.

Today, grave breaches provisions, at least those of the 1949 generation, remains privileged as tried and true black-letter law, compared with the nebulous customary law origins of war crimes. At the same time, this has arrested the development of the grave breaches laid down in the Geneva Conventions and Protocol I, whereas the more dynamic war crimes have evolved and adapted to new realities. With time, war crimes will no doubt become as well accepted in law as grave breaches. They will benefit from clear definitions, yet retain the advantage of adapting to the evolution of international customary law. Any comparative advantage of grave breaches will fade away. The real value of grave breaches may

109 Cassese, above note 108, pp. 5–7; Draper, above note 2, pp. 159–161, 168; Draper, above note 1, pp. 39–42, 51; van Elst, above note 96, pp. 841, 850–853; Christine Van den Wyngaert, 'The suppression of war crimes under Additional Protocol I', in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff, Dordrecht, 1991, pp. 202–205. See also note 96 above.

110 See note 52 above.

111 *Kaing Guek Eav, OCII, Closing order indicting Kaing Guek Eav alias Duch*, 8 August 2008, p. 44, available at http://www.cambodiatribunal.org/CTM/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3 (visited 21 April 2009). This choice was probably due to the fact that the founding instruments give the Extraordinary Chambers clear jurisdiction over grave breaches but generally not over other war crimes (see Article 9 of the 'Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea' and Articles 2, 6 and 7 of the Law on the Establishment of the Extraordinary Chambers), which itself is probably due to Cambodia's greater acceptance of grave breaches of the 1949 generation.

therefore be historical, as a stepping stone towards broader and better conceived rules governing war crimes. Grave breaches are becoming part of this war crimes regime, in the shape of substantive grave breaches. They will leave a lasting mark, which eventually the observer may only recognize if he or she knows what to look for.

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2008

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A. Legislation

Ireland

The *Cluster Munitions and Anti-Personnel Mines Act 2008* was adopted on 2 December 2008.¹ The Act makes the use, development or production, acquisition, possession or transfer of cluster munitions and anti-personnel mines a criminal offence under Irish law, fulfilling Ireland's international obligations under the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. According to the Act, a person guilty of such an offence will be found liable, on summary conviction, to a fine or imprisonment or both.

The Act also prohibits the investment of public moneys, directly or indirectly, in munitions companies. Should public moneys be directly invested in a company which is or becomes a munitions company, the investor should establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or, alternatively, divest itself of its investment in that company.

Norway

An amendment to the *Norwegian General Civil Penal Code*² was passed on 7 March 2008, entering into force on the same date, by which the crimes of genocide, crimes against humanity and war crimes were introduced. The provisions on the latter are divided into five sections: war crimes against the person (para. 103), war crimes

against property and civil rights (para. 104), war crimes against humanitarian operations and emblems (para. 105), war crimes consisting of the use of prohibited methods of warfare (para. 106), and war crimes consisting of the use of prohibited means of warfare (para. 107).

These sections mostly correspond with existing international humanitarian law. Paragraph 104 raises the minimum age of conscription of children from fifteen to eighteen. The provision in paragraph 104 stipulates that a person who, in connection with an armed conflict, conscripts or enlists children under the age of eighteen into the armed forces or uses them to participate actively in hostilities, may be punished for war crimes.

The amendment also awards a limited extraterritorial jurisdiction to Norwegian courts over non-Norwegian nationals alleged to have committed any of the above crimes abroad, subject to several cumulative requirements, such as the presence of the accused in Norwegian territory, double incrimination, that the offence is considered a crime under international law, and that prosecution should be in the public interest.

South Africa

The Government of South Africa passed the *Prohibition or Restriction of Certain Conventional Weapons Act No. 18 of 2008*, on 13 October 2008.³ The Act prohibits the use, stockpiling, production, development, acquisition and transfer of prohibited weapons, and explicitly outlines the procedure for the State's reporting compliance with the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Conventional Weapons Convention).⁴ It provides for the extraterritorial jurisdiction of South African courts, based on the *active personality* and *protected interest* principles. It would also allow for the exercise of jurisdiction based on the protective and universality principles, should the act or omission *affect or intend to affect a public body, business or any other person in the Republic*.⁵ The Act prohibits, *inter alia*, the use, possession and manufacture of non-detectable fragments and blinding laser weapons. It restricts the use of mines, booby-traps and other devices, as well as incendiary weapons, in conformity with the Conventional Weapons Convention. Penalties may include a fine and imprisonment for a period not exceeding 15 years.

1 Cluster Munitions and Anti-Personnel Mines Act 2008, No. 20 of 2008, entered into force on 2 December 2008.

2 Amendment to the General Civil Penal Code, LOV-2005-05-20-28, entered into force on 7 March 2008.

3 Prohibition or Restriction of Certain Conventional Weapons Act No. 18 of 2008, was adopted on 13 October 2008. The Act shall enter into force upon publication of its regulations.

4 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, 10 October 1980.

5 Article 3(2) of the Act.

United States

The *Child Soldiers Accountability Act of 2008* was signed by the President on 3 October 2008.⁶ The Act makes it a federal crime to knowingly recruit, enlist or conscript a person to serve in an armed force or group while such person is under 15 years of age. Alternatively it criminalizes using a person under 15 years of age to participate actively in hostilities. Regarding the modes of criminal liability, the Act penalizes the violation, attempted violation or conspiracy to commit the above offences with a fine, a term of imprisonment of no more than 20 years, or both. If the offence results in the death of a person, the offender shall be fined and imprisoned for any term of years or for life.

The Act allows for prosecution if the offender is a national of the United States, is an alien lawfully admitted for permanent residence in the United States, or is present in the United States irrespective of his or her nationality, or if the offence occurred in whole or in part within the United States. The prosecution, trial or punishment shall be subject to a statute of limitations unless the indictment or the information is filed not later than 10 years after the commission of the offence.

The Act also provides for a definition of the notion of 'active participation in hostilities', which is understood to mean 'taking part in ... combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or ... direct support functions related to combat, including transporting supplies or providing other services'.

Vietnam

The National Assembly of the Socialist Republic of Vietnam approved on 3 June 2008 the *Law on Red Cross Activities*.⁷ The law entered into force on 1 January 2009. The Law regulates the activities of the Vietnamese Red Cross Society conducted individually or in collaboration with other institutions or individuals in the humanitarian field, including emergency relief, health care and primary first aid, the tracing of missing persons in the event of armed conflict and natural disasters, the dissemination of humanitarian values and disaster preparedness and response. The law regulates the use in Vietnam of the red cross emblem in accordance with the Geneva Conventions of 1949 and provides for the protection of the red cross, the red crescent and the red crystal. The law also defines the conditions of mobilization, receipt, management and use of resources by the Vietnamese Red Cross, as well as the principles governing the cooperation of the Vietnamese Red Cross with

6 S. 2135, 'An Act to prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes', passed by the House of Representatives on 8 September 2008, and signed by President George W. Bush on 3 October 2008.

7 No. 11/2008/QH12, passed by the National Assembly Legislature XIIth, Session 3, on 3 June 2008.

state agencies and with international organizations and other foreign institutions or individuals in the conduct of Red Cross activities.

As regards organizations belonging to the International Red Cross and Red Crescent Movement, Chapter V of the Law states that they shall comply with Vietnamese legislation, and shall be given favourable conditions by the state. The Act lastly allocates responsibilities among various ministries in guiding and supporting the Vietnamese Red Cross in the realization of its humanitarian activities.

B. National Committees on International Humanitarian Law

Ireland

On 29 April 2008 the government authorized the Minister of Foreign Affairs (MFA) to establish a National Committee on International Humanitarian Law.⁸ Besides the MFA itself, the government invited the departments of Defence, of Education and Science, and of Justice, Equality and Law Reform, together with the Office of the Attorney General, the Defence Forces and the Irish Red Cross to take part in the work of the Committee.

The Committee, which meets two or three times a year, assists the government in the implementation and promotion of IHL, including in the development of new legislation or other measures that may be required and in preparations for the International Conferences of the Red Cross and Red Crescent. It also encourages greater knowledge and a broader dissemination of IHL within Ireland.

Morocco

The *Moroccan National Commission for International Humanitarian Law* was officially established on 9 July 2008.⁹ It is composed of representatives of the government and of other official institutions concerned with IHL, as well as of the Moroccan Advisory Council on Human Rights and of the Moroccan Red Crescent Society. Four additional members were appointed by the Prime Minister, including two university professors and 'associations most active in the field of IHL'. The permanent secretariat is held by the Ministry of Justice.

Zambia

The Zambian government established a *National Committee on the Implementation of International Humanitarian Law*.¹⁰ After holding its first meeting on 8 December

8 Although the National Committee is fully operational, legal basis for its creation has not been established yet and should be forthcoming in 2009.

9 Decree 2.07.231, published in the official gazette *Al-Jarida Al-Rasmiya*, issue 5646 on 10 July 2008.

10 The Committee was constituted by Cabinet Order No. MOJ/7/14/1.

2008, it agreed on its terms of reference, which include, among others, to review national legislation in order to identify amendments needed for the full implementation of the obligations arising from IHL; to encourage the dissemination of IHL to the armed forces and the general public; to consider the advisability of state adherence to international treaties and its participation in conferences related to IHL; and to monitor new developments in IHL and review its implications for the state.

The Committee's members include representatives from the Ministry of Justice and Ministry of Finance, the Zambia Air Force and Army and the Department of Development Cooperation and International Organizations from the Ministry of Foreign Affairs, as well as from the National Red Cross Society and the University of Zambia. It is currently chaired by the Director of International Law and Agreements of the Ministry of Justice.

C. Case law

Bosnia and Herzegovina

*Prosecutor v. Ivica Vrdoljak, Court of Bosnia and Herzegovina, Section I for War Crimes, 10 July 2008*¹¹

On 10 July 2008 the Court of Bosnia and Herzegovina (BiH), Section I for War Crimes, found the accused – a member of the 103rd Derventa Brigade of the Croat Defence Council (HVO), guilty of 'crimes against civilians', committed against persons of Serb ethnicity from the territory of Derventa and Bosanski Brod municipalities. The events occurred between late June and late July 1992. The accused was sentenced to five years' imprisonment.

The Court ruled that Mr Vrdoljak, acting contrary to international humanitarian law, in particular Article 3(1)(a) and (c) common to the four Geneva Conventions of 12 August 1949, inhumanely treated prisoners by mentally and physically abusing them, and inflicted great physical and mental suffering upon them. Under the Bosnian Criminal Code, the offences and mode of liability were found to violate Article 173(1)(c) and fall under Articles 29 (related to accomplices) and 180(1) (individual criminal responsibility).

The Court also found that the applicability to the case of the 2003 Criminal Code and its system of penalties – adopted after the commission of the crimes – did not violate the principle of legality. The Court pointed out that the crime for which the accused was found guilty constitutes a crime under international customary law and thus falls under 'general principles of international law' stipulated under Article 4a of the Law on Amendments to the Criminal Code

11 Court of Bosnia and Herzegovina, case of Vrdoljak Ivica for the criminal offence of crimes against civilians, Case No. X-KRZ-08/488, July 10 2008.

of BiH and ‘general principles of law recognised by civilized nations’ stipulated under Article 7(2) of the European Convention on Human Rights.

Further, the Court pointed out that the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was recognized by the UN Secretary-General and the International Law Commission, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) jurisprudence. In its view, these institutions have established that criminal responsibility for war crimes against civilians constitutes a peremptory norm of international law or *jus cogens*. Such conclusion, according to the Court, was confirmed by the Study on Customary International Humanitarian Law conducted by the ICRC, namely its Rules 156, 151 and 158.

The Court also referred to UN General Assembly Resolution 95(I) from 1946 as well as to work by the International Law Commission referring to the Nuremberg Charter.

Appeals Decision, Prosecutor v. Nikola Andrun, Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Panel, 19 August 2008¹²

The Appellate Panel of Section I for War Crimes of the Court of Bosnia and Herzegovina revoked the first-instance verdict against Mr Andrun, whereby he was found guilty of the criminal offence of war crimes against civilians and sentenced to 13 years’ imprisonment, and on 19 August 2008 delivered the second-instance verdict, raising the sentence to 18 years’ imprisonment.

The Appellate Court ruled that the accused – a former Deputy Camp Commander in the municipality of Capljina belonging to a brigade of the Croat Defence Council (HVO) – acted contrary to Article 3(1)(a) and (c) common to the four Geneva Conventions of 12 August 1949, committing the criminal offence of ‘crimes against civilians’.

The Court then found the accused guilty of participating in killings and acts of torture and inhuman treatment at the Gabela camp, during the period from June to September 1993. Under the Bosnian Criminal Code, he committed the criminal offence of crimes against civilians in violation of Article 173(1)(c) in conjunction with Article 29 (which refers to accomplices).

The legal issues in this case included the legality of applying the 2003 Criminal Code and its system of penalties to acts committed in 1993. As in other cases, the Court dismissed the arguments, basing itself on the fact that the crimes constituted an offence under customary international law.

12 Court of Bosnia and Herzegovina, case of Andrun Nikola for the criminal offence of war crimes against civilians, Case No. X-KRZ-05/42, 19 August 2008.

*Appeals Decision, Prosecutor v. Radmilo Vukovic, Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Panel, 13 August 2008*¹³

On 13 August 2008, the Appellate Panel of Section I for War Crimes acquitted the accused – a member of the military forces of the so-called Serb Republic of Bosnia and Herzegovina – of the charges of war crimes against civilians.

The first-instance Court had ruled that the accused, acting contrary to the rules of international humanitarian law, had forcibly had sexual relations with a detainee, violating Article 3(1)(a) and (c) and Article 27(2) of the 4th Geneva Convention of 12 August 1949, and Article 173(1)(c) and (e) of the Criminal Code of BiH. Mr Vukovic was then sentenced to five and a half years' imprisonment.

The Appellate Panel argued, in reversing the decision of the first-instance Court, first, that an armed conflict was under way when the act was committed, and that sexual intercourse had indeed taken place between the accused and the victim in the period between 10 June 1992 and late August 1992, in the Foca municipality. This had further resulted in pregnancy and childbirth. The accused was proved to be the biological father of the newborn child.

The Appellate Panel, however, then considered that there was not sufficient evidence to convict the accused of rape, questioning the validity of the alleged victim's testimony and that of her sister, arguing that they had imperilled their own credibility when some of their statements were found to be inconsistent. According to the Panel,

the testimony of the injured party must not raise any suspicion as to its exactness and truthfulness, credibility and integrity of the witness exactly because the act of rape, as a rule, is never attended by a witness who might decisively support the testimony of the injured party ... However, having carefully analysed the injured party's testimony, the Panel noted a whole range of unacceptable inconsistencies and lack of logic in her description of the event.⁷

Not convinced that the evidence and testimonies proved the charges beyond reasonable doubt, and in application of the principle of *in dubio pro reo*, Mr Vukovic was acquitted on all counts.

*Prosecutor v. Zrinko Picic, Court of Bosnia and Herzegovina, Section I for War Crimes, 28 November 2008*¹⁴

On 28 November 2008 the Court of Bosnia and Herzegovina, Section I for War Crimes, found the accused – a member of the Croat Defence Council (HVO) in the

13 Court of Bosnia and Herzegovina, case of Radmilo Vukovic for the criminal offence of war crimes against civilians, Case No. X-KRZ-06/217, 13 August 2008.

14 Court of Bosnia and Herzegovina, Section I for War Crimes, case of Pincic Zrinko, for the criminal offence of war crimes against civilians, Case No. X-KR-08/502, 28 November 2008.

capacity of a secretary of Hrasnica HVO – guilty of ‘crimes against civilians’ committed against Serb civilians in the Konjic municipality from November 1992 to March 1993. Mr Pincic was sentenced to nine years’ imprisonment.

The Court ruled that the accused, acting contrary to the rules of international humanitarian law, had violated Article 3(1)(a) and (c) and Article 27(2) of the 4th Geneva Convention of 12 August 1949, and Article 173(1)(e) of the Criminal Code of BiH, by coercing another person to have sexual intercourse by threat of immediate direct attack upon her body. The charge also referred to Article 180(1) of the code, on individual criminal responsibility.

The Court also found that the applicability of the Criminal Code and its system of penalties – although adopted after the commission of the crimes – did not violate the principle of legality. As with other similar cases, the Court based its decision on the fact that the crime for which the accused was found guilty constitutes a crime under international customary law and thus would fall under the wording ‘general principles of international law’ found in Article 4a of the Law on Amendments to the Criminal Code of BiH. Further, the Court pointed out that the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was recognized by reports from the UN Secretary-General and the International Law Commission, as well as ICTY and ICTR jurisprudence. In its view, these institutions have established that criminal responsibility for war crimes against civilians constitutes a peremptory norm of international law or *jus cogens*. Such conclusion, according to the Court, was confirmed by the Study on Customary International Humanitarian Law conducted by the ICRC, namely Rules 156, 151 and 158 of the Study.

Prosecutor v. Sreten Lazarevic et al., *Court of Bosnia and Herzegovina, Section I for War Crimes, 29 September 2008*¹⁵

On 29 September 2008 the Court of Bosnia and Herzegovina found four Bosnian Serbs, members of the reserve police forces of the Zvornik Public Security Station, guilty of ‘war crimes against civilians’. The Court ruled that the accused, in the period from May 1992 until March 1993, acted contrary to the rules of international humanitarian law, in particular Article 3 common to the four Geneva Conventions, when civilians from the Zvornik municipality were unlawfully detained and inhumanely treated in the premises of the Misdemeanour Court and the building of DP Izvor, causing them serious suffering and the violation of their bodily integrity.

According to the Court, Mr Lazarevic, as deputy warden of the prison, perpetrated, aided and abetted, and failed to prevent or punish the inhuman treatment of the unlawfully detained civilians, violating Article 173(1)(c), with a mode of liability falling under Articles 29 (referring to accomplices), 31 (accessory)

15 Court of Bosnia and Herzegovina, case of Sreten Lazarevic et al. for the criminal offence of war crimes against civilians, Case No. X-KR-06/243, 29 September 2008.

and 180(2) (command responsibility) of the Criminal Code of BiH. He was sentenced to ten years' imprisonment.

According to the Court, on several occasions he permitted unauthorized persons – groups of Serb soldiers called Gogicevci and others – to enter the prison grounds by unlocking the doors for them or by allowing other guards to do so without being punished, thus enabling these persons to torture and abuse the prisoners.

As for Mr Stanojevic, a guard in the prison, the Court found that he treated the detained civilians inhumanely, committing the criminal offence of 'war crimes against civilians' referred to in Article 173(1)(c), in conjunction with Article 29 (accomplices) of the Bosnian Criminal Code. He was sentenced to seven years' imprisonment.

Two of the accused (Mile Markovic and Slobodan Ostojic), also guards at the prison, were also found guilty of treating detained civilians inhumanely, and were each sentenced to five years' imprisonment.

In all cases, the Court reasoned that the charge of inhuman treatment as a violation of the laws and customs of war was based on Article 173 of the Criminal Code, in conjunction with common Article 3 of the Geneva Conventions, which sets forth a minimum core of mandatory rules and reflects the fundamental humanitarian principles. The trial panel also established that all the persons deprived of their liberty and imprisoned on the premises of the Misdemeanour Court and the building of DP Izvor, enjoyed protection under the Geneva Conventions at the time of their arrest.

Norway

Public Prosecutor v. Misrad Repak, *Oslo District Court*, 2 December 2008¹⁶

The District Court in Oslo convicted Mr Mirsad Repak, a Bosnian and Norwegian national, to five years in prison on eleven counts of unlawful detention of civilians, falling under Section 103(h) of the new Norwegian Criminal Code.¹⁷ He was acquitted, however, of all charges of rape, aggravated assault and crimes against humanity, covered in Section 102. The accused, who fled to Norway after the Balkan wars and was granted Norwegian citizenship, had been a member of the Croatian Defence Forces (HOS) militia group that operated a prison camp in Dretelj, Bosnia and Herzegovina. He was ordered to pay US\$57,000 in compensation and damages to eight plaintiffs.

As for reference to international humanitarian law, two issues were raised by the Court: first, whether there was an armed conflict going on at the time of the events, a necessary determination to link the conduct to the war and label it as a

16 *Public Prosecutor v. Misrad Repak*, Case Number: 08-018985MED-OTIR/08, 2 December 2008.

17 Adopted in March 2008. See above.

war crime; and, second, whether the victims would fall under the category of ‘protected persons’ as determined by the Geneva Conventions of 12 August 1949. After easily affirming the first issue, the Court then gave primary importance to the determination of the status of each of the victims named in each count, reaching a decision for each of them.

Consideration was also given to the principle of legality. With respect to counts involving the crimes against humanity found in Section 102 of the Criminal Code, the Court dismissed the charges because at the time the offences were committed (June–August 1992) there were no provisions in Norwegian legislation penalizing the conduct in the same terms as the current code. The Constitution of Norway prohibits legislation from having retroactive effect.

Regarding the war crimes for which Repak was convicted, however, the Court determined that provisions in Section 223 of the 1902 Penal Code, in force at the time of the events, protected the same interests reflected in the wording of Section 103(h) of the new legislation. This was interpreted to mean that the retroactive effect prohibited in the Constitution would not apply.

United States

*Appeals Decision, Huzaifa Parhat v. Robert M. Gates, Secretary of Defense et al., US Court of Appeals for the District of Columbia Circuit, 20 June 2008*¹⁸

Acting as Court of Appeals for the Combatant Status Review Tribunal (CSRT), the US Court of Appeals for the District of Columbia Circuit was called upon to determine the legality of the CSRT’s determination of the appellant in the case as an ‘enemy combatant’. In concluding that the record upon which such a determination had been made was insufficient and not able to support the ‘preponderance of the evidence’ standard of proof required by the Detainee Treatment Act of 2005, the Court ordered the government either to release or to transfer the appellant, or expeditiously convene a new CSRT that could determine his status in a way consistent with the Court’s opinion. It further established that, following the US Supreme Court’s determination in *Boumedienne v. Bush*, its decision was without prejudice to the appellant’s ability to seek release via a writ of habeas corpus.

The appellant in the case was an ethnic Uighur who fled to Afghanistan from his home in the People’s Republic of China in May 2001 in opposition to the policies of the Chinese government. When their camp was destroyed by a US aerial strike, he and 17 other Uighurs crossed over to Pakistan. Around December 2001, he had been handed over to the US military by Pakistani officials and

18 United States Court of Appeals for the District of Columbia Circuit, *Huzaifa Parhat v. Robert M. Gates, Secretary of Defense, et al.*, Docket No. 06-1397, argued on 4 April 2008, decided on 20 June 2008.

remained imprisoned in the US Naval Base at Guantánamo Bay, Cuba, since June 2002.

With regard to the evidence presented, the Court showed concern with the use of assertions of unidentified individuals, as well as with the government's contention that some of the evidence was reliable because it had been presented in at least three different intelligence documents. On the first count, the Court emphasized that, although it did not suggest that hearsay evidence would never be reliable, it would still be necessary to use it in a form that would permit the CSRT and the Court to test its reliability. As for the information being found in different documents, the Court held that there was no basis for concluding that the information found in them had come from independent sources.

The Court also denied the government's motion to protect from public disclosure all non-classified record information labelled as 'law enforcement sensitive', as well as the names and 'identifying information' of all US government personnel mentioned in the record. Although it did accept *a priori* that some of this information could need protection, the Court rejected the government's generic explanation of such a requirement as being equally applicable to all the detainees' cases pending before the Court. In the Court's opinion, this would effectively allow the government, and not a judicial body, to determine unilaterally whether information is protected. The judgment finally directed the government to file a renewed motion for protection, accompanied by a copy of the record identifying the specific information it seeks to designate and pleadings explaining why the protection of that specific information is required.

*Rehearing en banc, Ali Saleh Kahlah al-Marri v. Commander John Pucciarelli, United States Court of Appeals for the Fourth Circuit, 15 July 2008*¹⁹

The Court of Appeals for the Fourth Circuit reversed and remanded for evidentiary proceedings in the case of Ali Saleh Kahlah al-Marri, in order to determine whether he qualifies as an 'enemy combatant' and thus may be subject to military detention. Mr al-Marri, a citizen of Qatar who lawfully entered the United States on 10 September 2001, was detained on 12 December 2001 as a material witness in the government's investigation of the 11 September 2001 attacks.

Although he was first charged with 'possession of unauthorized or counterfeit credit card numbers with the intent to fraud' and taken before federal district courts in New York and Illinois, on 23 June 2003 the US President signed an order determining that Mr al-Marri was an 'enemy combatant', thus ordering

¹⁹ United States Court of Appeals for the Fourth Circuit, *Ali Saleh Kahlah Al-Marri v. Commander John Pucciarelli, USN Consolidated Naval Brig*, Docket No. 06-7427, argued on 31 October 2007 and decided on 15 July 2008.

the Attorney General to surrender the suspect to the Secretary of Defense. Since that time, he has been held in military custody at the Naval Consolidated Brig in South Carolina. On 8 July 2004, the counsel for Mr al-Marri filed a *habeas* petition before the District of South Carolina. First dismissed by the District Court, it was then granted on appeal (see *al-Marri v. Wright*, 4th Circuit, 2007). On the government's motion for rehearing, the Court of Appeals for the Fourth Circuit vacated the judgment, reconsidering the case *en banc*.

The parties presented two principal issues of contention: first, whether, assuming the government's allegations about Mr al-Marri to be true, Congress had empowered the President to detain Mr al-Marri as an enemy combatant; and, second, assuming Congress had empowered the President to detain al-Marri as an enemy combatant provided the government's allegations against him are true, whether Mr al-Marri had been afforded sufficient process to challenge his designation as an enemy combatant.

On the first count, the *en banc* court held, by 5 votes to 4, that Congress indeed had empowered the President to detain Mr al-Marri. On the second count, it held again by 5 votes to 4 that even assuming that the allegations against Mr al-Marri were true, he had not been afforded sufficient process to challenge his designation as an enemy combatant.

The decision revolved around the authority of the President to determine the status of Mr al-Marri as an 'enemy combatant', based on the Authorization for the Use of Military Force, passed by Congress following the 2001 attacks in New York. Seen as an exception to the 5th Amendment to the Constitution, the Court found that Congress could constitutionally authorize the President to order the military detention, without criminal process, of persons who qualify as 'enemy combatants', but would then be obliged to proffer evidence to demonstrate that the individual in question qualifies for such exceptional treatment. As Judge Diana Gribbon Motz stated in her opinion, the ruling will 'at least place the burden on the Government to make an initial showing that the normal due process protections available to all within this country are impractical or unduly burdensome in al-Marri's case and that the hearsay declaration that constitutes the Government's only evidence against al-Marri is the most reliable available evidence supporting the Government's allegations'.

Memorandum Order, Lakhdar Boumediene et al. v. George W. Bush et al., United States District Court for the District of Columbia, 20 July 2008²⁰

Following the US Supreme Court's determination that persons being held at the US Naval Base at Guantánamo Bay, Cuba, were entitled to a prompt habeas corpus hearing, the US District Court for the District of Columbia ruled on 20 November

20 United States District Court for the District of Columbia, *Lakhdar Boumediene, et al. v. George W. Bush, et al.*, Civil Case No. 04-116 (RJL), Memorandum Order of 20 November 2008.

2008 for the release of Lakhdar Boumediene and four other Algerian nationals, rejecting the government's contention that they are 'enemy combatants'. A sixth detainee, Mr Belkacem Bensayah, was found to be lawfully detained. The case was the first hearing on the government's evidence for holding detainees at Guantánamo.

The case required the Court to rule on two important issues: first, to determine the most appropriate definition of 'enemy combatant' to be used throughout the proceedings. This would then be followed by a decision on the government's burden of proving 'by a preponderance of the evidence', the lawfulness of the petitioner's detention', that is, whether or not the petitioners were, indeed, enemy combatants.

As for the first issue, the Federal Court filed an order on 27 October 2008, by which it stated that 'fortunately, there is a definition that was crafted by the Executive, not the courts, and blessed by Congress which in my judgment passes muster under both the Authorization for the Use of Military Force AUMF and Article II [of the Constitution]'. Such definition describes an 'enemy combatant' as 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces'.

Applied to the petitioners, the government contended that five of them were enemy combatants because they had planned to travel from Bosnia to Afghanistan, in order to take up arms against the US military. Such plan would constitute 'support' of Al Qaeda under the definition of 'enemy combatant'. As evidence, the respondents submitted information contained in a classified document from an unnamed source.

The judge, based on *Parhat v. Gates*, ruled that while the government had provided some information about the source of the information's credibility and reliability, it had not provided the Court with enough information adequately to evaluate the credibility and reliability of the source's information. Thus while such evidence would definitely serve the intelligence purposes for which it was prepared, 'to allow enemy combatancy to rest on so thin a reed would be inconsistent with this Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention'.

The same was not the case for Mr Bensayah. Evidence presented by the government in this regard included the same source as before, but supported by a series of intelligence reports based on a variety of sources and evidence, which convinced the judge. The Court concluded that the government had established by a preponderance of the evidence that it is more likely than not that Mr Bensayah not only planned to take up arms against the United States but also to facilitate the travel of unnamed others to do the same. Such activities were considered sufficient to constitute 'direct support to Al Qaeda in furtherance of its objectives' and thus 'support' within the meaning of the 'enemy combatant' definition.

United States of America v. Salim Ahmed Hamdan,
Military Commissions at Guantánamo Base, 06 August 2008

The first verdict by a military commission for war crimes established by the Military Commissions Act (passed by Congress in 2006) was made public on 6 August 2008, convicting Mr Salim Ahmed Hamdan, a former driver for Osama bin Laden, of the charge of providing material support for terrorism. The panel, composed of six military officers, also found Mr Hamdan not guilty of conspiracy and sentenced him to 66 months' imprisonment.

The charge of conspiracy was based on two specifications: one asserting that Mr Hamdan was part of a larger conspiracy with senior Al Qaeda leaders and shared responsibility for the attack on the World Trade Center in September 2001 and other incidents, the other, that Mr Hamdan was part of a conspiracy to kill Americans in Afghanistan in 2001. Both were rejected.

The Commission's sentence was lower than the prosecution's request for no less than 30 years. The judge duly informed the panel that he would credit Hamdan for the 60 months he had already been held at the military prison in Cuba. On 30 October 2008 the judge refused a government motion that he reassemble the panel and tell them that Hamdan was entitled to no credit for time already served. The government also argued that, the military commission's sentence notwithstanding, it could choose to hold Mr Hamdan in detention indefinitely due to his status as an 'enemy combatant'. Mr Hamdan was transferred from Guantánamo in November 2008 to complete his sentence in Yemen.

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