

Volume 96 Number 893 Spring 2014

# INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action

**Scope of the law in  
armed conflict**



ICRC

### Aim and scope

Established in 1869, the *International Review of the Red Cross* is a periodical published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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**INTERNATIONAL**  
**REVIEW**  
of the Red Cross

**Humanitarian debate: Law, policy, action**

**Scope of the law in  
armed conflict**

## CONTENTS

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### SCOPE OF THE LAW IN ARMED CONFLICT

---

- 5 **Editorial: Delineating the Boundaries of Violence**  
Vincent Bernard, Editor-in-Chief
- 

- 13 **Interview with Brigadier General Richard C. Gross**  
US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff

### Debate

---

- 29 **The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?**  
Claus Kreß and Frédéric Mégret

### Articles

---

- 67 **Extraterritorial targeting by means of armed drones: Some legal implications**  
Jelena Pejic
- 107 **A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights**  
Colonel Kirby Abbott
- 139 **The beginning of application of international humanitarian law: A discussion of a few challenges**  
Julia Grignon
- 163 **The end of application of international humanitarian law**  
Marko Milanovic

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

- 189 Rewired warfare: Rethinking the law of cyber attack**  
Michael N. Schmitt

---

### Comments and Opinions

---

- 207 Consent to humanitarian access: An obligation triggered by territorial control, not States' rights**  
Françoise Bouchet-Saulnier

---

### Selected articles on IHL and humanitarian action

---

- 219 Humanitarian technology: A critical research agenda**  
Kristin Bergtora Sandvik, Maria Gabrielsen Jumbert, John Karlsrud and Mareile Kaufmann
- 243 Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors**  
Shane Darcy

---

### Reports and Documents

---

- 275 The International Committee of the Red Cross's (ICRC's) role in situations of violence below the threshold of armed conflict**  
Policy document, February 2014
- 305 Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict**  
Marie-Louise Tougas
- 359 ICRC Q&A and lexicon on humanitarian access**

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

- 377 What's new in law and case law around the world?**  
Biannual update on national implementation of international humanitarian law: July–December 2013

### Books and articles

---

- 393 The Practical Guide to Humanitarian Law**  
Françoise Bouchet-Saulnier  
*Book review by Dirk Salomons*
- 399 Droit international humanitaire**  
Jean D'Aspremont and Jérôme de Hemptinne  
*Book review by Antoine P. Kaboré*
- 403 New publications in humanitarian action and the law**  
This selection is based on the new acquisitions of the ICRC Library and Public Archives

## EDITORIAL

# DELINEATING THE BOUNDARIES OF VIOLENCE

What does the legal regulation of armed conflict at the beginning of the twenty-first century look like? Is it legally permissible to target anyone, anywhere, with armed drones? Can and should States apply their own human rights standards when they are involved in a multinational operation abroad? When, if ever, would a cyber-operation amount to an armed conflict? Some of these questions come up time and again as we scroll through the daily news feed. They all relate to what we call the “scope of applicability” of the body of law regulating armed conflict – international humanitarian law (IHL) – and its interaction with other legal regimes.

Today, some of the foundational concepts of this set of rules are debated – and sometimes challenged – in view of the evolution of armed violence and the means and methods of warfare. At first sight, the modern face of conflict seems to challenge the construction of IHL. So-called “cyber-attacks” challenge our traditional understanding of war, as do other new technological developments, such as increasingly autonomous weapon systems.<sup>1</sup> With its dichotomies between “international armed conflict” (IAC) and “non-international armed conflict” (NIAC) or between “civilians” and “combatants”, IHL may seem at first sight ill-suited to deal with the complex shades of reality. As we see in the Democratic Republic of the Congo, Iraq or Syria today, contemporary armed conflicts often involve non-State armed groups; they may involve the intervention of one or more foreign State armed forces; some of those who fight tend to hide among the civilian population; private contractors are available to carry out functions traditionally performed by States; local conflicts often take regional or even international dimensions; some conflicts and situations of occupation tend to be protracted in nature, with no prospect of political settlement; and the civilian population continues to bear the brunt of the fighting and its consequences, including insecurity and collapse of the rule of law.

Furthermore, crimes – notably acts of terror – and the repressive measures adopted by States in response to such acts are now often carried out using military means. They can be conducted on a large scale by actors who operate across different territories, facilitated by the use of technologies such as satellite imagery, drones or the Internet. Responsibility for attacks taking place in Kenya or the United States is claimed by groups operating from abroad and can trigger military operations and drone strikes in distant countries in response. The classic rhetoric and lexicon of warfare is often used by all sides to justify crimes and exceptional measures. Relayed by the media, overly simplistic war semantics may

add a layer of confusion to complex and multiform phenomena. In the face of these challenges, one might ask, how does IHL accommodate the political, military and humanitarian realities of today? Is it still fit for purpose?

As with all law, IHL is subject to interpretation, evolution and development. It cannot be applied in isolation of societal and political factors, of other legal regimes or of the changing nature of the very matter it seeks to regulate: armed conflict. The past decades have seen the continuation of the development of IHL, with major contributions brought in notably by treaty law, in particular regarding the regulation of weapons. We have also witnessed the level of protection afforded by the law of NIAC being brought closer to that of IAC. Considerable efforts have been invested in clarifying existing law through interpretative documents and other soft-law instruments such as codes of conduct.<sup>2</sup> Recently, the expanding role played by private military and security companies has been addressed by the Montreux Document, a commentary of which appears in the *Reports and Documents* section of this issue.

IHL is but one branch of international law, and others, importantly human rights law, also play a role during armed conflict. The interaction between IHL and human rights law has been discussed by many legal scholars in the *Review* and elsewhere. This has been accompanied by the development of rich jurisprudence of regional human rights bodies, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and People's Rights. It is virtually impossible to account for all available interpretations of the relationship between human rights law and IHL rules in times of armed conflict. Operationally, the difference in interpretations has found particular relevance in instances where States operate outside their own territories and/or vis-à-vis non-nationals. Col. Kirby Abbott discusses these tensions in this issue using the example of interoperability between troops from different NATO Member States.

The *Review* regularly publishes pieces by authors who go beyond the presentation of the law as it stands, taking stock of the existing applicable rules but also exploring new avenues for legal development. In recent years, the *Review* has devoted thematic issues to several specific debated areas: the application of the law to and by armed groups, in situations of occupation, by multinational forces, vis-à-vis medical personnel, and so on. The discussions in the journal have echoed the ongoing debates and the challenges to IHL raised by parties to modern conflicts, experts and scholars.

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- 1 For an overview, see *International Review of the Red Cross*, Vol. 94, No. 886: "New Technologies and Warfare", 2012, available at: [www.icrc.org/eng/resources/international-review/review-886-new-technologies-warfare/index.jsp](http://www.icrc.org/eng/resources/international-review/review-886-new-technologies-warfare/index.jsp) (all internet references were accessed in March 2014).
- 2 See, for instance, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009; *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Humanitarian Policy and Conflict Research, Harvard University, May 2009; *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge March 2013. For an example of a recent code of conduct, see the International Code of Conduct for Private Security Service Providers, available at: [www.dcaf.ch/Project/International-Code-of-Conduct-for-Private-Security-Service-Providers](http://www.dcaf.ch/Project/International-Code-of-Conduct-for-Private-Security-Service-Providers).

This issue of the *Review* seeks to address various questions regarding IHL's applicability: What? Where? When? Who? The answers to these questions matter because they define the scope of the protection that IHL can afford to people in times of armed conflict, and for the International Committee of the Red Cross (ICRC) and other humanitarian actors, they define the normative framework and conditions under which such actors can assist and protect those in need. This issue of the *Review* will highlight how the most complex and nuanced debates on IHL actually relate to these simplest of questions.

## To what does IHL apply?

As has been much discussed in recent times, “war” is a political concept, in contrast to the term “armed conflict”, which has legal meaning in contemporary IHL. In broad strokes, the use of force can be divided into IAC, NIAC and other situations of violence, the last of these not triggering the application of IHL. The debates around the material scope of IHL have recently focused on the relevance of the IAC–NIAC typology to capture the scenarios of today’s armed conflicts. It is a truism to write that NIACs represent the vast majority of armed conflicts today, and that the humanitarian consequences they engender, such as regional destabilization, refugee flows and the potential for escalation to inter-State conflict, can be significant. The typology of NIACs has also become increasingly rich over time, and imbued with correspondingly nuanced terminology: NIACs today are described as “spillover”, “multinational”, “cross-border”, “transnational” and so on. Each subcategory refers to a particular set of factual circumstances that would trigger the applicability of IHL. This being said, fundamentally there do not appear to be types of armed violence between organized parties today that would not be captured by the IAC–NIAC dichotomy.

Following 11 September 2001 and the subsequent US-led invasion of Afghanistan, some initially claimed that the United States and its allies were engaged in a new type of “global” conflict to which old rules could not apply. Subsequently, the law of NIAC was said to regulate the operations against “Al-Qaeda, the Taliban and associated forces” across multiple territories.<sup>3</sup> Claus Kress argues in the *Debate* section of this issue that, in the context of the “war on terror”, IHL was invoked *in a permissive way*, in order to accomplish objectives that States would otherwise be restrained from accomplishing under a law enforcement paradigm.<sup>4</sup>

Conversely, in many other contexts, the trend is to frame many situations as acts of terrorism or domestic criminality, thus rejecting the applicability of IHL to situations which factually amount to armed conflicts. This narrative, branding all armed actors as criminals, can – and in fact already does – have implications for

3 *Hamdan v. Rumsfeld*, 548 US 57, 2006.

4 Claus Krefß, “Debate: The Regulation of Non-International Armed Conflicts: Can a Privilege of Belligerency Be Envisioned in the Law of Non-International Armed Conflicts?”, in this issue of the *Review*.

certain multinational operations. To define some operations not as participation in an armed conflict but simply as “counter-terrorism” or law enforcement measures is an approach that risks straining the acceptance of IHL’s applicability. Here again, the challenge seems to be not the content of IHL *per se*, but the policy choices behind its application.

## **Where does IHL apply?**

The transnational character of armed violence has challenged the classical conception of an armed conflict being confined to a particular territory. Questions that come up time and again include the issue of whether IHL applies to the *entire* territory of the parties to the conflict, and if it applies extra-territorially, in particular on the territory of neutral or non-belligerent States.

Recently, the use of drones and operations involving special forces to carry out attacks against individuals or networks of individuals in various contexts around the world has given rise to heated debates on the applicable legal framework governing such operations. Discussions focus on the question of whether and in what circumstances targeting people with military means – with the possibility of causing harm to civilians and civilian objects – in any location on the planet is lawful under IHL. In this issue, Jelena Pejic analyzes, among other things, the geographical scope of NIAC under IHL in the context of drone strikes. She emphasizes the importance of a proper legal classification of each context in which drones are being used for targeted strikes, in order to determine whether or not IHL regulates such actions.

## **To whom does IHL apply?**

With the increased involvement of multinational/peacekeeping forces in modern armed conflicts, the question of which States and international organizations can be considered a “party to” a conflict has repeatedly arisen; particularly challenging scenarios are the ones in which States have approved of a multinational military operation conducted by an international or regional organization and provide logistical support but do not participate in the hostilities. Are such States to be considered party to a conflict or not? The question is not purely semantic, as the armed forces have to know on the basis of which legal regime they will deploy and which rules will protect them. The *Review* addressed this topic in its previous issue on “Multinational Operations and the Law”.

We often look at IHL as a series of obligations rather than as a series of protections extended to people in war, including journalists, medical personnel and private entities. Importantly, IHL also applies to and protects humanitarian actors who offer assistance to affected populations. Such assistance traditionally depends on State consent for access to the populations in need. The ICRC’s “Q&A and Lexicon on Humanitarian Access” and Françoise Bouchet-Saulnier’s

Opinion Note provide two perspectives in this issue of the *Review* on the rights that IHL gives to humanitarian actors to provide assistance when the parties to the conflict themselves are unable to meet the needs of the populations under their control.<sup>5</sup>

## When does IHL apply?

Two of the trickiest questions on the temporal scope of application of IHL are “when does an armed conflict begin?” (in other words, what is the threshold of violence necessary to bring about an armed conflict, thus triggering the applicability of IHL of IAC or NIAC) and “when does it end?” (related to but separate from the question of when all IHL-related obligations terminate).

Regarding the beginning of a NIAC, the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence has indicated the criteria that need to be taken into account.<sup>6</sup> There are no similar indications in IAC law, and opinions may diverge as to when an IAC begins, mainly between the majority view that IHL applies as of the “first shot” fired (also known as the “Pictet theory”), and the theory that a higher threshold of violence is necessary – in other words, that only a certain level of intensity in the use of force would trigger the applicability of IHL to an IAC.<sup>7</sup> The end of an IAC is arguably more straightforward to determine, though there is much commentary and confusion regarding the expressions “cessation of active hostilities” and “general close of military operations”. Marko Milanovic and Julia Grignon both highlight the complexity of interpreting the end of a NIAC, and the legal consequences engendered by a “declassification” of a conflict.

## How should IHL be interpreted?

Year in, year out, the scope of protection that IHL affords to those affected by armed conflicts has continued to expand. Overall, IHL concepts stand the test of time because they are practical and adaptable. True, IHL does not provide a universal formula for when, where or for how long its rules apply. Today’s conflicts also continue to require additional efforts not only to explain the law and reassert it wherever its protections are challenged, but also to identify gaps and possible areas of development. But it seems that the key concepts of IHL have repeatedly been tested against the challenges of armed conflicts, including in the last two

5 See previously Emanuela-Chiara Gillard, “The Law Regulating Cross-Border Relief Operations”, *International Review of the Red Cross*, Vol. 95, No. 890, pp. 351–382.

6 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, paras 561–568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, 30 November 2005, para. 84.

7 International Law Association, *Use of Force: Final Report on the Meaning of Armed Conflict in International Law*, report, 2010, available at: [www.ila-hq.org/en/committees/index.cfm/cid/1022](http://www.ila-hq.org/en/committees/index.cfm/cid/1022).

decades. IHL rules seem to have operated as a backbone: rigid enough to make the body stand, yet flexible enough to allow for movement.

In international law, States play a key role in interpreting existing law and initiating new developments. The *Review* asked for the perspective of Richard Gross, the Legal Adviser to the Chairman of the US Joint Chiefs of Staff, on the lessons learned by the United States since the 2001 invasion of Afghanistan and subsequent armed conflicts there and in Iraq. In his opening interview in this issue of the journal, he provides insights into combating terrorism in the framework of armed conflict, importantly pointing out the growth in understanding of the role played by the ICRC in providing neutral and independent humanitarian assistance.

For its part, the ICRC has always attempted to stay abreast of developments in the nature of warfare and seek the humanitarian solution, including in the law. Since 2003, the ICRC has been regularly taking stock of the challenges to IHL in its reports presented every four years at the International Conference of the Red Cross and Red Crescent (“International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”). The purpose of these reports is “to generate reflection and debate on a number of current challenges in the field of IHL identified by the [ICRC] and to outline prospective ICRC action aimed at clarifying and developing IHL”.<sup>8</sup>

Where the nature of conflict evolves, it creates unprecedented new problems. For each new development, the ICRC has to carefully assess whether IHL applies, and if so, which IHL rules apply exactly: those of IAC or those of NIAC. Do drones, cyber-warfare, the use of private contractors or attacks far from the battlefield as traditionally understood really unmask gaps in the law, or can we deal with them by interpreting existing rules? The debate over terrorism prompted the ICRC to focus on the reaffirmation of certain aspects of the law, while accepting the need to clarify or develop other aspects, such as procedural safeguards for internment or administrative detention,<sup>9</sup> or the notion of direct participation in hostilities.<sup>10</sup> The ICRC is currently also engaged in a major project to update its Commentaries to the 1949 Geneva Conventions and 1977 Additional Protocols, capturing the developments in the practice of IHL since the drafting of the previous commentaries in the 1950s and 1980s respectively.<sup>11</sup>

In some areas, complex interpretations of the law are – and will remain – required in view of the ever-changing reality of collective violence. Discussions on

8 See above note 3. See also the 2003 report, available at: [www.icrc.org/eng/resources/documents/misc/5xrdcc.htm](http://www.icrc.org/eng/resources/documents/misc/5xrdcc.htm); and the 2011 report, available at: [www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm](http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm). For further interest, see the “Contemporary IHL Challenges” series on the *Intercross* blog, available at: <http://intercrossblog.icrc.org/law-and-policy>.

9 See Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005.

10 See N. Melzer, above note 2.

11 See Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, *International Review of the Red Cross*, Vol. 94, No. 888, pp. 1551–1566.

the scope of the law regulating that reality often feature multiple, sometimes opposing interpretations. As legal interpretation can be tainted with ideological, political or strategic motives, this raises the question of what should serve as a compass in this endeavour. In this context, it may be useful to recall, at least as far as treaties are concerned, the principle of good faith in interpretation, in keeping with the object and purpose of the rules in question.

It is nevertheless important to recall that the answer cannot be found in the legal field only. It is common to read that today's crises are "complex" or "increasingly complex". It may not be that the crises we face today are fundamentally more complex than, say, the Second World War, the Cold War or decolonization. Likely, it is our capacity to better understand their multidimensional nature and the need to find durable solutions which is at play.

Paradoxically, we now possess more expertise and tools than ever to address crises, yet we live in a time where there is little appetite for complexity and where leaders seem to favour short-term, emotional and reactive postures over drawing a vision of the future. In order to create an environment conducive to respect for the law, it remains key not only to work at the legal level but also to include the legal considerations in a broader policy dialogue with authorities, directly and indirectly through civil society and – most importantly – in investing in long-term IHL education and prevention of crimes.

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The most important question to ask when applying the law to armed conflict remains, "why?" What do we have the law for? The sophisticated legal discussions that we have on IHL and other regimes today should not obscure what this is all about: the protection of the life, dignity and property of people. Faced with the legal reasoning of the defendants to justify acts of plunder and spoliation, the Nuremberg Tribunal felt the need to assert that "it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions".<sup>12</sup>

In order to be applicable by weapon bearers in the heat of the battle, there is a need for interpretations of IHL to offer clear and practical solutions for the realities in the field, respecting the inherent balance between humanitarian imperatives and military necessity. The "principles of humanity and the dictates of public conscience"<sup>13</sup> are the bedrock of IHL. Delineating the complex shape and scope of the law is thus "simply" about defining the boundaries of violence – the limits beyond which humanity must prevail.

Vincent Bernard  
Editor-in-Chief

12 *Krupp Trial* (Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others, United States Military Tribunal sitting at Nuremberg, 17 November 1947–30 June 1948), United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 10, 1949, pp 130–159, excerpt available at: [www.icrc.org/casebook/doc/case-study/united-states-nuremberg-krupp-case-study.htm](http://www.icrc.org/casebook/doc/case-study/united-states-nuremberg-krupp-case-study.htm).

13 Additional Protocol I, Art. 1.2.





## Interview with Brigadier General Richard C. Gross

US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff\*

*Brigadier General Richard C. “Rich” Gross is the US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff. He attended the Military Academy at West Point and was commissioned in the US Army as a second lieutenant in the Infantry. He also attended the University of Virginia School of Law and the US Army Judge Advocate General’s Corps. He holds a Master’s degree in strategic studies from the US Army War College. Prior to his current position, he served as the Chief Legal Adviser for the Joint Special Operations Command, the International Security Assistance Force (ISAF), US Forces-Afghanistan (USFOR-A) and at US Central Command.*

*The scope of application of international humanitarian law (IHL) is a deceptively simple concept; broadly speaking, it is where, when and to whom the IHL rules apply. Although this has always been a precondition for discussing IHL issues, the outer limits of the law’s applicability remain unsettled. To open this issue on the nuances of the scope of the law’s application, Brigadier General Gross gave the following interview providing the US perspective on the circumstances in which IHL applies, and the challenges that lie ahead in light of the ongoing evolution of the way war is waged.*

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\* This interview was conducted at the Pentagon in Washington, DC, on 9 April 2014, by Vincent Bernard, Editor-in-Chief; Daniel Cahen, Legal Adviser, ICRC Washington; and Anne Quintin, Legal Outreach Adviser, ICRC Geneva.

### ***What are your main responsibilities as Legal Counsel to the Chairman of the Joint Chiefs of Staff?***

By the title, you would think I only advise the Chairman but, in fact, I advise the Chairman of the Joint Chiefs of Staff, the Vice Chairman of the Joint Chiefs of Staff as well as the entire Joint Staff. To understand what I do, it is probably best to start with what my main client does. The Chairman of the Joint Chiefs of Staff, by US federal law, is the principal military adviser to the President, the Secretary of Defense and the National Security Council. He provides what we call “best military advice” to the leadership of our country on matters of national security. So, I provide him with legal advice while he provides his military advice.

### ***How much time do you spend on issues related to IHL every day?***

I may spend quite a bit of time on IHL-related questions, depending on the issues of the day. For example, a large part of the portfolio of our office, on which I advise the Chairman and the Joint Staff, involves operations across the globe. As different combatant commands – Pacific Command, European Command, Central Command, Africa Command – propose military operations throughout the globe, whether those are training exercises, multilateral or bilateral training exercises, or security cooperation or military operations in Afghanistan, Iraq and elsewhere, those come up to the Chairman for his military advice and recommendations to the Secretary of Defense. I advise him and the Joint Staff on matters related to military operations, and some of my advice will concern IHL issues. Most of the *jus in bello* issues tend to be handled by legal advisers at a much more tactical and operational level, at the “pointy end of the spear”, as we say – these are the people actually involved in combat operations. At my level, I tend to work more on questions relating to the domestic and international legal bases for the use of force – *jus ad bellum*. I do, however, deal with those IHL issues that come to our level; for example, detention operations. How large a part of the portfolio really depends on what is going on in the world. Often, I will know what I am going to spend the bulk of my day on just by reading the front page of the news: what happened overnight that is going to require the President and the National Security Council and certainly the Chairman and the Secretary of Defense to be involved in issues of national security? Those issues, when they hit the front page, are going to be issues that I handle that day.

Often, many of the issues we deal with are domestic legal issues that do not involve military operations. So, for example, during the tragic shooting we had at Fort Hood, naturally questions came up about our security procedures, investigation procedures, our mental health programmes and so on.<sup>1</sup> As these types of issues come up to the Chairman for his input, if there are legal questions

1 Editor’s note: In recent years, there have been two mass shooting incidents at Fort Hood military base near Killean, Texas. The first, which took place on 5 November 2009, left thirteen dead and more than thirty injured. The second, referred to here, occurred on 2 April 2014, leaving four dead, including the gunman, and sixteen others injured. For more information, see Manny Fernandez and Alan Blinder, “Army

involved, I get involved. So, I am “a mile wide and an inch deep” sometimes, as we say. I have to be prepared to advise on a full range of legal issues, and not all of those will involve IHL.

***What are some of the IHL-related lessons learnt from the last thirteen years and all the operations that followed 9/11?***

This is an extraordinarily broad question. One of the lessons, in particular as regards IHL, is that it is very ineffective to try to train military forces on *jus in bello*, the principles of IHL and the rules of engagement in a *classroom* setting with PowerPoint slides. You have to train armed forces using vignettes and, ideally, using real-life, role-playing-type scenarios so that you engrain these ideas of what is right and wrong; what is lawful and not lawful; what is permissible under the rules of engagement and what is not.

Before 9/11, we would have dog tags or little cards with the rules of engagement on them, and soldiers would wear the dog tags or put the cards in their wallets. But when you are in a scenario where you have to use force or when you detain someone and you have to act in a particular way in accordance with the law, you do not have a lot of time to look at your dog tag or in your wallet. So, you have to train on IHL through realistic, vignette-type training, the main goal being to reinforce the lessons of IHL and other principles so that people know how to do the right thing. You are never going to be able to cover every possible scenario; however, you can certainly train on a broad range of scenarios. This was one very important lesson: you can start the training in a classroom, but IHL has to be inculcated throughout all of our other military training and it has to be constantly reinforced and trained.

Another important lesson of the last thirteen years is that we should not be afraid to examine what we are doing and constantly revisit our procedures and our tactics. We have to be willing to keep an open mind and investigate thoroughly when something goes wrong or when there are civilian casualties, or when there is an allegation of inappropriate conduct. There may have been resistance to that in the early days perhaps, but now I think we are at the point where if something goes wrong, we just investigate it. There is no question. We investigate thoroughly. We do an independent review and we see what lessons we can learn and, if necessary, we hold people accountable for actions that they should not have taken. I think we have improved in that sense.

We have also learnt, I think, the criticality of protecting civilians in combat. All of our post-Vietnam conflicts were very short. Operation Desert Storm was very short; Operation Just Cause and our actions in Grenada and in Panama were also limited in time. In Iraq and Afghanistan, however, we have been in prolonged conflict around civilian populations, where we have had to learn to protect and

safeguard civilian life and property on a day-to-day basis, over the long term. We have realized that protecting civilian life is not just a lawful imperative under the principles of IHL, and it is not just good policy and humanity – it is all of those things, but in addition, when we protect civilians, we are also more effective in a counter-insurgency environment. So, not only is it the right thing to do under the law and the right thing to do morally, but it is the right thing to do to accomplish the mission. I think when our military forces realized that, it became much easier for us to get compliance and have our people working hard to protect civilian populations. So, that would be another important lesson.

A fourth lesson, which I think is important for this interview, is that we have really learnt the importance of the relationship with the ICRC. I have said this in other interviews as well, and I am sincere about it. We have learnt that the ICRC has a critical role in making States better at doing the right thing in warfare – in complying with IHL and giving us an outside, unbiased voice which says, “Here are some things you ought to think about; here are some things you are not doing right,” and not only pointing out things, but also pointing out ways to improve. There is also a great working relationship that we have developed with the ICRC over the last thirteen years. We go to Iraq – we see you in Iraq. We go to Afghanistan – we see you in Afghanistan. We go to other places – we see you in other places. We have a very constructive confidential bilateral dialogue with the ICRC that I think is unparalleled.

***What is your view of the value of that confidential relationship? Do you think it brings about results? Is it outdated?***

No, not outdated at all. Part of what we learnt in the conflicts in Iraq and Afghanistan is that confidentiality gives us the trust in you and the credibility that you have. We know that we can talk through issues openly and transparently. You also come in and very openly and candidly tell us: “Here are all the things you really should think about with this particular operation; here is what we think you did wrong; here are the principles of IHL that we think you violated, and here is why.” We know that we can take that in confidence, that we can share with you what we have learnt, that we can investigate and come back to you all and say: “Here is what we did.” That confidential dialogue is critical for allowing us to improve and make changes that will prevent missteps in the future. Other humanitarian organizations may see something wrong and immediately release it to the media, or otherwise publicly denounce it. You cannot have a full, open and candid dialogue with someone if you know they are going to turn around immediately and put that information out to the public, before you have had a chance to investigate, to fix things, to improve.

Note that I am not saying that transparency is a bad thing. I think it is a good thing, but there are times when you need to conduct an investigation in a calm and unbiased way, when you cannot prejudice the facts and you need to give

the investigating officers the space and time to arrive at their own conclusions. This cannot happen when the facts are being constantly discussed in public.

So, confidential dialogue is critical, and I learnt that early on. For example, I was asking the ICRC about the detention facilities of another State and inquiring as to what their detention areas were like. My ICRC interlocutor responded: "I cannot tell you." I said: "What do you mean, you cannot tell me?" But I ultimately understood what the ICRC meant. The ICRC had to keep that information bilaterally confidential with that State so that the State could improve its detention systems without every other State knowing what was going on. I respected that the ICRC was adamant that it was not going to share that information with me. This is when I really got a sense of how strict you are with confidentiality and that in turn gave me a lot of trust that our US discussions with you would be kept the same way.

***Is the "traditional" dichotomy between international armed conflict (IAC) and non-international armed conflict (NIAC) adequate to capture the types of violent scenarios we face today? Is it something that is always taken into account in the legal opinions of your office?***

In one sense it is still relevant, of course, but in another sense for the US government, at least for the Department of Defense, it is not that big an issue because by policy we apply the IAC rules of IHL in all forms of military conflict. We have a Department of Defense policy which says that no matter what the classification is, we will follow the principles of IHL applicable in IAC throughout our operations. That makes it, frankly, fairly easy for me and other military operational attorneys to advise our clients, because we are not worried about what the classification is.

As a legal matter, ignoring policy, this dichotomy is very important, in particular regarding non-international armed conflicts. I think an international armed conflict is very easy to spot – a State-on-State conflict, which, frankly, our initial invasion of Iraq, I guess, was probably the last one we have seen like that. You just do not see the traditional World War II-type clashes between the armed forces of two or more States; we have not seen a large-scale conflict like that in a while. This is not to say that we will not in the future. So, it is important to have those rules.

Where the difficulty comes, I think, is when we talk about non-international armed conflicts. We are all, I think, still struggling to understand when exactly a non-international armed conflict begins. "Struggling" is maybe the wrong word, but we are all still trying to determine what to do in cases where there are non-State actors like Al Qaeda, who play such a prominent role. For example, I think the ICRC classifies the conflict in Afghanistan today as a non-international armed conflict. So, you have Afghanistan, where there are over forty-five States involved, and it is a non-international armed conflict. This is kind of hard to wrap your mind around. You have more participants in

Afghanistan right now, more international participants, than you probably had in just about any previous conflict. But by definition it is not a conflict opposing two or more States, so we apply NIAC rules. Some countries do not even apply NIAC rules as they do not consider themselves party to a NIAC. Then you get into the whole discussion of applicable rules: armed conflict versus law enforcement. So, I think it is very important to be able to classify correctly, and we will have to continue to study the interplay between the rules of NIAC and international human rights law, because that is going to continue to be a challenge. When does IHL prevail over human rights law? I think every State will have a different answer to this question, and it creates quite an interesting field to practise in.

***What trends can be identified in the armed conflicts in which the US is involved today, and what relationship do these trends have with IHL?***

Certainly one trend is going to be the increasing accuracy of weapon systems. As the bombs become “smarter” and weapons systems become more accurate, the question will be, will you be precluded from using less accurate systems at some point? If all of your weapons can be honed in to a single square metre with absolute pinpoint accuracy, will that become the new standard or can you still use the less accurate, “dumber” bombs, if you will?

So, as weapons systems get more accurate, and increasingly remotely controlled, will that change the nature of warfare? As those weapons become more available, will that change IHL? I think autonomous weapons are going to be a trend that we will all have to watch as it becomes less science fiction and more science fact. As artificial intelligence, computer systems and targeting systems develop, at what point will a weapon be capable of firing defensively, by itself? What law would apply? One day, weapons may even become capable of autonomously firing in offence: to identify targets and to fire based on an algorithm. Who knows how far in the future that will be – ten years, twenty-five years, or maybe less? I honestly do not know, but those will be important trends we will need to think about as weapons systems get more sophisticated. There are going to be ethical considerations going beyond IHL, but certainly IHL will factor into that.

I think we will also see a trend towards more and more protection of civilians, which is a really good thing. This will happen not only as weapons systems become more accurate but, frankly, as a result of the media, NGOs and advocacy groups showing a keen interest in conflict. For example, I just cannot imagine that the bombing campaigns that we saw in World War I and World War II would happen again. Perhaps they could, and it would be World War III, but it is hard to imagine that that would play well in today’s media and public opinion environment. So, I think we will see a trend towards more civilian protection, more means put in place to protect civilians, thinking more about how military operations are conducted while protecting the civilian population, and so forth. I think that will be a trend. Asymmetric warfare I think will also be a big trend.

***Are you optimistic that an international conversation will develop over cyber in a way that will clarify the applicability of IHL in cyber-warfare?***

We are all continuing to struggle with cyber and defining how cyber fits and where it fits and what is an attack, and when does a “cyber-attack” – and I put that in quotes – rise to the level of an armed attack to which I can use armed force in response? A cyber-response to a cyber-attack is one thing, but what about an armed attack? If electrons come in and threaten my power grid, can I now shoot a missile – a physical missile – at the computer server site and take it out, or am I limited to an electronic response? We will have to work through all these issues as cyber capabilities become more and more capable and more threatening. We are going to have to come to grips with how we handle that. As of now, I do not think there is consensus at all, although the Tallinn Manual was a good step.<sup>2</sup> I think it is hard getting people to have the conversations that need to be had, but I think we are all still struggling with cyber as practitioners.

Unfortunately, I think it will take some kind of event to shake people up. We saw that a little bit with cyber-activity overseas. We saw how people reacted to those kinds of events, and countries reacted in some very positive ways by building up their defences and putting up centres of excellence on cyber and so forth. You saw that in the Baltic States, for example. I hope we do not, but if we do have a big event, then I think that will galvanize some action for people.

Secretary Panetta, for example, warned about a cyber-Pearl Harbor, and others have said the same thing. I am certainly not predicting that, but if something like that were to happen, that would certainly galvanize the conversation. If something like that does not happen, what could galvanize the conversation, I think, could be an expert meeting or something like that; it would be good to have that conversation and set down what we think the State practice is, and in some cases analogize to State practice in other areas to see what would be applicable in the cyber domain. I prefer to have that conversation before we have an event and not after, so we can figure it out with deliberation.

***Looking at current and future trends, how do you see the role of detention operations in modern conflicts?***

Well, we are still going to have them in any kind of conflict and I think we have learnt some hard lessons, at least the United States has, but I think other countries have as well. We have learnt from some events, such as Abu Ghraib, our experiences with Guantanamo Bay and our experiences in Iraq and Afghanistan. We have learnt a lot about detention and detention operations, and how to do it the right way, including interrogation of detainees. So, we have built up this body of policy and

2 Editor’ note: The Tallinn Manual is a study of how *jus ad bellum* and IHL apply to cyber-operations and cyber-warfare, produced by a group of experts. *Tallinn Manual on the International Law Applicable to Cyber Warfare*, NATO Cooperative Cyber Defense Centre of Excellence, Cambridge University Press, Cambridge, April 2013, available at: [www.ccdcoe.org/tallinn-manual.html](http://www.ccdcoe.org/tallinn-manual.html).

lessons learnt. I think other countries have as well. From speaking to some of my counterparts around the world, they have learnt those lessons as well, and that is a good thing. Hopefully, we will not be in another conflict, but if we are, ten years from now, those lessons, that body of law and policy will still be around to help inform our operations. To a degree, after 9/11, we were learning as we went and we made some missteps along the way, but we are constantly getting better.

I think you have to have capture or detain as a part of any military operation, as an option. First of all, you never want to have a “no quarter”-type situation – in other words, killing someone because you cannot or do not have the capacity to detain them.<sup>3</sup> That is not going to work. You also cannot have a situation where you have to choose between the use of lethal force or the release of enemy fighters because in many cases, releasing someone just means that they are going to be a threat again, whether it is to you immediately or to your forces in more the medium term. So, you have to have a capture/detention option but it has to be done the right way from the beginning. Hopefully, my successors will be able to reach into the files one day and say, “Here is what we learnt back in Iraq and Afghanistan, so we can do it right this time.”

***What standards of detention would you apply in situations where the classification of the conflict is unclear?***

As I said before, we always apply the IAC rules of IHL as a matter of policy. There is an extensive Department of Defense policy on detainee operations and the proper way to run those. We also have the Detainee Treatment Act that governs how we deal with detainees, which is federal law. So, we have a good body of law and policy that we look to, irrespective of how the conflict is classified.

***What is the geographic scope of application of IHL? Does it apply only on the battlefield, or on the whole territory of all parties involved in an armed conflict? Does an armed conflict follow any person who is directly participating in the hostilities anywhere in the world, including in non-belligerent States?***

I cannot speak for the US position, but I think you have seen in speeches from the administration and the past administration that the enemy gets a vote on where he is fighting. When Al Qaeda, as a terrorist organization, is entering into armed conflict with the United States, it does not confine itself to a particular country, and while the Westphalian Nation-State concept is still very applicable in international law,

3 Editor’s note: To give “no quarter” is to refuse to spare the lives of enemy fighters who surrender or are otherwise rendered *hors de combat* on the battlefield. Orders or threats to give no quarter are a war crime in both international and non-international armed conflicts. See Jean-Marie, Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, Rule 46.

transnational terrorist groups like Al Qaeda do not respect that concept. They move across borders. They are everywhere. So, carefully constrained by law and policy, we have to be able to go to the enemy, wherever the enemy may be. Now, that does not mean a global war. That does not mean we are everywhere. There are certainly principles of sovereignty. We have to respect the principles of international law, so you are not going to see a global war *per se*, but it is not just war confined to Afghanistan either.

Commentators will often say, “There is action being taken in Yemen, but we are not at war with Yemen.” Well, of course we are not at war with Yemen, but the Yemeni authorities have given permission/consent for us to partner with them in actions taken there and so the conflict is not with Yemen or Yemen’s enemies; the conflict is with Al Qaeda. Of course, geography matters in some instances. But we cannot tie ourselves to one country and say that combat will only take place in that country, and not outside. Now, the US also has a policy governing operations *outside* of what we call the “active zone of hostilities” or the “hot battlefield”, in other words Iraq and Afghanistan. So we have policy constraints for such types of operations as well, and I think those are important. They respect other countries’ sovereignty and keep the conflict limited and focused on the enemy without being overly broad.

***Looking at the scope of the battlefield, in the current US view, the US can go after the enemy outside the hot battlefield without the consent of the territorial State if that State is unwilling or unable to tackle the threat. Would you elaborate on the unwilling/unable dimension, which is not something that exists currently in international law?***

There is some consensus among a number of States (although not all States) that when a State faces a threat emanating from the territory of another State, and that other State is unwilling or unable to take care of the threat, the State under attack may take action in self-defence, under customary international law, to eliminate that threat (and only that threat).

Without that “unwilling or unable” analysis, an attacked State would have to just sit back and let the threat come. The “unwilling or unable” test would allow you to take action beforehand.

***If it is not the territory that is the main consideration in determining the limits of the battlefield, but rather the nexus between the members of a non-State armed group and the conflict, what type of links could trigger the application of IHL? Is it a question of participation in hostilities, or is everyone who is a member of a specific armed group covered by IHL?***

Let us start with the principle that there is an armed conflict between, in our case, the United States and an armed group. In this case, let us assume that

this is a terrorist group, and the US may be able to access the geographic area, or not. For example, with Al Qaeda, they launched an attack against the United States from Afghanistan. They stayed in Afghanistan, so we went to Afghanistan. They left, and then you had the Taliban in Afghanistan, so that conflict had a geographic boundary. But Al Qaeda could have just as easily launched the attacks from Afghanistan, and left before we got there. Say the lawful government of Afghanistan is now back in charge; we are not going to go to war in Afghanistan. So, where is the fight? Well, the fight is wherever Al Qaeda is. I think in that case, as it turned out, the Taliban stayed in Afghanistan, so we went there. As Al Qaeda has morphed and spread, they remain a threat to the United States, and we have continued to go to places where they are, like Yemen and Somalia.

The idea of a “hot battlefield” is valid when you have the intensity and duration of conflict in a particular place like Afghanistan, but Al Qaeda could just as easily have scattered across several States, and then you may not have had a geographic nexus.

It is a difficult problem, because we are so used to thinking of traditional conflicts. In World War II, we knew whom we were fighting and we knew where they were, which land masses they lived on. But even then, you had the war spread all over the globe to places that probably would have preferred to remain neutral, and nobody said in World War II – and I realize that was an IAC, so it was somewhat different, but nobody said, “You cannot fight them there.” In the current conflict, we have to look at where the enemy is, and not artificially stick to the boundaries of the State where the conflict began.

***Do you think the concept of “associated forces” is viable, looking ahead?  
Does the concept of associated forces mean that this conflict by definition cannot end?***

If you look at how we define “associated forces”, part of the definition is that they are a co-belligerent who has entered the fight alongside Al Qaeda against the United States or its coalition partners. So, it is not just any group that shares Al Qaeda’s ideology and it is not just any group that may be fighting the US somewhere in the world. It has to be a co-belligerent; this component is critical.

If we look at an IAC scenario, where we have country A fighting country B, and country C joins B’s side, well, country C is now an enemy. Even if the fight against country B stops, country C is still an enemy. The co-belligerency is part of what keeps the “associated forces” concept from being too broad. Without looking at the actual definition we use, people tend to think we could include anybody under the concept of “associated forces”, and I just do not think that is true. It is a fairly high standard because you do have to be a co-belligerent who has joined the fight *alongside* Al Qaeda *against* the United States.

***What is the US view on the extraterritorial applicability of international human rights law in times of armed conflict? Is human rights law an issue when the US works in partnership with other States, for example as part of a coalition?***

The US position is that international human rights law does not apply extraterritorially. This comes up regularly when working with international partners – not so much the extraterritoriality of international human rights law but just human rights law in particular, and then more generally which law applies, which paradigm applies, which rules apply. So, anytime we participate in coalition warfare, everybody brings with them their own domestic law, their own treaties that they are parties to, their own legal obligations, as well as their own policy and regulations. Each State has a different picture of what it is doing. We see this in Afghanistan, where some States very much believe that their involvement is regulated by the law enforcement paradigm, and other States believe it is an armed conflict and IHL applies, in particular IHL of NIACs. And you have States all throughout that spectrum. For European States, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights apply. Other States are party to other human rights treaties and have other human rights courts examining their practice. And then you have some countries that are party to the Additional Protocols to the Geneva Conventions and other countries that are not, so everybody has a slightly different picture of which law applies and which policy applies. That does create challenges.

One of the ways in which we deal with such challenges is by having a standard set of NATO ISAF rules of engagement and mission orders, policies and so forth. States come in agreeing to that, except to the extent that they make certain caveats. Caveats are important as they allow States to apply rules of engagement more narrowly. Importantly, caveats can never *expand* on the authorities NATO gives them; they can only narrow them.

The caveats are one way in which States notify NATO of their understanding of the rules under which they will be operating. Thus military planners have to plan operations knowing that, for example, a country will not want to participate in a counter-narcotics operation. Such caveats will often have to do with domestic law or policy, not IHL, but they may involve IHL components, such as the definition of “combatant”. So, when planning an operation that may be linked to a counter-narcotics mission, the commander would have to send in another State.

The other challenge in multinational operations is that you bring forty-five States together but you do not have forty-five legal advisers, one from each State. So some States either have to ask their capital for legal advice or they have to come to the ISAF Legal Office and get legal advice from an American or a British officer or whoever is there. The best one can do in that situation is to interpret in good faith what the NATO ISAF policy and rules of engagement say. One cannot really advise

another State on its own domestic law or on regional human rights treaty obligations.

***What are the main legal challenges that arise from the drawdown of troops from Afghanistan? Does it affect the applicability of IHL?***

There are a number of challenges. Obviously, the detainees that remain are one challenge. Afghanistan has taken over Afghan detainees and we still retain third-country detainees. How those persons are dealt with and returned to their home country is a challenge. We do not have decisions yet on whether or not there is going to be a bilateral security agreement between the US and Afghanistan.<sup>4</sup> Once we have that agreement, then we should have a decision from the President about what forces remain and what missions they will conduct. NATO, of course, has to make decisions about the coalition partners: how many will remain and what missions they will conduct. So, a lot of decisions have not been made yet.

As we advise our clients on what law and policy will need to be put in place, we have to think about what possible scenarios and missions are out there. But in reality, we just do not know yet. There is little clarity on the mission, the size of the forces or the type of agreement that will be in place. This creates a challenge.

I think post-2014, once we know what the mission and size of the forces is, we are going to have to really grapple with what post-conflict Afghanistan looks like and what rules apply. This concerns rules for the US forces but also for coalition partners and for Afghan forces. This concerns detention, force protection issues, self-defence issues and so forth. We are working through them now in anticipation, but we do not know what the final scenario will look like.

***We read in media today that the US is putting more emphasis on using Special Operations (or Special Forces) in strengthening or maintaining a security presence in conflict contexts around the world. What is the legal regime applicable to Special Forces involved in counter-insurgency operations? Do you see challenges in the application of IHL?***

The first thing we would note is that Special Forces are military forces. To us, they are governed by the same law and policy as every other type of operations. They are required to fully comply with IHL. They come under the same rules of engagement and the same execution orders. There may be times when they have special rules of engagement, but these are not rules of engagement that do not comply with the law; they fully comply with IHL, and with US domestic law and policy.

The idea that Special Forces have a free hand and can do anything they want, I think, is a myth or urban legend. They do have a lot of rules. A Special

<sup>4</sup> Editor's note: This interview took place well before the signing of the US-Afghanistan bilateral security agreement and the NATO Status of Forces Agreement on 30 September 2014.

Operations unit is just a unit that has special training. They tend to work in smaller groups. They are very, very good at the kind of operations that require a small elite group of highly trained military personnel with great support. They cannot do what a large conventional unit can do. For example, it takes a tank division or an infantry division to hold large areas of land. Special Forces cannot do that. They can do specialized missions, but they cannot hold large areas of ground. So they have different capabilities.

I think you may have seen statements, press reports and so forth about a desire that, as we draw down conventional forces, we use smaller groups of Special Forces that might be able to conduct more limited missions and special missions in places where we cannot put a tank division or an infantry division like the 82nd Airborne division. For example, if you needed to train another country's military on small arms tactics, that is part of Special Forces' bread and butter. They are very good at training forces on how to do small arms tactics. So you would not send the 82nd Airborne division into a country to do that; instead, you would send in a small Special Forces group or another small team.

Honestly, the challenges when you send in a small unit are that they do not have the same type of infrastructure, resources or oversight with them. They may not have a legal adviser to accompany them. By definition, they are smaller and more isolated. With modern communications, that is less of a problem certainly than it would have been twenty or thirty years ago. So today, if they have a legal question about their obligations under IHL or their rules of engagement, they will likely get legal advice quickly, but it may not be from somebody who is right there with them. This is one of the challenges. It means you have to do some training and briefing before Special Forces are deployed, so they know what their limits are.

***What legal obligations does the US have to respect in advising, assisting and training other national and local armed forces, when establishing partnerships with them or when carrying out joint actions?***

We have law and policy that covers some of the basics. We have the “Leahy provision”, which requires that if any unit has conducted gross human rights violations, it cannot receive training, equipment or other assistance.<sup>5</sup> This screens out the gross human rights violators. In our interactions with other States, we take the need to train on IHL and other international obligations very seriously. We have something called the Defense Institute for International Legal Studies, based in Newport Naval Station, which is funded by the State Department and manned mostly by active or retired military personnel. They go out and train foreign militaries. A big part of what they train on is the law regulating armed conflict, including IHL and human rights law. We consider this an important

5 Editor's note: These “Leahy provisions” are codified in the Foreign Assistance Act of 1961, as amended, P. L. 87-1954, §620M, 22 USC 2378d; and Department of Defense Consolidated Appropriations Act of 2014, PL 113-76 (signed into law 17 January 2014), §8057.

component. Again, this is not just about teaching people how to fight, shoot a weapon, move a unit or communicate; it is also about how to do all of that *in compliance with the law* and the democratic principles of civilian control, which we also find important to emphasize.

***In your view, what areas of IHL need to be further developed or clarified in the future?***

Cyber-warfare is one area. We also ought to continue to discuss on principles of detention in NIACs. How do we deal with the NIAC that does not look like a NIAC? Is there such as thing as “transnational armed conflict”, and should there be a separate body of law regulating it, or is the NIAC legal framework sufficient to capture the scenario where forty-five-plus countries fight an enemy who is located in twenty different countries, from the Far East all the way over to Africa? Is that a NIAC? It is, in the sense that it is *not* an IAC, but is there another category? Should there be one? That is not for me to say, but it is something to think about.

Another area that needs clarification is autonomous weapon systems. We are going to have to think through the legal and ethical challenges involved. How truly autonomous are these weapon systems, and how much do we want them to be autonomous? Further, the concept of “outside the hot battlefield”, I think, is going to continue to be of interest to scholars and practitioners, in particular given the increasing autonomy and remote operation capabilities of weapon systems.

***Do you believe we are now moving beyond the “9/11 era”, towards what Defense Secretary Chuck Hagel described as the “Post-War Era”? What are the next ten years likely to look like?<sup>6</sup>***

As we draw down in Afghanistan, we will not have a major conflict in a defined geographical space anymore, so we will have to think through those issues. We often think of it as one armed conflict, but another way of thinking of it really is as one armed conflict against Al Qaeda and another armed conflict against the Taliban – two conflicts that are linked and yet not absolutely the same. So if we end the conflict in Afghanistan, is that just ending it against the Taliban only or Al Qaeda as well? If you end the conflict against the Taliban, does that affect Taliban detainees at Guantanamo only or does that affect Al Qaeda detainees as well? If you end the conflict in Afghanistan, have you now dropped below the intensity and organization criteria to even call it a non-international armed conflict? If not, who is that conflict against? Is it just the Taliban or is it the

6 Kevin Baron, “Hagel’s Plan for the Military in the Post-War Era”, *Defense One*, 5 November 2013, available at: [www.defenseone.com/ideas/2013/11/hagel-plans-for-military-in-post-war-era/73203](http://www.defenseone.com/ideas/2013/11/hagel-plans-for-military-in-post-war-era/73203).

Taliban and Al Qaeda? Can you have areas outside an active combat zone if there is no longer an active combat zone?

We are thinking through all of these IHL-related questions but beyond that, we have our own domestic legal issues involving the Authorisation for Use of Military Force, the 2001 domestic law that is our domestic legal basis for targeting Al Qaeda, the Taliban and associated forces. The President has indicated that he wants to work with Congress to revise it and ultimately repeal it. So, we are looking at those issues as well from a domestic legal perspective. It is a challenging time right now, I think, to be a military operational attorney, but it is also very stimulating work.



## DEBATE

# The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?

**Claus Kreß and Frédéric Mégret**

*The Debate section of the Review aims to contribute to reflection on contemporary questions of humanitarian law, policy or action. In this issue of the Review, we invited two experts in international humanitarian law (IHL) – **Claus Kreß** and **Frédéric Mégret** – to debate on how IHL applicable in non-international armed conflict (NIAC) should develop. In the two pieces that follow, Professor Kreß submits for debate a new norm of international law outlawing NIACs – a jus contra bellum internum – with a corresponding set of rules applicable in NIACs – a jus in bello interno. The jus in bello interno would give the “privilege of belligerency” – akin to combatants’ privilege in international armed conflicts – to non-State actors in NIACs, providing an incentive for them to comply with these new rules of civil war. Frédéric Mégret critically examines the proposed privilege of belligerency, pointing out its problematic aspects and positing that the creation of such a privilege is, in fact, not desirable.*

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# Towards further developing the law of non-international armed conflict: a proposal for a *jus in bello interno* and a new *jus contra bellum internum*

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## Abstract

*Since 1945, most armed conflicts have occurred between States and rebels or between non-State armed groups within fragile or failed States. Currently, the tragedies in Iraq, Syria and the Ukraine teach us just another lesson that the civil war is one of the major evils of our time. In recognition of this fact, the law of non-international armed conflict, in particular since the first half of the 1990s, has undergone a stormy development. This has led to the remarkably far-reaching assimilation between that body of law and that of international armed conflict. This legal development is Janus-headed: on the one hand, it is characterized by the humanization of the law of non-international armed conflict, but on the other, rules on the conduct of hostilities have crystallized and their denomination as “humanitarian” is somewhat euphemistic. It appears worth asking whether the recent development of the law of non-international armed conflict should be complemented through a new international law against non-international armed conflict. The ongoing controversy in legal policy about a possible privilege of combatancy for non-State fighters should be discussed in such a new light.*

**Keywords:** history, development of international law, international humanitarian law, non-international armed conflict, international armed conflict, customary law, assimilation, International Criminal Tribunal of the former Yugoslavia, international human rights law, conduct of hostilities, transnational armed conflict, aggression, combatant’s privilege, *jus contra bellum*.

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## The humanization<sup>1</sup> of the law of non-international armed conflict

The devastating sight of the wounded soldiers lining the battlefield near the town of Solferino after the battle between the allied forces of Sardinia and France on the one side and those of Austria on the other awoke a powerful humanitarian impulse in the Geneva merchant Henry Dunant. In 1862, he lit a beacon with his *Souvenir de Solférimo*.<sup>2</sup> Dunant passionately pleaded for the establishment of a voluntary aid society dedicated to the care of the wounded in times of war and for the protection of such an innovation through an agreement between States. Dunant's appeal was well received. Already in 1863, the (albeit slightly later named) International Committee of the Red Cross (ICRC) had been founded in Geneva, and only a year later States adopted the Geneva Convention on the Amelioration of the Condition of the Wounded in Armies in the Field.<sup>3</sup> Despite the intermittent storms, a straight pathway leads from this first Geneva Convention to the international humanitarian law (IHL) of today. A central concern of IHL today is—as it was in the second half of the nineteenth century—to alleviate the suffering caused by armed conflict.<sup>4</sup> However, at first the sole concern of States was the containment of international war; the regulation of the potentially no less harrowing *civil* war was to come later. Classic international law provided no protection of human rights in principle and up until the end of the Second World War, civil wars remained outside the reach of international law and thus within the *domaine réservé* of the State concerned.<sup>5</sup>

- 1 The term is of course borrowed from Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, 2000, p. 239. In this article, Meron describes how the law of war, “driven to a large extent by human rights and the principles of humanity ... has been changing and acquiring a more human face”, and he sets out “the inroads made on the dominant role of reciprocity; the fostering of accountability; and innovations in the formation, formulation, and interpretation of rules”.
- 2 Henry Dunant, *Un souvenir de Solférimo*, Cassel, London, 1947.
- 3 Auswärtiges Amt, Deutsches Rotes Kreuz and Bundesministerium der Verteidigung (eds), *Dokumente zum Humanitären Völkerrecht (Documents on International Humanitarian Law)*, 2nd ed., Academia Verlag, Sankt Augustin, 2012, p. 13.
- 4 For an account of the historic development of IHL, see Mary Ellen O’Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 1 ff.
- 5 In practice, this certainly did not mean a complete absence of regulation. Rather, the armed forces at times received internal instructions. For details, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 9–29. The Code drawn up by Francis Lieber, which Abraham Lincoln in 1863 made binding for the Union troops during the American Civil War and which the Confederate States would later accept, is the most famous example and has subsequently influenced the development of IHL in general. Moreover, it was possible under customary international law, as applicable at the time, to recognize rebels who had succeeded in establishing quasi-State structures in parts of the war-ridden territory as a belligerent party to a conflict. *Ibid.*, p. 9. As a result of such recognition, the laws of war became applicable to both sides. However, the question of the recognition of rebels as a belligerent party was often a matter of controversy, and States were reluctant to accept an obligation of recognition. For example, in the Spanish Civil War of the 1930s, the Spanish government refused to recognize its opponent as a belligerent. *Ibid.*, p. 17. On the significance of the Spanish Civil War for the subsequent development of the law of non-international armed conflict, see Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Conflicts”, in Antonio Cassese (ed.), *Current Problems of International Law: Essays on U.N. Law and*

In 1949, when the laws of war were under scrutiny following the catastrophe of the Second World War, the ICRC called for IHL to extend to civil war. Some States, including Great Britain and Burma, expressed concern and stressed the importance of national sovereignty.<sup>6</sup> In the end, States agreed on the text of common Article 3, the “mini-convention” regulating civil war within the four major new Geneva Conventions (GCs) of 12 August 1949.<sup>7</sup> The acceptance of this mini-convention marked the birth of a rudimentary international *jus in bello interno* (or in its technical legal expression, IHL of non-international armed conflict).<sup>8</sup> Nearly three decades later, States would refuse another attempt to determinedly assimilate the IHL applicable in non-international armed conflict (NIAC) to that of international armed conflict (IAC). During the 1974–1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, which led to the adoption of two Additional Protocols (APs) to the GCs, States were divided over the classification of struggles for anti-colonial liberation. According to the classical perspective, national liberation wars were a specific form of civil war.<sup>9</sup> The States which emerged from such conflicts and their supporters succeeded in “upgrading” the national liberation struggle (though under stringent conditions) to an IAC.<sup>10</sup> Having reached this goal, the Non-Aligned States’ thirst for reform was essentially satisfied. Especially the newly independent States, the governments of which frequently faced internal tensions, did not take long to recognize the allure of protecting national sovereignty through international law. India

on the Law of Armed Conflict, Dott. A. Giuffrè Editore, Milan, 1975, pp. 287 ff. The protection of the individual through international law in civil wars thus remained precarious.

6 See S. Sivakumaran, above note 5, p. 40, n. 77, 78.

7 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). A. Amt, Deutsches R. Kreuz and B. Verteidigung, above note 3, p. 167. For an early appraisal of the GCs, see, for example, Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Year Book of International Law*, Vol. 29, 1952, pp. 360 ff. Apart from common Art. 3, the GCs’ provisions had been confined to international armed conflict within the meaning of common Art. 2.

8 On the negotiations leading to this agreement, see S. Sivakumaran, above note 5, pp. 40 ff; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 25 ff.; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 23 ff.

9 Antonio Cassese, “Wars of National Liberation and Humanitarian Law”, in Christophe Swinarski (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 313 ff.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Arts 1(4), 96; A. Amt, D. Rotes Kreuz and B. der Verteidigung, above note 3, pp. 503, 509, 575. On the position of the non-aligned States, see Luigi Condorelli, “Pays Afro-Asiatiques”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 386 ff., and in particular, pp. 392 ff.

expressed this frankly at the conference: after the question of national liberation struggles had been settled, there was no need to extend international law's regulation of NIACs.<sup>11</sup> Despite such statements, Additional Protocol II on NIAC was eventually adopted.<sup>12</sup> Its content, however, remained of limited reach.

Nevertheless, the expansion of the law of NIAC came with great force. It did not take the ceremonial form of a diplomatic conclusion of a treaty; rather, it took place on the seemingly unobtrusive path of unwritten international law. Such customary international law must often be authoritatively identified, ideally by a competent international court, in order for its development to unfold reliably and effectively. The International Criminal Tribunal for the former Yugoslavia (ICTY), which was established by the United Nations (UN) Security Council in 1993 in light of the Balkan atrocities, would establish itself as the key institution to progressively determine the existence of customary international law relevant to NIAC. The election of Professor Antonio Cassese as judge at the ICTY would prove most conducive to this process. Not only was Cassese progressively minded in general, but he was also an academic supporter of the development of an international law applicable in civil wars.<sup>13</sup> Cassese's moment had come when the first defendant, Duško Tadić, challenged the ICTY's jurisdiction to determine his criminal responsibility under international law in the internal Yugoslav conflict for want of a sufficiently developed NIAC law. In a groundbreaking decision on 2 October 1995, the professor of international law in judge's robes took a comprehensive look at the international practice regarding civil war since 1936, and with the ingenuity of a true master, he identified the overall tendency that parties to civil wars had over time moved towards accepting rules which were similar to those governing inter-State wars.

According to Cassese and his fellow judges, the distinction between sophisticated laws of war governing inter-State wars and the rudimentary rules governing NIACs "was clearly sovereignty-oriented",<sup>14</sup> and "if international law ... must gradually turn to the protection of human beings", the said dichotomy "should gradually lose its weight".<sup>15</sup> Clearly, the *Tadić* decision was animated by the spirit of Henry Dunant, and its key message quickly prevailed.<sup>16</sup> In 2005, the ICRC lent its voice to the remarkable development which the customary international law of NIAC had undergone, in the organization's authoritative customary IHL study.<sup>17</sup> The guardian of IHL confirmed the assimilation of the customary international law of NIAC to that of IAC.

11 S. Sivakumaran, above [note 5](#), p. 50, n. 150.

12 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II).

13 See, most notably, his early contribution, A. Cassese, above [note 5](#), pp. 287 ff., and in particular, pp. 315 ff.

14 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 96.

15 *Ibid.*, para. 97.

16 Claus Krefß, "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. 104–109.

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005. For a more reserved

This “*Tadić* dynamic” – the assimilation of the law of NIAC to that of IAC, with the goal of enhancing the former’s humanitarian protection – was in line with another major development in international law: the development of a customary international law set of minimum standards for the protection of human rights, in particular after the adoption in 1966 of the two International Covenants on human rights.<sup>18</sup> It was not surprising that Cassese would build on the crystallization of international human rights law as nothing else made it clearer that international law had opened itself more directly to the concerns of the individual. Furthermore, after some initial uncertainty, it was increasingly recognized that international human rights law could be relied upon to enrich and strengthen the IHL of NIAC.<sup>19</sup> The second report issued by the independent Israeli Turkel Commission in 2012 exemplified to what extent this could occur.<sup>20</sup> In complete accordance with the “*Tadić* dynamic”, the Commission reached the conclusion that a customary international law duty had come into existence, according to which the territorial State and the State of active nationality must investigate the credible allegation of a war crime committed in a NIAC.<sup>21</sup> Furthermore, the Commission held that international human rights law could provide significant guidance in giving this duty to investigate meaningful content.<sup>22</sup> To conclude, the humanization of the international law of NIAC has reached an advanced stage today.<sup>23</sup>

## The tension between the law of non-international armed conflict and international human rights law

This humanization is only one side of the coin, however. Taken as a whole, the legal evolution under consideration turns out to be of a profoundly ambivalent nature. The reason is that this evolution has long since spread into the realm of the conduct of hostilities, which forms an important part of the laws of war.<sup>24</sup>

position on the status of customary law governing the law of NIAC, see Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire*, Editions A. Pedone, Paris, 2012, pp. 25 ff.

- 18 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See, e.g., Thomas Buergenthal, “Human Rights”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 4, Oxford University Press, Oxford, 2012, pp. 1023 ff.
- 19 For a general analysis of the issue, see Robert Kolb, “Human Rights and Humanitarian Law”, in R. Wolfrum, above note 18, pp. 1040 ff.
- 20 Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013.
- 21 *Ibid.*, p. 93.
- 22 *Ibid.*, pp. 114 ff.
- 23 For a comprehensive statement of the law, see S. Sivakumaran, above note 5, pp. 255–335; see also pp. 430 ff.
- 24 For a comprehensive statement of the law of non-international armed conflict governing the conduct of hostilities, see *ibid.*, pp. 336–429.

If one examines somewhat more closely the law on the conduct of hostilities in IAC,<sup>25</sup> key components of which have been codified in AP I, the term “international humanitarian law” reveals its somewhat euphemistic aspect. The law on the conduct of hostilities brings the ugly face of war to light, which is irreconcilable with the ideal of human rights. As a rule, the law on the conduct of hostilities in IAC permits the killing of enemy combatants throughout the conflict, and this regardless of whether the targeted combatant is about to launch an attack or not.<sup>26</sup> This permission does not respond to an immediate danger posed by an individual human being, but it reflects the target’s membership, as identified by his or her uniform, in a collectivity/group which is prepared to fight. In light of the ideal of human rights, it is even harder to digest that the law on the conduct of hostilities does not offer civilians full protection. According to the most basic legal principle, as codified in the first sentence of Article 51(2) of AP I, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack”. However, the attack on a military objective remains permissible even if, after having taken all due precautionary measures, a risk of collateral civilian damages persists under the circumstances. The customary law principle of *jus in bello* proportionality, as codified in Article 51(5)(b) of AP I, only prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>27</sup>

Furthermore, the law regarding prisoners of war constitutes a double-edged legal institution. As humanitarian as the absolute ban on the torture of prisoners of war may be, it is just as obvious that the applicable legal framework allows for an extraordinarily robust preventive detention mechanism for individual members of a dangerous collectivity – the enemy armed forces. Such detention is not based on judicial decisions and is solely limited by the end of the conflict. Despite the siren call of the term “international humanitarian law”, this body of law recognizes the necessities of war to a considerable extent. As has been observed time and again, the law of IAC cannot be directed against the conduct of war as such. It has to accept the inconvenient truth that victory in a perfectly justified war of self-defence could often not be secured if the hostilities had to be conducted in accordance with the ideal of human rights. It is this state of utmost emergency that requires the law of IAC to embrace a permissive conduct of hostilities

25 For a monographic treatment, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge, 2010, *passim*; for a more concise account, see Stefan Oeter, “Methods and Means of Combat”, in D. Fleck, above note 4, pp. 115 ff.

26 For the legal concept of combatant, see, for example, Knut Ipsen, “Combatants and Non-Combatants”, in D. Fleck, above note 4, pp. 85 ff.

27 S. Oeter, above note 25, pp. 196 ff.; for an intriguing recent analysis of “collateral civilian damages” in international law and ethics, see Reinhard Merkel, “Die ‘kollaterale’ Tötung von Zivilisten im Krieg: Rechtsethische Grundlagen und Grenzen einer prekären Erlaubnis des humanitären Völkerrechts”, *Juristen Zeitung*, Vol. 67, 2012, pp. 1137 ff.

paradigm, which severely cuts back the reach of the internationally guaranteed human rights to life and liberty.

The question of whether the law of NIAC also includes a legal framework for the conduct of hostilities has long remained without a clear answer.<sup>28</sup> Arguably, the absence of an internationally binding human rights standard until well into the second half of the twentieth century is one reason for this uncertainty. As long as States were not subject to international human rights obligations, their governments felt no urgent need to contemplate an international law applicable to the conduct of hostilities in NIACs. From the perspective of a government facing internal tensions with a potential for escalation, it must have been an attractive option to be in a position to reject any international scrutiny over how the conflict with the opposition was conducted by arguing that it remained within the *domaine réservé* of the State concerned. After the Second World War a similar calculus, as is well known, has repeatedly led States to deny the existence of a NIAC on their respective territories, contrary to the facts. The admission of a NIAC would not only have shown the serious challenge to their authority but would have also implied the recognition of the applicability of the international standards as formulated in common Article 3 of the GCs.

As David Kretzmer has set out in an illuminating analysis, the picture radically changed once internationally binding standards on human rights were developed.<sup>29</sup> Governments directly confronted by well-organized rebels had to realize that under the full restraining effect of the rights to life and liberty, victory in a civil war was just as uncertain as in a war of self-defence fought against the armed forces of an aggressor State. This truth also applied to external States coming to the assistance of a government under threat. Germany, for example, experienced this dilemma much sooner than its political establishment had hoped. The memory of the slow and painful German learning process of having unintentionally become a party to a NIAC still remains vivid.<sup>30</sup> While German politicians were still trying to quietly dispose of the sweet dream of a “soft” security assistance mission in Afghanistan, Colonel Klein’s order to attack in the Kunduz incident forced the German judiciary to accept the less fortunate reality on the ground.<sup>31</sup> Since the attack in the Kunduz River valley met the criteria of

28 See S. Sivakumaran, above [note 5](#), p. 336. In contrast, A. Cassese, above [note 5](#), pp. 294 ff., has sought to demonstrate that – despite the non-recognition of belligerency – the conduct of hostilities by both parties to the Spanish Civil War in the 1930s was internationally scrutinized on the basis of legal principles akin to those under the laws of war applicable to inter-State war.

29 David Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 42, 2009, pp. 8 ff.

30 “What Is This Thing Called War?”, *The Economist*, 22 April 2010, available at: [www.economist.com/node/15954464/print?story\\_id=15954464](http://www.economist.com/node/15954464/print?story_id=15954464).

31 In the early hours of 4 September 2009, Colonel Klein, who formed part of the German International Security Assistance Force contingent, acting under the mandate provided by the UN Security Council, ordered an air attack on two fuel tankers which had been hijacked by Taliban forces and had got stuck in a sandbank in the middle of the Kunduz River. According to the factual assessment made by the German Generalbundesanwalt beim Bundesgerichtshof, Colonel Klein intended to destroy the tankers (which he had reason to consider as posing a threat) and knew the attack would also hit a number of Taliban commanders present on site, but, erroneously, he did not expect civilian casualties to occur.

the crime of murder under Section 211 of the German Code of Criminal Law, and as the conduct could not be justified by reference to the law enforcement paradigm, Germany's federal public prosecutor resorted to the customary international law on the conduct of hostilities in NIAC in defence of the colonel.<sup>32</sup>

In view of the civilian casualties, it is difficult to see the humanitarian impetus of Henry Dunant at work here. And yet on the basis of current international law of NIAC, the prosecutor's decision to resort to the customary law on the conduct of hostilities was essentially correct. Today, most States arguably share the view of the federal public prosecutor and recognize that in an age of the universal protection of human rights by international law, a special legal regime regarding the conduct of hostilities in NIAC is also needed. The International Court of Justice (ICJ) had accepted this in its 1996 Advisory Opinion on Nuclear Weapons, as it had determined that the law on the conduct of hostilities limits the effect of the right to life in *all* armed conflicts and therefore also in NIACs.<sup>33</sup> In 2009, the ICRC followed the same line. In its seminal *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, it spelled out key components of the law governing the conduct of hostilities in NIAC, powerfully endorsing the need for a special legal regime for NIAC similar to the corresponding body of law applicable in IAC.<sup>34</sup> Finally, in September 2013, Christof Heyns, in his capacity as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, acknowledged the existence of a special international legal framework governing the conduct of hostilities in NIAC which limits the full effect of human rights.<sup>35</sup> Heyns' report, which circumspectly takes stock of the international law debate surrounding the use of drones in situations of armed conflict and beyond, is particularly significant in light of this UN Special Rapporteur's human rights mandate.

Generalbundesanwalt beim Bundesgerichtshof, *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel Wilhelm wegen des Verdachts einer Straftat nach dem VStGB und anderer Delikte*, 3 BJs 6/10-4, Offene Version des Vermerks vom 16 April 2010 zur Verfügung der Einstellung nach § 170 Abs. 2 Satz 1 StPO, pp. 13 ff.

32 *Ibid.*, pp. 41 ff.

33 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25.

34 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009.

35 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/68/382, 13 September 2013, para. 52 ff. It should perhaps be noted that Heyns' report (as is true for international legal scholarship) does not fully clarify the legal position of State soldiers in NIACs in one respect which is important both in theory and in practice. While it is difficult to deny that State practice supports the view that the law of NIAC empowers the State party to go beyond the international human rights law constraints in fighting its adversary, it is less clear whether the individual soldier enjoys a targeting privilege directly under the law of NIAC or whether such a power can only flow from a piece of domestic legislation of the State concerned which, as it were, activates a non-international law of armed conflict paradigm; even Sandesh Sivakumaran avoids a decision on this legal issue in his monumental work. See S. Sivakumaran, above [note 5](#), p. 151.

## **A new international law *against* non-international armed conflict (*jus contra bellum internum*) complemented by a law of non-international armed conflict (*jus in bello interno*)?**

Whatever the state of legal development in detail, it can no longer be denied that the international law of NIAC has undergone a noteworthy process of assimilation to the law governing IAC, especially with respect to the particularly sensitive area of the conduct of hostilities. This has reanimated the scholarly debate about the question of whether it is now overdue to grant non-State fighters a combatant privilege equivalent to that of soldiers on both sides of an IAC. As a result of such a change in the present law, those rebels who fight in conformity with the law of NIAC would not only (as is the case at present) avoid international criminal responsibility for a war crime committed in a NIAC, but could also (contrary to the existing law) go unpunished under the domestic law of the State concerned, say for rebellion or murder, because of their participation in the armed conflict. In one of his last publications, Antonio Cassese pleaded for such a legal reform in the case of a high-intensity NIAC and provided that the armed forces of the non-State party are sufficiently prepared to distinguish themselves from the civilian population.<sup>36</sup>

The main argument in favour of the introduction of a combatant privilege for fighters of the non-State party to a NIAC is of a humanitarian nature. The argument runs as follows: what incentive is there for the non-State armed forces to obey the international humanitarian rules if they are doomed to face punishment at the end of the armed conflict unless they prevail militarily?<sup>37</sup> As reasonable as this question may be, States have not hesitated to respond: they may well appreciate the perspective of a better incentive for non-State armed forces to comply with IHL, but they insist on the need also to provide an effective incentive for a political opposition group not to take up arms and unleash a NIAC.<sup>38</sup> In light of the human suffering associated with such conflict, this response equally carries the utmost humanitarian weight. Can this impasse be overcome?

36 Antonio Cassese, “Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane”, in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, pp. 523 ff. For a passionate pleading for the same reform, see Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, p. 168. More cautiously, but pointing in the same direction, S. Sivakumaran, above note 5, p. 520, suggests applying AP II, Art. 6(5)5 in a manner that tends to operate as a “functional equivalent” to a privilege of combatancy. For an earlier and yet more modest proposal in the same direction, see ICRC, Draft Additional Protocols to the Geneva Conventions of 12 August 1949: Commentary, ICRC, Geneva, 1973, as submitted by the ICRC in June 1973, Draft Protocol II, Art. 10(5), p. 141.

37 A. Cassese, above note 36, p. 519; Nils Melzer, “Bolstering the Protection of Civilians in Armed Conflict”, in A. Cassese, above note 36, pp. 514–515; Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 26–27.

38 This point is fully appreciated by N. Melzer, above note 37, p. 516.

## Outline of the two possible legal innovations

It is worthwhile looking at the law governing inter-State relations for a possible way out. Here a similar tension exists between the goal of preventing the illegal use of force in the first place and the need to provide humanitarian protection if this first goal has not been reached. There is reason to doubt that this tension can be completely dissolved, but current international peace and security law tries to moderate this tension in the following manner: it not only prohibits the use of force (save for a limited number of exceptions<sup>39</sup>), but also criminalizes, though the crime of aggression, individual participation in serious instances of the illegal use of force.<sup>40</sup> Yet the threat of international punishment is confined to those “in a position effectively to exercise control over or to direct the political or military action of a State”.<sup>41</sup> Within that legal system, the privilege of combatancy retains its potential also for the armed forces of the aggressor State to comply with IHL. As regards relations between States, international law therefore addresses the State leadership’s responsibility to prevent a war and, if such prevention fails, provides the armed forces with an incentive to wage war as humanely as possible.<sup>42</sup>

This inter-State model suggests how the privilege of combatancy could be extended to rebels while maintaining a powerful normative barrier against their taking up arms in the first place. A reformed international law of NIAC could rest on two pillars, similar to those of its inter-State counterpart: it could embrace a privilege of combatancy in the *jus in bello interno* and at the same time prohibit any non-State organization from launching an armed attack against its government through a new *jus contra bellum internum*.<sup>43</sup> Within such a model, international law would no longer (save for the intervention by the UN Security Council) remain indifferent to the outburst of a NIAC, but would make the prevention of civil war its direct concern.<sup>44</sup> Within the reform model under

39 The right of self-defence, as recognized in Art. 51 of the UN Charter, and the use of force, as authorized by the UN Security Council under Chapter VII of the UN Charter, are two universally accepted exceptions.

40 The judgment of 1 October 1946 rendered by the International Military Tribunal of Nuremberg set the precedent for criminalizing under international law the waging of an aggressive war. For the judgment’s key passages and the subsequent international debate on this subject, see Stefan Barriga and Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, Cambridge, 2012, pp. 135 ff.

41 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183.9 (Rome Statute), Art.8(1) *bis* (as adopted 2010 in Kampala). On the leadership requirement, see Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice*, Vol. 8, No. 5, 2010, p. 1189.

42 Claus Kreß, “Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus”, *European Journal of International Law*, Vol. 20, No. 4, 2009.

43 For an allusion to such a new international law on NIAC, see *ibid.*, pp. 1133–1136. For an earlier proposal pointing in the same direction, see N. Melzer, above note 37, pp. 515 ff. In Melzer’s proposal it is not entirely clear, however, whether the armed insurrection against the government shall be prohibited directly under international law under the threat of (international) punishment; *ibid.*, p. 517.

44 This essay is chiefly concerned with massive internal violence, but of course, careful consideration should also be given to the question of whether the new *jus contra bellum internum* should also cover the transnational non-State armed attack against a State. Such an armed attack is currently not covered by the Kampala definition of the crime of aggression as States, in line with existing customary international law, have refrained from including non-State acts of aggression in the new definition of

consideration, the State monopoly on the use of force would therefore not be weakened by the introduction of the privilege of combatancy in the law of NIAC; this monopoly would in fact be strengthened through the introduction of a ban on armed rebellion under international law.<sup>45</sup> The latter prohibition, however, would have to be confined to the leadership level of the rebels, in accordance with the definition of the crime of aggression.<sup>46</sup> In this way the incentive, provided for the individual rebel soldier through the new privilege of combatancy, to fight the NIAC in conformity with IHL could be maintained.<sup>47</sup>

Whether a *jus contra bellum internum* could be upheld without exception is a most delicate question. It bears emphasizing that considering the human suffering in NIACs (and this includes above all the suffering of those *not* participating in the fighting), there are compelling reasons to prohibit not only regime change *by force* but also the taking up *of arms* against a government which does not act in full conformity with international human rights standards. But what if internal politics become cancerous and a government-orchestrated genocide or crime against humanity of murder or extermination is imminent? In light of such a scenario, there is a strong case for an (extremely limited) *jus ad bellum internum* – that is, a right of self-defence of the civilian population under lethal attack, “until the UN Security Council has taken the measures necessary to maintain international peace and security”.<sup>48</sup> As of yet, such a strictly circumscribed *jus ad*

the crime of aggression under international law. See C. Kreß and L. von Holtzendorff, above [note 41](#), p. 1190. There would be no need for a new *jus contra bellum internum* to extend to transnational non-State armed attacks if customary international law already contained a crime of international (non-State) *terrorism*. In his last important judicial pronouncement, Antonio Cassese (as the Presiding Judge and the Judge Rapporteur) and his colleagues in the Appeals Chamber of the Special Tribunal for Lebanon (STL) held that such a crime exists and covers leaders and low-level members of a terrorist group alike. STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration and Cumulative Charging*, Decision (Appeals Chamber), STL-11-01/I, 16 February 2011, para. 111. Under the *lex lata*, however, this judicial finding is open to very considerable question. For a powerful criticism, see, most importantly, Ben Saul, “Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, *Leiden Journal of International Law*, Vol. 24, No. 3, 2011; the definition, as suggested by the Lebanon Tribunal, is dangerously broad if understood as a candidate for criminalization directly under international law. It must therefore be seriously doubted that the Lebanon Tribunal paved the way towards a satisfactory solution under international (criminal) law for transnational non-State violence.

45 A new *jus contra bellum internum*, as considered in the above text, would have to be asymmetric in nature, as it would be addressed to non-State actors only. In light of the State monopoly on the internal use of force, this asymmetry is without alternative; the international legal limits upon the *internal* use of force *by the State* would continue to flow from international human rights law and the threat of *international* punishment would continue to result, in cases of the most egregious abuses, in the resort to internal violence by State officials from the international criminalization of genocide and crimes against humanity.

46 Applying the logic underlying Rome Statute, Art. 25(3) *bis*, *mutatis mutandis*, low-level rebels would also not be responsible as aiders and abettors. See C. Kreß and L. von Holtzendorff, above [note 41](#), p. 1189.

47 Nils Melzer’s proposal in “Bolstering the Protection of Civilians in Armed Conflict”, above [note 37](#), p. 517, does not provide for a legal distinction between the leadership level and the lower-ranking rebel soldiers, and one wonders whether the effect he seeks to achieve through the introduction of a privilege of combatancy would not be too seriously weakened through the *jus contra bellum internum* as he conceives of it.

48 The classic debate about a right of a *colonialized* people of *forcible* external self-determination need not be pursued any further here. As far as the debate about a right of a people of *forcible* remedial secession

*bellum internum* has only received extremely limited scholarly attention.<sup>49</sup> The underlying problem has rather been debated from the perspective of an intervening foreign State. This has been done either by reference to the (subsidiary) international responsibility to protect or, more controversially, under the heading of a possible right of States to forcible humanitarian intervention.<sup>50</sup> This is not particularly satisfactory from the perspective of the law's internal consistency. At a stage of the development of international law where non-State actors are no longer necessarily relegated to being indirect beneficiaries of State rights, the justification for an exceptional right to use force in the case of an impending humanitarian catastrophe should be rooted in the individual right of self-defence of the civilian population under attack, and any right of a foreign State forcibly to come to the assistance of the targeted population should be conceived of as a form of *collective* self-defence to the benefit of the population concerned and derivative of the civilian population's right. In that context, it is extremely interesting to note that, in its declaration at the March 2013 Doha Summit, the Arab League explained the legality of supplying weapons to the Free Syrian Army on the basis of the right to self-defence of the Syrian people.<sup>51</sup>

In its essence, a fully symmetrical legal regime for NIAC was already known in the nineteenth century, but at this time it had to be activated by the recognition of belligerency, whose occurrence could never be taken for granted. A completely symmetrical law of NIAC would, however, have to be complemented by a new international law against civil war. By virtue of such a *jus contra bellum internum*, the prohibition on the use of force in international law would be extended to non-State organizations with a capacity to initiate massive violence. The new *jus contra bellum internum* could build on the now consolidated practice of the UN Security Council to consider a NIAC as a threat to

outside the colonial context is concerned, it is suggested that such no such right should be recognized that exceeds the extreme factual scenario as discussed in the above text. On the State practice on this point, see Claus Krefß, "Major Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force", *Journal on the Use of Force and International Law*, Vol. 1, No. 1, 2014, pp. 28 ff.

49 But see Frédéric Mégret, "Civil Disobedience and International Law: Sketch for a Theoretical Argument", *Canadian Yearbook of International Law*, Vol. 46, 2010, identifying the case of an impending genocide as the core field of application of a *jus ad bellum internum*. In his most recent contribution to the topic, Mégret discusses the latter in conjunction with the idea of introducing a privilege of combatancy in the law of NIAC; instead of introducing such a privilege, Mégret suggests a decisive focus on the *ad bellum* side of the coin and argues in favour of a "right of the rebels to a *jus post bellum internum* amnesty" if (but only if) they have taken up arms under circumstances justifying a *jus ad bellum internum*. Frédéric Mégret, "Should Rebels be Amnestied?", in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, pp. 538–539.

50 For an analysis of the pertinent State practice, see C. Krefß, above note 48, p. 20.

51 The relevant passage reads as follows: "while stressing on the right of each member state, in accordance with its wish, to provide all means of self-defense, including military support to back the steadfastness of the Syrian people and the free army". "24th Arab Summit Issues Doha Declaration", Arab League 24th Summit, 21–27 March 2013, available at: <http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html>; on the ideas underpinning the declaration, see Niaz A. Shah, "The Use of Force under Islamic Law", *European Journal of International Law*, Vol. 24, 2013, p. 346.

international peace and security,<sup>52</sup> and it would enrich international law through the introduction of a hitherto unknown discriminatory concept of civil war. It is therefore conceivable in theory to compose a new international law on NIAC, which would reach yet another stage of its development in Antonio Cassese's spirit and which would even extend slightly beyond Cassese's last word on the subject through the distinction between an *asymmetrical jus contra bellum internum* and a completely symmetrical *jus in bello interno*, mirroring to an extent the law governing the relations between States. But what about possible fundamental objections to such a new law, and if such objections could be addressed, what about the workability in practice of such a new law to the benefit of humanity?

### A "realizable utopia"?<sup>53</sup>

The idea of achieving full symmetry in the law of NIAC gives reason to pause and to have a fresh look at the legitimacy of the privilege of combatancy in the law of IAC in the first place. In this respect, the starting point is to recognize that, in the age of a prohibition of force in international relations, the legitimacy of a permission to use lethal force for the individual soldier of the *aggressor* State must be open to question. A couple of years ago, Jeff McMahan subjected the privilege of combatancy for the "unjust warrior"<sup>54</sup> to an elaborate criticism in terms of moral philosophy. He argues that neither the idea of a mutually valid consent,<sup>55</sup> nor a general presumption in favour of an unavoidable error of law, nor the reliance upon an allegedly binding superior order to wage war given by the leadership of the aggressor State, constitutes a good reason to justify such a privilege.<sup>56</sup> It is important to note McMahan's argument because it carries even more weight with respect to a non-State "unjust warrior" in a NIAC. Yet, McMahan has explicitly refused (while adding the caveat "at present") to argue for an asymmetrical construction of the law of IAC as a consequence of his moral argument. In that context, he refers *inter alia* to the incentive which flows from their privilege of combatancy for "unjust warriors" to comply with the law of armed conflict.<sup>57</sup> In a recently published, thoughtfully written book chapter, Frédéric Mégret takes a different position and questions the symmetrical privilege of combatancy in the law of

52 For this consolidated practice, see ICTY, *The Prosecutor v Duško Tadić*, above note 14, para. 30.

53 This expression alludes to the title of the book edited by A. Cassese, above note 36.

54 Meaning a soldier fighting for the aggressor State.

55 The idea that participation in hostilities implies consent to being targeted by the other side.

56 Jeff McMahan, *Killing in War*, Oxford University Press, Oxford, 2009, pp. 38 ff.

57 *Ibid.*, pp. 190–191: "Unjust combatants who feared punishment at the end of the war might be more reluctant to surrender, preferring to continue to fight with a low probability of victory than to surrender with a high probability of being punished ... And they might also reason that if they face mass punishment in the event of defeat, they have little to lose from abandoning all restraint in the effort to win. They might reason, for example, that if they are defeated, and if the prosecutors are unlikely to have knowledge of their individual acts, each might have nothing to lose, but perhaps something to gain, from the commission of war crimes or atrocities that would increase their chance of victory and thus of immunity to punishment." For a similar line of reasoning, see Nigel Biggar, *In Defence of War*, Oxford University Press, Oxford, 2013, p. 196.

IAC. This position is (among other things) based on the disbelief that the privilege of combatancy in fact works as an incentive for compliance. Mégret denounces the widely held opposite view as being based upon no more than the unreflected psychological assumptions of laypersons.<sup>58</sup> These doubts deserve to be treated seriously, and they call for another round of reflection on the incentive for compliance potential of a privilege of combatancy for the “unjust warrior” with respect to both the current law of IAC and a possible future law of NIAC. Thought should also be given to the feasibility of an empirical study on the subject. As regards the law of NIAC, which is at the heart of this essay, one thing is clear: the introduction of a privilege of combatancy for non-State fighters in a NIAC imperatively requires the realistic prospect of thereby significantly improving compliance with IHL by the non-State party to the conflict.

The impossibility of justifying such a prospect would, however, not render the debate about a new *jus contra bellum internum* moot. It is true that the idea of such a new law has been presented here as a complement to a fully symmetrical *jus in bello interno*. But it bears emphasizing that a new *jus contra bellum internum* (including an exceptional *jus ad bellum internum* in case of an impending humanitarian catastrophe) should be a matter for debate in any event. In other words, a move towards complete symmetry in the law of NIAC is dependent on the introduction of a new *jus contra bellum internum*, but this statement does not necessarily hold true the other way round.

The idea of a new *jus contra bellum internum* also gives rise to important questions. First of all, careful thought must be given to the question of whether it is possible to formulate a new international prohibition (under the threat of international punishment) as well as a limited exception therefrom, which is both satisfactory in substance and sufficiently precise.<sup>59</sup> Confirmation is also needed on whether a non-State party leadership level can be identified in most instances of an emerging NIAC so that the new international rule could indeed work as the intended legal barrier against the unleashing of a civil war. Furthermore, the workability in practice of the new legal regime under consideration would be exposed to serious doubt if the outbreak of a NIAC was generally preceded by an escalation dynamic that could not be disentangled with sufficient clarity to reliably attribute responsibility. Sadly, the situation of Syria (since 2012) provides us with a fresh example of such dynamics. Yet another challenge results from the fact that there are national constitutions which provide for a right to armed resistance under certain conditions.<sup>60</sup> There would thus be a need to bring both levels of legal regulation in harmony with each other. Finally, there can be no doubt that the introduction of a *jus contra bellum internum* would constitute an

58 F. Mégret, above note 49, pp. 538–539.

59 For the question of whether or not to include transnational non-State violence, see above note 44. Furthermore, in order to duly respect the domestic sphere of jurisdiction, the scope of application of the new international rule would have to be properly confined to *intensive* non-State violence reaching the threshold of NIAC.

60 For one example, see the German Constitution, *Grundgesetz für die Bundesrepublik Deutschland*, Art. 20(4).

ambitious legal reform. One wonders whether it is a bridge too far for international law, at least for the time being.

In view of all these important and as of yet barely discussed questions, the reform model for an international law *on* NIAC is *not* here presented for immediate adoption. Instead, the model is submitted in a scholarly spirit for debate as to whether it could be seen as a “realizable utopia” in the sense of the late Antonio Cassese. It would be a multifaceted and challenging debate, but as civil wars are one of the main evils of our time, an improved, if modest, contribution by international law to deal with that evil at its roots would therefore justify the most demanding intellectual effort.

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## Response to Claus Kreß: Leveraging the privilege of belligerency in non-international armed conflict towards respect for the *jus in bello*

**Frédéric Mégret**

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### **Abstract**

*In this response to Claus Kreß’s piece, I focus particularly on the suggestion of granting a privilege of belligerency to non-State armed groups in non-international armed conflict. I take issue with the idea that the privilege of belligerency is an inherently humanitarian issue, and note its deeply problematic aspects from the point of view of both the idea of human rights and the jus ad bellum. I also argue that it is unclear how the privilege of belligerency would incentivize rebels to better comply with international humanitarian law. At the very least, I suggest that the granting of a privilege of belligerency to non-State armed groups should be conditional upon good humanitarian performance.*

.....

## Introduction

Claus Kress has written a spirited evaluation of the legal regime of non-international armed conflicts (NIACs), in which he also makes some very notable suggestions, particularly that the privilege of belligerency (POB) be extended to non-State armed groups in NIACs, and that an internal *jus contra bellum* be developed. In this sympathetic but somewhat sceptical response to his argument, I want to underline the points on which I agree and disagree. The NIAC regime has by and large been a regime by default, one constructed in the shadow of the regime applicable to international armed conflict (IAC). It is one marked, among other things, by very specifically sovereign fears that may have little to do with first principles, and which have traditionally oriented it in a conservative and timid direction.

We clearly live in an age where it is becoming increasingly necessary to conceive of a sounder regime for NIAC. In addition, it may well be that the limitations of the laws of war are linked not only to a series of functional and policy obstacles, but also to what one might call failures of the legal imagination. In this respect, I salute in passing Kress's willingness as a lawyer to draw on normative theory that is produced outside the legal realm, for only by going beyond a strictly positivist register can one avoid the sort of circularities that all too often have characterized reasoning about the regulation of conflict. I also believe a discussion of the POB in all its forms, as one of the great under-debated structuring assumptions of international humanitarian law (IHL), is long overdue.<sup>61</sup>

At the same time, in contributing to this important intellectual discussion, I believe my esteemed colleague attempts to hit too many birds with one stone and may, as a result, hit the wrong bird or not hit the right bird hard enough. In this response to Kress's article, I first outline my principal points of agreement with him. I then argue that his proposal for a POB in NIAC does not flow from his diagnosis and is, in fact, more problematic than appears, from the point of view of his own, peace-oriented agenda. Finally, I suggest that we need to think more precisely about the role that the POB may have in fostering better compliance with the *jus in bello*. I argue in particular that obtaining a POB should be explicitly conditional upon a certain satisfactory level of compliance with the laws of war. In saying this, I speak from the point of view of an international law sensibility (shared broadly, I think, by Kress) which is interested in the broad view of the regulation of armed conflict—including the way in which different regimes that purport to regulate violence interact and create trade-offs, and not simply devoted in abstract to the pursuit of the humanitarian project at the exclusion of all else.

61 Work of this sort, at the intersection of law and moral theory, has started emerging. However, its focus seems to be more on IAC than NIAC. Richard V. Meyer, "The Privilege of Belligerency and Formal Declarations of War", in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford University Press, New York, 2012, pp. 183–220.

## Points of agreement: The basic diagnosis

In his piece, Kreß seems to express three central concerns. I will briefly address them in their own right to emphasize how much I share each taken independently. First, Kreß argues that there is a problem with the asymmetry of the humanitarian regimes of IAC and NIAC; second, he draws attention to a trend that seems to be occurring simultaneously and pulling in the opposite direction – the danger of over-application of the laws of war; and third, he suggests that we need to consider the possibility of a domestic *jus contra bellum*.

### The hard-to-defend asymmetry of the humanitarian regimes of international and non-international armed conflicts

To begin with, that more could be done to improve compliance with the humanitarian regime of NIAC is fairly evident. In terms of humanitarian policy, finding ways to incentivize both States (repressing non-State armed groups with a vengeance because they feel it is their sovereign prerogative to do so) and non-State armed groups (unsocialized in the ways and values of international law) to respect certain humanitarian limitations has become a sort of Holy Grail of international humanitarianism. A distinct and influential strand of humanitarian thought has for quite some time argued for an upgrading of the regime applicable to NIAC by reference to that of IAC. Kreß's analysis in this respect lies firmly within the current progressist canon that sees the need to develop the law relating to the conduct of hostilities in NIACs.

Many of the arguments for assimilating the regimes of IAC and NIAC are compelling morally if not always strictly in positive law. In many respects, the regime of IAC is more comprehensive and thoroughly protective than that existing in NIAC. It is often argued that limitations of the humanitarian regime in NIAC derive from sovereign concerns that have more to do with protecting a *domaine réservé* than creating the best of humanitarian worlds. What difference should it make, after all (except for sovereignty-obsessed States whose motivations we have increased reason to be wary of), whether as a victim of war one is situated in an IAC or a NIAC? Is not a lot of energy wasted in arcane issues of conflict classification<sup>62</sup> that could be usefully redirected to more productive pursuits? Auspiciously, then, many international lawyers would argue that, as a result of what Kreß refers to as the “*Tadić* dynamic”, the laws of war in the last twenty years have moved towards a greater humanization, taking their cue from international human rights law.<sup>63</sup> It is only a small step from there to

62 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. 313–350.

63 Theodore Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 239–278.

effectively argue for a “unified” law of war that would apply equally regardless of the conflicts,<sup>64</sup> and the trend towards convergence at times seems unstoppable.<sup>65</sup>

## The danger of over-application of the laws of war

In addition to this proactive commitment to the development of the law, Kreß is also wary of something that almost goes in the opposite direction, namely the risk of what one might call the “over-application” of the laws of war. This may be counter-intuitive since we are used to States seeking to deny the application of the laws of war, but evidently the opposite is also true. It is perhaps the natural tendency of any body of law to seek to apply to an ever-increasing range of situations, spurred by good intentions and fear of a legal void. That may be particularly the case when that body of law is associated with humanitarian virtues. *A fortiori*, if this expansion is backed by powerful and well-organized institutional agendas, the case for it may be overwhelming.

However, as Kreß notes in one of the most clear-sighted passages in his article, there is also a danger of displacement of other bodies of law where arguably they should remain applicable or continue to be controlling in the background. In particular, a comprehensive application of a conduct of hostilities regime in NIAC might be said to objectively displace the ordinary application of human rights. In IAC, that departure from ordinary expectations about core rights (to life, to physical integrity) is perhaps less intensely felt because of the highly anomalous status of the international system normatively, and the way structured assumptions about war have led us to a state of permanently degraded expectations about what can be achieved. The problem is that protection is relative: what is most humanitarian (in the laws of war sense) is not necessarily what is most protective. The regime of IAC may be more protective than (i) nothing and (ii) the regime of NIAC, but it is certainly not as protective as normally applicable human rights standards. The issue of what exactly is being displaced should therefore be front and centre of any attempt to import a legal regime originally designed to address very different kinds of situations.

In this respect, I would add a further point to signify my profound agreement with Kreß on this issue. The humanitarianism inherent to non-international violence starts from fundamentally different premises than the humanitarianism inherent to inter-State violence. With regard to the latter, the starting point, as exemplified perhaps a little stereotypically by the founding myth of Solferino, is a situation in which almost no rules prevail in the waging of violence. Humanitarianism, then, is a significant victory over barbarism.

64 Emily Crawford, “Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts”, *Leiden Journal of International Law*, Vol. 20, No. 2, 2007, pp. 441–465.

65 Michel Veuthey, “The Need for a Universal Humanitarian Order”, *Foresight*, Vol. 7, No. 1, 2005, pp. 26–46; Marco Sassoli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 26–27.

Domestically, however, the situation is quite different. Indeed, the starting point is one that is ideally characterized by the pursuit of human rights. Humanitarianism, therefore, does not intervene in a void but rather displaces a thick pre-existing network of obligations, duties and norms. It significantly downgrades our ordinary expectations of justice. Understanding this asymmetry between the humanitarian projects in IAC and NIAC is crucial. Hence the international humanitarian solicitude, however well-intentioned, is one that the human rights community may understandably be wary of in principle.<sup>66</sup> In practice, for example, whilst we should rightly be wary of States who refuse to acknowledge armed conflicts on their territory, we may also have reason to find problematic States who too readily find conflicts occurring there.

Now it might of course be argued that the applicability of the laws of war is better than nothing and may introduce a modicum of restraint in a context that is fast spiralling out of control. That may be a price worth paying for pragmatic reasons (an issue further addressed in the final section). A time of “armed conflict” may not be the time to be picky about rights, and one should seek to save what can still be saved in deeply compromised moral circumstances. This is the characteristic, almost foundational motive of the humanitarian project in IAC as well as in NIAC: humanitarianism is preferable to unrestrained violence if violence is inevitable. But we should also always keep in mind that even “humanized” laws of war may be little consolation for a broader flight from rights. The irruption of the laws of war in the domestic context interferes with a relationship structured around radically different assumptions. It displaces dearly held ideals about the sanctity of human life. We should at least recognize that concession to humanitarianism for what it is, namely a deep bowing to the inevitability and to a degree the legitimacy of war as an institutional practice in international society.<sup>67</sup> Whether that is a move we are ready to make as confidently in NIAC as in IAC is the real normative question. It is thus very much to Professor Kreß’s merit to have raised it.

### The need for a domestic *jus contra bellum*

Finally, in addition to an amplified humanitarian regime, one of the more intriguing points suggested by Kreß is that a form of non-international *jus contra bellum* should be developed. There is no doubt that this is quite a striking and radical suggestion, and one which is bound to be very sensitive with States who

66 In practice international human rights lawyers have tended to pragmatically abdicate the human rights high ground to endorse the notion that the laws of war are the *lex specialis*, thus powerfully reinscribing the violence of the inter-State system within human rights. This is not to say that this fundamental concession does not create the occasional pang of unease. See in particular William Schabas, “Freedom from Fear and the Human Right to Peace”, in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, Edward Elgar, Cheltenham, 2012, pp. 36–51.

67 Frédéric Mégret, “Who’s In and Who’s Out? A propos de la protection internationale du monopole de l’exercice de la violence légitime et quelques autres attributs des monstres froids”, *Revue Québécoise de Droit International*, 2011.

traditionally have considered that the repression of violent challenges to their power is in principle (means aside, and even then, grudgingly) entirely within their sovereign prerogative. That is of course because behind any *jus contra bellum* is an implicit claim of *jus ad bellum*, one that could operate to the benefit of the State (say, in the pursuit of its legitimate maintenance) but also to the benefit of non-State armed groups. Very briefly, I broadly concur with three types of arguments made by Kreß for internationalizing the question of the legal use of force domestically.

First, NIACs represent today the vast majority of armed conflicts, and they have significant transnational and international consequences (regional destabilization, refugee flows, escalation to inter-State conflict). In other words, sovereigns and non-State actors can hardly claim that they can keep domestic violence within their borders, and the international community is within its rights when it seeks to scrutinize the conditions under which violence is triggered. Such an argument has already been invoked quite successfully in the context of constructing a humanitarian regime for NIAC. Second, as international law becomes normatively denser and more hierarchical, it simply cannot be expected to blandly accept that the protection of sovereignty through repression of non-State violence is always its *ipso facto* right. If nothing else, there are extreme cases—for example, that of an ongoing genocidal campaign—where it is inconceivable that international law would stand on the side of the sovereign oppressor, denying the would-be victims the right to protect themselves.<sup>68</sup> Third, in effect there is a long tradition of international legal thinking and practice that has foregrounded the existence of legitimate practices of violence in fighting tyranny, radical oppression and criminality. This tradition has re-emerged more strongly in recent decades as part of an increasingly influential discourse of human rights. International law is, in other words, not starting from nothing, and there is merit in seeing a discussion about domestic *ad bellum* as a form of continuation of long-existing debates rather than a sudden proposed innovation.<sup>69</sup>

In concluding this first section, I would like to point out that it is not clear which of Kreß's three concerns, outlined above, is foremost in his mind. Kreß's article opens with an emphatic evocation of the humanitarian project and is, after all, published as part of a special issue on the scope of the law in armed conflict in the *International Review of the Red Cross*. The shadow of Cassese looms large in the article and orients it towards the humanitarian dimension of NIAC. However, towards the end, the article becomes much more interested in the *jus contra bellum* issue, almost as if such a bold move as the conferral of a POB needed to be compensated by something that would reassure States. Both concerns, however, might be in tension with the risk of overextension of the laws

68 Frédéric Mégret, "Not 'Lambs to the Slaughter': A Program for Resistance to Genocidal Law", in René Provost and Payam Akhavan (eds), *Confronting Genocide*, Springer, New York, 2011, pp. 195–237.

69 Frédéric Mégret, "Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l'ambition normative internationale", *Etudes Internationales*, Vol. 39, No. 1, 2008, pp. 39–62.

of war. This is why the connection between these concerns needs to be the object of further investigation.

### **The point of disagreement: The problematic character of a conferral of the privilege of belligerency in non-international armed conflict**

It is with this in mind, and having underlined my broad agreement with the basic diagnosis, that I find Professor Kreß's joining of voices with those who argue that a POB status should be granted to combatants in NIACs<sup>70</sup> not entirely convincing in its current form. To be clear, my concern here will not be with whether this is a politically realistic or legally grounded proposal, but whether it is a normatively and ethically sound one. Since we are, after all, talking *de lege lata*, then we should be all the more at liberty to invoke all relevant normative considerations. There may be some tension, in particular, between the goal of humanizing war on the one hand and the project of simultaneously granting a POB and reinforcing the *jus contra bellum* on the other. In fact, I will argue that the main policy proposal of Kreß's article does not follow from its premises: granting a POB status would do little to remedy the problematic humanitarian situation in NIACs. I take issue with the contention that the great move of convergence between IAC and NIAC needs to be perfected by remedying the anomaly that the POB exists in the former but not the latter. In fact, recognition of the POB may further entrench domestically some of the most exorbitant and problematic features of the laws of war, notably by making the ordinarily morally abhorrent and criminal (e.g., murder) fully legal. In doing so, it arguably risks falling prey to the very danger of an excessive import of features of IACs into NIACs that Kreß rightly denounces.

In the urge to humanize NIACs, one can identify a tendency to underestimate the significant normative differences between IACs and NIACs. What I think is needed, as a result, is to better characterize the legal status of the POB and understand how it might unfold differently in NIAC as opposed to IAC. Its existence in the latter but absence in the former is perhaps one of the most striking and defining differences between the two regimes. Where everything else seems to be a matter of degree (there are rather more humanitarian protections in IAC than in NIAC), this is a difference of *nature*, one that grants unique juridical protection to combatants aligned with States in IAC, but that is strikingly absent in NIAC.

The typical explanation as to why this distinction exists is that NIACs occur domestically and States are naturally more concerned with what happens within their sovereign province, and so do not want to risk legitimizing non-State armed groups even indirectly. However, I want to argue that there are deep normative

<sup>70</sup> These are clearly in the minority, but they have produced impressive normative tracts in support of their proposition. See E. Crawford, above [note 36](#), pp. 153–169 (“Achieving a Universal Combatant Status”).

reasons for being wary of the POB in NIAC that have little to do with State cynicism. The question then should be, what is the precise legal and moral nature of the POB and what might its broad introduction into NIAC portend? The POB is often seen as an essential, inseparable and defining element of the regime of IACs and, as a consequence, an integral part of its claim to offer greater humanitarian protection. I contend, however, that the POB has relatively little to do with humanitarianism in the first place, is not logically tied to increased humanitarian protection (at least in the form in which it is typically recognized) and, ultimately, is at least theoretically severable from any humanitarian regime. Moreover, if we are serious about the application of POB in NIAC, we should envisage how it should apply to *State armed forces* as well.<sup>71</sup>

### The privilege of belligerency is not in itself humanitarian progress

A certain confusion is created by the fact that the POB is largely contained in laws of war instruments.<sup>72</sup> However, there are practical and political reasons why this may be so which do not necessarily lead to an inference that it is an *intrinsically humanitarian* issue. In fact, the POB's presence in humanitarian law instruments appears to be largely accidental. Even though it may be a political condition of feasibility of the humanitarian project, that does not *in itself* make it a humanitarian provision. Rather, if anything the POB pertains to a sort of *proto jus ad bellum*, somewhere in a grey area between the *jus ad bellum* and the *jus in bello*, which identifies who, *a priori*, ought to be considered a privileged combatant for the purposes of the laws of war, and therefore who can be considered as a (relatively) legitimate participant in the particular form of violence internationally known as "war".<sup>73</sup> Its Statism (State troops almost always benefit from it, where non-State armed groups only do so under strict conditions) is not accidental but very much a recognition that sovereigns are clearly the historically preferred participants in armed conflict.<sup>74</sup>

Let us first consider the juridical significance of the POB in and of itself (not in some broader, instrumental sense). The POB effectively functions as an immunity from prosecution – or even a permission – for what might otherwise be considered a criminal act (killing and wounding other human beings, provided they are

71 This may seem a moot question given the assumption that only States have the ability to prosecute and most likely will not, but of course (i) it is conceivable that non-State armed groups would want to prosecute State agents for their participation in a counter-insurgency campaign, or (ii) that a successor government or (iii) some emanation of the international community would want to do this.

72 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Lands, 18 October 1907, 187 CTS 227, 1 Bevans 631 (entered into force 26 January 1910), Art. 1 (Annex); GC III, Art. 4; AP I, Art. 43.

73 Frédéric Mégret, "*Jus In Bello as Jus Ad Bellum*", *American Society of International Law Proceedings*, Vol.100, pp.121–123.

74 Incidentally, many of the "just war" arguments for the POB in IAC have less to do with the *jus in bello* than with concerns about fairness for individual soldiers who were asked to sacrifice themselves for their State and to respect the national collective will, as well as the mutual consent to killing as between members of State forces. In other words, they are very much imbricated in the normative fabric of Statehood and its particular exigencies.

combatants). This much at least should be clear, therefore: the POB is not *per se* a form of humanitarian protection, except in the twisted sense that it protects combatants who kill other combatants.<sup>75</sup> It is generous towards the very act of war, but it does exactly the opposite of what humanitarianism normally does and is about: limiting violence. It may be that it is part of a broader, realistic trade-off that makes the humanitarian project more palatable to States (by saying “we recognize your unique privilege to kill combatants to encourage you not to kill non-combatants”), but that is not the same thing as saying that it is in itself humanitarian.

In fact, one could argue that the fairly wanton killing of combatants is the one irreducible non-humanitarian blind spot of humanitarianism, the bare definition of war that the laws of war have never dared to challenge. It is true that prisoner-of-war status—which is the logical consequence, if one has been captured, flowing from the POB—is humanitarian at least in the sense that it proposes that the wounded or those who have surrendered should not simply be killed (which might otherwise make sense in war). However, this limited humanitarian protection could still be obtained without the conferral of a POB. Indeed, wounded or surrendered combatants could be entitled to certain forms of safe detention and yet be prosecuted for having killed other combatants.<sup>76</sup> At any rate, the idea that combatants can kill each other legally is an abnormal exception to the notion present in most legal systems that one cannot consent to one’s own death at the hands of others. Rather than *limiting* war, the POB makes the very practice of war, understood as a legalized activity, possible.

### The privilege of belligerency is problematic from the point of view of human rights

In addition to not being intrinsically humanitarian, the POB is arguably one of the crucial ways in which the ordinary promise of human rights is downgraded under the banner of humanitarianism. Internationally, this is perhaps less evident because of the paucity of States’ extra-territorial legal obligations and the broad positive-law deferral to the laws of war as the *lex specialis*.<sup>77</sup> The POB has become such an assumed part of the laws of war that lawyers typically do not question the legality

75 The resistance of many international humanitarian lawyers to the suggestion that “unprivileged” participation in hostilities is a war crime but is better treated as a violation of domestic law suggests that the POB is indeed not fully central to the humanitarian project. On this topic, see Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War”, *Columbia Journal of Transnational Law*, Vol. 43, No. 1, 2004, pp. 1–71.

76 Michael H. Hoffman, “Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law”, *Case Western Reserve Journal of International Law*, Vol. 34, 2002, p. 227; Derek Jinks, “The Declining Significance of POW Status”, *Harvard Journal of International Law*, Vol. 45, No. 2, 2004, pp. 367–442; E. Crawford, above [note 36](#), Chapters 3 and 4.

77 This is an aspect that has only begun to be an object of critique by a very few international lawyers. William A. Schabas, “Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus Ad Bellum*”, *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 592–613.

of killing other combatants – surely this must be the incompressible minimum on which the very existence of the laws of war depends. Nonetheless, from a rights perspective informed by moral and cosmopolitan thinking (as opposed to positive international human rights law), the POB still means that individuals can kill or be killed as part of the mere existence of an objective state of affairs between sovereigns – an “armed conflict” – at the expense of the maximization of their rights. Specifically: (i) enemy combatants fighting a war of self-defence can be legally killed, which is a hard-to-justify encroachment on their right to life;<sup>78</sup> and (ii) combatants ordered to engage in a war of aggression can essentially be sacrificed by their own State for an illegal end, again in violation of their right to life.<sup>79</sup>

In domestic contexts, this downgrading of the ordinary promise of human rights through the granting of a POB would be even more evident because, as has been pointed out, the starting point is the applicability of internationally protected human rights. The downgrading would manifest itself in the simultaneous undermining of the existing framework of domestic, particularly criminal law, and of human rights. When it comes to domestic law (whose protections are indispensable to human rights), the POB undermines the idea that killing or wounding others without legitimate and legal authority or permission (e.g., individual self-defence) is, straightforwardly, a criminal act (in addition to being in contradiction to the State’s monopoly on the legitimate use of violence). It thus dramatically weakens the rights of those who are targeted in armed conflict, whose expectation that their right to life will be upheld in all but the most exceptional circumstances now gives way to a situation in which they can be killed legally.

Where killing State agents lawfully exercising their authority is normally considered one of the gravest crimes, it would suddenly leave such agents legally defenceless against attacks. This exemption to the most cherished domestic laws, then, would be a boon to rebels, suddenly normalizing the completely illegal into a mere act of war. Perhaps more importantly, when it comes to human rights law, the POB is particularly relieving of obligations that would normally apply to *State* agents. In cases where a State’s forces would normally be liable for human rights violations for killing individuals (except in narrow circumstances such as during an arrest, while keeping order, or self-defence), they could now avail

78 Normally, a limitation on the right to life in international human rights law must be justified on narrow grounds (self-defence, arrest). Although international human rights law typically defers to the laws of war as the *lex specialis* when it comes to war, one might argue that killing as part of a war of aggression would be hard to justify.

79 In just war theory, this is what is sometimes referred to as the “internal *jus in bello*”, namely the extent of obligations that the State owes to its own soldiers. There is an argument that this moral idea might be translated into legal human rights obligations. Frédéric Mégret, “The Specific Evil of Aggression”, in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2015, forthcoming. Current work on the “human rights of soldiers” is also in this vein. Solon Solomon, “Targeted Killings and the Soldiers’ Right to Life”, *International Law Students Association Journal of International & Comparative Law*, Vol. 14, No. 1, 2007, pp. 99–120; Gabriella Blum, “The Dispensable Lives of Soldiers”, *Journal of Legal Analysis*, Vol. 2, No. 1, March 2010, pp. 115–170.

themselves of the considerable violence implicit in the laws of war to kill those who would henceforth be considered as combatants. A POB for State troops in NIACs is a formidable licence to kill.

### The privilege of belligerency is problematic in terms of *jus contra bellum*

Kreß distinguishes the issue of granting a POB in NIAC from that of developing a domestic *jus contra bellum* and presents these as largely irreducible issues. The reinforcement of the domestic *jus contra bellum* is offered up as a sort of *quid pro quo* for having introduced a POB in NIAC. What this seems to acknowledge yet simultaneously neglects, however, is the considerable objective role that the POB would have in legitimizing resort to force in the first place. It is as if Kreß's *jus in bello* proposal has simultaneously and discreetly undermined his own *jus contra bellum* commitment. One cannot help getting the impression, in other words, that the proposal to grant a POB to actors involved in NIACs removes one of the clearest disincentives for resorting – including illegally – to the use of armed force domestically in the first place. Whilst the concern with granting a POB to non-State armed groups is one that Kreß associates with traditional States, it is also crucially important to note that the goal of deterring an illegal rebellion or, for that matter, an illegal war by a State against its population should rank as a major human rights concern in its own right.<sup>80</sup>

Again, I will turn in the next section to the ways in which the POB is nonetheless often understood as part of a broader system of trade-offs which characterizes the laws of war, so that even its unsavoury aspects are considered redeemable. For the time being, let us note that the POB in IAC not only protects soldiers engaged in war in general, but also specifically protects soldiers involved in illegal wars from what might otherwise be the consequences of such participation. That this is essentially a sunk cost of doing international warfare does not relieve us from highlighting it for what it is, especially at the moment of extending it to another, very different type of warfare. The POB effectively concedes the existence of a broad, unconditional right to kill combatants, even for individuals who clearly know that they are engaging in actions that are illegal – even criminal – in the first place. It thus removes what might have been a particularly strong safeguard against aggression, namely the sure knowledge that one cannot kill combatants when one is knowingly engaging in a war of aggression.

Of course, this result is powerfully reinforced by the fact that the international criminal law of aggression has itself conceded that only senior commanders can be liable for the crime.<sup>81</sup> Low-ranking officers and soldiers (in practice, the vast majority of the military) who implement orders to carry out an aggression fall outside the penal reach of the *jus ad bellum*. It is thus logical

80 Kjell Anderson, “The Universality of War: ‘Jus Ad Bellum’ and the Right to Peace in Non-International Armed Conflict”, in D. Keane and Y. McDermott (eds), above [note 66](#), pp. 52–73.

81 Kevin Jon Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, *European Journal of International Law*, Vol. 18, No. 3, June 2007, pp. 477–497.

that they are given the protective cover of the *jus in bello* (it would be paradoxical, of course, if the *jus ad bellum* let them off the hook but the *jus in bello* did not). It is perhaps no surprise as a result that individual soldiers do not feel particularly compelled to challenge the violations of the *jus ad bellum* that they are ordered to take part in, given how the *jus ad bellum* and *jus in bello* conspire to fashion them into largely irresponsible actors. Still, even allowing for that specific limitation, the POB also applies to those commanders located at the top of the chain of command who may be held liable for the crime of aggression, but would nonetheless not be liable for killing the combatants they knew they had no *ad bellum* right to kill in the first place. The point here is not as such to criticize this facet of the regulation of IAC that is often seen as unassailable even by the majority of moral theorists writing about the topic<sup>82</sup> (I will return briefly to this issue in the conclusion). Rather, it seeks to warn about what is exactly proposed to be imported in NIACs.

Indeed, there is no reason to think that these very significant concerns with the POB would be redeemed in NIAC; quite the contrary. Inserting a POB in NIAC may import precisely one of the most problematic features of the regulatory apparatus of IAC. Even though a POB would presumably not prejudice the *ad bellum* legality of the rebels' acts, it would at least provide them with a significant legal cover regardless of that legality. Rebels might not have a just or legal cause, but they would nonetheless be recognized as being a relatively legitimate actor for the purposes of engaging in war. No longer risking prosecutions for the mere fact of attacking State troops, they would find themselves significantly empowered, and a very big step would be taken in the direction of at least partly protecting unjust or illegal rebellions. For the State, such a formal and automatic recognition of a POB to rebels might be exactly the sort of danger of overextension of the laws of war against which Kreß seeks to guard us: one that would deprive the State of its full ability to maintain public order and discourage sedition, in the name of prioritizing a humanitarian objective above all else. It would also incidentally mean that non-State armed groups would have an objective interest in bringing their campaign to the level of an armed conflict so as to benefit from the POB and, as a consequence, launder their individual behaviour. Needless to say, this is a morally and legally paradoxical outcome.

Here it may be worth bringing attention to a specificity of NIACs when it comes to the *ad bellum* that cautions against any broad introduction of the POB. One of the typical arguments for denying that individual soldiers can engage in aggression (and therefore ought to normally benefit from a POB in IAC) is that it may be hard for them to know that the war they are asked to fight is, indeed, an aggression. Whatever the merits of this argument in IAC, it should be noted that it is particularly weak in the context of NIAC. The argument that individual rebels "could not know" whether an attack on the State was legal or not is clearly

82 Michael Walzer, *Just And Unjust Wars: A Moral Argument With Historical Illustrations*, 4th ed., Basic Books, New York, 2006; J. McMahan, above [note 56](#).

less well taken than its international variant: individual rebels are not members of stable and institutionalized military structures (“private armies”) waiting to be given orders, and who can therefore be forgiven for going with their leaders’ choices. Rather, they are typically cause-oriented participants in armed conflicts that they chose, and should thus less easily be able to claim innocence from such choices.

Moreover, the international confirmation of a broad POB for *State* troops in NIACs, regardless of the legality of their campaign, would launder behaviour that might be deeply problematic from the point of view of the *jus contra bellum* and even human rights. Imagine for example that the State is fighting against a non-State actor that is an emanation of a civilian population trying to protect itself from genocide: would it make sense, legally or morally, to consider that the POB always applies to State troops effectively helping a project of annihilation of a people? Kreß’s indication for a more humanitarian regime of NIACs, therefore, may come at the cost of being less humanitarian vis-à-vis fundamentally unjust forms of repression. Non-State aggressors would, for most purposes, be treated in the same way as non-State self-defenders. The POB (at least in the dominant form in which it is conceptualized) is a great humanitarian equalizer, precisely where the *jus contra bellum* seeks to draw stark differences.

### **The incentive question: Might the privilege of belligerency nonetheless orient parties towards greater humanitarian compliance?**

I have thus highlighted the net costs of the POB – a not intrinsically humanitarian provision – in terms of two bodies of law (human rights and the *jus contra bellum*) that we also evidently have reason to care about as broadly minded international lawyers. Now it may be that this is simply, as is generally held in IACs, a further price to pay for the greater humanitarian regulation of armed conflicts. After all, humanitarianism is about reducing expectations and making tragic compromises, about the specificity of war as a moral universe, and ultimately a normative choice to foreground the protection of certain categories of persons in the midst of violence rather than harnessing all energies to the more ambitious, but elusive, goals of preventing war altogether or protecting everyone’s rights. Still, it is to the pertinence of such claims in relation to the granting of a POB that I turn in this section in more detail.<sup>83</sup>

We should at the very least be clear about what it is we are regularizing and how it is objectively in tension with (even though not entirely destructive of) the goal of firming up an otherwise fragile and barely nascent *jus contra bellum* in domestic

83 And indeed it might also be that some self-styled international humanitarian lawyers would not care much for what happens at the level of the *jus ad bellum* and would promote the humanitarian case at all costs, but apart from the fact that this author does not think this would be particularly cogent or intelligent, it is certainly not Kreß’s own position.

settings (let alone protecting rights in an ambitious fashion). Moreover, whereas the POB appears, for better or for worse, to be deeply embedded in our understanding of IACs and thus something we may simply have to live with, the same can hardly be said of NIACs, where the long-standing legal consensus among States suggests that such a privilege does not exist as a rule and is not something that ought to be introduced. This does not necessarily mean that a POB should not be granted in NIACs, but that there are very significant costs to granting it broadly and automatically. Given the importance of these costs, the benefits should be relatively clear and correspondingly significant. The risk otherwise is that one would grant a POB but not get much in exchange.

Moreover, it should be clear, based on the previous section, that the net costs of the POB can no longer be easily outweighed by a reflex appeal to some inherent humanitarian benefit. The question, then, is whether the deeply problematic character of the POB from the point of view of both human rights and the *jus ad bellum* might nonetheless be rescued if its conferral were to help obtain some indirect, yet major, humanitarian benefits. Kreß is, in fact, keenly aware of this issue and stresses that “the introduction of a privilege of combatancy for non-State fighters in a NIAC imperatively requires the realistic prospect of significantly improving compliance with IHL by the non-State party to the conflict”.<sup>84</sup> Indeed, he insists that “[t]he main argument in favour of the introduction of a combatant privilege for fighters of the non-State party to a NIAC is of a humanitarian nature”.<sup>85</sup> It is to this central question that I now turn.

### The privilege of belligerency in international armed conflict was never particularly thought of as an incentive for humanitarian compliance

One might formulate the fundamental humanitarian reason for having a privilege of belligerency in the following manner: (i) we recognize that the POB is not in itself a humanitarian feature of the laws of war, but (ii) its conferral is part of a humanitarian “grand bargain” in which a limited type of combatant activity is defined as legal (killing combatants) in exchange for many other activities being defined as illegal (killing non-combatants). However, there are two ways of assessing this grand bargain as it is understood at least in IAC. The first one suggests that at a very general level States, as international law’s principal norm bearers, would not accept the very idea of the laws of war if they did not grant State combatants a POB in NIACs. Even if this were true, it is also true that States are unlikely to see any problem with rebels not being granted the POB. In addition to this general sense, in NIAC the concession of a POB is typically proposed as more *directly and tactically* a factor in respect for the laws of war. Indeed, this idea that the POB is an incentive (and its absence a disincentive) is

84 See Claus Kreß, “Towards Further Developing the Law of Non-International Armed Conflict: A Proposal for a *Jus in Bello Interno* and a New *Jus Contra Bellum Internum*”, in this issue of the *Review*.

85 *Ibid.*

very prominent in the discourse and constitutes one of its most unquestioned assumptions.<sup>86</sup>

I believe, however, that there are many reasons to take this assumption as a descriptive statement with a salutary pinch of salt. Since Kreß is gracious enough to point to some of my own inchoate attempts at grappling with the question,<sup>87</sup> this may be an opportunity to further scrutinize humanitarian assumptions about the uses of the POB. Indeed, too much is at stake to loosely assume that these, which are often heavily indebted to an international model of armed conflict, hold true always, often, or ever. The view is premised on the quite widespread but in my opinion wrong view that the POB in IAC (from which most lawyers take their cue) was itself historically part of the humanization of IAC. But there is no sign in the negotiations of the Geneva Conventions that the POB was to be granted as a form of incentive for troops to comply with the laws of war. In other words, it is not the case that the parties to the Geneva negotiations were initially reluctant to recognize a privilege of combatancy for those involved in an armed conflict but were nonetheless swayed to do so by its humanitarian promise. Rather, they cast the privilege of combatancy as one of the founding, unquestionable and axiomatic starting points of the laws of war, for reasons that were themselves antecedent to and distinct from the humanitarian project, and to which I have already alluded. It is probably only later that, as a key feature of the regime of IAC, it became casually assumed that it must surely be central to the Geneva Conventions' humanitarian promise.

The problem is that had the recognition of a POB really been granted as a way of humanizing war, *it should have been granted conditionally*. In light of the fact that it is given “for free”, as it were, to State forces, it is hard to accept that it is really an incentive as opposed to simply a privilege that flows from the identity of certain actors (i.e., States) in war. If something is granted *ab initio* based on (sovereign) status and cannot be lost even if abused (and this is certainly the case for State actors, who always retain it, regardless of how many civilians they massacre), it can hardly be said that its granting is part of doing everything possible to ensure that actors restrain from acting badly. In other words, if there was really a *quid pro quo* between humanitarian obligations and the privilege of combatancy, then obviously one should not be allowed to have the benefits of the latter without any of the constraints of the former. Conversely, a *quid pro quo* would mean that the

86 S. Sivakumaran, above [note 5](#), pp. 71, 514, 515, 58 and 548 (deploring the lack of incentive for rebel groups as a result of not benefiting from the POB). One assumption may be that recognizing non-State participants in a NIAC as combatants would help targeting decisions and thus respect for the distinction principle. However, as I think is correctly identified by Corn and Jenks, the recognition that certain groups are legitimate targets because they are effectively in combat does not logically entail that their combatancy should be privileged. Geoffrey Corn and Chris Jenks, “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts”, *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2011, pp. 328–330. Also, in the context of IACs, see R. V. Meyer, above [note 61](#) (“In asymmetric war, the non-state actor, having no possibility of obtaining privileged belligerency, has no incentive to distinguish himself from the civilian population even if and when he engages in hostilities”).

87 F. Mégret, “Should Rebels Be Amnestied?”, above [note 49](#), pp. 519–541.

POB could be withdrawn from those having committed grave offences. Instead of being an incentive to comply with the laws of war, the automatic conferral of the POB is in that respect a disincentive, or at least not as much of an incentive as it could be.

During the negotiations of Additional Protocol II to the Geneva Conventions, a proposal was made to grant non-State armed groups a POB. Although such a proposal probably had loose humanitarian underpinnings (but may have also been linked to the need to achieve peace in NIACs, as is the requirement for amnesties), the arguments against it failed to take its humanitarian rationale seriously. At no time then or since has this been identified as a particularly problematic feature of Additional Protocol II and its ability to deliver on its humanitarian promise. Rather, the automaticity of the POB with regard to State troops and its exclusion when it comes to non-State armed groups reflects a much more conventional bias in favour of States' monopoly on the legitimate use of force.

The claim that the privilege of belligerency is a key to better compliance is less clear-cut than is often thought

Even though it was not specifically thought of as incentivizing compliance, the POB might have that effect more or less fortuitously. General wisdom, for example, seems to suggest that not granting the POB provides the parties to an armed conflict with a pretext for not respecting the laws of war. How this may disincentivize belligerents is never clearly spelled out in the literature. Before cautioning against any facile mechanistic assumptions in that area, it may be helpful to briefly sum up what seems to be the dominant consensus. The reasoning goes as follows: warriors involved in IAC can at least – for a range of reasons linked to the history of war and statehood – get away with killing other soldiers: in fact, theoretically, this is primarily what they are asked to do. They do not risk automatic prosecution and infamy for doing what is after all the core of their activity. There is thus a sort of rough *quid pro quo* involved: we will pursue you if you kill non-combatants, but (regardless of whether you are on the good side of the *jus ad bellum* or if you respect the *jus in bello*) we will never bother you for targeting combatants. If that realistic and tragic agreement were to be compromised, according to the dominant view, then “all bets would be off the table”. No longer capable of being even partly legally redeemable, combatants would descend into a further spiral of violence.

A similar argument is often made in NIAC. In this case, the idea is that failure to dignify non-State armed groups as combatants means that they are not socialized into international law – that they essentially get all of the obligations and none of the privileges of being in war. We ask them to honour humanitarian obligations but, at the same time, we tend to treat them as criminals if they are caught by the State. This is unfair and unproductive. There is a certain intuitive appeal to the idea of a normative system's success depending on a level of fairness towards its potential subjects. As a result, one strong argument for

granting a POB to all in any armed conflict is symmetry. The idea is that the laws of war cannot function without symmetrical applicability (consider, for example, the traditionally rigid separation between the *jus ad bellum* and the *jus in bello*) and that this would be mortally wounded by the idea that only one side would have a POB—in other words, that the other side would objectively be under a much higher burden of obligation. The destruction of the equality of parties will, in a sense, shatter their sense of obligation in war. In particular, non-State armed groups who think that State forces are benefiting from the POB whilst they are being denied it might give up entirely on respecting their humanitarian obligations.

There are several issues with this theory as an explanation of what is problematic with the regulation of NIAC. First, it seems too dramatic; clearly, it is typically not thought to be the case when it comes to NIAC, where non-State armed groups have long been incited to comply with the laws of war with no prospect of recognition of a POB. In fact, there are many reasons to question whether symmetry of obligations and the equality of parties are as central to compliance with the laws of war as is ordinarily assumed, even in IAC. The conceptual emphasis of the laws of war themselves over the last decades has been on the non-synallagmatic character of humanitarian obligations as exemplified in the desuetude of such practices as reprisals. It is bizarre, in a context where the fundamental element of non-reciprocity at the level of principles is consistently emphasized, to seek to make symmetry the central plank of a policy proposal focused on implementation. If anything, non-State armed groups' desire to comply with the laws of war is less likely to be incited by the blanket grant of the POB than by State troops themselves complying with the laws of war in the conduct of hostilities and in relation to protected persons (including rebels when they qualify).

Second, whether a non-State armed group in a NIAC decides to engage in a policy of war crimes or not seems to depend on a whole series of complex psychological, social and political factors (values, goals, publicity, reputation, “lawfare”, etc). In other words, if a non-State armed group is determined to kill civilians and is taking the risk, for example, of vulnerability to international prosecutions, then I find eminently implausible the notion that it would not do so on the basis that it might also be prosecuted for the (presumably relatively more benign) crime of attacking combatants. Inciting actors not to commit a particular genus of crimes by giving them immunity to commit another genus hardly seems a straightforward gamble. Certainly, the idea that non-State armed groups who have not received the POB would “slam the door on international law” and consider that, having nothing to lose since they will also be prosecuted for killing combatants, they might as well violate the rights of non-combatants sounds improbable, at least without much more empirical evidence.<sup>88</sup> Simply because one risks being prosecuted for attacking State forces does not mean that

88 In fact what evidence we have already suggests otherwise. See Olivier Bangenter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 353–384.

one will then necessarily and wantonly *also*, out of normative spite as it were, target civilians.<sup>89</sup>

It may be that non-State armed groups feel they are outsiders when it comes to the international game, but aside from the fact that some may relish this status, it might precisely bring them to seek to compete with the humanitarian performance of States. There are many examples of parties to an armed conflict honouring their obligations even when faced with an enemy that does not at all, or even vis-à-vis an enemy that is not bound by the same obligations. A situation in which the POB is not by and large on the table has not prevented many notable and novel initiatives to implicate non-State armed groups in the implementation of the laws of war, to which they have shown themselves to be sensitive. If we allow for the possibility that asymmetrical compliance is actually sustainable, it is only a small step to conceiving of asymmetrical obligations as also being sustainable.<sup>90</sup> In effect, IACs have already become more like NIACs in that they have often proceeded along asymmetrical normative lines. At any rate, one rarely hears from non-State armed groups that the POB would significantly enhance their humanitarian performance; one is more likely to hear that it would be a deserved recognition of the legitimacy of their cause.

### For the privilege of belligerency to have a real impact, it should be conditional

To be clear, my concern is not with the possibility that the POB might be extended under some circumstances, but that it might be granted broadly and *ex ante* to non-State actors in all NIACs. Even though Krefß does not dwell on this point, central to his suggestion seems to be an almost automatic granting of the POB. This is implicit in the fact that he takes his cue from IAC, where the POB is automatically granted when it comes to State armed forces. At any rate, if there is to be an element of conditionality, it is not spelled out with any precision.

Given the doubts I have voiced that the granting of a POB is in itself rich with humanitarian promise, how could it be used as a lever to actually increase compliance? Simply because it has not been very effectively used in this way does not, assuredly, mean that it could not be reinvented as a more potent element of

89 Incidentally, it is also unclear if the POB in IAC contributed to significantly reducing violations of the laws of war. Imagine that Wehrmacht soldiers in 1944 had had some inkling that as a result of being systematic violators of the *jus in bello* (killing non-combatants), they would now *also* become prosecutable for killing enemy combatants. Surely, it is a little implausible to think that this would have led them to commit even more violations of the laws of war – after all, the starting point is that the POB in this scenario would be withdrawn because of what was a dismal failure to comply with IHL in the first place. It is not particularly realistic to think that soldiers already engaged in atrocities for their own powerfully vicious reasons would be swayed by the prospect of even further prosecutions. If anything, one could argue that the automatic and non-reversible grant of a privilege of combatancy reinforces soldiers in the arrogant belief that they are above all “warriors”, even when arguably they no longer behave as such in any significant sense of the term.

90 René Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 437–442.

the policy mix that goes into obtaining compliance with the laws of war. Put simply, the problem is that the grant of the POB is either too narrow or too broad. On the one hand, it is currently too narrow because it is not granted to any non-State armed group, notwithstanding that there may be good reason to grant it to some. This means that effectively, a non-State armed group which wages a campaign that reaches a certain critical intensity against the State “creates” an armed conflict, which then empowers the State to deal with it through relatively more ruthless methods than would be available under human rights law. Simultaneously, however, the non-State armed group does not gain much, except a range of international humanitarian obligations that constrain its actions without any obvious added benefit. “Virtuous” rebel movements may have their own reasons for being so, but they are not particularly rewarded compared to those who make a profession of violating the laws of war. On the other hand, the granting of the POB it is too broad because it is implicitly always granted to State armed forces, whether in IAC or NIAC. As for non-State armed groups, according to Kreß’s proposal the POB should be granted broadly to rebel movements regardless of whether they are systematic violators of the laws of war or responsible actors.

The incentive implicit in a broad grant of the POB in NIAC is one that would encourage non-State armed groups (and perhaps even the State) to bring violence to a certain critical level of intensity. By the time an armed conflict is recognized to exist, their actions would cease to be criminal and would be covered by the POB. If that were all there was to this particular calculation, it could create a perverse incentive. Violent actors would be encouraged to go beyond skirmishes and the odd armed attack to a full-blown military campaign. The more systematic violence would be legal, whereas the most benign would remain strictly sanctioned under domestic law. It is unclear in this context who the laws of war would reward, except perhaps that they would bow to the power of certain actors to create mischief on a “humanitarian” scale. This is, needless to say, not very appealing. If such a radical shift in the granting of the POB to non-State armed actors is to occur (and this is what is at stake), it should depend on something other than the fortune of arms.

Remedying one problem by creating another (i.e., from over-narrowness to over-breadth in granting the POB) is not the right solution. The problem, I believe, lies with the idea that the POB is in itself a *cause* of greater humanitarian compliance. I suggest that we must more clearly inverse the assumption and consider that the POB should be a *consequence* of a certain high level of compliance. This implies that, rather than broadly granting a POB to non-State armed groups in armed conflicts on *a priori* humanitarian grounds, we should make the grant of the privilege *conditional* upon a recognized humanitarian performance. The privilege would be something that is earned rather than simply granted *ab initio* once a non-State armed group has effectively created the fait accompli of a NIAC. Perhaps more crucially, it is something that could be lost (in contrast to State armed forces, who retain the POB regardless of compliance with IHL) if it became evident that a group which had once been granted the privilege had significantly failed to honour the obligations that come with it.

Now, it is true that Additional Protocol II already defines its material field of application as those conflicts confronting a Contracting Party's armed forces "and dissident armed forces or other organized armed groups which ... exercise such control over a part of its territory *as to enable them to ... implement this Protocol*".<sup>91</sup> In other words, the ability to implement the Additional Protocol is a condition of there being a conflict in the first place. Yet this ability is not the same thing as actual performance and points merely towards a broad capability approach. It does not give us a strong indication of sustained commitment to the laws of war. Here, a conditional POB could be envisaged as a considerable leverage in ensuring respect for IHL. An appropriate formula would have to be found to describe the expected level of compliance with the laws of war of rebels, but the threshold could be set quite high and go beyond capability to include elements of a sustained record. In such a situation, the State would be (relatively) empowered by the emergence of an armed conflict, but so would the responsible non-State armed group. For some of those who have decided to engage in an armed conflict, holding out a *promise* of a POB could act as a significant incentive to bring their game up to international standards.

Concretely, it may be that rather than granting a POB *ex ante* or at least in the midst of a conflict, the better policy option would be to grant amnesties retrospectively to those groups that have broadly satisfied humanitarian exigencies over the course of a conflict.<sup>92</sup> This would be a specifically humanitarian-compliance oriented use of amnesties, whereas their grant is traditionally invoked in the context of peacebuilding and transitional justice.<sup>93</sup> This would mean that the incentive would continue to operate on a consistent basis throughout an armed conflict and would thus consistently put rebels "on notice" that their acts may have consequences, and that a certain belligerent respectability is what is ultimately at stake. Even though a State might be reluctant to give amnesty to individuals for taking up arms against it, at least it might be forced to grudgingly recognize a particular rebel group as having behaved responsibly from a combatancy point of view. And the idea of an amnesty based on humanitarian performance would at least preserve the idea that for members of non-State armed groups to kill State combatants is *excusable* under certain circumstances, yet not strictly permissible.

## Conclusion: Possible further steps

There are probably deeper reasons, beyond the creation of a system of incentives, as to why a performance-conditional rather than an automatic-status conferral of the POB to non-State armed groups can be particularly compelling in NIAC. This is linked to the untried and unsocialized character of non-State armed groups in

91 AP II, Art. 1(1).

92 An amnesty is of course legally not the same thing since it merely absolves behaviour *a posteriori*, but it comes quite close functionally, especially if there is a legitimate expectation of it being given *ex ante*.

93 F. Mégret, above [note 49](#).

war. One may think that it is excessive for States' forces to always have a POB (even when their humanitarian performance is dismal), but, at least, the State may lay claim to certain *a priori* arguments about its performance in conflict: (i) it is formally bound by international humanitarian legal instruments, and with that comes a certain enforcement machinery; (ii) it will be internationally liable if it fails to comply with these instruments, thus providing it an incentive to comply; and (iii) it has the machinery to enforce humanitarian obligations, including a judicial and a military discipline system, and so on. Conversely, any emerging non-State armed group is at the outset untested as a violence entrepreneur, may not be strictly legally bound, will not have been socialized in the laws of war, will lack the time to train personnel, and may suffer from a range of logistical limitations which make it harder to enforce certain humanitarian provisions. Hence, we may have particular reasons to be wary of a broad granting of the POB to non-State armed actors and, conversely, a motivation for granting it to those who have shown themselves capable of transcending their inherent limitations.

At a deeper level, international law has an interest in distinguishing between genuine belligerents and terrorist movements in a context where it is not immediately clear which category an armed group falls in. A conditional POB would therefore mark the official entry of some violent actors into the fold of international law, and would help keep out those who have no intention of conforming to it. The argument here might be that some non-State armed groups who have systematically violated IHL, particularly in relation to civilians, are no longer engaging in *war* in any meaningful sense of the term as much as in a campaign of terrorism or crimes against humanity. There is therefore no reason why they should continue to avail themselves of privileges that were conceived with quite a different activity in mind. The privilege of combatancy should be reserved for *bona fide* combatants, not violence entrepreneurs who happen to wear military fatigues but who cannot, and have never intended to, be understood as actual warriors.

Is a conditional POB realistic, particularly with change-wary States? Probably marginally more than an automatic recognition of a POB for non-State actors in NIAC, since it at least promises something in exchange. Recent voices in this debate have made the case that some form of implicit POB has in fact often historically been granted to members of rebel groups who have typically been prosecuted for treason, but not for actual murder against State combatants they may have targeted. It may be, then, that international practice is already more subtle than is often understood.<sup>94</sup> This trend is particularly visible in NIACs which have become quasi-international because of the sustained and territorialized divisions they have created.<sup>95</sup> Nonetheless, obtaining States'

94 Jens David Ohlin, "Guest Post: Henderson & Cavanagh on Self-Defense & The Privilege of Combatancy", *Opinio Juris*, 8 July 2014, available at: <http://opiniojuris.org/2014/07/08/guest-post-henderson-cavanagh-self-defense-privilege-combatancy/>; Rymn J. Parsons, "Combatant Immunity in Non-International Armed Conflict, Past and Future", *Homeland & National Security Law Journal*, Vol. 1, No. 1, 2013, pp. 1–54.

95 S. Sivakumaran, above note 5, pp.515–517.

recognition of an obligation to grant a POB beyond such admittedly special cases is likely to be an uphill struggle. I hope, at least, to have provided a more solid rationale for giving *ex post* amnesties to rebels who have exhibited a high regard for the laws of war. And the present argument, whilst taking seriously the suggestion that there is a specific and irreducible morality to war,<sup>96</sup> argues that we should not jump to the conclusion that NIACs manifest this “war” ethos in quite the same way.

Having said that, I would like to suggest two points which cannot be fully covered in this article: the first unorthodox, the other almost heretical. First, if States continue to insist that humanitarian regulation is perfectly possible without granting a POB to rebels (a point I broadly agree with, even though I have suggested ways in which humanitarian compliance might be *improved* under certain limited conditions through a conditional POB), the time may come to critically reassess the sacrosanct character of the POB *even when it comes to State troops in IAC*. If what I have argued in relation to NIAC has a sliver of a chance of working or is at least considered ethically sound, there is no reason in principle why it should not be considered internationally, aside from the all too obvious political difficulties. For example, in a case where State troops become systematically predatory on the civilian population and terroristic in their methods, a stage may be reached where the issue of loss of POB should at least be contemplated. This would imply a greater propensity by the international legal regime to disaggregate the conferral of the POB *on the basis of humanitarian performance (respecting/not respecting the laws of war) rather than status (State/non-State)*. It would be quite an ironic reversal of Professor Kreß’s own suggestion, which is to bring the regime of IAC to NIAC; but it would, arguably, be more consonant with humanitarian objectives than the contemporary international laws of war’s fixation with the State.<sup>97</sup>

Finally, with regard to NIAC, some thought should go into the possibility that the POB, in addition to (or more problematically alternatively to) being conditional upon respect for the *jus in bello*, should be conditional upon respect of the internal *jus contra bellum* that Kreß promotes. Given what I have argued about the POB belonging more to a *proto-ad bellum* logic and the relatively greater onus on domestic non-State armed groups as political agents, it is important to figure out whether the non-State armed groups are engaging in internationally lawful action when taking up arms. A true *jus contra bellum* push would sanction those non-State armed groups who clearly have no legitimate authority to launch armed action against the State (or recompense those that did). Although I have argued that a conditional POB could improve respect for

96 R. V. Meyer, above [note 61](#).

97 Frédéric Mégret, “L’étatisme spécifique du droit international”, *Revue Québécoise de Droit International*, Vol. 24, No. 1, 2011, pp. 105–129. Surely, States have not made the case in the twentieth century that they are such formidable respecters of the laws of war that they should always as a matter of principle be considered worthy of the POB. One might argue that there should be a presumption that State actors enjoy a POB and yet still concede that a presumption is not the same thing as an ironclad privilege that is entirely inelastic to actual humanitarian performance in the field.

IHL, it should also be clear that failure to grant a POB to non-State armed groups engaged in internationally illegal violence would not in and of itself spell the end of efforts to bind non-State armed groups to IHL. The more or less significant humanitarian benefits of a POB, at any rate, should be weighed against the need to pre-empt illegal rebellion and also, perhaps, illegal repression by the State.

# Extraterritorial targeting by means of armed drones: Some legal implications

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## Abstract

*The use of “drones” has grown exponentially over the past decade, giving rise to a host of legal and other issues. Internationally, it is the utilization of armed drones by States for the extraterritorial targeting of persons that has generated significant debate. This article attempts to outline some aspects of the relevant legal framework, with a focus on the international law applicable to drone strikes in situations of armed conflict. It briefly addresses the jus ad bellum and then centres on the jus in bello, addressing, in turn, questions related to when there is an armed conflict, what the rules on targeting are, who may be targeted and where persons may be targeted.*

**Keywords:** drones, targeting, use of lethal force, conduct of hostilities, direct participation in hostilities, conflict classification, extraterritorial NIAC, international armed conflict, non-international armed conflict, IHL, *jus ad bellum*, geographical scope, non-belligerent state, neutrality.

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The use of “drones”, the colloquial term for an array of remotely piloted airborne vehicles, has grown exponentially over the past decade. Drones are being increasingly relied on in peacetime to perform a range of tasks, including traffic congestion monitoring and police surveillance, to name just two. It may safely be said that this type of drone use is likely to increase with time; it raises thorny privacy protection and other legal issues and is the subject of growing attention,

\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

particularly in States in which it is becoming more common.<sup>1</sup> At the international level, it is the use of armed drones by States for the extraterritorial targeting of persons that is generating significant debate.<sup>2</sup> The purpose of this article is to attempt to outline some aspects of the international legal framework applicable to the extraterritorial use of armed drones in situations of armed conflict. Before that, several preliminary observations need to be made. The first relates to the use of terms. In this text, “drone” is shorthand for an armed *remotely piloted aircraft* or *remotely operated weapon system* – i.e., a weapon platform that is at all times under human command and control in the process of identification and attacking of targets, meaning that there is a “person in the loop”. It should be noted that certain other functions of drones, such as take-off, navigation and landing, are often automated, which indicates that these platforms are actually not entirely “remotely piloted”. The term *unmanned combat aerial vehicle* is also in common use.

Second, weapons with autonomy in the “critical functions” of identifying and attacking targets, and therefore in the use of force, are outside the scope of this examination, due to the fact that different legal considerations are involved.<sup>3</sup> Third, an attempt to outline certain aspects of the international legal framework implies adopting a “big picture” rather than a granular approach to the relevant law. Provided below is thus a broad legal reading of the regulation of armed drone use, not a blueprint (if that were even possible) for analyzing specific instances of targeting by drone. Fourth, it must be stressed that the text below is limited primarily to the legal implications of extraterritorial targeting by drones. It does not deal with other possible aspects of armed drone use, of a political, ethical or other nature, that are also the subject of intense debate.

- 1 See, e.g., Conor Friedersdorf, “Local Anti-Drone Activism Begins: ‘If They Fly in Town, We Will Shoot Them Down’”, *The Atlantic*, 30 July 2013, available at: [www.theatlantic.com/politics/archive/2013/07/local-anti-drone-activism-begins-if-they-fly-in-town-we-will-shoot-them-down/278198/](http://www.theatlantic.com/politics/archive/2013/07/local-anti-drone-activism-begins-if-they-fly-in-town-we-will-shoot-them-down/278198/).
- 2 See, e.g., Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson, UN Doc. A/HRC/25/59, 11 March 2014, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/25/59](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/25/59). In this context it should be noted that the current focus of international attention has been the extraterritorial targeting of specific individuals by States, even though the day may not be far when States might use armed drones within their borders. Focus has also been directed mainly at the use of drones by State actors, despite the fact that it is likely only a question of time before drones are more widely utilized by organized non-State armed groups and other non-State actors, as well as by private individuals. The Lebanon-based Hezbollah group is reported to have deployed drones laden with explosives. See Micah Zenko, *Reforming US Drone Strike Policies*, Council Special Report No. 65, Council on Foreign Relations, Center for Preventive Action, January 2013, p. 21, available at: [www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736](http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736). More recently, in July 2014, Hamas is reported to have flown an unarmed drone over Israel. See “When Terrorists Have Drones”, Editorial, *BloombergView*, 22 July 2014, available at: [www.bloombergview.com/articles/2014-07-22/when-terrorists-have-drones](http://www.bloombergview.com/articles/2014-07-22/when-terrorists-have-drones).
- 3 For an examination of legal and other issues related to autonomous weapons see ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, Report of Expert Meeting, Geneva, 26–28 March 2014, available at: [www.icrc.org/eng/assets/files/2014/expert-meeting-autonomous-weapons-icrc-report-2014-05-09.pdf](http://www.icrc.org/eng/assets/files/2014/expert-meeting-autonomous-weapons-icrc-report-2014-05-09.pdf); See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, UN Doc A/HRC/23/47, 9 April 2013, para. 38, available at: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf).

The article is divided into two parts. The section below is devoted to a brief examination of the lawfulness of drones as such. The subsequent section, which is the greater part of the text, sets out the framework for analysis, including, briefly, the *jus ad bellum*. It then focuses mainly on the *jus in bello* and deals with the classification of armed conflicts, the general principles and rules on targeting, the question of who may be targeted under the international law governing armed conflicts, and the territorial scope of application. The final section provides a few brief concluding remarks.

## The lawfulness of drones as such

One of the first questions asked when the issue of armed drone use came onto the public radar is whether drones are lawful as such. Different concerns were raised, and continue to be expressed. By way of example, it is pointed out that this technology can make it easier for States to decide to use lethal force abroad because of the lower political and financial costs involved. This lack of or lowered political risk is based on the fact that drones are operated by personnel who, being located many kilometres/miles away from the site of an attack, remain out of harm's way themselves. Drones are also known to be significantly less costly to produce, and are thus less costly to potentially "lose" than other types of fixed-wing aircraft.<sup>4</sup> It has been pointed out that, as a result, drone technology may enable the spread of armed conflict throughout the world in ways that a traditional "boots on the ground" military campaign generally cannot.<sup>5</sup> While these and other arguments are undoubtedly compelling and deserve serious consideration, they are outside the realm of the law and relate to the political, policy, moral and other possible implications of armed drone use.

As regards existing law, drones are not a weapon platform specifically prohibited by any international treaty or by customary law. Distance from a potential adversary is not a unique feature of drones when compared to other weapons or weapon systems: the operators of cruise missiles, for example, might also be located hundreds or thousands of kilometres/miles away from an intended target. There is also no particular characteristic of the technology itself to suggest that drones are inherently incapable of being used in a way that would comply with the relevant international norms. While the rules of international humanitarian law (IHL) governing the conduct of hostilities in armed conflict will be outlined further below, a few technical features of drones relevant to such a conclusion are very briefly mentioned here.

Many armed drones in use today have sensors similar to those on manned aircraft, but a major difference is that they are able to loiter over an area for extended

4 Michael J. Boyle, "The Costs and Consequences of Drone Warfare", *International Affairs*, Vol. 89, No. 1, January 2013, p. 22, available at: <http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12002/abstract>.

5 Stephen Holmes, "What's in it for Obama?", *London Review of Books*, Vol. 35, No. 14, 18 July 2013, pp. 15–18, available at: [www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama](http://www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama).

periods of time to identify possible targets. This provides personnel with increased options regarding the timing of an attack, which could help avoid or minimize incidental harm to civilians and damage to civilian objects. Attacks can also be suspended at very short notice, which is not the case with many types of ordnance fired from other weapon platforms at long ranges (although some munitions and missiles do have on-board deactivation or self-destruct mechanisms). In short, to the extent that drone pilots and operators have an increased ability to determine that their target is indeed a military objective, to take the required precautions in attack and to observe other rules on the conduct of hostilities, it has been argued that drones could actually be the preferred option for certain operations from an IHL standpoint.<sup>6</sup> There are, admittedly, differing views on whether drone operators experience reduced levels of stress in comparison to the crews of manned fighter jets.<sup>7</sup>

It should also be recalled that any and all prohibitions on the utilization of certain types of weapons based on international treaties and customary law apply to drones. For example, it would be a violation of international law to fire prohibited weapons, such as chemical or biological weapons, from a drone. States party to the Cluster Munitions Convention would, similarly, be barred from employing drones to launch cluster munitions. The use of incendiary weapons from a drone would likewise be subject to specific limitations under customary IHL and, for States party to Protocol III to the Convention on Certain Conventional Weapons (CCW), to additional restraints.

The real test of the lawfulness of drone use may thus be said to lie not in the features of the weapon platform itself – provided the targeting and firing process remains under human control – but in the willingness and ability of the persons commanding and operating drones extraterritorially to utilize them within the existing international legal framework. This is the subject of the next section.

## **The international legal framework applicable to extraterritorial targeting by means of armed drones**

Assessing the lawfulness of extraterritorial targeting by means of drones requires a two-step process.

6 See Ian Henderson and Bryan Cavanagh, “Unmanned Aerial Vehicles: Do They Pose Legal Challenges?”, in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, Springer, Berlin, 2014, pp. 203–204.

7 In this context, an occasionally stated allegation is that there is a risk that abuses are more likely to occur when a person deciding on the use of lethal force is disconnected and at a great distance from a potential adversary (the “PlayStation” mentality). See “Study on Targeted Killings”, Addendum to Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, para. 84, available at: [www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf). There is at present no evidence that this is the case or is more frequent with drones than with other remotely operated weapon platforms.

## The law governing when force may be used

### **The jus ad bellum**

First, it must be determined whether the resort to force by one State in the territory of another complied with the *jus ad bellum*, the body of international law governing when force may be used. The applicable rules of the *jus ad bellum* are provided for in the United Nations (UN) Charter and customary international law. Under Article 2(4) of the Charter, States must refrain from the threat of use of force against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the UN.<sup>8</sup> A use of force will not be deemed contrary to the Article 2(4) prohibition of the Charter where one State (the “host” State) validly consents to the use of force in its territory by another.<sup>9</sup> When consent may be deemed to have been validly granted may be difficult to establish in some cases, not necessarily because of lack of clarity regarding the applicable law, but because the opacity of the factual situation may be such that a careful evaluation to establish validity may be required.<sup>10</sup>

The exercise of self-defence is a well-established basis under both treaty and customary law precluding the unlawfulness of an extraterritorial use of force even without a host State’s consent. Article 51 of the UN Charter preserves the inherent right of States to individual or collective self-defence<sup>11</sup> “if an armed attack occurs” against a member State of the UN. Based on the plain language of the provision, action in individual self-defence by a State may be undertaken in response to an ongoing armed attack and, according to prevailing but not unanimous doctrine, when such an attack is imminent,<sup>12</sup> provided the customary law principles of necessity and proportionality have also been observed. While this statement of the law seems straightforward on its face, each of the elements included has been subject to different interpretations and remains the focus of significant international legal debate. This text does not aim to provide a specific legal reading of the *jus ad bellum*, but only to briefly highlight a few outstanding points of divergence.

8 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 2(4).

9 International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, UN Doc. A/56/10, November 2001, Art. 20. For a commentary, see James Crawford, *ILC Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, pp. 163–165.

10 In this context it may be noted, for example, that the issue of whether a particular person or entity within a State had the authority to grant consent in a given case is not a question regulated by international rules on State responsibility but by international law relating to the expression of the will of the State, as well as domestic law. As regards the former, the rules on consent to treaties contained in the Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, are considered to provide relevant guidance. See J. Crawford, above note 9, p. 164, paras 5 and 6.

11 Given that current extraterritorial targeting by means of drones is not being conducted by the relevant States under the rubric of collective self-defence, this basis will not be explored further.

12 See Secretary-General Kofi Annan, *In Larger Freedom*, Report, UN Doc. A/59/2005, 21 March 2005, para. 124 (based on Report of the High Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 188).

One such point is how the criterion of imminence should be understood and where the limits of anticipatory self-defence should be drawn. At one end of the spectrum, there may be said to be a lack of acceptance of the concept of anticipatory self-defence.<sup>13</sup> At the other end, there has been an attempt to extend the imminence criterion to include what has been called “pre-emptive self-defence”<sup>14</sup> – in other words, self-defence that aims to prevent threats that have “not yet crystallized but may materialize”.<sup>15</sup> There are middle-ground views as well.<sup>16</sup>

The International Court of Justice (ICJ) has provided its legal reading of the necessity criterion. According to the Court, “the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any measure of discretion”.<sup>17</sup> Needless to say, evaluating the necessity of a particular action taken in self-defence can only be done on a case-by-case basis, taking into account the facts available at the time and provided all peaceful means of ending or averting the attack have been exhausted or are unavailable.<sup>18</sup>

The proportionality criterion must also be satisfied for a use of force in self-defence to be deemed lawful. This essentially means that the use of force, taken as a whole, must not be excessive in relation to the need to avert the attack or bring it to an end.<sup>19</sup> Once again, the application of the legal standard to specific facts will in many cases be challenging.

Perhaps the greatest disagreement in international law circles centres on the question of whether the right to self-defence may be invoked by a State in response to an armed attack carried out by a non-State actor. (An additional issue is whether the attack must, as a precondition, be large-scale.<sup>20</sup>) It has been pointed out that there are essentially three schools of thought on this.<sup>21</sup> Under one view, the

13 See, e.g., Non-Aligned Movement position expressed in relation to the High Level Panel’s Report in Official Records of the 85th Plenary Meeting of the United Nations General Assembly, 6 April 2005, New York, UN Doc. A/59/PV.85, pp. 14 and 15, available at: <http://www.un.org/ga/59/pv.html>.

14 The White House, *The National Security Strategy of the United States of America*, Washington, DC, September 2002, pp. 6, 15 and 16, available at: [www.state.gov/documents/organization/63562.pdf](http://www.state.gov/documents/organization/63562.pdf).

15 Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defence*, Working Paper, Chatham House, October 2005 (Chatham House Self-Defence Principles), p. 9, available at: [www.chathamhouse.org/publications/papers/view/108106](http://www.chathamhouse.org/publications/papers/view/108106).

16 See *Ibid.* See also Nico Schrijver and Larissa van den Herik, *Leiden Policy Recommendations on Counterterrorism and International Law*, 1 April 2010, paras 27–52, available at: [www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf](http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf).

17 International Court of Justice (ICJ), *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *ICJ Reports 2003*, para. 73.

18 See E. Wilmschurst, Chatham House Self-Defence Principles, above note 15, p. 7.

19 See *Ibid.*, p. 10.

20 See, e.g., Daniel Bethlehem, “Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors”, *American Journal of International Law*, Vol. 106, No. 4, 2012, p. 773. See also Elizabeth Wilmschurst and Michael Wood, “Note and Comment: Self-Defense against Nonstate Actors: Reflections on the ‘Bethlehem Principles’”, *American Journal of International Law*, Vol. 107, No. 2, April 2013, p. 390.

21 Ashley S. Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extra-territorial Self-Defense”, *Virginia Journal of International Law*, Vol. 52, No. 3, 2012, p. 492, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1971326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326).

“armed attack” envisaged in Article 51 of the UN Charter can only emanate from another State.<sup>22</sup> The other view, in support of which the ICJ is usually cited, is that an armed attack may be committed by a non-State actor, but must be attributable to a State for the attack to trigger the right of self-defence.<sup>23</sup> The ICJ’s more recent pronouncement on this issue has, admittedly, cast doubt on what its position might be in the future.<sup>24</sup> The third view, which seems to be gaining traction at least among some States and scholars in the West, is that an armed attack within the meaning of Article 51 of the UN Charter may be committed by a non-State actor, and thus trigger the right of self-defence, even if there is no host State involvement.<sup>25</sup>

The question of how to resolve the conundrum outlined above, in particular as regards non-State actors deemed to be “terrorists”, leads to similarly divergent views. Some scholars, for example, believe that the way to accommodate recent State action within the *jus ad bellum* lies in devising a “special standard of imputability in relations between terrorist groups and host states, [one] arguably most closely resembling international rules against ‘aiding and abetting’ illegal conduct”.<sup>26</sup> Others are of the view that the necessity criterion should be expanded to include two inquiries. An attacked State should examine not only whether the use of force is a necessary response to an armed attack by a non-State actor, but should also evaluate whether the host State is “unwilling or unable” to deal with the non-State actor threat emanating from its territory. If that is the case, the use of force in self-defence would be lawful, provided the other criteria, such as proportionality, are satisfied.<sup>27</sup>

As mentioned above, the purpose of this brief outline was not to take a position on any of the views presented here. Rather, the aim was to indicate the difficulty that is likely to arise in reaching a generally accepted legal reading of the operation of the *jus ad bellum* in a given case at the international level. This is important because, as will be noted below, there is a strand of scholarly thought that adopts an expansive view of the territorial scope of application of the *jus in bello* in non-belligerent States, but believes that the use of lethal force would be constrained by the *jus ad bellum*. It is submitted that this argument should be approached with caution.

Apart from the inherent right of self-defence, force may be used in a State’s territory without its consent based on a legally binding decision to that effect

22 *Ibid.*, p. 492, note 24.

23 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 194, in which the Court rejected Israel’s claim of self-defence because it did not argue that the relevant attacks were imputable to a State.

24 See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 116, in which the Court noted that it has “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”.

25 See A. S. Deeks, above note 21, p. 493, note 26.

26 See Christian J. Tams, “The Use of Force against Terrorists”, *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 385.

27 See A. Deeks, above note 21, p. 495. See also E. Wilmshurst, Chatham House Self-Defence Principles, above note 15; and N. Schrijver and L. van den Herik, above note 16.

adopted by the UN Security Council under Chapter VII of the UN Charter.<sup>28</sup> While the practical implementation of the Security Council's enforcement powers is the subject of much nuanced legal discourse, the basic proposition, which is expressly rooted in the UN Charter, is commonly accepted. A recent study by a group of international law experts that examined the use of drones came to the following conclusion as regards this context:

If a legally binding UN mandate authorises the use of force, armed drones may be deployed to implement the mandate, provided such action accords with the general conditions and objectives of that mandate. It is not necessary for the UN Security Council to give explicit authorisation for the use of armed drones.<sup>29</sup>

### The law governing how force may be used

In addition to the lawfulness of an extraterritorial operation under the *jus ad bellum* (when may force be resorted to), the second step required to determine the international legal framework applicable to extraterritorial targeting by means of drones involves establishing whether the way in which lethal force is used against a particular individual or individuals is likewise lawful (how it may be used). This will depend on whether extraterritorial targeting takes place within an armed conflict or outside of it. In the first scenario, the relevant rules are those of IHL (also known as the law of armed conflict or LOAC), which constitute the *jus in bello* and are the focus of this text. In the second case, outside armed conflict, the rules on the use of force in law enforcement provided for in international human rights law will govern. While complementary, IHL and human rights law differ in the way in which they regulate the use of lethal force because of the different circumstances in which these branches of law were designed to apply: situations of armed conflict and peacetime, respectively. It is beyond the scope of this article to examine the interplay of the two branches of international law.<sup>30</sup> For the sake of completeness, it must be mentioned that self-defence is sometimes posited, particularly in the US, as a separate, stand-alone legal basis regulating how lethal force may be used:

As a matter of international law, the United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may *also* use force consistent with our inherent right of national

<sup>28</sup> See UN Charter, above note 8, Arts 39–43.

<sup>29</sup> Netherlands Advisory Committee on Issues of Public International Law (CAVV), *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague, July 2013 (Netherlands Advisory Committee Report), pp. 2–3, available at: [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV\\_advisory\\_report\\_on\\_armed\\_drones\\_\(English\\_translation\\_-\\_final\)\\_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf). The CAVV is an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues.

<sup>30</sup> It is submitted that, as a general rule, what constitutes an “arbitrary” deprivation of life within the meaning of Article 6 of the International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), 999 UNTS 171 (ICCPR), is to be determined, in situations of armed conflict, with reference to the rules on the conduct of hostilities provided for in IHL, as the *lex specialis*. See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25.

self-defence. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.<sup>31</sup>

At first blush, it appears that the reference to self-defence above addresses situations in which lethal force is used outside existing armed conflicts, but in which such use of force would not be governed by human rights law.<sup>32</sup> It is submitted that, under current international law, the right to self-defence is a concept of the *jus ad bellum* and not a stand-alone legal regime governing how force may be used. Even if that were accepted for the sake of argument, the specific rules on the use of force under this legal basis remain unclear, as they have not been officially articulated. At second blush, given that the statement above mentions the unable or unwilling standard, it may be that self-defence was also being referred to within the *jus ad bellum* sense. While it would be necessary and useful to better understand the meaning(s) ascribed to self-defence in the US context, this “separate” basis will not be dealt with further in this article.

## The *jus in bello*

Given that the *jus in bello* applies only in armed conflict, the first inquiry that is required in relation to an extraterritorial targeting by drone is whether the use of lethal force took place within such circumstances. This involves (a) application of the relevant IHL rules on the classification of armed conflicts in order to

31 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy*, Remarks at the Woodrow Wilson International Center for Scholars, Washington, DC, 30 April 2012, available at: [www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy](http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy) (emphasis added).

32 This concept has been called “naked self-defence”. See Kenneth Anderson, “Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War’”, in Peter Berkowitz (ed.), *Future Challenges in National Security and Law*, Hoover Institution, Stanford University, 2011, p. 8, available at: [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf), stating:

The US government position rejects the frame that legal uses of force are necessarily regulated either as law enforcement under human rights law or as the law of armed conflict – and nothing else. This takes up the brief, but much-noticed, reference by US State Department legal adviser Harold Koh to the customary law of “self-defence” in a speech to the American Society of International Law in March 2010 ... Koh’s 2010 statement was consistent with Sofaer’s address from decades before. It held out the possibility that there might be instances in which the United States would engage in uses of force under self-defence that would not necessarily be part of an armed conflict in a technical legal sense (we might call it “naked” self-defence). It can be defined as resorting to force in self-defence, but in ways in which the means and levels of force used are not part of an armed conflict, as a matter of the technical law of war. Those circumstances include self-defence uses of force against non-State actors, such as individual terrorist targets, which do not (yet) rise to the NIAC threshold.

The reference here is to a speech delivered in 1989 by the then US State Department Legal Adviser Abraham Sofaer, “Terrorism, the Law, and the National Defense”, Sixth Annual Waldemar A. Solf Lecture in International Law, *Military Law Review*, Vol. 126, 1989, p. 89, available at: [www.loc.gov/rr/frd/Military\\_Law/Military\\_Law\\_Review/pdf-files/277079-1.pdf](http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277079-1.pdf). Anderson recognizes that the concept of naked self-defence is controversial.

determine, based on the facts, if a particular situation of violence qualifies as an armed conflict.<sup>33</sup> Additional questions that have been posed in respect of extraterritorial targeting under the *jus in bello* are (b) what the general principles and rules on targeting are and, as part of them, (c) who may be targeted, and (d) where persons may be targeted. Each will be briefly addressed in turn.

## Classification of armed conflicts

As is well known, IHL distinguishes between two types of armed conflicts: international and non-international. *International armed conflicts* (IAC) are essentially those waged between States.<sup>34</sup> Pursuant to Article 2 common to the four Geneva Conventions, these foundational IHL treaties apply to all cases of declared war, or to “any other armed conflict which may arise” between two or more State parties thereto even if the state of war is not recognized by one of them.<sup>35</sup> As explained by Jean Pictet in his commentaries to the four Conventions:

any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.<sup>36</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a similar general definition of international armed conflict. In the *Tadić* case, the Tribunal stated that “an armed conflict exists whenever there is a resort to armed force between States”.<sup>37</sup> This definition has been adopted by other international bodies since then.

33 For a comprehensive examination of this issue see Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012. See also ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, ICRC, Geneva, 17 March 2008, available at: [www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf](http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf).

34 Pursuant to Additional Protocol I, an armed conflict between a State and a national liberation movement can also be classified as international provided the requisite conditions have been fulfilled. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Arts 1(4), 96(3).

35 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 2; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 2; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 2 (common Article 2). Under IHL, belligerent occupation is considered a type of international armed conflict. The challenges raised in relation to the criteria for determining the existence of an occupation will not be explored further in this article.

36 Jean Pictet (ed.), *Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Commentary*, ICRC, Geneva, 1960, p. 23.

37 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The 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, available at: <http://www.refworld.org/docid/47dfb520.html>.

In the decades since the adoption of the Geneva Conventions, duration or intensity have generally not been considered to be constitutive elements for the existence of an IAC. It should be noted that this approach has recently been called into question by suggestions that hostilities must reach a certain level of intensity to qualify as an armed conflict, the implication being that the fulfilment of an intensity criterion is necessary before an inter-State use of force may be classified as an IAC.<sup>38</sup> Pursuant to this view, a number of isolated or sporadic inter-State uses of armed force that may be described as “incidents”, “border clashes” and others do not qualify as IACs because of the low intensity of violence involved.

While this approach may appear to be appealing, it is submitted that the absence of a requirement of threshold of intensity for the triggering of an IAC should be maintained because it helps to avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of a given situation. There are also compelling protection reasons not to link the existence of an IAC to a specific threshold of violence. To give but one example: under the Third Geneva Convention, if members of the armed forces of a State in dispute with another are captured by the latter’s armed forces, they are eligible for prisoner of war (POW) status regardless of whether there is full-fledged fighting between the two States. POW status and treatment are well defined under IHL, including the fact that a POW may not be prosecuted by the detaining State for lawful acts of war. It seems fairly evident that captured military personnel would not enjoy equivalent legal protection solely under the domestic law of the detaining State, even when supplemented by international human rights law. The lack of a threshold of intensity for the application of the Geneva Conventions is not due to chance, but may be said to be an element of the entire package of protection offered by these treaties.

According to still another school of thought, which seems to be gaining traction among some scholars,<sup>39</sup> when a State uses force in the territory of a host State – including by means of drones – which is directed not at the latter *per se* but at an organized non-State armed group operating from its territory, such use of force would constitute a non-international armed conflict (NIAC) between the attacking State and the non-State armed group, but not an IAC between the two States themselves. This approach risks standing a well-established IHL precept on its head: that any use of force by one State in the territory of another without the latter’s consent constitutes an international armed conflict. As has been cogently explained:

[T]o attempt to distinguish between force directed at a non-State group and force which has as its overall purpose the intention to influence the

38 See Mary Ellen O’Connell, *Final Report on the Meaning of Armed Conflict in International Law*, Committee on the Use of Force, International Law Association, The Hague, 2010, available at: [www.ila-hq.org/en/committees/index.cfm/cid/1022](http://www.ila-hq.org/en/committees/index.cfm/cid/1022).

39 For a discussion of the various positions, see Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in E. Wilmshurst (ed.), above note 33, p. 72.

government of the State is to condition the application of IHL on the mental state or motive of the attacker. It is to suggest that the very same acts of force directed by one State against the territory of another State would yield different legal results depending on the intention of the intervening State regarding whom it seeks to affect.<sup>40</sup>

It is submitted that while a double classification in that scenario cannot be excluded (an IAC between the two States and a NIAC between the attacking State and the non-State armed group, depending on the circumstances), an elimination of the IAC track would be cause for serious concern.

A further issue that has recently arisen, particularly in relation to extraterritorial targeting by means of armed drones, is whether IHL applies in situations in which there is no “declared war” between States. The seeping of this term into public discourse<sup>41</sup> appears to merit a reminder. One of the most important historical advances achieved by the drafters of the Geneva Conventions is that they delinked their application from any official declaration of “war”. As specified in common Article 2, the treaties also apply to “any other armed conflict which may arise” between two or more States Parties, a determination that is made only on the facts. The application of the law of IAC was divorced from the need for official pronouncements many decades ago precisely in order to avoid cases in which States could deny the protection of this body of rules by means of lack of official recognition.<sup>42</sup> In this context it is important to note that the same approach applies to determining the existence of a NIAC: it is a factual issue that does not depend on a declaration by any or all of the parties to such a conflict. The concept of battlefield, which is not synonymous with that of war or armed conflict, is dealt with further below.

A key distinction between an international and a *non-international armed conflict* is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States,<sup>43</sup> a NIAC involves hostilities between a State and an organized non-State armed group (the non-State party), or between such groups themselves. In order to classify a situation of violence as a NIAC within the meaning of common Article 3 of the Geneva Conventions (i.e., to distinguish it from internal disturbances and tensions not reaching that level such as riots, isolated and sporadic acts of violence and other acts of a similar

40 *Ibid.*, p. 75.

41 See, e.g., European Parliament Resolution on the Use of Armed Drones, Plenary Sitting, 2014/2567(RSP), 25 February 2014, para. E, available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN).

42 See Christopher Greenwood, “Scope of Application of International Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 43. “The application of IHL is not dependent on a formal declaration of war.”

43 Except as mentioned in above note 34.

nature),<sup>44</sup> two factual criteria are deemed indispensable. The first is that the parties involved must demonstrate a certain level of organization, and the second is that the violence must reach a certain level of intensity.

Common Article 3 expressly refers to “each Party to the conflict”, thereby implying that a precondition for its application is the existence of at least two “parties”. While it is usually not difficult to establish whether a State party exists, determining whether a non-State armed group may be said to constitute a “party” for the purposes of common Article 3 can be complicated, mainly because of a lack of clarity as to the precise facts. Nevertheless, it is widely recognized that a non-State party to a NIAC means an armed group with a certain level of organization. International jurisprudence has developed indicative factors on the basis of which the “organization” criterion may be assessed.<sup>45</sup> They include the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group’s ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as ceasefires or peace accords, and so on. Differently stated, even though the level of violence in a given situation may be very high, unless there is an organized armed group on the other side, one cannot speak of a NIAC.

The second criterion commonly used to determine the existence of a common Article 3 armed conflict is the intensity of the violence involved. This is also a factual criterion, the assessment of which depends on an examination of events on the ground. Pursuant to international jurisprudence, indicative factors to consider include the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones.<sup>46</sup> The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. The ICTY has deemed there to be a NIAC in the sense of common Article 3 whenever there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”.<sup>47</sup> The

44 Given that NIACs under the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) (AP II), have to fulfil certain conditions not found in common Article 3 and that they are far less common, they will not be further discussed here. See AP II, Art. 1(2); GC I, Art. 3; GC II, Art. 3; GC III, Art. 3; and GC IV, Art. 3 (common Article 3). It is generally accepted that the threshold found in Article 1(2) of AP II, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3. Given that NIACs under AP II have to fulfil certain conditions not found in common Article 3 and that they are far less common, they will not be further discussed here.

45 See Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses of the Hague Academy of International Law*, Vol. 163, Martinus Nijhoff, The Hague, 1979, p. 147. For a detailed analysis of this criterion see ICTY, *The Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, 30 November 2005, paras 94–134.

46 For a detailed analysis of this criterion, see *Limaj*, above note 45, paras 135–170.

47 *Tadić*, above note 37, para. 70.

Tribunal's subsequent decisions have relied on this definition, explaining that the "protracted" requirement is in effect part of the intensity criterion.

NIAC is by far the prevalent type of armed conflict today. When the Geneva Conventions (i.e., common Article 3 thereto) were being drafted, the negotiators essentially had one, "traditional", type of NIAC in mind: that between government armed forces and one or more organized armed groups within the territory of a single State. (The historical backdrop was, among other cases, the Spanish civil war.) Nowadays there is a variety of factual scenarios, with an extraterritorial element, that may also be classified as NIACs.<sup>48</sup> For the purposes of this examination, two types will be mentioned.

The first is a "spillover" NIAC. These are armed conflicts originating within the territory of a State as described above, between government armed forces and one or more organized armed groups, which spill over into the territory of one or more neighbouring States. While common Article 3 does not expressly provide for this scenario, there seems to be increasing acknowledgment by States and scholarly opinion that the applicability of IHL between the parties may be extended to the territory of an adjacent, non-belligerent State (or States) in such a case.<sup>49</sup> By way of reminder, the Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted by the UN Security Council already in 1994, provided that the ICTR's jurisdiction covers serious violations of IHL committed not only in Rwanda but also by Rwandan citizens "in the territory of neighbouring States".<sup>50</sup> Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into a neighbouring territory (violations of sovereignty and the possible reaction of the armed forces of the adjacent State, which could turn the fighting into an IAC between the States), it is submitted that the extension of IHL applicability in this factual scenario is accepted at the international level on a *sui generis*, exceptional basis. As will be discussed further below, prevailing State practice and *opinio juris* do not seem to currently allow for a similar conclusion with respect to the extension of the applicability of IHL between the parties to a NIAC to the territory of a non-adjacent, non-belligerent State.

There is, admittedly, no readily accessible or detailed explanation for the legal reading that has been recognized by States and scholarly opinion with

48 For a possible typology see ICRC, *Report on IHL and the Challenges of Contemporary Armed Conflicts*, Report presented to the 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 28 November–1 December 2011 (2011 ICRC Challenges Report), pp. 9–11, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf).

49 See, e.g., Michael N. Schmitt, "Charting the Legal Geography of Non-International Armed Conflict", *International Law Studies*, Vol. 90, US Naval War College, 2014, p. 11. "In particular, there is growing acceptance of the proposition that IHL applies to 'spillover' conflicts in which government armed forces penetrate the territory of a neighboring State in order to engage organized armed groups operating in border areas ... There is certainly State practice and scholarly support for this interpretation" (footnotes omitted).

50 Statute of the International Criminal Tribunal for Rwanda (ICTR), UN SC Res. 955 Annex, UN Doc. S/RES/955, 8 November 1994, Art. 1.

respect to spillover NIACs.<sup>51</sup> It may be assumed that the contiguity of land surface between States, which can and does facilitate the spread of a NIAC into a neighbouring State, is deemed crucial. The fairly constant occurrence of spillover NIACs in various parts of the world is the likely practical reason. While spillover conflicts such as the one in Rwanda used to be fairly uncommon, this type of NIAC is far more frequent today (e.g., in Colombia and Uganda). Similarly, a spillover of the NIAC in Afghanistan (see below) into certain border regions of Pakistan has been widely reported for several years now.<sup>52</sup>

A second type of NIAC with an extraterritorial aspect is one in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups. As the armed conflict does not oppose two or more States – i.e., as all the State actors are on the same side – the conflict can only be classified as non-international, regardless of the international component, which can at times be significant.<sup>53</sup> This type of NIAC can come about in different ways. One scenario is where an armed conflict that was initially international in nature is reclassified as non-international because of an evolution in circumstances on the ground. A case in point is the armed conflict in Afghanistan, which is still ongoing as of this writing. While an IAC began in 2001, since June 2002 the foreign contingents, including US and other forces under “Operation Enduring Freedom”, and those making up the International Security Assistance Force (ISAF), have been acting in support of the Afghan government against organized non-State armed groups.<sup>54</sup>

Another scenario is one in which the armed forces of a State, or States, become involved in a NIAC that is already taking place in the territory of a host State between its armed forces and one or more organized armed groups. While international law does not provide specific guidance as to the criteria on the basis of which the intervening State may be deemed to have become a party to an ongoing NIAC, it is submitted that the following elements, cumulatively applied, could be relied on: (1) there is a pre-existing NIAC in the territory of a State; (2) acts of hostilities are carried out in its territory by another State (or States); (3) they are undertaken in support of the host State, and with its consent, against

51 A specific legal and practical issue that is the subject of much debate and on which no majority opinion may currently be discerned is how far into a neighbouring State the applicability of IHL extends in case of a spillover NIAC: does it extend to the entire territory of the adjacent country or only to the area of hostilities between the parties? This question, while important, will not be further explored here.

52 See, *inter alia*, CNN, “Gates Calls Pakistan ‘Most Worrisome’”, 1 March 2009, available at: <http://edition.cnn.com/2009/US/03/01/us.afghanistan/>. “Meanwhile, the war is spilling over into Pakistan, where the Taliban have long had a foothold in the tribal areas along the mountainous border.”

53 A subset of this type of NIAC is one in which UN forces, or forces under the aegis of a regional organization (such as the African Union), are sent to support a host government involved in hostilities against one or more organized armed groups in its territory. See 2011 ICRC Challenges Report, above note 48, p. 10.

54 See Francoise J. Hampson, “Afghanistan 2001–2010”, in E. Wilmshurst, above note 33, p. 251 (citing, *inter alia*, the ICRC’s view). See also *ibid.*, p. 252, where the author submits that the IAC in Afghanistan ended either with the adoption of UN Security Council Resolution 1386 (2001) or with the inauguration of Hamid Karzai as president after the Loya Jirga and the establishment of an Afghan transitional government in June 2002. The latter, ICRC view is adopted here.

one or more non-State armed groups; and (4) they reflect a considered decision taken at the highest decision-making level of the intervening State (or States).<sup>55</sup> There are a number of recent and ongoing examples of this type of NIAC taking place in various parts of the world. A case in point was the 2013 French intervention in Mali on the side of the govent of Mali against a range of organized non-State armed groups.<sup>56</sup> It has been argued that the United States is also involved in this type of non-international armed conflict in Yemen.<sup>57</sup>

An account of types of NIAC would not be complete without a brief mention of the classification of violence currently taking place between the United States and “Al-Qaeda, the Taliban and associated forces”.<sup>58</sup> The US was initially of the view that this was an international armed conflict<sup>59</sup> of global dimensions (“global war on terror” or GWOT), but since the US Supreme Court decision in the 2006 *Hamdan* case it is domestically regarded as being non-international in nature.<sup>60</sup> At the risk of simplifying, the gist of the US’s view, which has remained unchanged since the attacks of 11 September 2001, is that the country is engaged in a single armed conflict with the above-mentioned

55 For a more detailed elaboration of the criteria on the basis of which a State (or States) may be considered to have become a party to a pre-existing NIAC in a host State, see Tristan Ferraro, “The Applicability and Application of IHL to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891, 2013, p. 561.

56 See Agence France-Presse, “Key Dates in French–Led Mali Intervention”, *Global Post*, 1 July 2013, available at: [www.globalpost.com/dispatch/news/afp/130701/key-dates-french-led-mali-intervention](http://www.globalpost.com/dispatch/news/afp/130701/key-dates-french-led-mali-intervention).

57 See Robert Chesney, “The United States as a Party to an AQAP-Specific Armed Conflict in Yemen”, *Lawfare*, 31 January 2012, available at: [www.lawfareblog.com/2012/01/yemen-armed-conflic/](http://www.lawfareblog.com/2012/01/yemen-armed-conflic/). “[T]he U.S. has not merely provided various forms of assistance to the government of Yemen in its fight with AQAP, but also has attacked AQAP targets in Yemen in its own right at least *seventeen* times over the past few years, including a strike yesterday. I think the better view, then, is that we are party to the Yemen NIAC, and that our uses of force there implicate IHL as a result (quite apart from arguments about the existence and geographic scope of conflict elsewhere or with respect to other entities)” (emphasis in original).

58 The domestic legal basis is the Authorization for the Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, adopted by Congress in S.J. Res. 23 on 14 September 2001 and signed by President George W. Bush on 18 September 2001, available at: [www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm](http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm). For an explication of how the AUMF is being applied, see Stephen W. Preston, General Counsel, Department of Defense, *Prepared Statement on The Legal Framework Under U.S. Law for Current Military Operations*, Committee on Foreign Relations, United States Senate, 21 May 2014, available at: [www.foreign.senate.gov/download/preston-testimony-05-21-14](http://www.foreign.senate.gov/download/preston-testimony-05-21-14).

59 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 57, 2006, p. 67, available at: <http://www.law.cornell.edu/supct/pdf/05-184P.ZO>. (“[T]he Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’”)

60 See US Department of State, *Report of the United States of America Submitted to the UN High Commissioner for Human Rights In Conjunction with the Universal Periodic Review*, 2010, para. 84, available at: [www.state.gov/documents/organization/146379.pdf](http://www.state.gov/documents/organization/146379.pdf). “Individuals detained in armed conflict must be treated in conformity with all applicable laws, including Common Article 3 of the 1949 Geneva Conventions, which the President and the Supreme Court have recognized as providing ‘minimum’ standards of protection in all non-international armed conflicts, including in the conflict with Al Qaeda.”

groups.<sup>61</sup> At the apex is the “core” of Al-Qaeda, based in the border regions of Afghanistan and Pakistan, with which a range of other groups are associated.<sup>62</sup> The full list remains classified,<sup>63</sup> similar to the criteria on the basis of which a group is added to it. As is well known, this armed conflict has involved the presence of US armed forces on the ground in Afghanistan starting in 2001, but is also being waged – primarily by means of remotely piloted and manned fixed-wing aircraft – outside that country (i.e., in Pakistan, Yemen and Somalia).<sup>64</sup>

It has been stated on various occasions that the International Committee of the Red Cross (ICRC) does not share the view that an armed conflict of global dimensions with the above-mentioned groups has been taking place or is currently ongoing.<sup>65</sup> A single NIAC across space and time would, *inter alia*, require the existence of a “unitary” non-State party opposing one or more States. Based on publicly available facts, and especially at the present time, when the Al-Qaeda core is publicly recognized as having been significantly degraded,<sup>66</sup> this does not seem to be the case. It is likewise doubtful that groups whose affiliation to the Al-Qaeda core is primarily ideological, but whose military operations in

- 61 According to President Obama: “Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.” See President Barack Obama, *Remarks by the President at the National Defense University*, Office of the Press Secretary, Washington, DC, 23 May 2013, available at: [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university). The Taliban is only targeted in Afghanistan: “Beyond the Afghan theater, we only target al Qaeda and its associated forces.” See also, e.g., US Department of Justice, Office of Legal Counsel, *Memorandum for the Attorney-General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, 16 July 2010 (released publicly 23 June 2014), p. 24, available at: <http://fas.org/irp/agency/doj/olc/aulaqi.pdf>. “[T]he contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.”
- 62 In his NDU speech President Obama stated: “Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. ... Instead, what we’ve seen is the emergence of various al Qaeda affiliates. From Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse, with Al Qaeda’s affiliates in the Arabian Peninsula – AQAP – the most active in plotting against our homeland.” B. Obama, above note 61.
- 63 See Cora Currier, “Who Are We at War With? That’s Classified”, *ProPublica*, 26 July 2013, available at: [www.propublica.org/article/who-are-we-at-war-with-thats-classified](http://www.propublica.org/article/who-are-we-at-war-with-thats-classified).
- 64 For a succinct overview of Obama administration views, with links to key speeches by administration officials on the issue over the past few years, see Jonathan Masters, *Targeted Killings*, Background, Council on Foreign Relations, Washington, DC, 23 May 2013, available at: [www.cfr.org/counterterrorism/targeted-killings/p9627](http://www.cfr.org/counterterrorism/targeted-killings/p9627).
- 65 See, *inter alia*, 2011 ICRC Challenges Report, above note 48, p. 10.
- 66 See J. Brennan, above note 31. “Al-Qa’ida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They’re struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qa’ida is losing, badly.” See also Tim Lister, “How ISIS is Overshadowing al Qaeda”, *CNN*, 30 June 2014, available at: <http://edition.cnn.com/2014/06/30/world/meast/isis-overshadows-al-qaeda/>.

the respective theatres of armed conflict are otherwise autonomously conducted, may be deemed to be “co-belligerents” in one and the same armed conflict.<sup>67</sup>

The ICRC has taken a case-by-case approach to analyzing and legally classifying the various situations of violence that have taken place since the attacks of 11 September 2001 and have been subsumed under the fight against terrorism.<sup>68</sup> Based on the relevant classification criteria, and as outlined above, some situations have been classified as international armed conflicts, violence in other contexts has been deemed to constitute a non-international armed conflict, and while certain acts of terrorism that have taken place in the world (an issue not addressed above) have been assessed as being outside any armed conflict. IHL is applicable only when drone strikes take place within an armed conflict.

## The rules on targeting

This text has thus far referred to IHL rules on “targeting”. It would, in fact, be more legally correct to speak of IHL rules on the conduct of hostilities, which are far broader, and include principles and rules governing both attacks against persons and objects. Provided below are a few background observations and a brief summary of the main IHL principles and rules on the conduct of hostilities, including by means of armed drones. The specific rules on the use of lethal force against persons (who may be targeted) under IHL are dealt with in the next section.

### *Background observations*

IHL rules on the conduct of hostilities were historically developed for IAC and are nowadays mainly provided for in Additional Protocol I to the Geneva Conventions, in Additional Protocol II (with far less elaboration), and in customary IHL. Common Article 3 is devoted essentially to the protection of persons in enemy hands and contains no rules on the conduct of hostilities. Practice, however, has unquestionably demonstrated that both State and non-State parties conduct hostilities in NIACs meeting the common Article 3 threshold and that limitations on the use of means and methods of warfare are accepted as a matter of law. This was confirmed in the 2005 ICRC Customary Law Study, which identified a number of conduct of hostilities rules applicable regardless of the classification of a conflict.<sup>69</sup> Before outlining the rules themselves, two preliminary remarks are deemed useful.

67 See Charlie Savage, “Debating the Legal Basis for the War on Terror”, *New York Times*, 16 May 2013, available at: [www.nytimes.com/2013/05/17/us/politics/pentagon-official-urges-congress-to-keep-statute-allowing-war-on-terror-intact.html?\\_r=0](http://www.nytimes.com/2013/05/17/us/politics/pentagon-official-urges-congress-to-keep-statute-allowing-war-on-terror-intact.html?_r=0). “Mr. Taylor [Acting General Counsel of the Pentagon] said that as a matter of domestic law, the authorization did grant such authority if groups in those countries had affiliated themselves with the original Al Qaeda and became ‘co-belligerents’ in the conflict.”

68 For an examination of the relationship between armed conflict and terrorism, see Jelena Pejić, “Armed Conflict and Terrorism: There Is a (Big) Difference”, in Ana Maria Salinas de Frias, Katja L. H. Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, pp. 171–204.

69 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

The first is that IHL rules governing the use of force are specific to the reality they govern and cannot be transposed to situations other than armed conflict. This is because the ultimate aim of military operations is to prevail over the enemy's armed forces. Parties to an armed conflict are thus permitted to attack, or at least are not legally barred from attacking, each other's military objectives (which include members of the armed forces and other persons taking a direct part in hostilities – see next section). Violence directed against those targets is not prohibited as a matter of IHL regardless of whether it is inflicted by a State or a non-State party, provided, of course, that other IHL rules such as those prohibiting specific weapons are respected. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians and civilian objects from the effects of hostilities. IHL thus regulates both *lawful* and *unlawful* acts of violence and is the only body of international law dealing with the protection of persons that takes such a two-pronged approach. There is, for example, no similar dichotomy in international human rights law, another branch of international law that, *inter alia*, protects persons from State violence.<sup>70</sup>

The second feature not replicated in other bodies of international law is the principle of equality of rights and obligations of belligerents under IHL.<sup>71</sup> Pursuant to the *jus in bello*, each side to an armed conflict has to comply with the same rules. This is because the purpose of IHL is not to determine which party was “right” in resorting to the use of armed force against the other (the purview of the *jus ad bellum*, outlined above), but to ensure the equal protection of persons and objects affected by armed conflict regardless of the lawfulness of the first resort to force. Thus, any party to an armed conflict is equally prohibited from directly attacking civilians or civilian objects, but is not prohibited from attacking the adversary's military objectives under IHL.<sup>72</sup>

### *General principles and rules on the conduct of hostilities*

Distinction is the fundamental IHL principle in the conduct of hostilities, and has two prongs. Under the first, the parties to an armed conflict must distinguish at all times between civilians and combatants, and may direct attacks only against combatants.<sup>73</sup> Civilians are persons who are not members of the armed forces,

70 This is not to say that there cannot be lawful use of force by State agents under human rights law. Such use of force, however, is always undertaken in response to a previously unlawful act by an individual or group of persons. That is not the case with direct participation in hostilities, which is either explicitly allowed, or is not prohibited under IHL. Thus, direct participation in hostilities is not a war crime under IHL.

71 See Marco Sassòli and Lindy Rouillard, “La définition du terrorisme et le droit international humanitaire”, *Revue québécoise de droit international*, Studies in Honour of Katia Boustany, 2007, p. 31. See also the debate between Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really Be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 431.

72 The principle of equality of parties, or “equality of belligerents”, under IHL is not only legally important, but also serves to *de facto* enhance compliance with the norms by all sides involved.

73 AP I, Art. 48; ICRC Customary Law Study, above note 69, Rule 1.

and the civilian population comprises all persons who are civilians. Pursuant to both treaty and customary law, civilians are protected against attack unless and for such time as they take a direct part in hostilities.<sup>74</sup> In case of doubt as to whether a person is a civilian, he or she must be considered to be a civilian.<sup>75</sup>

The second prong of the principle of distinction is that the parties to an armed conflict must at all times distinguish between civilian objects and military objectives and may direct attacks only against military objectives.<sup>76</sup> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are all objects that are not military objectives. They are protected against attack, unless and for such time as they are military objectives.<sup>77</sup>

The definition of and prohibition of indiscriminate attacks are provided for in both treaty and customary IHL.<sup>78</sup> It is likewise well accepted that the IHL rule of proportionality must be observed in the conduct of hostilities in both IAC and NIAC<sup>79</sup> and that the parties must also adhere to the rules governing precautions in attack or against the effects of attacks.<sup>80</sup> Given a later discussion in this text, it is useful to note here that there are important and often misunderstood differences between the operation of the principle of proportionality under IHL and human rights law, which reflect the differences between what is practically possible in war and in peacetime.

The principle of proportionality in attack prohibits attacks against military objectives that may be expected to cause incidental death, injury to civilians or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. There is no precise mathematical or other formula for assessing the excessiveness of incidental civilian harm against the expected military advantage; in practice, the higher the military value of a legitimate target, the greater the possible justification for higher incidental harm will be. How to strike the right “balance” (for lack of a better word) is one of the most operationally challenging issues in the conduct of hostilities and requires a careful evaluation of the circumstances in each specific case. The crucial difference between the relevant IHL and human rights rules is that the aim of the IHL principle of proportionality is to limit incidental (“collateral”) harm, while nevertheless recognizing that an operation may be carried out even if such harm is likely, provided, as just noted above, that

74 See AP I, Art. 51(3) and AP II, Art. 13(3); ICRC Customary Law Study, above note 69, Rule 6.

75 AP I, Art. 50(1). For an evaluation of the customary law status of this rule, see the ICRC Customary Law Study above note 69, commentary to Rule 6, pp. 23–24. See also *Tallinn Manual on the International Law Applicable to Cyber Warfare*, NATO Cooperative Cyber Defence Centre of Excellence, Cambridge University Press, Cambridge, April 2013, Rule 33, available at: [www.ccdcoe.org/tallinn-manual.html](http://www.ccdcoe.org/tallinn-manual.html).

76 AP I, Art. 48; ICRC Customary Law Study, above note 69, Rule 7.

77 ICRC Customary Law Study, above note 69, Rule 10.

78 AP I, Art. 51(4); ICRC Customary Law Study, above note 69, Rules 11 and 12.

79 AP I, Art. 51(5)(b); ICRC Customary Law Study, above note 69, Rule 14.

80 AP I, Arts 57 and 58; ICRC Customary Law Study, above note 69, Rules 15–24.

it is not excessive in relation to the concrete and direct military advantage anticipated. In contrast, the aim of the principle of proportionality under human rights law is to prevent harm from happening to anyone else except to the person against whom force is being used. Even such a person must be spared lethal force if there is another, non-lethal way of achieving the aim of a law enforcement operation.<sup>81</sup>

The IHL principle of precautions in attack is multifaceted in that it requires the application of a range of steps to ensure that civilians and civilian objects are spared the effects of military operations.<sup>82</sup> It means, *inter alia*, that everything feasible must be done to make sure that the object of attack is indeed a military objective – i.e., to avoid erroneous targeting of civilians or civilian objects. It mandates that all feasible precautions in the choice of means and methods of warfare must be taken in order to avoid or at least minimize possible collateral civilian damage or casualties, and that parties must refrain from an attack which may be expected to cause excessive incidental civilian damage or casualties. In practice, the extent to which precautions are feasible will depend on a variety of factors including, for example, “the availability of intelligence on the target and its surroundings, the level of control exercised over territory, the choice and sophistication of available weapons, the urgency of the attack and the security risks that additional precautionary measures may entail for the attacking forces or the civilian population”.<sup>83</sup> The principle of precautions also requires that an attack be suspended or cancelled if it becomes clear that an intended target is not a military objective, or if the attack may be expected to cause excessive incidental civilian damage or casualties. As mentioned, there are also precautions incumbent on the defending party.<sup>84</sup>

By way of summary, IHL rules on the conduct of hostilities recognize that the use of lethal force against persons is inherent to waging war. This body of rules aims to avoid or limit death and other harm, particularly to civilians, but recognizes that the very nature of armed conflict is such that loss of life, regrettably, cannot be entirely prevented.

81 See Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, *International Review of the Red Cross*, Vol. 87, No. 860, 2005, p. 745, available at: [www.icrc.org/eng/assets/files/other/irrc\\_860\\_lubell.pdf](http://www.icrc.org/eng/assets/files/other/irrc_860_lubell.pdf). “For example, under human rights law and the rules of law enforcement, when a State agent is using force against an individual, the proportionality principle measures that force in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary and restricting the use of lethal force.”

82 For an excellent overview of the issue, see Jean-Francois Queguiner, “Precautions Under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, available at: [www.icrc.org/eng/resources/documents/article/review/review-864-p793.htm](http://www.icrc.org/eng/resources/documents/article/review/review-864-p793.htm).

83 Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, Study, European Parliament, Directorate-General for External Policies, Policy Department, May 2013, p. 24, available at: [www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953](http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953).

84 AP I, Art. 58; ICRC Customary Law Study, above note 69, Rules 22–24.

## Who may be targeted?

The issue of who may be targeted by means of armed drones has been, and continues to be, the subject of much controversy. Provided below is an overview of IHL rules on the conduct of hostilities that relate specifically to the question against whom lethal force may be used in armed conflict.

There is no doubt that under IHL lethal force may be used against combatants. A combatant is a member of the armed forces of a party to an IAC who has “the right to participate directly in hostilities”.<sup>85</sup> This means that he or she may use force against – i.e., target and kill – other persons taking a direct part in hostilities (and destroy other enemy military objectives). Under IHL, the civilian population and individual civilians enjoy general protection against the dangers arising from military operations, in both IAC and NIAC.<sup>86</sup> To give effect to this principle, IHL specifically provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack”.<sup>87</sup> Civilians remain protected from direct attack, whether in IAC or NIAC, “unless and for such time as they take a direct part in hostilities”.<sup>88</sup>

Who is deemed to be a civilian taking a direct part in hostilities is thus a key practical and legal issue. As noted in an ICRC report, civilians have, throughout history, contributed to the general war effort to a greater or lesser degree, but such activities were typically conducted at some distance from the battlefield.<sup>89</sup> Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields and into civilian population centres, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the “civilianization” of the armed forces, meaning the involvement of large numbers of private contractors as well as intelligence personnel and other civilian government employees, in armed conflict. Moreover, in a number of contemporary conflicts, military operations have attained an unprecedented level of complexity and have involved a great variety of interlinked human and technical resources, including remotely operated weapons systems such as drones.

The increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, and the wide variety of activities performed by civilians in contemporary armed

85 AP I, Art. 43(2).

86 AP I, Art. 51(1) and AP II, Art. 13(1).

87 AP I, Art. 51(2) and AP II, Art. 13(2).

88 AP I, Art. 51(3) and AP II, Art. 13(3).

89 ICRC, *Report on IHL and the Challenges of Contemporary Armed Conflicts*, Report presented to the 30th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 26–30 November 2007, pp. 15–16 (on which part of this section is based), available at: [www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf](http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf). “They included, for example, the production of arms, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.” *Ibid.*, p. 15.

conflicts have caused confusion and uncertainty as to how the principle of distinction should be implemented in the conduct of hostilities. These difficulties are aggravated when armed actors do not distinguish themselves from the civilian population, or when persons act as “farmers by day and fighters by night”. As a result, peaceful civilians are more likely to fall victim to erroneous or unnecessary targeting, while members of the armed forces run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians even though they must have been trained to protect civilians.

The challenges above have emphasized the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do not participate directly in hostilities and those who do. As noted above, under IHL the notion of “direct participation in hostilities” describes individual conduct which, if carried out by civilians, suspends their protection from direct attack. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities.

It was with a view to clarifying the law that in 2009 the ICRC published its Interpretive Guidance, enunciating the organization’s recommendations.<sup>90</sup> The first question addressed in the Interpretive Guidance is who is considered a civilian for the purposes of the principle of distinction, because the answer determines the scope of persons protected against direct attack “unless and for such time as they directly participate in hostilities”. The Guidance distinguishes between (i) members of organized armed forces or groups, the latter defined as persons whose continuous function is to conduct hostilities on behalf of a party to an armed conflict; and (ii) civilians – that is, persons who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis. It concludes that, for the purposes of the principle of distinction under IHL, only the latter are deemed to be civilians.

This means that, in NIAC, persons who are not members of State armed forces or of organized armed groups are considered civilians and may not be targeted unless and for such time as they are engaged in a specific act of direct participation<sup>91</sup> (see below). Conversely, organized armed groups constitute the armed forces of a non-State party to a NIAC. The decisive criterion for individual

90 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (Interpretive Guidance), available at: [www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm](http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm). For scholarly articles criticizing certain aspects of the Interpretive Guidance, and Nils Melzer’s response to those views, see *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, available at: <http://nyujilp.org/print-edition/>, which is devoted to that topic.

91 Pursuant to the Interpretive Guidance, in IAC all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Members of irregular armed forces (militia, volunteer corps, etc.) whose conduct is attributable to a State party to a conflict are considered part of its armed forces. They are not deemed civilians for the purposes of the conduct of hostilities even if they fail to fulfil the criteria required by IHL for combatant privilege and POW status. Membership in irregular armed forces belonging to a party to the conflict is to be determined based on the same functional criteria that apply to organized armed groups in NIAC.

membership in an organized armed group is whether a person performs a continuous function for the group involving his or her direct participation in hostilities (“continuous combat function” or CCF). As long as this is the case, he or she ceases to be a civilian for the purpose of the conduct of hostilities and loses protection against direct attack. This does not imply *de jure* entitlement to combatant privilege, which in any event does not exist in NIAC. Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians, including those who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis. The concept of CCF has been criticized as being allegedly based on status rather than behaviour as the basis for targeting.<sup>92</sup> It is submitted that this view is misplaced, as the Interpretive Guidance does not – and could not – introduce combatant status into a NIAC. On the contrary, as the very term indicates, membership in an armed group is linked to the CCF that a person carries out.

The second question dealt with in the Interpretive Guidance is what conduct amounts to direct participation in hostilities. Pursuant to the Interpretive Guidance, a specific act must fulfil the following cumulative criteria: (1) it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (*threshold of harm*); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction, the three requirements are believed to permit a workable distinction between activities amounting to direct participation in hostilities and those which, although occurring in the context of an armed conflict, are not part of the hostilities and do not lead to loss of protection from direct attack. In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, are deemed to constitute an integral part of the act.

The third issue addressed in the Interpretive Guidance is the modalities that govern the loss of protection against direct attack. These include the time during which members of State armed forces or of organized armed groups, as well as individual civilians, may be subject to direct attack, and the rules and principles governing the use of force against them. As regards the latter, the Guidance determines that “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing

92 See Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, above note 7, para. 65.

circumstances”.<sup>93</sup> This recommendation, in particular, has been criticized as being contrary to IHL, which does not include any explicit restriction on the targeting and killing of persons who are legitimate targets.<sup>94</sup> It has also, wrongly, been interpreted as requiring in all circumstances a “capture rather than kill” obligation in the conduct of hostilities.

With respect to the first critique, the ICRC’s view, as explained in the Interpretive Guidance, is based on the interplay between the principles of military necessity and humanity that underlie the entire normative framework of IHL. Just as importantly, the recommendation is drawn from the interpretation given by relevant States to the interface of those principles as reflected in their military manuals.<sup>95</sup>

The second critique misreads the plain language of the recommendation and of the accompanying commentary. The latter specifically states that “the absence of an unfettered ‘right to kill’ does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances”.<sup>96</sup> The commentary also explains that:

what kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather, it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.<sup>97</sup>

The Interpretive Guidance ends with a reminder that civilians who cease direct participation in hostilities and individuals who cease to be members of an organized armed group by disengaging from a continuous combat function regain full civilian protection against direct attack. However, in the absence of combatant privilege they are not exempted from prosecution under the domestic law of the detaining State for acts committed during direct participation or membership. They may also be held individually responsible for war crimes or other crimes under international law.

93 Interpretive Guidance, above note 90, p. 77, Recommendation IX.

94 See W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, p. 799.

95 See, for example, NATO, *Glossary of Terms and Definitions*, AAP-6V, M-5, p. 2; US Department of the Army, *Field Manual 27–10*, 1956, § 3; US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1–14M/MCWP 5–12-1/COMDTPUB P5800.7A, 2007, § 5.3.1, p. 5–2.; French Ministry of Defence, *Manuel de Droit des Conflits Armés*, 2001, pp. 86 ff.; German Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts*, August 1992, §130; Switzerland, *Swiss Army, Regulations 51.007/IV, Bases légales du comportement à l’engagement*, 2005, § 160. Historically, the modern concept of military necessity has been strongly influenced by the definition provided in *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, 24 April 1863 (Lieber Code), Art. 14.

96 Interpretive Guidance, above note 90, p. 78.

97 *Ibid.*, p. 80.

It should be noted that the Interpretive Guidance was intended to provide military planners, commanders and their lawyers, as well as others, with legal standards elaborating the concept of direct participation in hostilities. The recommendations formulated are thus of necessity broad and abstract in nature and need to be further “translated” into operational tools in order to be applicable in specific targeting operations on the ground.

Given some of the current controversies surrounding either the law or the reported practice related to the extraterritorial targeting of persons by means of armed drones, a few additional observations may be made. Apart from State armed forces in an IAC, the *only* other persons against whom in the ICRC’s view lethal force may be used by way of direct attack are either members of armed groups in NIAC (defined as those who perform a continuous combat function) or civilians directly participating in hostilities on an individual basis for the duration of the specific act of direct participation. In this context there have been reports in the public domain, and reactions thereto, about the practice of “signature strikes”.<sup>98</sup> These have been described as drone attacks that target “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known”.<sup>99</sup> The concept of signature strikes is not a legal term of art and risks creating confusion by suggesting the possible introduction of a new (legal) notion. The way in which this concept is used – i.e., in distinction to “personality” strikes<sup>100</sup> – also erroneously implies that targeting under IHL will only be lawful if the identity of the person targeted is known. This requirement is not an element of the principle of distinction and would for the most part not be possible to fulfil in the reality of armed conflict.

What is required is a determination that a person constitutes a lawful target, either because of a continuous combat function or because he or she is a civilian who is taking a direct part in hostilities, and sufficient evidence of either one or the other. It is not suggested that gathering evidence will in all cases be easy, as IHL does not provide guidance on the quality or quantity of evidence required. It should also be recalled that implementation of the requirement that an attacker do everything feasible to verify that he is not targeting civilians (part of the principle of precautions in attack) can be only based on information available at the time, and not in hindsight. Nevertheless, in case of doubt, as also mentioned above, a person should be presumed not to be targetable.

98 See Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, Policy Brief, European Council on Foreign Relations, London, 3 July 2013, p. 5, available at: [http://ecfr.eu/publications/summary/drones\\_and\\_targeted\\_killing\\_defining\\_a\\_european\\_position211](http://ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211). See also N. Melzer, above note 83, pp. 34–35.

99 For a comprehensive review of the issue, see Kevin Jon Heller, “‘One Hell of a Killing Machine’: Signature Strikes and International Law”, *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013, p. 1, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169089](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169089), citing Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, Houghton Mifflin Harcourt, New York, 2012, p. 41.

100 Those in which the targeting entity has a “high degree of confidence” that it knows the precise identity of the target. See K. Heller, above note 99, p. 2.

There have also been reports of drone strikes against military-aged males. These are strikes that allegedly consider all males of military age in a strike zone as combatants (this term presumably being used in its colloquial sense), because “simple logic indicates that people in an area of known terrorist activity ... are probably up to no good”.<sup>101</sup> The practice is sometimes examined on its own, while in other cases it is considered to be a subset of “signature strikes”.<sup>102</sup> If targeting on this basis has been or is taking place, it would be contrary to the principle of distinction as the vicinity of a person to a particular area, coupled with his age, cannot make him a military objective. If, alternatively, the persons at issue are not considered targets themselves but are not counted as civilians in any proportionality assessment, then that would be an improper application of the rule of proportionality described above.

A question that is sometimes posed relates to the IHL rules that would be applicable to the use of lethal force against drone operators. The fact that a drone is operated from a distance does not change the IHL rules on the conduct of hostilities outlined above. If a drone operator is a member of the regular armed forces of a State involved in an IAC he or she may be targeted by the adversary by virtue of the fact that he or she is a military objective. If in an IAC a drone is operated by a government entity which is not part of the armed forces, the persons involved will lose protection from direct attack to the extent that their activity amounts to a continuous combat function or to individual direct participation in hostilities. The relevant IHL rules outlined above will also govern the use of lethal force by means of armed drones in a NIAC. Thus, direct attacks would not be prohibited under IHL against members of the State’s armed forces operating a drone, or against persons operating a drone as part of a continuous combat function or directly participating in hostilities by operating drones as civilians on a sporadic basis, whether on the State or non-State side. The difference with IAC of course relates to the issue of the legal status of the operators: there is no combatant or POW status in NIAC, which means that persons on the side opposing government forces will remain prosecutable under domestic criminal law upon capture even in the case of drone attacks that may not have been in violation of IHL.<sup>103</sup>

## Where may persons be targeted?

The territorial scope of armed conflict – and therefore of IHL – is probably the most challenging issue that has arisen in the legal and other debates on extraterritorial targeting by means of armed drones. This is in no small measure due to the fact that IHL does not contain an overall explicit provision on its scope of territorial applicability. The individual specific references to “territory”

101 See *ibid.*, p. 11 and note 52.

102 For an examination of the practice on its own, see N. Melzer, above note 83, p. 35. For an examination of the practice as a subset of signature strikes, see K. Heller, above note 99, p. 11.

103 See I. Henderson and B. Cavanagh, above note 6, p. 208.

included in the Geneva Conventions and their Additional Protocols have thus recently given rise to different positions on what has been termed the “legal geography of war”.<sup>104</sup> The questions most often asked are: does IHL apply to the entire territories of the parties to an armed conflict, or is it restricted to the “battlefield” within such territories? Does it apply outside the territories of the parties, i.e., in the territory of neutral or non-belligerent States? It must be stressed that the views offered below are of a “framework” nature only. The reality is so complex, and constantly evolving, that not all possible specific practical cases and the legal questions they generate have been, or can be, addressed at this time.

### *The applicability of IHL in the territories of the parties to an armed conflict*

As regards international armed conflict, it is generally accepted that IHL applies to the entire territory of the States involved in such a conflict, as well as to the high seas and the exclusive economic zones (the “area” or “region” of war).<sup>105</sup> A State’s territory includes not only its land surface but also rivers and landlocked lakes, national maritime waters and territorial waters, and the airspace above these territories.<sup>106</sup> There is no indication either in the Geneva Conventions and the Additional Protocols or in the doctrine and jurisprudence that the scope of applicability of IHL rules is limited to the “battlefield”/“zone of active hostilities” or “zone of combat”, generic terms used to denote the space in which hostilities are taking place.<sup>107</sup> It is also widely agreed that military operations may not be carried out beyond the area/region of war as defined above, meaning that they may not be extended to the territory of neutral States, an issue dealt with briefly below.

It may likewise be argued that IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of the scope of its territorial applicability by specifying certain acts as prohibited “at any time and in any place whatsoever”.<sup>108</sup> The *travaux préparatoires* to this article do not suggest that its applicability was meant to be confined to the “battlefield” or the “zone of active hostilities/combat”. The ICTY Appeals Chamber has specifically stated that

104 See K. Anderson, above note 32.

105 See, e.g., C. Greenwood, above note 42, p. 51 (area). See also Yoram Dinstein, *War, Aggression and Self-Defense*, Cambridge University Press, Cambridge, 2011, p. 19.

106 Parts of the national territory of the parties to an IAC, such as demilitarized zones, including hospital and safety zones, as well as neutralized zones and non-defended localities, are subject to a special IHL regime that will not be examined here.

107 For an examination of the notion of “zone of active hostilities”, see Jennifer C. Daskal, “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the ‘Hot’ Conflict Zone”, *University of Pennsylvania Law Review*, Vol. 161, No. 5, 2013, pp. 1165–1234.

108 Common Art. 3(1).

there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.<sup>109</sup>

For its part, the ICTR has concluded:

Once the conditions for the applicability of Common Article 3 and Additional Protocol II are satisfied, their scope extends throughout the territory of the State where the hostilities are taking place without limitation to the “war front” or to the “narrow geographical context of the actual theatre of combat operations”.<sup>110</sup>

It could be pointed out that the pronouncements of the International Tribunals were intended to establish the territorial reach of IHL primarily for the purposes of enabling jurisdiction over war crimes. While this may be the case, it is nevertheless submitted that their findings are valid as regards the territorial applicability of IHL, including its rules on the use of lethal force, which are the focus here. IHL will apply to specific hostile acts carried out by individuals as part of the conduct of hostilities between the parties to an armed conflict – i.e., to direct participation in hostilities – wherever in the territory of the parties such acts may take place. A different conclusion would mean that hostilities could not spread beyond the “battlefield” or “zone of active hostilities/combat” within the territory of a State. However, in reality they do, in which case IHL is designed to regulate them.

It is important to stress in this context that the applicability of IHL to the territory of the parties to a conflict does not mean that there are no legal constraints, apart from those related to the prohibition of specific means and methods of warfare, on the use of lethal force against persons who may be lawfully targeted under IHL – i.e., members of State armed forces or of organized armed groups, as well as individual civilians taking a direct part in hostilities, *particularly outside the “battlefield” or “zone of active hostilities/combat”*. As explained in the commentary to Recommendation IX of the ICRC’s Interpretive Guidance, referred to above, IHL does not expressly regulate the kind and degree of force permissible against legitimate targets.<sup>111</sup> This does not imply a legal entitlement to use lethal force against such persons in all circumstances without further considerations. Based on the interplay of the principles of military necessity and humanity, the Interpretive Guidance determines that “the kind and degree of force which is permissible against persons not entitled to protection against direct

109 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96–23 & IT-96–23/1-A, Judgment, 12 June 2002, para. 57, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf). It may be noted that the ICTY Appeals Chamber’s view on the geographical scope of application of IHL seems to have evolved from the initial position taken in the 1995 *Tadić* Decision, above note 37, paras. 67–69.

110 ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment, 15 May 2003, para. 367, available at: [www.refworld.org/docid/48abd5a30.html](http://www.refworld.org/docid/48abd5a30.html).

111 Interpretive Guidance, above note 90, p. 78.

attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances”.<sup>112</sup> As has been mentioned, it is recognized that this will involve “a complex assessment” that will depend on a wide range of operational and contextual factors. In some instances, it should lead to the conclusion that means short of lethal force will be sufficient to achieve the aims of a military operation. As already noted, this does not introduce a law enforcement “capture rather than kill” obligation into the framework of IHL, although that could in certain limited circumstances be the practical outcome of the legal analysis called for in Recommendation IX.

It should also be noted that Recommendation IX does not, and cannot, prejudice the application of other branches of international law that may also be relevant in a given situation, an issue which is outside the scope of this examination. Suffice it to note that domestic law, as well as its international and/or regional human rights obligations, will also impact the legal analysis of the lawfulness of a State’s use of lethal force in a NIAC in its territory.<sup>113</sup> By way of example, it has recently been argued that IHL provisions on the protection of persons in enemy hands apply throughout the territory of a State within which a NIAC is taking place, but that the same cannot be said for its rules on the conduct of hostilities.<sup>114</sup> The latter will apply only in the “context of hostilities”,<sup>115</sup> meaning that a State may not use lethal force against a member of an armed group “in a situation in which it is perfectly feasible to employ law enforcement mechanisms”.<sup>116</sup> According to this view “this approach is similar” to that enunciated in Recommendation IX of the Interpretive Guidance.<sup>117</sup> While, as noted above, this may in certain limited circumstances be the case as a matter of practical outcome, it must be recalled that in terms of legal grounding Recommendation IX is based on IHL, while this view rests on a law enforcement paradigm.

In the context of this discussion, the question of IHL applicability to the territories of the parties to a NIAC with an extraterritorial element may be posed (the case in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups). There is at present little in the way of official pronouncements by States on this specific issue, and the few publicly expressed expert views differ. According to some, “in principle IHL applies only to the territory of the State where the conflict is taking place”.<sup>118</sup> Others have said (with reference to the States members of ISAF in Afghanistan): “Since all such states are party to

112 *Ibid.*, p. 77, Recommendation IX.

113 See Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, Report of Expert Meeting, ICRC, Geneva, November 2013, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf).

114 David Kretzmer, Aviad Ben-Yehuda and Meirav Furth, “Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 47, No. 2, 2014.

115 *Ibid.*, p. 194.

116 *Ibid.*, p. 224.

117 *Ibid.*, p. 222.

118 See Netherlands Advisory Committee Report, above note 29, p. 3.

Afghanistan's NIAC, IHL applies throughout their territories, even though no conflict related hostilities are taking place there.”<sup>119</sup>

It is submitted that there are cogent legal reasons to believe that IHL applies to the territories of the assisting States in this scenario. It may be argued that third States involved in an extraterritorial NIAC should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders. This would be contrary to the IHL aim of creating, at least in law, a level playing field between the parties, one in which both have the same rights – and, of course, obligations – under this body of norms. Thus, while acts possibly carried out as part of the hostilities by a non-State party on an assisting State's territory will certainly be penalized under domestic law (and probably qualified as “terrorist”), they may under some circumstances be lawful under IHL. This would be the case if an attack by the relevant non-State party were, for example, directed at a military objective in the intervening State's territory. If the attack were directed at civilians or civilian objects, it would be criminal and prosecutable as such under IHL, as well as a war crime. As regards the use of lethal force by a third State on its own territory against the non-State side, it would be governed by the standard outlined in Recommendation IX of the Interpretive Guidance, and also determined by the State's domestic law and its international and/or regional human rights obligations, as mentioned above.

### *The applicability of IHL to the territory of a non-belligerent State*<sup>120</sup>

While IHL is believed to apply in the entire territory of the parties to an armed conflict as just explained, there is also a range of views and significant disagreement among lawyers, scholars and others regarding the applicability of IHL to the territory of a non-belligerent State. The scenario is the following: a person who constitutes a military objective – because he or she is a member of the armed forces of a State, or is a member of a non-State armed group (continuous combat function), or is an individual civilian taking a direct part in hostilities – moves from a State in which there is an ongoing armed conflict into the territory of a non-neighbouring non-belligerent State, and continues his or her activities in relation to the conflict from there. Can such a person be targeted by a third State in the non-belligerent's territory under the rules of IHL?

There are, broadly speaking, two basic positions. Under the first, the answer is yes. A concise presentation of this view is provided below:

From a policy perspective, humanitarian law was never designed to prevent armed conflicts or to confine them territorially but, rather, to regulate them whenever and wherever they occur. From a legal perspective, the prevention and territorial confinement of armed conflicts are not a matter for

119 M. Schmitt, above note 49, p. 16.

120 The term “non-belligerent” is used here in the generic sense to signify a State not taking part in an armed conflict, in distinction to the status of neutrality of a State in an IAC, as described below.

humanitarian law, but for the UN Charter and the law of neutrality. Moreover, while the latter frameworks do aim to prevent and confine armed conflicts, they do not prevent or confine the applicability of humanitarian law (as a matter of law) when and where armed hostilities do occur (as a matter of fact). Once the objective criteria for the existence of an armed conflict are met, the applicability of humanitarian law is not territorially delimited but governs the relations between the belligerents irrespective of geographical location... In the absence of express territorial limitations, however, humanitarian law applies wherever belligerent confrontations occur, including international air space, the high seas, cyberspace and, indeed, the territory of third States, whether hostile, cobelligerent, occupied or neutral. What is decisive is not where hostile acts occur but whether, by their nexus to an armed conflict, they actually do represent “acts of war”. Therefore, any drone attack or other use of robotic weapons for reasons related to an armed conflict is necessarily governed by humanitarian law, regardless of territorial considerations. The separate question of whether the extraterritorial use of robotic weapons is lawful depends not only on humanitarian law, but also on other bodies of international law, such as the UN Charter or the law of neutrality, which may restrict or prohibit hostile acts between belligerent parties even when they are permissible under humanitarian law.<sup>121</sup>

The other approach separately addresses situations of international and non-international armed conflict. Pursuant to this view, “in situations of international armed conflict between states, the applicability of international humanitarian law is limited to the territory of the warring states”.<sup>122</sup> It is submitted that there are valid legal and policy reasons for this reading. When it comes to IAC, a close examination of the Geneva Conventions may lead to the conclusion that the vast majority of their provisions were in fact drafted for and intended to apply only to the territory of the States involved in such a conflict. By way of reminder, apart from national territory, which is not limited to the land surface, the area/region of war may include the high seas and exclusive economic zones. The issue of controversy being examined here is the extension of IHL application beyond that space to the territory of non-participating States. The obvious example is the Fourth Geneva Convention, which is essentially structured around the protection of persons either in the territory of a party to the conflict or in occupied territory. Some of its provisions are thus “common to the territories of the parties to the conflict and to occupied territories”,<sup>123</sup> others govern the treatment of “aliens in the territory of a party to the conflict”,<sup>124</sup> and

121 N. Melzer, above note 83, p. 21. For a similar position see Michael N. Schmitt, “Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law”, *Columbia Journal of Transnational Law*, Vol. 52, 2013, p. 99.”

122 Netherlands Advisory Committee Report, above note 29, p. 3.

123 GC IV, Part III, § I, Arts 27–34.

124 GC IV, Part III, § II, Arts 35–46.

still others concern the treatment of persons in “occupied territory”.<sup>125</sup> There are also numerous references to “territory” (a total of seventy-one) or “territories” (a total of fourteen) throughout other parts of the Fourth Geneva Convention related to the internment of protected persons, their death, release and repatriation, the execution of the Convention, etc.

While the Third Geneva Convention has a smaller number of explicit references to “territory” (a total of twenty) or “territories” (a total of three), its operation on the national territory of the State parties to an IAC is likewise clearly intended. Article 4, which *inter alia* defines eligibility for POW status for members of militias and other groups “belonging to a party to the conflict” (that is, in IAC, a State, which by definition consists of a defined territory under public international law), expressly refers to the operation of such groups “in or outside their own territory, even if this territory is occupied”.<sup>126</sup> Given the context, the term “own” territory can only be interpreted to mean the national territory of the State to which they “belong”. Where the Geneva Conventions refer to or have an effect on neutral States, the relevant provisions for the most part also explicitly refer to the “territory” of neutral States.<sup>127</sup>

It could be argued that the essentially “territorial” scope of the Geneva Conventions is simply a result of the fact that they govern the treatment of persons in enemy hands,<sup>128</sup> but that the same conclusion is not necessarily valid with respect to the rules of Additional Protocol I on the conduct of hostilities. Here again, arguments to the contrary may be made.

First, AP I “supplements”<sup>129</sup> the Geneva Conventions: there is nothing to suggest that the Protocol was meant to enlarge the essentially territorial scope of applicability of the Conventions as a matter of law. Second, no particular provision indicates that the Protocol’s rules on the conduct of hostilities were intended to apply “globally” – i.e., outside the territories of the belligerents. The wording of AP I Article 49(2) is, admittedly, unusual in that it specifies that the Protocol’s provisions on “attacks” (defined as acts of violence against the adversary, whether in offence or defence)<sup>130</sup> “apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the

125 GC IV, Part III, § II, Arts 47–78.

126 GC III, Art. 4A(2).

127 Thus, for example, in Article 4B(2), the Third Geneva Convention extends POW treatment to members of the armed forces of a belligerent who have been received by a neutral State (in which case they must be interned in accordance with the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land). Similarly, the First and Second Geneva Conventions specify, in Articles 4 and 5 respectively, the treatment that neutrals must afford to wounded, sick or shipwrecked members of the armed forces of the belligerents, including medical personnel and chaplains, received or interned in their territory.

128 The essentially territorial scope of application of IHL treaties in IAC does not mean that IHL will cease to operate in favor of individual protected persons who are removed from belligerent territory, as long as they remain in enemy hands.

129 AP I, Art. 1(3).

130 AP I, Art. 49(1).

conflict, but under the control of the adverse party”.<sup>131</sup> A review of the drafting history of this provision<sup>132</sup> and of scholarly commentary<sup>133</sup> clarifies, however, that what the drafters were anxious to ensure were limitations on the behaviour of a party in its own territory. The reference to “whatever territory” was thus not intended to suggest a spatial extension of the scope of application of this rule outside the territories of the parties to the conflict, but on the contrary, to guarantee that a belligerent will apply it in its own.<sup>134</sup> If the Protocol’s rules on the conduct of hostilities were meant to potentially apply without geographic limitation, then the way in which the end of this treaty’s application is formulated would presumably also have been different. However, it reads as follows: “The application of the Conventions and of this Protocol shall cease, in the territory of the Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation.”<sup>135</sup>

The view that IHL application cannot be automatically extended any time a member of the adversary’s armed forces in an IAC moves around the world is further buttressed by the existence of the law of neutrality.<sup>136</sup> Under a geographically “unlimited” reading of IHL rules on targeting, such a person could be attacked based on his or her very status as a combatant, without more. But this is not the case. Due to the operation of the law of neutrality, enemy combatants may be targeted only if the neutral State assists a belligerent or is derelict in preventing members of his armed forces from continued participation in hostilities from its territory, and not just because they may be located there. The law of neutrality is an extension of IHL, and its main goal is precisely to prevent the spread of hostilities to the territory of non-participating States. It does so by means of a range of rules governing the behaviour of both neutral and belligerent States. While an examination of the rules on neutrality is not the focus of this text, a few general principles will be recalled.<sup>137</sup>

131 AP I, Art. 49(2): “The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a party to the conflict but under the control of an adverse party.”

132 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (AP I Commentary), paras 1883–1891.

133 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 240.

134 See AP I Commentary to Art. 49(2) at para. 1891. “Finally this paragraph makes it clear, as implied in paragraph 4, that the provisions of the Protocol relating to attacks and the effects thereof apply to the whole of a population present in the territory of a party to the conflict, even if it is under enemy control – as does Part II of the Fourth Convention” (emphasis added).

135 AP I, Art. 3(b).

136 For an overview of the law of neutrality and arguments in favour of its continued validity, see Wolff Heintschel von Heinegg, “‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality”, in Michael Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, Leiden/Boston, 2007, pp. 543–568.

137 See Peter Hostettler and Olivia Danai, “Neutrality in Land Warfare”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, §2, General Rules, paras 7–10, available at: <http://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e347?rskey=UkNyhH&result=1&prd=EPIL>.

Neutrality is the status of States that do not participate in an IAC. Neutral States must abstain from supporting or harming States that are parties to such a conflict, whether by means of direct support to military operations, by hindering the belligerents outside neutral territory, or by providing belligerent States with services not authorized under the law of neutrality. In the same vein, neutral States are obliged to treat the belligerents in an equal manner (the principle of impartiality). The law of neutrality obliges the belligerents to respect the inviolability of the territory of neutral States, which includes the prohibition of any type of military activity in a neutral's territory, as well as such activities in close proximity to neutral territory that may cause damage to persons or property situated on it. Neutral States are obliged to prevent and repel violations of their neutrality by belligerent States.<sup>138</sup> According to some, the decision of a State to remain neutral is unilateral and does not require a declaration, nor is it subject to the agreement of another State.<sup>139</sup>

Thus, in the scenario provided above, the law of neutrality will operate to possibly allow the targeting of a belligerent who continues to directly participate in hostilities from a neutral's territory. But, it is submitted, this will be the result of the application of the specific rules of neutrality and not based on an unfettered "right" of one party to an IAC to target members of the opposing side's armed forces, without more, under IHL rules governing the conduct of hostilities anywhere in the world.

In this context it is worth mentioning that while its essential postulates remain valid, the law of neutrality is widely believed to be in need of update.<sup>140</sup> The bulk of the treaty rules date from the beginning of the last century and the customary law norms likewise leave much to be desired in terms of present-day relevance. The other observation that must be made, in relation to the discussion that follows, is that the law of neutrality does not apply *de jure* in NIACs, which are by definition armed conflicts not between States, but between States and a non-State party or parties.

The hypothetical scenario provided at the beginning of this section – in which a member of a non-State armed group (continuous combat function) or an individual civilian taking a direct part in hostilities in relation to an ongoing NIAC moves into the territory of a non-belligerent State – is probably the one currently being most hotly debated because of the real challenges presented in reality and law. Once again, two basic legal positions may be discerned.

138 For the application of the rules of neutrality to air warfare, see Peter Hostettler and Olivia Danai, "Neutrality in Air Warfare", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, paras 1–23, available at: <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e346?rskey=J0TtA8&result=2&prd=EPIL>.

139 P. Hostettler and O. Danai, above note 137, paras 3–4. There are also different views on this, as noted in W. H. von Heinegg, above note 136, p. 556.

140 See Michael Bothe, "The Law of Neutrality", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 487.

Pursuant to the first view, which has been outlined above, as in IAC, there is no territorial limitation to the scope of application of IHL in NIAC. What is decisive is “not where hostile acts occur, but whether, by their nexus to an armed conflict, they actually do represent ‘acts of war’. Therefore, any drone attack ... for reasons related to an armed conflict is necessarily governed by humanitarian law, regardless of territorial considerations.”<sup>141</sup> It is also posited that the norms of other bodies of international law “may restrict or prohibit hostile acts between the belligerent parties even when they are permissible under humanitarian law”.<sup>142</sup> This could be the *jus ad bellum* under the UN Charter, or the rules on State responsibility for internationally wrongful acts.

It is submitted that a different reading of the scenario given is also possible – and should be preferred – based on reasons of law and policy. To begin with, it is evident that common Article 3 contains explicit provisions on its applicability in the “territory” of a State in which such a conflict is taking place.<sup>143</sup> Traditionally, this was understood to cover only the fighting between the relevant government’s armed forces and one or more organized non-State armed groups on its soil. However, as previously outlined, the factual scenarios of NIAC have evolved, and with them the legal interpretation of the spatial scope of applicability of common Article 3. Thus, in addition to the *sui generis* case of a spillover NIAC, there have been and continue to be instances in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups (an additional example of an extraterritorial NIAC). As has been argued, there are legal reasons to believe that IHL will apply in such a situation also to the territories of the assisting States, because they are parties to the NIAC.

However, it is a different order of legal magnitude to suggest that “territory” may be understood to mean that IHL – and its rules on the conduct of hostilities – will automatically extend to the use of lethal force against a person located outside the territory of the parties involved in an ongoing NIAC, i.e. to the territory of a non-belligerent State. This reading would mean the acceptance of the legal concept of a “global battlefield”, which as has been outlined, does not appear to be supported by the essentially territorial focus of IHL, which appears to limit IHL applicability to the territory of States involved in an armed conflict. A territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities moving around the world would be deemed to automatically “carry” the “original” NIAC with them wherever they go, and based on IHL, would remain targetable within a potentially

141 N. Melzer, above note 83, p. 21.

142 *Ibid.*

143 AP II provides in Article 1(1): “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions ... and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.” Given the different legal threshold for the applicability of AP II, due to which the hypothetical scenario is outside the purview of the Protocol, this treaty will not be further mentioned here.

geographically unlimited space. With the exception of the United States, State practice and *opinio juris* do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a “global battlefield”.<sup>144</sup> In addition, it is disturbing, as a practical matter, to envisage the potential ramifications of the territorially unlimited applicability of IHL if other States around the world involved in a NIAC were to likewise rely on the concept of a “global battlefield”.

It is posited that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL, but that the threat he or she poses should rather be dealt with under the rules governing the use of force in law enforcement.<sup>145</sup> (See further below for the exception.) The rules governing the use of lethal force in law enforcement under human rights law – which would, of course, also be applicable to possible drone targeting outside situations of armed conflict – would merit a separate examination. Given that such an analysis is outside the scope of this text, only the most basic provisions will be noted. It is important to recall for the purpose of this discussion that human rights law does not prohibit the use of lethal force in law enforcement, but provides that it may be employed only as a last resort, when other means are ineffective or without promise of achieving the intended aim of a law enforcement operation.<sup>146</sup> Lethal force will be allowed if it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life.<sup>147</sup> The use of lethal force is also subject to the human rights requirement of proportionality, which, as noted above, differs from the principle of proportionality applicable in the conduct of hostilities under IHL.<sup>148</sup> In effect, the application of the relevant rules on the use of force in law enforcement would circumscribe both the circumstances in which lethal force could lawfully be used, as well as the way in which it would have to

144 For example, the European Union and its member States have consistently stressed a human rights (i.e., criminal justice) approach to the fight against terrorism (which includes persons associated with organized non-State armed groups designated as “terrorist”), without mention in EU documents or in joint statements with the US of a “global war on terrorism” or of a “global battlefield”. For the EU approach, see, e.g., EU Council Secretariat, *The European Union and the Fight Against Terrorism*, Factsheet, Brussels, 2 October 2009, available at: [www.consilium.europa.eu/uedocs/cmsUpload/Factsheet-fight%20against%20terrorism%20091002.EN.revised.PDF](http://www.consilium.europa.eu/uedocs/cmsUpload/Factsheet-fight%20against%20terrorism%20091002.EN.revised.PDF). See also *Joint Statement*, EU–US Summit, Brussels, 140326/02, 26 March 2014, para. 13, available at: [www.eas.europa.eu/statements/docs/2014/140326\\_02\\_en.pdf](http://www.eas.europa.eu/statements/docs/2014/140326_02_en.pdf). “We cooperate against terrorism in accordance with respect for human rights.”

145 ICCPR, Art. 6; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990 (BPUFF), available at: [www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx). If in this scenario the non-belligerent State did not consent to the use of force in its territory, a separate IAC between the two States will also be deemed to exist as a matter of law.

146 BPUFF, Principle 9.

147 *Ibid.*

148 N. Lubell, above note 81, p. 745.

be planned and carried out. Drone strikes in the territory of a non-belligerent State would thus be legally justifiable only in very exceptional circumstances.

Reliance on the rules governing the use of force in law enforcement in the scenario being examined would also be more appropriate as a matter of policy. A non-belligerent State is by definition one that does not take part in an armed conflict being waged among others. As a result, the rules governing the possible use of lethal force in its territory by a third State pursuing a specific person located there in relation to a territorially removed NIAC should not be those of IHL. The application of law enforcement rules would be more protective of the general population in those circumstances than IHL norms on the conduct of hostilities (designed for the specific reality of armed conflict), as there is no armed conflict in the non-belligerent State. The employment of IHL conduct of hostilities rules could lawfully entail consequences in terms of harm to civilians and civilian objects in the non-belligerent territory – i.e., allow for “collateral damage” – that the utilization of the rules on law enforcement could not.

It may also be pointed out that reliance on other bodies of international law to essentially “counterbalance” the effects of a territorially expansive view of IHL applicability in the territory of a non-belligerent State – on which proponents of the geographically unlimited approach put emphasis – is of little comfort. It has already been mentioned that the law of neutrality will not apply *de jure* to the scenario at hand. As regards the possibly constraining impact of the *jus ad bellum*, it would appear that this body of norms is being increasingly interpreted by some States and experts in ways that are making it easier for third States to use force extraterritorially, particularly against non-State actors. As for the restraining influence of the law on State responsibility, it must be recalled that its role is not the direct prevention of any particular conduct, but to possibly establish that the conduct was unlawful – after the fact.

What has just been said above should not, however, be understood to mean that IHL applicability can never be extended to the territory of a non-belligerent State. For example, it has been pointed out in relation to an ongoing NIAC that:

The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the warring parties move into the territory of another – usually neighbouring – state and continue hostilities from there. IHL does not apply to the territory of a third state simply because one or more members of the armed forces of a warring party are physically located on the territory of that third state.<sup>149</sup>

Pursuant to another, similar, view: “IHL also governs operations in States not party to the conflict when the intensity and organization criteria are satisfied within that State during a conflict between an organized armed group and another State’s forces.”<sup>150</sup> It is submitted, in keeping with the gist of these opinions, that IHL would begin to apply in the territory of a non-belligerent State if and when the conditions

149 Netherlands Advisory Committee Report, above note 29, p. 3.

150 M. Schmitt, above note 49, p. 18.

outlined at the beginning of this text necessary to establish the factual existence of a separate NIAC in such a territory have been fulfilled. In other words, if persons located in a non-belligerent State acquire the requisite level of organization to constitute a non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, that situation could be classified as a NIAC and IHL rules on the conduct of hostilities between the parties would come into play. The relationship under IHL of the two States would also need to be determined in this case, based on the rules related to the classification of armed conflicts outlined previously.

The scenarios related to the possible extension of IHL applicability to the territory of a non-belligerent State relied on above are not the only ones that could be envisaged.<sup>151</sup> They have been provided, as already mentioned, to serve as the backdrop for a framework reading of some of the salient points of the law. In this context it may be added that the legal interpretation of any particular scenario will not only be heavily fact-specific, but will inevitably require dealing with a set of very complex facts. The application of other relevant bodies of international law, as well as of domestic law, will make a careful legal assessment in any specific case all the more challenging.

## Closing remarks

The increasing use of drone technology in situations of armed conflict has posed, and is likely to continue to pose, a host of legal and other questions. IHL can only provide answers to the queries to which it was designed to respond, which do not include the political, policy, moral and other implications of the employment of armed drones – issues that undoubtedly also warrant serious consideration.

The *jus in bello* is able to provide guidance on many of the legal queries being raised with a fair degree of certainty, while others remain the subject of heated debate. It has been submitted that drones are a weapon platform that is not prohibited by any specific rule of IHL and that there is likewise nothing inherent to the technology itself that would make operators unable to respect the relevant IHL norms. While the classification of a situation of violence presents factual and legal challenges, once an armed conflict has been determined to exist, IHL rules, including those on the conduct of hostilities, will apply. Drone operators must observe these provisions, under which only military objectives

151 Two specific issues have been flagged in this regard. The first is the legal regime that would be applicable to the possible use of force against bases established by a non-State armed group in the territory of a non-belligerent State for training and logistical purposes in relation to an ongoing NIAC. See M. Schmitt, above note 49, p. 17. It is submitted that the same question should also be posed with respect to the legal regime that would be applicable to the targeting of the military bases of States located in non-belligerent territory from which military operations are conducted in relation to an ongoing NIAC. The second issue is the legal regime that would be applicable to cyber-attacks launched by and against non-State armed groups from and through non-belligerent territory. Both questions will clearly require further examination as State practice evolves.

may be lawfully attacked, and which also require the application of other relevant IHL rules, such as proportionality and precautions in attack. The issue of who may be lawfully targeted in armed conflict remains controversial, but a specific legal reading of how to interpret the notion of direct participation in hostilities has been summarized in this text. The greatest difference in opinions currently centres on the applicability of IHL targeting rules to persons located in the territory of a non-belligerent State, as outlined above. This is an ongoing legal and policy discussion which is likely to continue, and in which positions are likely to evolve as the possible factual scenarios become more fully evident over time.

# A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights

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## **Abstract**

*This article briefly overviews some of the current and future challenges to NATO legal interoperability arising from the relationship between international humanitarian law (IHL) and international human rights law generally and between IHL and the European Convention on Human Rights in particular.*

**Keywords:** interrelationship between IHL and IHRL, interrelationship between IHL and the ECHR, legal interoperability, NATO, *lex specialis*.



\* The views contained in this paper are personal and not necessarily reflective of the Canadian Armed Forces.

The most challenging contemporary legal interoperability issues for any coalition operation taking place in armed conflict often turn on the interplay between international humanitarian law (IHL) and international human rights law (IHRL).<sup>1</sup> The North Atlantic Treaty Organization (NATO) is no different in this regard. The legal relationship between IHL obligations and obligations under the European Convention on Human Rights (ECHR) is a real challenge for NATO legal interoperability, and will become even more so in the future.

Generally speaking, legal interoperability of NATO Member States has historically been possible. NATO's doctrine and use of force frameworks for operations occurring in the context of armed conflict have been primarily shaped by IHL. However, there is a real and currently emerging potential for the transatlantic link of legal interoperability between North American and European NATO Member States to be strained or severed, and for divergence among NATO's European members, due to the influence of litigation arising from the European Court of Human Rights (ECtHR). This litigation, in turn, is redefining, and has the potential to further redefine, NATO's use of force doctrine and Rules of Engagement (ROE), targeting and detention frameworks. It also has the potential to impact on how NATO Member States, as a matter of law and policy, view the overall interrelationship between IHL and IHRL.

Should NATO Member States eventually diverge on whether the use of force frameworks are to be defined primarily by a law enforcement paradigm (regulated by IHRL generally and the ECHR specifically) or by a war-fighting ("conduct of hostilities") paradigm regulated by IHL, it would be difficult to say that NATO would be legally interoperable in any meaningful sense. The two paradigms, while sharing much overlap, are different in fundamental ways. As an example, the rules for applying kinetic force to, and detaining, members of an opposing party to an armed conflict are very different under the IHL and IHRL frameworks. Under IHL, members of an opposing force can, generally speaking, be killed based on status/function, while under an IHRL framework, force can only be used when absolutely necessary to preserve life or prevent serious injury. Under IHL, members of an opposing force may be administratively detained without criminal charges (e.g., the prisoners-of-war regime), while such charges would be required under an IHRL framework.

These differences in approaches between the IHL and IHRL frameworks may pose several challenges for interoperability between NATO Member States. First, if commanders of different NATO Member States are operating under different legal paradigms, subordinate forces may be led to operate either under a more restrictive paradigm or under a more permissive one, thus exposing, politically and legally, higher-level commanders. Some may say that the simple

1 The International Committee of the Red Cross (ICRC) is taking the initiative on promoting discussion on this topic and has created a useful resource that introduces some of the complexities. See ICRC, *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Enforcement Law Paradigms*, October 2013, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf) (all internet references were accessed in October 2014).

solution to managing this is for the North Atlantic Council to authorize operations with broad use of force frameworks that can then be caveated (or restricted) by Member States. If this is the way of the future, I would not consider NATO to be “legally interoperable” because distinct legal regimes would be used by different Member States. This would no longer be a situation of all Member States agreeing to apply an IHL framework but allowing for differences within it, for example, on the use of anti-personnel mines. Rather, this new reality would involve Member States regulating the use of force in two very distinct ways. Second, the real impact of this divergence would result in some Member States taking on more war-fighting operations than others, and potentially suffering greater casualties. A third consequence of this—and this has already unfolded in Afghanistan and Libya, though perhaps not solely for legal reasons—is that NATO Member States may choose to participate in the NATO mission but also, concurrently, act on a national basis, in a separate mission within the same geographic area of operations.

This paper will briefly identify some of the potential “wedge” issues arising from IHL’s interrelationship with IHRL generally, and in particular in light of the ECtHR’s case law, which may impact on NATO’s legal interoperability today and in the future.

## The NATO Context

It is important to understand the NATO context.<sup>2</sup> First, the Alliance is comprised of twenty-eight *sovereign* nations, two of which (the United States and Canada) are not, and cannot become, parties to the ECHR. Second, an understanding of the central role played by “consensus” is crucial. Any NATO decision to participate in a mission requires the consensus of all Member States. Likewise, all Operational Plans (OPLANs), which define the geographic scope and operational parameters of an operation including tasks, and all use of force authorizations in ROE, as well as targeting frameworks, require consensus. Consequently, under NATO doctrine relating to planning, operational plan development, ROE and targeting, there are expressly defined processes and procedural moments that allow States to break consensus, or to limit their involvement, because of legal, policy or operational reasons, through the use of “restrictions” or “caveats”. If a State blocks consensus on the mission as a whole, the ROE or the targeting framework, the operation will not proceed. A State may take the position that a mission is politically or legally questionable and yet not block consensus, but then instead

2 For a few analytical pieces on the NATO perspective, see Peter M. Olson, “Perspectives on IHL and Multinational Forces: A NATO Perspective on Applicability and Application of IHL to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891–892, pp. 653–657; Marten Zwanenburg, “International Humanitarian Law Interoperability in Multinational Operations”, *International Review of the Red Cross*, Vol. 94, No. 891–892, pp. 681–705; see also Peter M. Olson, “Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: A NATO Perspective”, in Erika De Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria University Law Press, Pretoria, 2014, p. 227.

may choose not to participate in the mission (as was the case with Germany during the Kosovo and Libya air campaign). A State may choose not to participate but may, at the same time, insist on significant restrictions on the ways in which the other participating Member States may use force (such as a NATO Member State deciding not to participate in the NATO Libya campaign, but not blocking consensus on going forward with the mission, while insisting on a zero civilian casualty cut-off requirement in order for targets to be engaged – in other words, to abort targeting a military objective if it may lead to a single civilian death).

For those States that do choose to participate in an operation, doctrinally created moments allow sovereign legal approaches to be exercised in a number of ways. These include caveats or restrictions on where, when and how their forces will be employed (for instance, in geographic areas where there are no ongoing hostilities), caveats limiting how force will be used within ROE (for instance, restricted to a law enforcement rather than a conduct of hostilities paradigm, as was the case in Afghanistan), restrictions on targeting frameworks (such as the requirement of zero civilian casualties in Libya, even though IHL would allow for incidental loss of life during a proportionate strike) and exercising the “red card” in order to refuse an assigned task or target (for instance, refusing to target a drug facility in Afghanistan or refusing to “block” an airfield in Kosovo).

Additionally, while usually giving NATO commanders operational control (within the constraints set by caveats and other restrictions), contributing Member States retain operational command. Thus, NATO commanders have little (if any) administrative or disciplinary power over their “subordinates”, since accountability, compensation to civilians adversely affected by operations and substantial investigative powers often remain with the contributing State. This can be incredibly challenging for a NATO commander at the best of times; it is even more challenging if the mission is dynamic, such as the one in Afghanistan, where the situation transformed from an international armed conflict (IAC) to a non-international armed conflict (NIAC) while a series of authorizing United Nations (UN) Security Council resolutions continually redefined the mission’s scope and focus. The complexity increases if Member States have divergent legal frameworks, with some working within an IHL framework while others work within an IHRL framework. This is significant, as it would directly impact on the tasks that could be assigned and the way in which national forces could be employed.

Ultimately, this legal divergence can create significant operational interoperability issues, which may in turn create policy tensions – particularly if the divergence leads to an unequal distribution of risk between national forces. Lastly, while the NATO ROE and targeting doctrines display a very traditional IHL, “*lex specialis*” approach, NATO does not have a doctrine *per se* that allows its Member States to collectively define the relationship between IHL and IHRL/ECHR.<sup>3</sup> There is a potential, therefore, for national legal approaches to diverge, including those expressly or implicitly related to IHL and IHRL/ECHR interaction.

3 Editor’s Note: The expression “IHRL/ECHR” is used by the author to point the reader to the *specific* tension that ECHR-related case law may create for the interrelationship between IHL and IHRL.

Consequently, practitioners have remarked that:

given this general context, NATO addresses legal questions, including issues of the relationship of IHL and IHRL pragmatically rather than doctrinally ... [R]ather than requiring adherence to a *single common body of law*, the Alliance's expectation is that all states participating in a NATO or NATO-led operation will act lawfully within the legal framework applicable to them.<sup>4</sup>

There is no NATO doctrinal definition of “legal interoperability”. If legal interoperability is defined simply as the ability of NATO States to work together in an operation, then NATO will always be legally interoperable.<sup>5</sup> Within this understanding of the term, NATO would be legally interoperable even where one Member State views the operation as occurring within a situation of armed conflict, with the use of force being regulated primarily by IHL, while another views the situation as not being one of armed conflict, with IHRL or the ECHR regulating the framework for the use of force. While the ability of each NATO Member State to participate in a mission with its own national legal approach is crucial given that NATO is a political organization, a significant divergence of legal frameworks, or a disagreement on the applicable legal paradigm regulating the use of force (law enforcement based on an IHRL framework versus war-fighting based on an IHL framework), will hinder operational interoperability as there will be a divergence among nations with regard to what they can and cannot do, thus impacting on how a commander can employ national forces and assign tasks.

If legal interoperability is supposed to mean that all participating Member States have a shared agreement on the applicable international legal regime (allowing for some variations in national interpretations) and its relationship with other regimes, then legal interoperability will *not* exist if some Member States view the operation as legally requiring a law enforcement paradigm while others view it as a war-fighting operation.

For analytical reasons (and hopefully to provoke debate), this article defines legal interoperability as the acquisition of a generally shared international legal regime or paradigm, as this allows for a critical analysis to focus, compare and identify potential areas of legal divergences and strains and, in turn, assess, for the operational commander, the impact these divergences may have on operational interoperability. In other words, I would consider NATO to be legally interoperable if all Member States were relying on the same legal regime, such as IHL, to regulate the use of force during armed conflicts and shape OPLAN, ROE and targeting framework development, despite the fact that some Member States may not have ratified the same weapons treaties (such as the Ottawa Convention). I would *not* consider NATO to be legally interoperable, in any meaningful sense, if one group of Member States was conducting kinetic

4 P. Olson, “Convergence and Conflicts”, above note 2, p. 234 (emphasis added).

5 M. Zwanenburg, above note 2.

operations based on one legal regime, such as IHL, while another group was relying on IHRL (and ECHR obligations in particular).

Although there is significant practical operational overlap between IHL and IHRL (see section below), the potential divergence between the two regimes is also operationally noteworthy when one considers the key differences between the two paradigms.<sup>6</sup> Unlike IHRL, IHL allows for the following: targeting based on status/function (e.g., whether as a combatant or as a member of an organized armed group party to an armed conflict who carries out a continuous combat function), incidental loss of civilian life (when a strike is compliant with IHL requirements of proportionality and precautions), administrative or preventive detention without criminal charge and trial, different triggers for investigations and their procedural requirements, different definitions of necessity, proportionality and precautions, and so on. While some of these issues may be reconciled by application of the *lex specialis* doctrine or other related techniques, there is debate in this area (see the subsections below on *lex specialis*). When one folds the application of the ECHR into the discussion, the issues of interrelationship and interoperability become even more complex, given the ECtHR's inability to date, for various reasons, to consider the relationship between the ECHR and IHL when assessing the legality of military actions in situations that could have been expressly qualified as armed conflict or occupation.<sup>7</sup> As outlined below, there are many potential "wedge" issues where NATO Member States may diverge on the IHL and IHRL/ECHR relationship, which may impact legal interoperability and consequently the practical ability to be interoperable.

## The relationship between IHL and IHRL

Issues on the interrelationship between IHL and IHRL/ECHR are complex,<sup>8</sup> even within government ministries, let alone among allies. There are a number of

- 6 For a helpful discussion on the differences between the two regimes, see ICRC, above note 1, pp. 4–9.
- 7 ECtHR, *Georgia v. Russia II*, Case No. 38263/08, Decision (Former Fifth Section), 13 December 2011, and ECtHR, *Hassan v. United Kingdom*, Case No. 29750/09, heard 11 December 2013, may finally address some of these issues and, for the first time, include IHL into their analysis. These decisions will be a key moment on the future interrelationship (or lack thereof) between IHL and the ECHR, and possibly the approach that European NATO Member States take in the future when creating use of force frameworks within NATO.
- 8 For an introduction to the complexity, debates and trends on this topic, see the following sampling: Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, 2000, p. 239; ICRC, above note 1; Cordula Droegge, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40, No. 2, 2007, p. 310; Noam Lubell, "Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate", *Israel Law Review*, Vol. 40, No. 2, 2007, p. 648; Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship", *Israel Law Review*, Vol. 40, 2007, p. 356; Orna Ben-Naftali, "Introduction: International Humanitarian Law and International Human Rights Law—Pas de Deux", in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 3; Marko Milanovic, "A Norm Conflict Perspective on the

current or potentially emerging issues that will challenge NATO's legal interoperability even further in the future. These include, but are by no means limited to, extraterritorial application of relevant IHRL treaties, redefining the temporal and geographical scopes of application, as well as the intensity threshold of armed conflict. These challenges are also linked to other issues such as limiting the application of IHL to "hot" battlefields, the scope and ambit of the *lex specialis* doctrine and methodology, reinterpretation of IHL principles and concepts with reference to IHRL, and IHRL institutional encroachment into areas of IHL. The section below will look briefly at each of these in turn.

## The extraterritorial application of relevant IHRL treaties

An obvious and fundamental but sometimes overlooked threshold issue *prior* to any consideration of the interrelationship between IHL and IHRL generally is whether all NATO Member States agree that key IHRL treaties such as the International Covenant on Civil and Political Rights (ICCPR) apply extraterritorially to the State's conduct of military operations.<sup>9</sup> As the International Committee of the Red Cross (ICRC) has noted in its report *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, "not all States accept the extraterritorial application of human rights law".<sup>10</sup> While the United States does not concede the extraterritorial application of the ICCPR, Canadian case law has accepted extraterritorial application in "control

Relationship between International Humanitarian Law and Human Rights Law", *Journal of Conflict and Security Law*, Vol. 14, 2009, p. 459; Marko Milanovic, "Norm Conflict in International Law: Whither Human Rights?", *Duke Journal of Comparative & International Law*, Vol. 20, 2009/10, p. 69; Françoise Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 547; Oona Hathaway *et al.*, "Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law", *Minnesota Law Review*, Vol. 96, 2011–12, p. 1883; Daniel Bethlehem, "The Relationship between International Humanitarian Law and International Human Rights Law and the Application of International Human Rights Law in Armed Conflict", *Cambridge Journal of International and Comparative Law*, Vol. 2, No. 2, 2013, p. 180; John Bellinger III and Vijay Padmanabhan, "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law", *American Journal of International Law*, Vol. 105, 2011, p. 201; Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", *American Journal of International Law*, Vol. 98, No. 1, 2004, p. 1; Kenneth Watkin, "Use of Force during Occupation: Law Enforcement and Conduct of Hostilities", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 267; Geoffrey Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict", *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 52; Michelle Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict", *Military Law Review*, Vol. 194, 2007, p. 1; Michael Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, Vol. 99, 2005, p. 119; Brian Bill, "Human Rights: Time for Greater Judge Advocate Understanding", *Army Lawyer*, Vol. 54, 2010, p. 54.

9 F. Hampson, above note 8, p. 566, noting this often overlooked point: "Clearly, the importance of the relationship between IHL and human rights law is very significantly reduced if the latter is not applicable extraterritorially."

10 ICRC, above note 1, p. 5.

over territory” situations that equate to situations of occupation.<sup>11</sup> On the other hand, Canadian courts considered and rejected the “State agent authority” or “control over the person” tests, as adopted in the ECtHR’s post-*Bankovic*<sup>12</sup> decision, *Issa v. Turkey*,<sup>13</sup> and in the Human Rights Committee’s General Comment 31.<sup>14</sup> The key point to be made for the purposes of this article is that there is a transatlantic legal interoperability divide between NATO’s North American States and ECHR States, who are bound by the ECtHR’s “State agent authority” or “control over the person” test as a trigger for a broader extraterritorial application of IHRL treaty obligations.

### A sliding scale to limit IHL to the “hot battlefield”

Some commentators have suggested that the geographical scope of IHL should be narrowed within the context of armed conflict. When government forces reach a certain “sliding scale” of control over territory and intensity of violence, there should be a paradigm shift from IHL to IHRL. IHL should regulate kinetic force only within the geography of the “hot battlefield”. In areas outside the “hot battlefield” where territory is not as contested, there should be an increased reliance on the law enforcement paradigm, defined primarily by IHRL, to regulate the use of force.

From a NATO perspective, there may be a policy attraction to this line of argument by the contributing Member States who do not wish to war-fight but do wish to deploy to a NATO-defined geographical area of operations. So in Afghanistan, for instance, where there are regional differences in the intensity of violence, some Member States may prefer to deploy in northern Afghanistan rather than the more active Helmand or Kandahar provinces. Variations on this theme sometimes make a distinction between NIAC as defined by Additional Protocol II and NIAC “of lesser intensity”, with the latter being predominately regulated by IHRL. Some scholars go further and suggest that all NIACs are

11 For a review of jurisprudence on extraterritorial application, including the positions of the United States and Canada, see also M. Dennis, above note 8; Michael Dennis, “Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict”, *Israel Law Review*, Vol. 40, p. 453; Blaise Cathcart, “The Role of the Legal Advisor in the Canadian Armed Forces Addressing International Humanitarian Law and International Human Rights Law in Military Operations”, in E. De Wet and J. Kleffner (eds), above note 2; Federal Court of Canada (Trial Division), *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Decisions of 25 January and 12 March 2008. These cases were upheld on appeal to the Federal Court of Appeal and leave to appeal was denied by the Supreme Court of Canada.

12 ECtHR, *Bankovic and Others v. Belgium and Others*, Case No. 52207/99, Decision (Grand Chamber), 12 December 2001.

13 ECtHR, *Issa v. Turkey*, Case No. 31821/96, Judgment (Second Section Chamber), 16 November 2004.

14 UN Human Rights Council (HRC), General Comment 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10, articulates the jurisdictional scope of the ICCPR by noting that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party .... This principle applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances.”

regulated primarily by IHRL.<sup>15</sup> Some of the factors advanced to support this approach are (with the exception of Additional Protocol II, some weapons conventions and Article 3 common to the four Geneva Conventions): the absence of treaty-based IHL applicable to a NIAC, the absence of the “extraterritorial issue” given that IHRL would apply within the State where the NIAC is occurring, a transference of law enforcement in occupation situations by analogy to NIAC scenarios, and the ECtHR’s jurisprudence arising from the Turkey and Chechnya cases.<sup>16</sup> Various aspects of this approach have received critical comment. First, the analysis fails to consider countries like Canada and the United States, which may have alternative views on the extraterritoriality of IHRL treaty law than another country participating in a NIAC. Second, the sliding scale has been seen as practically too complex for soldiers on the ground to implement.<sup>17</sup> Lastly, with reference to the argument that there is an absence of IHL in NIAC situations, there is a failure to consider the existence of customary IHL which proves that the “gap” left by limited NIAC treaty law is not as large as proposed. The ICRC, citing the existence of customary IHL, has rejected the position that force used during a NIAC is to be regulated primarily by IHRL due to the absence of applicable customary IHL.<sup>18</sup> Similarly, during an ICRC roundtable on the use of force in 2011, the scenario of a fighter in an organized armed group sleeping at home in a part of a territory controlled by the government, during an ongoing armed conflict, was discussed in relation to in/outside the conflict zone, intensity of violence and degree of control; a small majority of experts maintained that an IHL, not IHRL, paradigm would apply.<sup>19</sup>

### *Lex specialis* and its methodological challenges

Leaving aside issues of extraterritorial application, most military lawyers would take the position that IHL regulates the use of force during both IACs and NIACs and would invoke the *lex specialis* doctrine when discussing the interrelationship between IHL and IHRL, while, perhaps, quoting the famous paragraph 25 from the International Court of Justice’s (ICJ) *Nuclear Weapons* Advisory Opinion.<sup>20</sup>

15 William Abresch, “A Human Rights Law of Internal Armed Conflicts: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 746.

16 For an exploration of these types of issues, see Marco Sassòli and Laura Olson, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 599; W. Abresch, above note 15; Louise Doswald-Beck, “The Right to Life in Armed Conflicts: Does International Humanitarian Law Provide All the Answers?”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 881; ICRC, above note 1, p. 16. For an example of a Turkish and a Russian case where the ECtHR chose not to explore IHL on its own initiative, see ECtHR, *Ergi v. Turkey*, 32 EHRR 18, 2001, and *Isayeva and Others v. Russia (No.2)*, 41 EHRR 38, 2005.

17 ICRC, above note 1, p. 16.

18 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2011, p. 20.

19 ICRC, above note 1, p. 16.

20 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25: “In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely

As noted above, NATO does not have a doctrine that defines the interrelationship between the two bodies of law, nor is there a doctrinal elaboration on how the *lex specialis* methodology would guide the application of the doctrine in practical operational scenarios where IHL and IHRL may possibly overlap.<sup>21</sup> However, NATO's ROEs and targeting doctrine do display a traditional *lex specialis* approach. Questions of potential debate include: does the *lex specialis* doctrine mean that IHL displaces IHRL as a legal regime, or that it simply displaces a particular norm in certain situations, or only when there is conflict between the regimes or norms in areas where the use of force during an armed conflict is regulated? Does it apply to situations not directly involving the use of force (to procedural rights arising from detention in NIAC, to procedural triggers and requirements for investigations, to privacy and mobility rights during cordon and searches and freedom of movement operations, etc.)? How is a "conflict" defined to trigger the application of the doctrine – only when two express norms apply to the same situation, or when a more specific norm operates in the area covered by the other regime despite the fact that the latter regime contains no specific rule, thus creating a "gap" or "lacuna"? The questions go on. NATO Member States have different responses to these questions – there is no shared approach.

A good first step, to move beyond the level of rhetoric that often divides and polarizes the debate, is to recognize that there are indeed significant areas which are regulated by only one particular norm, and importantly many situations where there is overlap but where IHL and IHRL produce the same operational result. One such situation is where there are express IHL provisions which incorporate IHRL norms or expressly allow for IHRL norms to apply – for instance, the prohibition on torture

the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life ... is to be considered an arbitrary deprivation of life ... can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

21 F. Hampson, above note 8, p. 559: "Whilst the ICJ may not have used the most appropriate formulation, it is clear in general terms what the Court meant. It appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times, by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law. This sounds straightforward, but does not in fact explain how the *lex specialis* doctrine should work in practice. There are various possibilities." Hampson goes on to list several approaches. A similar theme – lack of methodology – has been identified by Sir Daniel Bethlehem QC, the former UK Foreign Office legal adviser, in his piece "The Relationship between International Humanitarian Law and International Human Rights Law and the Application of International Human Rights Law in Armed Conflict", above note 8, p. 193. He concludes by noting that "the anxiety on this area is largely driven by warranted concern over the methodological shortcomings of courts and other bodies seized of these issues, particularly on the human rights side of the equation." J. Bellinger III (former United States State Department Legal Advisor) and V. Padmanabhan, above note 8, also comment: "When the rules offered by both bodies of law are in conflict, or when one body of law has deliberately left discretion to states, a methodology is needed to prioritize between the rules" (p. 210). See also Stephen Pomper, "Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead", *International Law Studies Series*, US Naval War College, Vol. 85, 2009, p. 529, who reviews American and Canadian litigation that considered European jurisprudence, and notes that "States purporting to apply the law of armed conflict and human rights law conjointly to extraterritorial armed conflicts did not appear to have a clear understanding about how to balance certain fundamental tensions between the two bodies of law". For an overview of the debate surrounding *lex specialis*, see C. Droege, above note 8, p. 338.

and ill-treatment of persons detained, or the intentional targeting of civilians not directly participating in hostilities, or the fundamental guarantees found in Article 75 of Additional Protocol I. This limits the potential scope of conflict between norms within the two bodies of law when issues are confronted in an operational setting. This has been highlighted by both Bethlehem and Watkin, both practitioners of considerable experience.<sup>22</sup> Only once this first step has been taken can norm conflict be identified. A number of potentially practical models that identify IHL as the primary body of law regulating kinetic force during armed conflicts have been offered which could frame discussions on establishing a clear methodology.<sup>23</sup>

The complexities surrounding the *lex specialis* doctrine should not, however, be grounds for jettisoning the doctrine altogether. This is an important point that is often overlooked in the debate between those who are entrenched in the different “camps”. The potential area of legal interoperability divergence within NATO is, generally speaking, not whether *lex specialis* applies but rather the methodology used to implement the doctrine. It appears that the ICRC has rejected a call to abandon the doctrine, and this position would be consistent with the practice of most, if not all, NATO States. The ICRC has noted: “While the meaning and even the utility of the doctrine of *lex specialis* have been called into question, it is believed that this interpretative tool remains indispensable for determining the interplay between IHL and human rights law.”<sup>24</sup>

### Abandoning *lex specialis*?

As noted, there is a growing body of literature that argues for the abandonment of the *lex specialis* doctrine altogether.<sup>25</sup> A traditional starting point is to note that the ICJ’s Advisory Opinion on the *Wall* case<sup>26</sup> applied a new test for defining the

22 D. Bethlehem, above note 8; K. Watkin, “Use of Force during Occupation”, above note 8. Consideration should also be given to the precision with which the application of *lex specialis* is approached by M. Milanovic, “A Norm Conflict Perspective”, above note 8.

23 In addition to Bethlehem and Watkin, *ibid.*, see, e.g., G. Corn, above note 8; F. Hampson, above note 8; O. Hathaway *et al.*, above note 8.

24 ICRC, above note 18, p. 14. See also D. Bethlehem, above note 8, p. 186, where he discusses the continuing utility of the *Nuclear Weapons* Advisory Opinion, stating that “the conclusions flowing from the *Nuclear Weapons* Advisory Opinion are both more considered and more useful, and better attuned to the complexity of these issues, than those flowing from the more recent *Wall* Advisory Opinion”; Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report—The Turkel Commission: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, p. 69.

25 See, as an example, Jean Paul Costa and Michael O’Boyle, “The European Court of Human Rights and International Humanitarian Law”, in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *The European Convention on Human Rights: A Living Instrument—Essays in Honour of Christos L. Rozakis*, Bruylant, Brussels, 2011, pp. 107, 113–114.

26 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106: “As regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both branches of international law.”

relationship between the two bodies of law than that found in its *Nuclear Weapons* Advisory Opinion, and in turn *lex specialis* was not even referenced in the *DRC v. Uganda* judgment.<sup>27</sup> In short, the argument goes, the ICJ no longer follows the *lex specialis* doctrine when assessing the relationship between the two bodies of law.<sup>28</sup> This line of argument ignores the fact that the *Wall* case dealt with a situation of occupation while the *Nuclear Weapons* Advisory Opinion was addressing the use of force and remains a useful framework in that regard.<sup>29</sup>

In the trilogy of ICJ decisions, the “*DRC v. Uganda* interpretation” is often interwoven by those who wish to abandon the *lex specialis* doctrine with a deconstruction of that doctrine in a way that demonstrates its inapplicability to resolve norm conflict.<sup>30</sup> Some commentators have argued that the *lex specialis* doctrine “appears to add confusion rather than solve it”, and is perhaps an “inept approach”; they assert that the doctrine suffers from a “vagueness and ambiguity that too easily lends itself to legal manipulation”,<sup>31</sup> and should be “abandoned as a sort of magical, two-worded explanation of that relationship between IHL and IHRL as it confuses far more than it clarifies”.<sup>32</sup> Consequently, as the argument goes, *lex specialis* is abandoned in one form or another, and alternative models to define the relationship are then proposed.<sup>33</sup>

Prud’homme,<sup>34</sup> relying on Lindroos<sup>35</sup> and Koskeniemi,<sup>36</sup> notes the ICJ’s methodological shortcomings with regard to the *lex specialis* doctrine, and covers the various ways in which it has subsequently been interpreted. She notes that *lex specialis* is best used to resolve norm conflicts within a treaty or a domestic legal system but that its utility is questionable within the context of international law, which is fragmented and unorganized. Prior to embarking on a proposed set of practical alternative models, she notes the vagueness of the principle and its inability to “provide any guidance to set apart the *lex specialis* from the *lex generalis*” and “articulate an agreeable and legally sound theoretical model for the parallel application” of the two bodies of law.<sup>37</sup> Others, too, have proposed

27 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 215–221.

28 See above note 24.

29 This would be significant for countries like Canada, which participate, for example, in a NIAC in Afghanistan, and which concede extraterritorial application of human rights for situations of occupation but not for “control over the person”. While the ICCPR would apply to the State of Afghanistan in Afghanistan, it would not do so for Canada.

30 For an overview, see William Schabass, “Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and The Conundrum of Jus Ad Bellum”, *Israel Law Review*, Vol. 40, No. 2, 2007, p. 592.

31 N. Lubell, above note 8, pp. 654–656.

32 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 462.

33 See N. Lubell, above note 8; N. Prud’homme, above note 8.

34 N. Prud’homme, above note 8.

35 Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis”, *Nordic Journal of International Law*, Vol. 74, No. 1, 2005, p. 27.

36 Martti Koskeniemi, “Study on the Function and Scope of the Lex Specialis Rule and Question of ‘Self-Contained Regimes’”, International Law Commission, UN Doc. ILC (LVI)/SG/FIL/CRD.1, 2004.

37 N. Prud’homme, above note 8, pp. 382, 384.

alternative models after dismantling the doctrine or significantly restricting its application.<sup>38</sup>

While lawyers from governments who retain *lex specialis* as a viable legal doctrine or principle may wish to set aside this “abandon *lex specialis*” school of thought as an academic exercise with no relevance in the “real world”, they should note that it is being incorporated into litigation strategies and is being considered by courts which are ruling, or will rule, on the legality of State action during military operations. Rather than simply entrench themselves into one camp or the other, it would be wise for government lawyers to look beyond the rhetoric and carefully examine not only the counter-arguments to the *lex specialis* doctrine but also the alternative models proposed. While many proposals would not be consistent with State practice or litigation positions, some proposals’ end results would be very similar to what a government lawyer might come up with – albeit by way of a very different line of reasoning.<sup>39</sup> Any models that champion or challenge a *lex specialis* approach must be scrutinized before determining their operational utility.

## Reinterpretation of IHL through IHRL

Another challenge to traditional IHL approaches arises from reinterpreting IHL norms in light of IHRL in a manner consistent with a law enforcement paradigm. This aspect of the “humanization of humanitarian law” is not a recent phenomenon. For some, this “project” has

a more radical purpose ... to shift the balance between effectiveness and humanitarianism ... in the direction of humanitarianism ... by using human rights norms to fill the gaps left unregulated or very sparsely regulated by IHL, ... and partly by trying to change some outcomes that in fact are determined by IHL by introducing human rights rules and arguments into the equation.<sup>40</sup>

In this vein, some limited aspects of the ICRC Customary Law Study,<sup>41</sup> the Israeli *Targeted Killings* case,<sup>42</sup> Chapter IX of the ICRC Direct Participation in Hostilities

38 In the seminal Volume 40 of the *Israel Law Review*, N. Lubell, above note 8, identifies a multitude of undefined terms that are used in the volume, such as “complementarity”, “cross fertilization”, “harmonization”, “parallel applicability”, “convergence” and “integration”.

39 At the time of writing, argument in the ECtHR case of *Hassan v. United Kingdom*, above note 7, has been concluded and a decision is pending. Hassan was captured by UK forces in Iraq, during the ongoing armed conflict, prior to occupation, and screened as a possible prisoner of war or a person falling within the scope of Geneva Convention IV who is subject to internment for imperative reasons of security. The UK government is arguing for the application of IHL as *lex specialis*, as the relevant body of law over the ECHR. A third-party brief filed by Noam Lubell and Françoise Hampson, on behalf of the Human Rights Centre of the University of Essex, challenged the usefulness of the *lex specialis* doctrine but did propose a model that asserts that there would only be an IHRL breach in areas of grounds for detention, the type of review mechanisms and the trigger for release if the relevant Geneva Convention III and IV provisions were breached.

40 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 460.

41 Jean Marie Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

42 Israeli High Court of Justice, *The Public Committee against Torture et al. v. The Government of Israel et al.*, HCJ (769/02), 13 December 2006.

Study,<sup>43</sup> International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence<sup>44</sup> and academic writings<sup>45</sup> are cited. Marten Zwanenburg has highlighted in a previous contribution to this journal a legal interoperability issue arising from divergent national IHL understandings of the concept of “military objective” within the context of NATO’s attempt to target drug-making facilities in Afghanistan.<sup>46</sup> This sort of IHL interpretative divergence may also occur if one nation adopts a “traditional” IHL approach to the concept of “intent” while another national commander and his legal adviser, perhaps acting as a higher-level target engagement authority, take an alternative view within the context of targeting.

## IHRL institutional encroachment into IHL

As Meron noted fourteen years ago, the “humanization of humanitarian law”, does not just involve the incorporation of IHRL principles and methodology into IHL concepts but also involves IHRL institutions and bodies expanding their ambit into areas concerning IHL compliance. The starting point for most justifications for IHRL “institutional encroachment” is that IHL lacks a sufficiently robust enforcement, investigative and/or accountability mechanism that also allows victims of IHL violations to obtain redress, or to initiate a legal action and receive compensation.<sup>47</sup> As has been noted:

[A]nother purpose of the IHL/IHRL project is the enforcement of IHL through human rights mechanisms. Thus, even if human rights substantially added nothing to IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced before political bodies, such as the Human Rights Council, or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the ICJ, the ECtHR, the UN treaty bodies or domestic courts.<sup>48</sup>

43 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009.

44 See Jens David Ohlin, “Targeting and the Concept of Intent”, *Michigan Journal of International Law*, Vol. 35, 2013, p. 79, where he considers a series of ICTY decisions (*Galic*, *Blaškić*, *Kordić*, *Strugar* and *Perišić*), arguing that the Court has “reinterpreted” and expanded the concept of intent to broaden it to include foreseeable civilian loss in targeting, thus conflating “distinction” and “proportionality”. Ohlin distinguishes between the civil law jurisdiction (or “European approach”) that is “nonplussed” by this development and the Anglo-American approach when assessing ICTY jurisprudence.

45 As an example, see Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, 2013, p. 819, where he argues that “in certain well-specified and narrow circumstances, the use of force should instead be governed by a least-restrictive-means analysis” and then introduces various scenarios, consistent with the capture versus kill debate, that are possibly subject to “restraints on the use of force”. See also Michael Schmitt, “Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’”, *European Journal of International Law*, Vol. 24, 2013, p. 855, and Goodman’s rejoinder in the same volume. An analysis of the capture versus kill debate and the struggle between IHL and IHRL approaches is presented in Jens Ohlin, “The Duty to Capture”, *Minnesota Law Review*, Vol. 97, 2013, p. 1268.

46 M. Zwanenburg, above note 2.

47 For an example of this justification see, J. P. Costa and M. O’Boyle, above note 25.

48 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 460.

This type of “lawfare” moment occurred between NATO and the Independent Commission of Inquiry into Libya (ICIL), which was created by a UN Human Rights Council (HRC) resolution. The HRC was created by General Assembly resolution to exclusively focus on IHRL, not IHL, violations.<sup>49</sup> Nowhere in the resolution was there a defined role for the HRC within the area of IHL. The ICIL was created, prior to NATO’s involvement in Libya, by an HRC resolution to “investigate all alleged violations of international human rights law”.<sup>50</sup> Security Council Resolution 1970 referred the situation in Libya to the prosecutor of the ICC on 26 February 2011.<sup>51</sup> Within this context, and possibly in the shadow of the HRC’s “Goldstone Report”,<sup>52</sup> the NATO legal adviser, in response to an ICIL request for information, cited the Commission’s limited mandate “to investigate alleged violations of international human rights law”, the referral to the ICC by the Security Council and the fact that NATO had already been in contact with the ICC.<sup>53</sup> The response by the ICIL noted that its mandate was created at a time when Libya was in “a formal state of peace” and consequently the mandate could not have referred to IHL, and that the commission interpreted its mandate in light of prevailing circumstances. After referring to its previously filed Interim Report that clearly showed its intention to examine NATO and IHL violations, the ICIL noted that “there were no objections to or comments in the Human Rights Council subsequent debates or separately from state delegations”.<sup>54</sup>

The ICIL, in its Final Report, also went beyond what was considered to be its mandate in other ways, not only by simply assessing the compliance of NATO with IHL but also by making assessments on whether NATO met its own internal targeting guideline of zero civilian casualties for each strike and issues of NATO compensation and investigations. While not finding any violations of IHL by NATO arising from its over 7,800 strikes – all with precision-guided munitions – it did identify a handful of cases which merited further investigation due to the absence of information. The ICIL also transferred its report to, and worked with, the ICC during its inquiry, showing the ability of an IHRL body to make institutional links with the ICC despite the absence of an express mandate to do so.<sup>55</sup>

49 UNGA Res. 60/251, 3 April 2006.

50 UNHRC Res. S-15/1, 25 February 2011.

51 UNSC Res. 1970, 26 February 2011.

52 See *Human Rights in Palestine and Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 15 September 2009, which triggered criticism for the way it misapplied IHL, a retraction by Goldstone, a subsequent UN report and the creation of the Turkel Commission by the government of Israel. See Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary”, *Yearbook of International Humanitarian Law*, Vol. 12, 2009, p. 347.

53 Letter from NATO Legal Adviser to ICIL, 20 December 2011. NATO subsequently provided detailed information on a number of strikes, and those letters are contained in Annex II of the ICIL’s Final Report, *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 2 March 2012. The letters sent by the ICIL to NATO are not included in the ICIL’s report.

54 Letter from ICIL to NATO Legal Advisor, 24 December, 2011.

55 This was the first, and perhaps last, IAC conducted with *only* precision-guided munitions (PGMs). Most IHRL and non-governmental organization bodies, when reviewing NATO’s actions, did not adjust their advocacy tactics in light of this historic development, and they probably missed an opportunity to shift the nature of the dialogue with NATO. Rather, they stuck to their traditional practice and focused on a few

This type of “mandate and IHRL institutional creep” can be expected to confront NATO in the future as well. The continued expansion into the domain of IHL by IHRL bodies, in the absence of State objection, is likely to continue.<sup>56</sup> The United States has been an exception to State acquiescence in this area.<sup>57</sup> The HRC in the past has been active in inquiring into IHL violations and will no doubt continue to be so. This will continue to be an issue for NATO and its Member States as future missions and scrutiny by IHRL bodies, including the HRC and ECtHR, arise.

The above paragraphs have briefly presented only some of the current IHL/IHRL issues confronting NATO Member States. These issues are complex and, in the absence of NATO doctrine on the interrelationship between IHL and IHRL, create legal and policy moments for divergent approaches and consequently an inability to maintain minimal levels of legal interoperability—a shared legal paradigm. Given the NATO requirement for consensus, this has the potential to produce mission parameters, OPLANs, ROE packages and targeting frameworks that are far more restrictive than some NATO partners would desire. Alternatively, Member States which maintain a more restrictive legal approach to the issues outlined above may not break consensus on an expansive operational framework but would insert various caveats that would limit their participation to fit their more restrictive legal frameworks. This will end in some Member States bearing a disproportionate war-fighting burden in terms of costs, risks and losses of equipment and personnel.

## The relationship between IHL and the ECHR

From a NATO perspective, the ECHR, as the key regional IHRL treaty, raises a *very* different set of IHL–IHRL interrelationship and interoperability issues. This is because the ECtHR, to date, has not considered IHL or opined on the relationship between IHL and the ECHR when assessing the lawfulness of State military operations.<sup>58</sup> This will change with the decisions in *Hassan v. United Kingdom* and *Georgia v. Russia II*. Lawfulness, to date, has completely been assessed with reference to the ECHR itself and not by direct application of IHL. ECtHR decisions in cases which were not, but could have been, classified as

strikes that caused incidental civilian loss, while giving this fact—7,800 strikes, all with PGMs—only a passing reference in a few sentences.

56 C. Droege, above note 8, p. 323.

57 See Philip Alston *et al.*, “The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’”, *European Journal of International Law*, Vol. 19, No. 1, 2008, p. 183, for a review of some of the US practice and response from the perspective of those aligned with the HRC.

58 F. Hampson, above note 8, pp. 70–71. The ICRC, above note 1, Appendix 3, has rightly cautioned: “It cannot be assumed that just because a human rights body uses words more commonly found in an IHL context (e.g. civilian) that it is taking account of IHL .... The case-law of the European Court of Human Rights ... is only relevant as a very detailed analysis of the requirements of human rights law. Not once has it addressed on the merits the relationship between IHL and human rights law, whether IHL was relevant or how it should take account of IHL.”

situations of armed conflict *may* not (debatable in some of the Turkish and Chechen cases and possibly in the situation of the third applicant in *Al-Skeini*<sup>59</sup>) have resulted in a different conclusion, had legality been assessed exclusively with reference to IHL, given that there is significant overlap between the two bodies of law as it relates to the protection of civilians who are directly targeted, are victims of disproportionate strikes, or are ill-treated or tortured in detention scenarios. The current approach of the ECtHR, however, sets up the possibility that, in the future, a State may be held in violation of the ECHR even while having acted lawfully under IHL.<sup>60</sup> We will see if this current approach starts to change with the *Hassan* and *Georgia* cases.

One commonly asserted explanation for the ECtHR's unwillingness to consider IHL is that respondent States have failed to "derogate" in accordance with ECHR Article 15. If they did, this would, as the argument goes, allow the Court to consider IHL.<sup>61</sup> ECHR Article 5 (liberty and security) rights may be subject to an Article 15 derogation "in times of war or other public emergency threatening the life of a nation", and ECHR Article 2 (right to life) rights can only be derogated, under Article 15, "in respect of deaths resulting from lawful acts of war". Whether extraterritorial armed conflicts would even fall within the ambit of these provisions, and if so, whether this would mean that IHL would "displace" the ECHR or simply be used to interpret ECHR provisions, remain open questions.

To date, no State has invoked an Article 15 derogation, and its scope, ambit and procedural application are subject to speculation and debate. Commentators have answered these questions differently. One group views an Article 15 derogation as the only way in which the ECtHR can consider IHL and relies on previous ECtHR decisions in which the Court could have classified the situation as one of armed conflict and thus applied IHL, but chose not to in light of the respondent State not derogating, as support for its position. Others are of the view that the ECtHR can, and should, consider IHL without the requirement of derogation. This is because courts should consider general principles of international law, including IHL principles when that body of law is relevant.<sup>62</sup> To do otherwise may lead to the absurd result, from a NATO legal interoperability perspective, that a State may have acted in violation of the ECHR but not IHL in situations where IHL should be the primary body of law to be applied.<sup>63</sup> A classic example of such an absurdity would be a finding that a

59 ECtHR, *Al-Skeini and Others v. United Kingdom*, Case No. 55721/07, Judgment (Grand Chamber), 2011.

60 See J. P. Costa and M. O'Boyle, above note 25, p. 129, where they comment: "The consequence is that the same military operation may be in violation of the provisions of the Convention but not of the relevant norms of IHL."

61 See *ibid.* and Olga Chernishova in ICRC, above note 1, Appendix 6, p. 89.

62 Third-Party Brief, Human Rights Centre of the University of Essex (see above note 39), filed in ECtHR, *Hassan*, above note 8.

63 See F. Hampson, above note 8; in ICRC, above note 1, Appendix 3, p. 77; Andrea Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights*

NATO European State has acted unlawfully through a violation of ECHR Article 2 by killing a combatant during an IAC in accordance with IHL.

These issues are about to be confronted by the ECtHR in the *Georgia v. Russia II* and *Hassan v. United Kingdom* cases.<sup>64</sup> In both cases, the respondent States have not derogated but have asserted IHL in a variety of ways, including as a basis to displace or oust ECHR jurisdiction. These cases involve questions of legality centred on the treatment of members of the Georgian armed forces and, in the case of *Hassan*, a civilian suspected, at the time of capture, of having been either a combatant or possibly a person posing a security threat. Both cases have occurred within the context of an IAC. If the ECtHR does not consider the IHL regime relating to the detention of civilians and prisoners of war because respondent States have not derogated, it will miss an opportunity to define the relationship between the ECHR and IHL and quite probably open itself up to further criticism for not considering other relevant principles of international law. The third-party brief to the Court in *Hassan* has shown it a road map out of this quagmire.

Within this backdrop there are other key ECHR issues which currently, or may in the future, affect the ability of NATO to be legally interoperable. They include: issues of extraterritorial application, whether ECHR rights can be “divided and tailored”, the interpretation given to the right to life, the trigger and procedural content of the duty to investigate, the interpretation given to UN Security Council Resolutions authorizing the use of force under Chapter VII of the UN Charter and the interplay between the ECHR and Article 103 of the UN Charter, and treaty-based non-criminal administrative or preventive detention.

## Extraterritorial application of the ECHR

The ECtHR decision in *Al-Skeini* on extraterritorial application of the ECHR has added to the confusion relating to the scope and ambit of the “control over the person” or “State agent authority” (SAA) tests—which, as noted above, have not been adopted by NATO’s North American partners. In *Al-Skeini*, although noting that the UK formally recognized a situation of occupation while still attempting to gain control over Basra and its surrounding area, the Court identified the key facts leading to jurisdictional application of the ECHR:

the exercise of some of the public powers that would normally be exercised by the sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security .... In these exceptional circumstances ... the United Kingdom ... through its soldiers engaged in security operations ... exercised authority and control over individuals killed in the course of such security operations.<sup>65</sup>

*Law*, Oxford University Press, Oxford, 2011, pp. 215–218; J. P. Costa and M. O’Boyle, above note 25, p. 107; W. Abresch, above note 15.

<sup>64</sup> ECtHR, *Georgia* and *Hassan*, above, note 7.

<sup>65</sup> *Ibid.*, para. 149.

It was a surprise that the ECtHR bypassed a discussion of the legal relevance of occupation, as outlined in *Bankovic*, and did not simply rely on an “effective control over area” (ECA) test to assert jurisdiction given the absence of direct physical control over some of the victims (for instance, the subject of the third applicant in the *Al-Skeini* case who was killed by a stray bullet while sitting at her dinner table inside her house). In any event, the decision’s ambiguity has sustained a variety of interpretations on what test the ECtHR used to define extraterritorial jurisdiction. One approach is that the Court has created some sort of “middle ground” test between ECA and SAA, where some physical control of the person in the context of the “exercise of some public powers” is “pivotal”. Another interpretation sees an expanded SAA test in the sense that it does not require direct physical control or custody but does include a broader control over the person by shooting at a distance. If the former “middle ground” test has been created, this raises questions about whether the “exercise of some public powers” is a lower threshold to establish jurisdiction than occupation, as the term is understood in IHL. If the latter test is the case (an expanded notion of control over the person), then questions arise over the limits of SAA – namely, is there a difference between horizontal shooting versus vertical shooting (such as *Bankovic*-type scenarios, drones in Afghanistan or NATO’s Libyan operation)?<sup>66</sup>

Even if SAA is limited to situations where the military force is exercising some public powers, what does this mean for the continued relevance of other ECtHR cases that relied on SAA or control over the person in situations that did not include occupation or exercise of public powers?<sup>67</sup> Additionally, what is the “exercise of some public powers”? It would seem that most NATO Chapter VII operations (Bosnia, Kosovo, Afghanistan etc.), designed to “maintain security”, would consequently engage the ECtHR’s jurisdiction despite the absence of ECA. Given the vagueness and ambiguity of the Court’s decision, it should not be surprising if European NATO Member States have divergent views on when jurisdiction is engaged and, consequently, on when force is regulated within an ECHR framework. This, in turn, will have impacts on OPLAN, ROE and targeting framework consensus. This creates a potential widening of the

66 For a review of the development of ECtHR jurisdictional cases and the interplay between SAA and ECA, see Barbara Miltner, “Revisiting Extraterritoriality after Al Skeini: The European Court of Human Rights and Its Lessons”, *Michigan Journal of International Law*, Vol. 33, 2011–2012, p. 693; O. Hathaway *et al.*, above note 8, p. 389; Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, *European Journal of International Law*, Vol. 23, No. 1, 2012, p. 121; Anna Cowan, “A New Watershed? Re-Evaluating *Bankovic* in Light of Al-Skeini”, *Cambridge Journal of International and Comparative Law*, Vol. 1, No. 1, 2012, p. 213. Both Cowan and Milanovic appear to view the SAA test in *Al-Skeini* as being coupled to the existence of exercise of public powers, thus preserving *Bankovic*. For a perspective which views the possibility of equating killing with SAA as a standalone jurisdictional trigger, without the requirement of being coupled with the exercise of some public powers, and consequently going beyond *Bankovic* to include killing by aircraft and drones, see Marek Szydło, “Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda”, *International Criminal Law Review*, Vol. 12, No. 2, 2012, p. 271; and see, importantly (given their activism within UK domestic courts and the ECtHR), Public Interest Lawyers, “Public Interest Lawyers: UK’s Use of Drones in Afghanistan ‘Highly Likely’ to Breach International Law”, which relies upon *Al-Skeini* in their 52-page legal opinion, available at: [www.publicinterestlawyers.co.uk/news\\_details.php?id=315](http://www.publicinterestlawyers.co.uk/news_details.php?id=315).

67 See B. Miltner, above note 66, pp. 727–739, tracing the historical development of this issue.

separation that already exists with the North American partners in NATO on extraterritorial application of IHRL treaties in general.

### ECHR rights can be “divided and tailored”

Another significant development in the *Al-Skeini* decision is the apparent reversal from *Bankovic* that ECHR rights can indeed be “divided and tailored”. Whether this applies equally to ECA and SAA (with or without a requirement for there to be an exercise of public powers) remains unclear.<sup>68</sup> The ECtHR gave little guidance as to when or how this is to be applied.<sup>69</sup> This is operationally very significant when one considers the wide range of activities that military forces conduct, whether in situations of armed conflict, peace enforcement operations or a combination thereof in “three block” war scenarios (in other words, conducting war-fighting, law enforcement and humanitarian assistance all in the same geographic area), or while conducting hostilities within the context of occupation. These wide range of military activities include the familiar ones, such as killing based on status, administrative detention in NIACs, incidental civilian loss of life or property arising from proportionate strikes, but also other common activities including: road side checks, cordon and searches, clearing houses to capture or kill persons directly participating in hostilities, tactical questioning, restricting freedom of movement and traffic control, control and restricting access to territory, enforcing curfews, prevention of looting, monitoring the security of election sites, supervising peaceful demonstrations, controlling airspace, etc. These types of activities may occur as part of the war-fighting tasks during an armed conflict or may occur within an exercise of law enforcement, or maintaining security.

A key unanswered question is that of the degree of control and temporal scope required to trigger a particular right (such as those relating to privacy, assembly and speech) becoming “relevant to the situation of the individual”. An inextricably linked question is to what extent a State has to be in a position to ensure that it can guarantee and enforce the rights in question – if at all – before they are triggered. This was an area of great emphasis in the UK House of Lords decision in *Al-Skeini* that placed emphasis on control over the territory and the capacity/ability of the State to administer and enforce rights. The ECtHR did not address this issue with the same degree of analysis, and this creates significant ambiguity. Lastly, rights, such as the right to privacy or assembly, are automatically triggered as troops have contact (however briefly) with civilians

68 A. Cowan, above note 66, p. 218; B. Miltner, above note 66, p. 699, after wondering whether the divide and tailor of rights applies to the newly formulated SAA test only or to ECA as well, notes that *Al-Skeini* “arguably leads it further down a path of incoherence”.

69 See ECtHR, *Al-Skeini*, above note 59, para. 137: “It is clear that, whenever the State through its agents exercises control and authority over an individual and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be divided and tailored” (emphasis added).

(who are, are not or are no longer directly participating in hostilities), while restoring international peace and security within, and outside, the context of armed conflict under the wording of a Chapter VII “all necessary means” Security Council resolution. Are they subject to the requirement of having an express exemption from a particular right if they wish to avoid the obligations that those rights would entail, as contemplated in *Al-Jedda*<sup>70</sup> for situations of administrative detention? As with the jurisdictional issue, one would expect a divergence of views amongst the European NATO Member States given the ECtHR’s ambiguity, thus potentially creating additional legal interoperability challenges with respect to planning and ROE—and a widening of the transatlantic divide.

### The unique wording of Article 2 of the ECHR: Right to life

The right to life under Article 2 of the ECHR and its possible relationship to IHL are different from the issues that arise within the context of the *lex specialis* analysis occurring within other IHRL treaties.<sup>71</sup> Unlike the ICCPR and the American Convention on Human Rights (ACHR), which prohibit “arbitrary” killings and consequently allow for an interpretative gateway to consider IHRL rights in light of IHL (as the ICJ did in the *Nuclear Weapons* Advisory Opinion, or the Inter American Commission in the *Abella* case), the ECHR’s language does not easily provide such an opportunity. The ECHR’s Article 2 protecting the “right to life” exhaustively lists the permitted grounds on which deadly force could be used. The article essentially codifies an IHRL law enforcement paradigm, and it does not include uses of force that would be lawful under an IHL framework. The same can be said of Article 5 of the ECHR’s protections of liberty and security. Although Article 15 does provide for derogation from Article 2, this would not engage an application of the *lex specialis* doctrine *per se*.

In *Georgia v. Russia II* and *Hassan v. United Kingdom*, neither respondent State made an Article 15 derogation. The ECtHR will be required to consider whether IHL displaces the jurisdiction of the Court or whether Article 2 of the ECHR will be interpreted on use of force issues arising within the context of an IAC by considering general principles of international law, including IHL principles, when that body of law is relevant. There is no guarantee that the Court will do so given its jurisprudence to date. The Court may decide that there was no violation of Article 2 given that the situation does not readily factually

70 ECtHR, *Al-Jedda and Others v. United Kingdom*, Case No. 27021/08, Judgment (Grand Chamber), 2011.

71 ECHR, Art. 2, reads:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

disclose ill-treatment or the death of Mr. Hassan while in custody. If the ECtHR *does* decide to look into the interrelationship between IHL and Article 2, another legitimate issue would be whether it would apply IHL properly.<sup>72</sup> If it chooses to consider IHL to assist in its interpretation of ECHR Article 2, that does not necessarily mean that the end result would be the same as if the right to life provision under the ICCPR (which includes the gateway language of “arbitrariness”) were considered, given the unique language and construction found in Article 2.

Consequently, consideration of IHL within the framework of the ECHR may not determine the legality of State action in the same way as if IHL was the only legal regime being considered. Furthermore, any judgement on the interrelationship between IHL and the ECHR which accepts the application of IHL, arising from the *Hassan* and *Georgia* cases, would be limited to IAC situations. Many thorny and more complex issues revolving around the lawfulness of killing arising from situations of occupation and NIACs would remain open in the “post-*Hassan* and *Georgia v. Russia* world”.

This is a key point for NATO legal interoperability. It is possible for the ECtHR to find that a State acted in contravention of the ECHR while being compliant with IHL. This has implications for situations involving killing based on status, such as combatancy or membership in an organized armed group that is a party to an ongoing NIAC. It also has obvious consequences for civilian deaths and injury arising from attacks that may have been fully compliant with IHL proportionality and precautionary principles.

This possibility was contemplated by Costa and O’Boyle, writing in 2011, when they were the ECtHR president and deputy registrar respectively. They noted:

The consequence is that the same military operation may be in violation of provisions of the Convention but not of the relevant norms of IHL. Given the differences between the two rule systems this is perhaps not as unusual as it might appear.<sup>73</sup>

For many (North American) military and government lawyers, this will seem like an impossible result. But for many in Europe, there is nothing unusual about it. This assertion is consistent with Appendix 6 of the ICRC’s Expert Meeting document, *The Use of Force in Armed Conflicts*, which is a summary prepared by the head of the Legal Division of the ECtHR of relevant ECtHR case law arising from high-intensity situations, including those which could have been classified as armed conflict.<sup>74</sup>

While this may not be a significant issue for cases involving the deaths of civilians who are not directly participating in hostilities and are not killed in a

72 T. Meron, above note 8, p. 247, cautions that one of the dangers of having IHRL institutional encroachment is that the IHRL body may lack expertise in IHL. J. P. Costa and M. O’Boyle, above note 25, p. 127, when discussing the ECtHR confronting IHL, note: “The Court is understandably brought outside its comfort zone, the more so when it has to decide inter-temporal questions of IHL.”

73 *Ibid.*, p. 129.

74 O. Chernishova in ICRC, above note 1, Appendix 6, p. 89.

proportionate strike, or those who are ill-treated while detained, as those circumstances are prohibited by IHRL and IHL, it means that any act of killing, including the killing of combatants or civilians in strikes which are compliant with the IHL requirements of proportionality, could be in violation of Article 2 if the ECtHR does not apply IHL or only considers IHL to the extent that it does not undermine the wording of Article 2.<sup>75</sup>

## Investigations under Article 2 through of the ECHR

Under the ECHR, the duty to investigate is an implied obligation under Article 2.<sup>76</sup> An applicant may simply allege a violation of the implied duty to investigate without directly alleging a violation of the right to life *per se*. In 2010, the ECtHR found sixty-four violations of the obligation to investigate.<sup>77</sup> *Al-Skeini*, in 2011, was another. From the perspective of the interplay between IHL and ECHR, a key issue is whether there would be a violation of the duty to investigate in cases where persons were killed or injured in IHL-compliant situations. Given the above discussion and the ECtHR's ambiguous reasoning in *Al-Skeini* (by adopting the Alston Report without qualification), the approach of the ECtHR suggests that it would consider there to be a violation, or at a minimum, that it would leave the possibility open. In *Al-Skeini*, the ECtHR adopted the following extract from the Alston Report:

Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights." It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right

75 See J. P. Costa and M. O'Boyle, above note 25, as they emphasize that any consideration of IHL would be within the framework of the ECHR: "At the same time, when confronted with non-international or international armed conflict, the Court should not bury its head in the sand. If it is to avoid findings that contradict IHL – as the Commission did successfully in *Cyprus v. Turkey* – it must at least be aware of the relevant provisions of IHL. The suggestion is *not* that it should seek to interpret and apply these principles in cases relating to armed conflict as the *lex specialis* but simply that it should be aware of them when it applies the Convention law in order to ensure the greatest harmony possible, *without* lowering its own often higher threshold of protection, for it is undoubtedly in times of crises that the need for vigilance is at its greatest" (emphasis added).

76 See ECtHR, *McCann and Others v. United Kingdom*, Case No. 18984/91, Judgment (Grand Chamber), 1995, para. 161; ECtHR, *McKerr v. United Kingdom*, Case No. 28883/95, Judgment (Third Section Chamber), 2001, para. 171.

77 O. Chernishova in ICRC, above note 1, Appendix 6, p. 92.

to life – but they may affect the modalities or particulars of the investigation ... Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.<sup>78</sup>

From a NATO perspective, the trigger for an investigation within the context of an armed conflict is crucially important. It should be noted that not all commentators or States would agree with the assertion that all deaths “regardless of circumstance”, including those that are IHL-compliant, require an investigation. In a very detailed comparison of IHL, IHRL and international criminal law requirements of investigation, the Turkel Commission’s Second Report took a different perspective from that of the ECtHR.<sup>79</sup> It recognized that there might regrettably be incidental losses of civilian life that are “not ‘excessive’ in relation to the concrete and direct military advantage anticipated from the attack” and, unlike the killing of a civilian in a law enforcement operation, “the incidental death of an uninvolved civilian during combat operations ... does not immediately trigger a duty to investigate”.<sup>80</sup>

The ICRC also appears to be of the view that deaths arising from the use of military force that are compliant with IHL do not trigger an obligation to investigate. It has noted:

In any case, it is clear that, under IHL, not every death triggers the obligation to investigate. This is so because, under IHL, legitimate targets – i.e. combatants, fighters and civilians directly participating in hostilities – can be killed lawfully and incidental loss of civilian life is not contrary to IHL as long as the principles of proportionality and precautions have been respected.<sup>81</sup>

During the ICRC-led expert roundtable discussion on *The Use of Force in Armed Conflicts*, the following proposition was submitted to the group of experts:

Legally speaking a State does not breach a human rights law obligation to investigate if legitimate targets are killed in accordance with IHL or when there is incidental loss of civilian life which is not contrary to IHL as long as the principle of proportionality has been respected.<sup>82</sup>

The Expert Meeting report noted that:

78 ECtHR, *Al-Skeini*, above note 59, para. 93, citing P. Alston, UN Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/cn.4/2006/53, 8 March 2006, para. 36.

79 *The Turkel Commission*, above note 24.

80 *Ibid.*, pp. 101, 103. See also the treatment of the *Al-Skeini* decision by the Commission at p. 109. The procedural requirements of an “investigation” under IHRL are beyond the scope of this paper. See Juliet Chevalier-Watts, “Effective Investigations under Article 2 of the European Convention on Human Rights”, *European Journal of International Law*, Vol. 21, No. 3, 2010, for a review of the various components that are part of an ECHR obligation to investigate; and Michael Schmitt, “Investigating Violations of International Law in Armed Conflict”, *Harvard National Security Journal*, Vol. 2, 2011, p. 31, who, with reference to state practice, discusses how the relationship between IHL and IHRL impacts on investigations occurring within the context of armed conflict.

81 ICRC, above note 1, p. 49.

82 *Ibid.*, p. 53.

there was in general no formal objection of the statement posed, except for one expert who clearly disagreed, recalling that in the context of the European Convention on Human Rights, a State would have to investigate any violent loss of life—including in cases of killing of enemy combatants or of apparently lawful incidental civilian casualties under IHL—unless the State derogated to the right to life in accordance with Article 15 of the European Convention on Human Rights.<sup>83</sup>

If the ECtHR refused to consider IHL and were to be confronted with a situation involving the death of a combatant or a person directly participating in hostilities, or a civilian incidentally killed in an IHL-proportionate strike within the context of an armed conflict, and decided the issue strictly with reference to Article 2, the point made by the expert in the above quotation could be considered accurate. In the post-*Al-Skeini* era, the ECtHR has paved the way under Article 2 for a real divide between the North American and European frameworks on the trigger for when an investigation would have to occur within armed conflicts. Challenging State military action only on the basis that the State failed to carry out a proper investigation, while avoiding issues surrounding the use of force, as was done in *Al-Skeini*, is becoming a popular litigation strategy and line of attack in advocacy by non-governmental organizations. NATO and its Member States should clearly anticipate “failure to investigate” cases in the future. Even if the ECtHR does allow for a legal basis to detain under IHL in the case of *Hassan*, there is certainly no guarantee that the Court would apply IHL when addressing the question of when an Article 2 obligation to investigate is triggered in the event that a detainee is unlawfully killed.

## IHL treaty-based non-criminal administrative/preventive detention and Article 5 of the ECHR

The issues of preventive or administrative detention during armed conflict and occupation raise complex legal interoperability and interrelationship challenges, particularly within the context of Article 5 of the ECHR, which defines the right to liberty within a law enforcement/criminal law framework and which does not allow for non-criminal preventive or administrative detention as contemplated by IHL treaties.<sup>84</sup> The language of Article 5 does not readily allow a reinterpretation based on IHL and indeed may be even more restrictive than Article 2 in that

<sup>83</sup> *Ibid.*

<sup>84</sup> ECHR, Art. 5, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

regard.<sup>85</sup> In the *Al-Jedda* decision, the ECtHR stated as much when it noted: “It has long been established that the list of grounds of permissible detention in Article 5§1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”<sup>86</sup>

The ECHR addresses issues relating to criminal detention. Treaty-based IHL addresses issues related to non-criminal detention arising from threats posed by either a combatant or a civilian requiring internment for imperative reasons of security. Detention in an IHL scenario is not punitive but rather preventive (to keep threats off the battlefield). Each regime has its own rationale and logic and consequently different procedural requirements. Under IHL, particularly in IACs and situations of occupation, it is permitted to detain without charge or trial, and while there is a requirement for administrative review in defined circumstances, there is no express right to judicial review of the grounds of administrative detention.<sup>87</sup> Persons under administrative detention would only have their criminal rights engaged if they were subjected to a criminal process.

In the ECtHR’s *Al-Jedda* decision, the applicant was a UK/Iraqi citizen who was interned for security reasons by UK forces in Iraq during the period of occupation and held in a UK detention facility, allegedly for facilitating the travel into Iraq of a terrorist and explosives, and who allegedly conspired to launch improvised explosive device attacks in Iraq. *Al-Jedda* challenged his internment on the basis that it violated Article 5(1) of the ECHR. The UK government relied not on IHL as the primary legal basis for his detention but rather on UN Security Council Resolution 1546, which, under the authority of Chapter VII of the UN Charter, authorized “all necessary means” to “contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”. Annexed to the resolution were letters that authorized internment for

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
  3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
  4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
  5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

85 A. Gioia, above note 63, pp. 238–239.

86 *Al-Jedda*, above note 70, para. 100.

87 A. Gioia, above note 63; J. Bellinger III and V. Padmanabhan, above note 8; Jelena Pejic, “The ECtHR’s *Al-Jedda* Judgment: The Oversight of IHL”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 837; M. Sassòli and L. Olson, above note 16; K. Watkin, “Use of Force during Occupation”, above note 8.

(using the language of Geneva Convention IV) “imperative reasons of security”. The degree of detail in the 1546 authorization was not previously seen in any similar UN Security Council resolution. The UK government argued that, pursuant to Articles 25 and 103 of the UN Charter (which ensure that Charter-based obligations prevail over other treaty obligations in the event of a conflict), Resolution 1546 authorization prevailed over the ECHR’s Article 5 obligations.

The ECtHR framed the issue differently, with a different understanding of “obligation”. It asked “whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment”.<sup>88</sup> It then ruled that Resolution 1546 did not create an “obligation”, and consequently the Article 103 issue – that there was a conflict of obligations – was not engaged.

The ECtHR then turned to consider whether there was “any other legal basis” for the detention that would “disapply” the requirements of Article 5. It was at this moment in the judgment that the court briefly, and erroneously,<sup>89</sup> considered IHL and noted that it does not place an “obligation on an Occupying Power to use indefinite internment without trial”.<sup>90</sup> The Court conflated the obligation issue in the UN Security Council Resolution and in IHL rather than simply referring to IHL as a possible legal basis to intern.

Aside from its treatment of the legal effect of a Chapter VII authorization of military operations, the decision may very well demonstrate the inability of the ECHR’s language to relate to, and the ECtHR’s inability to properly understand, the IHL framework on detention under Geneva Conventions III and IV, given that the court’s broad language has implications for both. While the *Hassan* case will permit the Court to revisit IHL (and criticisms arising from its *Al-Jedda* decision), given that it is central to the UK government’s argument, the potential impact of maintaining that “Article 5 does not include internment or preventive detention” has obvious legal interoperability consequences for NATO allies. As Jelena Pejic has noted:

Al-Jedda casts a chilling shadow on the current and future lawfulness of detention operations carried out by the ECHR States abroad. In addition their ability to engage with other non ECHR countries in multi-national forces with a detention mandate currently remains, at best, uncertain.<sup>91</sup>

Only time will tell whether the ECtHR in the *Hassan* and *Georgia* cases takes up the opportunity to consider the relationship with IHL arising from Article 5 detention cases so that international legal principles on detention found in Geneva Conventions III and IV are properly addressed.

88 ECtHR, *Al-Jedda*, above note 70, para. 101.

89 See J. Pejic, above note 87, p. 851.

90 *Al-Jedda*, above note 70, para. 107.

91 J. Pejic, above note 87, p. 851.

## *The ECtHR's interpretation of Chapter VII UN Security Council resolutions*

There is however, an even more profound and fundamentally worrisome issue arising from the *Al-Jedda* decision: the way in which the ECtHR approached a UN Security Council resolution issued under Chapter VII. The implications of the Court's approach go well beyond IHL/ECHR interrelationship and interoperability issues and include core issues on the scope and parameters of using military force to restore international peace and security within the UN's, and consequently NATO's, collective security structure.

As noted above, the key issue in *Al-Jedda* was framed as whether UN Security Council Resolution 1546 placed the UK under an obligation to hold the applicant in internment.

At paragraph 102, the ECtHR noted:

the Court considers that, in *interpreting* its resolutions, there must be a *presumption* that the Security Council does *not intend to impose any obligation* on Member States to breach fundamental principles of human rights. *In the event of any ambiguity* in terms of a Security Council resolution, the Court must therefore *choose the interpretation which is most in harmony with the requirements of the Convention* and which avoids any conflict of obligations ... it is to be expected that clear and explicit language would be used were the Security Council to intend to take particular measures which would conflict with their obligations under international human rights law.<sup>92</sup>

At paragraph 105, it concluded:

The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution.<sup>93</sup>

By employing this interpretative presumption,<sup>94</sup> the Court addressed the pivotal issue of whether a UN Security Council resolution authorization creates an obligation in a way that is very different from that found in State practice and the commentary of leading practitioners.<sup>95</sup> By doing so it avoided the "Article 103

<sup>92</sup> ECtHR, *Al-Jedda*, above note 70, para. 102 (emphasis added).

<sup>93</sup> *Ibid.*, para. 105.

<sup>94</sup> A technique of interpretative presumption was road-mapped out, and tailored to *Al-Jedda*, for the ECtHR after the House of Lords' decision: see M. Milanovic, "Norm Conflict in International Law", above note 8, p. 98.

<sup>95</sup> In the absence of UN Charter Article 43 agreements, the UN Security Council developed a practice of implementing the collective security structure through the authorization of military action. For

question” and injected uncertainty (*if* States follow the decision) into a line of State practice relating to Security Council resolution authorizations that dated back to the First Gulf War. No NATO State has ever approached OPLAN, ROE or targeting framework development using the approach adopted by the Court.

Presumably, the ECtHR’s reasoning would equally apply to other ECHR rights, including Article 2’s right to life, and to other rights relating to privacy, freedom of expression, assembly, etc. The logical effect of this would be that NATO operations within the context of an armed conflict, seeking to restore international peace and security as authorized by a Chapter VII resolution, would be restricted to the law enforcement paradigm as framed by the ECHR. Not only would each UN Security Council resolution to conduct administrative detention without criminal charge and trial require “clear and explicit language”, but so too would any use of force going beyond the framework of Article 2 or any other military activity that would engage an ECHR right. The only *possible* exception to this would be derogations from the ECHR.

The logic of this interpretation would lead to an encroachment on the UN Security Council’s authority to define collective security frameworks in peace enforcement operations for European States. Should European Member States within NATO adopt this new approach to UN Security Council resolutions, it would be a break with their historical practice, creating transatlantic divisions as NATO Member States consider the scope and parameters of future missions based on a UN Security Council resolution and define OPLANs, ROE and targeting frameworks.

## NATO challenges for future legal interoperability

If legal interoperability is to be understood as the sharing of a common body of rules, the issues identified above arising from the IHL/IHRL and IHL/ECHR interface will continue to challenge NATO. This should surprise no one. Essential for NATO’s ability to function is the central relevance of consensus.

perspectives on the legal relevance of authorizations and its legal effect on Articles 25 and 103 which do not support the approach taken by the Court and which equate authorizations with obligations, the UK government had relied on; Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, Vol. 10, 1999, p. 1; Vera Gowlland-Debbas, “The Limits of Unilateral Enforcement in Community Objectives in the Framework of UN Peace Maintenance”, *European Journal of International Law*, Vol. 11, 2000, p. 361; Danesh Sarooshi, *The United Nations and the Development of International Security: The Delegation by the UN Security Council of Its Chapter VII Powers*, Clarendon Press, Oxford, 1999, pp. 150–151; Robert Kolb, “Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorisations Adopted by the Security Council?”, *ZaöRV*, Vol. 64, 2004, p. 21; ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, *Provisional Measures*, *ICJ Reports 1993*, p. 3; Richard Lauwaars, “The Interrelationship between United Nations Law and the Law of Other International Organizations”, *Michigan Law Review*, Vol. 82, 1983–1984, p. 1604; Rudolf Bernhardt, “Article 103”, in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, p. 1302.

Consequently, each sovereign State will participate in each NATO mission in accordance with its own national legal framework. Within this context, the ECHR, as a regional IHRL treaty, has the potential to widen, perhaps drastically, the transatlantic divide on legal interoperability, and reduce the ability to have a generally shared legal paradigm regulating the use of force. This, too, should not surprise anyone.

One former US government lawyer wrote in 2011, after reviewing divergent litigation outcomes between North America and Europe, that:

something remarkable—and surprisingly unremarked upon—has been happening since 2001 that is both widening and securing the permanence of this transatlantic divide. Courts on both sides of the Atlantic are deciding cases brought by individuals who are contesting the way States have been fighting armed conflicts with non-State actors .... Decisions from the ECtHR ... are a critical ... factor affecting the rules by which Europeans have fought—and will fight—conflicts. If European historical and political concerns about armed conflict serve as a “pushing” mechanism away from conflict, the ECHR serves as a “pulling” mechanism toward the increasing application of human rights rules to war fighting.<sup>96</sup>

Two issues will be worth monitoring while tracking the above-noted trend. First will be the way in which European NATO States are, or are not, influenced by ECtHR jurisprudence when creating key NATO use of force frameworks through a consensus process. If the ECtHR continues to disregard IHL, or misapplies it, will European NATO Member States treat those decisions as binding on how they fight—or will they isolate them as decisions that are not applicable to operations occurring within the context of armed conflict regulated primarily by IHL? Secondly, as demonstrated in Afghanistan, NATO’s ISAF mission could have implemented a broader use of force framework based on IHL, but for operational and policy reasons related to securing the support of the local population, chose in many instances to restrict the use of force.<sup>97</sup> The point here is that any tracking of the “transatlantic divergence” will have to consider the policy and operational factors that shape use of force frameworks when assessing interoperability generally.

As the “humanization of humanitarian law” continues to be driven by the engine of human rights, and IHRL institutional encroachment continues in its quest to be an enforcement mechanism of IHL, future legal challenges to NATO Member States on how it fights are “inevitable”.<sup>98</sup> NATO should not acquiesce in the comfort of its legal immunity, provided for by its Status of Forces Agreement, as it watches domestic and ECtHR litigation unfold. The ECtHR may someday be the catalyst that pierces NATO’s immunity. As yet another way in which the ECHR may influence

96 Ashley Deeks, “Litigating How We Fight”, *International Law Studies*, Vol. 87, 2011, p. 450; see also S. Pomper, above note 21, p. 535.

97 Richard Gross in ICRC, above note 1, Appendix 5, p. 85.

98 See Charles Garraway, “Allegations, Denials and Investigations—Preparing For The Inevitable”, *NATO Legal Gazette*, Vol. 30, May 2013, p. 11.

the Alliance, the Court of Cassation of Belgium has been willing to set aside the immunity of international organizations on the ground that it contradicted an ECHR right.<sup>99</sup> The consequences of NATO losing its immunity would be profound and in many ways would have a bigger effect upon the Organization and its operations than what is currently being felt from ECtHR litigation on use of force. A piercing of immunity could lead to litigation strategies that would seek to have NATO identified as a party responsible for acts occurring within the context of an armed conflict, such as disproportionate strikes, and could possibly compel NATO, for the first time, to identify the Member States involved in particular operational incidents, thus opening the door to domestically based ECHR-driven litigation.

99 See Jan Wouters, Cedric Ryngaert and Pierre Schmitt, “Western European Union v. Siedler; General Secretariat of the ACP v. Lutchmaya; General Secretariat of the ACP Group v. B.D.”, *American Journal of International Law*, Vol. 105, No. 3, 2011, p. 560.



# The beginning of application of international humanitarian law: A discussion of a few challenges

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## Abstract

*This article discusses some of the challenges related to the beginning of application of international humanitarian law (IHL). It concludes that IHL pertaining to international armed conflicts begins to apply as soon as one State employs force in the territory of another State without the latter's consent, provided that the violence is of a collective nature. In the case of non-international armed conflicts, this article acknowledges that it is now well settled that the two key criteria are the organization of the parties to the conflict and the level of intensity of the violence. This article shows however that some of the challenges inherent to the beginning of application of IHL make it almost impossible to identify a very single point in time at which it begins to become applicable, be it for international armed conflicts, including occupation, or non-international armed conflicts.*

**Keywords:** IHL, temporal scope of application, beginning of application, beginning of armed conflict, international armed conflict, non-international armed conflict, occupation.

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\* Parts of this article consist of excerpts from the doctoral thesis of the author, which has been published in French: Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess Éditions Romandes, Genève, 2014.

The point in time at which international humanitarian law (IHL) begins to apply to a situation varies. Notwithstanding the series of limitations on the human person that IHL may involve, once it is deemed to apply, this branch of law also triggers a range of protective rules to the benefit of persons affected by armed conflicts. It is therefore crucial to be able to determine the point at which IHL begins to apply. Over and above the rules covering occupied territories, which are discussed below and which are among the most protective, IHL provides some substantial safeguards, for instance to persons who are deprived of their liberty in times of armed conflicts, in accordance with a specific conceptual framework adapted to the extraordinary circumstances of armed conflict. The simultaneous application of human rights law in armed conflict might obscure the usefulness of implementing the rules of IHL in matters of detention. However, in international armed conflicts (IACs), the status conferred by IHL imposes a number of obligations which are not found in any other body of law. It is sufficient to think of the prohibition on prosecuting prisoners of war on the sole grounds of their participation in the hostilities, or of the prohibition on the detention of civilians in any place other than in the territory where they have been captured.

Conversely, the appraisal that IHL applies to a situation radically alters the outlook as far as the rules on the use of force are concerned. While in one context (law enforcement), lethal force may be used only as a measure of last resort, in the other (armed conflict), it is standard practice. For this reason, a determination that IHL applies may prove extremely disadvantageous to persons engaged in violence. In these circumstances, such persons may indeed become legitimate targets if they are participating in hostilities within the meaning of IHL, while in a law enforcement paradigm governed by international human rights law and domestic law, other means than the use of lethal force would be needed. This fundamental distinction may possibly explain the strange position adopted by the International Committee of the Red Cross (ICRC) on 8 May 2012, after one year of clashes in Syria. Its opinion was reported to be that the conflict could be classed as “a situation of internal armed conflict in certain areas”.<sup>1</sup> In terms of another aspect of the application of IHL, its applicability *ratione loci*, this statement is, to say the least, curious, since it is well settled that if IHL applies in a given situation, it covers the whole of the territory concerned and not just the immediate theatre of hostilities. However, if it were held to apply throughout the territory, the existence of a localized conflict might be put forward as a pretext to consider any protests or demonstrations as direct participation in hostilities and thus as being governed by the rules on the conduct of hostilities (rather than law enforcement).

1 Stephanie Nebehay, “Some Syria Violence Amounts to Civil War: Red Cross”, *Reuters*, 8 May 2012, available at: [www.reuters.com/assets/print?aid=USBRE8470D920120508](http://www.reuters.com/assets/print?aid=USBRE8470D920120508) (all internet references were accessed on 14 January 2015). On 17 July of the same year, however, the ICRC clarified in a press release: “Thus, hostilities between these parties *wherever* they may occur in Syria are subject to the rules of international humanitarian law.” ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increased Fighting”, available at: [www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm](http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm).

Conversely, maintaining that the conflict is confined to just one part of the territory can help to avoid an escalation of violence.

In a different context, determining when IHL becomes operative has major implications in terms of its enforcement, above all with regard to the prosecution of persons who are suspected of having committed violations of IHL. The essential prerequisite for being able to charge someone with a war crime, or to claim universal jurisdiction, as provided for in the four Geneva Conventions of 1949, is to characterize the situation in which these breaches took place as an armed conflict and therefore to determine that IHL is applicable.

These are just three of the many scenarios where establishing the point at which IHL becomes operative is of key importance—and since IHL (with the exception of provisions applicable “at all times” or “in time of peace”, or those that begin to apply at the “end of active hostilities”) is deemed to begin to apply with the outbreak of an armed conflict, this point in time should be easy to identify. Yet, as this article will aim to show by way of discussing a few key challenges, this is not as straightforward as it seems.

## A few preliminary inquiries

While there is no mathematical formula for pinpointing the exact time at which IHL becomes operative, there are a number of factors which must be borne in mind for the purposes of this exercise. Traditionally, these factors turn on the distinction between IHL applicable in IACs and in non-international armed conflicts (NIACs). The pertinent provisions are to be found in the 1949 Geneva Conventions. Apart from the Hague Convention of 1907 relative to the Opening of Hostilities, which has fallen into desuetude,<sup>2</sup> the only IHL treaties which expressly stipulate when this *corpus juris* begins to apply are the 1949 Geneva Conventions supplemented by their Additional Protocols of 1977. Article 2 common to all four Geneva Conventions, relevant to IACs, states that the Conventions apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. The applicability of common Article 3, regulating NIACs, is set forth in the following terms: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions ...” These provisions are further supplemented by those of Additional Protocol I (AP I), which extends the applicability of IHL of IAC to “wars of national liberation”, and then by Additional Protocol II (AP II), which establishes a list of conditions triggering the application of IHL in NIAC, thereby making a distinction between those NIACs

2 For further details regarding the status of this Convention, see Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess Éditions Romandes, Genève, 2014, p. 30, note 88.

governed only by common Article 3 and those governed also by AP II (provided that the State in whose territory the NIAC takes place is party to that instrument). To this list must be added the relevant provisions of the Rome Statute, some of which are discussed below.

Generally speaking, in order to ascertain when IHL begins to apply, the following questions must be asked: when may it be said that a war has been declared? When does an IAC exist, including a situation of occupation? What events mark the beginning of a war of national liberation? What indicators point to the existence of a NIAC and hence to the moment when IHL of NIAC begins to apply? A number of challenges then arise from this set of questions. The first one is to answer not only each of these queries, but also various underlying questions such as: does IHL begin to apply when a single enemy soldier is captured or a single civilian interned, even in the absence of any previous hostilities? When does a NIAC turn into an IAC owing to foreign intervention, thus triggering the application of IHL of IAC, and which are the parties to this IAC? Then there are challenges related to the fact that some of the relevant texts do not explicitly stipulate when IHL begins to apply, while others attempt to tie the beginning of IHL's applicability to a list of criteria that are arguably objective but whose fulfilment is extremely difficult to establish in practice, particularly as a situation unfolds. A further complication stems from interpretations in the case law, especially that of international criminal tribunals, which are somewhat unclear, if not contradictory. Lastly, an undeniable challenge is the disconnect between the theory and its practice on the ground by those who are supposed to apply and respect IHL – in other words, the States and/or armed groups involved. This sometimes risks rendering the question of the beginning of IHL's application a purely theoretical one.

This article will examine the challenges mentioned above in relation to the beginning of the application of IHL, while at the same time supplying further evidence in support of the standard proposition that IHL begins to apply as soon as an armed conflict exists. The article will first focus on the beginning of IACs, including situations of occupation, and will then move on to a discussion of the beginning of NIACs.

## **The beginning of the application of IHL in international armed conflicts**

As the Geneva Conventions do not provide any real definition and as there is no universal authority responsible for classifying conflicts, the existence of an IAC must be determined on the basis of facts.<sup>3</sup> A number of factors, discussed in the

3 See Anthony Aust, *Handbook of International Law*, Cambridge University Press, Cambridge, 2005, p. 252; Dino Kritsiotis, "The Tremors of Tadić", *Israel Law Review*, Vol. 43, 2010, p. 275; Marko Milanovic, "The End of Application of International Humanitarian Law", in this issue of the *Review*; Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff/Henry Dunant Institute, Leyden/

sections below, help to identify the point(s) in time at which IHL pertaining to IAC begins to apply.

Although “clear declarations by the parties are the most distinct indication of the commencement of a war”,<sup>4</sup> the notion of a “declared war” refers to a practice which has now fallen into desuetude.<sup>5</sup> For this reason, this section will focus on the prerequisites for ascertaining that an armed conflict exists as a matter of fact, and hence that IHL begins to apply. Two positions serve as a point of departure for determining the beginning of the applicability of IHL: the one proposed in the Commentaries to the Geneva Conventions (commonly referred to as “the first shot theory”), and the one adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case.<sup>6</sup>

The Commentaries to the 1949 Geneva Conventions state:

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 Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.<sup>7</sup>

The ICTY, in its first case, stated more laconically that “an [international] armed conflict exists whenever there is a resort to armed force between States .... International humanitarian law applies from the initiation of such armed conflicts.”<sup>8</sup> With the benefit of hindsight, it is plain that two separate questions

Geneva, 1975, p. 52; Jean-François Quégunier, “Ten Years after the Creation of the International Criminal Tribunal for Former Yugoslavia: Evaluation of the Impact of Its Jurisprudence on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85. No. 850, 2003, p. 273; International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, Separate Opinion of Judge Shahabuddeen (Presiding Judge), p. 150, paras 25–26.

- 4 Werner Meng, “War”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam, North-Holland, 2000, p. 1338. See also Alfons Klafkowski, “Les formes de cessation de l'état de guerre en droit international (Les formes classiques et non classiques)”, *Collected Courses of the Hague Academy of International Law*, Vol. 149, 1976, p. 224.
- 5 This provision, which was codified in Convention III relative to the Opening of Hostilities (The Hague), 1907, may be regarded as a dead letter. Probably the last time that it was applied was in 1946, in the aftermath of the Second World War, in the judgment of the Nuremberg Tribunal, which found that that war had been conducted in breach of the 1907 Hague Convention III: International Military Tribunal for Germany, 14 November 1945–1 October 1946, *Trial of the Major War Criminals*, Vol. 1, Official Documents, Proceedings, Nuremberg, 1947, pp. 85 (Indictment), 220 (Judgment). For a fuller discussion of this question and for references in the literature, see J. Grignon, above note 2.
- 6 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.
- 7 Jean Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, ICRC, Geneva, 1952, p. 32. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 27, para. 3.1; Ministère de la Défense, *Manuel de droit des conflits armés*, Impressions SMS, Château-Chinon, 2000, pp. 12, 41.
- 8 ICTY, above note 6, para. 70. This definition has never been contradicted in later judgments; see in this connection Luisa Vierucci, “Armed Conflict”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 247–248. In the *Delalić* case, the Trial Chamber merely stated that “in its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva

regarding these factors require examination: against whom must the armed force be directed, and under what conditions, in order for IHL pertaining to IAC to apply?

### *The target of the armed violence*

While Article 2 common to the four Geneva Conventions makes it clear that an IAC exists whenever there is an armed conflict between two “High Contracting Parties”, the Commentary to this provision and the ICTY’s findings in the *Tadić* case refer to the use of armed force between “States”.<sup>9</sup> The question is therefore whether the two terms are synonymous.<sup>10</sup> Although a High Contracting Party must necessarily be a State, a State can be involved in an armed conflict without having had the opportunity to become a party to the Geneva Conventions. Since all the States in the world are party to the Geneva Conventions today,<sup>11</sup> and some of the rules they contain are customary in nature,<sup>12</sup> this question might seem to be moot. It is, however, pertinent in respect of wars of secession and the dissolution of a State in the course of an armed conflict. As the pre-existing State is usually opposed to secession or dissolution, these processes are generally accompanied by force—in other words, they occur during an armed conflict which will be classified as a NIAC as long as it is entities of the former State that are fighting against government armed forces. However, if this conflict continues between the new “State(s)” and the pre-existing State after secession or dissolution, the question then arises of when it turns into an IAC. Given the effects produced by these situations and bearing in mind the underlying question of when IHL pertaining to IAC becomes effective, it is necessary to be guided by the facts

Convention”. ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as “Pavo”, Hazim Delić, Esad Landžo, also known as “Zenga”*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, para. 208. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2002, p. 19; William A. Schabas, *The International Criminal Court: A Commentary of the Rome Statute*, Oxford University Press, Oxford, 2010, p. 202.

- 9 The ICTY had no choice but to use the term “State”. Its Statute made it impossible to use the term “High Contracting Party”, which is specific to the Geneva Conventions. On this point see also D. Kritsiotis, above note 3, p. 275.
- 10 For the ICRC, the answer is definitely in the affirmative: “According to this provision [common Article 2], international armed conflicts are those which oppose ‘High Contracting Parties’, meaning ‘States’.” ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, opinion paper, March 2008, available at: [www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm](http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm).
- 11 See ICRC, “Treaties and States Parties to Such Treaties”, online database available at: [www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).
- 12 See International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 226, para. 75 (reiterated with regard to the conduct of military operations in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004*, p. 136, para. 89). See also A. Aust, above note 3, p. 253; as well as Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. 628.

because, in these cases, “at most the international community accepts the *fait accompli*”.<sup>13</sup> In keeping with the pragmatism characterizing IHL, determining the moment at which its applicability is triggered must not be made subject to any international recognition process, or to any reaction on the part of the United Nations.<sup>14</sup> It can, however, prove difficult to rest the applicability of IHL on no more than the factual findings that the new “State” no longer recognizes the central government, is in sole command of its territory, and has its own armed forces. How can a distinction be drawn between these attributes and those of an armed group which could not be termed a “party” to an IAC within the meaning of IHL? It will therefore be necessary to abide by the conditions which public international law lays down for the recognition of a State by the international community. In other words, “as soon as States emerge as independent and fulfil the criteria of statehood ..., whether admitted into the United Nations (UN) or not, [they] are bound by the rules of the international legal community”,<sup>15</sup> including those of IHL. Nor is it necessary for the parties to the armed conflict to recognize each other as States, mutually or even unilaterally.<sup>16</sup>

It is then necessary to determine what State bodies must be covered. As already highlighted above, according to the Commentary to common Article 2, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict”.<sup>17</sup> This notion was later reaffirmed in the following terms: “any opposition between two States involving the intervention of their armed forces and the existence of victims, as defined by the Geneva Conventions, is therefore an armed conflict”.<sup>18</sup> In both cases, the requirement that there has to be intervention “of armed forces” or “of their armed forces” prompts a number of questions. First, the latter proposition, more than the former, suggests that in order for an international armed conflict to exist, and hence for IHL to begin to apply, the armed forces of one or more States must be involved. Acceptance of this view would be tantamount to considering, for

13 Patrick Dallier, Mathias Forteau and Allain Pellet, *Droit international public*, 8th ed., Librairie Générale de Droit et de Jurisprudence, Paris, 2009, p. 587, para. 344. See also the opinion of the Badinter Arbitration Commission (named after its chairman) in connection with the issue of whether the constituent republics of the Socialist Federal Republic of Yugoslavia were seceding and what the consequences were: “the existence or disappearance of a State is a question of fact and the effects of recognition by other States are purely declaratory”. Peace Conference on Yugoslavia, Arbitration Commission, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e13?>

14 See in this connection Marco Sassòli, “The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in Wang Tieya and Sienho Yee (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, p. 320.

15 Ram P. Anand, “New States and International Law”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, para. 1, electronic ed. available at: [www.mpepil.com](http://www.mpepil.com) (password required).

16 ICRC, above note 10; Christopher Greenwood, “Scope of Application of Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2nd ed., 2008, p. 51; Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, *Collected Courses of the Hague Academy of International Law*, Vol. 163, 1979, pp. 128, 129.

17 J. Pictet (ed.), above note 7, p. 32.

18 J. Pictet, above note 3.

example, that aerial bombing raids carried out by one State against another, without the latter reacting, either because it lacks the physical capacity or for any other reason, would not constitute an armed conflict. There is, however, no doubt that in these circumstances the distinguishing features of a conflict are present and that IHL is applicable, especially the part of this *corpus juris* specifically dealing with the conduct of hostilities. Consequently, it is not necessary for the armed forces of one or more of the States in question to have exchanged fire. An IAC will already exist – and therefore IHL will begin to apply – if one State employs armed force against another, even if the latter does not retaliate. Thus, the intervention of members of the armed forces of either High Contracting Party is sufficient. This conclusion is unavoidable in light of the rules on the conduct of hostilities. There would be no justification for exempting the initial attack by one country against another from these rules; the military target must be identified and proportionality and precautionary measures will have to be analyzed beforehand and respected. Furthermore, no other conclusion is possible bearing in mind the fact that some States do not have their own armed forces. If at least two armies have to participate in order for the situation to qualify as an armed conflict and for IHL to apply, it would be theoretically impossible for an IAC to arise with Costa Rica or the Solomon Islands.<sup>19</sup> Yet any use of force by a third State in the territory of these countries, and directed against them, would certainly be subject to the pertinent rules of IHL. Similarly, any national of these countries who is in the hands of the enemy would be protected by the relevant rules of IHL.

### *The purpose of the armed violence and its collective nature*

A State that used force against the civilian population of another State or against any other civilian object of another State, to the exclusion of military objects, would likewise be engaged in an IAC to which IHL applies. The mere fact that one State employs force against another is sufficient to render operative IHL pertaining to IAC, provided that the act in question is not an isolated one committed by a lone individual.<sup>20</sup> In order to fulfil the criteria for an IAC, the member of the armed forces who carries out the attack must have been under orders to do so. If he/she is acting on his/her own initiative, without consulting his/her superiors, it will not be possible to speak of an IAC between the State of which he/she is a national and the State which he/she is attacking. Whatever the nature of the object(s) or person(s) targeted, IHL pertaining to IAC applies as soon as a desire to harm the State against which the armed force is exercised can be inferred from this targeting; this is what is implied by the phrase “against another State”. In other

19 Despite some slight differences, since some of them have paramilitary forces or have a foreign army stationed in their territory, some twenty States in the world have no government armed forces. For a list of these States, see the CIA data available at: [www.cia.gov/library/publications/the-world-factbook/fields/2055.html#bp](http://www.cia.gov/library/publications/the-world-factbook/fields/2055.html#bp): they are Andorra, Costa Rica, Dominica, Grenada, Iceland, Kiribati, Liechtenstein, Marshall Islands, Mauritius, Micronesia, Monaco, Nauru, Palau, Panama, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Solomon Islands, Tuvalu, Vanuatu.

20 See in this connection C. Greenwood, above note 16, p. 46.

words, the use of force on the territory of another State must be hostile in nature. There is therefore absolutely no need for the armed forces of the State at the receiving end of the violence to be targeted directly. The International Criminal Court (ICC) has adopted the definition proposed in the Commentaries to the Geneva Conventions and the findings in the case law of the ICTY<sup>21</sup> in deeming “an armed conflict to be international in character if it takes place between two or more States”,<sup>22</sup> which seems satisfactory. A further assertion, however, must remain under scrutiny: the Court has further stated that “an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State”.<sup>23</sup> First, the word “between” need not imply a reaction from the State on the territory in which the force is used. Second, if the force must be used collectively by the armed forces of the State carrying out the attack at least, the words “through their respective armed forces” might give the false impression that a response is necessarily needed in order to trigger the applicability of IHL.

### *Capture as an act triggering the applicability of international humanitarian law in international armed conflicts*

In IHL, the use of armed force does not signify solely the use of lethal force. Capture of enemy soldiers is another form of violence and can constitute an act triggering the applicability of IHL. The Commentary to Article 2 of the third Geneva Convention explicitly states:

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. The number of persons captured in such circumstances is, of course, immaterial.<sup>24</sup>

If the aim of the armed conflict is to undermine the potential of the enemy army, one means of achieving this is to capture its soldiers. Consequently, the general applicability of IHL pertaining to IAC commences as soon as the conditions of common Article 2 are met. Once someone falls into the hands of the enemy, IHL *ipso facto* begins to regulate his/her situation. A hostile event consisting solely of the capture of members of enemy armed forces by those of another State triggers the applicability of the Third Geneva Convention, even if there are no other hostile acts. Hence the rules of IHL on capture and internment can begin to

21 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, paras 207, 208.

22 *Ibid.*, para. 209; ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, para. 238.

23 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 223.

24 Jean Pictet (ed.), *Geneva Convention relative to the Treatment of Prisoners of War: Commentary*, ICRC, Geneva, 1960, p. 23.

apply even in the absence of hostilities prior to the event. For example, the fifteen British soldiers captured by Iran on 23 March 2007, while they were on patrol in the Persian Gulf,<sup>25</sup> should have been regarded as prisoners of war merely by virtue of their capture. For this reason, by showing them on television a few days later, the Iranian authorities infringed Article 13(2) of the Third Geneva Convention, which protects prisoners of war against public curiosity.

This means of triggering the applicability of IHL as set forth in the Third Geneva Convention is straightforward. If the person concerned is a combatant, his/her capture will simply make him/her a prisoner of war, and this will entail the applicability of the Third Geneva Convention regardless of the territory in which that person is present, of his/her nationality and of whether the existence of an IAC had been established beforehand. The capture of a combatant is therefore *per se* a hostile act triggering the applicability of the third Geneva Convention.

The position with regard to the effects of Article 4 of the Fourth Geneva Convention is more delicate, as there are two possibilities. The first is that the person is present in the territory of a State of which he/she is a national at the time of his/her capture and, for this reason, if he/she has fallen into the hands of the enemy, this means that a foreign army has invaded the territory and has thereby triggered an IAC, bringing about the applicability of IHL. Even if no armed hostilities take place, the military operations leading to the enemy army's advance into the territory trigger the applicability of IHL before the capture of the person in question. This condition is met even if the sole purpose of the armed incursion was to capture one or more persons. The Fourth Geneva Convention therefore begins to apply not as from the actual capture itself but as from the previous act initiating the IAC. The second possibility is that a person is present in the territory of a country of which he/she is not a national when he/she falls into the hands of the enemy. When there have been no previous hostilities, how can a distinction be drawn in this case between ordinary detention and detention governed by IHL? If war has been formally declared, the question does not arise, since the applicability of IHL is simply triggered by this declaration and the internment of foreign civilians is covered by IHL. As this situation no longer occurs, however, it is problematic if, without other prior hostile acts, a State decides that the nationals of another State who are present in its territory are to be deprived of liberty. Since, in these circumstances, internment or assigned residence are ordered in the interests of the security of the State carrying out that measure, IHL must apply to these situations, which in themselves are signs of inimical relations between the two States in question. If, on the contrary, these persons form the subject of judicial proceedings, they must be regarded as ordinary detainees. It is therefore the purpose of detention,

25 For a detailed account of these events, see Jean-Pierre Langellier, "Téhéran capture quinze soldats britanniques", *Le Monde*, 25 March 2007, p. 4; and Jean-Pierre Langellier, "Les quinze marins britanniques capturés dans le Golfe sont apparus à la télévision iranienne: Londres gèle ses relations diplomatiques avec Téhéran", *Le Monde*, 30 March 2007, p. 4.

namely security, and the status of the persons concerned, as nationals of a given third State,<sup>26</sup> that are decisive in this second case.

### *The role of consent in determining the point in time at which IHL applies*

In addition to these physical factors, a mental element is required in order to establish whether IHL should begin to apply: the violence employed must be hostile in nature. The very term “hostilities” implies that the acts in question are motivated not by benevolence but by enmity. Hence, not all military operations observed in the territory of a State will automatically lead to their classification as an IAC. The presence of foreign armed forces in the territory of a High Contracting Party to which the latter has consented must therefore be excluded from the definition because, in this case, the foreign presence does not stem from a “dispute”.<sup>27</sup> In order to assess whether a dispute exists and therefore determine whether IHL pertaining to IAC begins to apply, it will be necessary to ascertain whether or not there is consent. While the absence of consent by virtue of armed hostilities is fairly easy to discern, the same is not true of its existence. When there are violent clashes between enemy troops, it is easy to conclude that an IAC exists, since the lack of consent is obvious. On the other hand, when only a foreign military presence in the territory of a State is observable, it may be difficult to infer that this presence is hostile, a case in point being the scenario in which a State conducts military operations against an armed group in the territory of another State but not against the government armed forces of that State. In this situation, it is IHL of NIAC that applies to the relations between the State conducting the military operations and the armed group, but IHL pertaining to IAC may likewise apply in the relations between that State and the State “hosting” the armed group.

Uganda’s conduct in the Democratic Republic of the Congo (DRC) highlights a difficulty in determining the point in time marking the beginning of applicability of IHL when a State requests the assistance of another State in order to combat an armed group in its territory, but subsequently withdraws its consent. In this instance, the DRC had initially requested support from Uganda in its armed struggle against rebel armed groups. Uganda had therefore used force in the territory of the DRC with the latter’s consent. After a while, however,

26 These circumstances call to mind the notion of allegiance employed by the ICTY in its reasoning regarding the application of Article 4 of the Fourth Geneva Convention in the event of ethnic armed conflicts, where people can be interned on account not of their nationality, but of their allegiance to a third State. This question alone would merit lengthy analysis, irrespective of any considerations related to the applicability *ratione temporis* of IHL. See in this connection ICTY, above note 3, paras 164 ff; Christopher Greenwood, “International Humanitarian Law and the *Tadic* Case”, *European Journal of International Law*, Vol. 7, No. 2, 1996, pp. 272–273; and Theodor Meron, “Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout”, *American Journal of International Law*, Vol. 92, 1998, p. 242.

27 See in this connection Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 73.

the DRC authorities claimed “the end of the presence of all foreign military forces in the Congo”,<sup>28</sup> then denounced the invasion of their territory by Uganda.<sup>29</sup> The DRC therefore considered Uganda’s presence in its territory to be unlawful. Uganda’s argument in defence against some of the accusations that the DRC was levelling against it was that consent had been given to its presence.<sup>30</sup> In a case like this, the foreign army will engage in acts against armed groups. So long as the State in whose territory the clashes take place (the “territorial State”) consents to these acts, the situation will “only” be classified as a NIAC between the territorial and intervening States, on one side, and the armed groups, on the other. But as soon as the State which initially requested assistance withdraws its consent, military activities that would nevertheless still be conducted by the intervening State in the territorial State would trigger an IAC between the two States. IHL of IAC would therefore apply to the relationship between those States at least. The question is then one of knowing when consent may be deemed to have ended. In the opinion of the International Court of Justice (ICJ), the fact that the DRC had denounced Uganda’s invasion of its territory signified that it no longer consented to the latter’s presence; however, the judges rejected the official statement of the DRC that all foreign armed forces had left its territory, on the grounds that it was ambiguous.<sup>31</sup> In this instance, the point at which consent is withdrawn is therefore the moment when the State publicly denounces a foreign presence in its territory. Here part of the question is not completely resolved, namely which is the organ(s) entitled to give and to withdraw consent within a State. What is important to note, however, is that the ICJ took care to specify that “no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil”.<sup>32</sup> Noting the withdrawal of consent is therefore purely a question of fact and must not necessarily be accompanied by a formal act in order to be valid.

### *The temptation to revive the animus belligerendi in order to determine the moment at which international humanitarian law begins to apply*

It is plain from the foregoing that the premise that violence must be exercised for hostile purposes before IHL can begin to apply may entail a difficult assessment.

28 Official statement of 28 July 1998, reproduced in the judgment of the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 49.

29 This denunciation took place at the Victoria Falls Summit, which ended on 8 August 1998. See in this connection *ibid.*, para. 33.

30 See *ibid.*, paras 42 ff.

31 *Ibid.*, paras 51, 53. See more generally the Commentaries to Draft Articles 20 and 45 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which refer to the point in time at which consent (or acquiescence) may be found to exist. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, available at: [legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), para. (3) of the Commentary to Draft Article 30 and para. (6) of the Commentary to Draft Article 45, pp. 73 and 122.

32 ICJ, above note 28, para. 51.

The exercise of classifying the armed conflict and determining the applicability of IHL can be rendered even more complex if account is also taken of the multiplicity of military operations conducted by coalition forces, not all of whom have the same role in the armed conflict. In order to overcome this obstacle, there might be a temptation to revive the old notion of *animus belligerendi*, related to the old-fashioned notion of “war”. *Animus* is an intention. In the context of a “war”, the *animus belligerendi* was a means of ascertaining whether the States in question had intended to replace a state of peace with a state of war between them. In other words, it meant employing a legal concept.<sup>33</sup> The introduction of the notion of “armed conflict” in 1949 was, on the contrary, an attempt to ground the applicability of IHL in a factual finding. Consequently, using the notion of *animus belligerendi* in this new context would be a step backwards and would not only be prejudicial to the implementation of IHL but would also be out of step with a general trend, which began in 1907, gathered momentum in 1949 and has grown stronger ever since, towards making a factual analysis in order to determine whether IHL applies to a given situation.<sup>34</sup> Furthermore, in order to establish the aforementioned hostile intention through the *animus belligerendi*, it would be necessary to rely largely on the parties’ expressions of their intention. Traditionally *animus belligerendi* was manifested by a “declaration of war or any other formal pronouncement”,<sup>35</sup> whereas IHL seeks to disregard any expression of a position when it comes to pinpointing the start of its application. The obligations that this branch of the law imposes on States involved in armed conflicts almost inevitably lead them to deny the existence of any such conflict in order to evade the application of IHL. For this reason, any attempt to detect an *animus belligerendi* would inevitably be stymied by declarations or stances at odds with the situation on the ground. Consequently, although the use of this notion is ostensibly appealing because it seems to facilitate the identification of enmity between the States in question, its untoward effects make its restoration undesirable.

It has been argued that this notion would be especially useful in “cases of doubt” such as erroneous troop movements to the territory of another State, or use of force at the behest of the State in whose territory it takes place.<sup>36</sup> It is hard to see how the *animus belligerendi* would be of assistance in the case of erroneous troop movements—if they were a mistake, by definition the army that had committed the error would have no reason to engage in any hostile act against the population of the territory concerned.

33 See in this connection Christopher Greenwood, “The Concept of War in Modern International Law”, *International and Comparative Law Quarterly*, Vol. 36, 1987, p. 286.

34 *Ibid.*, p. 295.

35 *Ibid.*, p. 286.

36 These are possibilities suggested by D. Kritsiotis, above note 3, p. 280.

## *The intensity of violence is irrelevant when determining the beginning of the application of IHL in international armed conflicts*

Notwithstanding some doubts and uncertainties stemming from statements made by various judicial bodies<sup>37</sup> or found in the literature,<sup>38</sup> IHL is indisputably applicable in IAC regardless of the level of violence which might occur in the use of force between the parties to the conflict. At the 31st International Conference of the Red Cross and Red Crescent, the ICRC solemnly affirmed this in the following terms:

In the decades since the adoption of the Conventions, duration or intensity have generally not been considered to be constitutive elements for the existence of an international armed conflict. This approach has recently been called into question by suggestions that hostilities must reach a certain level of intensity .... It is submitted that, in addition to prevailing legal opinion which takes the contrary view, the absence of a requirement of threshold of intensity for the triggering of an international armed conflict should be maintained because it helps avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of given situation.<sup>39</sup>

In the same vein, while the positions expressed by international criminal courts and tribunals have sometimes been less than clear, in the final analysis there appears to be a tendency towards retaining the traditional approach, namely that an IAC is characterized without reference to the level of intensity of the violence.

The ICTY judges' reasoning in their judgement in the *Tadić* case contains the curious statement that "it suffices for the moment to say that the level of intensity of the conflict ... was sufficient to meet the requirements for the

37 See, for example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the ICRC, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, p. 8, or ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the ICRC, 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, p. 7; and ICTY, *Tadić*, Case No. IT-94-1-A, Judgment (Trial Chamber), 7 May 1997, para. 569, or Special Court for Sierra Leone (SCSL), *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), 18 May 2012, paras 563 ff.; Lucius Caflisch, "La pratique suisse en matière de droit international public 2008", *Revue Suisse de Droit International et Européen*, No. 4, 2009, p. 605, reproduced in the reply given on 19 November 2008 by the Federal Council to a question put by Mr Josef Lang, Member of the National Council, on 1 October 2008.

38 See, for example, UK Ministry of Defence, above note 7, p. 29, para. 3.3.1; George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, Vol. 90, 1996, p. 67, or International Law Association, *Initial Report on the Meaning of Armed Conflict in International Law*, prepared by the International Law Association Committee on the Use of Force, submitted at the Rio de Janeiro Conference, 2008, p. 10; and International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 3, note 7, available at: [www.ila-hq.org/en/committees/index.cfm/cid/1022](http://www.ila-hq.org/en/committees/index.cfm/cid/1022).

39 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, pp. 8–9, available at: [www.icrc.org/fre/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-fr.pdf](http://www.icrc.org/fre/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-fr.pdf).

existence of an international armed conflict for the purposes of the Statute”.<sup>40</sup> It seems, however, that this is an isolated instance of such thinking. The opposite may be found, for example, in the *Delalić* case, which states that in the case of international armed conflicts, “the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law”.<sup>41</sup> The ICC has adopted a similar position.<sup>42</sup> Lastly, the Special Court for Sierra Leone, in its judgment of 18 May 2012, adopted the definition provided by the ICTY in paragraph 70 of its judgement in the *Tadić* case.<sup>43</sup> The wording is, however, ambiguous, since the judges in the *Taylor* case take the view that organization and intensity are criteria for establishing the existence of an armed conflict, without specifying its nature, either IAC or NIAC, whereas these two criteria are only relevant for the classification of a NIAC. It is therefore a moot point whether the judges wished to apply a criterion of intensity for the purposes of classifying a situation as an IAC. This did not seem to be their intention because, although they considered that the distinction between IACs and NIACs was of little relevance in the case before them as the acts in question were crimes in both kinds of conflict, they employed exactly the same wording as the ICTY, which certainly does draw a distinction between the two kinds of armed conflict.

### The special case of the beginning of the application of IHL in occupied territories

The issue of when the rules contained in Part III of the Fourth Geneva Convention on occupied territories apply is one of the crucial questions related to the beginning of the applicability of the IHL of IAC. In recent years, debates regarding IHL have centred on the notion of occupation as such, and on the implications of the point at which a foreign army may be deemed to be occupying a territory within the meaning of Article 42 of the Hague Regulations.<sup>44</sup> The invasion of Iraq by the United States in 2003 and the Israeli army’s unilateral withdrawal from the Gaza Strip in 2005 have reawakened interest in this topic. Without revisiting these aspects which have been widely debated by eminent experts in this journal,<sup>45</sup> it will simply be noted that a further difficulty emerges once it is accepted that, pursuant to the theory of functional occupation, the rules on occupied territories may apply before the situation may be qualified as an occupation within the meaning of the Hague Regulations. This becomes plain on reading the provisions of the section

40 ICTY, above note 38, para. 569.

41 ICTY, above note 8, paras 184 and 208.

42 See ICC, above note 21, para. 207.

43 SCSL, above note 37, paras 563 ff.

44 Article 42 of the Hague Regulations, which is the reference provision regarding the beginning of a situation of occupation, states: “Territory is considered occupied when it is actually placed under the authority of the hostile army.” Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

45 See *International Review of the Red Cross*, Vol. 94, No. 885, 2012, in particular the debate between Michael Bothe, Martin Zwanenburg and Marco Sassòli, as well as Tristan Ferraro’s contribution, all of which discuss the point at which an occupation can be said to have begun.

dedicated to occupied territories one after the other. There is no question of requiring the “Occupying Power” to respect all of these provisions if this “Power” amounts to just a few soldiers who have entered the territory, or more generally during the invasion phase before the Power’s authority has been decisively established.<sup>46</sup> In an effort to decide when the provisions related to occupied territories begin to apply, a guided reading of each of the provisions of Part III of the Fourth Geneva Convention was proposed by the present author in 2014, in order to make it possible to identify when the obligations that they contain start to apply to the “Occupying Power”.<sup>47</sup> To this end, consideration was given to the question of whether they established the enjoyment of a right, or if they had a bearing on the treatment of the protected persons, and at the same time, whether it could be found that they could be implemented before the “Occupying Power” had established effective control.<sup>48</sup> Indeed, the pragmatic nature of IHL demands that it must always make sure that its implementation is possible.<sup>49</sup> Most of the time, the present author’s 2014 study consisted in the observation that the provision studied requires only abstention from acts, and not the introduction of specific implementing measures. The conclusions were that Articles 47–49, 51, 53, 58, 59, 61 first sentence, 63, 64–75, 76 and 78 of the Fourth Geneva Convention applied immediately, unlike Articles 50, 52, 54 to 57, 60, 61 second and following sentences, 62 and 77.<sup>50</sup> Since some of the provisions of the Fourth Geneva Convention regarding occupied territories are found to be applicable even when there is no occupation within the meaning of the Hague Regulations, the legal situation remains hazy in some respects. The proposed reading of the articles contained in Part III of the Fourth Geneva Convention rests on a broad understanding of their authors’ intentions. This may prompt a feeling that IHL can be applied at will, thus throwing it open to challenge by an Occupying Power which could take refuge in the normal meaning of the terms “occupied territories”. It is therefore fortunate that AP I transcends the dichotomy that can stem from a combined reading of the Hague Regulations and the provisions of the Fourth Geneva Convention on occupation. Indeed, AP I no longer draws a distinction between the territory of the parties to a conflict and occupied territories, save in a few of its provisions. Only eight provisions (out of 102) specifically mention occupied territories, and only three of them<sup>51</sup> are entirely

46 See in this connection Robert Kolb and Sylvain Vité, *Le droit de l’occupation militaire: Perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009, pp. 145–146. See also Eritrea–Ethiopia Claims Commission, *Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26*, between the State of Eritrea and the Federal Democratic Republic of Ethiopia, The Hague, 19 December 2005, para. 27.

47 For the details of this study, see J. Grignon, above note 2.

48 ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting, ICRC, Geneva, 2012, p. 25, available at: [www.icrc.org/eng/resources/documents/publication/p4094.htm](http://www.icrc.org/eng/resources/documents/publication/p4094.htm).

49 See in this connection Daniel Thürer and Malcolm McLaren, “Ius Post Bellum in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?”, in Klaus Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlin, 2005, p. 758.

50 See J. Grignon, above note 2, p. 133 ff.

51 Geneva Convention IV, Arts 14, 63, 69.

devoted to this particular situation. The six others contain paragraphs addressed to the parties to the conflict and paragraphs addressed to the Occupying Power.

## The beginning of the application of IHL in non-international armed conflicts

Non-international armed conflict is the more prevalent form of armed conflict in today's world,<sup>52</sup> yet treaty law does not define when a NIAC begins. For this reason, the material aspects of this kind of conflict have been widely analyzed and dissected, mostly in the case law of the international criminal tribunals for the former Yugoslavia and Rwanda, as well as in doctrine. Although less attention has been devoted to its temporal aspects, in order to determine the moment when IHL begins to apply to NIACs, it is sufficient to sum up the numerous positions already expressed on this subject by judicial bodies and learned writers.<sup>53</sup>

In short, today it is accepted that IHL will begin to apply to a NIAC as soon as it is clear that the parties to the conflict are sufficiently organized and that violent clashes have reached a certain level of intensity. Although the indicators for both organization and intensity are elucidated in the ICTY's *Haradinaj* and *Boškoski* cases,<sup>54</sup> their practical determination almost inevitably proves extremely complex. Furthermore, a classification (or not) of NIAC carries significant consequences since, *inter alia*, rules on the use of force in international human rights law differ from those in IHL; the issue thus remains an extremely sensitive one.

It seems worthwhile to confine our study here to two aspects that have received relatively little attention in the literature and which have a direct bearing on the point at which IHL begins to apply in NIACs. These two aspects are as follows: first, the potential repercussions of introducing an element of protraction, which for a time was a predominant consideration in the case law, and the difficulties of applying the indicia for ascertaining whether the parties to the conflict are sufficiently organized; and second, the consequences of the additional differentiation or, on the contrary, standardization – depending on the viewpoint – of the threshold of NIAC after the adoption of the ICC Rome Statute.

52 See Michele Mack, *Increasing Respect for International Humanitarian Law in Non-international Conflicts*, ICRC, Geneva, 2008, available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0923.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf).

53 See in particular ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-T, Judgement (Trial Chamber I), 3 April 2008, para. 49; ICTY, *The Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Case No. IT-04-82-T, Judgement (Trial Chamber II), 10 July 2008; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 537; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2010; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2002.

54 ICTY, *Haradinaj* and *Boškoski*, above note 53.

## The uncertainty of determining the exact beginning of application of IHL in NIACs

The elements of intensity and organization are useful for the purposes of classification, but they still leave some doubts as to when IHL actually starts to apply in NIACs. The level of organization of the parties to the conflict is hard to assess and introduces an element of uncertainty into the point in time at which IHL begins to apply to NIACs. Similarly, the introduction of the notion of a “protracted armed conflict” into the analysis of the intensity of the violence is a temporal element muddling the analysis.

### *The criterion of organization*

The level of organization of the parties to the conflict is hard to assess and introduces an element of uncertainty into the point at which IHL begins to apply to NIACs. The case of Syria has well illustrated the difficulty of matching events on the ground with the indicators described in the case law. While it might be straightforward today to say that the situation in Syria displays the characteristics of a NIAC regulated by common Article 3,<sup>55</sup> it is still debatable at which point in time exactly the organization and intensity criteria were fulfilled.

It can be seen today that the weapons used by both the armed opposition groups and the government armed forces, the army’s inability to regain control of certain areas, the tens of thousands of victims, the mass flight of civilians into neighbouring countries, the mounting violence, and the involvement of the UN in a fruitless effort to restore peace, as well as the constant, intensive use of force on the government side, combined with the fact that the situation has lasted for almost three years, are all factors indicating that the level of intensity has been attained.<sup>56</sup> Similarly, as far as the degree of organization is concerned, it may be said that the Free Syrian Army, the main armed group present at the time (2011–2012), of which the vast majority of insurgents involved in the armed clashes claimed to be members, carried out coordinated actions, had a general staff, controlled certain parts of the territory or was at least capable of preventing the Syrian army from entering certain areas, and had spokespersons and representatives. Thus, the Free Syrian Army’s degree of organization appears to have met the relevant requirements. It can therefore be concluded that there was an ongoing NIAC, to which common Article 3 applied.<sup>57</sup> The

55 See ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increasing Fighting”, Operational Update, 17 July 2012, third paragraph, available at: [www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm](http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm). No further attempt will be made to consider whether the conflict also meets the requirements of the AP II, since Syria is not a party to that instrument; hence it is inapplicable to this situation. See the table of ratifications compiled by the ICRC, available at: [www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

56 See the indicative factors defined by the ICTY in *The Prosecutor v. Ljube Bošković, Johan Tarčulovski*, above note 53, paras 177 ff.

57 *Ibid.*, paras 199 ff.

descriptions offered by the ICRC, the UN and Human Rights Watch confirm this assessment.<sup>58</sup>

But although this seems to be an uncontroversial statement today, how long has it been true? It can be argued that the requisite level of intensity was attained fairly rapidly, insofar as the aforementioned indicative factors could be verified as from the end of April 2011.<sup>59</sup> On the other hand, it is much more difficult to assess the point in time at which the Free Syrian Army met the criterion of a sufficient organization. August 2011 is certainly a pivotal moment, since that was when it was formed. It seems, however, that it did not acquire a sufficient degree of organization until the following months. The available information on the intensification of the violence in autumn 2011 and the means deployed by the Syrian Army to counter the insurgents suggests a mature organization, as evidenced by the Free Syrian Army's capacity to conduct concerted military actions that held government forces in check. Another decisive element over this period has been the armed group's capacity to conduct genuine military offensives, which is an indication of the existence of a chain of command capable of giving orders to subordinates who will carry them out. For all these reasons, although it is impossible to give the exact date on which the two chief criteria of a NIAC coming under common Article 3 were met, it may be argued that this situation has existed since autumn 2011.

### *The criterion of intensity of the violence and the notion of "protracted armed violence"*

The mention of "protracted armed violence" early on in the ICTY's jurisprudence in the *Tadić* case, and the notion of "protracted armed conflict" figuring in Article 8 of the ICC Statute, may create some confusion to the extent that they may give the impression of an additional requirement being necessary for the purposes of

58 The UN set up an Independent International Commission of Inquiry to look into the situation in Syria. The Commission has produced several reports covering various periods, namely: UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 23 November 2011, UN Doc. A/HRS/S-17/2/Add.1; UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc. A/HRC/19/69; UN Human Rights Council, Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, 26 June 2012, UN Doc. A/HRC/20/CRP.1. The Parliamentary Assembly of the Council of Europe has also produced an extremely detailed report on events prior to 24 April 2012: Parliamentary Assembly of the Council of Europe, *The Situation in Syria*, report, 24 April 2012, Doc. 12906. See also UN Human Rights Council, Preliminary Report of the High Commissioner on the Situation of Human Rights in the Syrian Arab Republic, 14 June 2011, UN Doc. A/HRC/17/CRP.1. Reference may also be made to reports produced by the non-governmental organization Human Rights Watch, in particular: "We Live as in War": Crackdown on Protesters in the Governorate of Homs, Human Rights Watch, November 2011; "By All Means Necessary": Individual and Command Responsibility for Crimes against Humanity in Syria, Human Rights Watch, December 2011; and *In Cold Blood: Summary Executions by Syrian Security Forces and Pro-Government Militias*, Human Rights Watch, April 2012. See also S. Nebehay, above note 1; and "Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes", *Reuters*, 14 July 2012, available at: [www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714](http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714). See also ICRC, above note 1.

59 See UN reports of that time, above note 58.

classifying a NIAC. Such an interpretation, beyond the fact that it can only be made *a posteriori*, is also not very helpful because those engaging in armed violence cannot know how long it is going to last.

If the criterion for characterizing a NIAC is the protracted nature of the clashes, at any point in time from the first day onwards, the protagonists may consider that their actions are governed by a different legal regime and may not therefore realize that their acts, being related to an armed conflict, constitute a war crime. How long must they wait in order to be certain that the clashes are characteristic of a NIAC? While it is clear *a posteriori* that a conflict has lasted for three months, for example, during the hostilities it is impossible to predict when it will end. Over a three-month period, it might be possible to consider, again *a posteriori*, that the fifteenth day of the conflict meant that it had become protracted, but while it is taking place, how can the parties work out that this fifteenth day is the crucial juncture at which IHL becomes applicable and they can be charged with failing to respect it by an international criminal court or tribunal? On the contrary, they may imagine that the sixteenth day will be the last day of the conflict and be of the opinion that this duration is too short to meet the requirement of a protracted conflict. This element therefore raises the issue of the perpetrator's intentions when qualifying his/her acts as a war crime. In this situation, the perpetrator of a crime committed when the armed clashes had been going on for a few days could be found guilty even though he/she did not realize that he/she was in the midst of a NIAC when he/she committed it, because he/she could not anticipate that events were going to last long enough to be characterized retrospectively as a NIAC.

To look at it from a different perspective, the requirement that the use of force must be protracted before it may be regarded as a NIAC and hence regulated by IHL mars the protection of persons affected by these conflicts. If it is necessary to wait for some time before finding that the situation displays the distinguishing features of a NIAC, this means that persons arrested at the outset of the violence will not receive the protection afforded by IHL, whereas if they had been arrested a few days, weeks or months later, depending on the length of time considered appropriate for deciding that a NIAC exists, they would have been fully protected. This conflict of interest between the aims of IHL and the introduction of a criterion which postpones the beginning of its applicability was debated during the preparatory work on AP II. The government of the Federal Republic of Germany raised the following question: "Had a Government the right to take action which infringed minimum human rights just because a rebellion was of a recent nature ...?"<sup>60</sup> Of course today, thanks to the acknowledged applicability of human rights law at all times and to the non-derogable rights that remain applicable in all situations,<sup>61</sup> what the Federal Republic of Germany

60 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 8, Summary Records of Committee I, 1978, p. 220, para. 31.

61 When the Federal Republic of Germany spoke on 14 February 1975, neither of the international covenants had yet entered into force (the International Covenant on Civil and Political Rights entered into force on 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights on 3 January 1976).

termed “minimum human rights” must be respected, even if IHL does not apply. Nevertheless, IHL, which was specifically designed to regulate armed conflict, contains provisions which are tailored to such situations.

*The repercussions of the notion of “protracted armed conflict” in the Rome Statute on the applicability of customary IHL in NIACs*

A combined reading of Articles 8(2)(c) and (e) of the ICC Statute gives rise to some uncertainty. While Article 8(2)(c) refers to violations of common Article 3 “[i]n the case of an armed conflict not of an international character”, Article 8(2)(e) deals with “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character”. It is not until Article 8(2)(f) that the Statute stipulates that it applies to “protracted armed conflict between governmental authorities and organized armed groups or between such groups”. The purpose of this distinction is therefore unclear. Did States, through the Rome Statute, intend to reaffirm the traditional conception of common Article 3, with its extremely low threshold, by drawing a dividing line with the violations of Article 3 and *other* violations, or is the purpose of this specific clause in Article 8(2)(f) to standardize the classification threshold formulated by international criminal courts and tribunals and to extend it to all NIACs? The question remains unanswered, and positions are polarized.<sup>62</sup> We must wait for the ICC to give its interpretation in a case concerning a violation of Article 3. Either the Court will give the same interpretation as the ICTY, or it will return to a traditionally low threshold of applicability. It would then suggest either a standardization of the point at which IHL begins to apply in NIACs, or on the contrary a differentiation. Pending such a decision, it is interesting to examine a not inconsiderable consequence that standardization might entail.

If the standardization of the threshold of applicability for NIACs were to be confirmed – in other words, if the notion of a NIAC taking the form of protracted armed violence becomes the general definition of this kind of conflict – it could potentially have a substantial impact on the applicability of customary IHL to NIACs.

A customary rule should apply as of the same time as the corresponding rule under treaty law. While all NIACs covered by AP II are also necessarily covered by common Article 3, which has a lower threshold of applicability, the converse is not true. This is the very point of the distinction drawn in treaty law between the two kinds of conflict. There are situations that are covered by common Article 3, but to which AP II does not apply owing to the absence of the

62 For a position in favour of standardization, see A. Cullen, above note 53, p. 219. See in particular the detailed list which he proposes in footnotes 18 to 25 on pages 120 and 121. He welcomes this trend because he considers that common Article 3 has no objective criteria and that the criteria contained in AP II are problematic. See also Anthony Cullen, “The Parameters of Internal Armed Conflict in International Humanitarian Law”, *University of Miami International and Comparative Law Review*, Vol. 12, 2004, p. 202; Anthony Cullen, “Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law”, *Military Law Review*, No. 183, Spring 2005, pp. 108–109.

material criteria set forth in Article 1 thereof. In terms of the applicability threshold of customary IHL, this reasoning implies that it should be possible to distinguish between rules which are held to be of a customary nature in NIACs and which apply in situations covered by common Article 3, and those which apply in situations coming under AP II. Strangely, the ICRC Customary Law Study draws no distinction between the two spheres of applicability. When a rule is said to be applicable in a NIAC, the study provides no further indication of whether it is applicable in armed conflicts solely meeting the criteria of common Article 3, or also those of AP II. However, just as a customary rule in IACs is not automatically customary in NIACs as well, a customary rule in armed conflicts coming under AP II is not necessarily of a customary nature in armed conflicts coming under common Article 3. It may be concluded that a rule is of a customary nature in armed conflicts governed solely by common Article 3 and in those falling under AP II only if equivalent practice and *opinio juris* are found in both situations. As the ICRC Customary Law Study does not draw this distinction, for each of the rules which it regards as customary in NIACs, it will be necessary to decide whether the NIAC may be qualified as one which falls solely under common Article 3 or whether it also comes under AP II, by making a case-by-case examination of whether or not the rule in question inherently presupposes control over territory. This task would be impossible without repeating all the work done by the contributors to the study.

For this reason, the standardized definition introduced in Article 8(2)(f), taken with Article 8(2)(e), offers a considerable advantage in that the serious violations listed under Article 8(2)(e)(i) to (xv) include most of the acts covered by AP II. From the point of view of the applicability of IHL pertaining to NIACs, these provisions call for two sets of comments, the second of which is of particular relevance here. First, the ICC Statute makes it possible to prosecute acts falling under AP II on customary law grounds, without it being necessary for all the criteria required in the first article thereof to be met. These treaty-based criteria are so strict that in the end, this instrument applies in relatively few cases.<sup>63</sup> This definition, borrowed from the early case law of the ICTY, has in a way given it a second life.<sup>64</sup> It will be possible to prosecute breaches of some of its provisions on the basis of a more flexible definition. Secondly, this “new” definition is especially helpful in determining when customary IHL pertaining to NIACs begins to apply. Since Articles 8(2)(e) and (f) expressly refer to “armed

63 See in this connection A. Cullen, above note 53, p. 112; Dieter Fleck, “The Law of Non-International Armed Conflicts”, in: D. Fleck, above note 16, p. 624; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed., Manchester University Press, Manchester, 2008, p. 83; D. Schindler, above note 16, p. 149.

64 This shift in thinking is particularly noteworthy when compared with the view expressed by Dietrich Schindler in 1979: “The attempt to develop the rudimentary provisions of [common Article 3] by adopting Additional Protocol II has, therefore, proved rather unsuccessful [owing to the introduction of requirements for its applicability]. However, Additional Protocol II may be considered as a first step towards a larger recognition of rules of humanitarian law in non-international armed conflicts. The next step should be to lower the threshold of application of Additional Protocol II so as to assimilate its field of application to the one of Article 3.” D. Schindler, above note 16, p. 149.

conflicts not of an international character”, it is no longer necessary to ponder whether the relevant customary law applies only to situations covered by common Article 3 or also to those falling under AP II. Once there is a “protracted” armed conflict between governmental authorities and armed groups, or between such groups, customary IHL applicable to NIACs will become operative.

The result is that customary rules stemming from treaty law, in particular from AP II, could apply in situations not covered by those instruments. Articles 8(2)(e) and (f) thus simplify the implementation of customary IHL in non-international armed conflicts. The customary IHL applicable in NIACs therefore greatly facilitates the protection of persons affected by this kind of conflict. By adopting the definition proposed by the ICTY, in light of the Tribunal’s interpretation thereof in its subsequent case law and provided that standardization prevails, the ICC Statute can considerably extend the scope of protection. The threshold of Article 8(2)(f) would be as low as that of common Article 3,<sup>65</sup> because the protracted duration of the conflict is in fact only one of the factors used to assess the level of intensity of the violence. This provision would therefore set a very low threshold for the application of IHL. The material conditions listed in AP II do not have to be present in order to require the parties to a NIAC, possibly even a low-intensity one, to abide by IHL, including the rules drawn from AP II or from IHL pertaining to IAC. Furthermore, adopting this definition as the threshold for the applicability of customary IHL pertaining to NIAC would imply that treaty-based rules on IACs would now possibly be enforceable in armed conflicts where no State is involved. This would be a remarkable one-off in public international law in terms of the formative elements of custom.

## Conclusion

While a number of indicators make it possible to say with certainty that IHL applies to a given situation, it is often difficult to say precisely *when* it begins to apply, above all since nowadays armed clashes are sometimes the result of equivocal conduct. Among the challenges in determining the beginning of the application IHL discussed in this paper, no mention has been made of the significance of declarations made when violence erupts. The States concerned, or third States, or even other bodies, can make contradictory statements depending on their interests. One State will refuse to consider that it is involved in a NIAC in its territory in order to reject the application of IHL, while another will justify some of the measures it is taking by referring to the “global war on terror”.

In any event, such positions must have no effect on the applicability of IHL. There is no need for any authority to decide that an armed conflict exists, or that IHL is applicable, for the latter to be operative. In spite of this, the opposing sides’ assessment of the situation they face may indeed have unacceptable consequences in terms of access to humanitarian assistance or the effective

65 See in this connection D. Fleck, above note 63, p. 624.

protection of victims of armed conflict. If parties refuse to acknowledge that IHL applies, they may use this argument to deny humanitarian agencies access to territory where there are persons affected by the armed conflict. Determining when IHL starts to apply may therefore prove to be a complex exercise with fundamental operational implications, and one which moreover fails to produce a very precise result. However, it may generally be concluded that the opinions of the parties to the conflict involved are irrelevant for its classification.

IHL pertaining to IAC begins to apply as soon as one State employs force in the territory of another State without the latter's consent, provided that the violence is of a collective nature, regardless of the kind of objects or persons targeted. Such violence may take the form solely of capture. It is not necessary to assess the intensity of the violence or to look for the existence of any *animus belligerendi* to determine that a situation can be classified as an IAC under IHL.

In the case of NIACs, it is well settled that the two key criteria are the organization of the parties to the conflict and the level of intensity of the violence. These criteria have formed the subject of in-depth analyses in case law and literature. Some challenges stem from the temporal element of the "protracted duration" of the violence, especially in view of its implications in the initial phase of the application of customary IHL.

Although the negotiators of the Geneva Conventions, who remain the leading authorities in the matter, deliberately chose not to provide a strict definition of, or set a precise starting point for, the applicability of IHL, in order to retain as much flexibility as possible when it came to implementing IHL in practice, this lack of precision creates a number of complex challenges. Yet potential legal conundrums should never serve as a pretext for undermining the practical application of IHL. Besides, if this holds true when determining the crucial moment marking the beginning of the applicability of IHL, it is also true regarding the *end* of applicability of IHL.<sup>66</sup> The question of the end of applicability of IHL has its own inherent challenges and uncertainties. Among them, the lack of clarity regarding the point at which military operations may be deemed to have ended is one of great importance. Above all, the challenges related to postponing or staggering the end of IHL's application must be better understood, especially because they are completely different in form from those related to the beginning of its application.

66 See Marko Milanovic, "The End of Application of International Humanitarian Law", in this issue of the *Review*.

# The end of application of international humanitarian law

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## Abstract

*This article provides an overview of the rules governing the end of application of international humanitarian law (IHL), or the law of armed conflict. It articulates the general principle that, unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its application in the first place are no longer met. For IHL to apply, its distinct thresholds of application – international armed conflict, belligerent occupation and non-international armed conflict – must continue to be satisfied at any given point in time. The article also examines situations in which a departure from the general rule is warranted, as well as the factors that need to be taken into account in determining the end of each type of armed conflict. In doing so, the article analyzes terminating processes and events, which generally end the application of IHL (but not necessarily all of it), and transformative processes and events, which end the application of one IHL sub-regime but immediately engage another. Finally, the article briefly looks at the (putative) armed conflict between the United States and Al Qaeda and its seemingly imminent end.*

**Keywords:** IHL, temporal scope of application, end of application, end of armed conflict, international armed conflict, non-international armed conflict, occupation.



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The question of when international humanitarian law (IHL) starts applying is complex enough;<sup>1</sup> the end of IHL's application perhaps even more so. It is certainly one of those questions to which the relevant treaties provide no clear answer. As we will see, while some provisions of the 1949 Geneva Conventions<sup>2</sup> make reference to specific points in time, such as the cessation of active hostilities or the general close of military operations, they do not do so for the purpose of systematic regulation, nor do they indeed define these rather vague terms more precisely. This inherent uncertainty is exacerbated by three further considerations.

First, IHL is not a single, coherent body of law. It had no original designer who thought everything through and tied its loose strands together. Rather, like international law generally, IHL is written on a palimpsest, with layers building upon layers and the new replacing the old, but rarely, if ever, doing so completely. Thus, the Hague law regulating the conduct of hostilities that we still apply today was embedded in the then-customary framework in which “war” was the operative legal concept, rigidly opposed to peace. The various waves of Geneva law then built upon that, with the 1949 Conventions and the 1977 Additional Protocols in particular redefining the thresholds of IHL's applicability. We can then add to this mix the judicial gloss of these thresholds, set out mainly by international criminal courts and tribunals, the developments of customary law that they precipitated, and further developments in State practice in the post-9/11 global arena.

Second, and relatedly, even the factual and objective thresholds of modern IHL are fragmented. One cannot truly speak of the end of application of IHL in general terms, but only of the end of application of international armed conflict (IAC), belligerent occupation and non-international armed conflict (NIAC) respectively. Furthermore, while some IHL rules apply at all times – in other words, even outside armed conflict and occupation (e.g. the obligations to disseminate IHL, mark cultural objects, etc.) – as we will see, the application of others might have started with an armed conflict but need not have ended with the armed conflict (e.g. the obligation to investigate and prosecute grave breaches that occurred in an IAC). And while the development of the substantive customary law of NIACs was frequently based on analogies to IACs, the structural differences between the two types of conflicts may have a bearing on the temporal scope of IHL's application and render such analogies more difficult.

1 Generally on classification of armed conflicts, see Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict”, in Christian Henderson and Nigel White (eds), *Research Handbook on International Conflict and Security Law*, Edward Elgar, Cheltenham and Northampton, MA, 2013, pp. 256–313, pre-print draft available on SSRN at: <http://ssrn.com/abstract=1988915>, on which some parts of the following discussion draw heavily (all Internet references were accessed in October 2014). See also the article by Julia Grignon in this issue of the *Review*.

2 Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (GC I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (GC II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (GC IV).

Third, our interpretation of the thresholds of application and IHL's temporal scope will inevitably depend on how, within a particular professional setting – as domestic or international judges, government officials, military legal advisers, humanitarian activists, or academics – we weigh a number of competing, and evolving, policy considerations. In other words, an analysis of the end of IHL's application by any given actor is influenced by whether that actor ultimately *wants* IHL to continue applying, in light of the consequences of continuation or termination. Thus, for example, in Geneva in 1949, most of the humanitarian community – including the International Committee of the Red Cross (ICRC) – advocated for a broad applicability of IHL, particularly when it came to hitherto almost unregulated NIACs. Most States, on the other hand, wanted to both heighten the threshold for IHL application in case of NIACs and reduce the substantive scope of IHL rules applicable in NIACs, because they sought to preserve their own freedom to suppress rebellion and internal strife as they saw fit.<sup>3</sup> Today, however, the dovish humanitarians might *not* want IHL to apply expansively, since they may see it as a departure from concurrently (and if need be extraterritorially) applicable international human rights law. Yet States today might precisely want IHL to apply, since they would see it as *empowering* rather than constraining them, for instance with regard to targeted killings and preventive detention, allowing them to avoid the more demanding rules of international human rights law.<sup>4</sup>

In yet other situations, that calculus may work out differently. Such is the case, for instance, with regard to the question of whether the occupation of Gaza has ended – a question which turns mainly on whether the continued application of IHL is seen as desirable or not. Similarly, an international criminal tribunal may want to take a very generous approach to IHL's continued application since its own jurisdiction could depend on the existence of armed conflict as a contextual element. The *consequences* of the end of IHL's applicability, whether they concern the scope of the parties' rights and obligations or individual criminal responsibility, will inevitably be taken into account. This is not to say that even if inevitable, such result-oriented thinking is necessarily fully conscious and deliberate. For what it is worth, this article will strive to weigh the various relevant considerations as transparently as possible.

This article is structured as follows. It will first provide a brief overview of the changes that IHL has undergone through the years – to the extent that they are relevant to understanding the conditions for its end of application – and will set out the general principle governing this process. It will then look at the point at which different IHL rules cease to apply in international armed conflicts, belligerent occupation and non-international armed conflicts. It will subsequently examine the transformative processes that end the application of one IHL sub-regime (IAC or NIAC) but initiate the application of another. It will finish by looking at

3 See generally Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 30 ff.

4 See M. Milanovic and V. Hadzi-Vidanovic, above [note 1](#), pp. 305–308.

the (impending) end of the conflict between the United States and Al Qaeda, one of the most current and controversial issues of contemporary IHL.

## Brief historical overview and the general principle on end of application

Before we can examine the end of application of modern IHL, we need to take a brief look at the past, as well as the evolution of the thresholds of the beginning of IHL's application, which are dealt with in more detail elsewhere in this issue of the *Review*.<sup>5</sup> As noted above, the operative concept in customary international law before the 1949 Geneva reform (and perhaps for some time thereafter)<sup>6</sup> was "war". In classical international law, war was defined not merely as a factual situation involving hostilities between two States, but as a legal condition whose initiation and end brought about a host of consequences in the relations between the belligerents among themselves and with third States. War and peace categorically excluded each other, as did the law of war and the law of peace.<sup>7</sup> War was generally regarded as abrogating all peacetime treaties between the belligerents and triggered the application of the rules on neutrality for non-belligerents. It was also both formal and subjective, requiring not merely the objective existence of hostilities but also the expression of an *animus belligerendi*. This subjective *animus* could be proven, or not, by reference to criteria such as the severance of diplomatic relations between belligerents, the existence of a declaration of war or of a notification of the state of war to neutral powers, or the recognition of the state of war by these neutral powers.

This in turn opened the way to situations of widespread and protracted fighting in which, for political reasons, the States concerned refused to recognize the existence of war. A gap opened up between a common-sense, factual understanding of "war" and one derived from the niceties of the law of nations, a gap to be exploited when it served State interests. It not only introduced a large degree of uncertainty with regard to the rights of private citizens, but more importantly created a major obstacle to the application of any humanitarian rules of the law of war. All that a State had to do to avoid the law of war was to deny the existence of war *in the technical legal sense*, no matter how much blood was being shed in a very real sense.<sup>8</sup> It was precisely the rigidity of the law of peace/

5 See the article by Julia Grignon in this issue of the *Review*.

6 The applicability thresholds of the treaties did not immediately crystallize into custom, and due to the fluid nature of customary law, it is difficult to pinpoint the exact time at which this crystallization occurred.

7 See generally Jann Kleffner, "Scope of Application of International Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 44; M. Milanovic and V. Hadzi-Vidanovic, above [note 1](#), pp. 258–264.

8 *Ibid.*, p. 260. Perhaps the most notorious example of this occurred with regard to the Manchurian crisis and the Sino-Japanese conflict in the 1930s, in which both Japan and China for various political reasons denied the existence of a state of war – for more on this, see Anthony Carty and Richard A. Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945*, Martinus Nijhoff, The Hague, 2000, pp. 41 ff.

law of war framework and the strict consequences that followed the transition from one to the other that provided the incentive for States to avoid recognizing the existence of war. This led some scholars of the period to argue for the legal recognition of a third, middle category between war and peace – a *status mixtus*.<sup>9</sup> Others, in turn, wanted to objectivize war.<sup>10</sup> However, what the humanitarian lawyers may have wanted and what States thought to be in their interest were not necessarily one and the same. Rather than bringing some resolution, the controversies around the legal nature of war brought even more uncertainty.<sup>11</sup>

Since “war” was a formal business, it also needed to be formally terminated. While hostilities could be interrupted through an agreed-upon truce or ceasefire, or a more comprehensive armistice, the end of war generally required a peace treaty.<sup>12</sup> It was only upon the conclusion of such a treaty that normal relations between the parties could resume and their earlier peacetime treaties could be revived.

This was still the relevant framework as the Second World War started, but its aftermath saw the addition of more layers to the palimpsest of international law. First, even though the recourse to war as an instrument of national policy was already outlawed under the terms of the 1928 Kellogg–Briand Pact, the adoption of the UN Charter and its general prohibition on the use of *force* (not just “war”) truly created the *jus ad bellum* as separate from the *jus in bello*. Second, the applicability of the 1949 Geneva Conventions was generally detached from the formal concept of war. Article 2 common to the four Geneva Conventions (common Article 2 or CA2) introduced the concept of international armed conflict,<sup>13</sup> which was designed as an objective, factual replacement for the narrower concept of war while retaining its predecessor’s inter-State nature.

The 1949 Geneva Conventions also introduced the first systematic regulation of internal conflicts, through the concept of non-international armed conflict under common Article 3 of the Conventions (CA3). At the time of the Conventions’ adoption, the NIAC threshold brought about only the application of CA3 itself and its purely humanitarian provisions protecting persons not taking part in hostilities or rendered *hors de combat*. That was the sum total of the conventional law of armed conflicts as it applied to NIACs in 1949; for example, it contained no rules on the conduct of hostilities analogous to IACs.

Over time, however, through the adoption of the 1977 Additional Protocols and the evolution of customary law, the law of armed conflict coalesced around the

9 See Georg Schwarzenberger, “Jus Pacis ac Belli? Prolegomena to a Sociology of International Law”, *American Journal of International Law*, Vol. 37, No. 3, 1943, p. 470; Philip C. Jessup, “Should International Law Recognize an Intermediate Status between Peace and War?”, *American Journal of International Law*, Vol. 48, No. 1, 1954, p. 100.

10 See James Leslie Brierly, “International Law and Resort to Armed Force”, *Cambridge Law Journal*, Vol. 4, No. 3, 1932, p. 308; Theodore S. Woolsey, “The Beginning of a War”, *Yale Law Journal*, Vol. 9, No. 4, 1900, p. 153.

11 M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 260–261.

12 See J. Kleffner, above note 7, p. 62.

13 CA2(1) hence provides that: “In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” (emphasis added).

two factual thresholds set out in the 1949 Conventions. Not only is the CA2 threshold also valid for the application of Additional Protocol I (AP I) rules,<sup>14</sup> but it also became the threshold for application of the customary “Hague law” on the conduct of hostilities. This was also the case with the CA3 NIAC threshold, whereas the gaps in the regulation of NIACs were filled mainly through custom. The 1949 Geneva Conventions’ thresholds of application thus became the thresholds for the application of customary IHL more generally. The obsolescence of the traditional concept of “war” became almost complete, with States simply no longer declaring war against one another or formally expressing their view that war exists. Similarly, the distinctions between ceasefires, armistices and peace treaties gradually blurred, with peace treaties in particular becoming increasingly rare<sup>15</sup> and conflicts frequently ending with less formal instruments such as armistices or unilateral or joint declarations, or simply ending *de facto*.

But as the law of war was being rewritten into the law of armed conflict, the concept of “war” was still not abandoned formally, even if it was abandoned in fact as a condition for IHL applicability. Looking at the IHL palimpsest, one issue that arises is whether the concept of “war” still has any relevance for our modern debates. Notably, CA2 of the 1949 Geneva Conventions explicitly provides that they “shall apply to all cases of declared war”, thus making it possible for the Conventions (and the relevant custom) to *begin* applying before a single shot has been fired. But conversely, will their application *end* only with the end of the war in the formal, technical legal sense, once a state of war has commenced on top of a plain international armed conflict? Just consider a scenario of war with hostilities long having come to an end, yet without a peace treaty or any kind of formal instrument normalizing in full the relations between the parties.

Some authors, most notably Yoram Dinstein, still give significance to war as a legal concept.<sup>16</sup> Most, however, and here I include myself, would argue that the main point of the 1949 Geneva reform was precisely to do away with the subjectivity and formalism of war, and to make the thresholds of application objective and factual, with this tendency only being strengthened in the intervening years.<sup>17</sup> Having said that, the possibility of the “old” law still having an influence cannot be categorically excluded, especially because the concept of “war” transgressed the boundaries between *jus ad bellum* and *jus in bello*. However, that influence is likely to be minimal. In the case of a “war” in which

14 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (AP I), Art. 1(3).

15 See generally Howard S. Levie, “The Nature and Scope of the Armistice Agreement”, *American Journal of International Law*, Vol. 50, 1956, p. 880; Richard Baxter, “Armistices and Other Forms of Suspension of Hostilities”, *Collected Courses of the Hague Academy of International Law*, Vol. 149, 1976, pp. 357–390; J. Kleffner, above note 7, pp. 65–66.

16 See generally Yoram Dinstein, *War, Aggression, and Self-Defence*, 5th ed., Cambridge University Press, Cambridge, 2011. Dinstein focuses mostly on the continued relevance of the concept of war for the purpose of *jus ad bellum*.

17 On the marginalization of the concept of “war”, see especially Dino Kritsiotis, “Topographies of Force”, in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, The Hague, 2007, p. 29.

hostilities have *de facto* ended with permanence and finality, even in the absence of a formal conclusion of peace, as a matter of *jus ad bellum* any residual right to resume hostilities would be precluded by the UN Charter prohibition on the use of force,<sup>18</sup> while in the absence of actual hostilities or prisoners of war or protected persons in the hands of the adversary, IHL would have little or nothing to regulate.<sup>19</sup>

The rules governing the beginning and end of the application of IHL are both customary and conventional in nature. With regard to the conventional rules, of relevance to the temporal application of IHL are also some general issues of the law of treaties regarding entry into force and withdrawal. While the Geneva Conventions have achieved practically universal adoption, the general rules on entry into force are of particular relevance for newly formed States, who can become parties to treaties through accession or (automatic?) succession.<sup>20</sup> On the other hand, it is perhaps surprising that both the Geneva Conventions and their Additional Protocols contain explicit provisions permitting their denunciation.<sup>21</sup> No State party has ever denounced one of these treaties, and the inevitable political fallout would render this highly unlikely in the future. The denunciation provisions also contain explicit safeguards that would render any denunciation ineffective with regard to situations arising from an existing armed conflict or with regard to protected persons already in captivity.<sup>22</sup> The key legal safeguard, however, is the fact that most of the rules in the Conventions and the Protocols have achieved customary status, and would accordingly bind the denouncing State in any event. In the discussion to follow, I will accordingly disregard any potential issues arising from the general law of treaties, with the

18 See J. Kleffner, above [note 7](#), p. 66, *contra* Y. Dinstein, above [note 16](#), pp. 59–61 and 324.

19 The paradigmatic example of such a conflict would be the 1950–1953 Korean War. The hostilities in that conflict ended with the 27 July 1953 armistice, but no peace treaty was signed thereafter. Even if, despite the lack of hostilities and the long passage of time, the failure of the parties to agree to a peace treaty maintained the formal state of war, and thus an IAC, the effect of the Charter-based *jus ad bellum* rules would be to preclude a use of force even if the provisions of the armistice were breached. In other words, any resort of force would need to be justified under self-defence or Security Council authorization within the Charter framework – see, e.g., Ernest A. Simon, “The Operation of the Korean Armistice Agreement”, *Military Law Review*, Vol. 47, 2007, p. 105. For arguments that the 1953 armistice did, in fact, terminate the state of war, see, e.g., Y. Dinstein, above [note 16](#), pp. 43–44. Wolff Heintschel von Heinegg, “Factors in War to Peace Transitions”, *Harvard Journal of Law & Public Policy*, Vol. 27, No. 3, 2004, pp. 849–854.

20 This was, for example, an issue in the Ethiopia/Eritrea arbitration; Eritrea had not made a declaration of succession to the Conventions upon its independence in 1993 or thereafter, and consistently maintained that it was not bound by them. It only acceded to them in 2000, after its conflict with Ethiopia had ended. The Claims Commission found that Eritrea was not a party to the Conventions until its accession, but that most of the Conventions’ rules reflected customary IHL, which was indeed binding upon Eritrea – see Eritrea Ethiopia Claims Commission, *Partial Award, Prisoners of War – Eritrea’s Claim 17*, 1 July 2003, paras 31–42.

21 GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158; AP I, Art. 99; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (AP II), Art. 25.

22 For example, GC III, Art. 142, para. 2, provides that “[t]he denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.”

caveat that conventional rules which do not reflect custom could potentially be affected.<sup>23</sup>

Bearing in mind the evolution of the modern IHL regime, as well as its fragmented nature, we can state at this point the one *general principle* on the end of application of IHL that will form the basis for further discussion: unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its application in the first place no longer exist. In other words, if a particular situation can no longer be qualified as an IAC, a NIAC or an occupation, the application of IHL will end.<sup>24</sup>

In the absence of any specific guidance to the contrary, this general principle makes perfect sense in the factual, objective conceptual space of the Geneva Conventions. For IHL to apply, its thresholds of application must *continue* to be satisfied at any given point in time. In order to elaborate on this general principle, we must of course look at the constitutive elements of each threshold, in the context of those particular scenarios in which these elements might be extinguished. We must then establish whether a departure from the general rule is warranted, and whether some rules continue applying even after an armed conflict has ended. We will then observe certain *terminating* processes and events, which generally end the application of IHL (but not necessarily all of it),<sup>25</sup> and certain *transformative* processes and events, which end the application of one IHL sub-regime (IAC or NIAC) but immediately engage another. In the section below, I will address each threshold in turn.

## International armed conflict

As we have seen, the concept of IAC was crafted as an explicit replacement for the concept of war. As with the concept of war, IAC as defined in CA2 is of an interstate nature, a conflict between two sovereigns. In the words of the authoritative Pictet *Commentary*:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices

23 For more on this, see Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, Oxford, 2008, pp. 104–105.

24 See also Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts”, HPCR Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 27–29 January 2003, p. 3, available at: [www.hpcrresearch.org/sites/default/files/publications/Session3.pdf](http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf); J. Kleffner, above [note 7](#), p. 61.

25 This includes those rules that also apply in peacetime and those whose application was triggered by the armed conflict but will not cease with the end of armed conflict.

for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.<sup>26</sup>

The CA2 threshold is thus remarkably low – all it needs is a difference between two States leading to the intervention of their armed forces.<sup>27</sup> Whether Pictet was indeed correct in this, or whether a *de minimis* level of violence needs to occur in order to avoid minor exchanges of firepower between the forces of two States (for instance, a single rifle shot across the border) being classified as IACs, is not the subject of my enquiry at this time. Opinions and practice on this point are conflicted.<sup>28</sup> Yet, however exactly defined, the IAC threshold is certainly far lower than the NIAC “protracted armed violence” threshold, to which I will come momentarily, since the IAC threshold was not subject to the same sovereignty concerns as the NIAC one. A particular amount of violence may produce an IAC if perpetrated between States, but might not qualify as a NIAC if committed by or against non-State actors.

As we have also seen, the principal distinguishing point between “war” and IAC is the latter’s objective and factual nature. The end of IAC should equally be based on purely factual criteria – what matters is that the hostilities between the two parties have ceased. Because the IAC threshold is relatively easy to satisfy, however, and because it would be both impractical and would open the door to abuse to treat every lull in the fighting as an end to an IAC and each resumption of combat as the start of a new one, hostilities must end with a *degree of stability and permanence* in order for the IAC to be terminated.<sup>29</sup> Thus, for example, in the *Gotovina* case, the Trial Chamber stated that:

Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion. The Trial Chamber will therefore consider whether at any point during the Indictment period the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict. It will consider in particular whether there was a general close of military operations and a general conclusion of peace.<sup>30</sup>

This is always a factual assessment, which will vary from case to case, and the exact time at which the IAC ended may be hard to point out. Agreements concluded by

26 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Art. 2(1), p. 23.

27 M. Milanovic and V. Hadzi-Vidanovic, above note 1, p. 274.

28 For more on this, see J. Kleffner, above note 7, pp. 44–45.

29 Cf. D. Jinks, above note 24, p. 3: “Given the *de facto* ‘armed conflict’ regime of the Geneva Conventions, the general applicability of international humanitarian law terminates if active hostilities cease and there is no probability of a resumption of hostilities in the near future.” See also R. Kolb and R. Hyde, above note 23, p. 102.

30 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment (Trial Chamber), 15 April 2011, para. 1694.

the belligerent parties, however called – unilateral statements by either of them, or resolutions of relevant international organizations, such as those adopted by the UN Security Council<sup>31</sup> – may provide *evidence* that the hostilities have ended with the needed degree of stability and permanence. But it is the *fact* that the hostilities have ended that ultimately matters, not the precise legal nature of the instrument in question.<sup>32</sup> Depending on the political and military environment, a ceasefire agreement or an armistice may actually signify the point at which the hostilities have permanently ended, while a formal peace treaty might not be worth the paper it is written on if hostilities continue unabated.

This factual approach is supported by what little we have in the Geneva Conventions regarding the end of their application. Thus, Article 118(1) of GC III provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”. The repatriation obligation would naturally only be acceptable to States if hostilities had ended more or less permanently. Article 6(2) of GC IV, on the other hand, stipulates in the relevant part that “[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations”. The common provisions on the denunciation of the Geneva Conventions mentioned above refer to yet another point in time when they stipulate that “a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded”.<sup>33</sup> Here we have three moments in time: the cessation of active hostilities, the general close of military operations, and the conclusion of peace.

Article 5 of GC III and Article 6(4) of GC IV, on the other hand, make it clear that the Convention will continue to apply even after the general close of military operations if protected persons are still in the power of the enemy and they have not been released or repatriated before that time. Article 3(b) of AP I also sets out this principle very clearly:

the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

It is unclear whether the drafters of the Conventions were making a firm distinction between the “cessation of active hostilities” standard in Article 118(1) of GC III and the “general close of military operations” in Article 6(2) of GC IV and later in Article 3 (b) of AP I – in other words, whether the distinction was deliberate or was the

31 Leaving aside the possibility that the UN Security Council is actually modifying the applicable IHL regime through its decisions, or indeed that it has the power to do so.

32 See also J. Kleffner, above [note 7](#), pp. 61 and 70.

33 GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158.

consequence of uncoordinated drafting. What is clear is that the primary motivation behind the GC III formula was to depart from the earlier rule set out in Article 20 of the Hague Regulations, under which the obligation to repatriate prisoners of war started only at the (formal) conclusion of peace. This meant that in several instances in which the conflict had *de facto* ended but without a formal peace treaty, or with treaty negotiations taking a very long time, vast numbers of prisoners of war continued to be held without any real need to do so.<sup>34</sup> This of course does not mean that the GC III standard necessarily assures swift repatriation in practice, the lengthy repatriation efforts after the 1980–1988 Iran/Iraq war being a case in point. As for the “general close of military operations” formula in Article 6(2) of GC IV, the Pictet *Commentary* interprets it as a “final end of all fighting between all those concerned”.<sup>35</sup> Note that the test is an objective and factual one; as argued above, while an armistice or peace treaty can serve as evidence of the finality of the end of fighting, formal agreements are neither required nor conclusive on the point.<sup>36</sup> The *general* close of military operations implies an end of the fighting between *all* of the belligerents,<sup>37</sup> even though active hostilities may have ceased between some at a much earlier date (consider, for example, the 1940 surrender of France while the UK continued fighting, or the different times of the surrender of Germany and Japan during the Second World War).

The ICRC *Commentary* to AP I tried to draw more of a distinction between the “general close of military operations” and the “cessation of active hostilities” formulas. Thus, it held that military operations can be taken more broadly than actual combat as including “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat”, and that “[t]he general close of military operations may occur after the ‘cessation of active hostilities’ referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations”.<sup>38</sup> The distinction is also supported by academic commentary.<sup>39</sup> However, depending on

34 See J. Pictet, above [note 26](#), pp. 541–543.

35 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, Art. 6(2), p. 62.

36 The ICTY Appeals Chamber’s *dictum* in *Tadić* that “[i]nternational 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” is in my view too insistent, at least implicitly, with regard to the consensual nature of the end of conflict. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70. On the end of IHL application in NIACs, see below. What matters is finality *de facto*; plenty of armed conflicts, both international and internal, have ended without any kind of formal agreement or settlement, such as the NIAC in Sri Lanka.

37 See J. Pictet, above [note 35](#), p. 62.

38 See Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, Art. 3(b), paras. 152–153.

39 See, e.g., D. Jinks, above [note 24](#), p. 3; Laurie Blank, “A Square Peg in a Round Hole: Stretching Law of War Detention Too Far”, *Rutgers Law Review*, Vol. 64, No. 1, 2011, pp. 1179–1182; Rogier Bartels, “From *Jus In Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?”, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, pp. 300–303.

the circumstances on the ground, the distinction may actually be hard to draw – in other words, the cessation of active hostilities and the general close of (combat-oriented) military operations may occur at the same time, or very close to one another.

In sum, we can conclude that an IAC would end with a general close of military operations, with no real likelihood of a resumption in hostilities. The end of the IAC will also end the application of those rules of IHL regulating the conduct of hostilities. Further, it will end any IHL-granted authority to detain combatants or civilians preventively purely on grounds of security.<sup>40</sup> However, as we have also seen, some obligations under IHL will survive the end of the armed conflict, and indeed may be triggered by the conflict's (imminent) end, as with the obligation to repatriate prisoners of war. Persons who remain in the power of the enemy will continue enjoying the protections of IHL until their repatriation or release, including *inter alia* the right of access by the ICRC, even if IHL no longer authorizes their continued detention. They will also continue benefiting from fundamental guarantees in Article 75(6) of AP I, under which “[p]ersons who are arrested, detained or interned *for reasons related to the armed conflict* shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, *even after the end of the armed conflict*” (emphasis added). These protections would normally be complemented by human rights law, and to the extent that IHL allows any departures from human rights, for instance by virtue of the *lex specialis* principle, such departures would no longer be permitted with the end of the conflict.<sup>41</sup> Similarly, Article 33(1) of AP I provides that “[a]s soon as circumstances permit, *and at the latest from the end of active hostilities*, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party” (emphasis added). This and other obligations with regard to missing and dead persons, such as facilitating access to gravesites, will continue applying after the end of the conflict, as would the obligations to investigate and prosecute grave breaches of the Conventions and AP I.

There are thus a number of exceptions to the general principle on the end of application. The exceptions are not themselves temporally limited; further passage of time after the end of the conflict cannot by itself terminate the extant obligations. For example, if a State detains a prisoner of war for decades after the conflict, he or she will still be protected by IHL. The obligation will only terminate if its functional predicate is discharged, for instance when the prisoner is repatriated.

40 See Jelena Pejić, “Terrorist Acts and Groups: A Role for International Law?”, *British Yearbook of International Law*, Vol. 75, 2004, pp. 78 and 81. See below for more on the question of whether IHL actually grants such authority or merely sets limits on State action.

41 The legal effects of *lex specialis* are in my view quite modest; it does no more than allow human rights norms to be interpreted in the light of IHL (and vice versa where appropriate), but does not allow for their displacement in the event of any contradiction between the two. See Marko Milanović, “Norm Conflicts, International Humanitarian Law and Human Rights Law”, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 95.

As with IHL generally, this interaction between the general principle and the exceptions thereto strikes a balance between military necessity and considerations of humanity. Clarity and predictability require that the end of a conflict should not be presumed lightly. Rules on the conduct of hostilities stop applying only once the hostilities have definitively ended, while the cessation of hostilities will initiate the obligation to repatriate prisoners of war and release any civilian internees, because this is when the obligation can be realistically complied with and the need for such measures ceases. The protective rules on treatment in detention will continue applying while the detention lasts, which is of the greatest importance in cases of delayed repatriation. The need to protect persons deprived of liberty for reasons related to an armed conflict does not end with the conflict itself, nor would any serious violence against these persons be any less of a war crime. Similarly, the obligation to repress grave breaches can at times be implemented even more effectively in the post-conflict period, as investigations and any prosecutions can take place unhindered by active hostilities. I will now briefly look at the end of belligerent occupation as a subspecies of or a threshold complementary to IAC.

## Belligerent occupation

The end of occupation is again a complex topic, examined not long ago, for instance, by an expert meeting on occupation convened by the ICRC.<sup>42</sup> I will address it only very briefly. As with IACs and NIACs, we can start off with the general principle that IHL will normally cease to apply once its threshold of application – here, belligerent occupation – is no longer met. If we define occupation as effective control by a State of the territory of another State without the latter’s consent,<sup>43</sup> it follows that there are two basic modalities through which an occupation can end: loss of control by the occupant, or the occupant being granted valid consent by the displaced sovereign.

This basic position was not spelled out in the 1907 Hague Regulations, but it again follows from the very definition of the concept of occupation in Article 42: “territory is considered occupied when it is *actually placed under the authority* of the hostile army. The occupation extends only to the territory *where such authority has been established and can be exercised*” (emphasis added). The inability to exercise authority would consequently terminate the occupation; the difficult question is what factors are to be taken into account in establishing whether the occupant lost control over a territory or a substantial part thereof.

Article 6(3) of GC IV provided that in occupied territory,

42 See Tristan Ferraro, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting Report, ICRC, 2012, pp. 26 ff., available at: [www.icrc.org/eng/resources/documents/publication/p4094.htm](http://www.icrc.org/eng/resources/documents/publication/p4094.htm). See also Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris, 2010.

43 See generally Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 35.

the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Article 6(3) of GC IV focused on those situations in which the occupation outlives the IAC that created it, with the application of most of the Convention ending one year after the factual end of the conflict, and only a number of core humanitarian provisions applying thereafter, and even those only to the extent that the Occupying Power exercises the functions of government in the occupied territory. The provision was essentially tailor-made for the transformative Allied occupations of Germany and Japan after the Second World War, which were extensive and prolonged, followed the unconditional surrender of the Axis powers (or *debellatio*), and ended gradually through the creation of new institutions of self-government.<sup>44</sup>

Article 3(b) of AP I dropped the one-year limit from GC IV, providing that it would cease to apply “in the case of occupied territories, on the termination of the occupation”, whereas, as we have seen, above persons still in captivity would continue to be protected by the Protocol.<sup>45</sup> Whether customary IHL would follow Article 3(b) of AP I and displace Article 6(3) of GC IV even for States not parties to AP I is a difficult question which I will not address here – suffice it to say that while GC IV’s applicability *qua* treaty remains governed by Article 6(3), it is perfectly possible for treaties to be supplanted by supervening custom, if the existence of the customary rule is indeed established.<sup>46</sup>

Occupation can end through loss of control in a variety of scenarios: unilateral withdrawal; defeat of the occupying forces by the displaced sovereign or other outside intervention; or loss of control due to an insurgency in the occupied territory. The enquiry into loss of control should always be objective, factual and contextual, taking into account all of the circumstances on a case-by-case basis, and subject to two basic principles. First, as with IACs and NIACs, the end of occupation should not be presumed lightly. In particular, once the occupation is established, the maintenance of occupation might not require overt

44 See J. Pictet, above [note 35](#), pp. 62–63. On transformative occupation, see also Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, *American Journal of International Law*, Vol. 100, 2006, p. 580.

45 See also R. Kolb and R. Hyde, above [note 23](#), pp. 103–104.

46 In the *Wall* case, the International Court of Justice (ICJ) did not seem to consider this possibility, finding that due to the passage of time, only those provisions of GC IV mentioned in Article 6(3) continued to apply in the Occupied Palestinian Territory, although the remaining provisions were not really central to the case. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 125. While agreeing with the Court that GC IV, Art. 6(3) will be the governing framework for States not party to AP I, such as Israel, Dinstein argues that any outbreak of hostilities in the occupied territory (such as the Palestinian *intifadas*) will reinstate the applicability of the whole of GC IV and restart the time limit in GC IV, Art. 6(3) – see Y. Dinstein, above [note 43](#), pp. 280–283.

and frequent displays of military strength by the occupant, especially if the occupation faces little or no resistance and there are no competing authorities on the ground. Second, not every temporary lapse in control would terminate the occupation.<sup>47</sup> No matter how powerful the occupant, it may be impossible for it to control every single bit of the occupied territory all the time, especially in the case of an insurgency (one need only consider post-2003 Iraq, or the Nazi occupation of Yugoslavia in the face of partisan resistance). So long as the lapse in control is only temporary or very localized, and so long as the occupant has the full capacity to re-establish its control, the occupation should be considered to be uninterrupted.<sup>48</sup> Clearly, opinions will differ on the facts of specific cases as to whether an occupation has ended through loss of control, as with the Israeli withdrawal from Gaza, but the basic principle is relatively uncontested.

End of occupation through loss of control has parallels with the extraterritorial applicability of human rights law in the occupied territory – one issue raised before British courts and the European Court of Human Rights in the *Al-Skeini* litigation was whether the UK possessed effective control for the purposes of European Convention on Human Rights (ECHR) Article 1 jurisdiction in Basra, due to the level of sustained insurgency there, and despite the fact that the UK was formally the occupant in Southern Iraq. The House of Lords held that the UK did, in fact, lose effective control for the purposes of ECHR Article 1, even if it formally remained the Occupying Power for the purposes of IHL,<sup>49</sup> while the Grand Chamber of the European Court of Human Rights avoided the issue altogether.<sup>50</sup> The issue of whether the effective control thresholds for occupation and for the application of human rights treaties differ or not remains unresolved.<sup>51</sup>

With regard to occupation ending by the occupant obtaining consent, it is generally possible for the displaced sovereign to agree to the presence of the (former) occupier, whether by way of a peace treaty or some other kind of formal or informal agreement.<sup>52</sup> Note in this regard that Article 7 of GC IV prohibits special agreements between States Parties when these agreements adversely affect the

47 See Y. Dinstein, above note 43, p. 272: “A definitive close of the occupation can only follow upon a durable shift of effective control in the territory from the Occupying Power to the restored sovereign (or its allies).”

48 See *United States of America v. Wilhelm List et al.*, in *Law Reports of Trials of Major War Criminals*, Vol. 8, 1949, pp. 38 and 55–56 (holding that the German occupation of partisan-held parts of Yugoslavia did not cease since “the Germans could at any time they desired assume physical control of any part” of Yugoslavia); see also ICTY, *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 217 (holding that an occupation exists so long as the occupying army has the “capacity to send troops within a reasonable time to make the authority of the occupying power felt”).

49 *R (on the application of Al-Skeini and others) v. Secretary of State for Defence*, [2007] UKHL 26, [2008] AC 153, para. 83 (per Lord Rodger).

50 European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment (Grand Chamber), 7 July 2011.

51 Bearing in mind that the positive obligation to secure or ensure human rights is a flexible one, I would tentatively argue that the two thresholds should be the same – see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011, pp. 141–147.

52 See Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 63 and 67.

situation of protected persons. However, such agreements are only prohibited in situations in which GC IV itself applies, and Article 7 of GC IV does not preclude the general provision of genuine consent by a State to the presence of foreign forces, assuming that a government exists which can validly provide that consent.<sup>53</sup> That expression of consent would be subject to the general principle articulated in Article 52 of the Vienna Convention on the Law of Treaties, which provides that a treaty is void if it is procured by coercion of a State by threat or use of force contrary to the UN Charter.<sup>54</sup> It is also possible for the government of the displaced sovereign (whose territory may or may not have been occupied in its totality) to change, often at the instigation or at least with the input of the occupant, and then provide consent. Article 47 of GC IV makes it clear that any changes in the (local) government of the occupied territory, or any purported annexation of that territory by the occupant, cannot alter the applicability of the law of occupation.<sup>55</sup> But what of those situations in which the government of the displaced sovereign is wholly destroyed or changed, as was the case in Iraq post-2003? In this respect, we can observe at work similar considerations as with the transformative process of the “internalization” of an IAC into a NIAC, which I will deal with in detail below. What entity has the sufficient capacity and legitimacy to provide meaningful consent on behalf of a State may be a difficult and controversial issue.

## Non-international armed conflict

This brings us to the end of application of IHL in NIACs. We have seen that the end of IHL application in IACs and occupation is complex enough. This complexity is exacerbated with regard to NIACs by the structural differences between IACs and NIACs and the almost complete lack of any textual guidance. CA3 says nothing about its end of application, while Article 2(2) of AP II appears to endorse the general rule that the application of IHL will end with the conflict which initiated it when it provides for the humanitarian exception from the general rule regarding persons who remain in captivity:

53 Cf. Adam Roberts, “What is a Military Occupation?”, *British Yearbook of International Law*, Vol. 97, 1984, pp. 249, 276–279 and 287–288.

54 See Vienna Convention on the Law of Treaties, 1155 UNTS, 331, 8 ILM 679, entered into force 27 January 1980. For example, for an argument that the 1999 Kumanovo Military Technical Agreement, whereby the Federal Republic of Yugoslavia consented to the presence of NATO troops on its territory, was a possibility vitiated by coercion, with Kosovo thereby constituting an occupied territory, see John Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo”, *European Journal of International Law*, Vol. 12, No. 3, 2001, pp. 469 and 484. See also E. Benvenisti, above note 52, Chapter 10.

55 Art. 47 GCIV provides: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

In short, drawing analogies with IACs will be difficult.

As it stands today, NIAC is a plural legal concept, defined differently under different treaty regimes. The basic (non-)definition of NIAC, which encompasses all others, is that found in CA3. Its terms were famously elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadić* Interlocutory Decision on Jurisdiction,<sup>56</sup> which has been widely accepted as reflecting custom. Under *Tadić*, CA3 requires “protracted armed violence” – a threshold of *intensity* and possibly duration, rising above mere riots or disturbances – between a State and an armed non-State actor or between two such non-State actors, which are sufficiently *organized* to conduct hostilities.<sup>57</sup> On the other hand, the heightened threshold of Article 1(1) of AP II, which is only applicable to conflicts involving a State and a non-State actor, but not two such non-State actors, requires the non-State actor to have an organizational structure with a responsible command, to control a part of the State’s territory, and to have the ability to conduct sustained and concerted military operations and to implement AP II. I will leave aside the question of to what extent exactly the AP II threshold is really higher than the customary CA3 one when applied to particular facts.

As with IACs, the termination of NIACs is a matter of factual enquiry, but the intensity and organization thresholds in CA3 and AP II make that enquiry even less straightforward than in IACs. As we have seen, for IACs to end, the hostilities themselves need to end with a certain degree of permanence or finality. One option would be to treat NIACs in exactly the same way – so long as *some* hostilities continue, so would a NIAC.<sup>58</sup> This seems to be the implication of the insistence of the ICTY in *Tadić* that IHL applies “in the case of internal conflicts, [until] a peaceful settlement is achieved”.<sup>59</sup> This makes perfect sense from the standpoint of an international criminal tribunal, which wants to stabilize its jurisdiction and bring to account as many perpetrators of war crimes as possible. Thus, for instance, with respect to the NIAC between Serbia and the Kosovo Liberation Army in 1998, the first ICTY Trial Chamber judgment in the *Haradinaj* case found that “since according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a

56 ICTY, *Prosecutor v. Tadić*, above note 36, para. 70.

57 According to the ICTY Appeals Chamber, “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”. *Ibid.*, para. 70. For more detailed discussion regarding the elements of the NIAC threshold, see J. Kleffner, above note 7, pp. 49–50; M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 282 ff.

58 Cf. S. Sivakumaran, above note 3, pp. 252–254. See also D. Jinks, above note 24, pp. 7–8.

59 See above note 36.

settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period”.<sup>60</sup> The ICTY’s task was accordingly much easier.

Another option, however, and to me more logical from a purely IHL standpoint, would be to take into account the heightened NIAC intensity threshold when compared to IACs, since this is where the analogy with IACs may be at a breaking point. Any resumption of hostilities between States would in any event reconstitute an IAC, and it therefore makes sense to wait for the complete end of all hostilities for the IAC to be terminated. In NIACs, by contrast, it could be enough for the hostilities to fall below the threshold of “protracted armed violence” with a certain degree of permanence and stability so as to enable us to establish that the hostilities have, in fact, ended. As with IACs, once the threshold is met, there should be a presumption that it continues to be met absent strong evidence to the contrary – as a matter of policy, a NIAC which peters in and out of existence on a daily basis would be undesirable. But unlike in IACs, in NIACs the hostilities would not need to end altogether. What would matter is whether the intensity of the hostilities or the organization of the non-State actor factually eroded to such an extent that the threshold is no longer met.<sup>61</sup> For example, looking at the post-2003 conflict in Iraq, which involved the new Iraqi government and its foreign allies on the one side and several organized armed groups on the other, it could be argued that this NIAC (or set of NIACs) ended at some point in late 2009, as the capacity of insurgent groups was degraded and the level of armed violence decreased (even if the violence never ended completely). In August 2010, the US military withdrew its combat troops from Iraq. But after a period of relative calm, violence rapidly escalated in 2012 and 2013, as armed groups such as the Islamic State of Iraq and the Levant (ISIL) regrouped and reorganized, and a new NIAC was initiated.

As with IACs, NIACs can end through an agreement between the parties, a stalemate, or one of the parties’ defeat and surrender, but again the only legally relevant question would be whether the threshold continues to be satisfied. Similarly, AP II NIACs could end or transform into simple CA3 NIACs if the non-State actor fighting the State becomes so structurally compromised that it no longer has control over territory or the ability to conduct sustained and concerted military operations or implement AP II. The disadvantage of this approach is the greater likelihood of multiple transitions between peace and a NIAC.

For an example of a NIAC ending through the complete defeat of an adversary, we need only look at the Sri Lanka conflict. An example of a NIAC petering out would be the post-2007 surge in Iraq. Again, the enquiry is purely factual. In some cases it will be relatively easy to determine the exact moment

60 ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 100. The issue was not revisited in the subsequent litigation in *Haradinaj*, as the parties agreed on the scope of the armed conflict when the case was retried.

61 See also R. Bartels, above note 39, pp. 303 ff. (arguing that the organization element is of special relevance in the context of the end of a NIAC, and providing an overview of the ICTY jurisprudence on factors and indicators of the intensity and organization criteria).

when the conflict ended, especially when there is a peace agreement (as long as the agreement is, in fact, observed). In others, it might be exceedingly difficult to pinpoint the exact time when the hostilities fall below the “protracted armed violence” threshold, with Iraq again being a case in point.

Note again how diverging policy considerations can influence the contextual determination of whether the NIAC has ended, depending on the identity and the goals of the actor making the determination. For example, the end of the conflict would signal the end of any authority to detain individuals preventively and the resumption of the normal human rights regime (to the extent that IHL was actually capable of displacing it). If the actor making the determination cares about the possible arbitrary exercise of State power, it might be inclined to see the end of the NIAC more quickly. If, on the other hand, it cares about the arbitrary exercise of power by the non-State actor, which is bound by IHL but probably not by human rights law, then that calculus may turn out differently.

### **Transformation of conflicts: internationalization (NIAC to IAC) and internalization (IAC to NIAC)**

Until now we have looked at terminative events or processes, which end the application of IHL. But we also need to examine transformative processes, which end the application of one IHL sub-regime but start another.<sup>62</sup>

Let us first look at internationalization, one of the most controversial topics of modern IHL. In my view, the concept of internationalization is only legally useful if it is defined as the transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more comprehensive IAC legal regime.<sup>63</sup> The most important of these legal consequences is the grant, in principle, of combatant immunity and potential prisoner of war status to combatants on both sides of the conflict. As for the mechanism of internationalization, we have seen that under CA2, IACs are defined as differences leading to the use of armed force *between two States*. Accordingly, there are two basic ways of internationalizing a NIAC. First, a *prima facie* NIAC can be subsumed under the *existing* CA2 definition. In other words, what at first glance looks like a conflict between a State and a non-State actor is, on a deeper look, actually a conflict between two States. This can either happen because a third State exercises control over a non-State actor at some point during a NIAC, with the most controversial issue here being what test or standard of control is to be applied, or because a non-State actor involved in a NIAC emerges as a State during the conflict – a rare occurrence, but one that we can perhaps observe with regard to some of the conflicts in the former Yugoslavia.

62 This section incorporates much of the discussion in M. Milanovic and V. Hadzi-Vidanovic, above [note 1](#), pp. 292–293.

63 Note that one can use the term “internationalized armed conflict” in a different, descriptive sense, to refer to any NIAC in which there is some type of foreign intervention. This is, again, *not* how I will be using the term, in order to maximize both its utility and precision.

Secondly, a NIAC can be internationalized through the *redefinition* of IAC in terms of its party structure. In these cases a treaty or customary rule changes the CA2 definition so as to potentially include some non-State parties. Internationalization under this heading would clearly require proof of a specific rule to that effect. One such rule can be found in Article 1(4) of AP I (self-determination conflicts against colonial, occupying or racist regimes), subject to a declaration under Article 96(3) of AP I, while another possible candidate is the customary doctrine of the recognition of belligerency, which has fallen into disuse but perhaps not desuetude.<sup>64</sup>

The second transformative process is internalization, or de-internationalization, and it again flows from the inter-State CA2 definition.<sup>65</sup> It is easy to say that IACs are fought between States, and statehood may even be uncontested in a given case, but who gets to *represent* the State may turn out to be a very difficult issue. Not only is this question important for the initial qualification of a conflict, but it may also prove to be crucial for its requalification or transition from one type to another. Consider all those conflicts during which some kind of regime change takes place, whether in Afghanistan, Libya, Iraq or the Côte d'Ivoire. In all of these conflicts there was some form of foreign intervention coupled with a reversal of roles between a government and a rebel group, with a new government extending its invitation to the intervening State or States to assist it in fighting the former government.

What is at stake here is a process of transformation from an IAC into a NIAC. Looking at the competing policy considerations, we can see what is *not* enough for such internalization to occur. That the incumbent government of a country is defeated cannot by itself transform the conflict, nor can the establishment of a proxy government by the victors, as this would allow them to effectively strip by force the protections granted in IACs to the remaining combatants of the defeated State, depriving them of combatant immunity and POW status. Similarly, that a rebel group is recognized as the new legitimate government of the country cannot of itself transform the character of the conflict, as this would again allow the intervening States to unilaterally do what they will by installing their own proxies as the new State government.

In my view, both considerations of policy and recent practice support a rule consisting of the following three elements: a conflict would transform from an IAC into a NIAC only when (1) the old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element); (2) the new regime has established control over most of the country, and is legitimized in an inclusive process that makes it broadly representative of the people (positive element); and (3) the new regime achieves broad, although not necessarily universal, international recognition (external element). None of these elements is enough by itself, but jointly they take into account both questions of legitimacy and factual developments on the ground

<sup>64</sup> For more on the mechanisms of internationalization, see *ibid.*, pp. 292–302.

<sup>65</sup> *Ibid.*, pp. 281–282.

while providing safeguards against abuse by an intervening power. With regard to both the positive and the negative elements, the degree of control would be looked at holistically, taking into account not just troops on the ground but also direction over the State's institutions more generally, its economic assets, the media, or the nature of the internal legitimizing process (for instance, reasonably free and fair elections, or some other representative process such as the convening of the Loya Jirga, the grand tribal assembly, in Afghanistan). The external element would depend not just on bilateral State action but also on the decisions and conduct of the relevant international and regional organizations.

The exact mix of the three elements will inevitably vary from case to case. Internal and external legitimization will be especially important when the new government is able to wield control in the country only because it is being propped up by its foreign sponsors. The purpose of the formula is to find a solution which will, on the one hand, prevent foreign interveners from using puppet governments, established by force alone, to claim that the IACs/belligerent occupations have transformed into NIACs or mostly unregulated pacific (or non-belligerent) occupations, yet will, on the other hand, in some cases allow a transition to occur, but will do so in line with the rights of all peoples to self-determination, and on the basis of safeguards which will hinder a transition on the basis of pure force (especially when that use of force is *ad bellum* unlawful, as was the case in Iraq).

Obviously, it may be difficult to pinpoint the exact moment of internalization in any given case, and thankfully in most cases it may be unnecessary to do so, but it is necessary for us to be aware of the relevant elements and their interplay. In doing so, we must also be aware that the internalization of a conflict has as its consequence a possible reduction of various protections under IHL. While the legal regimes applicable to IACs and NIACs have largely been brought together through the development of custom, significant differences and uncertainties still remain in areas such as grounds for detention, treatment and procedural safeguards in detention, combatant immunity, and status-based targeting. Thus, though transformative processes do not end the application of IHL altogether, their practical consequences should not be underestimated. These practical consequences are probably the most significant with regard to detention which begins before, but continues after, the moment of transformation from one type of conflict to another. The key issue here is the existence or modification of any authority to detain; while such authority may exist directly under IHL in IACs, it likely requires the intervention of domestic law<sup>66</sup> in NIACs.<sup>67</sup>

66 In the case of cross-border NIACs the domestic law authority need not necessarily come from the law of the State in which the hostilities take place, but could also come from the law of the State exercising powers of detention.

67 In this regard, see especially *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB), paras. 239 ff. (in which the High Court of England and Wales finds that IHL in NIAC does not provide for a power to detain, and that any such authority can come from domestic law or other parts of international law, such as Security Council resolutions). For more on this, see Kubo Mačák, "No Legal

## End of the conflict with Al-Qaeda?

This brings us to one of the most vexing questions of contemporary international relations and IHL – that of the existence of an armed conflict between the United States and Al Qaeda, and its seemingly impending end. In order to analyse this question, we must first understand some relatively recent shifts in the underlying legal and political dynamics.

As originally designed, and through most of its history, IHL was seen by States as a system of *limitations* on their sovereignty and freedom of action, particularly so when it comes to the law of NIAC.<sup>68</sup> In other words, the *baseline* for international regulation from the classical period onwards was essentially the *Lotus* presumption: States were at liberty to do anything that international law did not expressly prohibit, including the unrestrained freedom to wage war, both against each other and internally. The law of war evolved precisely to impose such restraints, first and foremost in the inter-State context. States resisted the international regulation of internal conflict because of the fear – founded or not – that it would impose limits on how they could deal with rebels, and would confer on these rebels some rights in international law. It is this sovereignty-induced concern of States that explains the IAC/NIAC dichotomy in modern law and the higher thresholds of applicability for NIAC rules, in terms of intensity and organization of the non-State parties. Hence, it was rarely if ever in the interests of a State embroiled in a NIAC to recognize the existence of such a conflict – such a State simply *did not want* IHL to apply.<sup>69</sup> This may explain why, for instance, the United Kingdom consistently denied the existence of a NIAC in Northern Ireland, claiming that the euphemistically termed “Troubles” were an internal affair of criminal law enforcement despite the fact that the CA3 threshold was arguably reached,<sup>70</sup> and why it made a declaration regarding Article 1(4) of AP I that explicitly excluded acts of terrorism, whether concerted or in isolation, from the scope of armed conflict.<sup>71</sup>

Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence”, *EJIL: Talk!*, 5 May 2014, available at: [www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/](http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/); L. Hill-Cawthorne and D. Akande, “Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?”, *EJIL: Talk!*, 7 May 2014, available at: [www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/](http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/).

68 M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 305–308.

69 See Marco Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *HPCR Occasional Paper Series*, No. 6, Winter 2006, pp. 7–8.

70 Steven Haines, “Northern Ireland 1968–1998”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 130–131 and 133–136 (reporting that, according to unattributable information given to the author, various legal advisers within the United Kingdom government thought that the NIAC threshold was reached, at least during some periods).

71 “It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that

Now, however, human rights have gradually replaced, or are in the process of replacing, the idea of unrestrained freedom of action as the baseline for regulation, as much *culturally* as formally.<sup>72</sup> Instead of IHL being the only set of limitations on States, a more rigid, demanding and legalistic set of limitations has emerged, particularly in the internal context. States, or at least some States, have accordingly stopped seeing IHL as a *constraining* body of rules whose application they want to avoid in their engagements with non-State actors.<sup>73</sup> Rather, they have increasingly started seeing IHL as an *authorizing* body of rules liberating them or derogating from human rights or other constraints, often on the dubious basis of the *lex specialis* principle.<sup>74</sup> For example, while IHL targeting or detention rules evolved as limitations (for instance, while people will inevitably be killed in wartime, deliberately targeting civilians is prohibited), they are now seen as permissive rules authorizing departures from human rights (for instance, while an enemy fighter may be killed even if he or she does not pose an imminent threat, preventive detention for reasons of security is authorized even if human rights law generally prohibits preventive detention).<sup>75</sup>

To see how these dynamics have evolved, we need only look at US policy post-9/11.<sup>76</sup> The US government from the outset decided to cast the Al Qaeda threat and the US response thereto as a “war” for both domestic and international purposes, in order to get the detention and targeting authority that it thought it needed and avoid having its hands tied by any applicable rules of domestic constitutional law as well as international human rights law. The moniker “global war on terror” denoted a supposed single conflict under IHL between the US on one side and Al Qaeda and its affiliates on the other. Initially, the US characterized this conflict as an IAC, albeit a strange sort of IAC which transcended the Geneva Conventions CA2 definition since one of its parties was not a State. In the US government’s view, the CA2 definition did not create “field

it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.” United Kingdom of Great Britain and Northern Ireland, Declaration of 2 July 2002, available at: [www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument](http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument).

- 72 See also David Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 42, No. 1, 2008, pp. 8–45.
- 73 Cf. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford University Press, Oxford, 2010, pp. 123–124.
- 74 For more on this, see M. Milanovic, above note 41. Cf. the *Serdar Mohammed* judgment, above note 67.
- 75 See, e.g., John Bellinger and Vijay Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, 2011, p. 201 (repeatedly referring to targeting and detention *authority* under IHL, and identifying gaps of such authority in NIACs, which the authors feel is needed). See also Claus Kress, “Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts”, *Journal of Conflict & Security Law*, Vol. 15, No. 2, 2010, p. 260 (speaking of States being “more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations”).
- 76 In that regard, see especially Kenneth Anderson, “Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’”, in Peter Berkowitz (ed.), *Future Challenges in National Security and Law*, Hoover Institution, Stanford University, 2011, pp. 1–18, available at: <http://ssrn.com/abstract=1824783>.

pre-emption”,<sup>77</sup> or in other words was not all-encompassing; put in more traditional international legalese, the notion of IAC was wider under customary law. This was a completely ahistorical argument; the notion of IAC was *invented* in the Geneva Conventions and replaced the equally inter-State notion of war, while there was no evidence that it was redefined either through treaty or through custom in this particular fashion.<sup>78</sup> The administration also considered that the conflict could not be a NIAC as it transcended the borders of a single State.<sup>79</sup> In *Hamdan*, the US Supreme Court rejected the government’s arguments and found that the conflict with Al Qaeda could not be an IAC since it was not inter-State, and in an ambiguous holding apparently qualified it as a NIAC.<sup>80</sup> The position of both the Bush and Obama administrations post-*Hamdan* has hence been that the conflict with Al Qaeda is some sort of single, *global* NIAC, which is territorially unlimited in scope.

Opinions of course differ on whether the idea of such a global NIAC is legally tenable. In my view, even under a flexible interpretation of the IHL framework, which would allow for various kinds of cross-border NIACs, the idea of a global NIAC is an oxymoron. Any NIAC requires the existence of protracted armed violence which by definition has to take place *somewhere*, i.e. has to be localized at least to the territory of one State. That violence can spill over to the territory of another State (which need not necessarily be adjacent to the primary State), but there has to be a *nexus* to the protracted violence in the primary State for IHL to apply to that violence.<sup>81</sup> Thus, while one can safely speak of a NIAC (or NIACs) between the United States and the Taliban and other armed groups in Afghanistan, and while that conflict can spill over into, say, Pakistan or any other country – and arguably still be regulated by IHL – the existing legal framework does not seem to allow for a construction as amorphous as a planet-wide NIAC,<sup>82</sup> particularly one in which a loose terrorist network such as Al Qaeda is treated as a single organizational entity and belligerent party.<sup>83</sup> All of the difficulties in squaring the US conflict with Al Qaeda with the NIAC legal regime stem precisely from the fact that this regime was not designed to regulate anything like it.<sup>84</sup>

77 Supreme Court of the United States, *Hamdan v. Rumsfeld*, Government Brief on the Merits, No. 05–84, p. 26, available at: [www.justice.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.aa.html](http://www.justice.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.aa.html).

78 See also C. Kress, above note 75, p. 255; M. Sassòli, above note 69, pp. 4–5; N. Lubell, above note 73, p. 96.

79 See Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 195.

80 See *Hamdan v. Rumsfeld*, 548 US 557 (2006), p. 630. On the fundamental lack of clarity in the Court’s decision on classification and its several possible interpretations, see Marko Milanovic, “Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli Targeted Killings Case”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 373–393.

81 See also S. Sivakumaran, above note 3, p. 234.

82 See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2010, p. 56: “from the vantage point of international law ... a non-international armed conflict cannot possibly assume global dimensions.”

83 See also C. Kress, above note 75, p. 261; J. Pejic, above note 79, p. 196; N. Lubell, above note 73, pp. 114–121.

84 For a discussion of the difficulties in applying the IHL detention regime to suspected terrorists, see, e.g. L. Blank, above note 39.

In short, Al Qaeda as a non-State actor was and perhaps still is a party to a NIAC in Afghanistan. Its offshoots and affiliates have also been involved in other NIACs, as in Iraq or Yemen. But the attacks by Al Qaeda elsewhere have (thankfully) been so sporadic, and its control over its allied non-State actors so loose, that it would be exceedingly difficult to say that the intensity and organization criteria for a NIAC were satisfied for the purpose of establishing a single armed conflict which is global in scope.<sup>85</sup> One simply cannot aggregate all terrorist acts motivated by Islamic fundamentalism coupled with professed allegiance to Al Qaeda all across the world in order to satisfy the twofold intensity and organization test. Nor does it seem justifiable to depart from the *Tadić* criteria in the case of Al Qaeda but continue applying them rigorously to “normal”, common NIACs.

Again, opinions on this issue will differ. But even if the conflict with Al Qaeda could legally be qualified as a single NIAC, albeit a very unorthodox one, that conflict may well be approaching its end. The degradation that the US military operations have inflicted on the “core” Al Qaeda organization further threatens to push it below the NIAC organizational threshold, even if the threshold is applied more flexibly. Nor can this be prevented by using the concept of “co-belligerency”, which was imported from the law of IAC without much consideration as to whether the analogy can actually be drawn.

US policy-makers are of course well aware that the construction of a NIAC with Al Qaeda, which is sustained internally because it has broad bipartisan political appeal, is legally compromised by the continued degradation of core Al Qaeda and the impending US drawdown from Afghanistan.<sup>86</sup> But this does not end the US desire to keep using targeted lethal force, for instance through drones, when it considers such force to be necessary – nor, even more importantly, does this make the government’s life any easier with respect to those individuals that it still holds in preventive security detention, in Guantanamo or elsewhere, despite efforts to draw such detention to a close.

Its immense political importance notwithstanding, the US “war on terror” or its rebranded NIAC with Al Qaeda and associated forces is so idiosyncratic and mixed up with parallel questions of US domestic law and policy that we should exercise extreme caution in drawing from it any lessons regarding the end of application of IHL.<sup>87</sup> As explained above, the better view is that IHL did not even

85 See also Noam Lubell, “The War (?) against Al-Qaeda”, in E. Wilmshurst (ed.), above note 70, pp. 451–452.

86 See, e.g., the speech of Jeh Johnson, at the time General Counsel of the U.S. Department of Defense, at the Oxford Union, on “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” 30 November 2012, available at: <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/> (“I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an “armed conflict” against al Qaeda and its associated forces.”); Remarks by President Obama at the National Defense University, 23 May 2012, available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

87 For an excellent discussion of the developments in US law and policy and an argument that the end of the conflict would not necessarily spell the end of any authority to use lethal force, see Robert Chesney,

apply in the first place to many situations within this supposedly single conflict. A significant number of individuals were either targeted or detained outside the framework of any discrete, localized, legally cognizable NIAC. The individuals who were detained in the context of an actual NIAC, e.g. in Afghanistan, and remain in captivity, would benefit from the protection of IHL. The end of the conflict would spell the end of any preventive detention authority (and such authority probably does not even exist in NIACs for either party),<sup>88</sup> while the protective rules of IHL regarding treatment and procedural safeguards would continue applying so long as the person remains detained.

Finally, it is important to note that the end of IHL's application does not necessarily leave a regulatory void. This is not the place for any extensive argument about how human rights law would apply to all these situations, especially those unregulated by IHL, but for our present purposes I would simply caution against a dogmatic juxtaposition between "war" and "law enforcement". Not every targeted use of lethal force, nor for that matter every preventive detention, would necessarily be unlawful under the relevant human rights treaties, even in the absence of an armed conflict.<sup>89</sup>

## Conclusion

We have seen how the approach to the end of IHL's application needs to be objective and factual, as with its beginning – but that is easier said than done. The basic principle is that the end of armed conflict also ends the applicability of those parts of IHL that regulate the conduct of hostilities, while substantial parts of IHL actually survive the armed conflict. And while the end of a conflict should not be presumed lightly, with hostilities having to end with a degree of permanence and stability, any analysis of the ostensibly factual question of whether an IAC, NIAC or occupation has ended will at least partially be driven by external policy factors and the consequences of any finding regarding termination. Those factors are also significantly influenced by how IHL interacts with other branches of international law, such as international criminal law and human rights law. Accordingly, while the basic rules may be simple to state, they can be very complex to apply in practice, and that, at least, is inevitable.

"Postwar", *Harvard National Security Journal*, (2014, forthcoming), draft available on SSRN at: <http://ssrn.com/abstract=2332228>.

88 In other words, a rebel group fighting a State does not have the *right* in international law to detain the State's soldiers, nor for that matter does it have the *right*, or power, or authority to kill them. It is simply *not unlawful* under IHL for the rebel group to kill combatants if it abides by the targeting rules of IHL, or to detain them, but it must do so in conformity with IHL rules on treatment in detention. The same applies for the State itself, whose authority to kill or detain stems from its own domestic law. See also Peter Rowe, "Is There A Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?", *International and Comparative Law Quarterly*, Vol. 61, Issue 03, July 2012, p. 697.

89 For a discussion of the need to apply human rights flexibly in an extraterritorial setting and strike a balance between universality and effectiveness, see M. Milanovic, above [note 51](#).

# Rewired warfare: rethinking the law of cyber attack

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## Abstract

*The most significant debate regarding the applicability of international humanitarian law to cyber operations involves interpretation of the rules governing cyber “attacks”, as that term is understood in the law. For over a decade, the debate has been a binary one between advocates of the “permissive approach” developed by the author and a “restrictive approach” championed by those who saw the permissive approach as insufficiently protective of the civilian population and other protected persons and objects. In this article, the author analyses that debate, and explains a third approach developed during the Tallinn Manual project. He concludes by suggesting that the Tallinn Manual approach best approximates the contemporary law given the increasing value which societies are attributing to cyber activities.*

**Keywords:** cyber attack, cyber operations, data, functionality test.

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\* The views expressed are those of the author in his personal capacity and do not necessarily represent those of any organization with which he is associated. Email: [schmitt@aya.yale.edu](mailto:schmitt@aya.yale.edu).

Cyber operations are fast becoming a fixture of modern warfare.<sup>1</sup> They first appeared overtly in the 2008 international armed conflict between Georgia and Russia,<sup>2</sup> were employed during the international and non-international armed conflicts in Afghanistan and Iraq,<sup>3</sup> figured in operations throughout the non-international armed conflicts in Libya and Syria,<sup>4</sup> and most recently played a bit part during the 2014 international armed conflict between Russia and Ukraine.<sup>5</sup> The United States has established US Cyber Command to conduct defensive and offensive cyber operations during armed conflicts, and other States, most notably China, are following suit by acquiring cyber capabilities and developing their force structures to leverage them.<sup>6</sup> The spread of cyber wherewithal is not limited to the regular armed forces and other organs of the State. Non-State actors have discovered the utility of cyber operations as a means of asymmetrical warfare when facing a State's superior conventional forces.<sup>7</sup> Cyber operations have already become an integral facet of command, control, communications, computer, intelligence, surveillance, and reconnaissance activities in the battlespace, and it is inevitable that they will soon play a central role in "attacking" one's enemy.<sup>8</sup>

- 1 Lt Gen Richard P. Mills, speech, AFCEA TechNet Land Forces East Chapter Lunch, 21 August 2012, available at: [www.slideshare.net/afcea/afcea-tech-net-land-forces-east-aberdeen-chapter-lunch-lt-gen-richard-p-mills-usmc](http://www.slideshare.net/afcea/afcea-tech-net-land-forces-east-aberdeen-chapter-lunch-lt-gen-richard-p-mills-usmc).
- 2 Enekin Tikki, Kadri Kaska and Liis Vihul, *International Cyber Incidents: Legal Considerations*, NATO Cooperative Cyber Defence Centre of Excellence, Tallinn, 2010, pp. 66–90. The 2007 cyber operations directed at Estonia did not occur in the context of an armed conflict.
- 3 Shane Harris, "The Cyber War Plan", *National Journal Online*, 14 November 2009, available at: [www.nationaljournal.com/member/magazine/the-cyberwar-plan-20091114](http://www.nationaljournal.com/member/magazine/the-cyberwar-plan-20091114); Raphael Satter, "Afghanistan Cyber Attack: Lt. Gen. Richard P. Mills Claims to Have Hacked the Enemy", *The World Post*, 24 August 2012, available at: [www.huffingtonpost.com/2012/08/24/afghanistan-cyber-attack-richard-mills\\_n\\_1828083.html](http://www.huffingtonpost.com/2012/08/24/afghanistan-cyber-attack-richard-mills_n_1828083.html); John Markoff and Thom Shanker, "Halted '03 Iraq Plan Illustrates U.S. Fear of Cyberwar Risk", *New York Times*, 1 August 2009, available at: [www.nytimes.com/2009/08/02/us/politics/02cyber.html](http://www.nytimes.com/2009/08/02/us/politics/02cyber.html).
- 4 See, e.g., Eric Schmitt and Yhom Shankar, "U.S. Debated Cyberwarfare in Attack Plan on Libya", *New York Times*, 17 October 2011, available at: [www.nytimes.com/2011/10/18/world/africa/cyberwarfare-against-libya-was-debated-by-us.html?hp](http://www.nytimes.com/2011/10/18/world/africa/cyberwarfare-against-libya-was-debated-by-us.html?hp); Ivan Watson, "Cyberwar Explodes in Syria", *CNN*, 22 November 2011, available at: [www.cnn.com/2011/11/22/world/meast/syria-cyberwar/](http://www.cnn.com/2011/11/22/world/meast/syria-cyberwar/); Eva Galperin, Morgan Marquis-Boire and John Scott-Railton, "Quantum of Surveillance: Familiar Actors and Possible False Flags in Syrian Malware Campaign", Electronic Frontier Foundation, 2013, available at: [www.eff.org/files/2013/12/28/quantum\\_of\\_surveillance4d.pdf](http://www.eff.org/files/2013/12/28/quantum_of_surveillance4d.pdf).
- 5 Most of the reliable material is classified and cannot be cited. For some public discussion, see Jarno Linnell, "Why Hasn't Russia Unleashed a Cyber Attack on Ukraine?", *CBS News*, 2 July 2014, available at: [www.cbsnews.com/news/why-hasnt-russia-unleashed-a-cyber-attack-on-ukraine/](http://www.cbsnews.com/news/why-hasnt-russia-unleashed-a-cyber-attack-on-ukraine/).
- 6 David E. Sanger, "U.S. Tries Candor to Assure China on Cyberattacks", *New York Times*, 6 April 2014, available at: [www.nytimes.com/2014/04/07/world/us-tries-candor-to-assure-china-on-cyberattacks.html?\\_r=0](http://www.nytimes.com/2014/04/07/world/us-tries-candor-to-assure-china-on-cyberattacks.html?_r=0).
- 7 Gregory J. Rattray and Jason Healey, "Non-State Actors and Cyber Conflict", in Kristan M. Lord and Travis Sharp (eds), *America's Cyber Future: Security and Prosperity in the Information Age*, June 2011, pp. 65–86, available at: [www.cnas.org/files/documents/publications/CNAS\\_Cyber\\_Volume%20II\\_2.pdf](http://www.cnas.org/files/documents/publications/CNAS_Cyber_Volume%20II_2.pdf); Kenneth Geers, "Pandemonium: Nation States, National Security, and the Internet", Tallinn Paper No. 1, 2014, available at: [www.ccdcoe.org/publications/TP\\_Vol1No1\\_Geers.pdf](http://www.ccdcoe.org/publications/TP_Vol1No1_Geers.pdf).
- 8 See, generally, Chairman of the Joint Chiefs of Staff, Information Operations, Joint Publication 3–13, 27 November 2012; United States Air Force, Cyberspace Operations, Air Force Doctrine Document 3–12, 30 November 2011; United States Army, Cyber Electromagnetic Activities, Field Manual 3–38, February 2014.

This emergent reality begs the question of how to treat cyber operations in the context of international humanitarian law (IHL). This is an essential query not only from the perspective of persons and objects protected by IHL during armed conflict, but also from that of States, which are currently in the process of acquiring cyber capabilities, developing the tactics, techniques and procedures for their use, and crafting cyber-specific rules of engagement. Lying at the heart of the matter is a decade-old dispute over when cyber operations directed against protected persons and objects are prohibited. In particular, the debate circulates around the scope of the concept of “attack” under IHL, a normatively critical notion in light of the fact that most of the law regulating the conduct of hostilities is framed in terms of attacks.

The debate was engaged soon after the turn of the millennium. Two approaches emerged, one permissive (in the sense of allowing a wider range of cyber operations against the civilian population) and the other restrictive (restricting cyber operations as a matter of law). In order to qualify as an attack by the former, the cyber operation had to result in injury to persons or physical damage to objects. Accordingly, for instance, cyber operations directed at civilian cyber infrastructure that did not cause damage were not barred by the prohibition on attacking civilian objects because the operations did not qualify as an attack. By contrast, the latter extended the concept of attack, and prohibited operations more broadly, to cyber operations that caused certain harmful effects without necessarily resulting in injury or damage; no bright-line test was offered to identify prohibited cyber actions. I was the progenitor of the permissive approach, with my views best captured in a 2002 article in this journal entitled “Wired Warfare: Computer Network Attack and *Jus in Bello*”.<sup>9</sup> My friend, and presently head of the Legal Division of the International Committee of the Red Cross (ICRC), Knut Dörmann, originated the restrictive approach. An early exposition of his position was set forth in the article “Applicability of the Additional Protocols to Computer Network Attack”, published in the proceedings of a 2004 conference in Sweden that we both attended.<sup>10</sup>

The debate proved relatively static until the North Atlantic Treaty Organization (NATO) Cyber Defence Centre of Excellence in Tallinn, Estonia, launched a major project to examine the implications of cyber warfare under *jus ad bellum* and *jus in bello*, for which I served as director. Twenty distinguished international scholars and practitioners with extensive IHL expertise participated in their personal capacities (the “International Group of Experts”), supported by a team of cyber experts. The ICRC, NATO and US Cyber Command provided observers who participated fully in all deliberations. The result of that effort was

9 Michael N. Schmitt, “Wired Warfare: Computer Network Attack and *Jus in Bello*”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 365.

10 Knut Dörmann, “Applicability of the Additional Protocol to Computer Network Attack”, in Karin Bystrom (ed.), *Proceedings of the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law*, Stockholm, 17–19 November 2011, p. 139, Swedish National Defence College, 2005, reprinted at: [www.icrc.org/eng/resources/documents/misc/68lg92.htm](http://www.icrc.org/eng/resources/documents/misc/68lg92.htm).

the publication of the *Tallinn Manual on the International Law Applicable to Cyber Warfare* in 2013.<sup>11</sup>

Importantly, the Tallinn Manual raised the prospect of a third approach to the issue at hand, one focusing on the functionality of an object that has been targeted by a cyber operation. In my view, the so-called “functionality test” appropriately addresses fair criticism that the permissive approach fails to adequately constrain the effects of cyber operations on the civilian population. At the same time, it adds a degree of clarity as to where the threshold of attack lies that is missing in the restrictive approach.

It must be cautioned that the issue has not been definitively resolved. As the project was under way, the ICRC published a position on the matter in its 2011 report to the 31st Conference of the Red Cross and Red Crescent, entitled *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*.<sup>12</sup> An important recent article by an ICRC legal adviser, Cordula Droege, entitled “Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians”, has further sharpened the dialogue.<sup>13</sup>

Swayed by the logic of Dörmann, Droege and the ICRC, although not necessarily their precise legal argumentation, and influenced by the sophisticated discussions that took place during the three years of the Tallinn Manual process, my thinking on the topic has evolved. It is therefore appropriate to “rewire” my original approach. I will begin by outlining the competing permissive and restrictive approaches that prevailed prior to publication of the Tallinn Manual. I will then describe the legal reasoning of the majority of the experts that participated in that project, and explain why I now find their functionality test persuasive. The article will conclude with my thoughts on how this issue may continue to evolve over time.

## The permissive approach

Article 48 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I)<sup>14</sup> sets forth the principle of distinction:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects

11 Michael N. Schmitt (gen. ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013 (Tallinn Manual).

12 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, official working document of the 31st International Conference of the Red Cross and Red Crescent, 28 November–1 December 2011, Doc. 31IC/11/5.1.2, pp. 36–38.

13 Cordula Droege, “Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 533–578.

14 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

and military objectives and accordingly shall direct their operations only against military objectives.

Distinction, which has been labelled a “cardinal” principle of IHL by the International Court of Justice,<sup>15</sup> is universally acknowledged as a norm of customary law binding on all States during both international and non-international armed conflicts. This is the case regardless of their being parties to AP I.<sup>16</sup>

Textually, it might appear that the provision prohibits any *operation* conducted by the armed forces against civilians and civilian objects. However, State practice, including by States party to AP I, demonstrates that such an interpretation is overbroad. For instance, psychological and civil-military operations intended to influence the civilian population are key elements of contemporary military campaigns, especially during counter-insurgency conflicts such as those that have taken place, and continue, in Afghanistan and Iraq.<sup>17</sup> Although military operations, they are not prohibited under IHL because, as we shall see, they do not qualify as “attacks”.

In “Wired Warfare”, I argued that Article 48 reflects a general principle of IHL that is operationalized in a number of specific IHL rules. Most notable among these are Article 51(2) (“the civilian population as such, as well as individual civilians, shall not be the object of attack”) and Article 52(1) (“civilian objects shall not be the object of attack”). These two rules suggest that the essence of Article 48 is a prohibition on *attacking* civilians and civilian objects, not on targeting them in a manner that does not qualify as (or is not integrally related to) an attack. Repeated reference to attacks throughout the subsequent rules supports this interpretation. For instance, although Article 51(1) provides that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”, it goes on to explain that “[t]o give effect to this protection, the following rules ... shall be observed in all circumstances.” Each of the “following rules” in the article refers to attacks – indiscriminate attacks are forbidden,<sup>18</sup> attacks must comply with the rule of proportionality,<sup>19</sup> and reprisal attacks are outlawed.<sup>20</sup> Similarly, Article 57(1) provides that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.” Despite the

15 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 78.

16 ICRC, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, Rule 1.

17 According to NATO, “in complex political and social contexts where the will of the indigenous population becomes the metaphorical vital ground (i.e. it must be retained or controlled for success), there is a requirement to influence and shape perceptions through the judicious fusion of both physical and psychological means”. Allied Joint Doctrine, AJP-01(D), December 2010, pp. 2–10. See also, generally, NATO, Allied Joint Doctrine for Civil-Military Cooperation, AJP-3.4.9, February 2013; Allied Joint Doctrine for Psychological Operations, AJP-3.10.1(A), October 2007.

18 AP I, Art. 51(4).

19 *Ibid.*, Art. 51(5)(b).

20 *Ibid.*, Art. 51(6).

chapeau reference to operations, the article sets forth its various requirements in terms of attacks. Other AP I articles relevant to targeting also typically frame their operative provisions in the context of attack. Thus “attacks shall be limited strictly to military objectives”,<sup>21</sup> reprisal attacks against the natural environment are prohibited,<sup>22</sup> works or installations containing dangerous forces may not be attacked except under specified circumstances,<sup>23</sup> precautions against the effects of attack should be taken,<sup>24</sup> non-defended locations may not be made the object of attack,<sup>25</sup> and so on.

The repeated reference to attacks begs the question of how these prohibitions and restrictions relate to cyber operations. AP I defines attacks in Article 49(1): “‘Attacks’ means acts of violence against the adversary, whether in offence or defence.”<sup>26</sup> Similarly, the ICRC Commentary to Article 48 explains the reference to operations in terms of violence:

The word “operations” should be understood in the context of the whole of the Section; it refers to military operations during which violence is used, and not to ideological, political or religious campaigns. For reasons which have nothing to do with the discussions in the Diplomatic Conference, the adjective “military” was not used with the term “operations”, but this is certainly how the word should be understood. According to the dictionary, “military operations” refers to all movements and acts related to hostilities that are undertaken by armed forces.<sup>27</sup>

Although clear with respect to classic kinetic operations, Article 48’s plain text and the Commentary’s reference to the use of violence might seem problematic when applied to cyber operations since they are not violent *per se*. However, there appears to be widespread agreement that the matter is resolved by looking to the object and purpose of the various attack rules, especially Article 48.<sup>28</sup> State practice demonstrates that the article was designed to encompass acts having violent *consequences*, in addition to those that are violent in the kinetic sense. For instance, States have always treated chemical or biological operations, which had already occurred before the drafting of AP I, as attacks, even though they release no kinetic force.

Critics of the permissive approach sometimes cite the final sentence of the Commentary set forth above.<sup>29</sup> They also point to Article 51’s Commentary, which

21 *Ibid.*, Art. 52(2).

22 *Ibid.*

23 *Ibid.*, Art. 56(1).

24 *Ibid.*, Arts 57 and 58.

25 *Ibid.*, Art. 59.

26 The term “attack” in IHL must be distinguished from “armed attack” in the *jus ad bellum*. The latter term refers to the condition precedent for the exercise of self- (or collective) defence pursuant to Article 51 of the UN Charter and customary international law.

27 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1875.

28 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 31(1).

29 C. Droege, above [note 13](#), p. 556.

describes military operations as “all the movements and activities carried out by the armed forces related to hostilities”,<sup>30</sup> and the Commentary on Article 57, which explains that military operations “should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat”.<sup>31</sup> Doing so ignores the opening sentence of the quoted paragraph, which unambiguously notes that the relevant section of AP I deals with operations during which violence is used, as well as the fact that the Commentary to Article 51 contains a footnote referring back to Article 48’s Commentary, and thus incorporates the condition of violence by reference.<sup>32</sup> And, of course, the term “combat” in the Article 57 Commentary is self-explanatory.

The ineluctable conclusion is that the prohibitions and restrictions set forth in the relevant provisions of AP I generally apply to targeting operations that qualify as attacks and that attacks are acts that have violent consequences. I therefore concluded in “Wired Warfare”:

It is clear that what the relevant provisions hope to accomplish is shielding protected individuals from injury or death and protected objects from damage or destruction. ... Significant human physical or mental suffering is logically included in the concept of injury; permanent loss of assets, for instance money, stock, etc., directly transferable into tangible property likewise constitutes damage or destruction. The point is that inconvenience, harassment or mere diminishment in quality of life does not suffice; human suffering is the requisite criterion.<sup>33</sup>

The text of various articles in AP I supports the focus on damage, destruction, injury and death. In particular, Article 51 notes that the “civilian population and individual civilians enjoy general protection against *dangers* arising from military operations” and prohibits “acts or threats of *violence* the primary purpose of which is to spread terror among the civilian population”.<sup>34</sup> The environmental provisions refer to *damage* being widespread, long-term and severe,<sup>35</sup> whereas the article addressing restrictions on attacking dams, dykes and nuclear electrical generating stations speaks of “*losses* among the civilian population”.<sup>36</sup> Most importantly, the rule of proportionality is framed in terms of “*loss* of civilian life, *injury* to civilians, *damage* to civilian objects, or a combination thereof”.<sup>37</sup> Since this rule lies at the heart of targeting, it is difficult to convincingly extend the notion of attack beyond the types of harm specified therein. After all, it would be incongruent to suggest, on the one hand, that a cyber operation against civilian cyber infrastructure that did not cause loss, injury or damage constituted a prohibited

30 Y. Sandoz *et al.*, above [note 27](#), para. 1936.

31 *Ibid.*, para. 2191.

32 *Ibid.*, para. 1936, footnote 8.

33 M. Schmitt, above [note 9](#), p. 337.

34 AP I, Arts 51(1) and 51(2) (emphasis added).

35 *Ibid.*, Arts 35(3) and 55(1).

36 *Ibid.*, Art. 56(1) (emphasis added).

37 *Ibid.*, Arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b) (emphasis added).

attack, but, on the other, that the same harm caused incidentally to the same infrastructure during a cyber attack on a military objective need not be considered in the proportionality analysis.

The implications of the permissive approach must be grasped. Cyber operations directed against civilians, civilian objects and other protected persons and objects do not violate IHL prohibitions or restrictions framed in terms of attacks unless they result in death, injury, physical damage or destruction. But, as I noted in 2002, “the advent of [computer network attack] reveals a normative lacuna that, unless filled, will inevitably result in an expansion of war’s impact on the civilian population”.<sup>38</sup> The restrictive approach championed by Dörmann responded to this concern.

## The restrictive approach

At the 2004 conference in Sweden, Knut Dörmann set forth an alternative, more restrictive approach to the issue of how IHL governs cyber targeting. Although we generally came to similar conclusions regarding cyber operations during armed conflicts,<sup>39</sup> we differed on the matter of whether physical consequences are conditions precedent to activation of the prohibitions and restrictions on targeting.<sup>40</sup> Our two competing approaches would shape the debate for over a decade.

Dörmann pointed to the definition of military objectives as demonstrating the flaw in the permissive approach I was advocating.

The fact that CNA [computer network attack] does not lead to the destruction of the object attacked is irrelevant. In accordance with Art. 52 (2) of AP I only those objects, which make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage, may be attacked. By referring not only to destruction or capture of the object but also to its neutralization the definition implies that it is irrelevant whether an object is disabled through destruction or in any other way.<sup>41</sup>

In 2011, the ICRC affirmed this position in its report to the 31st International Conference of the Red Cross and Red Crescent, asserting that:

It is sometimes claimed that cyber operations do not fall within the definition of “attack” as long as they do not result in physical destruction or when its effects

38 M. Schmitt, above [note 9](#), p. 379.

39 We agreed, for example, that cyber operations are fully subject to IHL, in particular the principle of distinction and its various derivative rules such as the prohibition on attacking people other than combatants, civilians directly participating in hostilities, and military objectives.

40 On this issue, see also Nils Melzer, “Cyberwarfare and International Law”, UNIDIR Resources Paper, 2011, p. 27, available at: [www.unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf](http://www.unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf); Heather Harrison-Diniss, *Cyber Warfare and the Laws of War*, Cambridge University Press, Cambridge, 2012, pp. 196–202.

41 K. Dörmann, above [note 10](#), p. 6.

are reversible. If this claim implies that an attack against a civilian object may be considered lawful in such cases, it is unfounded under existing law in the view of the ICRC. Under IHL, attacks may only be directed at military objectives, while objects not falling within that definition are civilian and may not be attacked. The definition of military objectives is not dependent on the method of warfare used and must be applied to both kinetic and non-kinetic means; the fact that a cyber operation does not lead to the destruction of an attacked object is also irrelevant. Pursuant to article 52 (2) of Additional Protocol I, only objects that make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage, may be attacked. By referring not only to destruction or capture of the object but also to its neutralization the definition implies that it is immaterial whether an object is disabled through destruction or in any other way.<sup>42</sup>

I have become increasingly sympathetic to the concerns expressed by Dörmann and reflected in the ICRC report. That said, the legal logic underpinning the restrictive approach remains elusive for me. The concept of attack does not rely in any way on the definition of military objectives. On the contrary, directing injurious or harmful operations against civilians, civilian objects and other protected persons or objects is no less an attack than directing the same operations against combatants, civilians directly participating in hostilities, or military objectives. It is only once an operation qualifies as an attack (or even a “military operation” for those taking the restrictive approach) that the issue of whether the target is a military objective arises. For example, military forces often conduct intelligence, surveillance and reconnaissance (ISR) operations against both civilian and military activities – the former to develop pattern of life assessments that will facilitate compliance with the proportionality rule and the requirement to take precautions in attack, the latter in order to gather information to effectively strike the target. The question of whether the ISR is directed at a military objective is irrelevant since the operation does not qualify as one to which attack restrictions or prohibitions apply.

Cordula Droege has responded to this analysis. She argues that:

This criticism fails to acknowledge that “neutralization” was meant to encompass “an attack for the purpose of denying the use of an object to the enemy without necessarily destroying it”. This shows that the drafters had in mind not only attacks that are aimed at destroying or damaging objects, but also attacks for the purpose of denying the use of an object to the enemy without necessarily destroying it. So, for instance, an enemy’s air defence system could be neutralized through a cyber operation for a certain duration by interfering with its computer system but without necessarily destroying or damaging its physical infrastructure.<sup>43</sup>

42 ICRC, above [note 12](#), p. 37.

43 C. Droege, above [note 13](#), p. 558.

The ICRC Commentary to Article 52(2) unfortunately sheds no light on the meaning of the term “neutralization”. Moreover, Droege’s reference to the extract concerning the drafter’s intent, drawn from the unofficial commentary by Bothe *et al.*,<sup>44</sup> misconstrues the concept of neutralization, a common one in military tactics. Most military operations are designed to generate particular “effects”; indeed, today, “effects-based operations” are the norm.<sup>45</sup> The reference to neutralization must be evaluated from this perspective.<sup>46</sup>

To illustrate, if the effect sought is to “neutralize” an enemy airfield, one need not attack the entire airfield or, indeed, attack the airfield at all. It might be sufficient to attack a taxiway or off-base POL (petroleum, oil, lubricants) storage facility to neutralize the airfield and its operations. Similarly, one can destroy cyber infrastructure in order to neutralize enemy command, control and communications (C3) facilities without attacking the C3 facility itself. The point is that in military parlance, the term “neutralize” has never been an antonym for physical damage. On the contrary, “neutralization fire” is a term of art that refers to “[f]ire which is delivered to render the target ineffective”.<sup>47</sup> Moreover, in light of the military technology available at the time the Additional Protocols were negotiated, which only included first-generation electronic warfare equipment and not cyber systems, it is unlikely that the drafters were contemplating non-kinetic operations when referring to neutralization, rather than its classic military meaning.

Although the neutralization argument is counter-factual, the result it achieves better approximates what I believe has become the prevailing understanding of the concept of attack in the cyber context. Since my initial “Wired Warfare” analysis was designed to capture the *lex lata* and not the *lex ferenda*, my position demands “rewiring”. The interpretive journey commenced during the Tallinn Manual process.

## The Tallinn Manual deliberations

Among the areas with which the International Group of Experts struggled during the Tallinn Manual project was the application of targeting rules under IHL to cyber operations. The binary debate described above loomed large throughout the

44 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary to the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, Dordrecht, 1982, p. 325.

45 “Targeting systematically analyzes and prioritizes targets and matches appropriate lethal and nonlethal actions to those targets to create specific desired effects that achieve the JFC’s objectives, accounting for operational requirements, capabilities, and the results of previous assessments.” US Chairman, Joint Chiefs of Staff, Joint Publication 3–60, Joint Targeting, January 2013, Appendix A at p. I-5 (“JP 3-60”).

46 For instance, US Joint Doctrine provides that “[t]he CONOPS [concept of operations] provides more detail on what and where *fires* effects are desired by phase (e.g., deny, disrupt, delay, suppress, neutralize, destroy, corrupt, usurp, or influence)”: *ibid.*, p. I-10 (emphasis added).

47 US Chairman, Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (as amended through April 2012), p. 226. “Fires” is defined as “[t]he use of weapon systems to create specific lethal or non-lethal effects on a target”: *ibid.*, p. 119.

proceedings. Eventually, the experts agreed on Rule 30: “A cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.”<sup>48</sup> The rule does not necessarily exclude cyber operations that do not manifest in injury or physical damage from the ambit of attack. Rather, since the rules required unanimity, Rule 30 represented a least common denominator upon which all the experts could agree.<sup>49</sup>

### The notion of “attack”

A major breakthrough in the dialogue occurred in the project’s final year with the development of what has become known as the “functionality test”. Although a few supporters of the permissive approach remained firmly entrenched, the majority of the International Group of Experts eventually agreed that the concept of “cyber attacks” should not be limited to injurious or physically damaging operations. For them, a cyber operation that interfered with the functionality of cyber infrastructure such that it was, in a sense, “broken” would also qualify as damaging.<sup>50</sup> This was crucial, considering the relationship between the reference to damage in the rule of proportionality and the definition of attack: an operation that “damages” an object is logically an attack. I believe this new approach accurately reflects the current state of the law for reasons that I will set forth in the next section.

There were differences of opinion among the experts as to what qualified as interference with functionality. Some members took the position that “interference with functionality qualifies as damage if restoration of functionality requires replacement of physical components”.<sup>51</sup> Others included simple reinstallation of the operating system in the notion of repair, while a few argued that “interference with functionality that necessitates data restoration, while not requiring physical replacement of components or reinstallation of the operating system, qualifies as an attack”.<sup>52</sup>

A common factor among all these positions is that the object in question is unusable for its intended purpose, at least until some form of repair is undertaken. During their deliberations, the experts discussed the treatment of cyber operations that do not cause physical or functionality damage, but which result in particularly detrimental consequences for the civilian population. These would typically involve denial (and distributed denial) of service operations that interfere with the use of a system without affecting the system itself. An example cited in the Tallinn Manual commentary is “blocking email communications throughout the country (as distinct

48 Tallinn Manual, above [note 11](#), p. 106.

49 Similarly, the experts participating in the HPCR AMW Manual could not achieve consensus on this point. Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013, pp. 12–13 and 20–21.

50 Tallinn Manual, above [note 11](#), commentary accompanying Rule 30, para. 10.

51 *Ibid.*, commentary accompanying Rule 30, para. 10.

52 *Ibid.*, commentary accompanying Rule 30, para. 11.

from damaging the system on which transmission relies)”.<sup>53</sup> Most of the experts agreed that while “there might be logic in characterizing such activities as an attack, the law of armed conflict does not presently extend this far”.<sup>54</sup>

### Interpreting data as an “object” under IHL

A related issue that surfaced during the Tallinn Manual deliberations involved the treatment of data, and more specifically, the question of whether it qualifies as an “object” in IHL terms. If it does, then cyber operations that destroy or alter data are attacks, and those directed against civilian and other protected data are unlawful. Of course, if an attack on data directly causes injury to individuals (as in alteration of data in a water treatment plant that causes illness) or damages objects (as with manipulation of air traffic data that causes aircraft to crash), the operation is an attack. Similarly, destruction or alteration of data that causes a loss of functionality may also qualify as an attack. But is an operation targeting data an attack irrespective of the physical or functional consequence?

The majority of the International Group of Experts were unwilling to extend the concept of “object” to data as such. These experts found the ICRC Commentary on Article 52 – the prohibition on attacking civilian objects – to be particularly persuasive:

The English text uses the word “objects”, which means “something placed before the eyes, or presented to the sight or other sense, an individual thing seen, or perceived, or that may be seen or perceived; a material thing”. ... The French ... text uses the word “biens”, which means “choses tangibles, susceptibles d’appropriation”.

It is clear that in both English and French the word means something that is visible and tangible.<sup>55</sup>

They concluded that since data is neither tangible nor visible, it is not an object benefiting directly from the various IHL protections that certain objects enjoy.<sup>56</sup>

Moreover, the majority also took notice of Article 31(1) of the Vienna Convention on the Law of Treaties, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>57</sup> In the view of these experts, the ordinary meaning of object does not include data. For example, the Merriam-Webster dictionary defines an object as “something material that may be perceived by the senses”.<sup>58</sup> Data is unperceivable by any of the senses.

53 *Ibid.*, commentary accompanying Rule 30, para. 12.

54 *Ibid.*, commentary accompanying Rule 30, para. 12.

55 Y. Sandoz *et al.*, above note 27, paras. 2007–2008.

56 Tallinn Manual, above note 11, commentary accompanying Rule 38, para. 5.

57 Vienna Convention, above note 28, Art. 31(1).

58 “Object”, *Merriam-Webster Dictionary*, available at: [www.merriam-webster.com/dictionary/object](http://www.merriam-webster.com/dictionary/object).

Some experts nevertheless took the contrary position that data *per se* is to be treated as an object, such that it would be prohibited to direct cyber operations against it absent its qualification as a military objective. They argued that

failure to do so would mean that even the deletion of extremely valuable and important civilian datasets would potentially escape the regulatory reach of the law of armed conflict, thereby contradicting the customary premise of that law that the civilian population shall enjoy general protection from the effects of hostilities, as reflected in Article 48 of Additional Protocol I.<sup>59</sup>

Most, however, rejected this argument as reflecting *lex ferenda*, not *lex lata*.

## Wired warfare rewired

The functionality test developed during the Tallinn Manual project comports with contemporary understandings of how IHL governs targeting in cyberspace. In this regard, it must be emphasized that IHL represents a delicate balancing act between two competing interests: military necessity and humanitarian concerns.<sup>60</sup> The former reflects the interest of States in being able to fight effectively during armed conflicts, unhampered by excessive legal strictures. The latter signals the interest of States in protecting their citizenry from harm, minimizing harm to their soldiers and, for some, pursuing worthy moral ends. The paradigmatic example is the rule of proportionality, which permits incidentally harming or even killing innocent civilians in order to achieve a worthy military goal, so long as the attack in question is not expected to result in excessive incidental civilian harm.<sup>61</sup>

When the military necessity–humanitarian considerations balance changes, a corresponding evolution in the law can be expected. To illustrate, attacks using common World War II-era bombs and aircraft would be deemed indiscriminate today because of advances in precision warfare. Given these advances, the military utility of the outdated weapons has plummeted, while increased collocation of civilians, civilian objects and military objectives has heightened humanitarian concerns. As a result, the balance has shifted such that contemporary application of the IHL rule prohibiting indiscriminate attack demands far greater precision than was previously the case.<sup>62</sup>

In an ever more “wired” world, the societal value attributed to activities in cyberspace is constantly rising. At the same time, the wired and networked nature of modern militaries makes it ever more important to preserve the legal manoeuvre room necessary to conduct militarily important cyber operations. These trends will influence how States perform the military necessity–humanitarian concerns

59 Tallinn Manual, above [note 11](#), commentary accompanying Rule 38, para. 5.

60 My views on the operation of this balance are set forth in 10 Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, 2010, p. 795.

61 AP I, Arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b).

62 *Ibid.*, Art. 51(4)(a).

balancing act as they interpret and apply IHL norms vis-à-vis cyber operations. One thing is certain: the strict permissive approach no longer comports with the contemporary significance of cyber systems and activities.

The resulting shift will be subtle, but certain. It will progressively, albeit cautiously, afford greater protection to civilian cyber activities than would the strict injury, death, damage or destruction test that I had previously maintained. However, in terms of the legal rationale for this evolutionary progression, I remain unconvinced by arguments based on a nuanced reference to the term “neutralization” in the definition of military objectives. Such an interpretation deviates from traditional military usage of the term. At the operational level, the argument also runs counter to how the military thinks about targeting by placing, if you will, the cart (military objective) before the horse (attack). And theoretically, it makes little sense to define an act by reference to the entities that are protected against it.

I am nevertheless now persuaded by the foundational premise of the restrictive approach – that is, that the notion of cyber attacks cannot be limited to injurious or physically destructive cyber operations. My rationale is that States are no longer likely to adopt this rigid position. The legal basis for my revised interpretation of the law focuses on the rule of proportionality and its sharp articulation of the genre of harm against which the civilian population is protected. If civilians and civilian objects are protected against *incidental* consequences of a specified nature, they (and other protected persons and objects) must equally enjoy protection against an operation *directed* at them causing the same consequences. This being so, an attack is an operation that causes, borrowing from the text of the proportionality rule, loss of life, injury or damage.

The key is the contemporary understanding of damage. IHL has traditionally been framed in terms of physical damage, for that is the type of harm typically associated with warfare and the kinetic weaponry used to conduct it. Only limited means and methods were available for disabling systems and equipment non-kinetically. This explains the various AP I and AP Commentary references to danger, violence, combat and hostilities cited above. War was about physical destruction.

That reality has changed dramatically. In contemporary warfare, systems and equipment, whether civilian or military, can be more susceptible to being rendered inoperative by cyber than kinetic means. For instance, it may be impossible to target an object kinetically because it is hardened, difficult to locate, or situated in the proximity of civilians or civilian objects such that there is a risk of violating the rule of proportionality. Yet, depending on the circumstances, such factors may be no hindrance to cyber operations. Moreover, for the military and for civilians, it makes little difference whether a computer system or an object relying on computers fails to function because it is disabled kinetically or non-kinetically. It simply does not work. In the cyber context, therefore, the logic underpinning the requirement for injury or physical damage breaks down.

The functionality test elegantly addresses this new perspective in a way that does not exacerbate State concerns about overly restrictive norms that fail to

acknowledge the military advantage component of IHL's balancing act. It shifts attention away from the means of achieving an effect (physical damage/injury) to the effect itself (taking a targeted system out of play). After all, it is not the fact that an object is physically damaged that matters, but rather the fact that it is no longer completely suitable for its intended purpose. This is so regardless of whether one is a military commander attacking an enemy military objective or a civilian that relies on the object.

Of course, the civilian consequences of an attack were always what mattered; IHL is generally anthropocentric. The prohibition on attacking a civilian residence, for example, exists not because of the intrinsic value of the residence, but rather to protect its utility. In the past, the means of threatening that utility were kinetic and thus expressed in kinetic terms. Now that it is possible to threaten utility non-kinetically, it makes sense to reinterpret damage as the loss of functionality that permanently renders the object inoperable or that necessitates some form of repair.

As noted above, members of the International Group of Experts who supported the functionality test differed over the extent of repair necessary to qualify as a loss of functionality. The continuum ranged from physical replacement of components to reloading data. In my own view, the loss of functionality would include situations requiring reloading of the operating system or any software essential to operation, but would not include replacing data that was merely stored on the system.

Because reinterpretation is usually evolutionary, not revolutionary, I believe States would presently be uncomfortable extending the notion of damage to operations that temporarily interfere with functioning but require no repair or other remedial action, as in a distributed denial of service (DDoS) operation. Such operations are more akin to communications jamming, which is not an attack as a matter of law unless it results in harm qualifying as damage or injury. This is, obviously, a somewhat circular analysis. However, States make, interpret and apply IHL, and there appears to be no appetite for extending the concept of damage this far.<sup>63</sup>

The importance of the "functionality test" cannot be overestimated. To the extent that it accurately reflects the contemporary *lex lata*, a proposition by no means settled, it establishes substantial common ground between the permissive and restrictive approaches. The grace of the test is that it extends humanitarian protection well beyond the permissive approach without sacrificing meaningful military advantage. Thus, it plays well to the military advantage–humanitarian considerations balance that permeates IHL.

63 Cordula Droegge has usefully cited certain activities, the cyber equivalent of which would not be considered attacks. These include espionage, dissemination of propaganda, non-physical psychological and economic warfare, and embargoes. See C. Droegge, above note 13, p. 559. While I agree with her on every count, the question remains of how to articulate a norm of general applicability that does not rely on individual *ad hoc* determinations.

## The road ahead

This is an area of the law that will remain in flux for some time. The vector of evolutionary reinterpretation of extant norms is likely to be in the direction of greater protection of civilian cyber activities. As societies become ever more dependent on cyberspace, humanitarian considerations will loom larger in the balance, thereby increasingly offsetting military necessity factors. For instance, it is by no means certain that a decade from now the functionality test will be limited to permanent disablement or system incapacitation requiring repair. The argument that it makes no difference whether a cyber operation disables a system in a manner requiring repairs taking one day or simply shuts that system down for the same period is compelling. Along the same lines, why should targeting cyber infrastructure in a way that necessitates a day's repairs qualify as an attack, but not a DDoS operation against the same system that takes it offline for a week?

Similarly, the unwillingness to treat data as an object because it is not tangible, which I believe presently reflects *lex lata*, is unlikely to survive for long. Loss of data can produce effects that are far more deleterious than kinetic attack. For instance, altering financial system data in a manner that undercuts confidence in a nation's economic system is more detrimental to the civilian population than a kinetic attack on a single bank. It will prove increasingly difficult in cyber-reliant societies to maintain a normative distinction between harm caused to physical objects and that caused to data.

The question remains as to how the evolution towards greater protection for civilian cyber activities will unfold. One possibility is a shift in interpretive emphasis from nature to severity of harm. In the past, nature generally served as effective cognitive shorthand for severity. For instance, the rule of proportionality's reference to death, injury and damage made sense because harm of that nature was typically more severe than, say, inconvenience or disruption; congruity between the severity of consequences and the nature of harm set forth in the rule existed in most cases. Precisely the same result attended the definition of attack's reference to acts of "violence".

Yet, as the aforementioned examples illustrate, cyber operations disrupt that congruency dramatically. Therefore, a trend in interpretation that plays directly to the core concern of the severity of consequences, rather than their nature, when defining attack and applying the rule of proportionality and requirement to take precautions in attack should be expected. The reinterpretation of damage by the Tallinn Manual experts to include significant interference with functionality is illustrative. A similar reinterpretation might extend the notion of "injury" to actions that dramatically disrupt daily life for civilians, or of "violence" to include the same disruptive effect. Even the mere denial of some services could, in theory, eventually be characterized as damage. Of course, these prospects raise difficult questions. Would denial of service operations that, for instance, merely cause inconvenience or irritation be excluded? How would the threshold be expressed and how would legal logic justify a distinction between lawful and unlawful denial of service attacks?

An alternative approach might be to expand the scope of protected persons, objects or activities. As suggested, the obvious candidate for reinterpretation is the notion of “object” with respect to data, although this possibility begs the question of how to avoid making the interpretation overbroad. Should such a reinterpretation occur, it would raise anew the question of “damage”. Would data have to be destroyed, as in erased? Would it suffice to alter the data or even to simply make it inaccessible?

The scope of protected objects could also be expanded through reinterpretation of the “use” criterion in the definition of military objectives. Presently, the use of civilian objects, however slight, renders them military objectives.<sup>64</sup> When this transformation occurs, any residual protection enjoyed by the object (for example, because it can be subdivided into distinct civilian and military components) and nearby civilian objects resides in the rule of proportionality and the requirement to take precautions in attack.

Yet the criterion of “use” is problematic in the cyber context because so much civilian cyber infrastructure also serves military purposes. To accommodate this situation, “use” could be reinterpreted through State practice to require, for example, “substantial” or “predominant” military use, such that cyber operations directed at cyber infrastructure that was only marginally utilized for military purposes would not be lawful. Of course, the same practical result with regard to dual-use cyber infrastructure might be obtained if non-physical effects counted as “damage” for the purpose of the proportionality rule and requirement to take precautions in attack.

A final possibility is the provision of special protection to particular cyber infrastructure, such as that associated with, for the lack of an accepted term, “essential civilian functions”. In fact, protection could also be extended to those functions directly. As an illustration, special protection for cyber infrastructure and functions could be crafted analogously to that presently existing for objects indispensable to the civilian population or for civil defence activities.<sup>65</sup> Doing so would likely require adoption of new treaty law in the form of, for example, a further additional protocol to the Geneva Conventions. Since the path to conduct of hostilities treaty law is usually an arduous one, reinterpretation of existing law to accord with the emergence of cyber operations is far more likely.

## Concluding remarks

It has become fashionable to bemoan the inadequacy of IHL in the face of novel technologies. Such criticism undersells the law’s inherent flexibility and vitality. In fact, after an initial shock to the system, IHL, including the interpretation thereof, tends to respond rather comfortably to new weapon systems.

64 See discussion at Tallinn Manual, above [note 11](#), Rule 39 and accompanying commentary.

65 AP I, Arts 54 and 61–67.

This has been the case with cyber operations. Those early participants in the examination of IHL's application to cyber operations who argued that the law applied fully, such as Knut Dörmann and myself, have prevailed. Very few pundits, and no serious ones, continue to claim the inapplicability of IHL to this form of warfare. The next hurdle is determining *how* it applies. The differences between the two points of view that surfaced early on regarding the notion of cyber operations (and attack) have, over the ensuing decade, slowly but unremittably narrowed. That trend is certain to continue as further State practice and *opinio juris* exposes common ground.

There are, accordingly, grounds for optimism. Cyber operations do not exist in a normative void and do not constitute a method of warfare that is so fundamentally different that it renders application of the law forbiddingly complex, and the international legal community is actively engaged in searching for common ground on IHL's application to cyber operations. The trick will be to remain objective and open-minded about how best to balance military necessity and humanitarian considerations with respect to this new form of warfare.

## OPINION NOTE

# Consent to humanitarian access: An obligation triggered by territorial control, not States' rights

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The debate about the legality of cross-border relief operations has been revived in the wake of the failures experienced by international humanitarian organizations in their response to humanitarian needs in Syria.<sup>1</sup>

Beyond the unthinkable suffering experienced by Syria's people, these failures are especially hard to justify given that international humanitarian law (IHL) has developed steadily over the last fifty years, and that notions of

humanitarian access and the right to assistance and protection for victims of disasters and conflicts now seemingly represent an international consensus. This consensus is exemplified within the United Nations (UN) by the activities of the Office for the Coordination of Humanitarian Affairs (OCHA),<sup>2</sup> the UN Security Council (UNSC)'s policy and practices regarding the right to access humanitarian relief operations,<sup>3</sup> and the "Responsibility to Protect" victims of conflict with international armed forces, if necessary.

However, there are ambiguities and weaknesses in this apparent consensus, which are underlined in Emanuela-Chiara Gillard's legal analysis of cross-border operations.<sup>4</sup> Unsurprisingly, questions of consent and State sovereignty constitute the main stumbling block in connecting humanitarian relief activities with broader actions relating to managing conflicts and international security.

The invocation of IHL at the backdrop of general (traditionally State-centric) international law and its integration in State and UN-led humanitarian interventions must be done in a way that recognizes and preserves the specificities of certain IHL notions. Indeed, since its inception, IHL has recognized and accommodated the roles and responsibilities of *both* State and non-State actors, in their humanitarian and belligerent activities. The ICRC and other impartial humanitarian organizations are entrusted with a crucial assistance and protection mandate under IHL, including the right of initiative provided in Article 3 common to the four Geneva conventions, applicable in non-international armed conflicts. By referring separately to the High Contracting Parties and to the "parties to the conflict", IHL acknowledges the possible non-State nature of some parties to the conflict. These specificities tend to place less relative emphasis on the notion of State sovereignty and more emphasis on the concept of "effective territorial control" and of the responsibility of the parties to the conflict, on the mandatory nature of the medical mission and certain relief operations, and on guarantees concerning the strictly humanitarian nature of assistance.

- 1 See, for instance, Pierre Kraehenbuhl, "There Are No 'Good' or 'Bad' Civilians in Syria – We Must Help All Who Need Aid", *The Guardian*, 3 March 2013, available at: [www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria](http://www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria); Rony Brauman, "Médecins Sans Frontières and the ICRC: Matters of Principle", *International Review of the Red Cross*, Vol. 94, No. 888, pp. 1523–1535; Emanuela-Chiara Gillard, "The Law Regulating Cross-Border Relief Operations", *International Review of the Red Cross*, Vol. 95, No. 890, pp. 351–382.
- 2 See for instance OCHA, "Thematic Areas: Humanitarian Access", available at: [www.unocha.org/what-we-do/policy/thematic-areas/humanitarian-access](http://www.unocha.org/what-we-do/policy/thematic-areas/humanitarian-access).
- 3 See most recently, for instance, the UNSC resolution on humanitarian access in Syria, UN Doc. S/RES/2139, 22 February 2014, in particular paras 4–12.
- 4 E.-C. Gillard, above note 1.

## The question of consent

Certain IHL provisions relating to relief operations are written in imperative terms.<sup>5</sup> Though IHL refers to the notions of “consent”<sup>6</sup> and “agreement”<sup>7</sup> in the context of relief operations, the requirement of consent must weigh not on the *principle* of providing assistance but only on the *modalities* of its provision. On this topic, Emmanuela-Chiara Gillard’s article is instructive: the arbitrary refusal to allow relief operations constitutes a violation of IHL.<sup>8</sup>

However, this conclusion too quickly skirts questions regarding the validity of consent from non-State parties to a conflict, as well as the “legality” of “unauthorized” operations mounted by non-governmental organizations (NGOs). Indeed, NGO relief activities are always provided with the *de facto* consent of the State or non-State party to the conflict in control of the territory concerned. This *de facto* consent obviously carries some legal weight, even when it is obtained from a non-State party to the conflict. It implies, *inter alia*, the obligation to respect humanitarian principles and personnel, and the prohibition on depriving people of goods and services essential to their survival. From a legal perspective, therefore, an agreement between an NGO and a non-State party to a conflict pursuant to which the NGO will provide impartial humanitarian assistance should not be considered as an act of direct participation in the hostilities, a hostile act or a crime under international law.

As for propositions intended to overcome the arbitrary refusal by a State party, they mainly rely on imposing sanctions to force the consent and the access. Such argumentation circumvents the prohibition of interference and intervention contained in IHL,<sup>9</sup> and risks feeding the notion that relief operations can only occur in the shadow of international military interventions.

## Between the notions of “sovereign State” and “party to the conflict”: The stakes surrounding consent

There is a substantial difference between humanitarian principles adopted in the framework of the UN and those contained in IHL. Indeed, the Guiding Principles of UN humanitarian assistance were adopted in 1991 to regulate humanitarian

5 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 3 and 23; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 70.1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) (AP II), Art. 18(2).

6 See common Arts 9/9/9/10 of the GCs for international armed conflicts; GC IV, Art. 59 for occupation; AP II, Art. 18 for non-international armed conflicts.

7 See AP I, Art. 70(1) for international armed conflicts.

8 E.-C. Gillard, above note 1, in particular pp. 356–363.

9 AP I, Art. 70(1).

relief operations in situations of natural disasters and other emergencies.<sup>10</sup> They do not mention armed conflicts and do not use the notion of “parties to the conflict” used in IHL. On the contrary, they stress that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the UN Charter, and that humanitarian assistance should be provided with consent and, in principle, on the basis of an appeal made by the affected country. Even if the Guiding Principles do recognize that relief operations must be provided in accordance with the principles of humanity, neutrality, impartiality and independence,<sup>11</sup> when it comes to the issue of consent, they recreate a constraint that IHL had previously limited. This constraint – requiring the State’s consent – weighs more heavily on relief operations led by States or international organizations than on those led by private humanitarian organizations. Indeed, respect for sovereignty is a core principle of international law that is binding on States in their interactions with other States.

In contrast, IHL limits the national sovereignty principle, especially in non-international armed conflicts where one State is opposed to one or more non-State armed groups, or multiple non-State armed groups are fighting each other. Thus, IHL privileges the notion of “parties to the conflict” over the notion of State/High Contracting Party. Common Article 3 uses the expression “parties to the conflict”, imposing the same respect for fundamental humanitarian guarantees on both States and non-State armed groups. It also creates a right of humanitarian initiative for the International Committee of the Red Cross (ICRC) and any other impartial humanitarian bodies. It affirms that aid efforts and special agreements signed in non-international armed conflicts to facilitate the application of IHL will not affect the legal status of the parties to the conflict. Lastly, IHL affirms that humanitarian operations should not be regarded as interference in the armed conflict or as a hostile or unfriendly act.<sup>12</sup>

Accordingly, the various references to consent listed above refer to “parties to the conflict”. The rationale is not to defend State sovereignty and territorial integrity but to bind *all* authorities (legitimate or *de facto*) using armed force or exerting control over territory and to remind them of their obligations. There is only one instance in which IHL refers to the consent of the State concerned, rather than to the consent of the parties to the conflict: Article 18(2) of Additional Protocol II (AP II), relative to relief operations in non-international armed conflicts. Opinions on the legal meaning of that specific provision were not unanimous during the negotiation of AP II, as some States showed more concern with preserving their national sovereignty than undertaking to facilitate relief action in all circumstances. However, logic should dictate that it is not possible to apply such an exceptional provision broadly and that States which did

10 UNGA Res. 182 (XLVI), Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, UN Doc. A/RES/46/182, 19 December 1991.

11 UN Doc. A/RES/58/114 (LVIII), Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, 17 December 2003.

12 AP I, Art. 70(1).

not ratify AP II cannot claim the benefit of that provision.<sup>13</sup> That same logic would hold that this prerogative was given to the State party to the conflict so that it could exercise consent over the territory under its control, and not so that it could forbid relief to (or impose relief and relief organizations affiliated with itself on) territory and populations over which it no longer maintains effective control.<sup>14</sup>

In non-international armed conflicts, the notions of “parties to the conflict” and “effective control” are crucial keys to reading and interpreting IHL. Provisions of common Article 3 regarding special humanitarian agreements and the right of humanitarian initiative tend to validate both the ability of the non-State party to consent to relief operations, and the agreements made by and with them. IHL thus attempts to create a duty to facilitate and consent to the relief on the parties that are actually in control of the territory at issue and are therefore able to commit to providing or permitting humanitarian operations in the field. These central provisions governing non-international armed conflict should prevail when trying to interpret and apply apparently more restrictive provisions concerning the State’s consent.<sup>15</sup> The obligation to consent lies obviously on the party that is effectively in territorial control.

Rules 55 and 56 of customary international humanitarian law concerning the authorization of humanitarian operations<sup>16</sup> confirm that the general practice supports the link between the consent ability and the effective territorial control of each party and limits the consent to the right of control of the humanitarian nature of the relief. This link between consent and territorial control is also supported by the recent evolution in the terminology used in the UNSC’s resolutions on the protection of civilians in conflicts, as well as in its resolutions on the situations in Syria and the Central African Republic. In them, the UNSC addresses “all Parties to the conflict”<sup>17</sup> and demands that the “Parties” abide by their obligations to respect and facilitate relief operations, thus including the responsibilities and obligations of the non-State parties to the conflict.<sup>18</sup> It is hard to contemplate how non-State parties to the conflict can have obligations to

13 Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, pp. 1475–1481.

14 In armed conflicts as polarized as the Syrian one, the parties to the conflict may be reluctant, for political reasons, to have humanitarian organizations maintain relations with the enemy. However, it is an abuse of the law for the State to impose a monopoly on humanitarian relief, allowing only organizations affiliated with itself (such as the National Red Cross/Red Crescent Society) to provide aid. According to both IHL and the rules of the International Red Cross and Red Crescent Movement, only the ICRC can act as a neutral humanitarian intermediary in situations of armed conflict.

15 Article 1 of AP II completes common Article 3 without modifying its scope of application. It is therefore logical to assume that the more restrictive provisions of Article 18(2) do not cast doubt on the validity of assistance offers and special agreements concluded in accordance with common Article 3 between relief organizations and non-State parties.

16 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 193–202.

17 UNSC Res. 2127, 5 December 2013.

18 UNSC Res. 2139, 22 February 2014; UNSC Res. 2127, 5 December 2013; Statement by the President of the Security Council, UN Doc. S/PRST/2013/15, 2 October 2013.

facilitate relief operations and to respect populations without also having their legal capacity to consent to such operations recognized.<sup>19</sup>

It would be pertinent to limit the legal obstacles to providing relief born of the inter-State character of the humanitarian organizations within the UN family. This should include, in particular, the possibility of signing special agreements with non-State parties to the conflict, such as non-State armed groups, which is a necessary prerequisite in terms of relief operations and which is already granted by IHL to impartial humanitarian bodies. Provisions of common Article 3 providing that such special humanitarian agreements shall not affect the legal status of the parties to the conflict could enable this evolution and provide an appropriate framework within which to protect humanitarian actors from the criminalization of aid delivered to victims of conflict living in areas under the effective territorial control of armed groups placed on “terrorist” lists.

## The medical mission: Beyond consent and borders

Among the diverse forms of humanitarian action, IHL regulates the medical mission around a permanent imperative: to collect and treat all sick and wounded without discrimination other than that based on medical criteria.

This is historically the first and primary relief activity regulated by IHL.<sup>20</sup> Subsequent legal developments have extended that protection to all types of conflicts, and to all wounded and sick. They have also widened the scope of IHL to protect other categories of victims of conflict and other types of relief activities.

The “obligation of results” contained in common Article 3 is found in a series of IHL rules protecting the entire operational chain of medical relief: special status for the wounded and sick and for medical staff and facilities; equipment and safe modes of transportation; and a specific protective emblem.<sup>21</sup>

IHL protects the legal autonomy of the medical mission within the mandatory rules of medical ethics pertaining to that profession. As such, the medical mission is not subject to the criteria, formalities and conditions regarding consent that other relief activities are subject to, including those relating to access and control over relief organizations, nature of relief and beneficiaries.

Therefore, and in accordance with medical ethics, any shackles imposed by a State or a non-State party to the conflict on medical activities, whether cross-

19 On this, see UNSC Res. 1674, 28 April 2006, para. 5, on the protection of civilian victims of conflict, which clearly establishes the responsibilities of parties to take any required measures to ensure the population’s safety, condemns the intentional denial of humanitarian assistance and demands that all parties put an end to such practices.

20 It is to allow for the rescue and care of injured, and retrieval of those killed, from the battlefield that Henri Dunant participated in the creation of the Comité International de Secours aux Blessés and supported the drafting of the first Geneva Convention in 1864.

21 This specific protection can be found in GC IV, Arts 3, 16, 18, 19, 20, 21, 22 and 23. In both Additional Protocols, this protection was improved and extended to non-international armed conflicts. It can be found in AP I, Arts 8–31, and in AP II, Arts 7–12. In customary humanitarian law, Rules 25, 26, 28, 29, 30 and 110 listed in the ICRC Customary Law Study, above note 16, are relevant.

border or otherwise, should invariably be considered as arbitrary from the point of view of IHL.

This special legal protection is commensurate with the constant threats and attacks affecting medical missions due to the strategic value assigned to them by some belligerents.<sup>22</sup> Destroying or controlling medical facilities and therefore access to medical care is often used and abused to impose terror on the population and deter opposition groups from participating in hostilities. Moreover, the outrageous and illegal nature of such direct attacks should not distract us from equally lethal indirect attacks, especially the abusive use of some domestic legal provisions converting medical relief into a weapon of war to the advantage of the State party to the conflict.

This is particularly important in non-international armed conflicts because of the legal asymmetry between the parties to the conflict. In such contexts, there is a clear need to ensure that reference to sovereignty and domestic law does not contradict or eviscerate the fundamental principles of IHL protecting the medical mission. From an operational perspective, some legal questions must now receive clear answers. Can the State use sovereignty arguments to prevent medical care from being provided to people over whom it no longer has effective control? Can the State use the provisions of domestic law to turn (lack of) access to medical care into a weapon of war? As for access, the arbitrary and abusive interpretation of domestic law on medical care should be limited by clear international guidelines.

In non-international armed conflicts, the most common threat to medical care to the wounded and sick comes from a “police reporting” standard clause present in almost every domestic law. Such clauses require doctors to report certain communicable diseases or specific patients (such as people with gunshot wounds) to health authorities or the police. In time of peace, such clauses can be justified by legitimate State concerns with regard to public health and safety. In such a scenario, respect for medical confidentiality is generally taken into consideration when balancing the benefits of such a practice. However, in armed conflict, the validity and interplay of such domestic clauses with IHL is almost never addressed by IHL experts, either in theory or by challenging the practices of national authorities. Indeed, asking for patients’ names, entering hospitals to interrogate or arrest patients, forcing the wounded to be treated in military facilities,<sup>23</sup> or criminalizing medical activity under the guise of a “fight against terrorism” or the maintenance of law and order should be objected to in a coherent, consistent and systematic manner.

The fact that humanitarian NGOs do not benefit from immunity from domestic law creates risks that should be clarified from an IHL perspective; IHL should limit the application of such controversial provisions, especially with regard to the medical mission and the criminalization of certain medical activities

22 The Review dedicated a special issue to this problem. See *International Review of the Red Cross*, Vol. 95, No. 890, *Violence against Health Care (I): The Problem and the Law*.

23 Amnesty International, *Health Crisis: Syrian Government Targets the Wounded and Health Workers*, 25 October 2011, p. 21, available at: [www.amnesty.org/en/library/info/MDE24/059/2011](http://www.amnesty.org/en/library/info/MDE24/059/2011).

that are considered to “support terrorism”. This is particularly important in non-international armed conflicts due to the legal asymmetry created in favour of the State party to the conflict and has been pushed to its height in the current Syrian conflict.<sup>24</sup>

However, the two Additional Protocols to the Geneva Conventions give a clear answer to these questions. Articles 16 and 10 of Additional Protocol I (AP I) and Article 10 of AP II establish the principle of administrative, security and legal immunity for medical staff, whatever the circumstances and whoever the beneficiary. The only corollary is the requirement for staff to fully comply with the rules of medical ethics.<sup>25</sup>

In light of domestic legal provisions that require reporting despite otherwise applicable medical confidentiality obligations, AP I<sup>26</sup> explicitly forbids medical staff from releasing information on the wounded and sick to the opposing side, regardless of any provisions in domestic law. It also forbids the transmission of data to the party to which the sick or wounded person belongs if the health-care personnel have reason to fear that such information could harm patients or their families.

The residual reference to domestic law left in Article 16(3) does not suffice to change the prohibition into a self-executing obligation. It remains an exception to a prohibition leading, even within domestic law, to a case-by-case judgment balancing the necessity to protect legal principles such as medical confidentiality against procedures purportedly designed to protect law and order. The decision is primarily taken by the medical practitioner in line with the overarching binding principles of medical ethics and the best interests of the patient. In case of disagreement, the final judgment is left to a judge and not to administrative authorities.

Ultimately, Article 16 of AP I confirms this dual obligations mechanism by spelling out only one exception to medical confidentiality under humanitarian law, in cases concerning the notification of communicable diseases.<sup>27</sup> Such notification to the health authorities for the sake of public health arguably does not infringe on the patient’s right to medical confidentiality since it can be provided on a “no names” basis.

By doing so, Article 16 recognizes that reporting patients with gunshot wounds is no longer a legal obligation in a period of conflict, but rather falls within the judgement of the doctor, who is duty-bound to prioritize his/her ethical obligation to “do no harm”. This position has been established by the jurisprudence of various countries under their domestic law, which recognizes and arbitrates the duality of obligations relating to medial confidentiality, even

24 Sophie Delaunay, *Condemned to Resist: Professionals in Humanitarian Assistance and Protection*, 10 February, 2014, available at: <http://phap.org/articles/condemned-to-resist>; Amnesty International, *Squeezing the Life out of Yarmouk: War Crimes against Besieged Civilians*, 10 March 2014, available at: [www.amnesty.org/en/library/info/MDE24/008/2014/en](http://www.amnesty.org/en/library/info/MDE24/008/2014/en).

25 AP I, Arts 16(1) and 16(2); AP II, Arts 10(1), 10(2) and 104.

26 AP I, Art. 16(3).

27 AP I, Art. 16(3).

during peacetime.<sup>28</sup> It also corresponds with the rules of the Istanbul Protocol regarding doctors' obligations when faced with instances of torture, which clearly state that medical ethics must prevail over other conflicting legal obligations.<sup>29</sup>

In non-international conflicts, the wording of AP II Article 10 differs slightly but retains the same objective. It is thus erroneous to read this article as "forcing" medical staff to notify the authorities of wounded patients and to blindly obey domestic law.<sup>30</sup>

## National sovereignty and IHL interpretation: The new role of the UN Security Council

Cross-border relief activities have always been an alternative to the arbitrary denial of State consent to relief activities. Historically, only private humanitarian NGOs have carried out relief activities which were "unauthorized" by the State.<sup>31</sup> The specific legal framework of the medical mission justifies the legal freedom claimed by organizations like Médecins Sans Frontières (MSF), compared to others like the ICRC, which have been given a legal mandate by IHL that includes more constrained relief activities in terms of consent from parties to the conflict.<sup>32</sup>

Whatever the state of the legal debate regarding access for humanitarian relief or for the medical mission, the main obstacle to the implementation of IHL goes well beyond the arbitrary nature of withholding consent for relief operations. Indeed, interpretation of IHL applicable to a given armed conflict cannot be left to the sole decision of a State party to that conflict, without jeopardizing the application of IHL principles to the conflict.

The use of international military forces was developed in the early 1990s to impose humanitarian aid and override consent by the concerned parties.<sup>33</sup> But beyond the fact that this solution is not always available due to the lack of

28 In most domestic legal systems, obligations of notification are set out in a way that allows for the conflicting duty to abide by medical ethics to be taken into account. In such a system, sanctions are not automatic but are pronounced by a judge who evaluates the balance that has to be struck between the two competing duties in the case at hand.

29 UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, UN Doc. HR/P/PT/8/Rev.1, 2004, Arts 48–73.

30 The text stresses the primacy of medical ethics and forbids that medical personnel who comply with these rules of conduct be punished. It then states that confidentiality when dealing with the sick and wounded must be respected by all. The text mentions that exceptions to these rules must be spelled out in domestic law. It therefore relies on the guarantees given by the law regarding dual obligations and at the same time protects medical personnel from requests issued by executive civil or military powers in times of armed conflict.

31 Consent or refusal does not need to be explicit. Authorities may prefer to tolerate relief operations rather than explicitly authorize them. Similarly, refusals are seldom explicit. Nevertheless, delays in responding or certain conditions imposed by the authorities require relief organizations to find other channels to respond to the urgency of some situations.

32 On this, see R. Brauman, above note 1.

33 On several occasions, the UNSC decided on international military interventions with the goal of facilitating and securing the delivery of humanitarian aid and, more recently, the protection of populations. International sanctions for war crimes, crimes against humanity and genocide, as well as

consensus within the UNSC, and not always effective in terms of improving the safety of the population, it also runs counter to the prohibition of intervention and interference contained in IHL and the non-violent and neutral character of relief operations.<sup>34</sup>

The UNSC's stalemate on the use of force in the Syrian case prompted it to explore other ways to strengthen the right to assistance and to humanitarian access. In passing its resolutions on the Syrian crisis, the UNSC has developed a coherent doctrine on the interpretation of IHL, making clear that the right to assistance and to humanitarian access is no longer the monopoly of the State party to the conflict.<sup>35</sup> This counters certain abusive sovereignty-based interpretations of IHL that have led to arbitrary denial of assistance and to the use of aid as a weapon of war.

Thus, the UNSC has recognized the concept of arbitrary denial of humanitarian access, and pointed out that such arbitrary denial can constitute a violation of IHL.<sup>36</sup> It has further asserted that the obligation to consent weighs on *both* parties, including the non-State party. As a consequence, consent does not lie solely with the State in the case of non-international armed conflicts, nor is it a right that the State can abuse in order to weaken the opposing party or punish the population.<sup>37</sup>

The UNSC has also established that the medical profession must be neutral, that all medical facilities must be demilitarized, and that medical staff, material and transportation must be granted freedom of movement. It has thus clearly prioritized the rules of IHL regarding the neutrality and independence of medical missions over the rules in domestic law that could transform doctors and medical facilities into proxies for the authorities.<sup>38</sup>

Finally, the UNSC was led to revive a lapsed provision of IHL, by deciding to open four border posts for relief operations without the consent of the Syrian State in order to avoid a deadlock caused by the UNSC's inability to reach a consensus on the use of coercion.<sup>39</sup> The creation of a monitoring mechanism for relief convoys under the responsibility of the UN Secretary General mirrors IHL's requirement that relief operations in the context of international armed conflicts be entrusted to a neutral body, the "Protecting Powers" (or delegated to the

referrals to *ad hoc* tribunals or the International Criminal Court, have also been imposed by the UNSC without the consent of the States concerned.

34 In non-international armed conflicts specifically, AP II, Art. 3 clearly stipulates that "nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs". The UNSC can define a situation as a "threat to international peace and security" and decide upon an international intervention on those grounds. It would be, however, incorrect to base such an intervention on a violation of the rules provided by IHL. Arbitrary denial constitutes a violation of AP II, Art. 18(2), but cannot override the prohibition of intervention stipulated in AP II, Art. 3.

35 In UNSC Res. 2165, 14 July 2014, the UNSC rejected the reference to Chapter 7 and the option to use force in the case of a violation of its decisions, but it said that the resolution – and therefore its interpretation of IHL – has a legally binding effect under Article 25 of the UN Charter.

36 UNSC Res. 2139, 22 February 2014.

37 UNSC Res. 2127, 5 December 2013; UNSC Res. 2139, 22 February 2014; UNSC Res. 2165, 14 July 2014.

38 UNSC Res. 2139, 22 February 2014.

39 UNSC Res. 2165, 14 July 2014.

ICRC as a “substitute for the Protecting Powers” in the event that the parties to the conflict fail to come to an agreement about the Protecting Powers). This mechanism effectively removes from the parties to the conflict their prerogative to inspect and control relief – and consequently, their right to consent and their capacity to limit such relief.

The Syrian armed conflict being of a non-international character, the ICRC was not in a position to legally impose such a mechanism and remained constrained by the requirement that it fulfil its full humanitarian mandate only with the Syrian government's consent.

At the same time, MSF decided that due to the medical nature of its activities, those activities could legally be carried out without governmental consent in areas outside of the Syrian government's territorial control, where MSF's principled humanitarian activities were consented to by the *de facto* authorities in territorial control of those areas. In line with the same legal reasoning, and because of the Syrian government's refusal to consent to MSF's presence and activities, MSF abstained from providing direct relief in areas under the government's territorial control.

By reviving this mechanism and applying it to a non-international armed conflict such as Syria, the UNSC returned to IHL the effectiveness and autonomy it needs when faced with an abusive interpretation of law by the belligerents. It has also, paradoxically, restored the spirit and independence of the law and distanced it from the logic of sovereignty or recourse to international force. This unanimously adopted humanitarian resolution on a conflict, which has rendered manifest a collective political impotence to bring to a halt such unprecedented levels of violence and atrocity, may bring with it the foundation for a new humanitarian consensus within the international community.



# Humanitarian technology: a critical research agenda

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## Abstract

*New technology may offer many opportunities for humanitarian action, but it also presents a number of challenges. Currently, most of the critical analysis of these potential challenges takes place in the blogosphere, on tweets and on listservs. There is a strong need for more scholarly engagement on the subject. This article offers an agenda for critical inquiry into the emergent field of humanitarian technology as applied to a broadly defined context of crises, encompassing both natural disasters and conflict zones, by identifying what technology does to the humanitarian enterprise, and by reflecting on the key challenges that emerge.*

**Keywords:** humanitarian technology, humanitarian innovation, humanitarian principles, cash cards, digital food, crisis mapping, crowdsourcing, big data, science and technology studies.

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The humanitarian enterprise is characterized by considerable optimism regarding the possibility of improving humanitarian action through new, digital technology.<sup>1</sup> The uses of mobile phones, social media platforms, geospatial technologies and various forms of crowdsourcing have fundamentally altered how humanitarian crises are detected and addressed, and how information is collected, analysed, and disseminated. Biometric identification technologies are increasingly used as tools for emergency support and refugee management. Relief provision is beginning to shift towards virtual distributions through digital payment systems, so-called e-transfers or “mobile money.” There are significant expectations surrounding the humanitarian uses of drones. As broadly acknowledged by policymakers and a burgeoning field of scholarly contributions, these developments are changing the possibilities for prevention, response and resource mobilization for humanitarian actors and affected communities alike.

The 2010 Haiti earthquake is commonly seen as the game changer in the chronicles of humanitarian technology. Since then, the institutional and operational focus has been on leveraging technology to enhance humanitarian action, ensuring that more formal relationships are established, and improving the interaction between formal humanitarian organizations such as the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) and

1 Acknowledging that the notion of technology is very broad and that humanitarian action has always been facilitated by some kind of technology – even as basic as pen and paper – we focus in this article on the influence of novel, mostly digital and web-based information and communication technologies on the humanitarian enterprise.

informal volunteer and technological communities.<sup>2</sup> The *World Disasters Report 2013* by the International Federation of Red Cross and Red Crescent Societies (IFRC), entitled *Focus on Technology and the Future of Humanitarian Action*, and the OCHA report *Humanitarianism in the Network Age (HINA)*, have contributed to framing these developments as policy issues. Transformation through technological innovation will also be a key theme at the 2016 World Humanitarian Summit. Yet, despite the great potential and many positive effects of technological innovation, it can also compromise the core principles of humanitarian action and obscure issues of accountability of humanitarian actors towards beneficiaries. The question of how technological innovation affects humanitarian action is in need of more critical enquiry. This article offers an agenda for future research on the emergent field of humanitarian technology as applied in a broadly defined context of crisis, encompassing both natural disasters and conflict zones, by identifying what technology does to the humanitarian enterprise, and by reflecting on the key challenges that emerge. Just as man-made or natural disasters present different types of challenges to humanitarian action in general, they may also present different types of challenges in the application of new technologies. We are aware of this, but seek to highlight in this article some of the general challenges that may arise, in order to stake out avenues for future research.

From a scholarly perspective, this is a fast-moving and immature field. There has been an avalanche of “tech-optimistic” scholarly work, premised on the belief that adding technology will change things for the better.<sup>3</sup> Scholars have given attention to the opportunities that new technologies offer for making humanitarian action more effective, and their potential for strengthening local ownership. It is generally acknowledged that it is not helpful to do gap studies, such as assessments of discrepancies between policy and technical standards on the one hand, and implementation on the other (possibly due to the speed of innovation and local re-contextualization), nor to take a Luddite view of the technology (it is not going away). Somewhat unusually, but in tandem with the nature of the subject matter, most critical and theoretical contributions can be found in exchanges in the blogosphere, on tweets and on listservs.<sup>4</sup> As observed by Ryan Burns, in order to demonstrate its value to intended audiences, the field of digital humanitarianism is actively – if not explicitly – negotiating its

2 Patrick Meier, “New Information Technologies and Their Impact on the Humanitarian Sector”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011, pp. 1239–1263.

3 See e.g. Harvard Humanitarian Initiative, *Disaster Relief 2.0: The Future of Information Sharing in Humanitarian Emergencies*, UN Foundation and Vodafone Foundation Technology Partnership, Washington DC and Berkshire, 2011; Francesco Mancini (ed.), *New Technology and the Prevention of Violence and Conflict*, International Peace Institute, New York, April 2013.

4 See, for example, Patrick Meier’s blog, available at: <http://irevolution.net/>; the Wilson Centre’s Science and Technology Innovation Program blog, available at: [wilsoncommonsblog.org](http://wilsoncommonsblog.org); the Advanced Training on Humanitarian Action blog, available at: <http://atha.se/>; The Diary of a Crisis Mapper blog, available at: <http://crisismapper.wordpress.com/>; and the Global Humanitarian Technology Conference, accessible through the following email address: [GHTC-CONTACTS@LISTSERV.IEEE.ORG](mailto:GHTC-CONTACTS@LISTSERV.IEEE.ORG).

own knowledge politics, through a privileged position from which it can leverage competence and authority on data and technology.<sup>5</sup>

At the same time, there is so far limited critical scholarly engagement with the humanitarian turn to technology. We suggest that this is problematic for several reasons: firstly, as most technologies enable the collection and analysis of data, it needs to be pointed out that algorithms have politics; they are neither neutral nor natural, and there is a need to bring political contestation to the fore.<sup>6</sup> Another issue concerns the physical presence of technology in the humanitarian setting: the humanitarian community perceives the greatest challenge to be the creation of actionable and credible information that may be quickly transmitted to, and understood by, vulnerable communities. When humanitarian actors discuss possible negative outcomes, these are usually addressed through the recommendation of incremental improvements, along the lines of “We can do this (more) ethically if we can get more organized, have better equipment, or develop clearer standards.” Yet such “improvements” engender their own dynamics: technology mediates and alters human relationships and understandings of protection. The turn to technology also changes perceptions of what aid is, and what it means to provide it, as reflected in the often-repeated assertions that “humanitarian information is humanitarian aid” or “information is a basic need.” Moreover, there is a significant but little understood political economy aspect to the rise of humanitarian technology: both the military industry and the surveillance industry are looking for new markets – and the type of legitimacy that partnership with a humanitarian actor can provide.

Mark Duffield argues that, rather than uncritically embracing “cyber-humanitarianism”, humanitarian agencies need to understand exactly what they are buying into.<sup>7</sup> Taking such calls for a critical investigation of technology as a vantage point, the objective of this article is to offer a set of substantive pointers for a critical humanitarian technology research agenda. To that end, we are moving from a discussion of what technology does *for* humanitarian action to asking what technology does *to* humanitarian action. We identify humanitarian space, the generation of new partnerships, shifts in resource distribution, transformations of human relationships and the emergence of new vulnerabilities as analytical prisms for exploring this question. Our goal is to analyze and highlight how critical approaches to technology can inform a more reflective humanitarian practice, enhancing the humanitarian community’s ability to grapple with the ongoing transformation of the humanitarian enterprise and its

5 Ryan Burns, “Moments of Closure in the Knowledge Politics of Digital Humanitarianism”, *Geoforum*, Vol. 53, 2014, pp. 51–62.

6 Gus Hosein, personal communication, the Critical Humanitarian Technology Project Seminar, PRIO, 28 November 2013; similarly discussed in critical security studies, e.g. in Louise Amoore, “Algorithmic War: Everyday Geographies on the War on Terror”, *Antipode*, Vol. 41, No. 1, 2009, pp. 49–69.

7 Mark Duffield, “Disaster-Resilience in the Network Age: Access-Denial and the Rise of Cyber-Humanitarianism”, DIIS Working Paper No. 23, 2013, available at: [http://en.diis.dk/files/publications/WP2013/WP2013-33\\_Disaster-resilience-cyber-age\\_Duffield\\_web.pdf](http://en.diis.dk/files/publications/WP2013/WP2013-33_Disaster-resilience-cyber-age_Duffield_web.pdf).

operations, through and by technology. The approach is exploratory and built on secondary sources, unless otherwise indicated.

For the purposes of clarity, the topical focus of this article is on a specific slice of the humanitarian technology field, namely humanitarian information and communication technologies (mirroring the priorities of the IFRC *World Disasters Report*); it thus leaves aside other technologies such as biometrics and humanitarian drones.<sup>8</sup> Mobile phones, social media, crisis mapping, big-data analytics and e-transfers are all tools that can give beneficiaries the opportunity to take informed decisions in a crisis, give humanitarians better situational awareness and improve aid delivery. We are interested in the particular social interactions and practices these technologies allow for. How does technology create or reshape humanitarian space, power relationships and relief distribution? How can we make sense of the new possibilities for remoteness that technology brings to humanitarian action?

The article is divided into two main parts. The first part starts by providing a description of the hardware and software aspects of the relevant technologies, and the capabilities they are expected to bring to the field of humanitarian action. It then examines humanitarian technology as a theoretical idea, focusing on the constitutive relationship between technology and humanitarianism. The second part considers some of the ways in which technology brings changes to the humanitarian field. The discussion is organized into five sections, covering the relationship between technology and the contested issue of humanitarian space; the generation of new settlements in terms of generating a new shared understanding of meaning, roles, resource distribution and rules, such as the growth of public–private partnerships; the production of new forms of distribution of resources, namely through e-transfers or so-called “digital food”; the reorganization of the relationships between the “helper” and the “helped”; and finally the continuous manufacturing of new vulnerabilities engendered by data collection and processing. In the conclusion, we consider the implications for the “do no harm” imperative and the humanitarian principles of humanity, impartiality and neutrality.<sup>9</sup> We look at how humanitarian action, as it has evolved from the Red Cross Movement, is based on the imperative to “do no harm” in the pure medical sense, but also in the broader sense of acknowledging the impact one has when intervening in a situation of crisis.<sup>10</sup> We reflect on how technologies introduced in the humanitarian field relate to this imperative, how they affect the everyday achievement of humanitarian principles and how they alter practices in the field.

8 For a discussion, see Kristin Bergtora Sandvik and Kjersti Lohne, “The Rise of the Humanitarian Drone”, *Millennium Journal of International Studies*, Vol. 43, No. 1, 2014. See also Kristin Bergtora Sandvik and Maria Gabrielsen Jumbert (eds), *The Good Drone*, Ashgate, Surrey, forthcoming 2015.

9 Encoded in the Statutes of the Red Cross and Red Crescent movements, and encoded in various UN General Assembly resolutions, notably UN GA Res. 46/182, 19 December 1991.

10 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace or War*, Lynne Rienner, Boulder CO, 1999.

## Technology in crisis situations: towards an idea of humanitarian technology

The world has entered the age of “big data.” Data is gathered and generated at an exponential rate, doubling every 20th month: in 2012, the volume of digital content grew to 2.7 zettabytes (ZB), up 48% from 2011.<sup>11</sup> This is a function of a general digitalization of our lives, since many ordinary actions in everyday life can now be traced, stored and shared. The trend is no longer limited to the Western world. An increasing portion of the population in the South, including countries ravaged by war and conflict, is also stepping into the digital realm. This means that the amount of data that can be analysed to inform multilateral efforts for conflict prevention and international security is increasing rapidly and can thus give a more even and realistic picture of the situation in question.

Even in fragile countries, many people have a cell phone. And while cell phone ownership is not universal and most cell phones are not smartphones, there is a rapid spread of 3G networks in developing countries and smartphones are increasingly affordable as they are priced down to US\$40 or less.<sup>12</sup> Cell phone usage enables remote communication, data transfers and establishment of management procedures, and has the potential to be hugely helpful with respect to preparedness, response and recovery. Examples include mitigation of the harmful effects of a crisis by way of providing early warning through text messaging, or real-time evaluations through SMS feedback from affected people receiving aid. As the trend towards digitalization of money has reached crisis and disaster zones, material relief is now increasingly distributed through e-transfers or by SMS.

The data that populations generate through their everyday actions can be correlated to other information through crowdsourcing, identifying patterns of resource flows, movement and consumption. Crowdsourcing is a blanket term covering an array of ways in which many people contribute small amounts of data to form an aggregated larger dataset, usually via electronic means. In an aggregated form, such data can provide important insights into humanitarian needs and the effectiveness of interventions. Many types of data can be collected and aggregated to give a real-time understanding of developments in a particular area. Tracking the use of hate speech on social media can highlight areas of increased tension and potential violence. A sudden growth in remittances to particular countries or geographical locations can be a sign of greater vulnerability. Cell phone data can be used to track population movements in case of violent clashes or natural disasters.<sup>13</sup> SMS surveys can be conducted in

11 Business Wire, “IDC Predicts 2012 Will Be the Year of Mobile and Cloud Platform Wars as IT Vendors Vie for Leadership While the Industry Redefines Itself”, 1 December 2011, available at: [www.businesswire.com/news/home/20111201005201/en/IDC-Predicts-2012-Year-Mobile-Cloud-Platform#.U4uByi-kEy4](http://www.businesswire.com/news/home/20111201005201/en/IDC-Predicts-2012-Year-Mobile-Cloud-Platform#.U4uByi-kEy4).

12 Gulveen Aulakh, “Smartphone Rates May Slip Below 2.5k by Year-End”, *Economic Times*, 19 March 2014, available at: [http://articles.economictimes.indiatimes.com/2014-03-19/news/48366178\\_1\\_smartphones-handset-makers-karbons-mobiles](http://articles.economictimes.indiatimes.com/2014-03-19/news/48366178_1_smartphones-handset-makers-karbons-mobiles).

13 Linus Bengtsson *et al.* “Improved Response to Disasters and Outbreaks by Tracking Population Movements with Mobile Phone Network Data: A Post-Earthquake Geospatial Study in Haiti”, *PLoS*

cooperation with cell phone companies to generate input on food insecurity or fear of violence. During disastrous events, data about the situation of disaster victims from various information sources, such as texts, e-mails, blog posts and tweets, can be processed by crisis mappers in order to create layered maps with geo-referenced information, thus allowing for the detection of focal points that are not easily identified through other technologies.<sup>14</sup>

A critical research agenda in this field raises the question of the academic tools and concepts we use to think about humanitarian technology. As noted by Duffield, there is a need to contemplate how technology and humanitarian policies on the ground change together, meaning that work in disciplines such as anthropology, sociology and geography, as well as history and cultural studies, will be important – in tandem with a thorough theorization.<sup>15</sup> We suggest that while there has until now been little critical investigation into the use of new technology in humanitarian assistance, humanitarian studies being in itself a field in the making, a research agenda for the study of humanitarian technologies can learn a lot from science and technology studies (STS). With its critical view on technologies and their social functionalities, STS has significantly contributed to the understanding of what new technologies do to both social and power relationships.<sup>16</sup> Today, throughout the humanitarian field, technology enables specific sets of political and military rationales and projects that must be examined not for their oft-alleged “newness”, but for the power they represent.<sup>17</sup> The question is: where is power found, what does it look like, and how does it operate?

In our view, there has never been any humanitarianism without technology.<sup>18</sup> Furthermore, technology is not “bad” – but neither is it neutral, or just passively adopted by society. Technology is not an empty vessel waiting to be imbued with “humanitarian meaning”; rather, society and technology engage in a mutually constitutive relationship.<sup>19</sup> The construction of technology is subject to political contestation, and to the realities of professionalism and finance.<sup>20</sup>

*Med*, No. 8, Vol. 8, 2011; UN Global Pulse, *Characterizing Human Behavior During Floods Through the Lens of Mobile Phone Activity*, 2014, available at: [www.unglobalpulse.org/tabasco-floods-CDRs](http://www.unglobalpulse.org/tabasco-floods-CDRs).

- 14 Anne Nelson and Ivan Sigal with Dean Zambrano, “Media, Information Systems and Communities: Lessons From Haiti”, (published 21 January 2011), available at: [www.knightfoundation.org/media/uploads/publication\\_pdfs/KF\\_Haiti\\_Report\\_English.pdf](http://www.knightfoundation.org/media/uploads/publication_pdfs/KF_Haiti_Report_English.pdf).
- 15 Mark Duffield, personal communication; Critical Humanitarian Technology Seminar, PRIO, 28 November 2014.
- 16 Wiebe E. Bijker and John Law, *Shaping Technology/Building Society: Studies in Socio-Technical Change*, MIT Press, Cambridge MA, 1992; Donald MacKenzie and Judy Wajcman, *The Social Shaping of Technology*, Open University Press, Milton Keynes, 1999; Geoffrey L. Herrera, “Technology and International Systems”, *Millennium: Journal of International Studies*, Vol. 32, No. 3, 2003, pp. 559–593; Stefan Fritsch, “Technology and Global Affairs”, *International Studies Perspectives*, Vol. 12, No. 1, 2011, pp. 27–45; Daniel R. McCarthy, “Technology and ‘the International’ or: How I Learned to Stop Worrying and Love Determinism”, *Millennium: Journal of International Studies*, Vol. 41, No. 3, 2013, pp. 470–490.
- 17 D. R. McCarthy, above note 16, pp. 471 and 489.
- 18 Scholars have long been interested in the use of technology for humanitarian purposes: see Robin Stephenson and Peter S. Anderson, “Disasters and the Information Technology Revolution”, *Disasters*, Vol. 21, No. 4, 1997, pp. 305–334.
- 19 D. MacKenzie and J.Wajcman, above note 16.
- 20 G. L. Herrera, above note 16, p. 560; see also W. E. Bijker and J. Law, above note 16.

According to Patrick Vinck, humanitarian technology refers to the use of technology to improve the quality of prevention, mitigation, preparedness, response, recovery and rebuilding efforts.<sup>21</sup> Acknowledging the support functions that humanitarian technology can fulfil, but also pointing to the potential challenges of technological application, we suggest that humanitarian technology is both constituted by and constitutive of humanitarian practice. Humanitarian technology should be understood in the context of ideas about functionality and effectiveness – or perceptions about vulnerability and suffering – underpinning the contemporary humanitarian agenda.<sup>22</sup> New communication technologies are bounded in relation to other kinds of technology, and in relation to social and cultural sentiments about the “appropriateness” of particular tools and practices. These relations in turn infuse the mundane, everyday practices underpinning the adoption and use of “new” technologies.<sup>23</sup>

This perspective is particularly significant for an understanding of the Internet’s role within the global emergency zone, as well as in society at large. With social media, the long-held notion that the virtual world is a different social space to the “real world” has mostly given way to the understanding that there is one social world, which contains both traditional and technologically advanced modes of communication and sites of social activity.<sup>24</sup> Early optimism about the emancipatory potential of social media in the Arab Spring has been countered by negative conceptualizations of the Internet as a tool of propaganda used by armed actors and oppressive governments, as epitomized by Syria. This article adopts the view that a dichotomy between liberation and control is misleading: technologies – including humanitarian information and communication technologies – in turn shape and limit the prospects for human communication and interaction in a constantly iterative manner.<sup>25</sup>

## Humanitarian technology: understanding changes and challenges

### Technology and the politics of the humanitarian space

The following five sections will outline a critical agenda by investigating the impact that the use of technology has on humanitarian space. They will discuss the way in

21 Patrick Vinck, “Humanitarian Technology”, *World Disasters Report 2013*, International Federation of Red Cross and Red Crescent Societies, 2013, p. 20, available at: [www.ifrc.org/PageFiles/134658/WDR%202013%20complete.pdf](http://www.ifrc.org/PageFiles/134658/WDR%202013%20complete.pdf).

22 Because of space constraints, the ways in which humanitarianism shapes technology – for example, by providing “doing good” legitimacy – will not be discussed further here.

23 Marianne De Laet and Annemarie Mol, “The Zimbabwe Bush Pump: Mechanics of a Fluid Technology”, *Social Studies of Science*, Vol. 30, No. 2, 2000, pp. 225–263.

24 Angela Cora Garcia *et al.*, “Ethnographic Approaches to the Internet and Computer-Mediated Communication”, *Journal of Contemporary Ethnography*, Vol. 38, No. 1, 2009, pp. 52–84.

25 Ronald Deibert and Rafal Rohozinski, “Liberation vs. Control: The Future of Cyberspace”, *Journal of Democracy*, Vol. 21, No. 4, 2010, pp. 43–56.

which technology creates new settlements with respect to how humanitarian work can legitimately be organized, the effect of technology on the distribution of resources, the way in which technology is redefining relationships, and the way in which data collection creates new vulnerabilities.

Discussions about the use of humanitarian technology inevitably fold into the long-term debate about “humanitarian space”, a concept that remains central to humanitarian policymaking.<sup>26</sup> While the technical definitions of this concept vary, a common conception of humanitarian space is the ability of agencies to operate freely and meet humanitarian needs in accordance with the principles of humanitarian action.<sup>27</sup> Over the past decade, as the international community has grappled with the protection of civilians and relief provision in Afghanistan, the Democratic Republic of the Congo, Darfur, Iraq, Sri Lanka, and most recently South Sudan and Syria, there has been a persistent concern that the space for humanitarian action is shrinking. This is perceived to result both in less access to crisis settings – with serious consequences for beneficiaries – and a more dangerous operative environment for humanitarian workers.<sup>28</sup> The idea of a shrinking humanitarian space directly influences views on the role of technology within such settings. Technology is here mainly perceived as an instrument to allow for remote management of hard-to-reach areas, for example through the use of SMS surveys to map basic needs, or reliance on Skype for day-to-day management. Technology is thus mainly framed in terms of its instrumentality to maintaining humanitarian access. While this instrumentalist perspective needs to be critically investigated, it is useful to illuminate a practical challenge: humanitarian actors operate in environments that are intrinsically dynamic and unstable and that diverge from the typical environment in which technology is designed, such as the private sector.<sup>29</sup> In the emergency context, the failure rates of sophisticated technologies are likely to be high.<sup>30</sup> Design and manufacturing defects, human error and human–machine interface problems will shape their implementation, even with appropriate planning.

Instead of conceptualizing the humanitarian space as one that is shrinking, but can be saved by technological means, we suggest that the humanitarian space could be understood as a social arena where various actors (donors, UN agencies, NGOs, staff, beneficiaries, private sector actors, peacekeepers and other military

26 This section builds on Kristin Bergtora Sandvik, “The Humanitarian Cyber Space: Expanding Frontiers or Shrinking Space?”, 2014, unpublished manuscript on file with the author.

27 Victoria Metcalfe, *Alison Giffen and Samir Elhawary*, UN Integration and Humanitarian Space, Overseas Development Institute, London, 2011; Sarah Collinson, Samir Elhawary, “Humanitarian Space: A Review of Trends and Issues”, *HPG Reports*, No. 32, Overseas Development Institute, London, 2012.

28 Humanitarian Outcomes, *Aid Worker Security Report 2013: The New Normal: Coping with the Kidnapping Threat*, October 2013, available at: [www.humanitarianoutcomes.org/sites/default/files/HO\\_AidWorkerSecurityReport\\_2013\\_0.pdf](http://www.humanitarianoutcomes.org/sites/default/files/HO_AidWorkerSecurityReport_2013_0.pdf).

29 IFRC, *World Disasters Report 2013*, Chapter 7: “Innovation, Evaluation and Diffusion of Humanitarian Technology”.

30 For examples, see Gus Hosein and Carly Nyst, *Aiding Surveillance*, Privacy International, October 2013, available at: [www.privacyinternational.org/sites/privacyinternational.org/files/file-downloads/aiding\\_surveillance.pdf](http://www.privacyinternational.org/sites/privacyinternational.org/files/file-downloads/aiding_surveillance.pdf).

actors) negotiate activities and outcomes.<sup>31</sup> In our view, the shrinking-space narrative implicitly builds on the myth of a “Golden Age” of non-political humanitarianism and unfettered humanitarian access. As observed by Antonio Donini, the reality has always been characterized by a gap between the aspiration to a set of ideals and the everyday humanitarian politicking in complex political, military and legal arenas.<sup>32</sup> Technology-driven humanitarian action only has a limited potential to break free of the pre-existing political constraints that shape humanitarian access. Humanitarian technology may shelter humanitarianism from the politics of danger by protecting the physical security of humanitarian workers, but it will not save humanitarians from dangerous politics, or from politics in general.<sup>33</sup>

For example, technology can simultaneously be a medium of violence and of humanitarian action: historically, the radio has been the most important humanitarian information technology, but at the same time, violent actors have leveraged communication technologies to incite violence, promote conflict and perpetrate crimes. The classic example is the 1994 Rwandan genocide, where the broadcasts of Radio Télévision Libre des Mille Collines played a significant role in inciting mass killings. Moreover, in view of the nature of an emergency setting, any failure to consider the possible secondary effects of applying a specific new technology can lead to fatal outcomes.

With the rise of digital humanitarianism, areas with limited or non-existent access to connectivity and digital technologies – risk becoming an invisible part of the humanitarian space.<sup>34</sup> As noted by Patrick Vinck, “the on-the-ground reality is more often than not one of information poverty, limited mobile coverage and little or no access to internet for both humanitarians and communities at risk.”<sup>35</sup> While one in four people on earth have started using some form of social media regularly, access is deeply unequal across the global emergency zone.<sup>36</sup> Whereas the digital humanitarian response to Typhoon Yolanda in the Philippines played a significant role – 71% of the population has a cell phone and 34% a smartphone – the percentage of the population online in 2014 is 12% in Uganda and 8% in Pakistan.<sup>37</sup> In addition to that, there are also geographically gendered

31 Dorothea Hilhorst and Bram J. Jansen, “Humanitarian Space as Arena: A Perspective on the Everyday Politics of Aid”, *Development and Change*, Vol. 41, No. 6, 2010, pp. 1117–1139.

32 Antonio Donini (ed.), *The Golden Fleece: Manipulation and Independence in Humanitarian Action*, Kumarian Press, Sterling VA, 2012.

33 Kristin Bergtora Sandvik, “The Risks of Technological Innovation”, in IFRC, above note 29.

34 For an interesting case of a humanitarian organization addressing its own internal digital divide, see the IFRC’s digital divide initiative, “Technology in the Service of the Most Vulnerable”, 6 July 2011, available at: [www.ifrcmedia.org/blog/technology-in-the-service-of-the-most-vulnerable/](http://www.ifrcmedia.org/blog/technology-in-the-service-of-the-most-vulnerable/).

35 P. Vinck, above note 21, p. 30.

36 eMarketer, “Social Networking Reaches Nearly One in Four Around the World”, 18 June 2013, available at: [www.emarketer.com/Article/Social-Networking-Reaches-Nearly-One-Four-Around-World/1009976](http://www.emarketer.com/Article/Social-Networking-Reaches-Nearly-One-Four-Around-World/1009976).

37 Pew Research Center, *Emerging Nations Embrace Internet, Mobile Technology*, 13 February 2014, available at: [www.pewglobal.org/2014/02/13/emerging-nations-embrace-internet-mobile-technology/](http://www.pewglobal.org/2014/02/13/emerging-nations-embrace-internet-mobile-technology/); Neil Dufty, “A Review of the Value of Social Media in Countrywide Disaster Risk Reduction Public Awareness Strategies”, paper developed for the HFA Thematic Review and as an input to the Global Assessment Report on Disaster Risk Reduction 2015 (GAR15), available at: [http://works.bepress.com/neil\\_dufty/34](http://works.bepress.com/neil_dufty/34).

differences that create localized digital divides: the technology gap between men and women is much larger in low-income countries than in high-income countries.<sup>38</sup>

While humanitarian actors often emphasize the democratizing potential of information technology in disasters and OCHA proposes that technology redistributes power,<sup>39</sup> the emphasis on big data comes with its own particular blind spots regarding populations that are overlooked by big data.<sup>40</sup> Will individuals and communities whose life patterns do not generate enough digital breadcrumbs to make it into the algorithms fall outside the humanitarian space? These are some of the challenges which are important to take into account when assessing the use of technology in the humanitarian setting.

### Generating new settlements: the example of public–private partnerships

The introduction of new technologies and the unprecedented levels of connectivity now being seen across the globe will generate new settlements in the structural division of labour in the humanitarian sector. This changing landscape will involve new actors and the redistribution of tasks and responsibilities, as well as evolving understandings of the legitimacy of giving those new actors important roles in humanitarian action. In this section we will discuss one such important new development – namely, the proliferation of public–private partnerships, which in recent years have emerged as a preferred (and donor-encouraged) humanitarian strategy to reach stated goals of increased efficiency and accountability.<sup>41</sup> The rationale for including the private sector in humanitarian action is that partners can contribute to humanitarian solutions with different expertise and resources. Besides that, they own much of the infrastructure on which information and communication technology is based. For example, telecom businesses provide text messages, internet and phone services where there is significant potential for harvesting data and where access to “digital exhaust” is emerging as a key concern for humanitarian actors.

These relationships are increasingly being institutionalized. The Inter-Agency Standing Committee (IASC) Sub-Working Group on Emergency

38 International Telecommunication Union, *ICT Facts and Figures: The World in 2013*, February 2013, available at: [www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf](http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf); Alison Gillwald, Anne Milek and Christoph Stork, “Gender Assessment of ICT Access and Usage in Africa”, *Towards Evidence-Based ICT Policy and Regulation*, Vol. 1, Policy Paper 2, 2009; Laura L. Murphy and Alexandra E. Priebe, “‘My Co-Wife Can Borrow My Mobile Phone!’ Gendered Geographies of Cell Phone Usage and Significance for Rural Kenyans”, *Gender, Technology and Development*, Vol. 15, No. 1, 2011, pp. 1–23.

39 OCHA, *Humanitarianism in the Network Age (HINA) 2011*.

40 Jonas Lerman, “Big Data and its Exclusions”, *Stanford Law Review Online*, 3 September 2013, available at: [www.stanfordlawreview.org/online/privacy-and-big-data/big-data-and-its-exclusions](http://www.stanfordlawreview.org/online/privacy-and-big-data/big-data-and-its-exclusions).

41 Andrea Binder and Jan Martin Witte, “Business Engagement in Humanitarian Relief: Key Trends and Policy Implications”, Humanitarian Policy Group (HPG) Background Paper, Overseas Development Institute (ODI), London, June 2007; Jim Drummond and Nicholas Crawford, “Humanitarian Crises, Emergency Preparedness and Response: The Role of Business and the Private Sector”, HPG Report, ODI, London, January 2014.

Telecommunications, chaired by OCHA, is an open forum to facilitate the operational use of telecommunications in the service of humanitarian assistance, and has been meeting since 1994.<sup>42</sup> The emergency telecommunications cluster under the UN cluster system was created in 2005 and is led by the World Food Programme (WFP). The cluster's mission is limited to "provid[ing] vital IT and telecoms services to help *humanitarian workers* carry out operations efficiently and effectively."<sup>43</sup> In 2012, WFP and MasterCard announced a global partnership "that will use digital innovation to help people around the world to break the cycle of hunger and poverty."<sup>44</sup> In 2013, the Open Humanitarian Alliance came into existence as an initiative whereby organizations and individuals from humanitarian response organizations, academic institutions, government agencies and private sector companies collaborate "to bring the concept of open data into the humanitarian space by addressing the political, technological and capacity issues that currently limit information sharing during disaster."<sup>45</sup>

Critics have often interpreted the evolution of these types of partnerships as neoliberal governance strategies, where "the humanitarian ethos is gradually eroded."<sup>46</sup> Superficially, humanitarians and the private sector appear to share a set of assumptions about the competence, presence and relevance of the private sector. This was evidenced by the words of an official of the International Telecommunications Union, who noted that private sector organizations are "on the ground" and "often at the heart of the community"; hence, "[c]ooperation between public and private sectors can be ramped up. This will ensure a more effective use of emergency response technologies at the international level."<sup>47</sup> Nevertheless, to unpack how technology engenders such new settlements, it is necessary to be aware of the heterogeneous character of these partnerships within the humanitarian sector. There is a huge variation in the understanding of what constitutes a public-private partnership and what the appropriate label for the work done actually is. In this context, it is necessary to consider that the ability to call one's own work "humanitarian action" is a public relations strategy, a way of carrying out corporate social responsibility, and a commercial strategy aimed at spearheading access to new markets.

On a deeper level, the disparity is rooted in the fact that affected states, donor states, beneficiaries, international organizations and market actors all view

42 IASC, Emergency Telecom, available at: [www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=13](http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=13).

43 ICT Humanitarian Emergency Platform, Emergency Telecommunications Cluster, available at: <http://ictemergency.wfp.org/web/ictopr/emergency-telecommunications-cluster> (emphasis added).

44 MasterCard, "MasterCard and the United Nations World Food Programme in Partnership to Deliver 'Digital Food'", Press Release, 13 September 2012, available at: <http://newsroom.mastercard.com/press-releases/mastercard-and-the-united-nations-world-food-programme-in-partnership-to-deliver-digital-food-4/>.

45 See [www.nethope.org](http://www.nethope.org).

46 Thokozi Xaba, "From Public-Private Partnerships to Private-Public Stick 'Em Ups! NGOism, Neoliberalism, and Social Development in Post-Apartheid South Africa", *International Social Work*, 27 January 2014 (published online before print).

47 Paul Conneally, "What Technologists and Humanitarians Can Achieve Together", box. 1.1, in IFRC, above note 29, p. 19.

the state and the overall organization, as well as the objective of humanitarian aid, differently. Hence, attention must be paid to the ways in which ideology and idiosyncrasies shape the templates upon which such agreements are encouraged and entered into, as well as how they play out in practice. According to critics, these partnerships must be carefully managed, as companies are by their very nature mainly interested in “brand, employee motivation and doing more business.”<sup>48</sup> The challenge is to flesh out the precise nature of the dilemma. For example, in the case of e-transfers, it has been pertinently observed that:

Crisis-affected persons are not, in this context, customers of the bank with whom the implementing agency has partnered, and are not party to the contracts agreed between the implementing agency and the bank. Banks are not accountable to humanitarian principles and are likely not used to working with individuals with little knowledge of the banking system.<sup>49</sup>

Another dilemma is that victims of disasters are by nature in a vulnerable position, making them potentially easy targets for private companies’ interests and easy victims of breaches to their right to privacy, as they may be pressed in emergency situations to accept things they wouldn’t have otherwise. Furthermore, critics note that while many of these private companies are powerful global players, even the largest of them – Apple, Google, Microsoft and Facebook – are under the influence of government regulations and national security politics.<sup>50</sup> This influences their ability and willingness to protect the data of humanitarian organizations. Adding to this, many private sector companies are also military suppliers, and in recent years the humanitarian enterprise has in itself become a huge market for new surveillance and control technologies.<sup>51</sup> This overlap of the market with both humanitarian and security practices is deeply problematic, as evidenced by the creation of the new Coalition Against Unlawful Surveillance Exports,<sup>52</sup> which includes Amnesty International, Human Rights Watch and Privacy International.

So far, the proliferation of partnerships has not spurred the development of regulatory standards, and there is a dearth of voluntary guidelines, codes of conduct or principles. There appears to be little consensus on how to structure the dialogue with private sector companies, how to foreground humanitarian principles and

48 See Luk N. van Wassenhove, academic director of INSEAD Humanitarian Research Group, in *How Applied Research Can Contribute to Improvements in Future Humanitarian Supply Chains*, CONTRIBUTE workshop, BI Norwegian Business School, 2014, available at: [www.noreps.no/PageFiles/1156/BI,%20210114,%20slides.pdf](http://www.noreps.no/PageFiles/1156/BI,%20210114,%20slides.pdf).

49 Leah Campbell, “Cross-Sector Cash Assistance for Syrian Refugees and Host Communities in Lebanon: An IRC Programme”, The Cash Learning Partnership, 1 April 2014, available at: [www.cashlearning.org/resources/library/410-cross-sector-cash-assistance-for-syrian-refugees-and-host-communities-in-lebanon-an-irc-programme](http://www.cashlearning.org/resources/library/410-cross-sector-cash-assistance-for-syrian-refugees-and-host-communities-in-lebanon-an-irc-programme).

50 Ronald J. Deibert, *Black Code: Inside the Battle for Cyberspace*, McClelland & Stewart, Toronto, 2013.

51 See notably the revelations that the NSA bugged humanitarian organizations: “GCHQ and NSA Targeted Charities, Germans, Israeli PM and EU Chief”, *The Guardian*, 20 December 2013, available at: [www.theguardian.com/uk-news/2013/dec/20/gchq-targeted-aid-agencies-german-government-eu-commissioner](http://www.theguardian.com/uk-news/2013/dec/20/gchq-targeted-aid-agencies-german-government-eu-commissioner)

52 See the Coalition Against Unlawful Surveillance Exports website, available at: [www.globalcause.net](http://www.globalcause.net).

transparency,<sup>53</sup> or how to distinguish actors with an interest in corporate responsibility from those seeing the humanitarian space exclusively as a new market opportunity for their products. Whether or not humanitarian organizations are aware of such risks, they face a tacit and indirect pressure to adopt new technologies for “cost-efficiency” and “risk-avoidance” reasons. For researchers, the problem is also methodological: the lack of standardization and confidentiality agreements will make such partnerships difficult to scrutinize.

## Paving the way to new methods for distributing aid

The notion that “[c]ommunications are an important form of aid, and can be of equal importance to survivors as food, water and shelter”,<sup>54</sup> is a mainstay of the humanitarian technology discourse – and increasingly also of the general humanitarian discourse. According to the *World Disasters Report 2013*, “[s]elf-organization in a digital world affords opportunities unfeasible in the analogue past. Disaster-affected populations now have greater access to information, and many of their information needs during a crisis can be met by mobile technologies.”<sup>55</sup> In essence, these kinds of statements represent a move to see value-added information as relief in itself.<sup>56</sup>

We suggest that attention must be paid not only to how humanitarian technology impacts on what counts as resources, but also to the *distribution* of resources, in terms of who gets what, who gets to distribute, where this happens and why. In the following section we consider the latter issue in greater depth by looking at the case of e-transfers, often called “mobile money” or “digital food” in the humanitarian context. Over the last decade, the international development community has invested heavily in the so-called financial inclusion agenda, aiming to make poor people less aid-dependent; this is sometimes labelled “resilience through asset creation.”<sup>57</sup> The underlying assumption is that access to financial services such as credit and savings will “create sizeable welfare benefits” as beneficiaries of aid are drawn further into the market economy as customers.<sup>58</sup> In tandem with humanitarianism’s general turn to transparency, accountability and efficiency, the goal of implementing “cost-effective” electronic payment programs is also to help beneficiaries “save money, improve efficiencies and prevent fraud.”<sup>59</sup> The belief is that cash can “go where people cannot”, and

53 Interview with OCHA official, New York, 11 October 2013.

54 GSMA, “Key Takeaways from the UN Working Group on Emergency Telecommunications”, 17 April 2014, available at: [www.gsma.com/mobilefordevelopment/key-takeaways-from-the-un-working-group-on-emergency-telecommunications](http://www.gsma.com/mobilefordevelopment/key-takeaways-from-the-un-working-group-on-emergency-telecommunications).

55 See IFRC, above note 29, Chapter 3, p. 73.

56 This section builds on K. B. Sandvik, above note 26.

57 The World Food Program, *Building resilience through asset creation*, November 2013, available at: <http://documents.wfp.org/stellent/groups/public/documents/communications/wfp261744.pdf>

58 Daniel Radcliffe and Rodger Voorhies, “A Digital Pathway to Financial Inclusion”, 11 December 2012, available at: <http://ssrn.com/abstract=2186926>.

59 Tom Groenfeld, “MasterCard Promotes Financial Inclusion with Electronic Payments”, *Forbes*, 9 September 2013, available at: [www.forbes.com/fdc/welcome\\_mjx.shtml](http://www.forbes.com/fdc/welcome_mjx.shtml).

provide them with choice. This determinist vision of technology and capital fits with a key attribute of the humanitarian agenda: it is not redistributive, but focuses on helping those in need.

The World Food Programme has taken the lead in this development as a part of its broader strategy to move away from food aid and to improve food security through cash assets.<sup>60</sup> In a Kenyan pilot project, WFP is working with MasterCard and Equity Bank to implement a “digital food” delivery system whereby recipients are provided with a debit card linked to a bank account that holds their allowance. According to WFP, beneficiaries preferred the “digital food” allowance over food distribution because it provided choice and helped avoid misuse of cash. It was also found to be 15% cheaper than in-kind food assistance.<sup>61</sup>

Nevertheless, challenges abound for the project, including “an unprepared agent network outside of Port-au-Prince, a lack of mobile network in northern Uganda, limited bank networks and payment infrastructure in remote areas of the Philippines and challenges channelling the cash for the transfers in Kenya.”<sup>62</sup> In an early phase, WFP Kenya found that network connectivity was not strong enough to process payments under the initially devised solution. Unstable network coverage also presented a challenge: in July 2013, for example, Equity Bank experienced a week of unreliable service due to a crash of the operating system of its data base.<sup>63</sup> Through the early implementation phase, there were inconsistent and delayed payments (initially, 74% of the recipients did not receive their payments), resulting in frustrated and confused recipients who sometimes took on short-term credit to cover the shortage. WFP expressed surprise over subsequent “recipient behaviour”: when cash did come, the vast majority rushed to the agent to cash out at the same time, because of lack of trust and because the programme only covered the cost of one withdrawal fee per payment cycle. This caused long lines, insufficient agent liquidity, agent frustration and recipient confusion. Recipients also lacked technical and financial literacy, and did not always know their PINs or how to enter them.<sup>64</sup> Sometimes agents demanded recipients’ PINs or pressured recipients to buy goods in their outlets. Finally, many recipients had to travel significant distances to the nearest agents, and security continued to be an issue.<sup>65</sup> Examples of this kind only point to selected challenges related to the use of technology for the distribution of resources.

60 By 2015, WFP expects almost a third of its assistance to be delivered in the form of cash, vouchers and “digital food” through smart cards and e-vouchers delivered by short text messages.

61 Consultative Group to Assist the Poor (CGAP), World Bank, *Cash for Assets: World Food Programme’s Exploration of the In-Kind to E-Payments Shift for Food Assistance in Kenya*, September 2013, available at: [www.cgap.org/sites/default/files/eG2P\\_Kenya.pdf](http://www.cgap.org/sites/default/files/eG2P_Kenya.pdf).

62 Jamie Zimmerman and Kristy Bohling, “E-Payments in Low-Income Settings: Cutting-Edge or High Risk?”, CGAP, 12 March 2014, available at: [www.cgap.org/blog/e-payments-low-income-settings-cutting-edge-or-high-risk](http://www.cgap.org/blog/e-payments-low-income-settings-cutting-edge-or-high-risk).

63 CGAP, above note 61.

64 L. Campbell, above note 49.

65 CGAP, above note 61.

However, they illustrate that technology creates dependencies that, when disrupted, potentially aggravate the crisis situation.

## Reorganizing relationships

By allowing for more remote engagement with crisis situations, humanitarian technology reshapes relationships between individuals and communities in need, as well as between the individuals and professional groups aiming to provide relief.<sup>66</sup> As discussed above, the notion that the humanitarian space is shrinking as humanitarian workers are facing a more dangerous operative environment is a central preoccupation in the politics of contemporary humanitarianism. In the context of the “war on terror”, the attacks against the UN in Iraq, Afghanistan and other locations have engendered a long-term trend towards risk avoidance. At the same time, agencies seek to expand their presence in conflict zones, pursuant to the logic of the political economy of the humanitarian enterprise: it is through their ability to “stay and deliver”<sup>67</sup> that donors perceive humanitarians’ added value.

This amalgamation of danger and a higher degree of presence has resulted in an increasing bunkerization of humanitarian actors, involving a progressive withdrawal of many international aid personnel into fortified aid compounds, secure offices and residential complexes, alongside restrictive security and travel protocols.<sup>68</sup> This relationship between higher risk and endured presence is mediated through humanitarian technology. In areas such as Syria, South Sudan and Somalia, cell phones, social media and big-data analytics play an important role in allowing humanitarian organizations to continue operating.<sup>69</sup> The expectation is that remote management as a form of “simulating the experience of proximity”<sup>70</sup> will help humanitarians to address the costs to the quality of assistance, as experienced staff withdraws from the field. The web portal DisasterReady.org, for example, offers aid workers the ability to:

Share resources and information and access customized online learning anytime, anywhere in the world. By providing high-quality, accessible training at no cost, the DisasterReady.org Portal allows aid workers to do what they do best: save lives, rebuild communities, and restore hope.<sup>71</sup>

66 This section builds on K. B. Sandvik, above note 26.

67 OCHA, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, OCHA, New York, 28 February 2011, available at: <http://reliefweb.int/report/world/stay-and-deliver-good-practice-humanitarians-complex-security-environments-enar>.

68 Sarah Collinson and Mark Duffield, *Paradoxes of Presence: Risk Management and Aid Culture in Challenging Environments*, HPG, ODI, London, March 2013, available at: [www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8428.pdf](http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8428.pdf).

69 Joe Belliveau, “‘Remote management’ in Somalia”, *Humanitarian Exchange Magazine*, No. 56, January 2013, available at: [www.odihpn.org/humanitarian-exchange-magazine/issue-56/remote-management-in-somalia](http://www.odihpn.org/humanitarian-exchange-magazine/issue-56/remote-management-in-somalia).

70 S. Collinson and M. Duffield, above note 68.

71 See [www.disasterready.org/about](http://www.disasterready.org/about).

According to the critics, something more complicated is happening: Duffield describes remote management as the “distancing tendency” in humanitarian action. He argues that technology is replacing on-the-ground truth, through technological innovation, simulation and visualization premised on an “uncritical technological-determinist vision of simulating the moods, expectations and actions of remote disaster affected populations.”<sup>72</sup>

At the same time, remote management signifies a “re-allocation of risk” towards local organizations and beneficiaries, whereby technology is not only a management tool but also a vehicle for increased self-reliance as technologies “also enable communities to quickly transform themselves into first responders”, access updates about relief operations, give feedback to humanitarian actors and make complaints. Technology plays a central role as “ever-greater powers of self-organization and self-management are being demanded of populations.”<sup>73</sup> In remote management, face-to-face encounters disappear, normalizing a disconnect between aid organizations and their main stakeholders.<sup>74</sup> Remote technologies may also create a situation where both humanitarians and beneficiaries overestimate the actual degree of beneficiary empowerment and participation engendered through the use of remote management technologies.<sup>75</sup>

Parallel to the retreat of traditional humanitarians, technology is also bringing new actors into remote humanitarian action: we still know little about how these groups engage with humanitarianism and how their work will shape the future of humanitarian action. The more critical information infrastructure there is that can be damaged in a disaster, the more important are the private sector companies owning that infrastructure. They become a “relief provider” by dispatching individual employees to mend cell phone towers and re-establish network access.<sup>76</sup> The reliance on remote technologies also brings in invisible crowds of technical workers *de facto* contributing to humanitarian action. Here we borrow an example from Daniel Gilman of OCHA, who observes that a mobile phone application that allows the direct entry and transmission of user registration also brings an application developer, a mobile phone or satellite company, an internet service provider and a data storage company into the relationship, as well as government regulators – all of these being invisible to the beneficiary.<sup>77</sup>

The proliferation of new actors also heightens the risk of duplication of efforts. In the aftermath of the Haiti earthquake there was a proliferation of new sites tracking missing persons, hosted by the *The New York Times*, CNN and Google, among others. Quickly, it became apparent that these efforts were “redundant and potentially confusing because they separately tried to solve the

72 M. Duffield, above note 7.

73 *Ibid.*

74 S. Collinson and M. Duffield, above note 68.

75 K.B. Sandvik, above note 33.

76 A. Nelson and I. Sigal with D. Zambrano, above note 14.

77 Daniel Gilman, “Humanitarianism in the Age of Cyber-Warfare”, presentation, 26 October 2013, Human Security: Humanitarian Perspectives and Responses Conference, Istanbul, 24–27 October 2013.

same problem, lacked common coding standards and did not share information with other efforts.”<sup>78</sup> They also duplicated the International Committee of the Red Cross’s (ICRC) traditional efforts to locate missing persons. Similarly, during the Haiti earthquake, Ushahidi, in conjunction with Tufts University in the United States, provided a platform for crowdsourcing via the 4636 SMS short code, and plotted nearly 4,000 distinct events. Confusion ensued when the Thompson Reuters Foundation began using the same short code for public service announcements.<sup>79</sup>

So far, the most attention has been given to the emergence of the remote volunteering and technological communities (V&TCs) and their practices. Spurred by technical capacity and low barriers to entry, these groups now play an increasingly important role in humanitarian contexts – generating, aggregating, classifying and even analysing data, in parallel to, or sometimes in collaboration with, more established actors and multilateral initiatives. As a starting point, it is important to be aware that digital humanitarians are a heterogeneous group, with different skills, motivations, practices and objectives. So far, most of the scholarly attention has been given to a relatively small group of actors: the Standby Task Force (SBTF), Humanitarian OpenStreetMap Team and Crisis Mappers are three of the most well-known and structured examples of such initiatives, which have enjoyed formalized relationships with traditional humanitarian actors, processing and generating information in the support of humanitarian interventions. As a field, digital humanitarianism is in large part driven by high-profile norm-entrepreneurs; like any field of practice, digital humanitarianism comes with its own set of controversies and contestations over what has happened and what should happen. Critical inquiry must be broadened to discuss the state of critical debate *within* the field as such, and to analyse the activities of newer outfits like MicroMappers, exploring not only how approaches to problem definitions and problem-solving shift, but *why* they shift.

While the participation of this new group of remote humanitarians is frequently described as a “game changer” for humanitarian action, important issues pertaining to the participation of both corporate and volunteer humanitarians remain unaddressed. Crowdsourcing is based on the assumption that the aggregated input of remote participants will produce better knowledge – but what exactly does a crowd know about a crisis? Available evaluation reports indicate a mixed picture: the evaluation of the Ushahidi Haiti Project noted “a marked lack of understanding of operational aspects of emergency response” among the volunteers.<sup>80</sup> As a consequence of this, for example, the SBTF does not engage or communicate with disaster-affected communities “because that responsibility is not one that digital volunteers are equipped to manage.”<sup>81</sup>

78 A. Nelson and I. Sigal with D. Zambrano, above note 14.

79 IFRC, above note 29, p. 168.

80 Nathan Morrow *et al.*, *Independent Evaluation of the Ushahidi Haiti Project*, Development Information Systems International, 8 April 2011, p. 25.

81 Patrick Meier, personal communication on file with authors, July 2014.

Moreover, as the digital humanitarian community continues to proliferate, there are concerns about the professional identity of new actors in the volunteer and technical communities. Individual volunteers participating in such initiatives are often less equipped than traditional humanitarian actors to deal with the ethical, privacy and security issues surrounding their activities. Having taken technical know-how and a desire to do good as their starting point, V&TCs may not be familiar with, or care about, key humanitarian principles such as neutrality, impartiality and independence, and may not have enough contextual understanding to effectively assess the impact of their own work in relation to the “do no harm” principle. Nor is it clear to what extent V&TCs see themselves as engaged in humanitarian action and, therefore, as accountable according to the standards and principles of the humanitarian enterprise. In response, the Digital Humanitarian Network and OCHA have since actively collaborated on preparing guidelines for cooperation between V&TCs and formal humanitarian organizations,<sup>82</sup> and codes of conduct have been developed for organizations like the SBTF.<sup>83</sup> Nevertheless, even though particular situations and challenges can be addressed by codes of conduct and specific training, these examples illustrate more broadly that humanitarian technologies change and will continue to change relationships among people and between people and organizations.

## Technologies for humanitarian data collection: new trade-offs and vulnerabilities

The use of information technology for collecting and processing data in humanitarian settings engenders well-known dilemmas concerning data responsibility (of course, paper-based protection also carries these risks). Yet, the special case of the emergency setting means that these dilemmas must be considered in the light of context-specific trade-offs. In the following section, we outline what a set of individual, organizational and systemic trade-offs might look like.

At the individual level, there is a trade-off between increasing the efficiency of humanitarian action and protecting the privacy of beneficiaries in crises. Generally, protecting the privacy of vulnerable groups and individuals will require the allocation of time and resources in order to conduct risk assessments, to engage and secure informed consent, and to implement informational security protocols with respect to data collection routines and secure data storage. In humanitarian contexts, the imperative to act quickly and decisively may often run

82 Luis Capelo, Natalie Chang and Andrej Verity, “Guidance for Collaborating with Volunteer & Technical Communities”, Digital Humanitarian Network, 2013, available at: <http://digitalhumanitarians.com/collaboration-guidance>; Mary E. Milner and Andrej Verity, “Collaborative Innovation in Humanitarian Affairs: Organization and Governance in the Era of Digital Humanitarianism”, Digital Humanitarian Network, 2013, available at: <https://app.box.com/s/oq2gdcy466j6bpdvzyxt>; Annie P. Waldmann, Andrej Verity and Shadrock Roberts, “Guidance for Collaborating with Formal Humanitarian Organizations”, Digital Humanitarian Network, 2013, available at: <http://digitalhumanitarians.com/collaboration-with-orgs>.

83 SBTF, *Code of Conduct*, available at: <https://docs.google.com/file/d/0B8j8PoWWdddLRVl0RW9DVFJSDQ/edit>. For an overview of other codes of conduct, see Digital Humanitarian Network, *Code of Conduct*, available at: <http://digitalhumanitarians.com/content/code-conduct>.

counter to more measured actions intended to mitigate informational risks to privacy and security.

A challenge that complicates the assessment of protection versus efficiency is confusion about different data categories. A prime example of this is the conceptualization of “sensitive data” in the humanitarian context and the definition of corresponding means to protect these data. While generally relating to the personal data of beneficiaries, data may also include information about conflict development and violent outbreaks, as well as information or rumours about planned movements of military or armed groups. Yet, in practice, the unpredictable dynamics of a humanitarian crisis entail that sensitive data are hard to define *a priori*, with respect to both content and structure: information about who has reported someone else for an offence may suddenly pose a life-and-death security risk. Additionally, a piece of information may not be sensitive as such, or not even lead to the identification of anyone, but combined and merged with other data through triangulation, it may be the piece that gives sense to a broader set of information and leads to the identification of individuals.

Frequently, however, the problem may be one not of grappling with trade-offs, but of inadequate planning: Bowcock and Sossouvi note that with respect to e-transfers, risks to beneficiaries include the use of data for purposes other than the intended ones, as well as sharing or sale of data to third parties and the security risk of using mobile phones to convey sensitive data. Even though data are commonly shared with (broadly defined) partners, donors and local authorities, little thought seems to guide data disclosure to third parties. Moreover, exit strategies frequently lack clear plans for data disposal by agencies or the third parties with whom beneficiary data was shared.<sup>84</sup>

On the *organizational* level, considerations have to be made with regard to financial investments aimed at securing large data volumes vis-à-vis the possibility of spending those funds on delivering aid. New time-saving technologies can spare lives, but may be forgone due to high acquisition costs. Securing data at the operational level also means investment in training staff to be aware of how to collect and secure data in the field and how to transmit data in a secure manner to headquarters and partners. Consent of information suppliers is often presumed when information is provided “actively”, either through social media or dedicated reporting platforms, bypassing proper consent procedures.

Furthermore, massive collection of data can turn unwitting humanitarian organizations into intelligence providers,<sup>85</sup> damaging their credibility and on-the-ground operability.<sup>86</sup> Many of the V&TCs are not adequately equipped to

84 Haley Bowcock and Kokoevi Sossouvi, “Playing by the Code: Laying Down Some Rules of Engagement for the Use of E-transfers in Humanitarian Response”, Human Security: Humanitarian Perspectives and Responses Conference, Istanbul, 24–27 October 2013.

85 Christopher Wilson, “Constructing Consent: Ethical Challenges to Information Innovation in Humanitarianism”, Critical Approaches to Humanitarian Technology: Accountability, Decision-Making and New Actors, academic conference, Norwegian Centre for Humanitarian Studies/Peace Research Institute of Oslo, Oslo, 28–29 November 2013.

86 For controversial perspectives on the crisis mapping effort for Libya, see R. Burns, above note 5; Steve Stottlemire and Sonia Stottlemire, “Crisis Mapping Intelligence Information During the Libyan Civil

understand the risks involved. Government, militia or private cyber groups have capabilities that far exceed the security systems of humanitarian actors in the field as well as those of the V&TCs, and there are already many examples of entire organizations' data being "owned" by hostile cyber groups, most often without the organization's knowledge.<sup>87</sup>

On the *systemic* level, there is a drive to merge data silos and "join up" data to create more complete pictures of a crisis in real time. While this is in many ways a positive trend, there is a trade-off between merging organizational data silos to improve coordination and resource efficiency on the one hand, and the risk of more data being accessed by hostile actors on the other. Even in the absence of ill intentions or glaring malpractice, the mere collection of sensitive data creates risk and possible violations of the imperative to do no harm. Increasingly, codes of conduct, handbooks and standards of procedure are filling the regulative void. Crucially, it is not only the type but also the amount of data to be collected that matters: the emphasis on aggregated data is an important element in the drive to knowledge-based humanitarian action. There appears to be a tendency of collecting too much data, according to a "better safe than sorry" logic premised on the practical difficulties of gathering data in crisis settings. The excess data collected again infringes on the privacy of those struggling to survive in crises and disasters. Emergent challenges concerning identity and anonymity also exist at the systemic level: as humanitarian data is aggregated and made public, the chances for re-identification of individuals and groups increase at an unknown rate. This phenomenon, known as the "mosaic effect", is widely recognized but little understood. Having been demonstrated in the private sector, there is little understanding of the dangers that shared anonymous data would create in a humanitarian context, where data may be limited, but the potential damage of re-identification would be extreme.<sup>88</sup> As pointed out by the 2013 version of the ICRC protection standards, it is possible to gather less data – or data with less detail.<sup>89</sup>

Furthermore, big data and remote sensing capabilities provide an unprecedented opportunity to access contextual information about pending and ongoing humanitarian crises. Many notable initiatives such as the UN Global Pulse project suggest that development of rigorous information

War: An Exploratory Case Study", *Policy & Internet*, Vol. 4, No. 3–4, 2012; and Robert Munro, "Crowdsourcing and the Crisis-Affected Community", *Information Retrieval*, Vol. 16, No. 2, 2013, pp. 210–266.

87 John Scott-Railton, *Revolutionary Risks: Cyber Technology and Threats in the 2011 Libyan Revolution*, Center on Irregular Warfare and Armed Groups, US Naval War College, Newport RI, 2013; John Scott-Railton and Morgan Marquis-Boire, *A Call to Harm: New Malware Attacks Target the Syrian Opposition*, The Citizen Lab, University of Toronto, 2013; Carly Nyst, "There's No Good Reason for Spy Agencies to Snoop on Humanitarian Groups", *Slate*, June 2014, available at: [www.slate.com/blogs/future\\_tense/2014/05/22/nsa\\_gchq\\_spying\\_on\\_humanitarian\\_groups\\_like\\_unicef\\_medecins\\_du\\_monde.html](http://www.slate.com/blogs/future_tense/2014/05/22/nsa_gchq_spying_on_humanitarian_groups_like_unicef_medecins_du_monde.html).

88 We are grateful to Chris Wilson of the engine room ([www.theengineroom.org](http://www.theengineroom.org)) for this insight.

89 International Committee of the Red Cross (ICRC), *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 2nd ed., ICRC, Geneva, 2013, available at: [www.icrc.org/eng/resources/documents/publication/p0999.htm](http://www.icrc.org/eng/resources/documents/publication/p0999.htm).

management systems may even lead to feasible mechanisms for forecasting and preventing crises. Nevertheless, there are important issues to be discussed concerning the veracity and validity of data. Multiple data transactions and increased complexity in data structures raise the potential for error in humanitarian data entry and interpretation, and this raises concerns about the accuracy and representativeness of data that is used for policy decisions in highly pressurized situations that demand quick decision-making. Data that are collected or generated through digital or mobile mechanisms will often pose additional challenges, especially regarding verification. Though a significant amount of work is under way to develop software and algorithms for verifying crowdsourced or anonymously provided data, such tools are not yet operational or widely available. Understanding the limitations posed to veracity and validity of humanitarian data is critical in a context where humanitarians struggle to combine evidence-based approaches with effective and timely responses.

## **Conclusion: what is humanitarian about humanitarian technology?**

In this article, we have attempted to map out a research agenda that identifies humanitarian technology as a field of political contestation. The aim has been to explore what technology does to the humanitarian context, and how the unique characteristics of the emergency context shape the conditions in which technology can operate. By allowing for remote management, humanitarian technology is contributing to a reconceptualization of the humanitarian space. At the same time, the turn to technology has engendered a set of new settlements, most particularly with respect to the emphasis on public–private partnerships. Humanitarian technology also shapes what counts as resources and how resources are distributed. Moreover, by allowing for, and exacerbating, remote management, humanitarian technology reshapes relationships between the “helper” and the “helped”. The article has also reflected on how humanitarian data collection, a key element in the drive towards evidence-based humanitarian action, produces new trade-offs and vulnerabilities.

From these different dynamics and discussions emerges a need for reflection on the question: what is humanitarian about humanitarian technology? How does the use of technology for humanitarian practice relate to the moral underpinnings of the humanitarian enterprise, namely the imperative to do no harm? How does it relate to the humanitarian principles of humanity, impartiality and neutrality? We propose that at the heart of a future research agenda for critical humanitarian studies are questions concerning how new technologies introduced in the humanitarian field affect the everyday achievement of these principles and how they alter practices in the field. Such analysis must go beyond any discussion of the costs and benefits of surveillance, information and data collection devices.

We suggest that new technologies offer new possibilities to better uphold the humanitarian principles, but may come into conflict with the imperative to do no harm if the introduction of these new tools is carried out without further reflection on their impact and a regulating framework. When information is seen both as key to the provision of aid and as aid in itself, bad data collection processes, inaccurate data or the loss of beneficiaries' data can cause significant harm.

### The principle of humanity

It is possible to argue that technologies allow for a better achievement of the principle of humanity in the sense that they allow more people in need to receive assistance. Yet, over the next few years, the combination of the data available to humanitarians, and the ways in which technology allows for a parallel immediacy and remoteness between humanitarians and the field, will impact the way in which empathy is mobilized, and our understanding of a common humanity. Since information technology allows for a remoteness from the scene of crisis and the bunkerization of humanitarians, it potentially strips humanitarian assistance of its respect for the people in need and a contextual understanding of their predicament—both of which are the basis for the humanity principle. The humanity principle more broadly risks being jeopardized if data on people in need are not managed properly and their right to assistance or their security is compromised as a consequence.

### The principle of neutrality

The (simplistic) understanding of technology as an empty vessel waiting to be deployed and filled with meaning could pave the way for the argument that the neutrality principle could be better achieved by technologies, since they may act and decide more neutrally than humans. This article, however, argues that technology is neither neutral nor passively adopted in a crisis. Instead, technologies are used by human beings with different professional and cultural backgrounds, with varying abilities and idiosyncratic preferences. In the same sense, the “neutrality” of any information management system is dependent on the categories and corresponding actions that are entered into it. Furthermore, technology will never allow for perfect neutrality in the sense of freeing humanitarians from the politics of the humanitarian space. The introduction of unknown and novel devices and practices in areas of conflict, where lack of trust and suspicion often prevail, has the potential to feed into already existing conflicts. Thus, attention needs to be paid to how the *non*-neutrality of communication, mapping and data-gathering technology impinges on the stated objective of humanitarian neutrality.<sup>90</sup>

90 James Der Derian, “The Question of Information Technology in International Relations”, *Millennium: Journal of International Studies*, Vol. 32, No. 3, 2003, pp. 441–456; Maria Gabrielsen Jumbert, “Controlling the Mediterranean Space Through Surveillance: The Politics and Discourse of Surveillance

## The principle of impartiality

A prevailing argument is that the impartiality principle is potentially better achieved with a digitalized information management system, ensuring that everyone registered receives the aid to which they are entitled. In order to do so, however, it presupposes that anyone in need is registered, and that humanitarians remain aware of populations disconnected by digital divides populations remaining outside of the data collection samples. While humanitarian aid is supposed to be given impartially and based on need alone, relief distribution through technology, such as “mobile money”, often requires network coverage, widespread cell phone ownership, sufficient technical and financial literacy among the beneficiary population and the ability of humanitarians to make knowledge-based decisions based on big-data analytics. Technology may enable a better form of humanitarian assistance that doesn’t take sides or make distinctions based on race, gender, age or political convictions, and that favours the most urgent cases.

In sum, this article has argued that the deployment of technology for humanitarian action is not only a question of the best match between the most appropriate technology and a specific problem or practice. If that were the case, the successful deployment of technology within the humanitarian field would simply become a matter of specialized, end-user-oriented and purpose-fit innovation – and solutions to humanitarian challenges would likely be technology-driven. Instead, this article has shown that the use of novel technologies brings urgency to all the questions laid out here, whether referring to the politics of humanitarian space, the creation of new settlements, the distribution of resources and the definition of relationships, or the way in which data collection creates new vulnerabilities. Bearing that in mind, we invite the scholarly community and those who implement, develop and invest in humanitarian technologies to carefully evaluate the dynamics that those technologies engender.

# Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non- State actors

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## **Abstract**

*Despite the general consistency in the treatment of international humanitarian law by international courts and tribunals, recent decisions have seen significant disagreement regarding the scope of indirect responsibility for individuals and States for the provision of aid or assistance to non-State actors that perpetrate war crimes. The divisions at the international criminal tribunals with regard to the “specific direction” element of aiding and abetting are reminiscent of the divergence between the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia on the question of State responsibility for supporting or assisting non-State actors that engage in violations of international law. This article analyzes this jurisprudence on individual and State responsibility for the provision of support to non-State actors that breach*

\* Thanks are due to Ray Murphy, Noelle Higgins and the IRRC’s reviewers for their comments on an earlier version.

*international humanitarian law, and considers the interaction and interrelationship between these related but distinct forms of responsibility.*

**Keywords:** war crimes, non-State actors, individual responsibility, aiding and abetting, specific direction, State responsibility, direction, overall control, effective control.

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International humanitarian law (IHL), and especially the law of war crimes, has enjoyed a renaissance in recent years. This is due in large part to the work of the various international criminal tribunals established during the 1990s, most prominently the International Criminal Tribunal for the former Yugoslavia (ICTY), as well as to the establishment of the permanent International Criminal Court (ICC). While the creation of international courts with jurisdiction over war crimes has been an important development in terms of the enforcement of humanitarian law, the jurisprudence of the tribunals has also considerably advanced the substantive content of the law applicable in situations of armed conflict. Theodor Meron, the current president of the ICTY, wrote as early as 1998 that international humanitarian law developed more in the early years of the *ad hoc* tribunals “than in the half-century following Nuremberg”.<sup>1</sup> There is little doubt that ICTY case law has contributed greatly to the elaboration of the scope and content of humanitarian law, as well as addressing the customary international law status of its rules and the question of criminal liability for its most serious breaches.<sup>2</sup> Its pronouncements on various aspects of war crimes have proved especially influential in shaping the Rome Statute and in guiding some of the ICC’s early decisions.<sup>3</sup> International courts and tribunals have been generally consistent over the past two decades in their treatment of matters of IHL, but they have not always been in agreement with regard to the precise parameters of international responsibility for war crimes.

The current crop of international criminal courts are specifically tasked with assessing the criminal liability of individuals for international offences and have accordingly devoted considerable attention to adjudicating upon the elements of specific war crimes, as well as determining responsibility for those crimes.<sup>4</sup> The question of responsibility has proven particularly challenging at times, given the usual focus by international prosecutors on senior officials who

1 Theodor Meron, “The Hague Tribunal: Working to Clarify International Humanitarian Law”, *American University International Law Review*, Vol. 13, 1998, p. 1512.

2 See generally Robert Cryer, *The Development of International Humanitarian Law by the International Criminal Tribunals*, Oxford University Press, Oxford, 2015; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2014; Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi Judicial Bodies*, TMC Asser Press, The Hague, 2014.

3 See, for example, ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber 1), 29 January 2007, paras 210–211 and 277–281; ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber 1), 14 March 2012, para. 541.

4 See generally Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005; William A. Schabas, *The UN International Criminal Tribunals*, Cambridge University Press, Cambridge, 2006.

may have been remote from the actual perpetration of offences. This is especially so in the context of war crimes physically carried out by individuals or groups that are not directly subordinate to an accused, but to whom some form of aid or assistance has been provided. Recent decisions from the *ad hoc* tribunals have created uncertainty regarding the law on complicity, despite almost twenty years of concerted judicial application of the rules regarding international responsibility for war crimes. This jurisprudence has been fractured in relation to the requirements for individual criminal responsibility in cases of aid or assistance, with the “specific direction” element of aiding and abetting as a mode of criminal liability proving particularly controversial.

The ICTY has recently entered the completion phase of its activities – the Hague Branch of the Mechanism for International Criminal Tribunals has been operational since July 2013 – yet the Tribunal has found itself in the midst of a legal and political storm, in large part because of Appeals Chamber disputes concerning the contours of complicity. There have been acquittals of several high-level defendants, a departure from ICTY case law by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) and, somewhat remarkably, the forceful rejection by the ICTY Appeals Chamber of its own previous jurisprudence on aiding and abetting. This episode may harm the legacy of these tribunals, and feeds into concerns regarding the risks of fragmentation of international law arising from the proliferation of international tribunals.<sup>5</sup> It is also reminiscent of, and potentially related to, the difference of opinion that emerged between the International Court of Justice (ICJ) and the ICTY regarding the required level of State control over non-State actors for State responsibility to arise for violations of IHL. The ICTY considered the issue of control when assessing how a non-international armed conflict might become “internationalized”, but also took the opportunity to pronounce on broader issues of State responsibility. For a number of years, a judicial spat rumbled along between the two institutions regarding the rules of attribution for State responsibility, and there remains a degree of uncertainty in relation to the appropriate level of control required for international responsibility to be triggered because of State assistance to culpable groups. The precise contours of individual criminal responsibility in the context of providing aid or assistance to the commission of war crimes are also somewhat unclear.

This article seeks to untangle and analyze this international jurisprudence concerning individual and State responsibility for complicity in war crimes and violations of IHL. There are clear parallels between the judicial attempts to clarify and apply appropriate standards for these two distinct yet complementary forms of responsibility under international law. In the first section, individual responsibility for war crimes is examined, focusing in particular on the treatment of aiding and abetting as a mode of criminal liability by the ICTY. State

5 See, for example, Thomas Buergenthal, “Proliferation of International Courts and Tribunals: Is It Good or Bad?”, *Leiden Journal of International Law*, Vol. 14, 2001, p. 267; Rosalyn Higgins, “A Babel of Judicial Voices? Ruminations from the Bench”, *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 791; Fausto Pocar, “The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community”, *Journal of International Criminal Justice*, Vol. 2, No. 2, 2004, p. 304.

responsibility for war crimes is addressed in the second section, specifically for violations of IHL committed by individuals or groups that have received some form of aid or assistance from a State. In the third section, the article looks at the overlap and interaction between these forms of responsibility, and considers whether the attempted narrowing of individual criminal liability under aiding and abetting through the insistence on a “specific direction” element can be seen as an attempt to offset the more expansive approach to the scope of State responsibility that the ICTY’s overall control standard would entail. It also touches on new and existing obligations under IHL to prevent violations by others, including non-State actors. The current conflicts in Syria and Iraq, with their multitude of parties and participants, serve to underline the importance of indirect responsibility for both individuals and States as a means of addressing violations of IHL committed by non-State actors.<sup>6</sup> The interaction between international courts and the role of judicial creativity in the context of accountability for war crimes is addressed in the final section.

## Individual responsibility

In the flurry of international treaty-making following the Second World War, the existence of individual criminal responsibility for war crimes was expressly confirmed, but its exact parameters were left undefined.<sup>7</sup> The post-war trials had provided precedents, but in the context of codifying the laws of war, the focus was mainly on setting down the primary rules, rather than clarifying in any great detail secondary rules concerning individual responsibility. The grave breaches provisions of the 1949 Geneva Conventions, for example, refer only to those persons “committing or ordering to be committed” serious violations of those treaties.<sup>8</sup> At the 1949 Diplomatic Conference in Geneva, it was explained that modes of criminal liability and related matters were not the concern of the delegates:

These should be left to the judges who would apply the national laws. The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years.<sup>9</sup>

Amongst treaties of IHL, therefore, Additional Protocol I stands as something of an exception in that it specifically includes superior responsibility as a distinct form of

6 Regarding non-State actors, see generally International Institute of International Humanitarian Law, *Non-State Actors and International Humanitarian Law*, FrancoAngeli, Milan, 2010; Liesbeth Zegveld, *Accountability and Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 271–316.

7 See, for example, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/1317 (1950).

8 See e.g., Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 50.

9 Fourth report drawn up by the Special Committee of the Joint Committee, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Federal Political Department, Berne, 12 July 1949, Section B, p. 115.

criminal liability for war crimes.<sup>10</sup> When the United Nations (UN) Security Council established a number of international criminal tribunals beginning in the early 1990s, superior responsibility was included alongside various other modes of criminal liability, thus casting a wide net for criminal responsibility. The statutes of the *ad hoc* tribunals provide that those persons who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” are liable to prosecution.<sup>11</sup> In contrast, the Rome Statute of the ICC provides a more detailed treatment of the various forms of individual criminal responsibility in Articles 25 and 28.<sup>12</sup>

In deciphering the scope of individual criminal responsibility, the *ad hoc* international tribunals have interpreted their own constitutive documents with reference to customary international law. This has often have served as a euphemism for drawing on the (at times) limited practice of the post-Second World War trials, as exemplified in the ICTY’s jurisprudence on joint criminal enterprise liability.<sup>13</sup> Customary international law has also featured in the recent jurisprudence concerning aiding and abetting, although it was not mentioned in the first brief discussion of this mode of liability in *obiter dictum* of the ICTY Appeals Chamber in the seminal *Tadić* case. The Appeals Chamber explained that aiding and abetting involves the carrying out of “acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime ... and this support has a substantial effect upon the perpetration of the crime”.<sup>14</sup> According to *Tadić*, an aider and abettor must know that his or her acts assist the commission of a specific crime.<sup>15</sup> This form of liability is of particular relevance to persons who may supply the means to commit war crimes, or who contribute in other ways to such commission. While joint criminal enterprise and superior responsibility have attracted considerable judicial and scholarly attention, and a certain degree of infamy,<sup>16</sup> aiding and abetting proved to be

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 86.

11 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/827, 25 May 1993 (ICTY Statute), Art. 7(1); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between January 1, 1994 and December 31 1994, UN Doc. S/RES/955, 8 November 1994 (ICTR Statute), Art. 6 (1). See also Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002), UN Doc. S/2002/246 (SCSL Statute), Appendix II, Art. 6(1).

12 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9 (Rome Statute).

13 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 172–233.

14 *Ibid.*, para. 229.

15 *Ibid.*

16 See, for example, Mohamed Shahabuddeen, “Judicial Creativity and Joint Criminal Enterprise”, in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010, pp. 184–203; Allison Marston Danner and Jennifer S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, *California Law Review*, Vol. 93, 2005, pp. 75–169.

relatively uncontroversial at the *ad hoc* tribunals. This form of accomplice liability was cast into the spotlight, however, when it featured to varying degrees in a series of ICTY judgments that saw the acquittal of several high-ranking accused individuals, most notably Momčilo Perišić, the former chief of the general staff of the Yugoslav Army – the highest-ranking military officer in that army.<sup>17</sup> The spotlight’s glare became even more intense when the Appeals Chamber of the ICTY, in an unprecedented turn of events, “unequivocally” rejected the aiding and abetting standard that it had previously endorsed and applied in *Perišić*.<sup>18</sup>

In *Perišić*, the ICTY Appeals Chamber overturned the Trial Chamber’s conviction and twenty-seven-year sentence on the basis that the necessary ingredients for the modes of liability pleaded had not been met; for superior responsibility, it was not shown that Perišić exercised the necessary effective control over his subordinates, while for aiding and abetting, the majority concluded that it had not been proven that the assistance provided had been “specifically directed” to the commission of crimes as per *Tadić*.<sup>19</sup> The Yugoslav Army had put into effect the policy of the Supreme Defence Council of the Federal Republic of Yugoslavia of providing large-scale military assistance, including equipment, logistics and training, to the Army of the Republika Srpska, which had been responsible for war crimes in Sarajevo, Srebrenica and other locations in Bosnia.<sup>20</sup> Echoing the dissenting opinion of Judge Moloto at the trial stage,<sup>21</sup> the Appeals Chamber held that “assistance from one army to another army’s war efforts is insufficient, in itself, to trigger individual criminal liability for individual aid providers absent proof that the relevant assistance was specifically directed towards criminal activities”.<sup>22</sup>

Perišić had supported and implemented the policy of providing aid and may have known of the crimes committed by the Army of the Republika Srpska, but nevertheless he could not be liable for aiding and abetting as the assistance was directed towards the “general war effort” rather than specific crimes.<sup>23</sup> The type of aid provided by the Yugoslav Army was not seen as being “incompatible with lawful military operations”, and although it may have considerably facilitated the commission of crimes, the Appeals Chamber held that “proving substantial contribution does not necessarily demonstrate specific direction”.<sup>24</sup> Judge Liu, dissenting, was of the opinion that the Appeals Chamber had raised

17 ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment (Appeals Chamber), 28 February 2013. Other noteworthy acquittals (where aiding and abetting was not prominent) include ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Retrial Judgment (Trial Chamber), 29 November 2012; ICTY, *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Judgment (Appeals Chamber), 16 November 2012.

18 ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment (Appeals Chamber), 23 January 2014, para. 1650.

19 *Perišić*, above note 17, paras 72 and 119.

20 *Ibid.*, paras 50–57.

21 ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgment (Trial Chamber), 6 September 2011, Dissenting Opinion of Judge Moloto on Counts 1 to 4 and 9 to 12, paras 3–34.

22 *Perišić*, above note 17, para. 72.

23 *Ibid.*, paras 60, 68–69.

24 *Ibid.*, para. 65.

the threshold for aiding and abetting by insisting on specific direction, and by doing so risked undermining its very purpose, as it was “allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts”.<sup>25</sup>

Both the *Perišić* majority and Judge Liu in dissent had noted inconsistency in prior ICTY jurisprudence on the question of specific direction.<sup>26</sup> The Appeals Chamber, for example, had previously held that specific direction was “not an essential ingredient” of the *actus reus* for aiding and abetting.<sup>27</sup> Nonetheless, the Appeals Chamber considered that the requirement that acts of assistance be specifically directed to the commission of crimes was now the “settled precedent”.<sup>28</sup> It is also interesting to note judicial views regarding the designation of specific direction as an *actus reus* element, given that it would logically seem to relate more to the mental element. The Appeals Chamber did accept that “specific direction may involve considerations that are closely related to questions of *mens rea*”, and held that evidence relating to an accused’s state of mind could serve as circumstantial evidence of specific direction as an *actus reus* element.<sup>29</sup> Judges Meron and Agius, in their Joint Separate Opinion, asserted that “whether an individual commits acts directed at assisting the commission of a crime relates in certain ways to that individual’s state of mind”, and stated that were they to set out the elements afresh, they would include specific direction as a *mens rea* element.<sup>30</sup> Either way, they asserted, the key issue is “whether the link between assistance of an accused individual and actions of principal perpetrators is sufficient to justify holding the accused aider and abettor criminally responsible for relevant crimes”.<sup>31</sup> Within months of the *Perišić* appeal, an ICTY Trial Chamber relied upon the Appeals Chamber’s holdings concerning aiding and abetting to acquit two Serbian police officials, Stanišić and Simatović, who had been charged with war crimes and crimes against humanity. The assistance provided by the accused in the form of organization, training and financing had “assisted the commission of the crimes”, but it had not been specifically directed toward those crimes and in some instances, the Chamber felt, it could be reasonably concluded that it was directed towards seemingly lawful efforts to establish and maintain Serb control over certain areas.<sup>32</sup> While the requirements for other modes of liability had also not been met,<sup>33</sup> the judgment served to demonstrate that the approach of the *Perišić* Appeals Chamber to aiding and abetting was impacting the jurisprudence as a binding precedent for the lower

25 *Ibid.*, Partially Dissenting Opinion of Judge Liu, para. 3.

26 *Perišić*, above note 17, paras 26–36; Partially Dissenting Opinion of Judge Liu, paras 2–3.

27 ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgment (Appeals Chamber), 5 May 2009, para. 159.

28 *Perišić*, above note 17, paras 26–36.

29 *Ibid.*, para. 48.

30 *Ibid.*, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, paras 2–3.

31 *Ibid.*, para. 4.

32 ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Judgment (Trial Chamber), 30 May 2013, paras 2359–2360.

33 *Ibid.*, paras 2305–2355.

chamber.<sup>34</sup> This was despite the protestations of Judge Picard, who felt that the failure to secure conviction because of the application of this “overly restrictive” standard meant that “we have come to a dark place in international law indeed”.<sup>35</sup>

*Perišić* and other ICTY acquittals gave rise to considerable political and scholarly criticism.<sup>36</sup> Specific direction itself was seen as a conscious raising of liability standards that could render accountability for international crimes more difficult; for Kenneth Roth of Human Rights Watch, it “could cripple future efforts to prosecute senior officials responsible for human rights crimes”.<sup>37</sup> In an unprecedented turn of events, a Danish trial judge at the ICTY, Frederik Harhoff, voiced his concerns in a private letter that was subsequently published by a Danish newspaper. He suspected that the Tribunal had changed its approach to the requirements for individual criminal responsibility under “pressure from ‘the military establishments’ in certain dominant countries”.<sup>38</sup> He also alleged that the ICTY president, Theodor Meron, had put “tenacious pressure” on his fellow judges, such that “you [would] think he was determined to achieve an acquittal” in *Perišić*.<sup>39</sup> It is a breach of the Tribunal’s rules, and almost unheard of, for a sitting judge to disclose the substance of judicial deliberations, let alone to make such publicly critical comments about a colleague. Ultimately, Judge Harhoff was disqualified from the *Šešelj* case in which he sat as a trial judge.<sup>40</sup> Judicial propriety aside, the incident certainly serves to emphasize the division engendered by the requirement of specific direction as an element of aiding and abetting.

While the ICTY Appeals Chamber may have considered specific direction to be part of the “settled precedent” at the ICTY, the Tribunal’s jurisprudence only holds persuasive value for other international tribunals, as the SCSL was to so emphatically confirm. In one of the most high-profile international prosecutions to date, that of former Liberian president Charles Taylor, the Appeals Chamber of the Special Court expressly departed from the *Perišić* decision concerning specific direction as an *actus reus* element of aiding and abetting. Much of the case against Charles Taylor rested upon finding him criminally responsible for the assistance he provided, including various quantities of arms and ammunition, to the rebel groups fighting and committing war crimes in the civil war in Sierra Leone. The Trial Chamber considered that this aid amounted to practical assistance to the commission of crimes, being indispensable to military offensives

34 *Ibid.*, para. 1264.

35 *Ibid.*, Dissenting Opinion of Judge Michèle Picard, paras 2405–2406.

36 See, for example, Julian Borger, “War Crimes Convictions of Two Croatian Generals Overturned”, *The Guardian*, 16 November 2012; Marlise Simmons, “U.N. Court Acquits 2 Serbs of War Crimes”, *New York Times*, 30 May 2013; Thomas Escritt and Fatos Bytici, “Kosovo Ex-Premier Haradinaj Cleared of War Crimes Again”, *Reuters*, 29 November 2012; Owen Boycott, “Hague War Crimes Ruling Threatens to Undermine Future Prosecutions”, *The Guardian*, 13 August 2013.

37 Kenneth Roth, “A Tribunal’s Legal Stumble”, *New York Times*, 9 July 2013.

38 E-mail from Judge Harhoff, 6 June 2013, p. 3, available at: [www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf](http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf) (all Internet references were accessed in December 2014).

39 *Ibid.*, p. 4.

40 ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President (Chamber Convened by the Order of the Vice-President), 28 August 2013, para. 14.

in certain instances, and having an overall substantial effect on the commission of the crimes charged.<sup>41</sup> The Appeals Chamber emphasized that the essential requirement for aiding and abetting is that the acts of an accused have “a substantial effect on the commission of the crime charged”, and it agreed with the ICTY that it was not necessary to establish that an accused “had any power to control those who committed offences”.<sup>42</sup> The need for a causal link would ensure that persons would not be “unjustly” held responsible for the acts of others, even if they had only provided the means for those crimes.<sup>43</sup> An accused person must know or be aware of the “substantial likelihood” that his or her acts would assist the commission of crimes.<sup>44</sup> The SCSL was not convinced, however, that specific direction was required under customary international law, and considered that the absence of any discussion of custom by the ICTY Appeals Chamber in *Perišić* meant that the latter was “only identifying and applying internally binding precedent”.<sup>45</sup> That said, the SCSL was not persuaded by the analysis in *Perišić* and went so far as to assert that the standard espoused might be contrary to the presumption of innocence and the requirement of proof of guilt beyond reasonable doubt.<sup>46</sup> Although this was a stern admonition by another international tribunal, a potentially more devastating blow to the standing of *Perišić* soon followed, this time from the ICTY Appeals Chamber itself.

In *Šainović et al.*, the ICTY Appeals Chamber returned to aiding and abetting in the context of an appeal by the appellant Lazarević, who had been convicted in part for having provided various forms of support and assistance to soldiers of the Yugoslav Army involved in forcible displacement in Kosovo.<sup>47</sup> The case did not concern “remote assistance” to non-State actors, but is nonetheless especially relevant as regards the prevailing standard for aiding and abetting. The appellant claimed that the Trial Chamber had failed to show, as required by the Tribunal’s jurisprudence (particularly *Perišić*), that his acts or omissions were specifically directed to the commission of the crimes for which he was convicted.<sup>48</sup> A majority of the Appeals Chamber considered that the interpretation by the *Perišić* Appeals Chamber was “at odds” with previous jurisprudence that had plainly found that specific direction was not an “essential ingredient” of aiding and abetting, and it had relied upon a “flawed premise” that *Tadić* had established a precedent on this matter.<sup>49</sup> The Chamber reviewed international and national case law on specific direction and aiding and abetting, and found that no common legal principle existed in national practice, while

41 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Judgment (Trial Chamber II), 26 April 2012, paras 6912–6914.

42 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-1-A, Judgment (Appeals Chamber), 26 September 2013, paras 368–370.

43 *Ibid.*, para. 391.

44 *Ibid.*, para. 415.

45 *Ibid.*, paras 471–478.

46 *Ibid.*, para. 479.

47 *Šainović et al.*, above note 18, para. 1615.

48 *Ibid.*, para. 1617.

49 *Ibid.*, paras 1621 and 1623.

post-Second World War cases required that “defendants substantially and knowingly contributed to relevant crimes”.<sup>50</sup> Coupled with a brief look at relevant international instruments, principally the Rome Statute, the majority of the Appeals Chamber came to the “compelling conclusion” that specific direction is not an element of aiding and abetting under customary international law.<sup>51</sup> In the sort of language that is often reserved for strong individual dissenting opinions,<sup>52</sup> the Appeals Chamber majority stated that it “unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting and with customary international law in this regard”.<sup>53</sup> In making this finding, the Appeals Chamber exposed fundamental divisions amongst the judges regarding the scope of aiding and abetting.<sup>54</sup> This development can be seen to undermine the Tribunal’s reputation and judicial legacy, as it generates conflicting rather than definitive and authoritative judicial statements regarding criminal liability for those who provide assistance to the commission of war crimes.

Although a doctrine of binding precedent does not exist under international law, the desirability of consistency both within and between courts has been emphasized.<sup>55</sup> The ICTY Appeals Chamber noted an important rationale when it made it clear that its decisions are binding on ICTY Trial Chambers:

The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.<sup>56</sup>

The same could be said for the Appeals Chamber itself, which has held that it should follow its own decisions “in the interests of certainty and predictability”.<sup>57</sup> However, the Appeals Chamber considered that it could depart exceptionally from earlier decisions “for cogent reasons in the interests of justice”.<sup>58</sup> These might include instances where prior decisions were decided on a “wrong legal principle” or the judges were “ill-informed” on the applicable law.<sup>59</sup> The *Šainović* Appeals

50 *Ibid.*, paras 1642–1644.

51 *Ibid.*, para. 1649.

52 See, for example, Göran Sluiter, “Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY”, in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 215–216.

53 Note that Judge Ramarosan sided with the majority in *Sainović* on the issue of specific direction, as she had done in *Perišić*, even though both majorities came to different conclusions.

54 See also *Šainović et al.*, above note 18, Dissenting Opinion of Judge Tuzmukhamedov, para. 40.

55 See, for example, T. Buergenthal, above note 5, p. 274; R. Higgins, above note 5, p. 791; Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, Cambridge, 1996.

56 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment (Appeals Chamber), 24 March 2000, para. 113.

57 *Ibid.*, para. 106.

58 *Ibid.*, para. 107.

59 *Ibid.*

Chamber felt that the divergence in the earlier jurisprudence regarding specific direction and the inadequate analysis conducted in *Perišić* was a cogent reason to depart from the requirement of specific direction in the *actus reus* of aiding and abetting.<sup>60</sup>

The need for jurisprudential consistency was also touched upon by Judge Tuzmukhamedov in his *Šainović* dissent, in which he argued that the question of specific direction should have been left to a case where it was more clearly relevant on the facts. On the subject of consistency, he wrote:

It may not be possible to completely avoid disagreement between differently constituted benches of the Appeals Chamber over certain legal or factual issues, especially in the absence of a higher unified instance. However, it would be prudent to exercise some restraint in addressing such rifts in the jurisprudence of a respectable and authoritative judicial institution so as to preserve as much as possible, judicial harmony in the case law that impacts the development of international criminal law and international humanitarian law, as well as legal certainty, stability and predictability, in particular, for the benefit of the parties to proceedings before the Tribunal.<sup>61</sup>

No doubt, the majority would consider that they were realigning the jurisprudence, following the divergent path taken by *Perišić*. While this has been seen as helping “repair the recent fragmentation of the law on aiding and abetting”,<sup>62</sup> an Appeals Chamber composed of different judges could depart from *Šainović* in the future, provided they give cogent reasons for doing so.<sup>63</sup> An air of uncertainty thus surrounds the law on aiding and abetting at the ICTY.<sup>64</sup> The *Taylor* and *Šainović* appeals judgments, together with a subsequent Trial Chamber judgment from the Extraordinary Chambers in the Courts of Cambodia,<sup>65</sup> may possess sufficient force to dissuade any further divergence.<sup>66</sup> It is worth noting that a slightly differently constituted Appeals Chamber denied a prosecution motion in *Perišić* to overturn the former general’s acquittal in light of *Šainović*, considering that

60 *Šainović et al.*, above note 18, para. 1622.

61 *Ibid.*, Dissenting Opinion of Judge Tuzmukhamedov, paras. 45–46.

62 Charles Chernor Jalloh, “Prosecutor v. Charles Taylor”, *American Journal of International Law*, Vol. 108, No. 1, 2014, fn. 21.

63 William A. Schabas, “Prosecutor Applies to Reverse Final Acquittal of Perišić”, *PhD Studies in Human Rights* blog, 7 February 2014, available at: <http://humanrightsdoctorate.blogspot.com.au/2014/02/prosecutor-applies-to-reverse-final.html>.

64 See Marko Milanovic, “The Self-Fragmentation of the ICTY Appeals Chamber”, *EJIL Talk!* blog, 23 January 2014; Sergey Vasiliev, “Consistency of Jurisprudence, Finality of Acquittals and Ne Bis In Idem”, Centre for International Criminal Justice, 2014, available at: [http://cicj.org/?page\\_id=1608](http://cicj.org/?page_id=1608). See also Jens David Ohlin, “The Specific-Direction Smackdown”, 28 January 2014, *Lieber Code*, available at: [www.liebercode.org/2014/01/the-specific-direction-smackdown.html](http://www.liebercode.org/2014/01/the-specific-direction-smackdown.html).

65 Extraordinary Chambers in the Courts of Cambodia, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014, paras 707–710.

66 See Manuel J. Ventura, “Farewell ‘Specific Direction’: Aiding and Abetting War Crimes in *Perišić*, *Taylor* and *Šainović et al.*, and US Alien Tort Statute Jurisprudence”, in Stuart Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, Oxford University Press, Oxford, 2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2435515](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435515); Leila Nadya Sadat, “Can the ICTY *Šainović* and *Perišić* Cases Be Reconciled?”, *American Journal of International Law*, Vol. 108, No. 3, 2014, pp. 475–485.

there were no cogent reasons for it to depart from its earlier jurisprudence regarding reconsideration of final judgments.<sup>67</sup>

It is quite rare for an Appeals Chamber to depart from its own earlier jurisprudence, especially in an apparent climate of acrimony, or for other tribunals to reject precedent so forcefully. In the modern era there has been a notable degree of consistency in the case law regarding IHL within and across the various international judicial bodies.<sup>68</sup> Such an approach was exemplified at the Tokyo Tribunal:

In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.<sup>69</sup>

The SCSL Statute sought to promote such consistency by setting out that “[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda”.<sup>70</sup> But the SCSL Appeals Chamber, as it made explicit in *Taylor*, “is the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority”.<sup>71</sup> International courts have, it bears noting, taken different views at times over procedural issues, such as the permissibility of witness proofing,<sup>72</sup> as well as with regard to the applicability of certain modes of criminal liability, specifically joint criminal enterprise.<sup>73</sup> Where the statutory basis is unclear, such divergences are often based in differing interpretations of customary international law. Until the SCSL rejected the *Perišić* finding regarding specific direction, the most obvious example of disagreement between courts has been that between the ICJ and the ICTY on

67 ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Decision on Motion for Reconsideration (Appeals Chamber), 20 March 2014.

68 See generally S. Darcy, above note 2.

69 Judgment of the International Military Tribunal for the Far East, in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal*, Oxford University Press, Oxford, 2008, p. 81.

70 SCSL Statute, Art. 20(3).

71 *Taylor*, above note 42, para. 472.

72 Compare International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (Appeals Chamber), 11 May 2007; with ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber 1), 8 November 2006. See, however, ICC, *Prosecutor v. Muthaura and Kenyatta*, Case No. ICC-01/09-02/11, Decision on Witness Preparation (Trial Chamber V), 2 January 2013; *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on Witness Preparation (Trial Chamber V), 2 January 2013.

73 Compare *Tadić*, above note 13, paras 172–233; and Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras 236–249; with Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007/ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (Pre-Trial Chamber), 20 May 2010, and Case No. 002/19-09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise (Trial Chamber), 12 September 2011.

the question of the required degree of control over non-State actors for State responsibility to ensue, as explored in detail in the next section. Before turning to that judicial dispute, some consideration should be given to some potential implications of this judicial disharmony concerning aiding and abetting.

An obvious question is whether specific direction will feature in the aiding and abetting standard at the ICC. At first glance, the Court's judges may not need to take sides on this clearly divisive issue, given the greater level of detail in the Rome Statute and related instruments when compared to the statutes of the *ad hoc* tribunals. Antonio Cassese considered this to have been deliberate on the part of the drafters, because of a fear at the Rome Conference of the so-called "Cassese approach" of judges "overdoing it".<sup>74</sup> With regard to aiding and abetting, the Rome Statute provides in Article 25(3)(c) that criminal liability may arise for an individual who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".<sup>75</sup> There is no reference to specific direction, although the formulation does seem to require that the accused acted purposively, perhaps requiring a specific intent rather than mere knowledge.<sup>76</sup> William Schabas has suggested that this might be deduced from the acts of the accused,<sup>77</sup> and it would likely be satisfied where assistance was specifically directed towards criminal acts, although such specific direction may not be essential. The requirement of purpose falls within the *mens rea* standard, and at the ICTY, knowledge has been accepted as the appropriate mental element for aiding and abetting, with specific direction having been viewed as part of the required *actus reus*, albeit with some obvious judicial discomfort.<sup>78</sup> Elies van Sliedregt has said that specific direction at the ICTY has amounted to the introduction of "a veiled purpose test".<sup>79</sup> It may be that the ICC's requirement of a purposive approach for aiding and abetting will see specific direction treated as evidence of an accused's state of mind in that regard, rather than as an *actus reus* requirement.

Specific direction might also arise in the context of Article 25(3)(d) of the Rome Statute, which foresees criminal responsibility for an individual who intentionally contributes to the commission of a crime by a group acting with a common purpose. The contribution must have been made "with the aim of

74 Heikelina Verrjin Stuart and Marlise Simons, *The Prosecutor and the Judge*, Pallas Publications/Amsterdam University Press, 2009, pp. 52–53.

75 Rome Statute, Art. 25(3)(c).

76 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2011, pp. 435–436. See, however, Joanna Kyriakakis, "Developments in International Criminal Law and the Case of Business Involvement in International Crimes", *International Review of the Red Cross*, Vol. 94, No. 887, 2012, pp. 998–1000; Andrew Clapham, "Weapons and Armed Non-State Actors", in Stuart Casey-Maslen (ed.), *Weapons Under International Human Rights Law*, Cambridge University Press, Cambridge, 2014, p. 18, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2156408](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156408).

77 W. A. Schabas, above note 76, p. 436.

78 *Perišić*, above note 17, para. 48.

79 Elies van Sliedregt, in *Milestones in International Criminal Justice: Recent Legal Controversies at the UN Yugoslav Tribunal*, International Law Summary, Chatham House, 16 October 2013, p. 13.

furthering the criminal activity or criminal purpose of the group” or “in the knowledge of the intention of the group to commit the crime”.<sup>80</sup> In *Katanga*, the accused was convicted under this provision, and Judge Van den Wyngaert noted the relevant *ad hoc* tribunals’ jurisprudence on specific direction, offering the following view:

I do consider that, when assessing the significance of someone’s contribution, there are good reasons for analysing whether someone’s assistance is specifically directed to the criminal or non-criminal part of a group’s activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e. contributions that, by their nature, could equally have contributed to a legitimate purpose – are criminal or not.<sup>81</sup>

This was especially relevant, she felt, given the “extremely low” *mens rea* and *actus reus* thresholds under Article 25(3)(d). Although she stopped short of insisting on specific direction, Judge Van den Wyngaert noted that without such a requirement, there might otherwise “be almost no criminal culpability to speak of in cases when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose”.<sup>82</sup> The Trial Chamber convicted Katanga for having knowingly provided weapons to a group with a policy of targeting civilians, without seemingly having insisted that such provision be specifically directed to such crimes.<sup>83</sup> Emphasis was, however, placed on the need for the contribution to be substantial and have a “significant influence on the commission of those crimes”.<sup>84</sup> This reflects the fact that aiding and abetting jurisprudence from the *ad hoc* tribunals and the SCSL has always underscored that the assistance provided must have had a substantial effect on the commission of crimes. As regards specific direction at the ICC, the jurisprudence to date has simply not addressed this matter in any great detail.<sup>85</sup>

The jurisprudence of the international criminal tribunals also carries weight before national courts, and the treatment of aiding and abetting is of particular relevance in the context of corporate responsibility for complicity in human rights violations. The UN Guiding Principles on business and human rights, unanimously endorsed by the Human Rights Council in 2011, state that “[t]he weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or

80 Rome Statute, Art. 25 (3)(e).

81 ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, para. 287.

82 *Ibid.*

83 “Germain Katanga Found Guilty of Four Counts of War Crimes and One Count of Crimes Against Humanity Committed in Ituri, DRC”, ICC-CPI-20140307-PR986, press release, 7 March 2014. An English version of the trial judgment was not available at the time of writing.

84 See also ICC, “Summary of Trial Chamber II’s Judgment of 7 March 2014, Pursuant to Article 74 of the Statute in the Case of *The Prosecutor v. Germain Katanga*”, paras 76–84.

85 Kevin Jon Heller, “A Defence of the Specific Direction Requirement”, in *Milestones in International Criminal Justice*, above note 79, pp. 9–10.

encouragement that has a substantial effect on the commission of a crime”.<sup>86</sup> In the United States, courts adjudicating civil claims under the Alien Torts Statute have considered the criminal liability standard of aiding and abetting. There has been some disagreement over whether mere knowledge and a substantial contribution are required, or whether purpose is needed, in that the accomplice purposefully provided the assistance.<sup>87</sup> This would raise the bar for the *mens rea* requirement. For example, the purpose of selling arms to an armed group would more likely be to make a profit, rather than to commit war crimes.<sup>88</sup> In *Doe v. Nestle USA*, the United States Court of Appeal for the Ninth Circuit took note of the *Taylor* and *Perišić* jurisprudence but declined to take a position on specific direction, although noting that there is now “less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime”.<sup>89</sup> Manuel Ventura considers that the “specific direction saga” will also play out in Alien Torts Statute cases before the United States courts, and that it is likely that such an element will be introduced into an already uncertain jurisprudence.

Distinguishing principal perpetrators and accomplices carries an implied suggestion that the latter are somehow less blameworthy than the former. When the ICTY Appeals Chamber introduced joint criminal enterprise in *Tadić*, it stated that treating as aiders and abettors those that “in some way made it possible for the perpetrator physically to carry out that criminal act ... might understate the degree of their criminal responsibility”.<sup>90</sup> While criminal law might treat the facilitator more leniently than the physical perpetrator, the former’s role should not be neglected in the context of war crimes. Aiding and abetting is aimed at those who knowingly provide assistance, which has a substantial effect on the commission of crimes. Its requirement of knowledge is a lower *mens rea* standard – Article 30 of the Rome Statute sets “intent and knowledge” as the general standard – although under superior responsibility, for example, military commanders can be criminally responsible for subordinate crime of which they “should have known”.<sup>91</sup> This form of liability, however, is “predicated upon the power of the superior to control or influence the acts of

86 See John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, A/HRC/17/31, 21 March 2011, p. 17.

87 Compare, for example, United States Court of Appeal for the District of Columbia Circuit, *John Doe v. Exxon Mobil Corporation*, Case No. 09-7125, 8 July 2011; with United States Court of Appeal for the Second Circuit, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Case No. 07-0016, 2 October 2009. See further Angela Walker, “The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting is Knowledge”, *Northwestern Journal of International Human Rights*, Vol. 10, 2011, pp. 119–145.

88 See Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 374.

89 United States Court of Appeal for the Ninth Circuit, *Doe et al. v. Nestle USA et al.*, Case No. 10-56739, Order and Opinion, 4 September 2014, p. 27.

90 *Tadić*, above note 13, para. 192.

91 Rome Statute, Art. 28(a)(i).

subordinates”,<sup>92</sup> whereas for aiding and abetting, it is not necessary to show that an accused “had any power to control those who committed offences”.<sup>93</sup> The emphasis is instead on the significant influence that the assistance has on the commission of crimes. It is debated amongst scholars as to whether requiring specific direction provides a more appropriate reflection of the principle of personal culpability.<sup>94</sup> For Charles Cherner Jalloh, this is “probably unrealistic in terms of the threshold it requires for modern types of conflict and the wide range of assistance that political and military leaders are capable of providing to others, such as rebel groups, to fuel heinous atrocities”.<sup>95</sup> While such leaders may be liable as individuals under international criminal law, their actions may also give rise to State responsibility for violations of IHL perpetrated by such armed groups. There are clear parallels between the judicial divergence that exists regarding the scope of individual responsibility for such assistance to international crimes and the disagreement between international courts that arose in relation to the appropriate standard for holding States responsible for similarly contributing to violations by non-State actors during situations of armed conflict.

## State responsibility

A particularly exacting standard must be met for a State to be responsible under international law for providing or facilitating assistance to those engaging in war crimes, notwithstanding some judicial disagreement as to how stringent that standard should be. The general standard has some similarities to that applying to individuals under international criminal law, even though States themselves are not criminally liable or subject to criminal sanctions under international law.<sup>96</sup> According to the International Law Commission’s (ILC) Articles on State Responsibility, a State will be responsible for the internationally wrongful conduct of individuals or groups, absent acknowledging or adopting such conduct as its own, if those persons are “acting on the instructions of, or under the direction or

92 ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment (Trial Chamber I), 7 June 2001, para. 37.

93 ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgment (Appeals Chamber), 28 November 2006, para. 103.

94 Compare K. J. Heller, above note 85, pp. 5–10, with James G. Stewart, “The ICTY Loses Its Way on Complicity – Part 1”, *Opinio Juris*, 3 April 2013, available at: <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>.

95 C. C. Jalloh, above note 62, p. 66. See also Antonio Coco and Tom Gal, “Losing Direction: The ICTY Appeals Chamber’s Controversial Approach to Aiding and Abetting in *Perišić*”, *Journal of International Criminal Justice*, Vol. 12, No. 2, March 2014, pp. 345–366, available at: <http://jjcj.oxfordjournals.org/content/12/2/345.abstract>.

96 See generally Gabriella Blum, “The Crime and Punishment of States”, *Yale Journal of International Law*, Vol. 38, 2013, pp. 57–122; Nina H. B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, Oxford, 2000; Joseph H. H. Weiler, Antonio Cassese and Marina Spinedi, *International Crimes of State: A Critical Analysis of the ILC’s Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.

control of that State in carrying out the conduct”.<sup>97</sup> A similar article addresses State responsibility for the wrongful conduct of another State:

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.<sup>98</sup>

A State will also be responsible if it “aids or assists another State in the commission of an internationally wrongful act” while also fulfilling the two latter requirements of the above quoted paragraph.<sup>99</sup> Absent the direction and control of another State in the commission of a wrongful act, a State can be responsible for knowingly providing aid or assistance to the commission of an international wrong by another State. The Articles thus envisage different standards for when a State is implicated in violations committed by an individual or group, compared to when those are perpetrated by another State. For a State to be responsible for providing aid or assistance to non-State groups that commit war crimes, the Articles require that such groups were instructed, directed or controlled by the State in relation to the specific conduct. A State could also be responsible in the absence of such aid or assistance, if the unlawful conduct is carried out under its instruction, direction or control. Considerable judicial attention has been paid to the precise meaning of “control” in this context, leading to a fractious divergence between the ICJ and the ICTY.

In *Nicaragua v. United States*, the ICJ had to assess the nature of the relationship between the United States and the *contras*, the armed opposition fighting against the Nicaraguan state, in order to determine whether the latter’s unlawful acts could be attributed to the United States for purposes of State responsibility.<sup>100</sup> The judgment explained the nature of the assistance provided, saying that it included:

logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States.<sup>101</sup>

Although the United States had “largely financed, trained, equipped, armed and organized the FDN”, an armed *contras* group, this would not justify treating such

97 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83 2001, Arts 8, 11.

98 *Ibid.*, Art. 17.

99 *Ibid.*, Art. 16.

100 ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 109.

101 *Ibid.*, para. 106.

an entity as having acted on its behalf.<sup>102</sup> For the internationally wrongful acts of the *contras* to be attributed to the United States, the Court required that it be shown that the latter exercised “effective control” over the military or paramilitary operations of the *contras*.<sup>103</sup> The involvement and general control exercised by the United States “would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law”.<sup>104</sup> While the United States was found to have breached the norm of non-intervention in the internal affairs of another State by its assistance to the *contras*, the Court did not find it responsible for their unlawful acts. The Court did reprimand the United States for producing and disseminating a military manual to the *contras* which was seen to encourage violations of humanitarian law, and thus was contrary to the obligation to ensure respect for international humanitarian law.<sup>105</sup>

The ICTY addressed this “effective control” standard in a different context: determining when a non-international armed conflict might become “internationalized” through the provision of aid or assistance by an outside State to a non-State armed party to the conflict. Tadić had been charged with grave breaches under Article 2 of the ICTY Statute, war crimes which can only apply as a matter of law in international armed conflicts. Although not concerned directly with State responsibility, the *Tadić* Appeals Chamber described the approach in *Nicaragua* as unpersuasive and instead advocated a less stringent “overall control” test.<sup>106</sup> State responsibility for internationally wrongful acts, it asserted, could arise where these were committed by “individuals who make up organised groups subject to the State’s control ... regardless of whether or not the State has issued *specific instructions* to those individuals”.<sup>107</sup> The Trial Chamber had previously held that a relationship of dependence between the Bosnian Serb forces in Bosnia and the Federal Republic of Yugoslavia (FRY) was insufficient to internationalize the conflict,<sup>108</sup> although Judge McDonald, presiding, felt that a relationship of effective control had existed. She felt that “the appropriate test of agency from *Nicaragua* is one of ‘dependency and control’ and a showing of effective control is not required”.<sup>109</sup> The *Čelebići* Trial Chamber considered the conflict in question to be international as the FRY “remained in fact the controlling force behind the Bosnian Serbs”.<sup>110</sup>

102 *Ibid.*, paras 108–109.

103 *Ibid.*, para. 115.

104 *Ibid.*

105 *Ibid.*, para. 220. See also Dissenting Opinion of Judge Schwebel, para. 259.

106 *Tadić*, above note 13, para. 120. See also ICTY, *Prosecutor v. Rajic*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, paras 22–26.

107 *Tadić*, above note 13, para. 123 (emphasis in original).

108 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 588.

109 *Ibid.*, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, p. 288.

110 ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 18 November 1998, para. 228–235.

When the matter was addressed before the *Tadić* Appeals Chamber, a distinction was drawn between the ICJ's concern with State responsibility and its own focus on individual criminal responsibility. Nevertheless, the Appeals Chamber felt that the test for establishing when an individual could be treated as the *de facto* organ of a State could be the same for both.<sup>111</sup> The law of State responsibility was so devised because "States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law".<sup>112</sup> Where the group receiving assistance is organized, the Appeals Chamber felt it sufficient that the group as a whole be under the overall control of the State.<sup>113</sup> The applicable test was set out thus:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.<sup>114</sup>

Although there was some disagreement at the ICTY with this approach,<sup>115</sup> the Appeals Chamber's findings have held sway at the Tribunal.<sup>116</sup> It has also proven to be a persuasive precedent for the ICC, where armed conflicts must also be classified in light of the distinctions within Article 8 of the Rome Statute.<sup>117</sup> The *Lubanga* Trial Chamber held, without much explanation, that the overall control test is the "correct approach" in determining when a non-international armed conflict has become internationalized.<sup>118</sup>

The ICJ took issue with the ICTY's approach in *Tadić* and firmly reasserted its position regarding the appropriate standard for State responsibility for violations by non-State groups. With regard to rebel groups in Congo that had been provided training and support by Uganda, the Court did not find sufficient evidence to hold that they were acting "on the instructions of, or under the direction or control" of the latter.<sup>119</sup> It was in *Bosnia v. Serbia* that the Court specifically addressed the ICTY's overall control test, stating squarely that it was "unable to subscribe to

111 *Tadić*, above note 13, paras 101–104.

112 *Ibid.*, para. 117.

113 *Ibid.*, paras 117 and 120.

114 *Ibid.*, para. 131.

115 See, for example, *ibid.*, Separate Opinion of Judge Shahabuddeen, para. 5.

116 See, for example, *Aleksovski*, above note 56, para. 134; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 26.

117 See, for example, *Lubanga*, Confirmation of Charges, above note 3, paras 210–211.

118 *Lubanga*, Trial Chamber Judgment, above note 3, para. 541.

119 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, para. 160.

the Chamber's view".<sup>120</sup> In its opinion, the ICTY was not required to consider State responsibility and had accordingly addressed an issue which was "not indispensable" for the exercise of its jurisdiction.<sup>121</sup> Although the ICJ endorsed the Tribunal's legal and factual findings regarding individual criminal responsibility, it stated that:

The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.<sup>122</sup>

The *Tadić* test, in the Court's view, "stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".<sup>123</sup> The Court's vice-president, Judge Al-Khasawneh, on the other hand, expressed support for the ICTY approach, saying that:

to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.<sup>124</sup>

The Court took issue not with the ICTY applying its overall control test to the question of the classification of armed conflicts, but rather with its assertion that such a test might also be applied in the context of State responsibility. It felt that differing tests could apply to these related yet distinguishable issues "without logical inconsistency".<sup>125</sup> The "judicial diplomacy" exercised by the ICJ in *Bosnia v. Serbia*,<sup>126</sup> however, could not mask the divergence between its views and those of the ICTY regarding the concept of control in the context of State responsibility.

In light of this article's focus, it is worth examining the ICJ's treatment in *Bosnia v. Serbia* of Article 8 of the Articles on State Responsibility, as well as the concept of "complicity in genocide", as found in the 1948 Genocide Convention. Article 8, in the Court's view, embodies customary international law and provides that a State is responsible for the internationally wrongful acts of persons or groups "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The Court's interpretation is such that the person or group must essentially be the vehicle through which the crime is committed; it needed to be shown in this case that organs of the FRY had

120 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, para. 403.

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*, para. 406.

124 *Ibid.*, Dissenting Opinion of Vice-President Al-Khasawneh, para. 39.

125 *Bosnia v. Serbia*, above note 120, para. 405.

126 Bruno Simma, "Universality of International Law from the Perspective of a Practitioner", *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 280.

“originated the genocide”.<sup>127</sup> For the wrongful acts to be attributable, there needed to be effective control exercised, or instructions given, “in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken”.<sup>128</sup> Although the Court found that genocide was committed at Srebrenica, it had not been proven that instructions were issued from organs of the FRY to commit those massacres or that the relevant perpetrators were under its effective control.<sup>129</sup>

The Court also turned to “complicity in genocide”, an act for which individuals may be punished under the 1948 Genocide Convention. There was no doubt that this concept included “the provision of means to enable or facilitate the commission of the crime”.<sup>130</sup> While complicity *per se* is not known in the law of State responsibility, the Court turned to the customary rule in the Articles on State Responsibility regarding the provision of aid or assistance to another State in order to address this.<sup>131</sup> Although addressed to interactions between States and “not directly related” to the case at hand, the Court nevertheless applied the article and asked whether Serbia and Montenegro, or persons acting on its instructions or under its direction or effective control, had provided aid or assistance to the commission of the Srebrenica genocide.<sup>132</sup> As noted above, a State that provides aid or assistance to another State need not direct or control that State, whereas the Court here seemed to blend Article 8’s requirements of instructions, direction or control with those of Article 16 requiring the knowing provision of aid or assistance. For complicity to arise, the Court put it, the aid or assistance had to be provided “knowingly”, with the person or organ being aware of the specific intent of the perpetrator to commit genocide.<sup>133</sup> As regards the contribution made, the Court found that there was:

little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.<sup>134</sup>

Despite this, the Court found that the requirements for complicity in genocide were not met, as it had not been shown that assistance was given to the perpetrators “in full awareness that the aid supplied would be used to commit genocide”.<sup>135</sup> The decision to commit genocide was taken relatively quickly by the relevant Bosnian Serbs, and it was not conclusively shown that the authorities in Belgrade were made aware of it at the time.<sup>136</sup> But even if they possessed such knowledge, the

127 *Bosnia v. Serbia*, above note 120, para. 397.

128 *Ibid.*, para. 400.

129 *Ibid.*, para. 413.

130 *Ibid.*, paras 419.

131 See generally Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, Cambridge, 2013, pp. 358–364.

132 *Bosnia v. Serbia*, above note 120, para. 420.

133 *Ibid.*, para. 421.

134 *Ibid.*, para. 422.

135 *Ibid.*, para. 423.

136 *Ibid.*

Court's formulation for complicity seemed to require that the persons or group also acted on its instructions, or under its direction or control. This would effectively bring the question back to State responsibility for genocide itself, although when the Court refers to complicity later in the judgment, it speaks of organs of a State with "full knowledge of the facts" providing aid and assistance to perpetrators enabling or facilitating the commission of crimes.<sup>137</sup> The Court may have seen complicity in the context of genocide as somehow different from State involvement in other breaches of international law, and thereby giving rise to responsibility for knowingly aiding and assisting. As the Court's analysis did not go beyond the knowledge element, this remains something of an open question.

Returning to the required standard of control, the ICJ sought to reconcile the different approach of the *Tadić* Appeals Chamber with its own by treating these two approaches as being addressed to the separate and distinct issues of attribution for the purposes of State responsibility and the classification of armed conflicts respectively. Antonio Cassese, however, subsequently confirmed that the ICTY had indeed sought to assert the existence of a different control requirement for attributing the conduct of organized armed groups for purposes of State responsibility.<sup>138</sup> As Ventura notes, it may be superficially attractive to consider that these are different tests, but ultimately they are both concerned with the imputation of the acts of non-State actors to States, albeit for different legal purposes.<sup>139</sup> Despite the Court's stance, two of its former presidents seem to be at odds as to whether the difference is real or perceived.<sup>140</sup> The International Law Commission also sought to treat the differing approaches as relating to two separate matters,<sup>141</sup> although it later described the divergence as an example of "fragmentation through conflicting interpretations of general law".<sup>142</sup> While the ICC has relied upon the overall control standard in its conflict classification analysis, Judge Van den Wyngaert suggested that the test enunciated by the ICTY requires "a new justification" in light of its rejection by the ICJ.<sup>143</sup> At the very least, it is clear that the law of State responsibility requires more than the mere

137 *Ibid.*, para. 432.

138 Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, 2007, pp. 655–658.

139 Manuel J. Ventura, "Two Controversies in the *Lubanga* Trial Judgment of the ICC: The Nature of Co-perpetration's Common Plan and the Classification of the Armed Conflict", in Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, p. 488.

140 Compare Judge Gilbert Guillaume, "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order", speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000; with Judge Rosalyn Higgins, speech to the Legal Advisers of the Ministries of Foreign Affairs, 20 October 2007, both available at [www.icj-cij.org](http://www.icj-cij.org).

141 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001 (Draft Articles), pp. 47–48.

142 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, report of the Study Group of the International Law Commission Finalized by Martii Koskeniemi, UN Doc. A/AC.4/L.682, 13 April 2006, paras 49–52. See also Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals", in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 266.

143 *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, above note 81, fn. 382.

provision of aid or assistance to non-State actors for the providing State to be liable for violations committed by such groups. The internationally wrongful acts must have been committed under the instructions or direction of the State, or the group was under the State's control, be it "effective" or "overall". Such a standard does not apply in the case of knowingly providing aid or assistance to law-breaking States, nor, as the previous section demonstrated, is it necessary that an individual aider and abettor issued instructions to or exercised control over the direct perpetrators of war crimes in order to be held criminally liable. The following section considers the overlap and interaction between State and individual responsibility for providing aid or assistance to non-State actors, as well as additional norms of international humanitarian law that are relevant to such conduct.

## Synchronizing responsibilities?

State responsibility and individual criminal responsibility for breaches of international law are independent but not mutually exclusive, and can arise simultaneously for acts amounting to war crimes.<sup>144</sup> Similarly, the holding to account of persons or entities that assist or encourage the commission of international crimes is not an alternative to pursuing the direct perpetrators of those violations. A multitude of persons and entities can bear responsibility for the various contributions they might have made to transgressions of the laws of armed conflict. It has been said that a great majority of violations of IHL could not happen "without the assistance of arms dealers, diamond traders, bankers and financiers".<sup>145</sup> Such persons, as well as States and their officials, have undoubtedly contributed to breaches of IHL, including war crimes, by non-State armed groups. It is interesting to compare and contrast individual and State responsibility in such instances. Based on the foregoing analysis of the current state of the law on complicity, it would seem that a State official could be criminally liable for authorizing aid and assistance to non-State actors that commit war crimes, whereas those violations might not be attributed to the State itself in the absence of instructions to, or direction or control being exercised over, the armed group in question. It may be that an effort to synchronize the requirements of both forms of responsibility lay at the heart of *Perišić*, even if this meant raising the threshold requirement for individual responsibility. It would seem logical that a State should also be responsible for acts of its officials which attract liability under international criminal law. Before turning to this matter, some general observations are merited on the interaction between individual and State responsibility for violations of IHL.

144 See generally Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*, Martinus Nijhoff, Leiden/Boston, 2009.

145 William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", *International Review of the Red Cross*, Vol. 83, No. 842, 2001, p. 441.

State and individual responsibility under international law share a common subject matter in the context of armed conflict, namely war crimes, which comprise “serious violations of international humanitarian law”.<sup>146</sup> The International Law Commission has observed that “[w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them”.<sup>147</sup> Such serious breaches give rise to “aggravated State responsibility” according to the Commission,<sup>148</sup> although a State can also be responsible for other violations which amount to internationally wrongful acts.<sup>149</sup> Where serious violations do occur, State officials can no longer claim the protection of the “act of State” doctrine.<sup>150</sup> As the Nuremberg Tribunal famously declared, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>151</sup> Conversely, individuals can also be held responsible irrespective of State involvement; it is not necessary to show that a war crime was:

part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act [was] in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law.<sup>152</sup>

Nevertheless, there is considerable common ground between both forms of responsibility in the context of war crimes.

The question of fault is relevant in the context of international responsibility, and has different consequences for States and individuals. While mistake of fact is a recognized defence for individuals in international criminal law,<sup>153</sup> State responsibility would still arise for a mistaken violation of IHL, such as attacking a civilian object in the wrongful belief that it comprised a legitimate military target. For example, the United States accepted its responsibility and issued a formal apology for having “mistakenly hit” the Chinese embassy in Belgrade during NATO’s military operations in Kosovo.<sup>154</sup> The committee set up

146 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, p. 568.

147 Draft Articles, above note 141, p. 142.

148 *Ibid.*, p. 113.

149 B. I. Bonafè, above note 144, p. 28.

150 See, for example, ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(2); SCSL Statute, Art. 6(2); Rome Statute, Art. 27(1).

151 International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, reprinted in *American Journal of International Law*, Vol. 41, No. 1, 1947, p. 221.

152 *Tadić*, Trial Chamber Judgment, above note 108, para. 573.

153 See, for example, Rome Statute, Art. 32(1).

154 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000, paras 80–85. See, however, Paolo Benvenuti, “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia”, *European Journal of International Law*, Vol. 12, 2001, p. 525.

by the ICTY prosecutor to review NATO's bombing campaign was criticized for not recommending "parallel criminal responsibility",<sup>155</sup> although it explained that the aircrew "should not be assigned any responsibility for the fact they were given the wrong target", and it would be "inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency".<sup>156</sup> Facts aside, this is one instance where State and individual responsibility are not synonymous when breaches of IHL occur.

As a general observation, simultaneous individual and State responsibility will not arise where breaches of the laws of armed conflict are committed by non-State armed groups without any State involvement. Individuals belonging to such forces can obviously be prosecuted internationally for their actions, as exemplified by the first convictions before the ICC,<sup>157</sup> but a corresponding corporate responsibility of the non-State armed group remains undeveloped in international law. Nonetheless, as the foregoing sections and contemporary conflicts demonstrate, non-State armed groups are rarely fully autonomous entities and very often receive military and financial assistance from States. The civil war in Syria and the conflict involving Islamic State have seen various forms of support provided to certain non-State parties by outside States.<sup>158</sup> In September 2014, for example, the US Senate authorized President Obama's plan to provide training and arms to "moderate Syrian rebels".<sup>159</sup> Given that war crimes have been committed by non-State parties to these conflicts,<sup>160</sup> questions of State and individual responsibility for the provision of such aid or assistance to these groups continue to be of particular import, and, – in light of recent international jurisprudence – the extent to which these forms of responsibility are aligned.

Comparing the legal requirements for complicity for State and individual responsibility under international law reveals both similarities and differences. In terms of the culpable provision of aid or assistance, for individuals, they must know that their acts assist the commission of a specific crime and have a substantial effect on its commission, while similarly, for States that knowingly provide aid or assistance to another State, it must be shown that:

the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that

155 *Ibid.*, pp. 525–526.

156 *Final Report to the Prosecutor*, above note 154, para. 85.

157 *Lubanga*, Trial Chamber Judgment, above note 3; *Katanga*, Trial Chamber Judgment, above note 81.

158 See Tom Ruys, "Of Arms, Funding and 'Non-Lethal Assistance': Issues Surrounding Third-State Intervention in the Syrian Civil War", *Chinese Journal of International Law*, Vol. 13, 2014, pp. 13–53.

159 Patricia Zengerle and Richard Cowan, "U.S House Votes to Arm Syrian rebels, but Questions Remain", *Reuters*, 17 September 2014, available at: [www.reuters.com/article/2014/09/17/us-iraq-crisis-congress-idUSKBN0HC28120140917](http://www.reuters.com/article/2014/09/17/us-iraq-crisis-congress-idUSKBN0HC28120140917).

160 See, for example, Human Rights Watch, "You Can Still See Their Blood": Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Lakatia Countryside, 11 October 2013.

the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.<sup>161</sup>

Where the wrongful acts were perpetrated by individuals or groups, it must be shown that they acted under the instructions, direction or control of the State “in carrying out the conduct” in order for the State to be responsible.<sup>162</sup> The ILC stresses the need for a “real link” with the State, explaining that a State will not be responsible for “conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control”.<sup>163</sup> While control over a crime, subordinates or an organization is a feature of other modes of liability in international criminal law, it is not a requirement for individual responsibility under aiding and abetting; instead, there is an insistence on the substantial effect that the aid or assistance has on the criminal conduct. This is not referred to by the ILC in the context of State responsibility for wrongful acts committed by individuals or groups and which might be attributed to the State, where the focus is largely on the presence of instructions, direction or control over the group violating international law. The ICJ’s understanding of “effective control” requires that breaches were “directed or enforced” by the State, whereas the ICTY posited that “overall control” involving a contribution to the general planning of the group’s activity would suffice. The *Tadić* Appeals Chamber eschewed the need for a State to have given instructions for the commission of specific violations in order for that State to be responsible. Such a standard would arguably place a due diligence obligation upon States to ensure that their aid or assistance is not used to commit war crimes.

The emphasis on “specific direction” by the ICTY Appeals Chamber in *Perišić* did not require that the accomplice directed the crimes of the actual perpetrators, but rather that the assistance itself was directed towards those crimes. It entailed a raising of the aiding and abetting standard by insisting on a purposive element, one which has not been accepted in subsequent jurisprudence, although it is arguably required by the Rome Statute. *Perišić* might be interpreted as an attempted counter-balance of the more expansive approach taken by the *Tadić* Appeals Chamber to attribution for State responsibility, which sought to eliminate the need for specific instructions or directions for the commission of offences. By insisting on specific direction, was the Appeals Chamber trying to bring the standard for individual responsibility for war crimes closer to that for State responsibility as set out by the ICJ? It certainly would have brought them closer, bearing in mind that the legal requirements remain distinct. By way of an example, in the context of the Syrian civil war, Tom Ruys concludes that the application of the specific direction element would serve to prevent the assistance given to State and non-State armed groups from giving rise to aiding and

161 Draft Articles, above note 141, p. 66. On military support to other States, see H.P. Aust, above note 131, pp. 129–145.

162 Draft Articles, above note 141, Art. 8.

163 *Ibid.*, p. 47.

abetting liability for officials of third States.<sup>164</sup> Were his analysis to be revised in light of current jurisprudence, which does not require specific direction, it would suggest that criminal liability could arise, given that the knowledge and substantial effects requirements are seemingly satisfied.<sup>165</sup> Yet the legal requirements are not satisfied for the States that are providing such aid or assistance to be internationally responsible for the war crimes perpetrated by the relevant non-State actors.<sup>166</sup> This leads to an incongruity in the law of international responsibility whereby State officials can be individually responsible for an outcome of actions conducted for the State, but the State itself cannot.

In her detailed study of the relationship between State and individual responsibility, Beatrice I. Bonafè has referred to “the need to establish some form of co-ordination between these two regimes of international responsibility, which cannot be achieved by relying too rigorously on the principle of individual criminal liability alone”.<sup>167</sup> *Perišić* might be seen as having been an unsuccessful example of this, if the current jurisprudence prevails. Bonafè notes that reliance on modes of criminal liability, such as joint criminal enterprise, which focus on the collective nature of international crimes “has the effect of establishing individual criminal liability in a way which is increasingly similar to the assessment of aggravated state responsibility for the same internationally prohibited conduct”.<sup>168</sup> There is, however, no “direct legal connection” between the two forms of international responsibility.<sup>169</sup> In the *Taylor* appeal, defence counsel sought to argue that the Court’s jurisprudence on aiding and abetting effectively criminalized conduct viewed as lawful, and that States “have the right to supply materiel to parties to an armed conflict even if there is evidence that those parties are engaged in the regular commission of crimes”.<sup>170</sup> The SCSL Appeals Chamber was not persuaded by the evidence put forth, holding that no statement was provided of a State claiming “the right to assist the commission of widespread and systematic crimes against a civilian population”.<sup>171</sup> It focused on individual criminal responsibility, and found “no evidence of state practice indicating a change in customary international law from the existing parameters of personal culpability for aiding and abetting the commission of serious violations of international humanitarian law”.<sup>172</sup> If States wished to change the scope of individual criminal responsibility because of “policy considerations”, they possessed the necessary means to do so, the Appeals Chamber claimed. It would not “usurp that role” and act as legislator.<sup>173</sup>

164 T. Ruys, above note 158, pp. 20–22.

165 *Ibid.*

166 *Ibid.*, pp. 22–26.

167 B. I. Bonafè, above note 144, p. 138.

168 *Ibid.*, p. 189.

169 *Ibid.*

170 *Taylor*, above note 42, para. 453.

171 *Ibid.*, para. 459.

172 *Ibid.*, para. 464.

173 *Ibid.*, paras 464–465.

While international courts do not formally legislate, their jurisprudence carries significant weight in shaping the contours of international law. In the charged context of international responsibility, the relevant jurisprudence has been fragmented and has led to some uncertainty regarding when individuals and States might be indirectly responsible for war crimes perpetrated by non-State actors. In addressing such conduct, the law of international responsibility is only part of the puzzle, for IHL is as much concerned with preventing violations as it is with holding States or individuals responsible for breaches. This is evident in the obligation of High Contracting Parties to the Geneva Conventions and Protocol I to “ensure respect” for these treaties “in all circumstances”.<sup>174</sup> The ICJ, it will be recalled, found that the United States had breached its obligation to ensure respect for IHL by preparing and disseminating a military manual seen to encourage violations by the *contras*. In the Advisory Opinion on the *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ addressed the meaning of the obligation under the Fourth Geneva Convention, noting that “every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.<sup>175</sup> The Court held that States should not recognize as lawful the unlawful situation created by the construction of the wall by Israel, nor give any aid or assistance that would contribute to its maintenance.<sup>176</sup> This interpretation of the duty to “ensure respect” corresponds with previous interpretations by the International Committee of the Red Cross and organs of the UN.<sup>177</sup> A contemporary and meaningful interpretation of the duty to ensure respect can also be addressed to the provision of aid or assistance to non-State actors who may engage in war crimes.<sup>178</sup>

Of particular relevance to the prevention of violations of IHL is the adoption by the UN General Assembly in April 2013 of a treaty to regulate “the international trade in conventional arms” and to prevent and eradicate the “illicit trade” in such weapons and ammunition.<sup>179</sup> One of the key provisions of the Arms Trade Treaty touches on the obligations of States in relation to allowing arms to be supplied to the perpetrators of international crimes:

A State Party shall not authorize any transfer of conventional arms ... if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or

174 Common Art. 1 to the 1949 Geneva Conventions; AP I, Article 1(1).

175 ICJ, *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, *ICJ Reports 2004*, paras 157–158.

176 *Ibid.*, para. 159.

177 See, for example, Jean Pictet (ed.), *Commentary: IV Geneva Convention, Relative to the Protection of Civilian Person in Times of War*, ICRC, Geneva, 1958, p. 16; UN Security Council Res. 681, 20 December 1990, para. 5 (SC/RES/681); UN General Assembly Res. 57/125, 24 February 2003 (A/RES/57/125).

178 See, for example, T. Ruys, above note 158, pp. 26–31.

179 Arms Trade Treaty, 27 March 2013, UN Doc. A/CONF.217/2013/L.3 (entered into force 24 December 2014), Art. 1.

civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.<sup>180</sup>

The Arms Trade Treaty also requires States Parties to assess whether arms exports could be used to “commit or facilitate a serious violation of international humanitarian law”, and to refrain from authorizing any such transfer if there is an “overriding risk” of such.<sup>181</sup> The treaty entered into force in December 2014, creating a legal obligation for States Parties not to allow arms to be provided to those committing international crimes, even if such persons are not acting under the instructions, direction or control of the authorizing State. This obligation is arguably based on the customary duty to ensure respect for humanitarian law,<sup>182</sup> although it bears noting that a failure to fulfil the obligation does not render authorizing States responsible for the crimes in question solely on the basis of having authorized the transfer of arms. Nonetheless, as the Appeals Chamber of the SCSL noted in *Taylor*, this represents an indication of “developing attitudes amongst States that the international community has an obligation to ensure that civilian populations are protected from genocide, war crimes, ethnic cleansing and crimes against humanity”.<sup>183</sup>

## Conclusion

Notable parallels exist between the judicial treatment of individual criminal responsibility and State responsibility for the provision of aid or assistance to non-State groups that commit war crimes. The jurisprudence in both contexts has been characterized by differences of opinion between international courts and by tensions arising from the pursuit of interpretations of the law of international responsibility that are viewed as either overly expansive or restrictive. The absence of a clear and unambiguous conventional legal standard for aiding and abetting applicable to all of the international criminal tribunals, and of a precise definition for the concept of control in the context of attributing the acts of non-State actors to States, has allowed international judges to elaborate their own understandings as to the relevant tests and elements for each. Differing interpretations may have been motivated by an intention to progressively develop IHL, whereas others may have sought to remain faithful to existing laws as has been expressly agreed by States. Antonio Cassese, for example, admitted to having “exploited the *Tadić* case to draw as much as possible from a minor defendant to launch new ideas, and be creative”.<sup>184</sup> For another ICTY president, Gabrielle Kirk McDonald, “the immovable rock of State sovereignty” meant that

180 *Ibid.*, Art. 6(3).

181 *Ibid.*, Art. 7.

182 T. Ruys, above note 158, p. 29.

183 *Taylor*, above note 42, para. 462.

184 “To Be an International Criminal Court Judge: Conversation with Antonio Cassese”, Distinguished Fellows Lecture Series, 4 September 2003, Hauser Global Law School Program, NYU School of Law, p. 15, reprinted in *European Journal of International Law*, Vol. 22, No. 4, 2011, p. 942.

the law of armed conflict did not match developments in war itself, and “[w]here before we chiseled at the rock, the ICTY is a drill, the ICC a wrecking ball”.<sup>185</sup> In contrast, the ICJ stated squarely in the *Nuclear Weapons* Advisory Opinion that it “states the existing law and does not legislate”.<sup>186</sup> The Court has “no purely legislative competence”, according to former president Robert Jennings, and it must decide difficult cases using “the building materials available in already existing law”.<sup>187</sup> Such materials would include customary international law, the dynamic nature of which has allowed for reasonable disagreement as to its precise content.

When the statutes for the *ad hoc* tribunals were being adopted, a representative at the UN Security Council considered that exceptional international criminal justice initiatives “may not be the best way to promote the consistent, balanced and effective application of international humanitarian law”.<sup>188</sup> While this article has demonstrated the at times inconsistent approach to responsibility for war crimes amongst international courts and tribunals, it should be emphasized that such inconsistencies are far fewer and more obvious than the innumerable instances of judicial harmony. For one international judge, the concerns regarding fragmentation have been “overstated”,<sup>189</sup> while for another, this may be an acceptable by-product of the strengthening of the enforcement mechanisms of IHL: according to ICTY President Fausto Pocar, who sat on the Appeals Chamber in *Šainović*,

Although unity of international legal principles, and customary international law in particular, is important for the proper implementation of international criminal law, it is not the most pressing consideration. International proliferation of criminal jurisdictions unites international law in the struggle against impunity for the commission of war crimes, crimes against humanity and genocide, which remains more influential and important than the possible accompaniment of the fragmentation of certain legal principles.<sup>190</sup>

The various *ad hoc* tribunals will eventually cease to exist and it remains unlikely that similar temporary international criminal tribunals will be created again, at least on the scale of the ICTY or ICTR. With the ICC becoming the focal point for the international prosecution of war crimes, the scope for further

185 Gabrielle Kirk McDonald, “The Changing Nature of the Laws of War”, *Military Law Review*, Vol. 156, 1998, p. 51.

186 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 18.

187 Robert Y. Jennings, “The Role of the International Court of Justice”, *British Yearbook of International Law*, Vol. 68, No. 1, 1997, p. 43.

188 Representative of Brazil, Provisional Verbatim Record, S/PV.3453, 8 November 1994, reprinted in Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for Rwanda*, Vol. 2, Transnational Publishers, New York, 1998, p. 303.

189 B. Simma, above note 126, p. 289.

190 Fausto Pocar, “The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law”, in Holger P. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity; Libor Amicorum Rüdiger Woftrum*, Vol. 2, Martinus Nijhoff, The Hague, 2012, p. 1724.

fragmentation may diminish, although the ICJ will of course have cause occasionally to address IHL.

After two decades of significantly contributing to the growth and consolidation of IHL, the recent divergent decisions on aiding and abetting by the Appeals Chamber have cast an unfortunate shadow on the legacy of the ICTY regarding responsibility for war crimes. This jurisprudence is reminiscent of the disagreement between the ICTY and the ICJ in the context of indirect State responsibility for violations by non-State actors, and as has been suggested in this article, the narrowing of the scope of individual criminal responsibility in *Perišić* can be read as an attempt to synchronize State and individual responsibility in that context. While perfect alignment is neither desirable nor feasible given the fundamentally different underpinnings of State and individual responsibility, this recent international case law has shown that in certain instances indirect responsibility might arise for a State official who aids or abets a non-State armed group engaging in war crimes, but not for the State on whose behalf such an official acts. This apparent anomaly highlights the separate development of both legal regimes, but also suggests either that the standard applied to individuals may be too low, or that the rules of attribution for State responsibility are set too high. The latter must be understood, however, in light of the coexisting duty of all States to ensure respect for IHL, an obligation that has been given considerable substance with the adoption of the Arms Trade Treaty. As to individual criminal responsibility, the absence of a hierarchy amongst international courts means that the growing consensus regarding the scope of aiding and abetting can bring some – but not absolute – certainty as to the requirements of this form of liability.



## REPORTS AND DOCUMENTS

# The International Committee of the Red Cross's (ICRC's) role in situations of violence below the threshold of armed conflict

Policy document, February 2014

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### Summary

The policy document entitled *The ICRC: its mission and work* defines the mission of the International Committee of the Red Cross as follows:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence. (emphasis added)

This policy document aims to explain exactly what the 'other situations of violence' are that come within the ICRC's field of action: situations in which violence is perpetrated collectively but which are below the threshold of armed conflict. Such situations are characterized in particular by the fact that the violence is the work of one or several groups made up of a large number of people. The other types of

violence (interpersonal or self-directed) are not what the ICRC understands by 'other situations of violence' in the mission statement above.

This policy document also aims to present the criteria that must be met for the ICRC to decide to conduct a humanitarian operation in such situations. Indeed, unlike armed conflict situations, in which the ICRC is always keen and determined to act on the basis of its mandate under international humanitarian law, in other situations of violence the ICRC acts on the basis of its right of humanitarian initiative under the Statutes of the International Red Cross and Red Crescent Movement, and by choice, depending on a number of criteria.

The first of these criteria, the departure point for any ICRC activity, is that the situation of violence has significant humanitarian consequences. The horrific bloodshed of recent decades is the outcome of increasingly diverse and complex situations of violence, many of which, while not reaching the legal threshold of armed conflict, have humanitarian consequences that are as, or even more far-reaching than those of armed conflicts. In such cases, the ICRC does not turn its back on people's suffering on the grounds that it is not the result of violence committed during an armed conflict. Its interest in such situations, which are not governed by international humanitarian law, is not new: the ICRC has conducted humanitarian activities in such situations since its inception (the most common throughout the twentieth century were those carried out for 'political' detainees). Based on this long operational history, the ICRC adapts its policy as the humanitarian environment changes and in the light of its own experience.

In addition to significant humanitarian consequences, there is a second criterion, namely that the humanitarian action being considered by the ICRC constitutes a relevant response to those humanitarian consequences. Indeed, the ICRC's primary objective is to provide an impartial humanitarian response to the needs of the people affected by the violence. In that respect, it must be able to measure the relevance of its humanitarian work on the basis of the anticipated impact on the victims. Acceptance in a given context of the ICRC and of its principles of action (humanity, impartiality, independence, neutrality), the ICRC's expertise in certain specific fields and its capacity to provide a multidisciplinary response, its knowledge of the situation and of the perpetrators of the violence, its capacity to work in partnership, in particular with the National Red Cross and Red Crescent Societies, are some of the many factors enabling it to analyse whether the work it plans to do is indeed relevant.

This policy document also considers the principle of consent from the State on the territory of which the ICRC wishes to carry out a humanitarian operation.

Lastly, in situations of violence below the threshold of armed conflict, the ICRC prefers to work in partnership with others, notably the National Society. The National Society is often the first to respond – and to have the capacity to do so, given that it is already present on the territory – when a country is struck by an emergency; this is especially true in situations of violence below the threshold of armed conflict.

## I. Introduction

The horrific bloodshed of recent decades is the outcome of increasingly diverse situations of violence – which do not necessarily deteriorate into armed conflicts – in terms of the nature of both the perpetrators and the phenomena involved. These sometimes chronic situations of violence, whether spawned by social or political upheaval, identity-related tension and/or repressive or discriminatory State policies, or criminal acts, create dramatic humanitarian situations with consequences that are as, or even more far-reaching than those of armed conflicts. They have emerged against the backdrop of globalization, which in some cases has worsened inequalities within societies, hastened the privatization of violence in the absence of State services in certain contexts or encouraged ‘identitarianism’ or political or social contestation. Phenomena such as easily accessible weapons, climate change, urbanization, migration and the development of communication technologies have accelerated the emergence of violence and play in favour of certain perpetrators. The violence may also be the work of the State, which, through its use of law enforcement, arrests and detentions, etc., itself becomes a perpetrator of the violence.

This policy document endeavours to define the situations of violence entering into the field of action of the International Committee of the Red Cross (ICRC) even though they are below the threshold of armed conflict: violence perpetrated collectively.

The ICRC is a flexible institution and therefore adapts to change. For over 150 years, it has sought to mitigate the suffering of the people affected by situations of collective violence, whether armed conflicts or other situations of violence. It has done so, even in situations of violence that are below the threshold of armed conflict, ever since its inception in the late nineteenth century (when Europe went through a period of political upheaval). Today, it continues to adapt to modern phenomena of collective violence in an endeavour to respond to their humanitarian consequences, within the limits of its capacities and competences.

The ICRC also adapts its policies to take account of these changes. The present text describes the general thrust and principles of its work in situations of violence falling below the threshold of armed conflict. It reaffirms that human suffering is a central concern for the ICRC, which is motivated by the principle of humanity, the first of the Fundamental Principles underpinning the humanitarian work of the International Red Cross and Red Crescent Movement (hereafter the Movement). No matter what the causes or situations, the ICRC asks what it can do to help alleviate human suffering.

This policy document, entitled *The ICRC’s role in situations of violence below the threshold of armed conflict*, provides the reference frame the ICRC needs for its work in such situations of violence. Indeed, the ICRC’s mission and work in armed conflicts are derived from its treaty-based mandate under international humanitarian law (IHL), and it is therefore obviously keen and determined to act in all such situations. The situation is different in the case of other situations of violence. Over the years, the ICRC has therefore established, on the basis of its

operational practice and ‘Red Cross law’, or the law of the Movement, specific criteria for its involvement in such situations. Those criteria are set out in this policy document.

## II. Scope of the policy

The policy document entitled *The ICRC: its mission and work*<sup>1</sup> defines the scope of the ICRC’s work:

1. international or non-international armed conflicts;
2. other situations of violence;
3. natural or technological disasters, or pandemics;
4. other situations.

This policy document covers only the second field of activity.

‘Other situations of violence’ are situations in which acts of violence are perpetrated collectively but which are below the threshold of armed conflict.

The distinction, in particular between non-international armed conflicts and ‘other situations of [collective] violence’, is important when it comes to determining not only the applicable law (see section V below), but also the source of the ICRC’s mission and work in such situations (see section IV below).

This policy document covers situations in which acts of violence are perpetrated collectively but which are below the threshold of armed conflict.

### A. Internal disturbances and tensions

There has never been an agreed legal definition of what constitutes the situations of violence, other than armed conflicts, in which the ICRC acts. Various attempts were made during the twentieth century to define the concepts of ‘internal disturbances’ and ‘internal tensions’, in order to affirm the ICRC’s role in such situations and to determine which acts of violence are not covered by IHL. Both concepts are described in the commentary on Article I of Additional Protocol II:<sup>2</sup>

No real definitions are given. The concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar

1 Policy document adopted in 2008, available at: <http://www.icrc.org/eng/resources/documents/publication/p0963.htm>.

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

nature, including, in particular, large scale arrests of people for their activities or opinions.

(...) the ICRC gave the following description of internal disturbances during the first session of the Conference of Government Experts in 1971: This involves 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. The high number of victims has made necessary the application of a minimum of humanitarian rules.

As regards 'internal tensions', these could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of 'political' prisoners;
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances.

In short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.

These definitions are not contained in a convention but form part of ICRC doctrine. While designed for practical use, they may serve to shed some light on these terms, which appear in an international law instrument for the first time.<sup>3</sup>

According to the above description, the mere fact that there are 'political' detainees or inhumane conditions of detention, that judicial guarantees have been suspended or ill-treatment inflicted, suffices to qualify a situation as one of 'internal tensions'.

The 'acts of collective violence' covered by this policy document share the following characteristics:

- a definite degree of violence;
- the violence is committed by one or several large 'groups' of people;
- the violence has, or may have, humanitarian consequences.

3 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 1354–1355, paras. 4474–4478, available at: <http://www.icrc.org/ihl>.

## B. Why not simply refer to ‘internal disturbances’ and ‘internal tensions’?

The terms ‘internal disturbances’ and ‘internal tensions’ date back to the twentieth century (the term ‘internal disturbances’ was used, for example, in the 1928 version of the Movement’s Statutes; see section IV.B.1 below) and the above ‘description’ to the 1970s.

The phenomenon of collective violence started to diversify in the late twentieth century, and it would be difficult today to qualify every occurrence that is not an actual armed conflict as ‘internal disturbances’ or ‘internal tensions’. Cross-border or international violence would be particularly difficult to qualify as ‘internal’ disturbances or tensions. In addition, the descriptions set out in the commentary above would seem to indicate that ‘internal disturbances’ and ‘internal tensions’ imply the use of force by the State.

Thus, even though the terms ‘internal disturbances’ and ‘internal tensions’ probably continue to cover most situations of collective violence falling below the threshold of armed conflict, care must be taken not to exclude, by using those terms, certain forms of collective violence.

By way of illustration, some situations of violence can be qualified as ‘collective’ but may not necessarily have the characteristics set out in the above descriptions of internal disturbances or tensions: violence between non-State groups based on community, ethnic group, tribe, religion, clan, etc., violence generated by gangs, cartels or mafias which is international in nature, acts of violence carried out as part of a social or trade union struggle, to obtain access to land or resources, etc.

## C. ‘Collective violence’ in the typology of violence

When the ICRC uses the expression ‘armed conflicts and other situations of violence’, the words ‘other situations of violence’ may give the unknowledgeable reader the impression that all situations of violence are part of the ICRC’s field of action. This is not the case. The ICRC concentrates on situations of violence said to be ‘collective’ within the meaning of the typology of violence established by the World Health Organization (WHO) in its *World report on violence and health*.<sup>4</sup>

These situations comprise internal disturbances, internal tensions and other forms of collective violence below the threshold of armed conflict.

They are not always ‘visible’ and are not necessarily played out in public; rather, they can occur entirely behind the discreet walls of places of detention.

4 WHO, *World report on violence and health*, 3 October 2002, available at: [http://whqlibdoc.who.int/publications/2002/9241545615\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf). The same typology was used by the International Federation of Red Cross and Red Crescent Societies in *IFRC Strategy on violence prevention, mitigation and response 2011–2020, Strategic directions to address interpersonal and self-directed violence*, available at: <http://www.ifrc.org>.

This is a relatively simple typology comprising three categories: self-directed violence, interpersonal violence and collective violence.<sup>5</sup>

This initial categorization differentiates between violence a person inflicts upon himself or herself, violence inflicted by another individual or by a small group of individuals, and violence inflicted by larger groups such as states, organized political groups, militia groups and terrorist organizations.<sup>6</sup>

#### D. The concept of 'group'

The 'collective' nature of the violence implies that it is committed by a 'group'. The group comprises a large number of individuals and may, or may not, be structured or organized (it may be a very organized State group, or a relatively unstructured crowd of demonstrators). Its members feel that they belong to the group (shared identity, collective purpose, activities carried out jointly, etc.). The degree to which the group is structured or organized will influence the ICRC's analysis of the risks and the types of activities and working procedures to deploy. The ICRC cannot have the same relations with relatively unstructured groups as it does with highly organized groups.

#### E. Concluding remarks

In short, and on the basis of the definitions given above, the form of violence falling within the scope of this policy document is 'collective violence falling below the threshold of armed conflict', which has the following characteristics:

- a definite degree of violence;<sup>7</sup>
- acts of violence committed by one or several large 'groups' of people;
- acts of violence that have, or may have, humanitarian consequences.

Generally speaking, the ICRC analyses the dynamics of the violence and the behaviour of its perpetrators in order to determine what procedures to adopt. Each situation of violence has its own dynamics, which influence the humanitarian needs and the activities carried out in response.

The mere existence of a situation of collective violence does not, in and of itself, suffice for the ICRC to decide to respond to the potential humanitarian

5 The first two are not covered by this policy's field of application, see section III below. According to the WHO definition, 'collective violence' includes armed conflicts and other situations of violence. Only situations of collective violence below the threshold of armed conflict are covered by this policy document.

6 *World report on violence and health*, above note 4, p. 6.

7 The violence may be physical or psychological. Psychological violence refers to acts and behaviour affecting the psychological integrity of a person, a group or a community, such as emotional hostility, insults, threats, withholding information, forced isolation, the destruction of property, intimidation, passive aggression. It is not always easy to clearly distinguish between the humanitarian consequences of acts of psychological as opposed to physical violence, which are often committed at the same time. See also section VI.A.1 below on the humanitarian consequences.

consequences. The decision to act depends on its analysis of the criteria for involvement described in section VI below.

### III. Situations not covered by this policy document

This policy document does not apply to the following situations: armed conflicts,<sup>8</sup> situations of interpersonal or self-directed violence and non-violent situations.

This policy document therefore does not cover acts of violence that are not perpetrated collectively, i.e. acts of violence that WHO has qualified as ‘interpersonal violence’<sup>9</sup> and ‘self-directed violence’.<sup>10</sup>

This policy document also does not apply in situations in which ‘violence’ is not an issue: natural or technological disasters, pandemics and other situations in which the ICRC may act in specific areas of expertise, such as ‘restoring family links’ and spreading knowledge of IHL and the Fundamental Principles, for which it has been given an explicit mandate.

No matter what the type of situation, the ICRC has a ‘right of humanitarian initiative’, conferred by the States and the Movement’s components in Article 5(3) of the Movement’s Statutes. However, only the situations of violence described in section II above are covered by this policy document.

This policy document is not applicable in the following situations:

- international or non-international armed conflicts;
- situations of interpersonal or self-directed violence;
- non-violent situations.

### IV. Sources of the ICRC’s mission and work in situations of violence below the threshold of armed conflict

#### A. The ICRC’s mission and work in situations of violence below the threshold of armed conflict are rooted in its operational history

No sooner had the ICRC been founded than it became concerned about the suffering of victims of situations of violence not covered by IHL. The various

8 In practice, some of the situations of violence covered by this policy document unfold in contexts that are also affected by armed conflicts. In such contexts, this policy document applies only to the situation of violence below the threshold of armed conflict. In addition, a distinct legal framework is applicable (see section V below). For the definition of armed conflicts, see Sylvain Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, in *International Review of the Red Cross* (hereafter *IRRC*), Vol. 91, No. 873, 2009, pp. 70–94, available at: <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>.

9 ‘Family and intimate partner violence (. . .); Community violence – violence between individuals who are unrelated, and who may or may not know each other (. . .)’, *World report on violence and health*, above note 4, p. 6. What sets interpersonal violence apart from collective violence is the fact that the latter is committed by a large number of people, usually for social, political and/or economic reasons.

10 ‘[S]uicidal behaviour and self-abuse’, *ibid.*

insurrections, periods of unrest and revolutions that marked the late nineteenth and early twentieth centuries<sup>11</sup> mobilized its resources, chiefly in support of the National Societies or to facilitate their establishment where they did not exist, but also in the form of assistance activities and visits to ‘political detainees’.

Throughout the twentieth century, the ICRC gradually stepped up its activities in situations in which IHL was not applicable and codified the framework for its activities in such situations in the light of its practice and in internal reference texts. Those internal texts<sup>12</sup> affirm that, in addition to the legal qualification of the situation, ‘the existence or the probability of serious humanitarian situations suffices to justify the offer of services’.<sup>13</sup> The conditions for ICRC action were, at the time, principally the following:<sup>14</sup>

- unrest marked by a ‘degree of seriousness’;
- events that lasted a ‘certain time’;
- parties that were to ‘some degree organized’;
- the existence of ‘victims of the incidents’.

The ICRC’s operational practice at the end of the twentieth century<sup>15</sup> bore out its intention to respond to the humanitarian consequences of situations of violence

below the threshold of armed conflict. The ICRC diversified its activities beyond visits to ‘political detainees’, essentially as of the 1980s, and engaged with growing frequency in the distribution of assistance (material, medical, food) and in protection activities outside prison walls. It adapted its policy accordingly, adopting a policy document on ‘internal violence’ in 1992.<sup>16</sup>

The ICRC’s operational practice and internal policies are reflected in Red Cross law, which grants the ICRC a right of humanitarian initiative, including in situations of violence below the threshold of armed conflict (see section IV.B below).

The ICRC has been concerned about human suffering since its inception, even in situations of violence not covered by international humanitarian law. Throughout its history, it has adapted its operational practice and its policy to take account of the humanitarian consequences of such situations of violence.

11 For example, the insurrection in Herzegovina (1875) and the political strife in Hungary (1919), which were both situations of violence below the threshold of armed conflict.

12 For example, policy document D851 of 1965, which confirms the role of the ICRC in ‘internal disturbances’ and formalizes its right of initiative in ‘other cases of intervention’. Cited in Jacques Moreillon, *Le Comité international de la Croix-Rouge et la protection des détenus politiques*, Editions L’Age D’Homme, Lausanne, 1973, pp. 164–166. See also the 1978 policy document entitled *Action du CICR en cas de conflit armé non international, de troubles intérieurs et autres situations* (ICRC action in the event of a non-international armed conflict, internal disturbances and other situations).

13 *Ibid.*, p. 160.

14 See in particular internal report D205 of 1952, cited in *ibid.*, p. 120.

15 The organization became increasingly active outside Europe (Latin America, Asia, Middle East, Africa).

16 The content of this policy was published in the form of an article by its author, Marion Harroff-Tavel, ‘Action taken by the International Committee of the Red Cross in situations of internal violence’, in *IRRC*, No. 294, 1993, available at: <http://www.icrc.org/eng/resources/documents/article/other/57jmhy.htm>.

This historical overview shows that the ICRC has constantly endeavoured to adapt, at times cautiously but often doggedly, to the humanitarian needs generated by situations of collective violence, even though the latter are not armed conflicts governed by IHL. Thus, even though, by virtue of its mandate under the 1949 Geneva Conventions, the ICRC centres its activities on armed conflicts, and even though in practice it carries out most of its activities in such situations, it has never overlooked its right of humanitarian initiative in other situations of collective violence causing human suffering, grounding its decisions in the principle of humanity.

This policy document is part of this ongoing historical process, and changes none of the ICRC's choices and positions of the past few decades.

### **Examples of ICRC activities in situations of violence below the threshold of armed conflict**

#### Herzegovina – 1875 (excerpt from Rapport d'activité 1863–1883)

'Instructions for delegates of the International Committee (...). They shall, to the extent possible, visit such sick and wounded in the various places in which they may be found, and shall endeavour to provide them with the requisite care. (...) They shall seek to organize regular and ongoing assistance for the wounded (...).'

#### Russia – 1918 and Hungary – 1919 (excerpt from Rapport d'activité 1912–1920)

'As a result of the political and social events in Russia since 1917, in Hungary in 1919, the International Committee was called on to play a role it never had before. (...) the International Committee was able to (...) take direct and practical action (...) for political detainees and foreigners deprived of all protection, the sick and children from the civilian population who had suffered especially harshly from the blockade or the economic crisis resulting from the unrest caused by the revolution.'

#### Poland – 1924 (excerpt from Rapport d'activité 1923–1925)

'[The ICRC delegate] visited 20 penal establishments holding 9,000 men and 1,000 women, or nearly one third of the detainees held in the Republic's prisons. Of that number, 870 men and 81 women were political detainees.'

#### Austria – 1934 (excerpt from Rapport d'activité octobre 1930 – juillet 1934)

'[The] delegate of the International Committee travelled to (...) Woellersdorf internment camp. (...) political prisoners, unless detained in police prisons or courts, are concentrated in Woellersdorf camp and number about 4,600.'

#### German Democratic Republic and Federal Republic of Germany – 1957 (excerpt from Annual Report 1957)

'In 1957, with the authorisation of the Government of the German Democratic Republic, the ICRC delegate, accompanied by a representative of the National Red Cross Society, was able to visit three prisons and two penitentiary labour camps. (...) In 1957, [in the Federal Republic of Germany,] a delegate from the ICRC, accompanied by a representative of the National Red Cross Society, visited 19 prisons and penal institutions as well as two penitentiary hospitals.'

South Africa – 1967 (excerpt from Annual Report 1969)

‘In May, [the] ICRC delegates flew to South Africa, where, with the assent of the Pretoria Government, they visited all political prisoners who were serving sentences. The 945 prisoners were interned in 5 prisons, namely, Robben Island, Viktor Voerster, Biendonné, Pretoria Central and Barberton.’

Chile – 1974 (excerpt from Annual Report 1974)

‘By 31 December 1973 [ICRC delegates] had made 114 visits to sixty-one places of detention and met several thousand detainees held by the military authorities. Not only was ICRC action continued in 1974 but its field of activity was considerably extended, particularly with regard to relief.’

Philippines – 1988 (excerpt from Annual Report 1988)

‘At the end of 1988, the ICRC had all but finished its second complete series of visits to the country’s civilian and military prisons. (...) During their visits, the delegates saw people held in connection with insurgency-related incidents (...).’

Haiti – 2005 (excerpt from Annual Report 2005)

‘In light of Haiti’s persistent instability as the country prepared for general elections scheduled for the end of the year, the ICRC continued to focus on protecting victims of armed violence by intensifying its dialogue with all groups involved. It also helped the Haitian Red Cross evacuate hundreds of wounded people from Cité Soleil, one of the most violence-prone shantytowns, where a water and sanitation project initiated with the National Society in 2005 reversed to some extent the increasing marginalization of its residents. ICRC delegates continued to follow individual detainees arrested in connection with ongoing political disturbances.’

Papua New Guinea – 2012 (excerpt from Annual Report 2012)

‘After a study initiated in 2011 confirmed the usefulness of the ICRC’s neutrality in assisting people affected by tribal fighting in the Highlands, the organization focused its action in these areas and developed the dialogue initiated with local leaders and communities in past years, especially on the protection of health facilities and personnel. With the PNG Red Cross, the ICRC provided relief to people affected by incidents of violence in the Highlands and worked with the local authorities to improve health services.’

## B. The ICRC’s mission and work in situations of violence below the threshold of armed conflict are based on ‘Red Cross law’ and thereby crystallize its long-standing operational practice

‘Red Cross law’,<sup>17</sup> which comprises the Movement’s Statutes and resolutions adopted at the Movement’s statutory meetings (International Conferences of the Red Cross and Red Crescent (hereafter International Conferences) and Councils of

17 The term ‘Red Cross law’ designates all the legal and regulatory texts adopted at the Movement’s statutory meetings. ‘Red Cross law’ is ‘soft law’ (non-binding in international law), unlike the ‘hard law’ constituted notably by treaty-based law.

Delegates)<sup>18</sup>, confers roles and mandates on the Movement's components<sup>19</sup> in legal texts drawn up on the basis of prior practice.

The Movement's Statutes constitute the first legal source, the resolutions adopted at the Movement's statutory meetings the second. The ICRC's right of initiative is grounded in the Statutes and those resolutions, allowing it to act in situations that are below the threshold of armed conflict. Lastly, the Seville Agreement and its Supplementary Measures, adopted at the 1997 and 2005 Councils of Delegates respectively, assign the ICRC the role of lead agency in the Movement's international operations in internal disturbances (see section VIII.B below).

### 1) *The Movement's Statutes (from 1928 to 1986)*

From the day they were initially adopted by the 13th International Conference in 1928, and thus by all the participants at the International Conference (States and Movement components), the Movement's Statutes have assigned the ICRC a role in all situations, including situations of violence covered by this policy document. Article 7<sup>20</sup> in particular, concerning the ICRC's attributes, was unanimously adopted. It formalized the ICRC's role on the basis of its practice since its inception (see use of the terms 'continue' and 'remain').

The amended version of the Statutes adopted in 1952 described the ICRC's role in what were essentially the same terms.<sup>21</sup> The present version of the Statutes,<sup>22</sup> adopted by consensus by the States and the Movement's components in 1986, is very similarly worded.

18 For further information on the Movement's statutory meetings, see <http://www.icrc.org/eng/who-we-are/movement/index.jsp>.

19 The Movement's three components are the National Red Cross and Red Crescent Societies, the International Federation of Red Cross and Red Crescent Societies and the ICRC.

20 'Article 7 – The International Committee of the Red Cross (...) shall continue to be a neutral intermediary whose intervention is recognized as necessary, especially in time of war, civil war or civil strife. (...) all questions calling for examination by a specifically neutral body, shall remain the exclusive province of the International Committee of the Red Cross.' See *International Red Cross Handbook*, ninth edition, ICRC/League of Red Cross Societies, Geneva, 1951, pp. 307–308.

21 'Article 6 (...) – 5. As a neutral institution whose humanitarian work is carried out particularly in time of war, civil war or internal strife, [the ICRC] endeavours at all times to ensure the protection of and assistance to military and civilian victims of such conflicts and their direct results. (...) 6. It takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution.' See *International Red Cross Handbook*, eleventh edition, ICRC/League of Red Cross Societies, Geneva, 1971, p. 276.

22 'ARTICLE 5: The International Committee of the Red Cross (...) 2. The role of the International Committee, in accordance with its Statutes, is in particular: (...) d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results; (...) 3. The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.' See *Handbook of the International Red Cross and Red Crescent Movement*, thirteenth edition, ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 1994. The Statutes were subsequently amended in 1995 and 2006 and are available at: <http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf>.

When it comes to situations of violence below the threshold of armed conflict, the States and the Movement's components, by adopting the Statutes, thus recognized:

1. that the ICRC has a specific role to play in 'internal strife' (i.e. 'internal disturbances'<sup>23</sup>);
2. that the ICRC has a right of humanitarian initiative in all situations that might benefit from the work of a specifically neutral and independent institution.

No matter what type the situation of collective violence not reaching the threshold of armed conflict (whether internal disturbances or another type of collective violence), the ICRC therefore acts on the basis of its 'statutory' right of initiative under, depending on the case, Article 5.2(d) for internal disturbances and/or Article 5.3 for other situations.

'Red Cross law' also attributes a role in such situations to the National Societies and the International Federation of Red Cross and Red Crescent Societies (hereafter International Federation). That role can be inferred first from the Preamble to the Movement's Statutes, which mentions 'other emergencies' in which the Movement's components discharge their mission. Article 3 of the Statutes also refers to 'other emergencies' to define the mandate of the National Societies in all situations, including in contexts of violence as defined in this policy document, both on their national territory and in international operations. Article 6.3 of the Statutes, for its part, confirms that the role of the International Federation is to assist the National Societies 'at all times'. The general and specific mandates of the National Societies in situations of violence, no matter what type, are also defined in resolutions adopted by the Movement's statutory meetings.

## *2) Resolutions adopted by the Movement's statutory meetings: the International Conference and the Council of Delegates*

Under Article 5.2(h) of the Movement's Statutes, one of the ICRC's tasks is 'to carry out mandates entrusted to it by the International Conference'. Those 'mandates' are set out, not only in the above provisions of the Movement's Statutes, but also in a number of resolutions adopted at International Conferences and attributing a specific role in situations of violence below the threshold of armed conflict to the ICRC and a more general role to the Movement.

In 1921, Resolution XIV<sup>24</sup> broached the subject by explicitly recognizing the role of the 'Red Cross' in general, first and foremost the National Societies, in situations of 'civil war and social and revolutionary disturbances'. The role of the ICRC in particular was confirmed in Resolution XIV of 1938,<sup>25</sup> entitled 'Role and

23 The French term 'troubles intérieurs' can be translated as either 'internal disturbances' or 'internal strife' in English; the two are considered to be synonymous.

24 For an English translation of the resolution, see François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC/MacMillan, Oxford, 2003, pp. 260–262.

25 See *Sixteenth International Conference of the Red Cross, London, June 1938, Report*, The British Red Cross Society, London, 1938.

activity of the Red Cross in time of civil war<sup>26</sup>. In 1981, Resolution VI<sup>27</sup> referred to the ICRC's activities 'in internal disturbances and tensions'. Other resolutions<sup>28</sup> consider the roles of the ICRC and the Movement's other components in situations of violence below the threshold of armed conflict in the framework of generic mandates conferred on them over the course of various International Conferences and Councils of Delegates.

Among the regulatory texts adopted by the Movement, the Seville Agreement<sup>29</sup> and its Supplementary Measures<sup>30</sup> are especially noteworthy. They define the attributes of the ICRC – and of the Movement's other components – principally on the basis of the Movement's Statutes (for further information, see section VIII.B. below).

## V. The law applicable in situations of violence below the threshold of armed conflict

One of the fundamental reasons for distinguishing between 'armed conflicts' and 'other situations of violence' is to determine the branch of law that applies. The legal status of situations of violence has major legal ramifications because, in situations of armed conflict, IHL stipulates rules that are adapted to the specific nature of armed conflicts and which all the parties to the conflict must obey. In other situations of violence, IHL is not applicable. The non-State protagonists of the violence are not 'parties' bound by obligations under international law and, generally speaking, the State continues to hold a *de jure* monopoly on legitimate violence in such situations. The State's actions are governed in particular by international human rights law and domestic legislation.<sup>31</sup>

The fundamental rules protecting persons in situations of violence below the threshold of armed conflict are to be found in domestic legislation and international human rights law.

International humanitarian law is not applicable in such situations.

A distinction had to be made between non-international armed conflicts and other situations of violence when the rules of IHL applicable in non-international armed conflicts were developed (as of 1949 in Article 3 common to the

26 At the time, notably because there was no IHL applicable in 'civil wars' (the IHL governing non-international armed conflicts was codified in 1949), the term 'civil war' also covered situations of violence below the threshold of armed conflict, in particular 'internal disturbances'. See J. Moreillon, above note 12, pp. 58, 96 and 103.

27 See *Handbook of the International Red Cross and Red Crescent Movement*, above note 22, p. 751.

28 See, for example, Resolution XX of 1948, Resolution XIX of 1957 and Resolution XXXI of 1965.

29 Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement, Council of Delegates, Seville, November 1997, available at: <http://www.icrc.org/eng/resources/documents/misc/57jp4y.htm>.

30 Supplementary measures to enhance the implementation of the Seville Agreement, Annex to Resolution 8, Council of Delegates, Seoul, November 2005, available at: <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-8-2005.htm>.

31 Insofar as domestic legislation is in conformity with international human rights standards.

1949 Geneva Conventions). Additional Protocol II, adopted in 1977 specifically to strengthen IHL in non-international armed conflicts, deals explicitly with the threshold between non-international armed conflicts and other situations of violence (Protocol II uses the term ‘internal disturbances and tensions’), clearly stipulating that IHL does not apply in the latter (Article 1.2<sup>32</sup>).

The fundamental rules protecting persons in situations of violence that are below the threshold of armed conflict are for the most part contained in international human rights law and domestic legislation.<sup>33</sup>

## VI. Criteria for involvement

According to the policy document entitled *The ICRC: its mission and work*:<sup>34</sup>

the ICRC endeavours to take action in situations where international humanitarian law is applicable and carefully considers the advisability of taking action in the context of the direct results of these situations and in other situations of violence (...). (emphasis added)

The policy document further states:

the ICRC offers its services if the seriousness of unmet needs and the urgency of the situation warrant such a step. It also considers whether it can do more than others owing to its status as a specifically neutral and independent organization and to its experience.

When the ICRC considers undertaking humanitarian work in a situation of violence below the threshold of an armed conflict, it carefully examines the following criteria:

- the situation of violence is having significant humanitarian consequences;
- the humanitarian action being considered by the ICRC constitutes a relevant response to those consequences.

If both those conditions are met, the ICRC, after weighing the risks, decides to act, directly or in support of the National Society, to alleviate the victims’ suffering.

This section aims to explain what the ICRC considers when it undertakes to determine whether to conduct a humanitarian operation, and the type of operation,

32 The commentary on that article reads as follows: ‘Internal disturbances and tensions are not at present within the field of application of international humanitarian law; the ICRC has carried out activities in this field on an ad hoc basis. However, this does not mean that there is no international legal protection applicable to such situations, as they are covered by universal and regional human rights instruments.’ See Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 3, p. 1356, para. 4479.

33 According to the International Court of Justice, these fundamental rules include general principles, such as elementary considerations of humanity, which must be respected in all circumstances, in peace as in war (see *Corfu Channel Case (Merits)*, ICJ Reports 1949, p. 22, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 102, para. 215).

34 See above note 1.

in response to the humanitarian consequences of a situation of violence that is not an armed conflict. It describes the analytical stages that must precede the ICRC's decision to act in such situations.

#### A. Criterion for involvement 1: the situation of violence is having significant humanitarian consequences even though it is not an armed conflict

Before proposing to conduct activities in response to the humanitarian consequences of a situation of violence, a humanitarian organization such as the ICRC must assess those consequences, identify the persons affected and determine their needs. The assessment also takes account of anticipated humanitarian consequences if the situation is likely to deteriorate.

Humanitarian needs arise notably from attacks on life and physical and psychological integrity and from the specific vulnerabilities of people subject to arbitrary acts or deprived of essential services because of the situation of violence and its effects on people, services and infrastructure.

##### *1) The nature of the humanitarian consequences*

The nature of the humanitarian consequences informs the institution about the needs of the people affected and helps it identify those people. The list below is a non-exhaustive compilation of the direct or indirect humanitarian consequences that the situations covered by this policy document can generate (as can be seen, they are often pretty similar to those of armed conflicts):

- dead and wounded, in particular by firearms;
- physical and psychological, including sexual, violence;
- kidnappings, hostage-taking, human trafficking and poor conditions of confinement, ill-treatment, sexual violence, sexual slavery, forced labour;
- involvement of children in armed groups (including gangs);
- disappearances, especially enforced disappearances, summary executions, unidentified bodies;
- ill-treatment, including torture, in places of detention;
- arbitrary detention, political detention, denial of judicial and procedural guarantees, poor conditions of detention;
- constraints on the response to the needs of those affected or on their access to essential services arising from acts of violence against the medical mission (health personnel and infrastructure) or humanitarian practitioners in general;
- problems of access – which have an impact on health (epidemics, etc.) – to water, health care, food, essential goods, education, etc., because of restrictions on movements (resulting from insecurity, the climate of fear, discriminatory policies, etc.) or the absence of State services (notably because of the situation of violence);

- displacement and migration implying loss of livelihoods (work, land, etc.), owing *inter alia* to insecurity, a climate of fear, discriminatory policies or the above-mentioned problems of access;
- stress and needs specific to victims' families, especially as a result of a separation or disappearance;
- destruction or damage of goods, in particular those affecting essential services (water supply system, health centres, private property such as shops, warehouses, offices, livestock, crops, dwellings, means of transportation).

These different types of humanitarian consequences affect, depending on the case, various categories of people. Identifying those people and their needs is an essential component of the analysis of the humanitarian consequences. Generally speaking, this concerns *inter alia*: people who are at the mercy of an authority they oppose or that perceives them as the enemy, and the members of their families and communities; people in a hostile environment who are not protected from the acts perpetrated against them; people who are unable to meet their basic needs because of the situation of violence (detainees, displaced persons, restrictions on movements). In order to determine how to respond, the ICRC analyses the specific vulnerabilities of those affected and any resilience mechanisms in place or to be developed.

A number of the humanitarian consequences listed above stem from violations of international human rights laws of which the people concerned are victims. Typical violations of the law include:

- discrimination;
- attacks on life, physical and psychological integrity, dignity;
- violation of the rules governing the use of force;
- access to minimum conditions for survival (water, food, health care, etc.) restricted or denied;
- attacks on family unity, including disappearances;
- infringements of freedom of movement (displacements, transfers, restricted movements);
- unlawful or arbitrary deprivation of property;
- arbitrary or unlawful arrest or detention and failure to respect judicial and procedural guarantees.

The ICRC analyses, case by case, not only the humanitarian consequences for the people affected and their needs, but also the causes of the problems and any survival strategies in place (in order to determine how to respond).

## 2) *The severity and magnitude of the humanitarian consequences*

Severity refers to the gravity of the humanitarian consequences and the urgency of the response required, given that the impact on the people affected and on their families and communities can vary.

Magnitude refers to the number of people affected by and the duration of the humanitarian consequences, which do not have the same impact (and therefore require a different response) if they are of short duration, affect only a small group of people or, on the contrary, are widespread.

### 3) *Conclusion*

The ICRC recognizes that its analysis cannot be based on quantitative criteria alone and therefore examines, case by case, the humanitarian consequences arising from the situation of violence for the people affected in order to determine whether they justify action on its part.

The nature, severity and magnitude of the humanitarian consequences are analysed so as to determine their importance and the type of action to be taken by the ICRC.

That analysis also serves to determine the urgency and level of mobilization required. Indeed, the needs may be chronic in nature (and may require a structural response) or, on the contrary, call for urgent action.

Depending on the nature of the consequences, the type of persons affected, their needs and the activities planned in response, the ICRC's work is guided by more specific reference texts (see section VII below).

## B. Criterion for involvement 2: the humanitarian action being considered by the ICRC constitutes a relevant response to the humanitarian consequences identified

When the analysis described above (criterion 1) has established that the situation of violence below the threshold of armed conflict is having significant humanitarian consequences, the ICRC assesses in what way its action in particular would be justified in the context, alone or in support of the activities of other protagonists, chiefly from the point of view of the anticipated impact on the people affected.

This section outlines some of the indicators used to analyse the relevance of the humanitarian action being considered by the ICRC.

### 1) *The ICRC's identity and specific nature*

The ICRC is an internationally recognized humanitarian organization. Its adherence to the Fundamental Principles<sup>35</sup> of humanity, neutrality, independence and impartiality is particularly important from the operational point of view. The ICRC is also recognized for its confidential approach.<sup>36</sup>

<sup>35</sup> See section X below.

<sup>36</sup> See 'The International Committee of the Red Cross's (ICRC's) confidential approach', in *IRRC*, Vol. 94, No. 887, Autumn 2012, pp. 1135–1144, available at: <http://www.icrc.org/eng/assets/files/review/2012/irrc-887-confidentiality.pdf>.

What is more, the ICRC's world-wide reputation as a credible, effective and professional humanitarian organization can facilitate its work in certain situations.

The Fundamental Principles mentioned above, to which all the Movement's components adhere in all situations (armed conflicts, other situations of violence, disasters, etc.), usually facilitate an effective humanitarian response. As stated in the policy document entitled *The ICRC: its mission and work*,<sup>37</sup> those principles offer

the best chance of being accepted during an armed conflict or other situation of violence, in particular given the risk that actors at a local, regional or international level may become polarized or radicalized.

The relevance of the action being considered by the ICRC must be analysed in the context and in the light of its anticipated impact on the people concerned.

Relevance depends on several possible factors linked to the ICRC's identity, its specific competences, resources and expertise, its position and level of access in the context concerned and the partnerships it can forge within the Movement.

The analysis also takes into account the activities of partners the ICRC can support or mobilize, and those of other protagonists.

## 2) *The ICRC's specific qualities in the response being considered: competences, resources and expertise*

In view of the humanitarian consequences and the needs identified (see section VI.A above), the ICRC will consider various means of response. In that regard, it can call into play a number of advantages, such as:

- the resources required for a rapid and good quality humanitarian response, with, if necessary, a commitment over time (human, logistical and financial resources);
- specific competences and expertise relevant in the context (from security management to the handling of sensitive and confidential information, from forensics to activities in a prison environment, and so on);
- an integrated and multidisciplinary approach (broad range of activities).

## 3) *The ICRC's position in the context concerned*

The ICRC's intrinsic qualities cannot be 'presupposed'. The analysis of its relevance must provide information on the way in which the ICRC is perceived locally and

<sup>37</sup> See above note 1.

what would make it an effective participant in the response to the humanitarian consequences of the situation of violence.

If the ICRC is already present when a new situation of violence erupts, that very fact could consolidate its position in the context and facilitate its decision to act. The analysis of the ICRC's identity in such contexts may indicate *a priori* that the work it plans to do will be accepted or, on the contrary, be viewed with reluctance or even opposition.

The ICRC's potential advantages in a given context may include:

- its acceptance by the people affected;
- its acceptance by the authorities and the perpetrators of the violence, including its capacity to influence their conduct;
- its credibility and predictability in the context;
- its knowledge of the context and influential stakeholders;
- trust (from the authorities, those responsible for violations, civil society);
- its local history;
- the quality of its partnership with the National Society.

All these elements may make it easier for the ICRC to obtain access to the people affected, be it direct or indirect (for example, via the National Society).

#### 4) *The Movement's potential*

The ICRC is rarely alone in wishing to respond to the humanitarian consequences of a situation of violence below the threshold of armed conflict. The National Society in the context concerned (the operating National Society) is, given the chance, the means and the will, a key and major participant in the humanitarian response. In most cases, an operation by the operating National Society or the ICRC alone is less effective than an operation conducted in partnership (see section VIII below). That partnership is therefore a decisive factor of the relevance of the ICRC's work.

Mobilization of the Movement's other components (other (or participating) National Societies, International Federation) can also bolster the relevance of an ICRC operation.

The ICRC's strength may therefore lie in its membership of the Movement, the operating National Society's proximity to and position with its catchment population and the authorities, and the greater number of resources and expertise that the Movement as a whole can mobilize.

#### 5) *Analysis of the response of other protagonists*

The analysis of the relevance of the ICRC's planned action takes into account the response of others to the humanitarian consequences of the situation of violence.

The first thing to remember is that the State bears primary responsibility for meeting humanitarian needs (in particular for taking preventive action and for protecting and assisting the persons affected) on its territory. From a structural

point of view, it puts in place control (or regulatory) mechanisms,<sup>38</sup> and it carries out, in the light of the circumstances, concrete activities for the benefit of the persons affected by the situation of violence in question.

In addition to the Movement's humanitarian protagonists mentioned in the previous section, other local (non-governmental, civil society, religious or community organizations) or international protagonists (non-governmental, United Nations or other organizations) may conduct humanitarian activities. The ICRC must therefore analyse their humanitarian response, in order to choose the most relevant areas of action in the context and the most appropriate strategies for action (including determining the modes of action: support, substitution, persuasion).<sup>39</sup> In particular, if the humanitarian response involves several participants, the possibilities for coordination (or partnership) between them and the ICRC will be a key factor of the analysis.

The final purpose of the analysis is to establish the 'quality' of the response to the humanitarian consequences of the situation of violence so as to determine whether the needs of the persons affected are being met, notably with impartiality, and, ultimately, whether the ICRC has a relevant role to play as a humanitarian actor to that end.

### C. Risks to analyse before the ICRC decides to act

If the two criteria for involvement described above have been met, it can be presumed that the ICRC will choose to act in response to the humanitarian consequences of the situation of violence that is not an armed conflict. Before moving ahead, however, the ICRC will weigh the various operational and institutional risks at local and global level liable to influence its decision (which may be to take no action for the time being) or the choice of activity and working procedure (including its modes of action).

In terms of security, for example, the ICRC has years of operational experience in armed conflicts and other situations of violence that are particularly fraught from the security point of view. It therefore analyses security risks as a matter of routine.

It is nevertheless useful to analyse certain risks arising in situations of violence the characteristics of which vary from one context to another and of which the ICRC has less experience. For example, the essentially 'criminal'<sup>40</sup> nature of the environment in which it is considering becoming involved must be specifically analysed in order to orient the ICRC's frame of intervention.

38 'Control or regulatory mechanism' refers in particular to local or national mechanisms that are political (e.g. parliamentary), judicial or administrative (e.g. inspection) in nature, and to appeal mechanisms (ombudsman, national observer, human rights commission).

39 For more information on the ICRC's modes of action, see 'ICRC Protection Policy', in *IRRC*, Vol. 90, No. 871, September 2008, pp. 751-775, available at: <http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>.

40 Situations of violence that are not armed conflicts do not have a monopoly on criminality – or on the main perpetrators of the violence being criminals. This is also a feature of some situations of armed conflict. The

The analysis of security risks considers not only the security of the ICRC and its staff, but also that of its local partners, in particular the National Society, and of the persons affected by the violence.

There is no such thing as a risk-free humanitarian operation, especially in situations of violence. The prior analysis of potential risks is not intended to prevent humanitarian action or limit the capacity to act, but rather to identify the risks so as to gauge their importance and, if necessary, adapt the response or adopt measures to minimize or avoid them.

## VII. ICRC humanitarian activities in situations of violence below the threshold of armed conflict

The ICRC mission statement<sup>41</sup> stipulates:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence. (emphasis added)

This mission obliges the ICRC to centre its work on the ‘victims’, i.e. on the people affected by the situation of violence. This is why it must adapt its protection, assistance, prevention and cooperation activities in the light of the analysis of the humanitarian consequences (see section VI.A above). That analysis will have identified the people affected, the principal needs, the most severe consequences, the various degrees of urgency, etc.

The analysis of the relevance of the response being considered by the ICRC (see section VI.B above) will have identified what specific assets the ICRC possesses, including expertise, experience or resources, to respond effectively to the needs, and the factors that could hobble its development of activities.

The ICRC draws up its strategies for action on the basis of these analyses and with a view to being as effective as possible. In so doing, it will establish specific priorities and objectives with due regard for the principle of impartiality.<sup>42</sup>

criminal nature of the environment, or the fact that those responsible for the violence are criminals, has no impact on the legal qualification of situations of violence.

41 See the policy document entitled *The ICRC: its mission and work*, above note 1.

42 According to this Fundamental Principle, the Red Cross ‘makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress’. See the Fundamental Principles of the Red Cross proclaimed in Vienna in 1965, at the Twentieth International Conference of

Whenever possible, the strategies for action will address not only ‘the direct consequences of problems, but also (...) their origins and causes’.<sup>43</sup>

When drawing up strategies for action, the starting points should be first and foremost the persons affected and their needs, analysed from the holistic and systemic points of view in order to determine what combination of activities and what modes of action would be most effective.

When deciding on its activities and establishing strategies for action, the ICRC considers all factors in order to determine not only what coordination may be required with other protagonists, but also what partnerships, especially within the Movement, it may conclude to heighten the impact of its planned activities (see section VIII below).

One of the ICRC’s main assets is its wide range of expertise in the fields of protection, assistance, prevention and cooperation. The relevance of its response is often tied to its multidisciplinary approach, which allows it to combine the four types of activity in order to maximize, so far as possible, the anticipated impact on the persons affected.

The choice of modes of action (raising awareness of responsibilities: persuasion, mobilization, denunciation; support; substitution) and how they are combined are other elements determined by the strategies for action.<sup>44</sup>

The strategies for action incorporate consideration of what motivates those responsible for the violence. Acts of violence can be committed for various reasons, in particular social, political and/or economic. In practice, it is usually extremely difficult to classify situations of violence in distinct categories based on the motivation of the perpetrators. Quite often, one situation of collective violence will encompass economic, social and/or political motives. It is nevertheless important to analyse these possible motives so as to incorporate them into the analysis and thus deploy appropriate strategies. Indeed, the ICRC will not necessarily approach the perpetrators of the violence in the same way if their motivation is political, social or purely economic. The form and content of its dialogue with them will be very different depending on the nature of the groups. Criminal environments<sup>45</sup> in particular pose a number of additional challenges for ICRC action.

The humanitarian consequences may require an urgent response (acute phase of the crisis), a sustainable response (chronic crisis) or a residual response (after the acute phase, for example for persons deprived of liberty or missing persons).<sup>46</sup>

the Red Cross, available at: <http://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>.

43 Policy document entitled *The ICRC: its mission and work*, above note 1.

44 For more information on the ICRC’s modes of action, see ‘ICRC Protection Policy’, above note 39.

45 In particular if the violence is the work of ‘organized crime’ (including ‘transnational organized crime’ within the meaning of the United Nations Convention against Transnational Organized Crime, 15 November 2000), defined as all unlawful activities carried out by criminal organizations and territorial gangs, including activities that result in resort to armed violence.

46 The policy document entitled *ICRC Assistance Policy*, in *IRRC*, Vol. 86, No. 855, 2004, available at: <http://www.icrc.org/eng/resources/documents/misc/66dez7.htm>, discusses these time-related aspects. See also M. Harroff-Tavel, ‘Do wars ever end? The work of the International Committee of the Red Cross when the

The strategies for action take account of these various kinds of response in order to position them in time. In particular, if the ICRC is considering a long-term commitment from the outset, it must have the will to maintain that commitment over time with the necessary resources. It must also discuss the duration of its activities transparently with the authorities. By the same token, it must think about an 'exit strategy' and the hand-over to other protagonists, in particular the operating National Society, from the outset, and re-assess them throughout the operation's implementation.

The principle on which any humanitarian activity must be predicated is that it must continue to be of relevance – in the long term – in meeting the needs of the people affected. Over time, that relevance, which may have been clear at the start, can gradually wane. The ICRC must take account of this, notably by periodically reviewing its strategy for action, subjecting it to an updated analysis of the humanitarian consequences, the relevance of its operation and the risks involved.

The ICRC's protection,<sup>47</sup> assistance,<sup>48</sup> prevention<sup>49</sup> and cooperation<sup>50</sup> activities are governed by numerous reference texts. No type of activity in the ICRC's multidisciplinary range is, as such, specifically intended to be deployed in one situation of violence rather than another (there are no activities<sup>51</sup> 'reserved' for armed conflicts or other situations of violence). However, the way in which those activities are conducted and their content vary depending on the specific characteristics of the context and those responsible for the violence.<sup>52</sup>

guns fall silent', in *IRRC*, Vol. 85, No. 851, 2003, available at: [http://www.icrc.org/eng/assets/files/other/irrc\\_851\\_haroff-tavel.pdf](http://www.icrc.org/eng/assets/files/other/irrc_851_haroff-tavel.pdf).

- 47 'ICRC Protection Policy', above note 39; 'International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty', in *IRRC*, Vol. 93, No. 882, 2011, available at: <http://www.icrc.org/eng/assets/files/review/2011/irrc-882-policy-torture.pdf>; J. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', in *IRRC*, Vol. 87, No. 858, 2005, available at: [http://www.icrc.org/eng/assets/files/other/irrc\\_858\\_pejic.pdf](http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf); A. Aeschlimann, 'Protection of detainees: ICRC action behind bars', in *IRRC*, Vol. 87, No. 857, 2005, available at: [http://www.icrc.org/eng/assets/files/other/irrc\\_857\\_aeschlimann.pdf](http://www.icrc.org/eng/assets/files/other/irrc_857_aeschlimann.pdf); *Enhancing protection for civilians in armed conflict and other situations of violence*, ICRC, 2012, available at: <http://www.icrc.org/eng/resources/documents/publication/p0956.htm>. See also *Professional standards for protection work carried out by humanitarian and human rights actors in armed conflict and other situations of violence*, ICRC, 2013, available at: <http://www.icrc.org/eng/resources/documents/publication/p0999.htm>.
- 48 The policy document entitled *ICRC Assistance Policy*, above note 46.
- 49 'International Committee of the Red Cross: prevention policy', in *IRRC*, Vol. 91, No. 874, 2009, available at: <http://www.icrc.org/eng/resources/documents/article/review/review-874-p415.htm>.
- 50 Policy document entitled *Policy on ICRC Cooperation with National Societies*, 2003, available at: [http://www.icrc.org/eng/assets/files/other/policy\\_cooperationicrc\\_ns\\_ang.pdf](http://www.icrc.org/eng/assets/files/other/policy_cooperationicrc_ns_ang.pdf); certain specific aspects of cooperation within the Movement are also discussed in other reference texts, for example 'ICRC Protection Policy' (above note 39), *ICRC Assistance Policy* (above note 46), *The ICRC: its mission and work* (above note 1), and 'The International Committee of the Red Cross's (ICRC's) confidential approach' (above note 36).
- 51 'Activities' is used here in the broad sense. Of course, certain specific ICRC activities may be reserved for certain types of situation; visits to 'prisoners of war', for example, can only take place in international armed conflicts.
- 52 For example, IHL is not an appropriate legal framework for an operational dialogue (in terms of prevention or protection) with the perpetrators of violence in a situation of violence below the threshold of armed conflict; or, in a situation of violence with a strong criminal component, the ICRC cannot engage in

## VIII. At the heart of the ICRC's strategies for action in situations of violence below the threshold of armed conflict: partnerships

### A. Cooperation with Movement partners: the ICRC's preferred option at all phases of humanitarian action in situations of violence below the threshold of armed conflict

The policy document entitled *Policy on ICRC Cooperation with National Societies*<sup>53</sup> emphasizes two points: the strengthening, at all times, of the capacity of National Societies to act in specific fields in which the ICRC has expertise; and the encouragement of operational interaction with the Movement's other components, in particular the operating National Society, in the course of humanitarian work.

The Movement is made up of the ICRC, the International Federation and the National Societies. Its components work together to the same end: to alleviate human suffering, protect life and health and ensure respect for human dignity at all times and in all circumstances.

The National Societies form a network comprising several million volunteers working to attain that shared goal. At national level, the operating National Societies are the first able to respond to the humanitarian consequences of emergency situations, including situations of violence.

At international level, National Societies with the requisite capacity and will can contribute to or participate in the Movement's international operations with a view to heightening their impact on the persons affected (participating National Societies). In an armed conflict or internal disturbances, the ICRC or, in some situations, the operating National Society directs and coordinates the Movement's international response, if there is one (see section VIII.B below).

Before the situation of violence breaks out, or just as it is starting, the ICRC conducts preparedness activities and evaluates needs. When possible, it does so jointly with the operating National Society, so as to facilitate an effective Movement response when the time comes to take humanitarian action. The ICRC also endeavours to strengthen the capacity of operating National Societies through support programmes such as the Safer Access approach.<sup>54</sup>

During humanitarian operations in situations of violence below the threshold of armed conflict, and depending on the type of activity, the ICRC ensures that its activities complement those of the operating National Society and the other Movement components active in the context. The aim is to ensure optimum and transparent humanitarian action by the Movement as a whole, with

In situations of violence below the threshold of armed conflict, the ICRC seeks possible partnerships to implement its humanitarian action.

dialogue with the criminals on matters related to the protection of the population in the same way that it might engage in dialogue on protection of the civilian population with a rebel group in an armed conflict.

53 See above note 50.

54 See <http://www.icrc.org/saferaccess>.

due regard for the mandates and roles of its different components as defined in the applicable statutory and regulatory framework (see section VIII.B below). The ICRC should thus be able to strengthen its capacities and those of the operating National Society by exchanging expertise and experiences and to take full advantage of the operating National Society's operational capacities, its roots in the communities affected and its privileged position with the public authorities and, in some cases, with the other protagonists of the violence.

In situations in which the operating National Society is unable or does not have the capacity to perform or take part in impartial humanitarian work, the ICRC can run its own operation for the people affected by the violence.

When the ICRC withdraws from a specific context or activity, the operation, or some aspects of it, may be handed over to the operating National Society. In that case, the ICRC must ensure that the operating National Society concerned is duly involved in the ICRC's activities, insofar as that corresponds to its – the operating National Society's – objectives and capacities.

Whenever possible, the ICRC seeks partnerships within the Movement. It endeavours to coordinate its work with the operating National Society and to promote exchanges of expertise and experience in order to build the National Society's and its own capacities. By the same token, it seeks coordination with the Movement's other components present in the context.

For some activities, the ICRC may also act in partnership with the authorities or with local, national or international organizations.

The decision to develop a humanitarian operation in partnership is taken after an in-depth analysis of the specific risks, notably in terms of the quality of the operation being conducted. In all cases, the operation's impact is decisive. The ICRC will decide to act alone when doing so renders its response to the humanitarian needs identified more effective.

## B. Legal framework for partnerships within the Movement

The Movement's Statutes and the rules adopted by the Movement on the coordination of its international activities (notably the Seville Agreement<sup>55</sup> and its Supplementary Measures<sup>56</sup>) are the reference texts defining the conditions governing how the ICRC works with its Movement partners. The Seville Agreement and its Supplementary Measures specify the respective role of each of the Movement's components, in particular by assigning a lead agency for each type of situation.

Thus, the Seville Agreement assigns the role of lead agency ('the general direction and coordination of an international relief operation') to the ICRC in

<sup>55</sup> See note 29 above.

<sup>56</sup> See note 30 above.

situations of internal strife (and in armed conflicts), including their direct results. The lead agency concept ‘applies primarily in emergency situations (...) where rapid, coherent and effective relief is required in response to the large-scale needs of the victims, on the basis of an evaluation of these needs and of the capacity of the National Society concerned to meet them’<sup>57</sup> (Seville Agreement, Article 4).

The Supplementary Measures, for their part, specify that the operating National Society ‘may also assume the role of Lead Agency in some situations and when not, it always is the “primary partner” of the Lead Agency’ (section 1.2).

Section 1.7 of the Supplementary Measures specifies that, ‘[a]s a primary partner of the Lead Agency, the host National Society is consulted on all aspects of the Movement’s response’.

The Supplementary Measures further stipulate that ‘in situations of armed conflict, internal strife and their direct results (...) there are two institutions (the host National Society and the ICRC) with an *explicit mandate* to meet the needs of the people affected’ (Section 1.12, emphasis in the original).

### C. Cooperation with other partners so as to heighten the anticipated impact on the people affected and with due regard for the Fundamental Principles

Although the ICRC prefers to engage in partnerships with operating National Societies when conducting humanitarian operations, it may also form partnerships with other governmental or non-governmental organizations (especially local ones) or mobilize other protagonists to provide aid to people affected by a situation of violence.

It is the primary responsibility of the State to respond to the humanitarian consequences of a situation of violence on its territory, using its own services and/or enabling local or international humanitarian practitioners to act in order to provide a better response to the needs of the people affected. In that framework, the ICRC can take action and carry out humanitarian activities. Acting as a substitute, or in addition to its privileged partnership with the operating National Society, the ICRC can, in certain circumstances, carry out activities in partnership with State services (local authorities, health, education and security services, etc.) and/or with local (non-governmental, civil society and other organizations) or international organizations. The aim of such partnerships is to heighten the impact of the humanitarian activities by improving access, obtaining specific expertise, planting local and lasting roots for the activity, etc.

In all cases, the ICRC ensures that its activities and modes of operation do not contravene the Fundamental Principles.

57 On the ground, some operating National Societies are increasingly acting as lead agency in situations of violence.

## **IX. State consent for the ICRC's humanitarian activities in a situation of violence below the threshold of armed conflict**

No matter what the circumstances in which the ICRC is working in a given context, it ensures that it has the consent of the State to implement its humanitarian activities. Those circumstances may vary widely. The ICRC may plan to take humanitarian action in response to a situation of violence below the threshold of armed conflict in a State in which it is already present (because it is already carrying out activities related to an armed conflict, or for other reasons). In some contexts in which the ICRC is considering new activities in response to such a situation, agreements on its presence and/or activities may have already been signed in the past (headquarters agreements, memoranda, agreements on visits, etc.). Conversely, it may plan humanitarian activities in a context in which it is not present and in which it has concluded no agreement with the authorities.

ICRC action in situations of violence below the threshold of armed conflict does not constitute interference in the internal affairs of the State concerned and has no impact on the legal status of those responsible for the violence or the people affected.

The ICRC is open with the authorities concerned, whom it informs about the reasons why it wishes to be involved and about the nature of its involvement.

Because of this variety of contexts, the ICRC adapts the content and form of its dialogue to obtain the State's consent for its planned activities on a case-by-case basis.

Should the State refuse to allow the ICRC to carry out its planned humanitarian activities, the ICRC endeavours to pursue the dialogue with a view to convincing the authorities that its offer of services is justified, that its humanitarian work is purely impartial, neutral and independent and that its activities are needed to respond to significant humanitarian needs. The ICRC's offer of services has no impact on the legal classification of the situation or on the status of those responsible for the violence; it in no way constitutes interference in the internal affairs of the State, given that its action is purely humanitarian and has no underlying political agenda.

When it can contact or engage in dialogue with them, the ICRC is also open with any non-State perpetrators of the violence.

## **X. The ICRC's neutral, independent and impartial humanitarian action in situations of violence below the threshold of armed conflict**

The ICRC's status as a 'neutral institution' is mentioned in connection with its specific role in armed conflicts and internal disturbances (Movement Statutes, Art. 5.2(d)). What is more, its 'role as a specifically neutral and independent

institution and intermediary' also constitutes the basis for its work in all situations (whether violent or not) (Movement Statutes, Art. 5.3).

The ICRC's status as a neutral and independent institution is one of its intrinsic characteristics and facilitates the application, in humanitarian action, of the principles of neutrality, independence and impartiality.<sup>58</sup>

In certain situations of violence below the threshold of armed conflict, the principle of neutrality may at first sight appear ill-suited if it is construed in terms of armed conflicts and the ICRC's role as a neutral intermediary between two parties to an armed conflict.<sup>59</sup> Indeed, in certain situations, for example in situations in which the violence is predominantly criminal, it is not always appropriate to highlight the role of 'neutral intermediary' that the ICRC can play in some circumstances. It is nevertheless true that, even in such cases, the ICRC remains a 'neutral institution'. As such, it does not take part in political discussions or disputes in the context concerned, it does not take a position in favour of or against a government policy, etc. Its quality as an (apolitical) 'neutral institution' that does not necessarily play the part of 'neutral intermediary' between the parties to the violence can help it win the trust of both the authorities and other perpetrators of the violence and thus facilitate access to affected areas and people that would be off limits to other humanitarian practitioners.

This does not mean that the ICRC can never refer to its role as a 'neutral intermediary' in a situation of violence below the threshold of armed conflict. Depending on the nature and the characteristics of the violence, in particular when it is perpetrated by non-State groups fighting each other (e.g. polarized intercommunity violence), the ICRC can position itself as a neutral intermediary between those groups and thus win acceptance from all those responsible for the violence and conduct humanitarian activities impartially and effectively.

## Concluding remarks

The aim of this policy document is to affirm and explain the ICRC's role in situations of violence below the threshold of armed conflict. Indeed, the ICRC may mistakenly be perceived as having a role to play only in armed conflict situations. This document demonstrates that this has never been the case, whether in respect of the legal sources underpinning the ICRC's work and mission or its past operational practice.

In addition, this document implicitly confirms that armed conflicts remain at the heart of the ICRC's scope of action, which nevertheless also comprises other situations of violence, as defined in this document (i.e. those in which the violence is collective but remains below the threshold of armed conflict). The ICRC decides to

58 The policy document entitled *The ICRC: its mission and work* (above note 1) states that the ICRC's neutral, independent and impartial humanitarian action 'offers the best chance of being accepted during an armed conflict or other situation of violence'.

59 In armed conflicts, it is a principle that the belligerents are equal before IHL. That principle does not exist in other situations of violence, in which IHL is not applicable.

act in such situations of violence only after having engaged in a specific process of analysis based on simple criteria for involvement: the existence of significant humanitarian consequences generated by the situation of violence and the relevance of the humanitarian action it is considering in response. This policy document also recalls that, in this type of situation in particular, the ICRC ensures that it has the consent of the State for its work and that it strives to work in partnership with other, preferably local, players, above all, if possible, with the National Society.

## REPORTS AND DOCUMENTS

# Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict

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### **Abstract**

*The Montreux Document on Private Military and Security Companies (Montreux Document) was adopted in 2008 by seventeen States to reaffirm and, as far as was necessary, clarify the existing obligations of States and other actors under international law, in particular under international humanitarian law (IHL) and international human rights law (IHRL). It also aimed at identifying good practices and regulatory options to assist States in promoting respect for IHL and IHRL by private military and security companies (PMSCs). Today, fifty-one States and three*

\* This article was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC).

*international organizations have endorsed the Montreux Document. It contains twenty-seven “Statements” – sections recalling the main international legal obligations of States in regard to the operations of PMSCs during armed conflicts. Each statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in a way that clarifies its applicability to PMSC operations. This article aims to detail the basis of each legal obligation mentioned in the first part of the Montreux Document (Part I). The article follows the structure of Part I, in order to better facilitate its comprehension. The second part of the Montreux Document, relating to good practices, is not covered in this article.*

**Keywords:** Montreux Document, international legal obligations, IHL, IHRL, private military and security companies, private contractors, armed conflict, State responsibility



In 2006, the government of Switzerland and the International Committee of the Red Cross (ICRC) launched an initiative to promote respect for international humanitarian law (IHL) and international human rights law (IHRL) with regard to private military and security companies (PMSCs) operating in situations of armed conflict. Two years later, after several meetings with States and representatives from civil society, academic institutions and industry, seventeen States signed the Montreux Document on Private Military and Security Companies (Montreux Document).<sup>1</sup>

The Montreux Document should not be construed as endorsing the use of PMSCs in any particular circumstance or as taking a stance on the broader question of legitimacy and advisability of using PMSCs in armed conflict. Although this question is an important one, there was at the time of the launch of the initiative an urgent need to counter the misconception that PMSCs were operating within a legal vacuum. Therefore, the initiative focused on restating and clarifying the existing legal obligations relating to the activities of PMSCs during armed conflict and on setting out good practices in this regard. Indeed, the increased presence of PMSCs in armed conflict raised important humanitarian and legal concerns such as the status of PMSC personnel under IHL; States’ obligations to take appropriate measures to prevent, investigate and provide effective remedies for

1 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008 (Montreux Document), available in Arabic, Chinese, English, Finnish, French, Spanish and Russian at: [www.eda.admin.ch/psc](http://www.eda.admin.ch/psc) (all internet references were accessed in May 2014). The Montreux Document brochure is available in English, French, Spanish and Russian at: [www.icrc.org/eng/resources/documents/publication/p0996.htm](http://www.icrc.org/eng/resources/documents/publication/p0996.htm). On the process that led to the adoption of the Montreux Document, see James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document”, *Journal of Conflict and Security Law*, Vol. 13, No. 3, 2008; Louis Balmond, “Observations sur le Document de Montreux relatif aux obligations juridiques internationales pertinentes et aux bonnes pratiques pour les États concernant les activités des sociétés militaires privées”, *Revue Générale de Droit International Public*, Vol. 113, No. 1, 2009.

misconduct of PMSCs and their personnel; and individual accountability of PMSC personnel.

The Montreux Document therefore pursues two main objectives: (1) to reaffirm and, as far as is necessary, clarify the existing obligations of States, PMSCs and their personnel under international law, in particular under IHL and IHRL; and (2) to identify good practices and regulatory options to assist States in promoting respect for IHL and IHRL by PMSCs. As of January 2015, the Montreux Document had been signed by fifty-one States and three international organizations.<sup>2</sup>

The Montreux Document shall not be interpreted as limiting or prejudging in any manner existing rules of international law or the development of new ones. It is a restatement that certain well-established rules of international law apply to States and PMSCs.

The Montreux Document also does not concern or affect in any manner the rules relating to the *jus ad bellum*,<sup>3</sup> in particular those contained in the Charter of the United Nations. It does not address the question of mercenaries either, but States' obligations in this regard remain relevant and applicable. In particular, the African Union Convention for the Elimination of Mercenarism in Africa and the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries can be recalled.<sup>4</sup> Although in most situations directors and employees of PMSCs will not qualify as mercenaries under international law,<sup>5</sup> this possibility cannot be excluded and international agreements prohibiting mercenaries should be kept in mind.

The Montreux Document contains twenty-seven statements recalling the main international legal obligations of States in regard to operations of PMSCs in armed conflicts (hereinafter "statements"). Each statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in a way that clarifies its applicability to PMSCs' operations. These statements do not create legal obligations, but recall existing ones and link them with the activities of PMSCs in conflict zones. They highlight the responsibilities of three types of States: Contracting, Territorial and Home States. In addition, these statements recall that PMSCs and their personnel are bound by IHL and must respect its provisions at all times during armed conflicts, regardless of their status.

2 Swiss Federal Department of Foreign Affairs, *Participating States of the Montreux Document*, 11 November 2014, available at: [www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html](http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html).

3 The *jus ad bellum* relates to the legality of the use of force by States under international law and the *jus in bello* to the humanitarian rules that must be respected in warfare. On this issue, see Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, Vol. 1, 3rd ed., ICRC, Geneva, 2011, p. 114.

4 Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa, 1972, OAU Doc. CM/433/Rev.L (entered into force 1977), Annex 1; International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) (UN Mercenary Convention).

5 For legal definitions of mercenary under international law, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 47; OAU Convention for the Elimination of Mercenaries in Africa, above note 4, Art. 1; UN Mercenary Convention, above note 4, Art. 1.

While the statements set out existing obligations under IHL and IHRL, they do not seek to define – for every case – which rules are applicable in a given context. IHL, for instance, only applies in situations of armed conflict, either international or non-international. As far as the activities of PMSCs in such contexts are concerned, IHL is applicable to their conduct if their activities have a link to the armed conflict.

IHRL applies in times of peace and does not cease to apply in armed conflict<sup>6</sup> – although in times of armed conflict or other public emergency, States may decide to derogate from certain human rights. Nevertheless, rights such as the right to life and the prohibition of torture, inhuman or degrading treatment are non-derogable and thus continue to fully apply.<sup>7</sup> Both bodies of law provide protection to victims of armed conflict within their respective spheres of application.<sup>8</sup> Therefore, although the Montreux Document focuses on situations of armed conflict, statements and good practices related to IHRL obligations remain relevant. Furthermore, although not specifically mentioned in the document, it goes without saying that the rules set forth in the Montreux Document are relevant to situations involving PMSCs on the high seas.<sup>9</sup>

6 See for instance, International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106:

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

See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25; and ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 216.

7 See, e.g., International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 4:

1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2) No derogation from articles 6 [right to life], 7 [prohibition of torture and of cruel, inhuman or degrading treatments], 8 [paragraphs I and 2] [prohibition of slavery], 11 [prohibition of imprisonment for failure to fulfil a contractual obligation], 15 [non retroactivity of criminal law], 16 [right to legal personality] and 18 [right to freedom of thought, conscience and religion] may be made under this provision.

8 30th International Conference of the Red Cross and Red Crescent Movement, *Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict*, 30 November 2007, Resolution No. 3, available at: [www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-3-2007.htm](http://www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-3-2007.htm).

9 Indeed, the high seas are not a zone in which States are exempted from international legal obligations. See San Remo Manual on International Law Applicable to Armed Conflict at Sea, 12 June 1994, Art. 10(b). For IHRL, see, for instance, European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (Grand Chamber), 23 February 2012, paras 79 ff.

This article aims to explain in detail the basis of each legal obligation mentioned in the first part of the Montreux Document, following the structure of the document in order to facilitate its comprehension and implementation. The second part of the Montreux Document, relating to good practices, will not be addressed in this article.

## Definitions

It is important to understand the terms used in the Montreux document and their specific definition within the document. Several terms will be explained in this section.

For the purposes of the Montreux document:

- **“PMSCs”** are private businesses entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

The Montreux Document does not attempt to classify companies. Rather, it seeks to promote respect for IHL and IHRL by any business providing military or security services in armed conflict situations. PMSCs often provide both military and security services, and even other services. It is immaterial whether a PMSC considers itself to be a “military” or “security” company – what matters is the nature of the activities it carries out in a given situation. Furthermore, the Montreux Document is not restricted to military or security services involving the use of arms; it is also relevant for services such as the training of armed forces, intelligence and the interrogation of prisoners.

- **“Personnel of a PMSC”** are persons employed by a PMSC, through direct hire or under a contract with a PMSC, including its employees and managers.

The rules contained in the Montreux Document are applicable to every individual employed by a PMSC and operating in a situation of armed conflict. This includes all employees, regardless of their function within a company, as well as all managers and directors. Personnel employed by business entities which are themselves subcontracted by a PMSC are also covered by this definition.

- **“Contracting States”** are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
- **“Territorial States”** are States on whose territory PMSCs operate.
- **“Home States”** are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”.

The Montreux Document is conceived around three main relations that States may have with PMSCs: contractual, territorial or by means of incorporation.

The Contracting State, due to the specific links that the contract creates between itself and the PMSC, should take particular care to ensure that the decision to contract a PMSC does not impede respect for IHL and IHRL in any manner. The notion of “contract” should be interpreted in a broad sense, so as to also include very basic contracts. Furthermore, when the contracted PMSC subcontracts to another PMSC, the Contracting State should exercise due diligence to ensure that the subcontracted PMSC will also respect IHL and IHRL.

As for the Territorial State, it has, of course and as with all other States, an obligation to respect and ensure respect of IHL. When a State authorizes PMSCs to operate on its territory and/or to collaborate with or support its own military or police forces, it shall make certain that adequate national mechanisms are in place to ensure respect for IHL on its territory and to allow proper measures, including investigation and prosecution, to be carried out in case of violations. This territory also includes territorial seas and air above its lands and seas. Ships under the flag of a State will also be considered as part of the territory of that State. States are also generally considered responsible for respect and implementation of IHRL obligations “within their jurisdiction”.<sup>10</sup>

The Home State is the State in whose jurisdiction the PMSC is incorporated, registered or has its principal place of management. Through its domestic legislation and policy, the Home State can contribute to ensuring that PMSC activities do not result in violations of IHL or IHRL. A State can do that through a variety of measures, such as imposing specific training requirements or activities restrictions for this industry through a licensing and reporting system.

Even if their relationship with PMSCs may be more tenuous, all other States also have some obligations in this regard and should implement the Montreux Document and the good practices it sets out. For instance, all States have an obligation to ensure that they have legislation allowing them to investigate and prosecute war crimes committed by their nationals working for foreign PMSCs abroad.

Furthermore, the IHL and IHRL obligations of Contracting, Territorial and Home States are not implemented in watertight compartments, and various States may have obligations toward one particular PMSC and members of its personnel. Therefore, with the aim of ensuring respect for IHL and IHRL and access to remedy for victims, States should cooperate in elaborating and implementing their regulations so as to avoid jurisdictional gaps.

10 See ICJ, *Legal Consequences of the Construction of a Wall*, above note 6, para. 109. Some States, in particular the United States and Israel, reject the extraterritorial application of certain human rights treaties, especially the ICCPR, via a narrow interpretation of “jurisdiction” as concurrent with “territory”. However, according to the UN Human Rights Committee, this treaty “also applies to those within the power or effective control of the forces of a State Party acting outside its territory”. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para 10.

## A. Contracting States

### **1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.**

This statement recalls that contracting companies to perform certain activities does not relieve States from their international law obligations. Although international law does not prevent States from contracting out various activities,<sup>11</sup> failure of a State to meet its international obligations cannot be excused by the outsourcing of a particular task. Therefore, Contracting States shall ensure that the respect and implementation of their obligations under international law, and in particular under IHL and IHRL, is not impeded by their decision to contract out PMSCs.

For instance, in an international armed conflict, the Detaining Power is responsible for the treatment given to prisoners of war (PoWs).<sup>12</sup> Therefore, even if the capture, transfer or detention of PoWs is carried out by a PMSC contracted by the State, the Contracting State, which will be the Detaining Power in this case, remains responsible for the respect of applicable IHL rules. This overall responsibility of the Detaining Power is also applicable if it contracts out activities related to the running of a detention facility to a private company, such as interrogation of detainees or internees, care or facility administration. If private company personnel do not treat detainees according to the standards of IHL, for instance by mistreating them or by not ensuring adequate health care or nutrition, the State will be responsible if the action or omission in question can be attributed to the State (in this regard, see Commentary to Statement 7) or, depending on the circumstances, for its own failure to ensure that the conditions of detention and standards of treatment specified in the relevant conventions are met (see Commentary to Statement 3).

Furthermore, States contracting out the operation of checkpoints to PMSCs retain their obligation to ensure freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions and to allow and facilitate

11 However, it is interesting to point out that international law prohibits the use of privateers. See Declaration Respecting Maritime Law, Paris, 16 April 1856 (entered into force 16 April 1856), Art. 1: "Privateering is, and remains, abolished." This prohibition is reflected in the Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907 (entered into force 26 January 1910), Art. 1: "A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies."

12 Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III), 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 12. The responsibility is the same in respect to any protected persons in the hand of a party to the conflict, such as civilian internees during international armed conflicts. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 29. However, activities listed in Statement 2 below cannot be contracted to non-State agents.

rapid and unimpeded passage of humanitarian relief, which is impartial and conducted without any adverse distinction, for civilians in need.<sup>13</sup>

In a situation of occupation, IHL imposes on the Occupying Power a number of obligations towards the population of the occupied territory.<sup>14</sup> The Occupying Power remains responsible for taking all feasible measures to fulfil these obligations, even if it contracts a private company to do so. A more specific obligation can be found in Article 43 of the Hague Regulations, which requires the Occupying Power to “take all measures in his power to restore, and ensure, as far as possible, public order and safety”. According to the International Court of Justice (ICJ):

This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.<sup>15</sup>

The Occupying Power has an obligation to exercise “vigilance” in order to prevent violations of IHL and IHRL, including by non-State actors.<sup>16</sup> Thus, in an occupied territory, the Occupying Power has to take positive steps to prevent all third parties, including PMSCs, from committing acts that endanger public order and safety.

Another example can be found in respect to training and teaching. The fact that military training and teaching are being performed by PMSCs does not discharge the State or the military commanders of their obligation to prevent and suppress violations of IHL.<sup>17</sup>

States also remain bound by their obligations under IHRL (as they continue to apply in times of armed conflict). Indeed, under IHRL, States not only have an obligation to refrain from violating human rights, but also have a positive obligation to ensure that the human rights of persons under their jurisdiction are

13 See GC IV, Art. 23; AP I, Arts 70(2), 71(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II), Art. 18(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 55 and 56.

14 For instance, the Occupying Power has the obligation to ensure the general welfare of the occupied population. Hague Convention (IV) respecting the Laws and Customs of War on Land, and its Annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910), Art. 43; the obligation to facilitate, in cooperation with national and local authorities, the proper working of all institutions devoted to the care and education of children (GC IV, Art. 50); the duty to ensure, to the fullest extent of the means available to it, food and medical supplies the population (GC IV, Art. 55), as well as clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population (AP I, Art. 69); and, in cooperation with national and local authorities, to ensure the maintenance of health and medical establishments and services (GC IV, Art. 56). It also has the obligation to ensure that, when the needs of the civilian population are not met, relief actions are undertaken and relevant IHL dispositions implemented without delay (see also GC IV, Arts 59–62, 108–111; and AP I, Arts 69 and 71).

15 ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 178.

16 See *ibid.*, para. 179.

17 AP I, Arts 86 and 87.

respected even by private actors, including PMSC personnel.<sup>18</sup> Therefore, States must adopt legislative and other measures in order to protect and to implement their obligations under IHRL. These human rights obligations might be limited when States contract PMSCs to conduct activities abroad (see Commentary to Statement 4).

**2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.**

Under IHL there are a number of responsibilities of the parties to the conflict that cannot be contracted out at all, as they must be performed by the State party itself, and in some instances even by a specific person. Examples can be found in the following provisions:

- Article 51 of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV), requires a written order of the commander-in-chief for any contribution collected in occupied territory;
- Article 52 of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV), requires the commander in the occupied locality to give authorization for requisitions or demanded services;
- Article 1 of the Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships indicates that a merchant ship converted into a warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and responsibility of the power whose flag it flies;
- Article 39 of GC III states that PoW camps have to be under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power;
- Article 120(2) of GC III states that death certificates or lists of deaths of prisoners of war have to be certified by a responsible officer;
- Article 99 of GC IV states that internment facilities have to be under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power; and
- Article 121 of GC III and Article 131 of GC IV state that in case of death of a prisoner of war or a civilian internee caused or suspected to have been caused

18 See, e.g., General Comment No. 31, above note 10, para. 8:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

by another person, the Detaining Power must carry out an immediate official enquiry.

**3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:**

- a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;**
- b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;**
- c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.**

The obligation to respect IHL means an obligation for the State to refrain from committing violations through its own authorities and armed forces, while the obligation to ensure respect for IHL entails a duty to take measures to prevent and repress violations of humanitarian law. It is a commitment to promote compliance with IHL,<sup>19</sup> a commitment to act “with due diligence to prevent [violations of IHL] from taking place, or to ensure their repression once they have taken place”.<sup>20</sup>

The obligation to ensure respect for IHL is enshrined in Article 1 common to the four Geneva Conventions and Article 1 of Additional Protocol I (AP I), which stipulate that “[t]he High Contracting Parties undertake to respect and to ensure respect for [the present Convention/this Protocol] in all circumstances”. This obligation “does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”.<sup>21</sup> It is also a rule of customary law specifically in regard to persons or groups of persons acting in fact on the instructions of, or under the direction or control of, the State<sup>22</sup> (in this respect, see Commentary to Statement 7). The obligation of States not to encourage violations of IHL by parties to an armed conflict and to exert their influence, to the degree possible, to stop violations of IHL is also a rule of customary law.<sup>23</sup> “Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from

19 See Intervention by Mr Pilloud from the International Committee of the Red Cross in Diplomatic Conference of Geneva of 1949, Final Record, Vol. 3, 9th Meeting, 25 May 1949, p. 39; ICRC, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, 2nd ed., Geneva, April 1958, p. 129; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Commentary on Art. 1, p. 18; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, Art. 91, p. 1057.

20 *Ibid.*, Art. 91, p. 1058.

21 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 220.

22 See ICRC Customary Law Study, above note 13, Rule 139.

23 See *ibid.*, Rule 144.

occurring, but without warranting that the event will not occur.”<sup>24</sup> As the wording of common Article 1 indicates, this has to be the case in all circumstances, including in respect to the activities of PMSCs.

Contracting States are in a particularly favourable position to ensure respect for IHL. Indeed, PMSCs provide services on the basis of contracts with clients, including Contracting States. Contracting States thus have the means to effectively control how PMSCs operate. In this respect, the good practices contained in Part II of the Montreux Document offer guidance on measures that can be taken to ensure that PMSC personnel comply with IHL. For instance, this could be done by first determining which services may be outsourced, by establishing procedures and criteria for the selection and contracting of PMSCs, by monitoring compliance of PMSCs and their personnel with IHL and IHRL, and by ensuring accountability in case of violations, for instance through criminal procedure or non-criminal accountability mechanisms.<sup>25</sup>

In addition to the obligation to give appropriate instructions to its armed forces and ensure that they are properly carried out,<sup>26</sup> The Contracting State must also disseminate the texts of the Geneva Conventions to its armed forces and to the civilian population as widely as possible.<sup>27</sup> The State also has an obligation to disseminate IHL among “the entire population” – especially personnel of PMSCs.<sup>28</sup> Furthermore, considering the nature of the services offered by PMSCs and the fact that they may operate in conflict zones, States may decide to develop dissemination programmes specifically designed for the industry.

The Contracting State has to give itself the legal and material means to ensure that its obligations will be respected and to take measures to prevent violations of IHL by PMSC personnel. For instance, the Commentary to Article 27 of GC IV providing for the treatment of protected persons<sup>29</sup> states:

The Convention does not confine itself to stipulating that such acts are not to be committed. It goes further; it requires States to take all the precautions and measures in their power to prevent such acts and to assist the victims in case of need.<sup>30</sup>

24 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, No. 2, 2001 (ASR Draft Articles), Commentary to Art. 14, para. 14.

25 See Montreux Document, above note 1, Part 2, Good Practices 1–23.

26 J. Pictet, above note 19, Commentary on Art. 1, p. 16.

27 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (GC I), 75 UNTS 31 (entered into force 21 October 1950), Art. 47; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949 (GC II), 75 UNTS 85 (entered into force 21 October 1950), Art. 48; GC III, Art. 127; GC IV, Art. 144; AP I, Art. 83; AP II, Art. 19.

28 See GC I, Art. 144; ICRC Customary Law Study, above note 13, Rule 143.

29 Which established, *inter alia*, that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”

30 J. Pictet, above note 19, Commentary on Art. 27, p. 204.

Therefore, measures taken by States to prevent violations of IHL by PMSCs and their personnel and accountability mechanisms established to deal with violations must have practical and concrete preventive effects. They must also provide assistance and remedies to victims.

IHL gives rather clear indications that military authorities must be fully acquainted with the texts of the Geneva Conventions<sup>31</sup> and that they must have adequate instructions, orders and supervision.<sup>32</sup> This obligation is relevant for activities of personnel of a PMSC that is integrated into the armed forces or whose conduct is attributable to the State (see below Commentary to Statement 8). As stated before (see Commentary to Statement 1), the State is not discharged from its obligations under IHL by its decision to have recourse to PMSCs to provide military-related activities.

Which measures a State has to take in order to discharge its obligation to ensure respect will depend on various parameters such as the capacity of that State to effectively influence the PMSCs and/or members of their personnel likely to commit violations, the geographical distance of the State from the events, and the strength of its links – contractual, legal, political, economical, etc. – with PMSCs.<sup>33</sup> The risk of IHL violations should also be a factor in assessing the due diligence obligation of a State. For instance, if the PMSC personnel operate in an armed conflict situation or are authorized to carry arms, or if the contract involves direct participation in hostilities, the State should be particularly vigilant and should implement preventive measures appropriate to the situation.<sup>34</sup>

Mainly, States should provide instructions to the relevant authorities, for instance their own authorities in charge of liaising with PMSCs. If States contract PMSCs, the obligation to ensure respect for IHL can be understood as entailing an obligation of the contracting authorities to ensure that the company and its employees are aware of their obligations and commit themselves to respecting them.<sup>35</sup> When the contracted PMSC subcontracts other PMSCs, the Contracting State should also exercise due diligence to ensure that IHL is respected by those subcontracted PMSCs. How the authorities ensure this is within the margin of discretion of the State, as long as it takes all appropriate measures. As a minimum, States have an obligation not to encourage or assist in any violations of IHL committed by personnel of PMSCs that they contract.<sup>36</sup>

31 GC III, Art. 39; GC IV, Arts 99, 144(2); AP I, Arts 82, 83(2), 87.

32 AP I, Art. 80(2).

33 See, by analogy, ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 430.

34 In particular, Contracting States should take into account the potential involvement of private contractors in direct participation in hostilities when determining which services may or may not be contracted out to PMSCs. see Montreux Document, above note 1, Part 2, Good Practice 1.

35 See e.g., *ibid.*, Part 2, Good Practices 10, 11, 12, 14 and 15.

36 ICRC Customary Law Study, above note 13, Rule 144. See also ICJ, *Nicaragua v. United States of America*, above note 21, para. 220, finding that the United States was “under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions”.

Finally, the Statement mentions the obligation to suppress violations of IHL. In addition to the suppression of grave breaches, the relevant articles of the Geneva Conventions require the “suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article”.<sup>37</sup> Measures taken in this respect may include, in addition to criminal law, military regulations, administrative orders and other regulatory measures as well as sanctions by appropriate means, which can be administrative, disciplinary or judicial.

**4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.**

The obligation to implement IHRL is a complex one which can vary according to different treaties to which a State has subscribed.<sup>38</sup> The obligations described in the following commentary are relevant not only for Contracting States, but also for Territorial and Home States. However, due to their close link with PMSCs, Contracting States should be especially vigilant in ensuring that they have adopted adequate legislative or administrative measures to give effect to their IHRL obligations in respect to activities of PMSCs that they contract.

**a) Obligation to implement human rights:** Human rights can be threatened not only by the conduct of States, but also by that of private actors. Some human rights treaties specifically require States to protect individuals from private actors’ abuses.<sup>39</sup> Human rights bodies and courts have also generally interpreted the obligation to implement human rights as including an obligation for States to protect people against the conduct of third parties that infringes upon their

37 GC I, 49(3); GC II, 50(3); GC III, 129(3); GC IV, 146(3).

38 See, e.g., ICCPR, Art. 2(1); African Charter on Human and Peoples’ Rights (ACHPR), 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (entered into force 21 October 1986), Art. 1; American Convention on Human Rights (ACHR), 22 November 1969, OAS Treaty Series No. 36, 1144 UNTS 123 (entered into force 18 July 1978), Art. 1; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended, Art. 1. On this issue, see also Monica Hakimi, “State Bystander Responsibility”, *European Journal of International Law*, Vol. 21, No. 2, 2010, pp. 344–345.

39 See, e.g., Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 18 December 1979, UN Doc. A/34/180 (entered into force 3 September 1981), Art. 2(e); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 7 March 1966, 66 UNTS 195 (entered into force 4 January 1969), Arts 2(d), 5(b); Convention on the Rights of the Child (CRC), 20 November 1989, UN Doc. A/44/49 (entered into force 2 September 1990), Art. 19(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, UN Doc. A/45/49 (entered into force 1 July 2003), Art. 16(2); Convention on the Rights of Persons with Disabilities, 13 December 2006, 46 ILM (2007) 443 (entered into force 3 May 2008), Arts 4(e), 16.

human rights.<sup>40</sup> At a minimum States have an obligation to exercise due diligence to prevent, investigate, hold perpetrators accountable for, and provide remedies against the harm caused by the conduct of private persons or entities which can affect human rights.<sup>41</sup> In regard to the obligation of prevention, the obligation to implement human rights includes, for instance, a duty to provide adequate training and clear guidance on IHRL to PMSC employees.<sup>42</sup>

Certain rights are, of course, more amenable than others to application between private persons or entities. The right to life – which some treaties explicitly oblige States to protect by law<sup>43</sup> – is of particular importance and has been recognized as requiring protection by States against the conduct of third parties.<sup>44</sup>

Similarly, the right to physical integrity, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, has been recognized in international jurisprudence as requiring protection by the State.<sup>45</sup> For instance, if a PMSC employee commits any form of assault on a person, this affects that person's right to physical and mental integrity. The State, even if it is not necessarily responsible for that private act, has an

40 See, for instance, General Comment No. 31, above note 10, para. 8:

However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

See also ECtHR, *X and Y v. the Netherlands*, Series A, No. 91, Judgment, 26 March 1985, para. 27; Inter-American Court of Human Rights (IACtHR), *Velázquez Rodríguez v. Honduras*, Series C, No. 4, Judgment, 29 July 1988, para. 74.

41 See, e.g., *ibid.*, para.172.

42 See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT), Art. 10: "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" (emphasis added). See also Human Rights Committee, "Consideration of Report Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America", UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 14.

43 ICCPR, Art. 6(1); ECHR, Art. 2(1); ACHR, Art. 4(1).

44 See Human Rights Committee, General Comment No. 6 on the Right to Life (Article 6), 30 April 1982, UN Doc. HRI/GEN/1/Rev.7, para. 3; General Comment No. 31, above note 10, para. 8; See also ECtHR, *Osman v. the United Kingdom*, Judgment, *Reports of Judgments and Decisions 1998-VIII*, No. 95, 28 October 1998, para. 115 ff.

45 See, e.g., General Comment No. 31, above note 10, para. 8; Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, 24 January 2008, para. 18; ECtHR, *A. v. the United Kingdom*, Judgment, *Reports of Judgments and Decisions 1998-VI*, No. 90, 23 September 1998, paras 20–24.

obligation – if the assault is of a criminal nature – to investigate, prosecute and punish the perpetrator.<sup>46</sup>

**b) Legislative and other measures:** States must adopt all necessary legislative or other measures to implement their human rights obligations. This includes measures to prevent any violation by the State or abuse by PMSCs and their personnel, to punish violations and to provide remedies to victims. This is explicitly stated in some human rights conventions, such as in Article 2(2) of the International Covenant on Civil and Political Rights, which states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>47</sup>

A similar formulation is found in Article 2 of the American Convention on Human Rights. While the European Convention on Human Rights does not contain an express obligation to adopt legislative measures, the European Court of Human Rights has recognized this obligation in its constant jurisprudence.<sup>48</sup> Furthermore, as mentioned above, some treaty provisions on the right to life explicitly recognize

46 See IACtHR, *Velásquez-Rodríguez v. Honduras*, above note 40, para. 176:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

The Human Rights Committee, in its Concluding Observations on the Report submitted by Lesotho under Art. 40 of the ICCPR, was "concerned that no action has so far been taken to prosecute law enforcement officers and members of the private security agency responsible for the killings in Butha-Buthe in 1995. The Committee recommends to the State party to take the necessary action against those responsible." UN Doc. CCPR/C/79/Add.106, 8 April 1999, para. 19. Although pertaining to inter-State arbitration, in the case of *Laura M. B. Janes and al. (USA) v. United Mexican States*, General Claims Commission, 16 November 1925, *Reports of International Arbitral Awards*, Vol. IV, p. 87, the indication of the Commission on the notion of due diligence may be of interest:

Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender.

47 ICCPR, Art. 2(2).

48 See ECtHR, *X and Y v. The Netherlands*, above note 40, para 40; ECtHR, *Kudla v. Poland*, Judgment, 26 October 2000, paras 158–160. On the obligation to implement human rights obligations through national legislation, see for instance IACtHR, *The Last Temptation of Christ v. Chile*, Series C, No. 73, Judgment, 5 February 2001, para. 88; IACtHR, *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, Series C, No. 94, Judgment, 21 June 2002, para. 212; IACtHR, *Trujillo Oroza v. Bolivia (Reparations)*, Series C, No. 92, Judgment, 27 February 2002, para. 122; Human Rights Committee, *Suárez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, Views, 30 March 1982, para. 15; African Commission on Human and People's Rights (ACoMHPR), *Avocats sans Frontières (on behalf of Gaëtan Bwampamyé) v. Burundi*, Communication No. 231/99, 2000; ACoMHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 211/98, 2001.

the duty to protect this right “by law”, including against criminal conduct by private parties.<sup>49</sup> In regard to PMSCs, the Inter-American Commission in its 1996 Annual Report recommended to Guatemala that it should dedicate additional attention “to the proliferation of arms and private security forces or groups, to assure that adequate legislative, administrative and judicial measures are in place to control the number and use of firearms, and to monitor and control the actions of private security agents”.<sup>50</sup>

**c) Remedies:** Under human rights law, everyone who has an arguable claim that his or her rights have been violated has a right to an effective remedy as determined by competent authorities.<sup>51</sup> Commonly, this means a judicial remedy in accordance with national law, but it can also be an administrative remedy as long as it is effective.<sup>52</sup> Thus the individual has the right to bring a claim against the State authorities not only on the grounds that the State is responsible for a violation committed by its own authorities but also against a failure of the State to protect the individual against the conduct of a PMSC or its personnel. In this sense, the European Court of Human Rights has held that in order to seek protection as well as to ask the authorities to investigate alleged negligence on the part of governmental authorities, individuals have a right to a remedy if they have an arguable claim that the authorities did not fulfil their duty of due diligence to

49 ICCPR, Art. 6(1); ECHR, Art. 2(1); ACHR, Art. 4(1). See also Human Rights Committee, General Comment No. 6, above note 44.

50 Inter-American Commission on Human Rights (IACoMHR), *Annual Report on Human Rights 1996*, Chapter V, OEA/Ser.L/V/II.95, Doc. 7 rev., 14 March 1997, para. 71. In its recommendations to member States, the Commission adds:

The Commission is particularly concerned with the proliferation of private sector security personnel, who may be directed by employers to use measures of force, and who may be utilized without sufficient public sector monitoring or regulation. The Commission consequently recommends that member states review the norms applicable to the provision of private sector security services, and the systems to monitor such activity to ascertain where there may be *lacunae* in coverage and fill them, and take steps to ensure that the provision of such services, to the extent they may be permitted by law, neither conflicts with public sector duties nor infringes upon individual liberties.

*Ibid.*, Chapter VII, Recommendation 2.

51 ICCPR, Art. 2(3); ECHR, Art. 13; ACHR, 25; CERD, Art. 6; CAT, Art. 13; CRC, Art. 39; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN GA Res. A/RES/60/147, 16 December 2005 (Basic Principles on Reparation); see also AComHPR, Principles on Remedy and Fair Trial in Africa of the Commission on Human and People’s Rights, DOC/OS(XXX)247, 2003. The Human Rights Committee in its General Comment No. 29 on derogations during a state of emergency specified that even during a state of emergency, “the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective”. See General Comment No. 29 on Derogations during a State of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.

52 Human Rights Committee, General Comment No. 31, above note 10, para. 15. See also Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, UN Doc. A/HRC/17/31, 21 March 2011 (UN Guiding Principles), Principle 25, which states: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”

prevent the abuse or investigate it.<sup>53</sup> In other words, a victim of unlawful behaviour by a PMSC or its personnel can bring a claim against the State for its failure to take appropriate measures to protect the victim against such unlawful behaviour.

Measures allowing victims to obtain remedies directly from the perpetrator may also be established. Some domestic legislation provides for victims' civil claims to be filed directly against non-State perpetrators, including business entities, for certain human rights and IHL violations; for instance, the US Alien Tort Claims Act (ATCA)<sup>54</sup> gives subject-matter jurisdiction to US federal courts over claims of non-nationals for a tort resulting from violations of international law.<sup>55</sup> Violations of international law that have been recognized as actionable under this statute include genocide,<sup>56</sup> crimes against humanity,<sup>57</sup> war crimes,<sup>58</sup> torture,<sup>59</sup> extrajudicial killings,<sup>60</sup> prolonged arbitrary detention<sup>61</sup> and forced labour.<sup>62</sup> Claims have been filed against PMSCs and members of their personnel based on this statute.<sup>63</sup> However, in 2013, the Supreme Court of the United States held that the presumption against extraterritorial application of federal statutes applies to the ATCA. Its scope of application has thus been significantly narrowed: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial

- 53 See ECtHR, *Osman v. the United Kingdom*, above note 44, para. 147. In the ECHR, this claim can arise out of the right to a fair hearing enshrined in Art. 6 or the right to remedy in Art. 13.
- 54 For an exhaustive overview of international law norms accepted by the jurisprudence, see Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law*, Leiden, Martinus Nijhoff, 2009; Neils Beisinghoff, *Corporations and Human Rights: An Analysis of ATCA Litigation against Corporations*, Peter Lang, Frankfurt, 2008. See also Cedric Ryngaert, "Litigating Abuses Committed by Private Military Companies", *European Journal of International Law*, Vol. 19, No. 5, 2008, p. 1036.
- 55 The ATCA was adopted in 1789 and reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". 28 USC § 1350. According to the jurisprudence, the "law of nations" to which the ATCA is referring must be interpreted as it has evolved and exists today and not as it was at the time of its enactment. See, for instance, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. 1980), p. 881.
- 56 See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1996); *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244 (2nd Cir. 2009).
- 57 See, for instance, *ibid.*; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000); *Presbyterian Church of Sudan v. Talisman*, above note 56; *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); *Bowoto v. Chevron Corporation*, LEXIS 59374 (not reported in F. Supp.) (N.D. Cal. 2007).
- 58 See, for instance, *Kadic v. Karadzic*, above note 56; *Estate of Valmore Lacarno Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman*, above note 56.
- 59 See, for instance, *Filártiga v. Peña-Irala*, above note 55; *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, above note 57.
- 60 See, for instance, *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).
- 61 See *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). On short-term illegal detention not having been considered as reaching the necessary threshold, see *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), at 2765–2768.
- 62 See, for instance, *Doe I v. Unocal Corp.*, above note 59.
- 63 See *Ilham Nassir Ibrahim v. Titan et al.*, 391 F. Supp. 2d 10 (D.D.C. 2005). See also *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, (D.D.C. 2006); *In re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009); *Al Quraishi v. Nakhla et al.*, 728 F. Supp. 2d 702 (D. Md. 2010). Although liability of individuals, including personnel of PMSCs, is well established under this statute, it should be noted that US federal courts are divided on the question of whether a corporation can be held liable under the ATCA. See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2nd Cir. 2011); *John Doe VIII et al. v. Exxon Mobil Corp. et al.*, 654 F.3d 11 (D.C. Cir. 2011), vacated on other grounds.

application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”<sup>64</sup> Nevertheless, it remains possible to bring claims for violations of IHL or IHRL involving business entities under this statute.<sup>65</sup> In other jurisdictions, war crimes may be indictable offences under civil law.<sup>66</sup>

Additional guidance on measures that States can adopt in order to protect victims of abuses by private companies and to provide them with remedies can be found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>67</sup> According to these basic principles, States have an obligation under international law to adopt appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice and remedies, including reparation.<sup>68</sup> Victims should be informed of their rights for seeking redress.<sup>69</sup> States should also support victims of the worst abuses with compensation if compensation is not available from the offender<sup>70</sup> and ensure that victims receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based or indigenous means.<sup>71</sup>

States can also encourage and support corporate-based grievance mechanisms as a complementary means for victims to access remedies.<sup>72</sup> For instance, the International Code of Conduct for Private Security Service Providers (ICoC), adopted in November 2010, provides for the establishment of grievance procedures to address claims alleging failure by the a signatory company to respect the principles contained in the ICoC, brought by personnel of the company or by third parties.<sup>73</sup> The Charter for the Oversight Mechanism of the

64 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010), p. 1669 (reference omitted), affirmed 133 S. Ct. 1659 (2013).

65 On the possibility of bringing claims for IHRL or IHL violations against business entities in various countries, see Beth Stephens, “Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations”, *Yale Journal of International Law*, Vol. 27, No. 1, 2002, pp. 1–57, especially pp. 17–34; L. F. H. Enneking, “Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases”, *George Washington International Law Review*, Vol. 40, No. 4, 2009, pp. 903–938.

66 This is the case, for instance, in the Canadian province of Quebec, which applies civil law in the matter. See Superior Court of Quebec, *Bil’in (Village Council) et al. v. Green Park International Inc. et al.*, No. 500-17-044030-081, 18 September 2009, at 37.

67 Basic Principles on Reparation, above note 51.

68 *Ibid.*, at I.(2)(b) and (c). See also Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UNGA Res. A/RES/40/34, 29 November 1985.

69 Basic Principles on Reparation, above note 51, Annex, Principle 12(a).

70 *Ibid.*, Principles 15, 16. See also Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, above note 68, Principle 12.

71 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, above note 68, Principle 14.

72 See the UN Guiding Principles, above note 52, and their Addendum, “Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned”.

73 See International Code of Conduct for Private Security Service Providers (ICoC), 9 November 2010, Arts 66, 67, 68, available at: [www.icoc-psp.org](http://www.icoc-psp.org).

ICoC, adopted in February 2013,<sup>74</sup> establishes the foundations for the creation of the ICoC Association (ICoCA). The ICoCA was officially launched in September 2013 and involves PMSCs, governments and civil society organizations. As of January 2014, more than 700 companies had signed the ICoC and committed to respect IHL and IHRL standards.

**d) Limits of extraterritorial application:** Human rights treaties usually restrict the obligation of States to secure rights and freedoms that they provide for to “their territory or subject to their jurisdiction”.<sup>75</sup> “Subject to their jurisdiction” must be understood as anyone within the power or effective control of the authorities.<sup>76</sup> Although obligations of States that contract PMSCs to carry out activities abroad or Home States of PMSCs operating in another territory may be limited, those States may have some obligations in this respect and may bear responsibility for violations of human rights committed by PMSCs abroad.<sup>77</sup> For instance, if a State contracts a PMSC to carry out operations abroad, this State will have obligations with regard to violations of human rights committed by the PMSC or its personnel if their acts can be attributed to the State by virtue of the law of State responsibility (see below Commentary to Statement 8) or can be considered as having occurred within the jurisdiction of the State. Again, if the Contracting State has effective control over the territory abroad, such as in a situation of occupation, or if the State has power over the victim, such as in a situation of detention,<sup>78</sup> effective control of the State would entail human rights law obligations.

Furthermore, domestic criminal laws may provide for domestic jurisdiction over acts committed by nationals abroad. For instance, criminal provisions on war crimes (see Commentary to Statement 5), crimes against humanity, genocide,

74 International Code of Conduct for Private Security Service Providers Association, available at: [www.icoc-ppsp.org/uploads/ICoC\\_Articles\\_of\\_Association.pdf](http://www.icoc-ppsp.org/uploads/ICoC_Articles_of_Association.pdf).

75 See, e.g., ICCPR, Art. 2; ECHR, Art. 1; ACHR, Art. 1 (this article does not mention territorial limitation, but rather stipulates that States have the obligation to respect and ensure the free and full exercise of rights and freedoms provided by the convention for “all persons subject to their jurisdiction”).

76 See General Comment No 31, above note 10, para. 10; ECtHR, *Loizidou v. Turkey*, Series A, Vol. 310, Judgment (Preliminary Objections), 23 March 1995, para. 62; ECtHR, *Loizidou v. Turkey*, Judgment, *Reports of Judgments and Decisions 1996-VI*, 18 December 1996, para. 56; ECtHR, *Cyprus v. Turkey*, Judgment, *Reports of Judgments and Decisions 2001-IV*, 10 May 2001, para. 77; IACoMHR, *Coard v. the United States*, Case 10.951, Report No. 109/99, 29 September 1999, para. 37.

77 For instance, the ICJ states in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall*, above note 6, para. 109:

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory.

78 See, e.g., ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, Decision on Admissibility, 30 June 2009; ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment (Grand Chamber), 12 May 2005, para. 91; ECtHR, *Issa and Others v. Turkey*, No. 31821/96, Judgment, 16 November 2004; ECtHR, *Cyprus v. Turkey*, above note 76, *Loizidou v. Turkey*, 1995, above note 76, and *Loizidou v. Turkey*, 1996, above note 76; ECtHR, *Al-Skeini and others v. United Kingdom*, No. 55721/07, Judgment, 7 July 2011; ECtHR, *Al-Jedda v. United Kingdom*, No. 27021/08, Judgment, 7 July 2011.

terrorism, human trafficking or torture may provide for extraterritorial jurisdiction based on the nationality of the alleged perpetrator. In cases where the domestic law of the territorial State grants immunity to private contractors, Contracting States should make sure that their own domestic law provides for jurisdiction over criminal acts of the personnel of PMSCs that they contract with, in order to avoid jurisdictional gaps and impunity.<sup>79</sup>

**5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.**

This obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches of the Geneva Conventions and AP I, where applicable, and to investigate, prosecute and punish the commission of grave breaches, is a core IHL obligation. States can also choose to hand suspects over for trial to another State if this State has made a *prima facie* case, or to an international criminal tribunal.<sup>80</sup>

For any grave breach committed by personnel of PMSCs, all States have an obligation to search for persons, regardless of their nationality, alleged to have committed, or to have ordered to be committed, such grave breaches at least within their territory, and to bring these persons before their own courts or to hand them over for trial to another State, at least when these persons find themselves on their territory.<sup>81</sup> That jurisdictional basis is additional to other bases of criminal jurisdiction used for common crimes: jurisdiction based on the territory on which the crime has been committed, on the nationality of the perpetrator, on the nationality of the victim, or on the protection of national interests or security.

The word “persons” used in Statement 5 can be read as including legal persons. It can be noted that in a number of countries, criminal law, including statutes on war crimes, applies not only to individuals but also to corporations.<sup>82</sup>

79 See Montreux Document, above note 1, Part 2, Good Practice 22.

80 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts 86 and 88.

81 From the wording of the grave breaches provisions, it is not entirely clear whether “to search for” means that all States have the obligation to search for alleged perpetrators of grave breaches everywhere in the world. While the wording seems to suggest as such (especially as opposed to the wording in some human rights treaties, such as the CAT, Art. 5), there is disagreement on the interpretation. The prevailing view is that the obligation to search for alleged perpetrators is limited to persons within the territory of the State.

82 See an overview of sixteen countries in Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries*, Report 536, Fafo, September 2006.

In these legal systems, not only the personnel or managers can be prosecuted for crimes, but also the company itself. Many domestic legal systems, especially common law countries, recognize corporate criminal responsibility.<sup>83</sup> The principle is also a developing one in continental law countries.<sup>84</sup> However, the doctrine used to affirm the criminal responsibility of corporations varies in different countries, from the one of the *directing mind*<sup>85</sup> to the one requiring the establishment of the guilty mind of the corporation as a whole<sup>86</sup> or by establishing a *corporate culture*.<sup>87</sup> Nevertheless, in most domestic legislations, for a corporation to be held liable, the criminal act must have been committed by an employee with a certain status, such as a director, or with a certain level of influence within the company and within the scope of his or her employment.<sup>88</sup>

**6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.**

International law requires the criminalization of a number of acts. This obligation exists in varying forms in different treaties, which impose different types of jurisdiction for specific crimes. For instance, Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) stipulates that each State Party must establish jurisdiction over the offence of torture when it is committed in any territory under its jurisdiction or on board of a ship or aircraft registered in that State, or when the alleged offender is a national of that State, or when the victim is a national of that State if that State

83 See Fafo, *Business and International Crimes. Assessing the Liabilities of Business Entities for Grave Violations of International Law*, Report 467, Allkopi Sarpsborg, Norway, 2004; A. Ramasastry and R. C. Thompson, above note 82.

84 Thomas Weigend, "Societas delinquere non potest? A German Perspective", *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, p. 928. For an overview of common law corporate criminal responsibility, see Celia Wells, *Corporations and Criminal Responsibility*, Oxford University Press, Oxford, 2001.

85 Under this doctrine, used in Canada and United Kingdom, for instance, a corporation may be held liable for the actions of its agents if these actions can be interpreted as being consistent with the intent of the corporation. Fafo, above note 83, p. 23.

86 The *mens rea* of the corporation can be demonstrated by actions or omissions of employees or by establishing that the directing management knew or should have known of the illegal pattern benefiting the corporation. This doctrine is used in the United States and also in the United Kingdom. *Ibid.*, p. 23. See also T. Weigend, above note 84.

87 See Australian Criminal Code Act 1995, Act No. 12 of 1995, Section 12.3(2)(c), Australian Criminal Code. See also Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code", *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, p. 809; Allens Arthur Robinson, "Corporate Culture" as a Basis for the Criminal Liability of Corporations, documents prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, available at: [www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf](http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf).

88 See A. Ramasastry and R. C. Thompson, above note 82, p. 13.

considers it appropriate; or when the alleged offender is present in any territory under its jurisdiction and it does not extradite him or her.<sup>89</sup> Other violations of international law that require criminalization in national law include slavery, trafficking in human beings,<sup>90</sup> child pornography,<sup>91</sup> violent acts of racial discrimination,<sup>92</sup> crimes against humanity,<sup>93</sup> genocide<sup>94</sup> and enforced disappearance.<sup>95</sup> Arguably, State practice also reflects an obligation to criminalize murder/extrajudicial executions. Murder is criminalized in all legal systems and, as discussed above, States have an obligation under IHRL to protect life by law.<sup>96</sup> States also have an obligation to investigate alleged perpetrations of these crimes.<sup>97</sup>

In regard to PMSC personnel contracted by a State, the respect of this obligation may face some complex issues due to the fact that employees of PMSCs may have various nationalities and may operate in another territory. States must ensure that these complexities do not result in impunity and that they respect their international obligations in this regard.

Prosecution of international crimes must always be conducted in accordance with international standards of fair trial. The right of any person facing criminal charge to a fair trial is guaranteed by both IHL<sup>98</sup> and IHRL.<sup>99</sup> A fair trial must be held before a competent, independent and impartial tribunal established by law. It must also respect the fundamental judicial guarantees of the accused. Fundamental judicial guarantees include the right to be presumed innocent until proven guilty according to the law, the right to be informed without delay of the particulars of the alleged offence, the right and means of defence, the right to be present at one's own trial, the respect of the principle of non-retroactivity of the law, the right not be sentenced to a heavier penalty than

89 CAT, Art. 5.

90 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003), Art. 5.

91 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), Arts 3, 4, 5.

92 CERD, Art. 4(a).

93 Rome Statute of the ICC, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), Art. 7.

94 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), Arts 4, 5, 6; Rome Statute, above note 93, Art. 6.

95 Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res. 47/133, 18 December 1992, Art. 4; International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED), 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010), Arts 4, 9.

96 See notes 43 and 44 above. See also Resolution Adopted by the General Assembly: Extrajudicial, Summary or Arbitrary Executions, UNGA Res. 57/214, 25 February 2003, para. 5; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, 24 May 1989, Principle 18.

97 For instance, in its second periodic report under the CAT, the United States stated that it had "conducted or initiated investigations" in respect to allegations of misconduct levied against PMSC personnel in the Abu Ghraib prison. UN Committee Against Torture, *Second Periodic Reports of States Parties Due in 1999: United States of America*, CAT/C/48/Add.3, 29 June 2005, p. 74.

98 See common Art. 3(1)(d); GC I, Art. 49(4); GC II, Art. 50(4); GC III, Arts 102–108; GC IV, Arts 5(3), 66–75; AP I, Art. 75(4); AP II, Art. 6; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956), Art. 17(2).

99 See, e.g., ICCPR, Arts 14, 15; ECHR, Arts 6, 7; ACHR, Arts 8, 9; ACHPR, Art. 7.

was applicable at the time of the commission of the offence, the right to benefit from the lighter penalty provided by the law at the time of the sentence, and the respect of the *ne bis in idem* principle.

**7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:**

- a) **incorporated by the State into their regular armed forces in accordance with its domestic legislation;**
- b) **members of organized armed forces, groups or units under a command responsible to the State;**
- c) **empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or**
- d) **in fact acting on the instructions of a State (i.e. the State has especially instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).**

This Statement incorporates the most relevant rules of attribution of international responsibility of States in respect to PMSCs, without including all possible ways in which State responsibility may be engaged. It is inspired mainly by the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARS).<sup>100</sup> While they are not, as such, binding, they draw on international practice and jurisprudence, and are meant to reflect to a large extent the current status of customary international law, especially by taking into account the comments of governments.<sup>101</sup> They are therefore often cited as international standards in this area.

#### **a) Organs of the State, including members of the regular armed forces**

According to Article 4 of the ARS:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative,

<sup>100</sup> ARS Draft Articles, above note 24. On this subject, see Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, Cambridge, 2011; Marco Sassòli, "State Responsibility for Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401.

<sup>101</sup> See Introduction in James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 60.

executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

A State may be responsible for the conduct of a PMSC or its personnel under this article if the PMSC or its personnel are formally incorporated by legislation into the State's armed forces or other organs of the State, such as the foreign affairs department, national police forces, or border control and immigration agencies, or if it can nevertheless be treated as an organ of the State due to the powers that it has or its relationship with governmental bodies.

On this last aspect, as stated by the second paragraph of Article 4 of the ASR, an organ of the State *includes* any person or entity having that status under the internal law of that State. The term "includes" means that reference to municipal law may not be the only way to characterize a private contractor or a PMSC as an organ of the State as in some countries this status might be determined by practice. The status of a private contractor or a PMSC may also be determined by its powers and its relation with other governmental bodies.<sup>102</sup> The term "includes" is also aimed at preventing a State from "avoid[ing] responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law".<sup>103</sup> This has been clearly stated by the ICJ in the case of *Bosnia-Herzegovina v. Serbia and Montenegro*, in which the Court stated that in exceptional circumstances, a person or an entity can be regarded as an organ of a State for the purpose of State responsibility when that person or entity is in *complete dependence* on the State,<sup>104</sup> even in the absence of a domestic law establishing this status.

The status of a private contractor or PMSC as a State organ might in some circumstances be difficult to determine. Jurisprudence offers some guidance in this respect. For instance, in the case of *Blake v. Guatemala*,<sup>105</sup> the Inter-American Court of Human Rights found that members of the civil patrols, although they did not receive salary or social benefit from the State, were agents of the State as they were legally subordinated to the Ministry of National Defence. The Court also noted that the patrols have been created by the State as a part of its counter-

<sup>102</sup> See ARS Draft Articles, above note 24, Commentary to Art. 4, para. 11, p. 42.

<sup>103</sup> *Ibid.*

<sup>104</sup> ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, above note 33, para. 392:

according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

<sup>105</sup> IACtHR, *Blake v. Guatemala*, Series C, No. 36, Judgment (Merits), 24 January 1998.

insurgency strategy, and “enjoyed an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision”.<sup>106</sup>

Although under international law of State responsibility private actions or omissions of individual members of a State organ, like a ministry of foreign affairs, do not entail the responsibility of that State, according to Article 3 of the Fourth Hague Convention and Article 91 of AP I, States will be responsible for all acts of members of their armed forces, including acts committed contrary to order or instruction and acts committed in a private capacity. In this case, IHL has to be considered as the *lex specialis* to the general rule of State responsibility.<sup>107</sup> Therefore, a State will be responsible for all acts or omissions contrary to international law committed by PMSC personnel incorporated into its armed forces.

An example of incorporation of PMSC personnel can be found in the contract signed between Sandline International and the Papua New Guinea (PNG) authorities in 1997 to support the PNG armed forces fighting the Bougainville Revolutionary Army. This contract foresaw that:

[a]ll officers and personnel of Sandline assigned to this contract shall be enrolled as Special Constables, but hold military ranks commensurate with those they hold within the Sandline command structure and shall be entitled to give orders to junior ranks as may be necessary for the execution of their duties and responsibilities.<sup>108</sup>

### **b) All organized armed forces, groups or units under a command responsible to the State**

This paragraph refers to Article 43(1) of AP I, which is also a rule of customary law in international armed conflict.<sup>109</sup> Article 43(1) specifies who is to be considered as members of the armed forces of a party to the conflict for the purposes of IHL. According to this article, a PMSC can also fall under the definition of armed forces of the State if it forms an organized armed force, group or unit under a command responsible to the State for the conduct of its subordinates. In this case, its personnel will be considered as members of the armed forces of the State and, according to the specific rule of IHL, the latter will be responsible for all their acts.<sup>110</sup>

<sup>106</sup> *Ibid.*, para. 76.

<sup>107</sup> See, e.g., ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 214.

<sup>108</sup> “Agreement for the Provision of Military Assistance Dated this 31 day of January 1997 between the Independent State of Papua New Guinea and Sandline International” (Sandline Agreement), available at: [http://psm.du.edu/media/documents/industry\\_initiatives/contracts/industry\\_contract\\_sandline-papua-new-guinea.pdf](http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf).

<sup>109</sup> ICRC Customary Law Study, above note 13, Rule 4.

<sup>110</sup> See *ibid.*; AP I, Art. 91; Hague Convention IV, Art. 3.

Furthermore, PMSCs that are performing combat functions on behalf of a party to an international armed conflict may fall under the functional definition of armed forces under Article 43(1) of AP I or customary law.<sup>111</sup>

There is no need for a formal incorporation of PMSCs into the armed forces under national law, since the definition of armed forces set forth by IHL does not depend on the different domestic law regimes. To be under a responsible command, it is not necessary for every single employee of the PMSC to be responsible to the State authorities. It suffices that the leader of the armed force, group or unit (who can be either civilian or military)<sup>112</sup> be responsible to that State.

### c) Persons or entities empowered by law to exercise elements of governmental authority

Under international law, the conduct of a private contractor or PMSC which is not a State organ but which is empowered by the law of a State to exercise elements of governmental authority can be attributed to that State.<sup>113</sup> Private companies can fall into this category “provided that in each case [they are] empowered by the law of the State to exercise functions of a public character normally exercised by State organs”.<sup>114</sup> Attribution under Article 5 of the ARS is limited in the sense that only conduct of PMSCs empowered by domestic law to exercise elements of governmental authority will be attributable to the State under this article.<sup>115</sup> According to the ILC: “The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community.”<sup>116</sup> The term “internal law” should also be given a broader meaning than national legislation.<sup>117</sup> For instance, in its commentaries, the ILC gives the example of private

111 See Louise Doswald-Beck, “PMCs under International Humanitarian Law”, in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market*, Oxford University Press, Oxford, 2007, p. 121. For the requirements to be fulfilled by the PMSC to fall into this category, see Michael Schmitt, “Humanitarian Law and Direct participation in Hostilities by Private Contractors or Civilian Employees”, *Chicago Journal of International Law*, Vol. 5, No. 2, 2005, pp. 527–531.

112 J. Pictet, above note 19, Commentary on Art. 4, p. 59.

113 ARS Draft Articles, above note 24, Art. 5: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

114 *Ibid.*, Commentary to Art. 5, para. 2, p. 43.

115 *Ibid.*, Commentary to Art. 5, para. 7. See also Marina Spinedi, “Private Contractors: Responsabilité internationale des entreprises ou attribution à l’État de la conduite des personnes privées ?”, *International Law Forum*, Vol. 24, No. 4, 2005, p. 277.

116 ARS Draft Articles, above note 24, p. 43.

117 Indeed, the French version of Article 5 of the ARS Draft Articles on Responsibility of States for Internationally Wrongful Acts refers to “droit interne” (national legal order) and not “lois internes” (national legislation). By analogy, the commentary of the ILC on Article 3 of the ARS Draft Articles, which also refers to the term “internal law”, can be mentioned: “The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level. In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.” *Ibid.*, Commentary to Art. 3, para. 9, p. 38.

security firms contracted to act as prison guards, but without giving more details on to what extent and under which conditions a contract with such a firm can be a sufficient basis for attribution under Article 5 of the ARS.<sup>118</sup> This question remains to be clarified over time but would most likely be an important factor. Some have even argued that, contrary to Article 5 of the ARS, international customary law does not require empowerment by the law of the State for attribution of conduct of a person or entity exercising elements of governmental authority.<sup>119</sup>

There is no clear definition in international law of “elements of governmental authority”, since the content of this notion depends to a large extent on the prevailing legal and constitutional traditions peculiar to each State. In general, activities such as judicial functions, national defence, foreign policy and police operations would commonly be understood as inherently governmental functions. For instance, private security firms contracted to exercise powers of detention and discipline pursuant to a judicial sentence or to prison regulations would exercise elements of governmental authority.<sup>120</sup> Drivers of private vehicles used to carry troops to the front, and private persons appointed by a State to carry out intelligence missions, to help insurrectional movements in a foreign country<sup>121</sup> or to serve as auxiliaries in the police or the armed forces, would also fall under this category.<sup>122</sup> In this sense, direct participation in hostilities on behalf of a State party to an international armed conflict should be considered as an element of governmental authority.<sup>123</sup> Other examples include powers related to immigration or border control.<sup>124</sup>

118 *Ibid.*, Commentary to Art. 5, para. 2, p. 43.

119 For instance, in its judgment on *Democratic Republic of the Congo v. Uganda*, above note 6, the ICJ did not make reference to the law of the State for attribution under Art. 5 of the ARS, but rather made reference to an “entity exercising elements of governmental authority on its behalf” (para. 160). See also Lindsey Cameron and Vincent Chetail, *Privatising War: Private Military and Security Companies under Public International Law*, Cambridge University Press, Cambridge, 2013, pp. 165–171.

120 ARS Draft Articles, above note 24, Commentary to Art. 5, para. 2.

121 Third Report on State Responsibility, by Mr Robert Ago, Special Rapporteur: The Internationally Wrongful Act of the State, Source of International Responsibility, UN Doc. A/CN.4/246 and Add. 1–3, 1971 (Third Report on State Responsibility), para. 190.

122 *Ibid.*, para. 191. In this regard, the decision in the *Stephens* case of the Mexico/United States of America General Claims Commission can be mentioned. In this case, the Commission held that

[s]ince nearly all of the Federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization – at first called “defensas sociales” – had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its political subdivisions.

...

Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.

General Claims Commission, *Charles S. Stephens and Bowman Stephens (U.S.A.) v. United Mexican States*, Reports of International Arbitral Awards, 15 July 1927, pp. 265–268, paras 4 and 7.

123 On the notion of direct participation in hostilities, see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), available at: [www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf).

124 ARS Draft Articles, above note 24, Commentary to Art. 5, para 2.

PMSCs have been contracted out in the past to perform services that can be regarded as elements of governmental authority. The example of PMSCs contracted to act as interrogators in prisons can be mentioned in this respect, as well as those commissioned to provide intelligence services.<sup>125</sup> Operating checkpoints at the border of national or occupied territories is also an element of governmental authority.

Under IHL, some obligations must be undertaken by the State party to the conflict, and related conduct can be considered as an element of governmental authority. This is the case, for instance, for the administration of PoW camps or civilian internment facilities. As indicated above (Commentary to Statement 2), the Detaining Power remains responsible for the treatment of the prisoners and the facilities must be placed under the authority of a State official. From this it can be derived that conduct in relation to the running of the PoW camp or internment facility falls within the governmental authority of the Detaining Power. While it might outsource some of its activities, any activities in the camp or facility will be emanations of governmental authority.

Finally, it must be noted that, according to Article 9 of the ARS, in some situations such as revolution, armed conflict or foreign occupation,<sup>126</sup> a State may be unable to exercise some elements of governmental authority. In those cases, it could be held responsible for the conduct of a private actor, including a PMSC and its personnel, “if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”.<sup>127</sup> For attribution under Article 9, no authorization by the State authorities or by national law is required as is the case for attribution under Article 5 of the ARS.<sup>128</sup> Indeed, situations foreseen by Article 9 are those in which the regular authorities have been dissolved or abolished, are collapsing or are inoperative.<sup>129</sup> Three conditions must be met for attribution under Article 9: the private entity’s conduct must be related to the exercise of an element of governmental authority; it must be carried out in absence or default of the State authorities; and the circumstances must call for the exercise of these elements of governmental authority. For instance, conduct of people taking part in a *levée en*

125 Again, the case of Sandline International in Papua New Guinea can be mentioned, as the PMSC was contracted to gather intelligence to support effective deployment and operations, to conduct offensive operations in Bougainville in conjunction with PNG defence forces and to provide follow-up operational support. The contract also provided that the PMSC shall “have such powers as are required to efficiently and effectively undertake their given roles, including but not limited to the powers to engage and fight hostile forces, repel attacks therefrom, arrest any persons suspected of undertaking or conspiring to undertake a harmful act, secure Sovereign assets and territory, defend the general population from any threat, and proactively protect their own and State Forces from any form of aggression or threat”. Sandline Agreement, above note 108.

126 ARS Draft Articles, above note 24, Commentary to Art. 9, para. 1, p. 49.

127 *Ibid.*, Art. 9.

128 The ILC gives the example of the conduct of people participating in a *levée en masse*; see *ibid.*, Commentary to Art. 9, para. 2.

129 *Ibid.*, Commentary to Art. 9, p. 49, para. 1.

*masse* would fall under this category.<sup>130</sup> The conduct of the Revolutionary Guards in the immediate aftermath of the revolution in the Islamic Republic of Iran has also been deemed as being covered by the attribution principle embodied in Article 9 by the Iran–United States Claims Tribunal.<sup>131</sup>

#### **d) Persons in fact acting on the instructions of a State or under its direction or control**

Article 8 of the ARS states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>132</sup>

Some PMSCs or members of their personnel acting alongside the State authorities could fall under this category of person. The terms “instructions”, “direction” and “control” are independent of one another, so that any one of them is sufficient to establish State responsibility.<sup>133</sup>

**On the instructions:** instructions must be understood as clear orders for a certain task. This could be relevant, for instance, if PMSCs are subject to the orders of a military commander or other State official when they are operating alongside the armed forces. This does not mean that an order has to be given for the specific violation; rather, it need only be given for the specific task in the context of which the violation is being committed. If a PMSC employee is acting outside instructions, the State will nonetheless be responsible if the act is incidental to the task. In general a State should not bear the risk that lawful instructions are carried out in an unlawful way; but if persons have committed wrongful acts under the overall instructions of a State, the conditions for attribution may nonetheless be met if the acts are closely linked to the instructions.<sup>134</sup>

**Under its direction or control:** under this rule, a number of activities carried out by PMSCs could be attributed to the State that contracts them. What exactly “direction or control” means in international law will have to be further clarified over time. For the purpose of attribution under the rules of State responsibility, the ICJ requires that for an act of a private entity (be it an individual or a member of an organized group) to be imputable to the State, the direction or effective control of the authorities over that specific act must be demonstrated, and not only in general and in respect of the overall actions taken

130 See Third Report on State Responsibility, above note 121, para. 189, in which the ILC considers participation in a *levée en masse* as the exercise of an element of governmental authority. See also M. Sassòli, above note 100, p. 409.

131 See, for instance, US–Iran Claims Tribunal, *Kenneth P. Yeager v. The Islamic Republic of Iran*, Partial Award No. 324-10199-1, Iran–US CTR, Vol. 17, 2 November 1987, p. 104, para. 43. See also ARS Draft Articles, above note 24, Commentary to Art. 9, para. 2.

132 *Ibid.*, above note 24, Art. 8, p. 47.

133 *Ibid.*, Commentary to Art. 8, para. 7.

134 *Ibid.*, Commentary to Art. 8, para. 8.

by the persons or groups of persons having committed the violations.<sup>135</sup> In the absence of such control over the specific act, it cannot be imputed to the State, even when committed by a group with a high degree of dependency on the State authorities.<sup>136</sup> In the same vein, the commentary to the ARS requires that the State directs or controls the specific operation.<sup>137</sup> A mere contract between a State and a PMSC would probably not fulfil the requirement of effective control, since not all contracts between a State and a private company lead to control by the State authorities over all the specific activities of the private company. The situation of a local military commander having overall control over an area and the capacity to broadly direct the movements of PMSCs would probably neither qualify as effective control as required by the ICJ, in case the personnel of PMSCs committed violations without being specifically ordered on certain operations by the commander or other authority. Nevertheless, the ILC's Commentary states that "it will be a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it".<sup>138</sup>

Financial and material support as such does not seem to be sufficient for establishing control of a State over an entity:

Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.<sup>139</sup>

As for actions going beyond the scope of authorization given by the State or its direction or control, the responsibility of that State for these actions may raise questions. These actions may trigger the responsibility of the State if they were incidental to the mission and did not clearly go beyond it.<sup>140</sup> It will be a question of fact whether the State authorities still had control or could have exercised it.

However, the criteria of "global" or "overall" control has also been used on some occasions by tribunals,<sup>141</sup> the most significant case being the judgment of the International Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case. For the purpose of armed conflict classification, the ICTY held that where a group is

135 ICJ, *Nicaragua v. United States*, above note 21, paras 115–116, and *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, paras 400–406.

136 ICJ, *Nicaragua v. United States*, above note 21, para. 115.

137 ARS Draft Articles, above note 24, Commentary to Art. 8, para. 3.

138 *Ibid.*, Commentary to Art. 8, para. 5.

139 ICJ, *Nicaragua v. United States*, above note 21, para. 109.

140 ARS Draft Articles, above note 24, Commentary to Art. 8, para. 8.

141 On "global control", see ECtHR, *Loizidou v. Turkey*, above note 76, para. 56.

organized, such as an armed opposition group, it is sufficient that the State authorities exercise “overall control” over such an organized and hierarchically structured group to consider that the group belongs to that State in the context of hostilities against another State and where that situation is an international armed conflict, without a need for the State’s specific control or direction over the actions or omissions of the individuals.<sup>142</sup> While it is unlikely that a mere contract would be sufficient to find such overall control, a PMSC could be considered to be under the overall control of a military commander if the commander has broad control over their movements and the power to at least impede certain actions of the company. The ICTY has also acknowledged that where the controlling State is not the Territorial State, more compelling evidence is required to show that the State is genuinely in control of units and groups.<sup>143</sup>

Nevertheless, the ICJ has not yet established the “overall control” criteria as a sufficient basis for attribution under the rule of State responsibility and continues to require an effective control in that regard.<sup>144</sup>

### **8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.**

Where the act of a PMSC or its personnel is attributable to the State, the responsible State is under an obligation to cease the violation and ensure reparation for the injury caused by the violation.<sup>145</sup> The obligation to afford reparation for unlawful conduct under international law is a long-standing principle of public international law.<sup>146</sup> This reparation may take the form of restitution,

142 ICTY, *Prosecutor v. Duško Tadić*, IT-94-1, Judgment (Appeals Chamber), 15 July 1999, para. 120. It is sometimes said that the question before the Tribunal was one of qualification of the conflict as non-international or international; nonetheless, the Tribunal decided this question in the light of the law of State responsibility, which is relevant for the purposes of this discussion.

143 *Ibid.*, paras 138–140.

144 See ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 160, and *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, para. 398–407. On this issue, see also Chia Lehnhardt, “Private Military Companies and State Responsibility”, in S. Chesterman and C. Lehnhardt (eds), *From Mercenaries to Market*, above note 111, p. 152; see also the analysis by Antonio Cassese, “The Nicaragua and Tadić Test Revisited in light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, Vol. 18, No. 4, 2007, pp. 649–668.

145 ARS Draft Articles, above note 24, Art. 31. See also Basic Principles on Reparation, above note 51.

146 Permanent Court of International Justice (PCIJ), *Opinion in the Lusitania Case*, 1 November 1923, *Recueil des sentences arbitrales*, Vol. 7, p. 35; PICJ, *Case Concerning the Factory at Chorzów (Jurisdiction)*, Collection of Judgments, Series A, No. 9, 26 July 1927, p. 21; PICJ, *Case Concerning the Factory at Chorzów (Merits)*, Collection of Judgments, Series A, No. 17, 13 September 1928, para. 125. See also ARS Draft Articles, above note 24, Arts 30, 31, 34, 35, 36, 37.

compensation, satisfaction or guarantees of non-repetition.<sup>147</sup> The responsible State has an obligation to compensate for the damage suffered by the State victim of the wrongful act, but also by *all natural or legal persons*.<sup>148</sup>

The broad formulation of this statement is used to reflect the different legal consequences that arise under different treaties or bodies of law. For instance, for violations of IHL in international armed conflict, reparation is regulated by Article 3 of Hague Convention IV and Article 91 of AP I. The obligation to pay compensation under IHL should be distinguished from individual criminal responsibility arising from the commission of grave breaches. It should be noted that violation of any rule of IHL, be it a grave breach or not, gives rise to an obligation of reparation.<sup>149</sup> The obligation of States to make full reparation for loss or injury caused by violations of IHL for which they are responsible is also a rule of customary law in both international and non-international armed conflicts.<sup>150</sup> Articles 3 of Hague Convention IV and 91 of AP I only address the responsibility to pay compensation and not the question of who is entitled to such reparation. Although IHL does not limit the right of victims to reparation, this issue remains contentious, and doctrine and jurisprudence vary in this regard. Factors such as the preclusion of individual claims under peace settlement, sovereign immunity, or the non-self-executing nature of the right to reparations under international law have in many cases prevented victims from successfully bringing their claims.<sup>151</sup> However, “[t]here is an increasing

147 *Ibid.*, Art. 34. See also Basic Principles on Reparation, above note 51, Principle 18.

148 ICJ, *Legal Consequences of the Construction of a Wall*, above note 6, para. 153, and *Democratic Republic of the Congo v. Uganda*, above note 6, para. 259.

149 On this issue of reparation for IHL violations, see, *inter alia*, Emanuela-Chiara Gillard, “Reparation for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 534; Riccardo Pisillo Mazzeschi, “Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview”, *Journal of International Criminal Justice*, Vol. 1, No. 2, 2003, p. 343; Rainer Hofmann, “Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?”, in Pierre-Marie Dupuy, Bardo Fassbender, Malcom N. Shaw and Karl-Peter Sommermann (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, N. P. Engel Verlag, Kehl, 2006, p. 357; M. Sassòli, above note 100; Liesbeth Zegveld, “Remedies for Victims of Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 497; and Friedrich Rosenfeld, “Collective Reparation for Victims of Armed Conflict”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 731.

150 ICRC Customary Law Study, above note 13, Rule 150. This is also in line with ARS Draft Articles, above note 24, Art. 31, which state that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

151 See E.-C. Gillard, above note 149, pp. 535 ff.

trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State”.<sup>152</sup> Developments in international criminal law also provide an opening for victim’s claims.<sup>153</sup>

In IHRL, the obligation to provide for reparation is regulated in the respective human rights treaties and the right of individual victims to remedy is expressly recognized (see also Commentary to Statement 4).<sup>154</sup> Article 75 of the

152 ICRC Customary Law Study, above note 13, Rule 150, Comments. For instance, the Eritrea/Ethiopia Claims Commission has jurisdiction over

all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party ... that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Art. 5(1), available at: [www.pca-cpa.org/showfile.asp?fil\\_id=138](http://www.pca-cpa.org/showfile.asp?fil_id=138). As for the United Nations Compensation Commission established in 1991 by the Security Council with the mandate to process claims and pay compensation for losses and damages suffered as a direct result of Iraq’s unlawful invasion and occupation of Kuwait, it also dealt with individual claims and even with claims brought by corporations. See United Nations Compensation Commission, available at: [www.uncc.ch](http://www.uncc.ch). The ICJ, in its advisory opinion concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, seemed to recognize an obligation of reparation towards the individual; above note 6, see paras 152, 153. However, in the case on *Jurisdictional Immunities of the State*, the ICJ noted that:

against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports 2012*, para. 94. It can also be mentioned that in 2010, the International Law Association adopted a resolution on reparation for victims of armed conflict: *Reparation for Victims of Armed Conflict*, Resolution No. 2/2010, 74th Conference of the International Law Association, The Hague, 15–20 August 2010. Art. 6 of the resolution states: “Victims of armed conflict have a right to reparation from the responsible parties.”

153 See Rome Statute, above note 93, Art. 75.

154 See, for instance, ICCPR, Art. 2(3); CAT, Art. 14; ECHR, Art. 41; ACHR, Art. 63. See also Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948, Art. 8; and Basic Principles on Reparation, above note 51, Principle 15, which states:

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

Statute of the International Criminal Court (ICC) recognizes the right of victims to reparation, including restitution, compensation and rehabilitation.<sup>155</sup>

## B. Territorial States

**9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:**

- a) **disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;**
- b) **not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;**
- c) **take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.**

The duty to ensure respect, as explained above,<sup>156</sup> exists for all States according to Article 1 common to the four Geneva Conventions and Article 1 of AP I. As for the Territorial State, it has an obligation to ensure respect for IHL within its territory: it must, for instance, ensure that appropriate instructions are given to the competent authorities, especially the military, and must ensure that they are carried out. The undertaking to ensure respect for IHL also means a commitment to promoting compliance with IHL, for instance through the dissemination of IHL and the texts of the Geneva Conventions not only to the State's armed forces but also to the civilian population, in particular civilians working for the private military and security services industry. The Territorial State must also refrain from encouraging violations of IHL by PMSCs.

Under IHL there is an obligation to enact criminal legislation, but the duty to ensure respect for IHL does not go as far as imposing a specific obligation on States to adopt legislative measures with respect to private companies whose activities affect persons in the context of an armed conflict, such as PMSCs. However, legislation to regulate the activities of such companies is a means of ensuring respect for IHL, and the Territorial State is in a particularly favourable position in this regard as it can enact domestic legislation restricting and

<sup>155</sup> Rome Statute, above note 93, Art. 79(1). See also *ibid.*, Art. 79, which provides for the establishment of a trust fund for the *benefit of the victims of crimes within the jurisdiction of the Court, and of the families of such victims* (emphasis added).

<sup>156</sup> See Commentary on Statement 3.

controlling PMSC activities within its boundaries in order to ensure respect for IHL. It could do so, for instance, by determining which services may or may not be carried out by PMSCs or their personnel and by establishing a licensing system for companies operating on its territory, or for particular services or contracts. The licensing regime could include requirements for the PMSCs such as background checks of the companies, appropriate vetting of the companies' employees, adequate training, an internal disciplinary regime that can enforce respect for IHL, or cooperation with official investigations.<sup>157</sup>

As it contains details on the general obligation to respect and ensure respect for IHL, the Commentary to Statement 3 may also be relevant for Territorial States. The Commentary to Statement 11 below, on the obligation to provide effective penal sanctions in respect to grave breaches, may also be relevant here.

**10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have an obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.**

States have an obligation not only to respect human rights, but also to ensure that all persons within the State's territory or jurisdiction will be protected against conduct of third parties that impairs the enjoyment of their human rights. Territorial States must ensure that activities of PMSCs will not infringe on the human rights of people within their territory or jurisdiction and, if a violation occurs, that their organs will conduct an investigation and provide effective remedies to the victims. The nature of the services carried out by PMSCs and their personnel and the context in which they often operate probably call for specific measures and good practices such as systems and procedures of authorization, monitoring and control of PMSCs and their personnel, legislation on the use of firearms, training requirements, and accountability mechanisms.

For instance, in its *Report on Citizen Security and Human Rights*, the Inter-American Commission on Human Rights provides guidance on measures to ensure respect for human rights that should be implemented by States where PMSCs are allowed by law to carry out activities:

The domestic legal system must regulate the functions that private security services can perform; the types of weapons and materials they are authorized to use; the proper mechanisms to oversee their activities; introduction of licensing, and a system whereby these private security firms are required to report their contracts on a regular basis, detailing the typing of activities they perform. Likewise, the public authorities should demand compliance with

157 See Montreux Document, above note 1, Part 2, Good Practices 31–52.

selection and training requirements that individuals hired by these private security firms must meet, specifying which public institutions are authorized to issue certifications attesting to the firms' employees.<sup>158</sup>

The Commentary to Statement 4, which addresses the responsibility of the Contracting States to implement their human rights obligations, may also be relevant for Territorial States.

**11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.**

As is explained in the Commentary to Statement 5, States have an obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches of the Geneva Conventions and AP I, where applicable.<sup>159</sup> They also have an obligation to investigate, prosecute and punish serious violations of such grave breaches. They can choose to hand suspects over for trial to another State, in accordance with their national law, if this State has made a *prima facie* case, or to an international criminal tribunal.

As territoriality is the most common ground for jurisdiction and as victims, witnesses and evidence are generally located in the area where the crime has been committed, Territorial States have an important role to play in terms of prosecution and penal sanctions for perpetration of grave breaches. If a Territorial State is not in a position to investigate and prosecute grave breaches due to ongoing hostilities or a difficult post-conflict situation, it should cooperate with other States eventually asserting jurisdiction or with the international criminal tribunal.

The Commentary to Statement 5, which addresses this same obligation from the perspective of Contracting States, is also relevant for Territorial States.

**12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under**

158 OAS, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, Doc. 57, 31 December 2009, para. 73.

159 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 86.

**international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.**

For the Territorial State, the obligation described above means that it has an obligation to investigate and, as the case may be, prosecute, extradite or surrender suspects of international crimes committed on its territory or involving suspects present on its territory. As victims, evidence and witnesses are generally located in the area where the crime has been committed, the Territorial State should cooperate with other States investigating or prosecuting suspects of international crimes committed on its territory.

If a Territorial State considers entering into agreements providing for immunity before its national courts for PMSC personnel acting on its territory (such as status of forces agreements), it has to ensure that no impunity results from that immunity, i.e. that in practice the perpetration of international crimes will be effectively investigated and, as the case may be, prosecuted, in whatever forum. This could be done, for instance, by ensuring that the Territorial State conditions the delivery of private military or security services on its territory to the existing legal basis for prosecution in the Home or Contracting State; or by ensuring that an agreement is being reached between the Contracting, Territorial and/or Home States to clarify which State or States will assert jurisdiction – for example, the Territorial State if the Home or Contracting State is unable or unwilling to prosecute crimes, or vice versa.<sup>160</sup>

The Commentary to Statement 6, which addresses this same obligation from the perspective of Contracting States, is also relevant for Territorial States.

**13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.**

International obligations of a State under occupation can be limited by the loss of effective control over a part of its territory. As previously mentioned (see Commentary to Statement 1), the occupying State or States bear specific obligations under IHL towards the occupied territory and its population. Furthermore, should the Occupying Power let the local authorities carry out some activities in the occupied territory, it remains under the obligation to ensure that the protection conferred by IHL to the occupied population is not adversely affected thereby.<sup>161</sup>

Occupying Powers may have obligations comparable to those of Territorial States. If a territory is under occupation, the effective control lies with the

<sup>160</sup> See Montreux Document, above note 1, Part 2, Good Practices 51 and 52.

<sup>161</sup> In that case, Art. 17 of the ARS Draft Articles, above note 24, would be applicable if its requirements are met: “A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if a) That State does so with knowledge of the circumstances of the internationally wrongful act; and b) The act would be internationally wrongful if committed by that State.” *Ibid.*, Commentary on Art. 17, paras 5 and 6.

Occupying Power, “the authority of the legitimate power having in fact passed into the hands of the occupant”.<sup>162</sup> Under the law of occupation, the Occupying Power has an obligation to “take all measures in his power to restore, and ensure, as far as possible, public order and safety” and has a number of obligations that come with its control over the territory.<sup>163</sup> The Occupying Power may choose to delegate some activities to the local government. In such cases, the local government’s obligations will be commensurate to the degree of authority delegated.<sup>164</sup> However, the Occupying Power will always have a residual responsibility by virtue of its effective control over the occupied territory and will retain the overall responsibility vis-à-vis that territory, including for the competences it has transferred to the local authority.

## C. Home States

**14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:**

- a) **disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;**
- b) **not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;**
- c) **take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.**

As mentioned above, the obligation to ensure respect for IHL is binding on every State, including States in whose jurisdiction PMSCs are incorporated. As stated by the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

It follows from that provision [common Article 1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.<sup>165</sup>

<sup>162</sup> Hague Convention IV, Art. 43; see also *ibid.*, Art. 42.

<sup>163</sup> See, in particular, *ibid.*, Arts 42–56, and GC IV, Arts 47–78.

<sup>164</sup> See, e.g., *Legal Consequences of the Construction of a Wall*, above note 6, para 162, where the ICJ recalled in an *obiter dictum* that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life”.

<sup>165</sup> *Ibid.*, para. 158.

Measures that a State has to take in order to discharge its obligation to ensure respect will, in part, depend on its capacity to effectively influence the person or group of persons likely to commit violations. The geographical distance of the State from the events may make it more difficult for the Home State to actually prevent violations of IHL by a PMSC of its nationality.<sup>166</sup> However, the risk of IHL violations should be a factor in assessing the due diligence obligation of a State. In this regard, due to the nature of the services offered by PMSCs and the fact that their employees often carry arms and operate in situations of violence, the Home State should take specific measures to ensure respect of IHL by PMSCs of its nationality. Of course, as noted above, Home States must also refrain from encouraging or assisting in violations of IHL committed by PMSCs or their personnel.

The Good Practices of the Montreux Document make recommendations on how Home States can take steps to ensure respect for IHL. For instance, they can establish a licensing or notification system for the companies or for the export of specific services, thereby imposing a number of requirements which would contribute to respect for IHL by PMSCs, such as background checks of the companies, appropriate vetting of the companies' employees, adequate training, an internal disciplinary regime that can enforce respect for IHL, or cooperation with official investigations.

The Commentary to Statement 3, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

**15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.**

Although its ability to do so may be limited when a PMSC is operating abroad, the Home State is nonetheless responsible for implementing its human rights obligations and ensuring that the activities of PMSCs of its nationality and their personnel respect human rights. Determining services that may be performed by PMSCs incorporated in the Home State's jurisdiction and establishing authorization systems and procedures are good practices that can be implemented by Home States in this respect.<sup>167</sup> Home States may have a particular role to play in regard to investigations on human rights abuses committed by PMSCs of their nationality, and their personnel. Contracting States, Territorial States or other States may request the Home State's assistance when conducting investigation about alleged misconduct of a PMSC incorporated

<sup>166</sup> See, by analogy, ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, para. 430.

<sup>167</sup> See Montreux Document, above note 1, Part 2, Good Practices 53–67.

in its territory. Home States should cooperate with the authorities of these States in matters of common concern regarding PMSCs.<sup>168</sup>

In regard to accountability and remedies for victims, Home States should establish close links between their authorities granting authorizations to PMSCs and their representatives in countries where they operate and/or with authorities of Territorial and Contracting States. They should also provide for accountability mechanisms, such as civil liability, and should require PMSCs to provide reparation to victims in cases of improper or unlawful misconduct by the company or its personnel.<sup>169</sup>

The Commentary to Statement 4, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

**16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.**

As indicated above (see Commentary to Statement 5), States commonly base their jurisdiction on the principles of territoriality, nationality of the victim, nationality of the perpetrator or protection of national interests or security. The domestic legislation of Home States has to provide for criminal jurisdiction over grave breaches of IHL committed by PMSC personnel.<sup>170</sup> Home States could also consider providing for corporate criminal responsibility over grave breaches of IHL.<sup>171</sup>

In this respect, the most relevant obligation for Home States is probably the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the Geneva Conventions, and to bring such persons, regardless of their nationality, before their own courts or to hand them over for trial to another State. This obligation particularly comes into play if personnel alleged to have committed grave breaches of IHL abroad, or directors involved in the decision or policy which has led to the perpetration of grave breaches, find themselves on the Home State's territory.

168 See *ibid.*, Part 2, Good Practice 73.

169 See *ibid.*, Part 2, Good Practices 68, 70 and 72.

170 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts 86, 88.

171 See Montreux Document, above note 1, Part 2, Good Practice 71.

The Commentary to Statement 5, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

**17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.**

Although in general Home States have no, or limited, human rights obligations in respect to persons who are not on their territory or within their jurisdiction, it is worth recalling that international law may require that they investigate and prosecute persons or entities suspected of having committed international crimes. This is the case, for instance, under the CAT<sup>172</sup> or the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>173</sup> States party to the Rome Statute also have an obligation to cooperate with the ICC in its investigations and prosecutions.<sup>174</sup>

The Commentary to Statement 6, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

## D. All other States

**18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.**

The obligation of all States to ensure respect for IHL entails the obligation of States, including States not party to an armed conflict, to take all possible steps to ensure that the rules are respected by parties to the conflict. It is described in the Commentary to the Geneva Conventions as follows:

[I]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.<sup>175</sup>

172 CAT, Art. 5.

173 ICPPED, above note 95, Art. 9.

174 Rome Statute, above note 93, Arts 86 ff.

175 J. Pictet, above note 19, Commentary on Art. 1, p. 18.

All States have an obligation to refrain from encouraging and assisting in violations of IHL by other armed forces or armed groups. Also, all States should, if they become aware of violations of IHL, take steps to make the violations cease. They have a number of methods at their disposal, such as repression of grave breaches, mutual assistance in criminal matters, bilateral diplomatic interventions or multilateral mechanisms.<sup>176</sup>

The Commentary to Statements 3, 9 and 14, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

**19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.**

Although their relation to the activities of PMSCs may be more tenuous, and their capacity to prevent, investigate and provide remedies for misconduct by PMSCs and their personnel more limited, than Contracting States, Territorial States and Home States, other States are responsible for implementing their obligations under IHRL in this respect. Other States may be, for instance, States of nationality of the victims or of PMSC personnel or directors; States in which territory a person suspected of having committed international crimes is living or hiding; or States where a PMSC has assets or investments.

The Commentary to Statements 4, 10 and 15, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

**20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.**

Under the Geneva Conventions and AP I, all States Parties have an obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches.<sup>177</sup> As noted above, “all other States” may include States of nationality of suspected perpetrators or States in whose territory they are present.

176 For example, a meeting of the High Contracting Parties in accordance with AP I, Art. 7, or resort to the Protecting Powers institution, AP I, Art. 5.

177 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts. 86, 88.

All other States may also be States receiving requests for extradition or judicial cooperation from another State or an international criminal tribunal.

The Commentary to Statements 5, 11 and 16, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

**21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.**

As stated above (see Commentary to Statement 6), international law requires criminalization of a number of acts and omissions in the internal legal order of States. For instance, under the CAT and the ICPPED, each State Party shall take appropriate measures to establish jurisdiction over the crime of torture or enforced disappearance, *inter alia*, when the alleged offender is a national of that State, when the victim is a national of that State, or when the alleged offender is present in its territory.<sup>178</sup> Any State may be the State of nationality of directors or personnel of PMSCs, of victims of international crimes committed by PMSCs or their personnel, or the State in which a person suspected of having committed international crimes is located. All States have to fulfil their obligation to investigate, prosecute, extradite or surrender persons suspected of having committed international crimes in relation to PMSC activities.

The Commentary to Statements 6, 12 and 17 may also be relevant for all other States.

## **E. PMSCs and their personnel**

**22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.**

PMSCs, as private legal entities, do not have obligations under IHRL treaties or under IHL unless, in respect to IHL, they are parties to an armed conflict.<sup>179</sup>

<sup>178</sup> CAT, Art. 5; ICPPED, Art. 9.

<sup>179</sup> Although this would be a highly exceptional case, the possibility of a PMSC being a party to the conflict cannot be excluded. In such a case, the PMSC would be bound by the rules of IHL. If PMSCs are taking part in hostilities without being part of the armed forces of a party to the conflict, they may be considered organized armed groups if they present a sufficient level of internal organization and command and the capacity to sustain military operations. In this case, they will also be bound by IHL. For a detailed analysis of the criteria, see ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", opinion paper, March 2008; and ICTY, *The Prosecutor v. Fatmir Limaj*, IT-03-66-t, 30 November 2005, paras 94–134.

However, national legislation may impose on private entities such as PMSCs obligations derived from IHL or IHRL. For instance, as mentioned above, the national criminal law of some countries provides for corporate criminal responsibility for international crimes such as war crimes, crimes against humanity and genocide,<sup>180</sup> and domestic law may provide for civil claims against private entities and individuals for violations of IHL and HRL.

PMSCs are obliged to comply with all the national legislation of the State in whose territory they carry out their activities and, as the case may be, with legislation of their Home State and Contracting State binding on them. States, whether Contracting, Territorial or Home, may adopt specific regulations on PMSCs limiting the scope of services that PMSCs can offer, submitting them to an authorization or licensing system or regulating the use and carrying of weapons.<sup>181</sup>

**23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.**

PMSC personnel, like anyone else, are obliged to respect the relevant domestic law of the State in which territory they operate. If applicable to them when operating abroad, they should also respect the national law of their States of nationality (see Commentary to Statements 6 and 22). As mentioned above, in addition international law may require States to provide for criminal jurisdiction for international crimes committed by their nationals abroad.

The fact that a Territorial State grants immunity for PMSC personnel before its national courts does not discharge the latter from the obligation to respect the law of that State and not to perpetrate international crimes. Immunity is a jurisdictional privilege and not a license to commit crimes. States granting such immunity should ensure that investigations will be conducted and that persons suspected of having committed a crime will be prosecuted and, as the case may be, punished by authorities of other States, for instance the Contracting State or the Home State.<sup>182</sup>

**24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.**

One of the core principles of IHL is the principle of distinction between civilians and combatants. This distinction is fundamental, as civilians have to be protected against the effects of hostilities.<sup>183</sup>

IHL defines civilians negatively: “Civilians are persons who are not members of the armed forces.”<sup>184</sup> In international armed conflicts, Article 4 of the Third Geneva

180 See an overview of sixteen countries in A. Ramasastry and R.C. Thompson, above note 82.

181 See Montreux Document, above note 1, Part 2, Good Practices.

182 See Montreux Document, above note 1, Part 2, Good Practices 22, 51, 52 and 73.

183 AP I, Art. 48; AP II, Art. 13(2); ICRC Customary Law Study, above note 13, Rule 1 (also applicable in non-international armed conflicts).

184 See AP I, Art. 50; and ICRC Customary Law Study, above note 13, Rule 5.

Convention (GC III) establishes who is entitled to the status of prisoner of war and Article 43 of AP I provides a definition of “combatants”. Therefore, in this situation, any person not belonging to one of the following categories is a civilian:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that they fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- ...
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>185</sup>

Situations (1) and (2) are the most likely to apply to PMSC personnel.<sup>186</sup> When they are not entitled to combatant status, members of PMSCs will be civilians.

The determination of the status of a person is of a great importance. Indeed, only combatants have the right to participate directly in hostilities;<sup>187</sup> that is to say, they are immune from prosecution for their mere participation in hostilities, as long as they do not commit grave breaches of IHL or international crimes. They are also entitled to the status of PoW when they have fallen into the power of the enemy.<sup>188</sup> On the other hand, they can be the object of attack at any time. Persons who are not entitled to combatant status will be civilians and as such will be protected against direct attacks,<sup>189</sup> unless and for such time as they directly participate in

185 See GC III, Arts 4(A)(1), (2), (3) and (6); and AP I, Art. 50. See also AP I, Art. 43.

186 On this issue, see, for instance, Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 525; and Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 573.

187 AP I, Art. 43(2).

188 See GC III, Art. 4; AP I, Art. 44(1).

189 AP I, Art. 51(2); AP II, Art. 13(3); ICRC Customary Law Study, above note 13, Rule 1.

hostilities.<sup>190</sup> However, “their activities or location may ... expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities”.<sup>191</sup> Employees of PMSCs having the status of civilians accompanying the armed forces under Article 4(A)(4) of GC III are entitled to PoW status.<sup>192</sup>

In a non-international armed conflict, there is no combatant or PoW status. Therefore, for the purpose of the principle of distinction, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and are consequently entitled to protection against direct attack, unless and for such time as they take a direct part in hostilities. Members of organized armed forces of a non-State party to the conflict constitute the armed forces of that party and consist only of individuals whose continuous function is to take a direct part in hostilities.<sup>193</sup>

The status of PMSC personnel should be determined prior to their mission and members of PMSCs should be aware of their status under IHL and of the legal consequences of that status.<sup>194</sup> PMSC personnel who are combatants should be identifiable as such.<sup>195</sup>

Although relating to another legal issue, i.e. State responsibility, the Commentary to Statements 7(a) and (b) may also be relevant as it addresses the question of PMSC personnel having the status of combatants under IHL.

**25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.**

During an armed conflict, attacks shall be directed only against combatants and military objectives.<sup>196</sup> Civilians shall be protected against attacks.<sup>197</sup> To enjoy this protection against attack, civilians working for PMSCs must respect one condition: not to participate directly in hostilities. If they fail to respect this condition, they will lose their protection against attacks, but only for such time as they directly participate in hostilities.<sup>198</sup>

190 See Commentary on Statement 25.

191 ICRC Interpretive Guidance, above note 123, p. 37, Recommendation III.

192 “Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.” GC III, Art. 4(A)(4).

193 See *ibid.* See also Commentary on Statement 25.

194 See Montreux Document, above note 1, Part 2, Good Practices 10, 14, 30, 35, 40, 63 and 67.

195 “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.” AP I, Art. 44 (3). See also Montreux Document, above note 1, Part 2, Good Practice 16.

196 AP I, Art. 48.

197 *Ibid.*, Art. 51.

198 *Ibid.*, Art. 51(3).

On the notion of direct participation in hostilities, the ICRC, after six years of expert discussions and research, published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, which aims to clarify the meaning and consequences of direct participation in hostilities under IHL.<sup>199</sup> According to the Interpretative Guidance, for an act to constitute a direct participation in hostilities, three criteria must be fulfilled:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>200</sup>

Diverse tasks provided by PMSCs may amount to a direct participation in hostilities. For instance, driving ammunition to the front line,<sup>201</sup> providing intelligence of a tactical nature and directly related to military operations,

denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary to prevent them being forcibly liberated, conducting electronic interference with military computer networks or wiretapping the adversary's high command or transmitting tactical targeting information for an attack could amount to direct participation in hostilities.<sup>202</sup>

199 See ICRC Interpretive Guidance, above note 123. See also ICRC Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Proceedings of the Expert Process (2003–2008), 2009, available at: [www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm](http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm).

200 ICRC Interpretive Guidance, above note 123, p. 16. See the Interpretive Guidance for a detailed analysis of these criteria and of the notion of direct participation in hostilities.

201 See *ibid.*, p. 56.

202 See *ibid.*, p. 48.

Recruiting military personnel or providing training or weapon maintenance services to the armed forces as such do not amount to direct participation in hostilities.<sup>203</sup> However, “where persons are specifically recruited and trained for the execution of a predetermined hostile act ... such activities [can] be regarded as an integral part of that act and, therefore, as direct participation in hostilities”.<sup>204</sup>

When the task they are carrying out constitutes direct participation in hostilities, PMSC personnel will lose their protection against attack for such time as they perform the task. In this regard, it should be pointed out that measures preparatory to a specific act of direct participation in hostilities, as well as the deployment to and return from the location of its execution, constitute an integral part of that act.<sup>205</sup>

The fact that the performing of a specific service may cause PMSC personnel to become involved in direct participation in hostilities should be taken into account by the PMSC when concluding a contract, and its personnel should be informed of the risks and consequences of directly participating in hostilities and properly trained in this respect. Furthermore, the activities performed by PMSC personnel, and their location, may expose them to an increased risk of incidental death or injury even if they do not directly participate in hostilities.<sup>206</sup> In this respect, it would be advisable that they clearly distinguish themselves from combatants by avoiding wearing military-like uniforms, for instance.<sup>207</sup>

## **26. The personnel of PMSCs:**

### **a) are obliged, regardless of their status, to comply with applicable international humanitarian law;**

IHL is binding on every individual in a context of armed conflict. The majority of rules are intended to apply to parties to the conflict and members of their armed forces. However, civilians also have to respect IHL when their acts are linked with the hostilities. Furthermore, the status of a person as civilian or combatant does not impact his or her criminal responsibility in regard to war crimes.<sup>208</sup> PMSC personnel should be aware of their rights and obligations under IHL and properly trained in this respect.

### **b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;**

203 See Y. Sandoz, C. Swinarski and B. Zimmermann, above note 19, Art. 47, para. 1806.

204 ICRC Interpretive Guidance, above note 123, p. 53.

205 *Ibid.*, p. 65, Recommendation VI.

206 See *ibid.*, p. 37, Recommendation III.

207 See Montreux Document, above note 1, Part 2, Good Practice 16.

208 See International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment (Appeals Chamber), 1 June 2001, paras 443 and 444.

As mentioned above, under IHL, civilians are persons who are not members of the armed forces of a party to the conflict.<sup>209</sup> In an international armed conflict, personnel of PMSCs are civilians unless they are either incorporated into the armed forces of a State or can be considered as members of the armed forces, groups and units which are under a command responsible to a party to the conflict (Article 43 of AP I).<sup>210</sup> Personnel of PMSCs with the status of civilian accompanying the armed forces are also civilians<sup>211</sup> (see Commentary to Statements 8 and 24).

PMSC personnel not having combatant status will be protected against attack unless and for such a time as they directly participate in hostilities (see Commentary to Statements 24 and 25). However, the status of a civilian does not change if he or she directly participates in hostilities. If civilians directly participate in hostilities they lose their protection against attack during their participation,<sup>212</sup> but do not thereby become combatants.

During a non-international armed conflict, as there is no status of combatant, personnel of PMSCs will be civilians protected against the attacks, unless and for such time as they take a direct part in hostilities. For the purpose of the principle of distinction, personnel of PMSCs working for an organized armed group belonging to a non-State party to the conflict and having a continuous combat function should be considered members of the armed forces of this non-State party and will lose their protection against direct attacks for the time that they exercise this function.<sup>213</sup>

**c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;**

PoW status is granted to some categories of persons during international armed conflict when they fall into the hands of an enemy. Combatants are entitled to PoW status. Generally civilians are not, except when they are accompanying the armed forces of a party to the conflict and meeting the requirement of Article 4 (A)(4) of GC III. This article defines those entitled to PoW status as:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.<sup>214</sup>

209 See AP I, Art. 50; and ICRC Customary Law Study, above note 13, Rule 5.

210 See E.-C. Gillard, above note 186, pp. 532–541.

211 GC III, Art. 4(A)(4).

212 AP I, Art. 51(3).

213 See Commentary on Statements 24 and 25; and Recommendation II and Commentary in ICRC Interpretive Guidance, above note 123, p. 27.

214 For the identity card model, see [www.icrc.org/ihl.nsf/FULL/375?OpenDocument](http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument).

However, as stated in the Commentary to GC III, the possession of a card is not an indispensable condition of the right to be treated as a prisoner of war, but rather a supplementary safeguard.<sup>215</sup>

According to Article 4(A)(5) of GC III, “[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law”, will also be entitled to PoW status. PMSC personnel entitled to PoW status shall be treated according to the requirements of GC III.

PoWs having combatant status cannot be prosecuted for taking direct part in hostilities. The Detaining Power may, nevertheless, prosecute them for possible war crimes and other international crimes. Their detention is not a form of punishment, but rather aims at preventing them from further participating in the conflict. However, it should be remembered that civilians (including those entitled to PoW status under Articles 4(A)(4) and (5)) are not entitled to combatant privilege (i.e. having the right to directly participate in hostilities). Therefore, they do not enjoy immunity from domestic prosecution for lawful acts of war – that is, for having directly participated in hostilities while respecting IHL.<sup>216</sup>

**d) to the extent they exercise governmental authority, have to comply with the State’s obligations under international human rights law;**

In their standards of behaviour, PMSC personnel exercising an element of governmental authority, as well as those acting as State agents, have to comply with the State’s obligations under IHRL. They should be fully aware of the international obligations of the State on whose behalf they are performing their tasks and properly trained in this respect. Furthermore, domestic law may impose IHRL obligations directly on PMSC personnel exercising governmental authority.<sup>217</sup>

As they address related issues, the Commentary to Statements 4, 7(c), 8, 10, 15 and 19 may also be relevant.

**e) are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.**

PMSC personnel are obliged to comply with the national law of the Territorial, Home or Contracting State, or any other State when applicable. International law establishes individual criminal responsibility for numerous acts, including war crimes, genocide and crimes against humanity.

215 J. Pictet, above note 19, p. 65, Commentary on Art. 4(A)(4).

216 See ICRC Interpretive Guidance, above note 123, p. 37, Recommendation III, and p. 83, Recommendation X.

217 See, on this topic, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 460–499. See also *Kadic v. Karadzic*, above note 56, and *Ibrahim v. Titan Corp.*, 391 F Supp 2d 10 (D.D.C. 2005), para. 14; and Cour administrative d’Appel de Bordeaux, *Société nationale des chemins de fer v. MM. Georges Lipietz et S.*, No. 06BX01570, 27 March 2007 (affirmed by the Conseil d’État in December 2007: *MM. Georges Lipietz et S. v. Société nationale des chemins de fer*).

The involvement of an individual in the commission of a crime may take different forms. For instance, Article 25 of the Rome Statute of the ICC provides for individual criminal responsibility if a person commits a crime, orders, solicits or induces its commission, aids, abets or otherwise assists in its commission, in any other way contributes to the commission of such a crime by a group of persons acting with a common purpose, or attempts to commit such a crime. Individual criminal responsibility thus may cover a wide range of acts.<sup>218</sup>

In addition, it can be recalled that only combatants have the right to directly participate in hostilities and can benefit from immunity from domestic prosecution for acts committed in accordance with IHL, but which may constitute crimes under domestic criminal law. Civilians do not benefit from such immunity and can be prosecuted for every act constitutive of a crime that they commit: murder, manslaughter, homicide, assault, bodily harm, acts of negligence, etc. Therefore, PMSC personnel having a civilian status in an international armed conflict or working in the context of a non-international armed conflict are subject to domestic criminal prosecutions for acts otherwise lawful under IHL.

As mentioned, States granting immunity for PMSC personnel before their national courts should ensure that an investigation will be conducted, and that persons suspected of having committed a crime will be prosecuted and, as the case may be, punished by authorities of another State or other States.<sup>219</sup>

As it addresses related issues, the Commentary to Statement 23 may also be referred to.

## F. Superior responsibility

### 27. Superiors of PMSC personnel, such as:

- a) **governmental officials, whether they are military commanders or civilian superiors, or**
- b) **directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.**

The responsibility of **military commanders** for war crimes committed by their subordinates, based on the commanders' failure to take measures to prevent or

218 On this issue, see, for instance, Chia Lehnhardt, "Individual Liability of Private Military Personnel under International Criminal Law", *European Journal of International Law*, Vol. 19, No. 5, 2008; Hans Vest, "Business Leaders and the Modes of Individual Criminal Responsibility under International Law", *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010; and Norman Farrell, "Attributing Criminal Liability to Corporate Actors: Some Lessons from International Tribunals", *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010.

219 See Montreux Document, above note 1, Part 2, Good Practices 22, 51, 52 and 73.

punish the commission of such crimes, is a long-standing rule of IHL.<sup>220</sup> It is also a rule of customary law both in international and non-international armed conflicts.<sup>221</sup>

This responsibility for failure to act is closely linked to the obligation of military commanders to take all necessary and reasonable measures within their power to prevent or repress the commission of violations or submit the matter to the competent authorities for investigation and prosecution.<sup>222</sup> While some aspects of superior responsibility are still being explored by international courts and tribunals, jurisprudence provides clarification on important elements of command responsibility.

Firstly, a commander is the one who possesses the power or authority either *de jure* or *de facto* to prevent a subordinate's crime or to punish the perpetrator of the crime after its commission.<sup>223</sup> The standard test to determine command responsibility is the one of effective control: if the commander has effective control over his or her subordinates, to the extent that he or she can prevent them from committing crimes or punish them after they have committed crimes, s/he would be held responsible for the commission of the crimes if he or she failed to exercise such abilities of control.<sup>224</sup>

Secondly, commanders will incur individual criminal responsibility for acts of their subordinates if they knew or had reason to know about these acts,<sup>225</sup> for instance if they had information which would put them on notice of possible unlawful acts by their subordinates.<sup>226</sup> The Rome Statute of the ICC contains a slightly different *mens rea* by requiring that the commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or were about to commit a crime.

Responsibility of superiors extends not only to military commanders but also to **civilian superiors**.<sup>227</sup> Thus, superiors from the civilian State authorities or other

220 AP I, Art. 86(2); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (ICTY Statute), Art. 7(3); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, 8 November 1994, UN Doc.S/RES/955 (ICTR Statute), Art. 6(3); Rome Statute, above note 93, Art. 28. See also International Military Tribunal at Nuremberg (IMT Nuremberg), *The United States of America v. Wilhelm von Leeb et al. (The High Command Trial)*, Case No. 12, Judgment, 30 December 1947–28 October 1948, and *List (Hostage Trial)* case, Judgment, 8 July 1947–28 October 1948; International Military Tribunal for the Far East (IMT Tokyo), *Case of the Major War Criminals*, Judgment, 4–12 November 1948; ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 189–198 and 222–241; and ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgment (Appeals Chamber, Reasons), 3 July 2002, paras 24–62.

221 See ICRC Customary Law Study, above note 13, Rule 153.

222 See AP I, Art. 87; and Rome Statute, above note 93, Art. 28(a)(ii).

223 ICTY, *Prosecutor v. Delalić*, above note 220, para.192.

224 *Ibid.*, para. 198.

225 *Ibid.*, para. 239.

226 *Ibid.*, paras 216–240.

227 Rome Statute, above note 93, Art. 28(b); ICTY Statute, above note 220, Art. 7(3); ICTR Statute, above note 220, Art. 6(3); ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber), 2 September 1998, paras 490–449; ICTY, *Prosecutor v. Delalić*, above note 220, para. 196.

organizations, including businesses,<sup>228</sup> could also be held criminally responsible under this rule. It is also a rule of customary law both in international and non-international armed conflicts.<sup>229</sup>

The scope of civilian superior responsibility is not yet entirely settled. The ICTY and International Criminal Tribunal for Rwanda (ICTR) applied the test of effective control and the *mens rea* requirement regardless of whether the superior is a military commander or a civilian.<sup>230</sup> For instance, the ICTR held the director of a tea factory responsible as a superior for the conduct of his employees because he was exercising *de jure* authority over his employees as he “exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory”.<sup>231</sup>

The Rome Statute limits the responsibility of civilian superiors to activities of subordinates that were within their effective responsibility and control,<sup>232</sup> a requirement that doesn’t exist for military commanders who, by the nature of military structures, have much tighter control over their troops (as well as a stricter disciplinary system at their disposal) than civilian superiors have over their subordinates.

Furthermore, the Rome Statute establishes a higher threshold of *mens rea* for civilian superiors than for military commanders. While the test for military commanders is whether they knew or should have known about the crime,<sup>233</sup> the test for civilians is whether they knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or were about to

228 See, for example, ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000.

229 See ICRC Customary Law Study, above note 13, Commentary on Rule 153:

(i) *Civilian command authority*. Not only military personnel but also civilians can be liable for war crimes on the basis of command responsibility. The International Criminal Tribunal for Rwanda, in the *Akayesu* case in 1998 and in the *Kayishema and Ruzindana* case in 1999, and the International Criminal Tribunal for the former Yugoslavia, in the *Delalić* case in 1998, have adopted this principle. It is also contained in the Statute of the International Criminal Court. The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone refer in general terms to a “superior[”], as do many military manuals and national legislation [references omitted].

230 See, e.g., ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgment (Appeals Chamber, Reasons), 3 July 2002, para. 50.

231 See *Prosecutor v. Musema*, above note 228, para. 880:

The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes.

See also ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 78, where the tribunal:

considers that the superior’s ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

232 Rome Statute, above note 93, Art. 28(b)(ii).

233 *Ibid.*, Art. 28(a)(i).

commit a crime.<sup>234</sup> In other words, the civilian superior must have been “wilfully blind” to information that was available to him or her.<sup>235</sup>

Due to the fact that they may have to work in close cooperation with military units or organized armed groups, or due to the nature of their work, the possibility for a PMSC employee to be held responsible as a military commander cannot be excluded, even if this person holds civilian status under IHL. Indeed, Article 28(a) of the Rome Statute refers not only to military commanders but also to “person[s] effectively acting as ... military commander[s]”.<sup>236</sup> Therefore, despite their civilian status and the fact that they are working for a private company, PMSC personnel could, under certain circumstances, be held criminally responsible under the standards applicable to military commanders.<sup>237</sup>

**Superior responsibility for other crimes under international law:** superior responsibility also exists for other crimes under international law, such as crimes against humanity and genocide.<sup>238</sup> Furthermore, it is not settled whether and to what extent the principle of superior responsibility also applies, under existing international law, to other crimes. While it is not enshrined in the CAT, the Committee against Torture has considered that superiors are responsible if “they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures”.<sup>239</sup> The ICPPED enshrines the principle of superior responsibility in its Article 6. Certainly, international law does not prohibit States from enacting superior responsibility standards for further crimes. Indeed, this may be one way for States to promote and ensure respect for IHL and IHRL by PMSC personnel.

234 *Ibid.*, Art. 28(b)(i).

235 Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 870.

236 On this notion, see ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), paras 408–410.

237 See Roberta Arnold and Otto Triffterer, “Article 28: Responsibility of Commanders and Other Superiors”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck Hart Nomos, Munich, 2008. On the requirements related to the military structure and the chain of command, see ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 193.

238 ICTY Statute, above note 220, Arts 4, 5 and 7(3); ICTR Statute, above note 220, Arts 2, 3 and 6(3); and Rome Statute, above note 93, Arts 6, 7 and 28.

239 Committee against Torture, General Comment 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/CRP.1/Rev.4, 23 November 2007, para. 26; see, similarly, *Hilao v. Estate of Marcos*, 103 F.3d 767, paras 776–778 (9th Cir. 1996).

## REPORTS AND DOCUMENTS

# ICRC Q&A and lexicon on humanitarian access<sup>1</sup>

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A considerable number of countries have been the theatre of armed conflicts – whether international or non-international – with all the devastation and suffering that this entails, chiefly among the civilian population. Indeed, civilians continue to be the primary victims of violations of international humanitarian law (IHL) committed by both State parties and non-State armed groups. Recurring violations in hostilities include deliberate and indiscriminate attacks against civilians, the destruction of infrastructure and goods indispensable to their survival, and the forcible displacement of the civilian population. All too frequently, civilians lack basic supplies and services, such as food, water and health care.

The primary responsibility for the security and well-being of a civilian population rests with States and parties to the conflict. In addition, impartial humanitarian organizations, such as the International Committee of the Red Cross (ICRC), may offer their services and be authorized to undertake relief operations in favour of victims of a armed conflicts. The complementary role of these organizations is often crucial for those affected by armed conflicts.

The ICRC is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. In order to be able to implement its mission, the ICRC – like any other impartial humanitarian organization – needs to access the areas affected by violence in order to reach persons in need of protection and assistance. This physical access is critical to be able to assess victims' needs independently and to address them in an impartial manner.

In situations of armed conflict, access to the victims thereof is regulated by IHL. The rules of IHL regulating humanitarian access must be respected by all parties to an armed conflict. In that framework, offers of services by an impartial humanitarian organization, such as the ICRC, cannot be interpreted as

interference in States' internal affairs, nor as recognition of or support to a party to the conflict.

Yet, parties to armed conflicts sometimes explicitly refuse access altogether or to certain areas. They might also implicitly/indirectly prevent access, for instance by creating legal, administrative and other practical obstacles impeding humanitarian action. In other cases, it is the absence of minimum conditions of security that prevents access by humanitarian personnel to individuals in need. This absence of security may materialize in the worst cases in direct threats and attacks against humanitarian personnel.

There are different underlying reasons for recent constraints on humanitarian access. One of them is a growing perception over the last years that humanitarian aid has become more and more politicized.

This is why the ICRC constantly seeks to remind and convince parties that its humanitarian action is apolitical and abides in all circumstances by the principles of neutrality, impartiality and independence. It has also repeatedly called over the years for respect for IHL provisions related to humanitarian access.

The short Q&A section below is followed by a more detailed lexicon section providing the meaning of key expressions and terms used in the IHL rules on humanitarian access.

## **Q&A on humanitarian access**

### **1. What causes limitations to humanitarian access?**

Constraints or limitations imposed on humanitarian access may have different causes. First, security-related concerns are among the main factors limiting humanitarian access. When hostilities are ongoing, or when humanitarian relief operations are deliberately targeted, it is extremely difficult to reach populations in need. The security situation may lead humanitarian organizations to either withhold from or scale down their operations in specific contexts or to hire security providers. This problem highlights how important the obligation to respect and protect humanitarian relief personnel is.

Second, in some cases, denial of consent for humanitarian action or constraints imposed on the delivery of relief schemes in the field may also be part of a military strategy aimed at depriving the adversary and/or the civilian population of essential supplies.

1 Editor's note: For the purposes of the *Review*, a few editorial changes have been made to the original text, which is available online at: [www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm](http://www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm) (all internet references were accessed in June 2014). On this topic in the *Review*, see also Felix Schwendimann, "The legal framework of humanitarian access in armed conflict", Vol. 93, No. 884, December 2011, pp. 993–1008; Emanuela-Chiara Gillard's "The Law Regulating Cross-Border Relief Operations", Vol. 95, No. 890, Summer 2013, pp. 351–382; Françoise Bouchet-Saulnier, "Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, Not States' rights" in this issue of the journal.

Another important constraint on humanitarian access is a growing perception over recent years that humanitarian aid has become more and more politicized. This is notably due to the discussion around the notions of “humanitarian intervention” or “responsibility to protect”, on which there is no consensus in the international community and which are not to be confused with humanitarian activities.<sup>2</sup> Moreover, certain international operations have followed “integrated” or “comprehensive” approaches, combining political, military and humanitarian objectives.

In some contexts, these developments have raised doubts about humanitarian actors’ real objectives and can contribute to eroding the perception of, and confidence in, these actors. Humanitarian organizations therefore experience greater difficulties in convincing parties to an armed conflict of their true intent, which is to provide humanitarian relief to persons in need or to have a protection<sup>3</sup> dialogue without any connection to political or military purposes. These doubts about humanitarian action lead some parties to armed conflicts to restrict or forbid humanitarian access, or worse, to expose humanitarian personnel to threats or attacks.

## 2. How is the ICRC addressing these restrictions of access?

The ICRC has always raised concerns about the risks of these approaches combining political, military and humanitarian objectives, and distances itself from such initiatives, in particular when they are implemented in highly polarized environments. In order to preserve its independent, neutral and impartial humanitarian action, the ICRC remains committed to its distinct approach of building a constructive dialogue and relationships with all relevant parties in a confidential manner, in order to promote trust and support for its activities and to reach agreement with the parties about them.

This approach notably aims at persuading the parties to comply with their legal obligations and to accept the ICRC’s humanitarian activities, such as visiting persons deprived of their liberty. The latter kind of activities and the dialogue sought by the ICRC could certainly not be undertaken if the ICRC were to be perceived as pursuing political objectives or if it were acting without the consent of the parties to the conflict concerned.

2 For more details on the notion of “humanitarian activities”, see the lexicon below.

3 The ICRC’s definition of “protection” is as follows: “In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict ..., protection aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals. It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations. It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations.” The ICRC’s “protection” activities are implemented following four main guiding principles: neutral and independent approach; dialogue and confidentiality; holistic and multidisciplinary character of ICRC action; and search for results and impact. See “ICRC Protection Policy”, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, available at: [www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm](http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm).

The ICRC calls on all parties to armed conflicts to respect IHL and reminds them that the Geneva Conventions (GCs) have been universally ratified, indicating a consensus on the obligation to assist and protect civilian populations against the effects of conflict and to grant access to impartial humanitarian actors during armed conflict when those populations are in need. Where warranted, it also recalls that States have undertaken an obligation to ensure respect for the Geneva Conventions. This means that all States must do everything in their power to put an end to violations of IHL, *inter alia* by exercising their influence over those who violate its provisions.

### 3. What is the ICRC's position regarding cross-border operations?

The ICRC seeks, in dialogue with all parties concerned and in light of the realities on the ground, to address impartially the needs that it has identified. "Cross-border" operations are only one among various other ways of accessing people in need.

For its part, the ICRC has always considered cross-border operations to be a possibility, as long as they can be carried out in full transparency with the parties to the armed conflict and with the other States concerned. As such, "cross-border operation" is not *per se* an IHL expression. It only constitutes a form of humanitarian relief operations regulated by the same IHL rules as any other impartial humanitarian operations, which notably require the consent of States concerned.<sup>4</sup>

Thus, the ICRC seeks to operate with the consent of the States concerned, including the relevant neighbouring countries. Operating with such consent is the best way for the ICRC to ensure effective action and to avoid exposing its teams to additional security risks.

### 4. Are the ICRC's concerns about humanitarian access recent, or linked to specific contexts?

The ICRC has repeatedly called for respect of the provisions of IHL in the situations of armed conflict in which it is working throughout the world. In recent years, the ICRC has publicly expressed the need to provide safe, rapid and unimpeded humanitarian relief to those in need in many conflict situations on all continents. The general call for humanitarian access and respect for the humanitarian mission has also been made repeatedly at the meetings of the International Red Cross and Red Crescent Movement and in other international fora.<sup>5</sup>

4 More details on these IHL rules governing humanitarian access can be found at questions 5 and 6 and in the lexicon below.

5 See Council of Delegates, Resolution on Humanitarian Assistance in Situations of Armed Conflict, 1991; Council of Delegates, Resolution on the Principles of Humanitarian Assistance, 1993; International Conference of the Red Cross and Red Crescent, Resolution on Protection of the Civilian Population in Periods of Armed Conflict, 1995; International Conference of the Red Cross and Red Crescent, Plan of Action for the Years 2000–2003, 1999; International Conference of the Red Cross and Red Crescent, Resolution 2, "4-Year Plan of Action", 31C/11/R2, 28 November–1 December 2011; ICRC, "Protection

Despite these appeals, impartial humanitarian organizations have been experiencing increasing difficulties in accessing vulnerable populations in situations of armed conflict, due to security risks (exposure of personnel to threats or attacks), denial of access and various political, legal or practical restrictions (geographic restrictions, curtailment of certain types of activities, and/or administrative obstacles). These restrictions are seriously hampering their capacity to operate. Ultimately, this means that victims of armed conflicts do not always receive the basic assistance to which they are entitled such as food, shelter, water, health care, and to see their protection problems addressed.

## 5. What are the rules of IHL dealing with humanitarian access?<sup>6</sup>

By ratifying the GCs and other IHL treaties such as the Additional Protocol to the GCs (APs), States have undertaken to implement their legal obligations in good faith and in particular to respect and ensure respect for IHL.<sup>7</sup>

IHL treaties and customary IHL contain specific rules governing relief and protection in favour of those in need,<sup>8</sup> be they civilians, sick or wounded fighters or any other category of victims of armed conflict.

Although these rules vary slightly depending on the nature of the conflict – occupation, international armed conflict (IAC) other than occupation, or non-international armed conflict (NIAC) – the IHL framework regulating humanitarian access mainly revolves around four main stages:

1. Each party to the armed conflict bears the primary obligation to meet the needs of the population under its control;
2. Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled;
3. Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned.<sup>9</sup> Under IHL, the parties to the conflict concerned must consent to such activities when the needs of the population under their control are not met; and
4. Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a party to the armed

of Civilians: ICRC Statement to the UN Security Council”, 22 August 2013, available at: [www.icrc.org/eng/resources/documents/statement/2013/08-19-civilans-un-security-council.htm](http://www.icrc.org/eng/resources/documents/statement/2013/08-19-civilans-un-security-council.htm).

6 See also the lexicon and list of relevant IHL provisions below.

7 Art. 1 common to the four Geneva Conventions.

8 In international armed conflict other than occupation, the most relevant IHL provisions are: Arts 9/9/9/10 of the four GCs respectively; GC IV, Arts 17 and 23; AP I, Arts 68–71 and 81. In situations of occupation, the most relevant provisions are GC IV, Arts 59 and 61, and AP I, Arts 69 and 71. Lastly, in NIAC the relevant norms are common Art. 3(2) and AP II, Art. 18. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 55 and 56 applicable in both IAC and NIAC.

9 In situations of non-international armed conflict, only the consent of the State party to the conflict is required by IHL. More details on this notion of consent are provided in the lexicon.

conflict must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.

Other relevant IHL provisions are those related to the respect and the protection of humanitarian and medical relief personnel and objects,<sup>10</sup> and to the prohibition to use starvation of the civilian population as a method of warfare.<sup>11</sup>

## 6. Do the rules of IHL themselves impose restrictions on humanitarian access?

IHL does not provide an unfettered right of access to all impartial humanitarian organizations in order to carry out every kind of activity unconditionally. IHL requires first that the offer of services made by an impartial humanitarian organization be accepted by the party to the conflict concerned before the former can operate in the territory under the control of the latter.<sup>12</sup> However, the decision of the party concerned to consent to relief schemes in its territory is – under IHL – not discretionary.<sup>13</sup>

Once consent has been given, relief schemes must be allowed and facilitated by all parties and States concerned, even if the relief is intended for the population under the control of the enemy. However, this does not mean that impartial humanitarian organizations – once allowed in the territory of the party concerned – are at liberty to operate without any constraints.

While discharging their obligation to allow and facilitate relief operations, the parties and States concerned are entitled to exert a right of control over the humanitarian operations and prescribe technical arrangements. In any case, the right of control recognized by IHL should not unduly delay humanitarian operations, impede their rapid deployment or make their implementation impossible.

In this regard, it is worth noting that the military necessity argument can be invoked in exceptional circumstances in order to regulate – but not prohibit – humanitarian access, and can only *temporarily* and *geographically* restrict the freedom of movement of humanitarian personnel.

Military necessity cannot be used under IHL to turn down a valid offer of services or to deny in their entirety the humanitarian activities proposed by impartial humanitarian organizations.

10 In IAC, the most relevant IHL provisions are AP I, Arts 12, 15, 21 and 70–71. In NIAC, the most relevant IHL provisions are AP II, Arts (1) and 11(1). See also ICRC Customary Law Study, Rules 25 and 28–32.

11 In IAC, the most relevant IHL provision is API, Art. 54(1). In NIAC, the most relevant IHL provision is AP II, Art.14. See also ICRC Customary Law Study, above note 8, Rule 53.

12 When impartial humanitarian organizations are directly solicited by the parties to the armed conflict, their consent is of course presumed.

13 The IHL rules governing consent vary in their scope and wording. For instance, in occupation, GC IV, Art. 59 states that “if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf the said population, and shall facilitate them by all the means at its disposal”. In other words, the Occupying Power is bound to accept the offer of services when it is unable to fulfil its primary obligation to meet the needs of the local population.

## Lexicon of expressions and terms on humanitarian access

### IHL rules on humanitarian access

1. Each party to the armed conflict bears the primary obligation to meet the needs of the population under its control.
2. Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled.
3. Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned. Under IHL, the parties to the conflict must consent to such activities when the needs of the population under their control are not met.
4. Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a party to the armed conflict must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.
5. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in cases of imperative military necessity may their movements be temporarily restricted.
6. Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected.

This lexicon section explains the meaning of key expressions and terms used in the IHL rules regarding humanitarian access (summarized in the box above). In practice, of course, these terms must be read as a whole and used in the context of applicable IHL rules.

It should be recalled that IHL provides specific rules for humanitarian relief operations both in IAC and NIAC. These rules are not applicable outside the context of armed conflicts.

1. Each party to the conflict bears the primary obligation to meet the needs of the population under its control.

The responsibility of a State to meet the needs of a population under its control is generally accepted as a corollary of State sovereignty. This “**primary obligation to meet the needs**” has also been expressly transposed to the IHL rules governing occupation for the Occupying Power.<sup>14</sup> IHL provisions governing IAC (other

<sup>14</sup> GC IV, Art. 55; AP I, Art. 69.

than occupation) and NIAC do not specifically contain a similar rule. However, in such situations, the responsibility of the parties to the conflict to meet the needs of the population under their control can be inferred from the object and purposes of IHL.

The adjective “**primary**” means that the obligation is first and foremost incumbent upon the parties to the conflict. The fact that IHL foresees that others, such as impartial humanitarian organizations, can step in – under certain conditions – in order to offer relief to the populations affected by armed conflicts in no way diminishes the primary responsibility of parties to the conflict to meet the needs of those under their control.

2. Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled.

With Article 3 common to the four GCs, second paragraph, and Articles 9/9/9/10 of the four GCs respectively, establishing the so-called right of humanitarian initiative, States have expressly recognized that impartial humanitarian organizations, such as the ICRC, may have an important role to play in addressing the humanitarian needs generated by armed conflicts. This right concretely allows those organizations to offer their services and to perform humanitarian activities in armed conflict settings.

Public international law, including IHL, has over time recognized that these offers of services made by impartial humanitarian organizations cannot be regarded as unlawful interference in the domestic affairs of a State, nor can they be seen as an unfriendly act. In this regard, it is critical not to confuse the offers of services and the subsequent humanitarian relief operations conducted by impartial humanitarian organizations with the so-called “right to humanitarian intervention” or “Responsibility to Protect” concepts. The latter notions are distinct from humanitarian activities carried out by impartial humanitarian organizations within the framework set by IHL.

- Impartial humanitarian organizations

Under IHL, only impartial humanitarian organizations are entitled to make offers of services. For the purposes of IHL, the organizations wishing to offer their services must therefore be “**humanitarian**” and “**impartial**”. The adjective “**humanitarian**” is self-explanatory: it indicates that the organization follows only humanitarian objectives and acts in particular for the survival, well-being and dignity of those affected by armed conflicts. The adjective “**impartial**” refers to the attitude of the humanitarian organizations which is to be adopted vis-à-vis the victims of the armed conflict when planning for, and implementing, the proposed humanitarian activities. Impartiality refers to the requirement not to make any discrimination as to nationality, race, religious beliefs, class or political opinions or, for that matter, any other similar criteria. Further, the fundamental

principle of impartiality requires endeavouring to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.<sup>15</sup>

- Humanitarian activities

International humanitarian law does not specifically define the notion of “**humanitarian activities**” that impartial humanitarian organizations may offer to the parties to an armed conflict. Articles 9/9/9/10 of the four GCs respectively, applicable to IAC, specify that the ICRC or any other impartial humanitarian organization can offer to undertake humanitarian activities for the *protection* and *relief* of those affected by armed conflict. Common Article 3 only refers to “services”, but one should consider that the right of initiative applicable in NIAC also includes all humanitarian activities. Humanitarian activities that can be offered within IHL therefore have a protection<sup>16</sup> and relief<sup>17</sup> dimension. Both work towards the same objective: safeguarding the life and dignity of the victims of armed conflicts. Therefore, in the context of an armed conflict, humanitarian activities are all the activities that seek to preserve the life, security, dignity and mental and physical well-being of victims of the conflict, or which seek to restore said well-being if it has been infringed upon.

The humanitarian activities referred to under IHL must benefit *all* those affected by an armed conflict. This broad interpretation as to who can be the beneficiary of humanitarian activities means that the latter are not limited to civilians but may also include, for instance, wounded and sick fighters or prisoners of war and other persons deprived of their liberty.

If IHL provides for the right of impartial humanitarian organizations to offer their services, this body of law does not however create an obligation incumbent upon those organizations to offer their services or to undertake humanitarian activities. These organizations therefore retain their discretion for engaging in any particular armed conflict.

15 As a matter of good practice, this definition is followed not only by the components of the International Red Cross and Red Crescent Movement, but also by actors outside the Movement.

16 See above note 3.

17 As used in the Geneva Conventions, the term “relief” is mostly aimed towards addressing emergency situations. It needs to be read jointly with the broader term “assistance”, used in Article 81(1) of AP I, which seeks to cover additionally the longer-term as well as the recurrent and even chronic needs. Neither relief nor assistance have been defined in the aforementioned treaties. The absence of a generic definition, or of a list of specific activities which would be covered by the term “assistance”, is in line with the fact that what may be needed in terms of humanitarian assistance in one context will not necessarily be needed in another context and may evolve over time. “Assistance activities” refer to all activities, services and delivery of goods, primarily in the fields of health, water, habitat and economic security and which seek to ensure that persons caught up in an armed conflict can survive and live in dignity.

- “...in particular when the needs of the population affected by the armed conflict are not fulfilled”

While humanitarian organizations will often offer their services in acute situations, they may also do so at any other time, in particular in order to carry out preventive activities. Nothing in the relevant provisions of IHL may be interpreted as restraining the right of impartial humanitarian organizations to offer their humanitarian services to the parties to an armed conflict. Conversely, at all times, nothing precludes a party to an armed conflict from approaching the ICRC, or another impartial humanitarian organization, to ask whether it would be willing to undertake humanitarian activities.

### 3. Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned

If IHL grants to impartial humanitarian organizations a right to offer their humanitarian services, this right should not be interpreted as constituting an unfettered right to humanitarian access (i.e. a right of actually being guaranteed to be able to undertake the proposed humanitarian activities). Whether impartial humanitarian organizations will effectively be able to provide their services in areas plagued by armed conflict will depend on their receiving “**consent**” by the parties to the conflict concerned.

The IHL rules governing consent vary in their wording and scope.<sup>18</sup> However, be it in IAC (including in situations of occupation) or NIAC, the consent of the parties to the armed conflict concerned must be obtained before impartial humanitarian organizations can operate and undertake their humanitarian activities in the territories under their jurisdiction/control. Therefore, before undertaking the humanitarian activities proposed, impartial humanitarian organizations must seek and obtain the consent of the party to the armed conflict concerned.<sup>19</sup>

In IAC (including occupation), the relevant IHL provisions<sup>20</sup> indicate that consent only needs to be obtained from those States which qualify as parties to the IAC and which are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken on their territory (it being understood that the opposing party does not need to be asked for consent to relief schemes when the latter take place in the territory of the adversary or in territory controlled by the adversary).

In NIAC, common Article 3 is silent on who should consent to humanitarian relief operations. However, the question as to whose consent needs to be obtained in NIACs governed only by common Article 3 can only be

18 For IAC, see Arts 9/9/9/10 of the four GCs respectively, and AP I, Art. 70(1); for occupation, see GC IV, Art. 59; for NIAC, see AP II, Art. 18.

19 It goes without saying that when impartial humanitarian organizations are directly solicited by the parties to the armed conflict, their consent is presumed.

20 Arts 9/9/9/10 of the four GCs respectively; AP I, Art. 70(1). For occupation, GC IV, Art. 59.

answered based on a careful consideration of the relationship between this provision and Article 18(2) of AP II, which expressly requires the consent of the High Contracting Party – in other words, the State party to the conflict. On this basis, *as a matter of IHL*, consent is to be sought from the State on the territory of which the NIAC takes place, and this also with regard to relief activities which are to be undertaken in areas over which the State in question has lost control to the opposing party.<sup>21</sup> In any case, for practical reasons, the ICRC would also seek the consent of parties to the NIAC concerned (including non-State armed groups party to it) before carrying out its humanitarian activities.

While the implementation of humanitarian activities depends upon the consent of the parties to the conflict concerned, the decision of the latter to consent to relief schemes is – under IHL – not discretionary. As always, IHL strikes a careful balance between States’ interests and humanitarian imperatives. Therefore, current IHL is not entirely deferential to State sovereignty when it comes to relief schemes.

#### 4. Under IHL, the parties to the armed conflict must consent to such activities when the needs of the population under their control are not met

Whether a party to an armed conflict can lawfully turn down an offer of humanitarian service is intrinsically linked to its ability to fulfil its primary obligation to meet the needs of the population under its control. When a party to an armed conflict is unable or unwilling to fulfil its primary obligation to meet the needs of its population and when offers of services have been made by impartial humanitarian organizations, there are no more valid/lawful grounds to withhold or deny consent to the undertaking of humanitarian activities. Therefore, there are circumstances under IHL in which a party to the conflict is obliged to grant its consent to an offer of services.

It is important to underline that, under IHL, imperative military necessity is not a valid ground for a general and definitive denial of consent to humanitarian activities. An offer of services can be declined by the parties to the conflict when there are no needs to meet and/or when the offer of services is not humanitarian in nature or does not emanate from an organization being impartial and humanitarian in character. IHL does not foresee other grounds justifying a general refusal to consent to relief schemes.

The expression “arbitrary denial/withholding of consent to relief operations” has been sometimes used to describe the situation in which a party to an armed conflict rejects a valid offer of services triggered by the existence of needs to be fulfilled.

No IHL provisions contain the expression “arbitrary denial/withholding of consent”, nor does this body of law define this notion. However, it may be argued

21 IHL reflects that the notion of consent in the context of relief operations is intrinsically linked to the notion of State sovereignty.

that a refusal to grant consent entailing a violation of the party to the conflict's own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case, for instance, when a refusal by a party to an armed conflict results in starvation of civilians as prohibited by Article 54 of AP I or where the party is incapable of providing the necessary humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL.

IHL also does not explicitly regulate the consequences of an unlawful denial of consent and thus does not spell out a general right of access derived from a so-called arbitrary/unlawful denial of consent. Therefore, the argument according to which such an arbitrary/unlawful denial of consent would justify as a matter of IHL unconsented-to cross-border operations does not reflect current IHL.

At the same time, IHL does not prohibit individual States and the international community as a whole from taking appropriate measures – in conformity with the applicable rules of international law – to ensure and facilitate the undertaking of impartial humanitarian operations in countries plagued by armed conflict. Such measures may also be in accordance with States' obligation to ensure respect for IHL, as specified in common Article 1.

5. Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a party to the armed conflict must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control

IHL makes a distinction between the requirement to obtain consent from a party to the armed conflict following an offer of services (in other words, the broad decision made by that party according to which an impartial humanitarian organization can be present and operate in its territory or territory under its control following a valid offer of services) on the one hand, and the obligation to allow and facilitate relief schemes, which aims at *implementing* the acceptance of the offer of services, on the other. The obligation to allow and facilitate relief is therefore an obligation conditioned by and directly deriving from the consent to the offer of humanitarian services, which the parties to the armed conflict concerned have previously given.

- **Must allow and facilitate**

Once relief actions are accepted in principle, the parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate the operations.<sup>22</sup> The parties must facilitate the tasks of relief personnel.<sup>23</sup> This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation issues, import/export, field

22 Commentary to AP II, Art. 18, para. 4888.

23 Commentary to AP I, Art. 71, para. 2892; AP II, Art. 18, paras 4869 and 4888.

trip approvals, and possibly privileges and immunities necessary for the organization's work; in short, "all facilities" needed for the organization to carry out its agreed humanitarian functions appropriately.<sup>24</sup> Measures must be also taken for the overall efficacy of the operations (for instance, time, cost, safety, appropriateness). This may include the organization being able to undertake its operation – where possible – in the most direct and safe way, which may be across borders in some circumstances.

The parties must also facilitate the relief by respecting and protecting relief consignments and humanitarian personnel, and not attacking them or diverting them (see section 6, below), and by facilitating their rapid distribution (see the notion of "rapid", explained below).<sup>25</sup> Armed forces must be informed about humanitarian relief convoys and their obligation to respect and protect them, and, for example, instructed regarding their facilitated passage through checkpoints.

In certain circumstances, facilitation by the parties to the conflict may include encouraging and facilitating effective international coordination of relief actions.<sup>26</sup>

In addition, IHL foresees specific rules requiring States to facilitate in every possible way the humanitarian activities carried out by the ICRC, as well as those undertaken by national Red Cross or Red Crescent societies.<sup>27</sup>

Under the law governing IAC, this obligation to allow and facilitate applies not only to the parties to the armed conflict but also to all the States concerned. This means that States not party to the armed conflict through the territory of which the impartial humanitarian organizations may pass in order to more efficiently reach conflict zones in which humanitarian activities are to be delivered, must authorize them to transit through and to use their territory.<sup>28</sup>

The law governing NIAC does not expressly contain a similar obligation to allow and facilitate relief operations binding upon States which are not party to the NIAC. However, there are expectations that States not party to the NIAC will not oppose the use of their territory by impartial humanitarian organizations in order to reach the victims of the NIAC. If those States were to refuse to allow and facilitate relief schemes, it would in effect preclude the humanitarian needs of the victims of an armed conflict being addressed and thus render the consent given by the parties to the conflict void.

24 See *inter alia* International Conference of the Red Cross and Red Crescent, Resolution 2, "4-Year Plan of Action", 31C/11/R2, 28 November–1 December 2011, Objective 1, "Enhanced Access by Civilian Populations to Humanitarian Assistance in Armed Conflicts", available at: <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-2-2011.htm>.

25 AP I, Art. 70(4). See also Commentary to AP II, Art. 18, para. 4888. See the notion of "rapid" explained below.

26 AP I, Art. 70(5).

27 AP I, Arts 81(1), (2) and (3).

28 GC IV, Art. 23; AP I, Art. 70(2); ICRC Customary Law Study, above note 8, Rule 55.

- **Rapid**

Once relief actions are accepted in principle, parties must facilitate their rapid distribution,<sup>29</sup> and not arbitrarily delay the forwarding of relief consignments,<sup>30</sup> in order for the aid or services to be received in a timely manner, taking into account the circumstances, including the needs of the population.

Some delay for reasons of checks/control of the operations is acceptable,<sup>31</sup> and in the exceptional case of imperative military necessity, the movement of humanitarian personnel may be temporarily restricted.<sup>32</sup>

In certain instances – for example, in some United Nations (UN) Security Council resolutions – the term “timely” is used. It is important to stress that such wording cannot displace the IHL obligation to facilitate “rapid” access.

- **Unimpeded**

The notion of “unimpeded” denotes that the passage of the relief, as well as the personnel accompanying it or carrying out other humanitarian services, must not be arbitrarily stopped, obstructed or hindered in the delivery of relief supplies to persons in need. Clearly, humanitarian relief personnel and objects must also never be attacked.<sup>33</sup>

Only in case of imperative military necessity may the activities of humanitarian relief personnel be limited or their movements temporarily restricted. This must not be prolonged beyond what is necessary, and for any prolongation of restrictions, sound reasons must be given.<sup>34</sup>

In certain cases – for instance, in certain UN Security Council resolutions – the term “unhindered” is used. This term should be understood as synonymous with “unimpeded”.

- **Passage**

“Passage” as used in the GCs and AP I refers to the transit of relief through the territory of parties to the conflict, as well as through the territory of States not party thereto, to reach its intended destination.<sup>35</sup> During IAC, subject to certain conditions, States must allow free passage of certain consignments intended only for civilians and particularly vulnerable groups of another State, even if it is an adversary.<sup>36</sup>

29 AP I, Art. 70(4); Commentary to AP II, Art. 18, para. 4884.

30 AP I, Art. 70(3)(c); GC IV, Art. 23; Commentary to AP II, Art. 18, para. 4888.

31 See the notion of the “right of control” explained below.

32 ICRC Customary Law Study, above note 8, Rule 56. See the notion of “unimpeded” passage of relief explained below.

33 See the definition of “respect and protect” in section 6, below.

34 AP I, Art. 71(3); ICRC Customary Law Study, above note 8, Rule 56; Commentary to AP I, Art. 71, para. 2896.

35 See GC IV, Arts 23, 59(3) and (4); AP I, Arts 70(2) and (3).

36 GC IV, Art. 23.

In contemporary usage, the meaning of “passage” has generally been broadened to include any movement of relief consignments, equipment and personnel accompanying it or carrying out other humanitarian services, including within the territory of a party to an IAC or NIAC. Frequently “passage” and “access” are used interchangeably, as both must necessarily be granted in order to reach persons in need.<sup>37</sup> In short, it includes all movements required for the effective undertaking of humanitarian activities. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in cases of imperative military necessity may their movements be temporarily restricted.<sup>38</sup>

- Relief

“Relief” refers to all activities, services and delivery of goods, primarily in the field of health, water, habitat and economic security and which seek to ensure that persons caught up in armed conflict can survive and live in dignity. Humanitarian relief includes objects necessary for religious worship and supplies essential to the survival of the civilian population, such as food, water and medical supplies, as well as clothing, bedding and means of shelter.<sup>39</sup> Furthermore, “relief” must be interpreted to include both relief items/goods and humanitarian services/activities.<sup>40</sup>

The humanitarian relief covered by the obligation to facilitate rapid and unimpeded passage must be impartial in character and conducted without any adverse distinction.<sup>41</sup> Relief personnel may form part of the assistance provided in any relief action,<sup>42</sup> for example, for needs assessment, the administration of relief, transportation, distribution, organization/coordination, specialized medical activities and protection services.<sup>43</sup>

37 See ICRC Customary Law Study, above note 8, Rule 55 and pp. 194–196 and 198–199; Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework*, Version 1, 2011, pp. 18, 20–22, 30–31; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (Kampala Convention), Arts 5(7) and 7(5)(g).

38 ICRC Customary Law Study, above note 8, Rule 56. See also Amended Protocol II to the Convention on Certain Conventional Weapons, Art.12.

39 AP I, Art. 69; AP II, Art. 18; Commentary to the ICRC Customary Law Study, above note 8, Rule 54. See also AP I, Art. 54(2); ICRC Customary Law Study, above note 8, Rule 54.

40 See e.g. AP II, Art. 18(1): “traditional functions [of Red cross and Red Crescent organizations] in relation to the victims of the armed conflict”. See also Commentary to AP II, Art. 18, para. 4869, which refers to “humanitarian activities”.

41 AP I, Art. 70; AP II, Art. 18(2); see also Commentary to AP II, Art. 18, para. 4889, describing the guarantees that humanitarian organizations must provide.

42 AP I, Art. 71(1). See also Commentary to AP II, Art. 18, para. 4869: “Article 18 is aimed at permitting and facilitating humanitarian activities in non-international armed conflicts for the purpose of assisting victims wherever they are and assuring them the *protection* to which they are entitled.”

43 Commentary to AP I, Art. 71, para. 2879.

- Right of control

The “right of control” is not an IHL treaty-based expression as such, but is reflected in several IHL provisions.<sup>44</sup> The fact that parties to the armed conflict and States which are not party thereto are under the obligation to allow and facilitate relief schemes remains without prejudice to their entitlement to control the humanitarian relief schemes<sup>45</sup> through measures such as verifying the humanitarian and impartial nature of the assistance, prescribing technical arrangements for the practical delivery of the assistance and restricting relief activities if reasons of imperative military necessity exist. The argument of military necessity can only be used in order to *temporarily* and *geographically* regulate relief operations. It should not result in a *de facto* prohibition against carrying out humanitarian activities once the offer of services has been accepted by the parties to the armed conflict.

Under IHL, the obligation to allow and facilitate – to which the right of control is a corollary – is an obligation of result, not an obligation of means. Thus, even if the holders of the obligation to allow and facilitate are entitled to a related right of control, the implementation of the latter may never result in unduly delaying or rendering impossible the delivery of the humanitarian relief.

Those responsible for the distribution of relief should be trusted to determine special priorities, such as relief for children, maternity cases, the disabled, the wounded and sick, or detainees.<sup>46</sup>

The parties’ control should respect and enable the organization’s ability to work according to its own mandate and principles as well as their working modalities. For example, there must be no diversion of the relief that would lead to it being distributed with adverse distinction and not according to need.<sup>47</sup> Relief personnel, on their side, must not exceed the terms of their humanitarian mission, for example by transmitting information of a military nature of which they may become aware (such as location of troops).<sup>48</sup>

## 6. Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected

Humanitarian personnel and the objects used for humanitarian relief operations must be respected and protected at all times.<sup>49</sup> This means first and foremost that

44 See GC IV, Art. 23; AP I, Art. 70 (3).

45 ICRC Customary Law Study, above note 8, Rule 55. See also e.g. Commentary to AP I, Art. 70, para. 2830; Commentary to AP II, Art. 18, para. 4887.

46 AP I, Art. 70(1); Commentary to AP I, Art. 70, paras 2817 and 2821; Commentary to AP II, Art. 18, para. 4889.

47 See Commentary to AP I, Art. 70, paras 2799 ff; Commentary to AP II, Art. 18, § 4889.

48 AP I, Art. 71(4); Commentary to AP I, Art. 71, paras 2898, 2901; Commentary to AP II, Art. 18, para. 4889.

49 AP I, Art. 71(2); ICRC Customary Law Study, above note 8, Rules 31 and 32.

they must not be attacked.<sup>50</sup> The parties to the conflict must also do their utmost to prevent relief from being diverted or looted,<sup>51</sup> and to ensure the safety of convoys.<sup>52</sup> This protection allows humanitarian personnel to act effectively for the benefit of persons in need.<sup>53</sup> To this end, the parties should provide clear and strict instructions to their armed forces to protect humanitarian relief and personnel, and respect the Red Cross and Red Crescent emblems.<sup>54</sup>

However, this obligation incumbent upon the parties to an armed conflict should not be manipulated so that the activities of an impartial humanitarian organization – initially consented to – would be wholly rendered impossible. While humanitarian personnel require a minimum of security in order to have access to victims of conflicts and to carry out their activities, humanitarian organizations do not expect full security guarantees as this would be unrealistic. Humanitarian personnel, by the nature of their functions, are prepared to take a reasonable amount of risk in an insecure environment, but in no circumstances can humanitarian personnel, objects and vehicles be the objects of threats or attacks.

Relief personnel, for their part, must take account of the national legislation and the security requirements of the party on whose territory they carry out their duties (for instance, routes and curfews) and the agreements negotiated with the parties.<sup>55</sup> As explained above, their movements and activities may be temporarily restricted only in cases of imperative military necessity.<sup>56</sup>

The obligation to respect and protect humanitarian relief personnel and objects is often translated into the phrase “safe access” (not itself an IHL term of art), which is frequently used in UN resolutions or other reference texts concerning humanitarian access.

50 Commentary to AP I, Art. 71, para. 2885; Commentary to ICRC Customary Law Study, above note 8, Rules 31 and 32.

51 Commentary to AP I, Art. 70, para. 2858; Commentary to ICRC Customary Law Study, above note 8, Rule 32.

52 Commentary to AP II, Art. 18, para. 4888.

53 ICRC Customary Law Study, above note 8, Rule 56; Commentary to AP I, Art. 71, para. 2871.

54 ICRC Customary Law Study, above note 8, Rule 30; Commentary to AP I, Art. 70, para. 2863.

55 AP I, Art. 71(4); Commentary to AP I, Art. 71, § 2902; Commentary to AP II, Art. 18, paras 4887, 4889(b).

56 ICRC Customary Law Study, above note 8, Rule 56. See above discussion on the term “right of control”.



## REPORTS AND DOCUMENTS

# What's new in law and case law around the world?

## Biannual update on national implementation of international humanitarian law\* July–December 2013



The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to regional events organized by the ICRC, to the development of national IHL committees and to accession and ratification of IHL and other related international instruments.

### ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks;<sup>1</sup> (iii) to collect and facilitate the exchange of information on national implementation measures; and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

\* This selection of national legislation and case law has been prepared by Julian Jaccard, legal intern at the ICRC Advisory Service on International Humanitarian Law.

## Relevant ICRC regional events

To further its work on implementation of IHL, the ICRC Advisory Service organized a number of national and regional events in the period under review. Of particular interest was the 2nd Continental Conference of National Committees on International Humanitarian Law of the Americas, co-organized with Costa Rica's Ministry of Foreign Affairs and national IHL committee, between 10 and 12 September in San José, Costa Rica. The Conference brought together governmental officials and members of seventeen national IHL committees (Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Dominican Republic, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Uruguay), representatives of three European national IHL committees (Germany, Spain and Switzerland), and officials from international and regional organizations including the Organization of American States, the Inter-American Court of Human Rights and UNESCO. The aim of the Conference was to follow up on the recommendations adopted at the 1st Continental Conference, including the establishment of a coordination mechanism between existing national IHL committees in Latin America and the Caribbean. Topics discussed included the regulation of the use of force in law enforcement operations and the legal needs of families of missing persons. The outcome of the Conference was the adoption of new recommendations encouraging the establishment of national IHL committees in countries where none currently exist.

## Update on national IHL committees

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through direct support of national IHL committees or similar bodies – inter-ministerial or inter-institutional bodies which advise the governments of their respective countries on all matters related to IHL. Such committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, and participate in the formulation of the State's position regarding matters related to IHL. There were 103 national IHL committees across the world by the end of 2013.

In particular, on 12 July 2013, the Liberia International Humanitarian Law Committee was established as a result of an administrative agreement concluded in August 2012 between the Ministry of Justice and the Ministry of Foreign Affairs. The main function of this national committee is to further the implementation and promote the knowledge of IHL at the national level. It represents a commitment to securing the essential guarantees laid down for the victims of armed conflict, demonstrating Liberia's involvement in taking steps towards

1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits and model laws, all available at the unit's web page, available at: [www.icrc.org/en/war-and-law/ihl-domestic-law](http://www.icrc.org/en/war-and-law/ihl-domestic-law).

fulfilling its fundamental obligation to respect and ensure respect for IHL. One of the mandates of the IHL committee is to promote ratification of and adherence to IHL and other related international conventions and protocols, and the amendment of national legislation to comply with these, and to contribute to the dissemination of IHL.

The committee is composed of fifteen State institutions, including the Ministries of Foreign Affairs, Defence, Justice, Information, Education and Finance, the National Police, the Law Reform Commission, the Governance Commission, the Independent National Commission on Human Rights, the Liberia National Commission on Small Arms, the Foundation for Democracy in Liberia, the Consortium of Civil Society Organizations of Liberia, the Liberia Red Cross Society and the ICRC, as an observer. It is chaired by the Ministry of Foreign Affairs and the Ministry of Justice, and by the Law Reform Commission.

## Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and therefore is a priority for the ICRC. In the period under review, fourteen IHL and other related international conventions and protocols were ratified or acceded to by various States.<sup>2</sup> In particular, there has been notable accession to the Arms Trade Treaty (ATT). Indeed, nine States have ratified the ATT in the second half of 2013. According to its Article 22, the treaty will enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification.

The Advisory Service also follows ratification of other international treaties that may be of a relevance *inter alia* for the protection of persons during armed conflict and the prevention and repression of violations of IHL, such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance (CPPED).

The following table outlines the total number of ratifications, as of June 2013, of relevant IHL treaties and other related international instruments.

## National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic tribunals in the second half of 2013, or collected by the ICRC Advisory Service during that period. They cover a variety of topics linked to IHL, such as the status of protected persons, and criminal and disciplinary repression of IHL violations.

2 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database. ICRC, *Treaties and States Parties to Such Treaties*, available at: [www.icrc.org/ihl](http://www.icrc.org/ihl).

**Ratifications and accessions  
July–December 2013**

<b>Conventions</b>	<b>States</b>	<b>Ratification/ accession date</b>	<b>Number of parties</b>
1954 First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict	New Zealand	17 October 2013	103
1977 Additional Protocol I to the Geneva Conventions – Declaration Article 90	Saint Vincent and the Grenadines	04 November 2013	74
1980 Convention on Conventional Weapons	Zambia	25 September 2013	117
1980 Protocol I to the Convention on Conventional Weapons	Zambia	25 September 2013	112
1980 Protocol II to the Convention on Conventional Weapons	Zambia	25 September 2013	93
1980 Protocol III to the Convention on Conventional Weapons	Zambia	25 September 2013	108
1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction	Syrian Arab Republic	14 September 2013	190
1996 Amended Protocol II to the Convention on Conventional Weapons	Zambia	25 September 2013	100
1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict	Cambodia New Zealand Morocco	17 September 2013 23 October 2013 05 December 2013	67
2001 Amendment to the Convention on Conventional Weapons	Zambia Bangladesh	25 September 2013 26 September 2013	79

2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Burundi	18 October 2013	70
2003 Additional Protocol V to the Convention on Conventional Weapons (explosive remnants of war)	Zambia	25 September 2013	84
2005 Additional Protocol III to the Geneva Conventions	Bangladesh	26 September 2013	66
	New Zealand	23 October 2013	
	Kenya	28 October 2013	
2006 Convention against Enforced Disappearances	Lithuania	14 August 2013	41
	Lesotho	6 December 2013	
2008 Convention on Cluster Munitions	Saint Kitts and Nevis	13 September 2013	84
2013 Arms Trade Treaty	Iceland	2 July 2013	9
	Guyana	4 July 2013	
	Antigua and Barbuda	12 August 2013	
	Nigeria	12 August 2013	
	Costa Rica	25 September 2013	
	Mexico	25 September 2013	
	Trinidad and Tobago	25 September 2013	
	Grenada	21 October 2013	
	Mali	3 December 2013	

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation. The full texts of these laws and case law can be found in the ICRC's Database on National Implementation of IHL.<sup>3</sup>

## A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (July–December 2013). Countries covered are Colombia, France, Libya, South Africa, Switzerland and Tunisia.

### *Colombia*

#### *Decree Creating a Departmental Working Group on Prevention, Assistance and Attention for Victims of Enforced Disappearance*

On 27 November 2013, the governor of the Nariño Department adopted a decree creating a working group to address the situation of missing persons and their families' needs in this Department. The governor created this working group as a response to humanitarian needs and to comply with Colombian international obligations, including those resulting from the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions, the 1994 Inter-American Convention on the Forced Disappearance of Persons and the 2006 CPPED.

According to Article 1 of the Decree, the working group will be a permanent body covering the Nariño Department, in charge of preventing people from going missing, and assisting and protecting missing persons and their families. In particular, the working group is expected to support the departmental government in reaching its duties towards missing persons; to make relevant recommendations; to promote and support the adoption of internal regulations; to publicize and disseminate the rights of missing persons and their families; and to be in charge of monitoring and analysing the disappearance phenomenon within the Department.

The working group is composed of different local authorities and representatives of civil society. The ICRC was recognized as a permanent invitee to this working group. This is the first body of this kind to be created in Colombia.

### *France*

#### *Law No. 2013-711 introducing various steps to adapt French justice system to European Union Law and to France's international commitments*

On 5 August 2013, in the process of aligning its legislation with EU standards, the French parliament adopted a law to implement both the 2005 Additional Protocol to the Geneva

3 ICRC, *IHL: National Implementation Database*, available at: <https://www.icrc.org/ihl-nat>.

Conventions, and relating to the Adoption of an Additional Distinctive Emblem, and the 2006 CPPED (Chapters VIII and X of Law No. 2013-711, respectively).

Chapter VIII amends the Penal Code by introducing new provisions to repress those who, publicly and without having the right, use the emblem or one of the distinctive signs protected by the 1949 Geneva Conventions and their Additional Protocols.

Chapter X also amends the Penal Code, introducing the crime of enforced disappearance to the conducts punished as other crimes against humanity (Articles 212-1 to 212-3 of the Penal Code). This section incorporates a new Chapter to the French Penal Code, defining the crime of enforced disappearance as it is defined by the CPPED<sup>4</sup> and providing a penalty of life imprisonment for offenders. This new Chapter also addresses command responsibility for enforced disappearance.

## *Libya*

### *Law No. 29 on Transitional Justice*

On 2 December 2013 the Libyan General National Congress adopted a law to address severe and systematic violations of human rights perpetrated since the beginning of the Gaddafi regime (1 September 1969). Violations committed by the “17 February Movement” during the 2011 revolution are also included. The aim of the Law is to reveal the truth about past human rights violations; to tackle State and individual responsibility; to reform remaining institutions from the Gaddafi regime; and to repair the victims of these violations.

A Fact-finding and Reconciliation Commission is established by the Law in order to investigate every severe and systematic human rights violation brought to its knowledge; to reveal the truth about circumstances relating to these violations (what, who and how); to address issues referring to internally displaced and missing persons; and to propose reparation measures for victims. According to Article 16 of Law No. 29, the Fact-finding and Reconciliation Commission is enabled to “order individuals, search locations, seize and seal documents” and “may seek the assistance of police officers” to pursue its functions. Investigations are intended to address individual responsibility and to make recommendations on how to proceed regarding specific files.

### *Law No. 31 on the Martyrs of Abu Salim Massacre*

On 18 December 2013 the Libyan General National Congress adopted a law relating to the events that took place in the Abu Salim prison on 29 June 1996. This law is designed to provide justice and reparations for this event.

4 Under Article 2 of the CPPED, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

According to Article 1 of the Law, the “Abu Salim Prison Massacre represents a crime against humanity” which requires that a “comprehensive and transparent inquiry” be initiated. As for reparations, Article 2 establishes different measures. Families of those victims who were governmental officials at the time of the events are entitled to receive payment equal to the amount of all salaries not received since 29 June 1996. For those victims who were not public servants, a fixed special pension will be granted to the relatives.

Moreover, the Law establishes a Special Committee in charge of fact-finding activities, identification of “martyrs” and the establishment of a detailed database with all the victims’ personal data. Data collection is intended to help resolve issues with the victims’ civil status. The Special Committee is expected to work together with other authorities, including non-official bodies, in order to gather and process all the required data.

## *South Africa*

### *Act No. 13 of 2013: Prevention and Combating of Torture of Persons Act*

On 29 July 2013 the Parliament of the Republic of South Africa adopted an Act to give effect to the Republic’s international obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which was ratified by South Africa on 10 December 1998. The legislation provides for the offence of torture and other associated acts, and is intended to prevent the torture of persons within or across the borders of the Republic.

According to Section 4, any person who commits, attempts to commit or incites, instigates, commands or procures any person to commit the act is guilty of the offence of torture. Persons found guilty of the offence may be sentenced to imprisonment, including life imprisonment. The Act recognizes criminal individual responsibility regardless of the fact that the accused is or may have been a head of State, a member of government or an elected representative or government official. In addition, no exceptional circumstances may be invoked as a justification to committing acts of torture.

The legislation provides for extra-territorial jurisdiction over acts of torture if committed by a citizen or resident, or if the acts have been committed against a citizen or resident. Jurisdiction may be exercised even in the absence of any link between the act committed and South Africa, as long as the accused is in the territory of the Republic.

## *Switzerland*

### *Federal Law on Private Security Services Provided Abroad*

On 27 September 2013, the Swiss Federal Assembly adopted a law to regulate private security companies and to require them to respect human rights and IHL.

Companies targeted are those based in Switzerland providing security services abroad; those providing services in Switzerland to private security companies working abroad; and those companies managed from Switzerland providing security services abroad. This law also applies to any individual working for these societies – in Switzerland or abroad – and to Swiss federal authorities employing them.

Under Article 4 of the Law, private security services include activities relating to the protection of persons in complex environments; riot control; management of detainee camps or prisons; operational and/or logistical support to armed forces; the use and maintenance of weapons systems; training of armed forces or security personnel; and deployment of intelligence and counterintelligence.

According to Article 7, all private security companies which fall within the scope of the Law have to respect the 2010 International Code of Conduct for Private Security Providers.<sup>5</sup> Moreover, Articles 8 and 9 provide for specific prohibitions relating to the provision of security services. In particular, Article 8 prohibits the provision of these services for the purpose of direct participation in hostilities abroad. Article 9 of the Law prohibits providing security services when it is likely that they would contribute to the commission of serious violations of human rights.

The Law creates an authority to register new companies and to control existing ones in order to assess whether or not they are acting or willing to act in compliance with its rules.

## *Tunisia*

### *Organic Law Establishing and Organizing Transitional Justice*

On 15 December 2013, the Tunisian National Constituent Assembly adopted a law establishing a range of mechanisms to deal with past human rights violations committed since 1 July 1955. Its purpose is to seek the truth about these violations, address accountability and pursue national reconciliation and non-recurrence. By “violation”, the Law means any serious infringement of a human right, committed by the State or any group of individuals acting in its name as well as by other organized groups.

Accountability is to be addressed by judicial and administrative commissions according to the domestic law in force. Specialized chambers composed by non-politicized judges are established to deal with any case referred by the Truth and Dignity Commission – also created by this law – relating to election fraud, financial corruption and/or misuse of public funds.

The Truth and Dignity Commission’s main purpose is to document serious violations and to gather all data referring to victims. Its duty is to establish State responsibility and refer any case leading to proven individual criminal responsibility to the Public Prosecution Office. Reparations are also the

5 International Code of Conduct for Private Security Service Providers, 9 November 2010, available at: [http://www.icoc-ppsp.org/Home\\_Page.html](http://www.icoc-ppsp.org/Home_Page.html).

Commission's task, as well as drafting recommendations regarding any relevant institutional reform. The Commission is also in charge of establishing a Committee for Vetting Public Servants and Institutional Reform.

## B. Case law

The following section lists, in alphabetical order by country, relevant domestic jurisprudence related to IHL and released during the period under review (July–December 2013). Countries covered are Bangladesh, Colombia, Germany, Israel, the Netherlands and South Africa.

### *Bangladesh*

*The Chief Prosecutor v. Abdul Quader Molla, Criminal Appeal Nos. 24–25 of 2013, Appellate Division of the Supreme Court*

**Keywords:** Bangladesh Liberation War, crimes against humanity.

On 17 September 2013, the Appellate Division of the Bangladesh Supreme Court overturned the lower court judgment and sentenced Abdul Quader Molla to death for crimes committed during the country's Liberation War in 1971. Following the 17 February 2013 amendments to the International Crimes (Tribunal) Act,<sup>6</sup> which allowed the appeal of sentencing orders, the government of Bangladesh appealed the International Crimes Tribunal-2 (ICT-2) judgment, wherein the accused was sentenced to life imprisonment. The government of Bangladesh demanded that the Appellate Division of the Supreme Court sentence Mr Molla to death, the highest sentence envisaged by International Crimes (Tribunal) Act.

Mr Molla was accused of having “actively aided, abetted, facilitated and substantially assisted, contributed and provided moral support and encouragement in committing appalling atrocities in 1971 in the territory of Bangladesh”. According to the prosecution, he organized the Al-Badar Bahini formation, a paramilitary pro-Pakistani body which allegedly participated in serious human rights violations prior to Bangladeshi independence.

The Appellate Division affirmed the judgment of the ICT-2, finding Molla guilty of committing murder and rape as a part of a systematic or organized attack against the civilian population for his participation in the 1971 Liberation War. Considering the gravity of the conduct and the high profile of the accused, the Appellate Division modified the sentence imposed by the ICT-2 and condemned him to death by hanging.

6 For further information regarding this law, please consult “What's New in Law and Case Law Around the World? Biannual Update on National Implementation of International Humanitarian Law, January–June 2013”, available at: [www.icrc.org/eng/assets/files/review/2013/irrc-891-892-national-implementation.pdf](http://www.icrc.org/eng/assets/files/review/2013/irrc-891-892-national-implementation.pdf).

## Colombia

### *Decision No. C-579/13, Constitutional Court*

**Keywords:** Legal Framework for Peace, transitional justice.

On 28 August 2013, the Colombian Constitutional Court released a decision in which it declared that constitutional amendments made by Legislative Act No. 1 of 2012 were in accord with the Colombian Constitution.

Legislative Act No. 1 of 2012, also called the Legal Framework for Peace, amended the Colombian Constitution by inserting two transitory Articles (66 and 67) which included transitional justice as an economic, social and cultural right.<sup>7</sup> Article 66 established the possibility of the Prosecutor giving priority to investigating those persons bearing the greatest responsibility and waiving criminal prosecution for cases not prioritized. This Article was brought to the Colombian Constitutional Court to establish whether this provision was in accord with the Constitution. It was argued that prioritizing or waiving certain investigations was against the State's duty to thoroughly investigate and repress all human rights violations.

The Court indeed recognized that the State obligation to respect and to ensure respect for human rights implied the duty of investigating, trying and repressing all violations, without any sort of distinction or priority. However, the Court also stated that, according to international human rights law and IHL, this obligation could be limited as long as serious violations were properly addressed. Moreover, for the Court, the waiver and prioritization were justified by the purpose of preventing future violations and seeking a stable and long-lasting peace. However, it also concluded that, when prioritizing, the Prosecutor should bear in mind the gravity of the violations and give priority to criminal conduct such as extrajudicial killings, torture, enforced disappearance, sexual violence, forced displacement and the recruitment of child soldiers.

### *Decision No. C-740/13, Constitutional Court*

**Keywords:** military criminal jurisdiction.

On 23 October 2013, the Colombian Constitutional Court ruled that Legislative Act No. 2 of 2012 was unconstitutional.<sup>8</sup>

7 For further information regarding this law, please consult "What's New in Law and Case Law Around the World? Biannual Update on National Implementation of International Humanitarian Law Related Treaties, July–December 2012", available at: [www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf](http://www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf).

8 For further information regarding this law, please consult "What's New in Law and Case Law Around the World? Biannual Update on National Implementation of International Humanitarian Law Related Treaties, July–December 2012", available at: [www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf](http://www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf).

This Act purported to amend the Colombian Constitution to expand the scope of the country's military criminal jurisdiction to violations of IHL committed by public forces, explicitly excluding enforced disappearances, extrajudicial executions, sexual violence, torture and forced displacement. Before this amendment, all IHL violations were investigated by the Office of the Prosecutor. Plaintiffs claimed that procedural breaches during the Parliament debate made the law unconstitutional.

After reviewing the legislative procedure followed within the Parliament, the Court ruled that this Legislative Act was not in accord with the Colombian Constitution and overturned the modification introduced by the Act.

## Germany

*“Varvarin bridge” case, Federal Constitutional Court*

**Keywords:** tort claims, State responsibility, war crimes, former Yugoslavia armed conflict.

On 4 September 2013, the German Federal Constitutional Court dismissed the claims lodged by the victims of the Varvarin bridge bombing.

On 30 May 1999, following NATO's decision to attack the Federal Republic of Yugoslavia, a bridge in the Serbian town of Varvarin was struck by NATO fighter planes, causing death to ten persons and injuries to thirty, all of them civilians. The German armed forces were not directly implicated in the conduct of the operation. Victims from the attack claimed compensation from Germany, arguing that by allowing NATO forces to target the bridge, Germany had violated its international obligations and domestic law.

Claims were rejected by both the courts of first and second instance. On 2 November 2006, the Federal Supreme Court affirmed previous rulings stating that the relevant international and domestic provisions do not grant individually enforceable rights; compensation resulting from these tort claims concerned exclusively the State of nationality of the claimants (in this case Serbia); there was no relevant obligation under customary international law; and there was no right to compensation under the German domestic liability law which could cover these facts.

The applicants appealed this decision but the Federal Constitutional Court did not overturn it. However, it took the occasion to criticize some of the lower courts' rulings. Indeed, it found that the lower courts granted too large a margin of appreciation to the German authorities regarding the application of the IHL principle of proportionality, and placed the burden of proof on the applicants with regard to the authorities' knowledge of the facts. Still, the Court did not modify the previous jurisprudence on this issue, confirming that the ordinary regime of State responsibility does not cover damages caused by war.

*“Kunduz incident” case, Regional Court of Bonn*

**Keywords:** Afghanistan, principles of distinction and precaution, tort claims.

On 11 December 2013, the Regional Court of Bonn dismissed the compensation claims filed by the victims of the “Kunduz incident”.

On 4 September 2009, Colonel Georg Klein, German commander of the International Security Assistance Force, launched an air strike near Kunduz, Afghanistan. This attack targeted two fuel tanker trucks which had been hijacked by Taliban fighters, and resulted in the killing of approximately ninety persons. Preliminary investigations were conducted by a parliamentary investigatory commission and by the General Federal Prosecutor. On 16 April 2010, the Federal Prosecutor dismissed the case, arguing that Mr Klein did not incur individual criminal responsibility. On August 2010 the German government agreed to make an *ex gratia* payment to the victims’ families but did not admit its alleged responsibility regarding the Kunduz incident. However, two survivors of the attack sued the German government in order to obtain compensation for damages suffered.

The Regional Court of Bonn dismissed these claims on the basis that Mr Klein did not participate in official misconduct or in a breach of IHL. According to the Court, he did respect the principle of distinction when defining fuel tankers as military objectives. Indeed, as specified by internal intelligence, the tankers were going to be used in an attack against an Afghan police station in Kunduz. Moreover, the Court stated that Mr Klein took all possible precautions when asking on seven occasions whether the persons standing around the tankers were civilians or not. Finally, the Regional Court of Bonn followed the recent ruling of the Federal Constitutional Court on claims for damages relating to IHL violations.

*Israel*

*Yoav Hess et al v. Chief of Staff, HCJ 4146/11, Supreme Court*

**Keywords:** white phosphorus, means and methods of warfare.

On 9 July 2013, the Israeli Supreme Court sitting as the High Court of Justice dismissed the claims lodged by Yoav Hess and others relating to the use of white phosphorus by the Israel Defense Forces (IDF) during the 2008 and 2009 Cast Lead operation.

Arguing that the use of white phosphorus as a weapon has indiscriminate effects on the civilian population both in a direct and an indirect way, the plaintiff asked the Court to order the IDF to limit the use of this chemical in populated areas and to prohibit the use of weapons containing it when there are alternative weapons available which pose fewer risks to the civilian population and offer similar military advantages. Although it normally refrains from intervening in the IDF’s choice of

means and methods of warfare, the Court did analyse these claims because an IHL violation had allegedly been committed. The State of Israel proved that IDF policy prohibited the use of white phosphorus in populated areas and that it was used solely for smokescreen purposes. Bearing in mind the extremely limited cases when, according to the IDF policy, white phosphorus could be used, the Court dismissed Mr Hess's claims. Nonetheless, it also recommended that the IDF conduct an extensive examination of its use and to search for other alternatives. It also left the door open for future claims if the current IDF policy should change.

### *The Netherlands*

*The State of Netherlands v. Hasan Nuhanovic, 12/03324, Supreme Court*

**Keywords:** State responsibility, former Yugoslavia armed conflict, dual attribution.

On 6 September 2013, the Supreme Court of the Netherlands confirmed the ruling of the Court of Appeal which found the Netherlands responsible for the death of three Bosnian Muslims killed during the Srebrenica massacre.

At the time of its intervention in the former Yugoslavia, the Dutch Battalion of United Nations (UN) peacekeepers (Dutchbat) was assigned to protect the “safe area” of the eastern Bosnian enclave of Srebrenica. On 11 July 1995, after the Bosnian Serb armed forces took control of the “safe area”, thousands of Bosnian Muslims sought refuge at the UN compound. On 13 July, while outside the compound men were being killed and abused, the Dutchbat command decided to expel from the compound three Bosnian Muslims, including a UN interpreter. They were subsequently killed in the Srebrenica massacre. The families of these three victims sued the Netherlands for its alleged responsibility for the events.

On 10 September 2008 the District Court of The Hague dismissed the claims, considering that Dutchbat was operating under a UN mandate in Bosnia and did not have operational command and control of the area, which was in the hands of the UN. However, on 5 July 2011, in an unprecedented ruling, the Court of Appeal overturned this decision, recognizing that in this case, there was dual responsibility between the UN and Dutchbat which implied a shared effective control over the same wrongful conduct. Therefore, the Dutch government was found responsible for what happened to the three Bosnian Muslims. The Supreme Court affirmed this ruling and added that, because of Dutch effective control of the compound, extraterritorial human rights obligations resulting from the European Convention on Human Rights were fully binding at the time.

### *South Africa*

*National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre, 485/2012, Supreme Court of Appeal*

**Keywords:** universal jurisdiction, implementation of the International Criminal Court Statute.

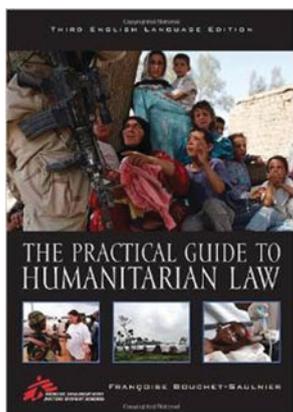
On 27 November 2013, in an unprecedented ruling, the Supreme Court of Appeal of South Africa dismissed the appeal lodged by the National Commissioner of the South African Police Services (SAPS) relating to the investigation of alleged crimes against humanity committed in Zimbabwe.

On 19 June 2009, the SAPS decided not to investigate complaints made by the Southern African Human Rights Litigation Centre (SAHRLC) regarding alleged widespread torture committed by Zimbabwean nationals against opponents of the ruling party in Zimbabwe. On 8 May 2012, as a result of a complaint lodged by the SAHRLC, the North Gauteng High Court ordered the SAPS to review the decision, but SAPS instead appealed the High Court's order.

On the basis of South African International Criminal Court Act 27 of 2002, the Supreme Court of Appeal affirmed the lower court decision. It considered that perpetrators of human rights violations cannot go unpunished; that torture as a crime against humanity is an offence with a universal nature; that States party to the Rome Statute have to take domestic measures to suppress these universal crimes; and that crimes against humanity committed extraterritorially could be investigated by the South African authorities whenever there are factors connecting the case to the jurisdiction. In this case, revealing that perpetrators might, at some stage, have been present in the South African territory and that investigations can be deployed in a manner not affecting Zimbabwe's sovereignty, the Supreme Court of Appeal affirmed the order given by the lower court to the SAPS.



## BOOK REVIEW



# The Practical Guide to Humanitarian Law

**Françoise Bouchet-Saulnier\***

**Book review by Dirk Salomons**, Director of the Humanitarian Policy Track at Columbia University's School of International and Public Affairs.

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It is astonishing how much those of us who live in reasonably functional communities take for granted. Looking out of my office window upon the brownstones in a leafy New York City neighbourhood, I feel confident that my peace and security are guaranteed. In the unlikely case that a shootout below me should shatter that peace, I only have to call 911 and a reliable scenario will unfold: police cars, ambulances and possibly a curious journalist will appear in no time. The police will secure the street and go after the perpetrators of the violence, the ambulance crews will pick up the casualties, impartial to their role in the conflict, and the media will begin to speculate on the root causes of the event. At some point, a prosecutor will gather information from the police, a trial will be held, the perpetrators will be given their day in court, and the local jail will provide room and board. The media will cover it all. I can safely go back to my desk.

Where rule of law prevails, we know that the State has the monopoly of force, that the judiciary is fair and effective, and that the penitentiary system is functional. The media are the public's watchful eye. If only we could feel as

\* Second ed., Rowman and Littlefield, Lanham, 2014 (originally published in 2006 under the title *Dictionnaire pratique du droit humanitaire*, edited and translated by Laura Brav and Camille Michel). Published in cooperation with Médecins Sans Frontières.

secure when it comes to violence in the international arena: violence between States, or violence within States or regions where the rule of law has lost its bearings. What do we have at the international level to mirror those State institutions that we rely on domestically? What legal framework shields us from lawlessness in international armed conflicts? Does international law, in other words, ensure that the necessary triad for global security is in place: a strong and neutral international armed force to protect civilians, a powerful international judiciary, and an effective international structure to provide humanitarian aid?

There is the United Nations (UN) Security Council, entrusted with the task of maintaining international peace and security, and endowed with considerable authority and powers to do so. Its “police” are the “Blue Helmets”, the well over 100,000 uniformed personnel spread over sixteen current UN peacekeeping operations.<sup>1</sup> Its “ambulances” are the wide array of humanitarian actors, inter-governmental and non-governmental, which attempt to alleviate the suffering of those displaced or harmed by outbursts of violence. Its judiciary is the International Criminal Court in The Hague, with a few *ad hoc* international criminal courts operating in the margins. And its penitentiaries, apart from a few cells in The Hague, consist mainly of facilities on loan from Member States.

Is this international legal framework sufficient to provide the same level of peace and security globally that we trust to find in democratic nation states? The Security Council is largely paralyzed, the UN peacekeeping operations address but a fraction of the global crises where stability must be restored, and impunity is still guaranteed for all but a very few at the top of the criminal pyramid – and even they tend to get away with crimes. So what then stands between us and total chaos? If anything at all, it is a formidable body of international humanitarian law (IHL), human rights law and international criminal law that at least reveals what the rules and norms are, even in their breach. Here, Françoise Bouchet-Saulnier’s *The Practical Guide to Humanitarian Law*, the subject of this review, serves as an indispensable resource and valuable guide.

It would seem that this body of international law has grown in scope and complexity as the world around us has become ever more fragmented. The bloodbath at Solferino triggered the First Geneva Convention (1864), addressing the plight of the wounded in battle. The legacy of the American Civil War shaped the standards of martial conduct set out in the Hague Conventions of 1899 and 1907.<sup>2</sup> The carnage of the First World War and particularly the ghastly impact of asphyxiating and poisonous gases led to a protocol prohibiting this practice in the future (1925),<sup>3</sup> and then elicited a subsequent elaboration of the Geneva

1 UN Department of Peacekeeping Operations, Peacekeeping Fact Sheet, 31 October 2014, available at: [www.un.org](http://www.un.org) (all internet references were accessed in October 2014).

2 These codified behaviour in times of martial law; for the full text of the Conventions with respect to the laws and customs of war on land, see Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900), available at: [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp).

3 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

Convention (1929), with provisions for the treatment of the sick and wounded and the treatment of prisoners of war.<sup>4</sup> But the real explosion of IHL, human rights law and international criminal law only occurred after the Second World War, when the annihilation of civilians had become strategy. To understand the depth and scope of that new universe, one needs a reliable and learned guide. Fortunately, that is exactly what we have in Bouchet-Saulnier's impressive *magnum opus*.

The author is legal director of Médecins Sans Frontières, and the book is clearly structured to do exactly what its title promises: provide easily accessible guidance to practitioners, especially those who are working in the field, often in the middle of armed conflict. Its topics are organized in alphabetical order, from "Adoption" to "Wounded and Sick Persons", covering some 200 entries. But before describing the riches that can be found there, I'd like to focus on the book's introduction, which in itself is a thoughtful and extensive essay on the profound changes in humanitarian law since the 1949 Geneva Conventions were drawn up. The author reflects there on the synchronous evolution of international criminal law in tandem with IHL and human rights law, and she examines this development in the context of the emergence of a peacekeeping and peace enforcement doctrine that resulted from a widening definition of national and international security, culminating in the "Responsibility to Protect" concept endorsed by the UN Security Council and the UN General Assembly at their sixtieth session, in 2005.<sup>5</sup> All this has profoundly changed the context of IHL.

Bouchet-Saulnier laments how the very concepts of IHL have been perverted by interpretations driven by the "war on terror", where "war" no longer is synonymous with "armed conflict" and belligerents no longer meet the definition of combatants, ending up in legal black holes. In citing Albert Camus' aphorism "Calling things by the wrong name adds to the affliction of the world", she stresses the need to restore "precise meaning and substance to words that have become a part of the media's vocabulary of misery and whose weight in law we have forgotten".<sup>6</sup> For Bouchet-Saulnier, the challenge in preparing this guide was to present humanitarian law from the perspective of victims' rights, and to respond to aid organizations' needs for direction in situations such as confrontations with armed groups, attacks on civilians under their care, combatants' withholding of food as a military strategy, or encounters with child soldiers.

In focusing on victim's rights, Bouchet-Saulnier does far more than provide an inventory of IHL in its narrow sense, within the confines of the 1949 Geneva Convention and the 1977 Additional Protocols. The guidance in this book is drawn from IHL, human rights treaties, international refugee law, the rules that

4 The International Committee of the Red Cross drew up a draft convention which was submitted to the Diplomatic Conference convened at Geneva in 1929. See Convention relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931), available at: [www.icrc.org/ihl/INTRO/305?OpenDocument](http://www.icrc.org/ihl/INTRO/305?OpenDocument). This convention was then superseded by the 1949 Geneva Convention and the later Additional Protocols.

5 *The Practical Guide to Humanitarian Law*, pp. xv–xxvii.

6 *Ibid.*, pp. xv, xvi.

govern peacekeepers, the UN Charter and UN Conventions, international criminal law, and case law of national and international courts. The book also describes and characterizes the institutions that have created this body of law, or that are responsible for observing and implementing its provisions: UN system organizations, regional organizations and international judicial bodies. This broad coverage, the author argues, is necessary in order for the compendium to “serve as a practical guide to the range of uses of international law in the context of aid activities and in the management of armed conflicts and other situations of crisis”.<sup>7</sup>

Very helpful in clarifying this complex environment is the author’s historical analysis of the manner in which this vast body of international law emerged from a changing political environment. The phenomenon of “asymmetrical war”, the use of guerrilla or terror tactics, and the efforts by states to combat secessionist or insurrectionist movements all brought out the gaps in the 1949 Geneva Convention, and triggered the 1977 Additional Protocols to fill this dangerous legal vacuum. At the same time, human rights instruments emerged, starting in 1948 with the Universal Declaration, followed by covenants on civil and political rights, as well as economic, social and cultural rights. This then opened the door for nearly a dozen UN conventions, addressing issues such as genocide, the status of refugees, racial discrimination, discrimination against women, torture, and the rights of the child, of migrant workers and of people with disabilities, just to name a few. In parallel, a system of international criminal courts came up, *ad hoc* initially, then leading to a permanent International Criminal Court.

Each of these developments has had an impact on the normative environment in which humanitarian operations are carried out, and thus *The Practical Guide to Humanitarian Law* is indispensable for both aid workers in the field and for their supporters at headquarters, in equal measure. It is difficult to predict in which crisis each entry will be the most useful, but I can’t think of a situation that is not covered. The first entry, “Adoption”, for example, brings to mind the immediate aftermath of the 2004 tsunami, when a major faith-based NGO planned to bring many orphans out of Aceh to its base in Djakarta, with the alleged intent of then facilitating the adoption of these children, possibly by Western families. At the same time, human traffickers moved in to export some of the 35,000 children who lost parents, for sale as sex slaves or sweatshop labour. This created havoc, and triggered legislation literally overnight whereby the Indonesian parliament blocked all movements of unaccompanied children across provincial boundaries without parental consent.<sup>8</sup> If the responsible agency had consulted *The Practical Guide*, then available in an earlier edition, it may have considered the provisions of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption, and Article 78

7 *Ibid.*, p. xvi.

8 Alan Cooperman, “Missionaries Take In Orphans: Christian Group to Build Home for 200 Muslims”, *Washington Post*, 13 January 2005; “Guards to Protect Tsunami Orphans from Child Traffickers,” *The Guardian*, 5 January 2005; “The Tsunamis and Child Trafficking”, Editorial, *The New York Times*, 13 January 2005.

of the Additional Protocol to the Geneva Convention, setting out rules restricting the evacuation of children.

To give another example: a fascinating entry, especially after the recent events in Gaza, deals with “Human Shields”.<sup>9</sup> It cites the Geneva Convention, its Additional Protocols, and the Statute of the International Criminal Court, all describing the use of human shields to prevent an enemy attack as a war crime under IHL. But what if the civilians serving as human shields do so voluntarily, out of ideological fervour? The author cites rulings of the Israel Supreme Court that introduce the notion of “free will” in the concept of human shields, and points out that the assessment of the potential “free will” of a civilian in a situation of armed violence is both complex and dangerous. In doing so, she demonstrates a critical, independent streak that makes *The Practical Guide* far more than a handbook: it is in fact a compendium of very thoughtful analytical essays, some very brief, that consistently reiterate the primacy of the “victims” perspective.

Each entry provides insight into the decisions of relevant courts, and gives detailed bibliographic references; often there are internet links to the organizations mentioned, and at the end of the guide one finds an up-to-date list of the status of ratification of more than thirty international conventions and treaties. But the dominant value of the entries is not only their factual riches, but above all the analysis and critical reflection embedded in nearly every one of them, never hiding the author’s sense of humanitarian purpose.

This focus on the suffering of people affected by violent upheavals is also manifest in entries on topics such as “Individual Recourse”, “Reparation (Compensation)”, “Torture”, “Detention” and “Collective Punishment” – all areas where *The Practical Guide* gives the inquisitive practitioner ample tools to stand her ground in defending assaults on victims’ rights.

*The Practical Guide* is bulky, taking up no less than 796 pages and weighing in at several pounds. Thus, it may not fit into the backpack of the itinerant aid worker, but it should be available in the field office of every operational NGO, with a copy at the organization’s headquarters, prominently displayed on the CEO’s desk. Will the next step be a digital edition, destined for the hard drive of every aid worker? In its current, physical form *The Practical Guide* represents a nearly monastic achievement, a labour of love and of deep commitment to humanitarian principles. It deserves to become a household item in the international world of aid and advocacy.

9 *The Practical Guide to Humanitarian Law*, p. 211.



## BOOKS AND ARTICLES



# Droit international humanitaire

Jean D'Aspremont and Jérôme de Hemptinne\*

**Book review by Antoine P. Kaboré**, Teaching Assistant at the Geneva Academy of International Humanitarian Law and Human Rights.

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There can be no doubt about the usefulness of this book given its subject matter. After all, armed conflicts are an almost daily reality for humanity and regulating them is more important than ever. We would all love to live in a world without armed conflicts, with no need for international humanitarian law (IHL), but one need only look at what is happening in Syria or South Sudan to realize that such a world is a utopia. This is why continuous efforts are needed to promote and develop this body of law in order to make it more effective and enhance the protection it affords. In publishing this book, Jean D'Aspremont and Jérôme de Hemptinne contribute to such efforts. Given the scarcity of francophone literature in IHL, this book fills also a “gap” in that sense, even if *Principes de droit des conflits armés* by Eric David remains a very valuable and outstanding contribution to the field. *Droit international humanitaire* has already been reviewed elsewhere by Professor Julia Grignon;<sup>1</sup> without repeating the points already highlighted there, this appraisal will briefly address both the format and the content of the book.

In terms of format, there are several noteworthy features. Overall, the book is easy to read and flows well, despite a few typos. The authors write in simple language, making the book easy to follow and understand. The decision to organize the book into themes rather than having a linear description of IHL is useful and user-friendly, but also less instructive. It is likely to suit readers who

\* Published by Éditions A. Pedone, 2012.

are interested in a specific aspect of IHL. However, despite the introduction and the fact that the fourteen themes cover the essential points, it is less instructive for those who need to grasp the structure and the background of the subject matter before getting into the more in-depth discussions on specific topics. Despite these slight issues, the book remains very useful for any type of audience, including academia, practitioners and military lawyers.

The summary and the bibliography at the end of each chapter are unquestionably useful.<sup>2</sup> The summary gives an overview of the issues addressed in the chapter, and the bibliography enables readers to pursue their research on a specific topic. Not to be overlooked is the decision to include a final chapter that deals with conclusions and future prospects, which gives the reader not just a general summary of the book, but also – and above all – a sense of the main issues concerning each theme therein.

In terms of content, a notable feature of the book is the fact that all the themes are addressed by means of rich discussion, drawing on legal opinion and theory (particularly in the reference documents of the International Committee of the Red Cross (ICRC), the “guardian” of IHL) as well as case law. The authors also go further than simply describing the rules; they do not hesitate to take a stand on certain “burning issues” (see below).

The aim of this review is not to discuss each of the particular themes covered in the book, but rather to point out a few themes that the authors have selected which may give rise to some interesting conversations on the effectiveness of IHL.

In Chapter 2, the authors address the difficulties of demonstrating the existence of customary rules of IHL. This discussion is of twofold relevance for the law of non-international armed conflict: first, it raises the issue of the systematic (or not) transposition of customary rules applicable to international armed conflicts to non-international armed conflicts;<sup>3</sup> and second, it links to the question of the extent to which the practice of organized armed groups can be taken into account in the development of customary rules of IHL. This in turn links to the discussion of the basis for the applicability of IHL to organized armed groups. This problem is addressed in Chapter 5, where the authors have tried to systematically justify this basis in terms of both treaty law and customary law, neither of which prove to be satisfactory given the current state of IHL. The authors are therefore urged to further develop and share their thinking on this issue in the future.

The discussions about the distinction between international and non-international armed conflicts in Chapter 3 are very important for the future of IHL. The authors contend that this distinction tends to become less marked once customary law comes into play, and IHL will probably lose any such

1 Julia Grignon, “Jean D’Aspremont and Jérôme de Hemptinne, Droit international humanitaire”, *Journal of International Criminal Justice*, Vol.11, No.3, 2013, pp. 688–690.

2 *Ibid.*

3 *Ibid.*

categorization in the future. They also draw conclusions about what the possible loss of such a distinction would mean for international criminal law, particularly as regards the scope of war crimes. Noting that the definition of these crimes is still dependent on the distinction between the two categories of armed conflicts, they immediately and rightly point out that efforts should be made to harmonize the scope of these crimes in both categories (leaving some room for manoeuvre if necessary), in order to strengthen protection for victims of armed conflicts. An in-depth study of the relevance of the traditional distinction between these two types of armed conflict, and the implications of ending that distinction, is therefore called for.

Chapter 4, on the intersection between IHL and international human rights law in armed conflict, is noteworthy because the authors offer a very original interpretation of the case law of the International Court of Justice (ICJ). Most legal literature quotes word-for-word the famous paragraph 25 of the ICJ's Advisory Opinion of 8 July 1996 on the threat or use of nuclear weapons<sup>4</sup> to conclude that, according to the ICJ, humanitarian law constitutes *lex specialis* in armed conflict. In their book, D'Aspremont and de Hemptinne subtly assert that in fact, the ICJ's reasoning was intended not to resolve the conflict that exists between these two bodies of law in terms of the right to life, but rather to get around it by means of a so-called "systemic" interpretation. While disputable, this is certainly an original interpretation. It supports their assertion that standards to protect human rights are undergoing a "humanitarianization", while IHL itself experiences a "humanization" when international criminal courts turn to human rights rules to define some war crimes. Contrary, therefore, to the generally accepted view that human rights and IHL are irreconcilable on certain matters, such as the prohibition on arbitrary deprivation of life, the authors' take is that the "humanitarianization" and "humanization" of the two bodies of law, respectively, could ultimately bring about their harmonization.

Some might say that such an approach is doomed to fail, given the extent of the differences between the two systems, but as another author has pointed out, "the reconciliation of human rights law and the law of armed conflict in a manner that provides a comparatively seamless and coherent set of rules across the spectrum of violence may be the challenge of the next generation of international lawyers".<sup>5</sup> The authors of this book therefore deserve credit for actively contributing to galvanizing this discussion. Let us hope that they intend to continue to do so in their future work, with a view to finding a satisfactory solution for the harmonious coexistence and mutually reinforcing role of human rights law and IHL for the protection of the human person.

It is also worth pointing out the special attention given to the principle of distinction between civilians and combatants, to which the entirety of Chapter 8 is

4 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, para. 25.

5 Charles Garraway, "The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of 'Direct Participation in Hostilities'", *International Law Studies*, Vol. 87, U.S. Naval War College, 2011, p. 184.

dedicated. Given the importance of this rule – described as the cornerstone of IHL by the authors – and the difficulties in implementing it during the conduct of hostilities, it is reasonable to agree with them that such special attention is warranted. Although they consider that the traditional form of the principle of distinction can cope with the new challenges posed by armed conflicts, the authors nevertheless recognize that the changing nature of contemporary armed conflicts, coupled with the inadequacies of treaty-based and customary humanitarian law when it comes in particular to the status of persons in non-international armed conflicts, does not make life easier for the commanders (giving orders) or the soldiers (executing such orders) on the ground. Despite the efforts of certain organizations, like the ICRC, to clarify concepts such as that of “direct participation in hostilities”,<sup>6</sup> there are still difficulties in implementing the principle of distinction, particularly in non-international armed conflicts, situations of occupation and military counterterrorism operations. The authors recognize this and offer a very insightful discussion of the issue. This prompts the reader to make a link with the discussion of the interaction between IHL and human rights. After all, given that the task of implementing the principle of distinction is almost impossible, it is perfectly legitimate to wonder whether the idea of unification – or at least of a pragmatic convergence – between the two legal regimes on the use of lethal force would not resolve the problem.

Of course, the book is not confined to the points discussed here; it covers others that are just as important and just as well addressed. IHL cannot be analysed today without addressing such issues as occupation (Chapter 6), United Nations forces (Chapter 7), the other principles of the conduct of hostilities (Chapter 9), prisoners of war and civilian internees (Chapter 10), the separation between *jus in bello* and *jus ad bellum* (Chapter 11), international implementation (Chapter 12), State responsibility (Chapter 13) and internal repression (Chapter 14).

All in all, this book is noteworthy for what it brings to the discussions about the burning issues of IHL today. More concretely, contemporary issues of IHL are addressed with a fresh and original view. This is especially true for the analysis of the relationship between IHL and human rights law, the identification of customary rules of IHL, the difficulties of implementing the principle of distinction due to the changing nature of armed conflicts, and the (ir)relevance of the distinction between international and non-international armed conflicts. The authors should be proud of such an achievement and are urged to do still more for a cause as noble as strengthening the promotion and effectiveness of this body of law.

<sup>6</sup> See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

## BOOKS AND ARTICLES

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# Scope of the law in armed conflict

Volume 96 Number 893 Spring 2014

## Editorial: Delineating the Boundaries of Violence

*Vincent Bernard, Editor-in-Chief*

## Interview with Brigadier General Richard C. Gross

*US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff*

**Debate: The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?**

*Claus Kreß and Frédéric Mégret*

## Articles

**Extraterritorial targeting by means of armed drones: Some legal implications**

*Jelena Pejic*

**A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights**

*Colonel Kirby Abbott*

**The beginning of application of international humanitarian law:**

**A discussion of a few challenges**

*Julia Grignon*

**The end of application of international humanitarian law**

*Marko Milanovic*

**Rewired warfare: Rethinking the law of cyber attack**

*Michael N. Schmitt*

## Comments and Opinions

**Consent to humanitarian access: An obligation triggered by territorial control, not States' rights**

*Françoise Bouchet-Saulnier*

## Selected articles on IHL and humanitarian action

**Humanitarian technology: A critical research agenda**

*Kristin Bergtora Sandvik, Maria Gabrielsen Jumbert, John Karlsrud and Mareile Kaufmann*

**Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors**

*Shane Darcy*

## Reports and Documents

**The International Committee of the Red Cross's (ICRC's) role in situations of violence below the threshold of armed conflict**

*Policy document, February 2014*

**Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict**

*Marie-Louise Tougas*

**ICRC Q&A and lexicon on humanitarian access**

## Books Reviews

**The Practical Guide to Humanitarian Law**

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REVIEW  
of the Red Cross**



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