

Returning foreign fighters: The case of Denmark

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Abstract

This article considers which legal regimes apply in cases where a Danish citizen and/or resident returns from Syria or Iraq after having taken part in the armed conflict on behalf of the group known as Islamic State, and continues his/her affiliation with the armed group. The article argues that international humanitarian law currently applies to the Danish territory and that a Danish foreign fighter may continue to be considered as taking a direct part in hostilities after having returned from Iraq or Syria. The article then considers the application of Danish criminal law to returned foreign fighters and argues that Danish counterterrorism laws do not apply to members of the armed forces of an armed group that is party to an armed conflict with Denmark.

Keywords: Syria, foreign fighters, non-international armed conflict, geographical and personal scope of international humanitarian law, use of force, counterterrorism.

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Introduction

In March 2016, the Danish foreign minister, Kristian Jensen, informed the US secretary of State, John Kerry, that the Danish Parliament would soon vote to

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increase its participation in the American-led coalition in Iraq, making one of the highest per-capita contributions to the military campaign in Syria. Jensen said: “What we learned is that Daesh [another name for Islamic State] does not care about borders. They just move the troops around. If we want to push them back, if we want to defeat Daesh, we need to fight them wherever they are.”¹ A number of European States are today involved in armed conflicts in Iraq and Syria, parallel with the participation of their own citizens as members of organized armed groups.² Since the outbreak of the Syrian armed conflict in 2012, many European States have experienced a rise in the number of citizens and residents that travel across borders to take part in an armed conflict³ – so-called “foreign fighters”.⁴ According to the Danish Security and Intelligence Service, since the summer of 2012 at least 150 people have left Denmark to travel to Syria and Iraq, and some still remain in the conflict zone.⁵ A majority of the Danish foreign fighters have joined the armed group known as Islamic State (IS),⁶ while only a small number, including Kurds and Shiites, have gone to the conflict zone in Syria and Iraq to fight militant Islamist groups or other armed opposition groups.⁷

This article considers which legal regimes apply in cases where a Danish citizen and/or resident returns from Syria or Iraq after having taken part in the armed conflict on behalf of IS, and continues his/her affiliation with the armed group. First, a short factual overview of the conflict in Syria and the Danish contribution to the American-led coalition will be provided. This will serve as a basis for further assessment and evaluation of the applicable law. It will then be examined whether international humanitarian law (IHL) applies to Danish territory, considering, in particular, whether IHL is limited to the territory of the State in which the armed conflict originated or if it may also be applied outside

1 Carol Morello, “What Tiny Denmark Is Doing to Fight the Islamic State in Syria”, *Washington Post*, 9 March 2016, available at: <https://tinyurl.com/yb9v2xhl> (all internet references were accessed in January 2019).

2 Members of the international coalition against Islamic State (IS) include Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, Spain, Sweden and the United Kingdom, all of which have reported citizens and/or residents taking part in the armed conflict in Syria and Iraq. The full list of members of the coalition is available at: theglobalcoalition.org/en/partners/. See also Thomas Hegghammer, “The Rise of Muslim Foreign Fighters”, *International Security*, Vol. 35, No. 3, 2010/11.

3 It was estimated in 2016 that about 4,000 people had left Europe to join the Syrian uprising against the Assad regime since its beginning in 2012, 30% of which returned to their countries of departure by 2016. See Bibi van Ginkel and Eva Entenmann, *The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies*, ICCT Research Paper, 2016, p. 3, available at: <https://tinyurl.com/ybc8akux>.

4 A foreign fighter is understood for the purposes of this article as an individual who travels to a State other than his or her own State of residence or nationality for the purpose of joining an organized armed group taking part in an armed conflict. See also the definition in Sandra Krähenmann, “Foreign Fighters under International Law”, *Geneva Academy of International Humanitarian Law and Human Rights*, Briefing No. 7, October 2014, p. 7.

5 Danish Security and Intelligence Service, *Vurdering af terrortruslen mod Danmark*, 12 January 2018, available at: www.pet.dk/Nyheder/2018/VTD%202018.aspx.

6 The abbreviation “IS” is used throughout the article when referring to the armed group also known as “the so-called Islamic State”, “ISIS”, “ISIL”, “Daesh”, etc.

7 Danish Security and Intelligence Service, above note 5.

its borders, extraterritorially in the territory of an intervening State. Attention then turns to the question of whether and to what extent a foreign fighter can be considered as taking a direct part in hostilities after having returned to the State in which s/he is a citizen and/or resident. The personal scope of application of IHL is seen in light of the geographical disjunction between the location of the foreign fighter and the primary battlefields. The second part of the paper considers the relationship between IHL and the law enforcement regime. This includes an analysis of Danish national laws and their application to persons who take part in an armed conflict.

The fight against IS on the territory of Syria and Iraq

In July 2012, the International Committee of the Red Cross (ICRC) concluded that there was “a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country”.⁸ The conflict has now entered its eighth year, and with numerous armed groups and militias still active in the hostilities,⁹ of which many are supported by different alliances of States, the situation is fluid and characterized by a shifting pattern of alliances, cooperation and clashes between the various groups. In September 2014 an American-led coalition launched air strikes inside Syria in an effort to “degrade and ultimately destroy” IS.¹⁰ Iraq explicitly requested assistance in the conflict following the formalities of declaring an armed attack on its territory and invoking Article 51 of the United Nations (UN) Charter.¹¹ The Iraqi government has been supported on its

- 8 See ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting”, Operational Update, 17 July 2012. For an overview of the conflict in Syria, see Rule of Law in Armed Conflict Project, “Involvement in Armed Conflicts: Syria”, available at: www.rulac.org/countries/syria.
- 9 For an overview of the current conflict status, see, for example, Christopher M. Blanchard, Carla E. Humud and Mary Beth D. Nikitin, *Armed Conflict in Syria: Overview and U.S. Response*, RL33487, Congressional Research Service, 24 June 2014, available at: <https://fas.org/spp/crs/mideast/RL33487.pdf>.
- 10 White House Office of the Press Secretary, “President Obama: ‘We Will Degrade and Ultimately Destroy ISIL’”, 10 September 2014, available at: <https://obamawhitehouse.archives.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil>.
- 11 Permanent Representative of Iraq to the UN, letter addressed to the President of the Security Council, UN Doc. S/2014/691, 20 September 2014. The Syrian government has not consented to the coalition’s operations within its territory and has characterized them as a violation of its sovereignty and as unlawful. At the same time, the Syrian government has not actively opposed the coalition air strikes and has refrained from taking action against coalition aircraft in its airspace. See Permanent Representative of the Syrian Arab Republic to the UN, identical letters dated 16 September 2015 addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/718, 17 September 2015. The legality of the intervention in Syria has been discussed by other scholars, focusing specifically on Syria’s “passive consent” and whether armed attacks carried out by a non-State actor can trigger a right of self-defence. See, for example, Terry D. Gill, “Classifying the Conflict in Syria”, *International Law Studies*, Vol. 92, 2016. Questions relating to *jus ad bellum* considerations will not be discussed in this article.

territory by several intervening States in the non-international armed conflict against IS.¹²

The current conflict in Iraq between the American-led coalition and IS has “spilled over” into the territory of Syria, from which non-State armed groups are operating. The analysis of this article is limited to the situation of armed conflict between the American-led coalition and IS.

A non-international armed conflict exists when there is “a resort to armed force between States or protracted armed violence” between governmental authorities and organized armed groups, or between armed groups within a State.¹³ The armed confrontation must reach a minimum level of intensity, and the parties involved in the conflict must show a minimum level of organization. Non-international armed conflicts are governed by Article 3 common to the four Geneva Conventions of 1949, the Second Additional Protocol (AP II) of 1977 (ratified by 168 States), and applicable customary law. If a situation of violence reaches the minimum level of intensity, and a group is considered organized, in accordance with the criteria laid out by the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁴ that group becomes a party to an armed conflict. The terms “terrorist group”,¹⁵ “non-State armed group” and “non-State party to the armed conflict” are not mutually exclusive. The application of IHL does not depend on the armed group’s conformity with the law, but rather on its organization and ability to uphold the law.¹⁶ An armed group may continuously and consistently violate the rules of IHL and still be considered a party to an armed conflict. No rules under IHL preclude non-State armed groups listed as terrorists at an international, regional or domestic level from being considered a party to an armed conflict within the meaning of IHL. Only if considered a party to an armed conflict can the State lawfully use force against the armed group, outside the law enforcement regime.

Before going into discussions of the application of IHL to Denmark, it has to be determined whether Denmark is a party to the armed conflict against IS in Syria and Iraq.

12 See, for example, Permanent Representative of Iraq to the UN, letter addressed to the President of the Security Council, UN Doc. S/2014/691, 20 September 2014. It was confirmed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), paras 67–69, that a conflict is non-international where a State is fighting non-State armed groups in States other than neighbouring countries (“transnational armed conflict”). The US Supreme Court held that the term “armed conflict not of an international character” “bears its literal meaning and is used ... in contradistinction to a conflict between nations”.

13 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. ICTY-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. The tribunal has confirmed and specified these criteria in later cases. See also ICTY, *The Prosecutor v. Limaj*, Case No. IT-03-66, Judgment (Trial Chamber), 30 November 2005.

14 ICTY, *Tadić*, above note 13, para. 70.

15 There are currently no widely accepted legal definitions of “terrorist” or “terrorism” under international law.

16 For a group to qualify as an organized armed group that can be a party to a conflict within the meaning of IHL, it needs to have a level of organization that allows it to carry out sustained acts of warfare and comply with IHL. Indicative elements were given in ICTY, *The Prosecutor v. Haradinaj et al.*, Trial Judgment, 2008, para. 60. See also ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, 2008, paras 199–203; ICTY, *Limaj*, above note 13, paras 94–134.

IHL binds the parties to an armed conflict in the conduct of hostilities and the protection of the victims of war. Conduct of hostilities in the course of an armed conflict must inevitably make the responsible State a party to the conflict. However, when a third State intervenes in a pre-existing armed conflict in support of the territorial State, the scale and form of support may vary and may not necessarily include participation in hostilities. Many of the members of the American-led coalition against IS only provide training, counselling and other material and financial support to the Iraqi forces, including the Peshmerga forces in the north; others, such as the UK, Belgium, France and, up until recently, the Netherlands and Denmark, have in addition carried out air strikes against IS on Iraqi and Syrian territory.¹⁷ Various types of States' involvement raise the question of whether coalition members are bound by IHL based on a declaration of participation only, or if *de facto* participation in the hostilities is a prerequisite for the application of IHL.

By invoking Article 19(2) of the Danish Constitution,¹⁸ the Danish Parliament in September 2014 decided to take part in the American-led coalition in Iraq and Syria.¹⁹ Denmark's military contribution to the coalition's fight against IS consists among other things of a capacity-building contribution, including a total number of 180 soldiers.²⁰ The capacity-building force contribution counsels and trains Iraqi forces on Al Asad Airbase.²¹ In addition, Denmark supports the coalition with a radar contribution that provides airspace surveillance in support of the coalition's air operations.²² In August 2016, a force contribution comprising special operations forces was deployed in a training, counselling and support role in Iraq.²³ On 16 January 2018, a broad majority in the Danish Parliament approved the future deployment of a C-130J transport aircraft contribution. In addition, an emergency medical team will be deployed to the medical element already included in the capacity-building contribution.²⁴ Finally, Denmark also provided a combat contribution of F-16 fighter aircraft in 2014–16.²⁵

There is no binding procedure in Danish law for determining when Denmark is engaged in an armed conflict, and IHL includes very few guiding principles for determining when a State becomes party to a non-international

17 The contributions of members of the international coalition against IS are listed by country at: theglobalcoalition.org/en/partners/.

18 Article 19(2) of the Danish Constitution requires the consent of Parliament for the use of armed force "against any foreign State". The paragraph is generally interpreted to mean that the government can repeatedly repel an armed attack but must seek the approval of Parliament for further defensive action. Despite its wording, the article has been invoked in a number of non-international armed conflicts.

19 Danish Parliament, Proposal for a Parliamentary Resolution on Danish Military Contribution in Support of Efforts in Iraq, B 122, 27 August 2014.

20 Danish Ministry of Defence, "The Effort against ISIL", available at: www.fmn.dk/eng/allabout/Pages/the-effort-against-isil.aspx.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

armed conflict through support of another party to the conflict. Two main approaches can be identified in international law.

First, though only applicable in international armed conflicts, laws on neutrality may indicate when a State's actions in a pre-existing armed conflict reach a form and scale which make that State a party to the armed conflict. Laws on neutrality prescribe protection and obligations on those States that do not take part in the armed conflict. Neutrality is defined by Lauterpacht as “the attitude of impartiality”²⁶ – any assistance to one of the belligerent parties will violate the neutrality of the State.²⁷ However, according to Lauterpacht, “a mere violation does not ipso facto bring neutrality to end”.²⁸ He distinguishes between “hostilities” understood as acts of war and “mere violations of neutrality”, and concludes that only conduct of hostilities, either by or against the neutral State, will bring the neutrality to end.²⁹ Michael Bothe concludes in Dieter Fleck's *Handbook of International Law* that “only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status”.³⁰

Tristan Ferraro argues for a support-based approach, where the status of multinational forces as participants in a pre-existing non-international armed conflict depends on the nature of their involvement: “support that would have a direct impact on the opposing party's ability to conduct hostilities” assumes participation, while “more indirect forms of support which would allow the beneficiary only to build up its military capabilities” do not.³¹

26 Hersch Lauterpacht (ed.), *International Law: A Treatise*, Vol. 2: *Disputes, War and Neutrality*, Longmans, Green and Co, London, 1952, para. 293. Laws on neutrality are found in customary law as well as Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, and Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

27 This includes, according to Bothe, the engagement of military forces, massive financial support, the supply of any war material and the supply of military advisers to the armed forces of a party to the conflict. See Michael Bothe, “The Law of Neutrality”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, 2013.

28 H. Lauterpacht, above note 26, para. 312.

29 *Ibid.*, para. 312.

30 M. Bothe, above note 27, p. 558.

31 Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013. In a more recent article, Ferraro looks at the legal position of the ICRC, which, according to Ferraro, also advocates a “support-based approach”. Accordingly, the ICRC considers that military or logistical support provided by third parties to one of the parties to a pre-existing non-international armed conflict can influence the application of IHL if it is considered as contributing to the collective conduct of hostilities or, in other words, can be “regarded as an integral part of the pre-existing conflict”. Tristan Ferraro, “The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015. Also see David Tuck and Cordula Droege, “Fighting Together and International Humanitarian Law: Setting the Legal Framework (1/2)”, October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>; David Tuck and Cordula Droege, “Fighting Together and International Humanitarian Law: Ensuring Respect for the Law and Assessing Responsibility for Violations (2/2)”, October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/>; David Tuck and Cordula Droege, “Fighting Together: Obligations and Opportunities in Partnered Warfare”, March 2017, available at: <https://medium.com/law-and-policy/fighting-together-obligations-and-opportunities-in-partnered-warfare-362c9dfb741a>.

According to Ferraro's approach, it seems that training of the Iraqi armed forces and other general support at the coalition's headquarters would not make a State a party to an armed conflict, while the deployment of F-16 fighter jets, the deployment of the Danish Special Forces and operating the mobile radar at Al Asad Airbase would. Based on the Danish contribution to the coalition and for the purposes of further analysis, it is assumed that Denmark currently continues to be a party to the armed conflict against IS.

Does IHL apply to Danish territory?

Concluding that Denmark currently continues to be a party to the armed conflict with IS in Iraq and Syria, it must further be considered whether IHL applies to Danish territory.

The geographical scope of armed conflicts has not been clearly regulated in the Geneva Conventions and must be determined on the basis of an analysis of each provision. As regards *international* armed conflicts, it is generally accepted that IHL applies in the whole territory of those States that are party to the armed conflict.³²

When it comes to *non-international* armed conflicts, the applicability of common Article 3 is not contested and has been raised in a number of cases by the international tribunals.³³ Though there are some textual inconsistencies between the formulations of the court rulings, they all apply a broad interpretation of the geographical scope of application of IHL to the territory of parties to the conflict. IHL applies independently of the concept of hostilities and

32 See, for example, Yoram Dinstein, *War, Aggression and Self-Defense*, Cambridge University Press, Cambridge, 2011, p 19; Jan K. Kleffner, "Scope of Application of International Humanitarian Law", in D. Fleck (ed), above note 27.

33 When common Article 3 is applicable, other rules of IHL of non-international armed conflict, including rules of conduct of hostilities, apply. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 389, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. See ICTY, *Tadić*, above note 13, paras 67, 69, 70; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 635–636; ICTY, *The Prosecutor v. Kunarac, Kovač, and Voković*, Case Nos IT-96-23 and IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 57; Special Court for Sierra Leone, *The Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL 04-16-T, Judgment (Trial Chamber II), 20 June 2007, para. 245; International Criminal Court (ICC), *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-1/06, Judgment (Trial Chamber I), 14 March 2012, para. 533. See also ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 64; ICTY, *The Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 209; ICTY, *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Appeals Chamber), 24 March 2000, para. 43–44. For a detailed analysis of the cases, see Noam Lubell and Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of armed Conflict", *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013.

extends throughout the geographical borders of the territorial State.³⁴ These cases, however, only consider the reach of IHL *within* the territorial State, while contemporary conflicts require us to consider whether IHL is limited to the territory of the State in which the armed conflict originated or if it may also be applied outside its borders, extraterritorially in the territory of an intervening State.³⁵

While AP II applies to conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”³⁶ (author’s emphasis), common Article 3 applies to non-international armed conflicts “occurring in the territory of one of the High Contracting Parties”. Thus, common Article 3 applies to any non-international armed conflict as long as there is a territorial link to one of the High Contracting Parties.³⁷ This reading is supported by the drafting history of the Geneva Conventions and has been

- 34 This expansive view has been supported by a number of legal scholars. See N. Lubell and N. Derejko, above note 33; Michael N. Schmitt, “Charting the Legal Geography of Non-International Armed Conflict”, *International Law Studies*, Vol. 90, No. 1, 2014; David Kretzmer, “Targeted Killings of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence?” *European Journal of International Law*, Vol. 16, No. 2, 2005; Louise Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 12, 2009; J. K. Kleffner, above note 32; Marco Sassóli, *Transnational Armed Groups and IHL*, Occasional Paper Series, No. 6, Program on Humanitarian Policy and Conflict Research, Harvard University, 2006.
- 35 The geographical scope of IHL may be subject to scrutiny by the ICC in the near future, if the investigation into the conflict in Afghanistan leads to the opening of a case on acts of ill-treatment of detainees allegedly committed since 2002 by the CIA in black sites in Poland, Romania and Lithuania, in connection with the armed conflict in Afghanistan. See: www.icc-cpi.int/afghanistan. For discussion on this, see Elvina Pothelet, “War Crimes in Afghanistan and Beyond: Will the ICC Weigh In on the ‘Global Battlefield’ Debate?”, *EJIL: Talk!*, 9 November 2017, available at: www.ejiltalk.org/war-crimes-in-afghanistan-and-beyond-will-the-icc-weigh-in-on-the-global-battlefield-debate/; Antonio Coco, “Freeing up the Rules on The Treatment of Detainees from the Debate on the Geographical Scope of International Humanitarian Law”, *EJIL: Talk!*, 3 January 2018, available at: www.ejiltalk.org/freeing-up-the-rules-on-the-treatment-of-detainees-from-the-debate-on-the-geographical-scope-of-international-humanitarian-law/. See also Andrew Clapham, Paola Gaeta and Marco Sassóli (eds), *The 1949 Geneva Conventions: A Commentary*, 1st ed., Oxford University Press, Oxford, 2015, p. 77–83; 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.
- 36 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1987), Art. 1. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), paras 4489–4490: “The Protocol applies to all residents of the country engaged in a conflict ... Persons affected by the conflict within the meaning of this paragraph are covered by the Protocol wherever they are in the territory of the State engaged in conflict.”
- 37 Given the Geneva Conventions’ universal ratification, all non-international armed conflicts today are subject to common Article 3.

adopted by several legal scholars.³⁸ The material field of application of AP II does not leave the same room for interpretation. This is underlined by the additional requirement of an armed group exercising control over part of the State's territory. AP II “develops” and “supplements” common Article 3 “without modifying its existing conditions of application”.³⁹ Interpreting common Article 3 restrictively in accordance with Article 1 of AP II would thus run counter to the object and aim of the Geneva Conventions and common Article 3.⁴⁰

State practice after the Second World War confirms the application of common Article 3 to conflicts which have spilled over into the territory of a neighbouring State.⁴¹ Common Article 3 has, for example, been applied in the conflict between Colombia and the Revolutionary Armed Forces of Colombia on Ecuadorian territory,⁴² and in the Rwandan armed conflict on the territory of the Democratic Republic of the Congo.⁴³

When defining the geographical scope of IHL beyond the immediate sphere of hostilities, the ICTY, in the *Tadić* case, applied a nexus test. Reasoning that since the beneficiaries of common Article 3 are those taking no active part (or no longer taking active part) in hostilities and similarly that AP II applies “to all persons affected by an armed conflict”, the Tribunal argued that the application should be based on a potentially hostile or belligerent relation rather than on the exact

38 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 258: “The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State's domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV. This is not to say, however, that a conflict governed by Article 3 GC I to IV cannot take place on the territory of more than one contracting State. From the perspective of a newly drafted treaty text it appears more appropriate to interpret the phrase in question simply as emphasizing that Article 3 GC I to IV could apply only to conflicts taking place on the territory of States which had already become party to the new Conventions.” See also 2016 Commentary on GC I, above note 33, paras 115–120; A. Clapham, P. Gaeta and M. Sassóli, above note 35; Jelena Pejic, “Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; M. N. Schmitt, above note 34, pp. 11–12. See, however, 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 (ICRC Commentary on GC IV), p. 36: “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.” See also ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (Trial Chamber), 27 January 2000, paras 247–248, where the Tribunal found that a non-international armed conflict is one in which the “government of a single state [is] in conflict with one or more armed factions within its territory”. Note, however, that the ICTR Statute specifically includes violations committed in any neighbouring states within its jurisdiction, spelled out in Article 1.

39 AP II, Art. 1.

40 ICRC Commentary on GC IV, above note 38, p 50. For further description of the preparative works for GC IV, see A. Clapham, P. Gaeta and M. Sassóli, above note 35, pp. 79–83.

41 See discussed in J. Pejic, above note 35; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elisabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012; Robin Gleiss, “Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

42 Referred to in A. Clapham, P. Gaeta and M. Sassóli, above note 35, p 82.

43 ICTR, *Akayesu*, above note 33, paras 608–609.

location of the hostilities.⁴⁴ IHL may thus be applied where there is a direct link between the hostilities and the armed conflict. The application of a nexus test has generally been accepted in a traditional non-international armed conflict.⁴⁵

Where the conflict has spread to States other than neighbouring States, the application is more controversial. However, whereas the application of common Article 3 to hostilities taking place in third States not party to the conflict has gained little support in legal writings (with a few exceptions),⁴⁶ the application of common Article 3 to multinational conflicts in the territory of the “intervening States” seems to have received more acceptance among legal scholars.⁴⁷ Contrary to applying IHL in a third, non-belligerent State, the applicability of IHL in an intervening State rests not just on the status of the person as a participant in the conflict, but also on the presumption that IHL is equally applicable in the territory of all States party to the conflict.⁴⁸

Accepting that IHL is applicable in the whole territory of the State in which hostilities take place and arguing that a conflict remains non-international when several States take part in the hostilities extraterritorially in their fight against a non-State armed group, it also has to be accepted that the application of IHL does not depend on a continuous local level of violence and that common Article 3 is equally applicable in the territory of all parties to the conflict. Any other reasoning would enable intervening States to evade the operation of the principle of equality of belligerents under IHL once they have become party to an armed

44 ICTY, *Tadić*, above note 13, para. 69. See also ICTR, *Akayesu*, above note 33, paras 635–636: “[The applicability of the rules is] irrespective of the exact location of the affected person in the territory of the State engaged in the conflict.” This approach is supported by conventional IHL: Geneva Conventions I and III, as well as Article 75 of AP I (rules related to arrest, detention and internment), apply to persons “related to the conflict”. See also 2016 Commentary on GC I, above note 33, paras 110, 124–126.

45 See also 2016 Commentary on GC I, above note 33, para. 460.

46 The question of extraterritorial application of Common Article 3 has given rise to a great deal of debate among legal scholars and practitioners. The debate shall not be repeated here, but it is important to point out that the ICRC has rejected “the notion that a person ‘carries’ a NIAC [non-international armed conflict] with him to the territory of a non-belligerent state” on the basis that “[i]t would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person’s movement around the world as long as he is directly participating in hostilities in relation to a specific NIAC”: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 22, available at: <http://e-brief.icrc.org/wp-content/uploads/2016/08/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf>. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015 (2015 Challenges Report), available at: www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf. See also 2016 Commentary on GC I, above note 33, paras 128–132. For a critique of this approach, see, e.g., M. N. Schmitt, above note 34; N. Lubell and N. Derejko, above note 33.

47 See T. Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, above note 31, p. 611; David Kretzmer, p. 195; M. N. Schmitt, above note 34, p. 16 on the ISAF operation in Afghanistan. See, however, the 2016 Commentary on GC I, above note 33, para. 473, in which the ICRC concludes that “[a]t the time of writing, there is insufficient identifiable State practice on its applicability in the territory of the home State”.

48 See also cases from the ICTY and the ICTR, in which the Courts find that IHL applies to the whole territory of the State affected by the conflict and cannot be limited to the battlefield: ICTY, *Kunarac et al.*, above note 33, para. 57; ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (Trial Chamber), 15 May 2003, para. 367.

conflict beyond their borders, contrary to the aim of laying down the same rights and obligations for all parties to a conflict.⁴⁹

With the above reasoning, it can be concluded that IHL also applies to Danish territory given that Denmark is a party to an armed conflict against IS.

Can a foreign fighter lose protection from attack after having returned to Denmark?

Assuming that IHL applies to Danish territory, the next question that can be asked is whether and to what extent a returned foreign fighter will lose his/her protection from attack while supporting IS in its fight against Denmark and the international coalition in Iraq and Syria.

Should a foreign fighter choose to return to Denmark while still being affiliated with IS, at least three groups of questions arise regarding direct participation in hostilities. First, when can an act be said to have been carried out on behalf of an armed group party to the conflict? Does it suffice that the armed group takes responsibility for the harm caused by the act, or does a link between the perpetrator and the armed group have to be identified in order to establish a belligerent nexus? Can the person be considered a “member” of the group in some way? What if the person claims links to the armed group, but these are not confirmed by the armed group? Second, does distance from the battlefield weaken the belligerent nexus between the person carrying out the act and the armed group? And third, for how long will a participant in the hostilities lose his/her protection against attack? Does it make any difference whether the person returned to Denmark specifically with the intention or instruction to commit an attack or only decided to do it once he/she returned?

When it comes to the conduct of hostilities, the principle of distinction protects those who do not take direct part in hostilities from being the target of an attack.⁵⁰ The notion of direct participation in hostilities determines when persons who are not members of armed forces of the party to the conflict may be subject to the use of force. In 2009 the ICRC issued its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (ICRC Interpretive Guidance),⁵¹ according to which each specific act by a civilian must meet three cumulative requirements to constitute direct participation in hostilities:

49 2015 Challenges Report, above note 46, p. 14. See also T. Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, above note 31, p. 611.

50 “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 1, available at: ihl-databases.icrc.org/customary-ihl/eng/docs/home.

51 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance).

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict^[52] 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).⁵³

The majority of experts discussing the drafting of the ICRC Interpretative Guidance agreed that the requirement of a belligerent nexus should be based on the objective purpose of the act, rather than on the desire of the person to carry out the act. An act must have been “specifically designed to support one party to the conflict by directly causing the required threshold of harm to another party”.⁵⁴ Persons with no affiliation or with only a loose affiliation with a party to an armed conflict may thus be considered as taking a direct part in hostilities if the act nevertheless constitutes an integral part of the hostilities that is “specifically designed to support one party to the conflict”.⁵⁵ Should a party to an armed conflict claim responsibility for an attack, however, it will be difficult to determine whether the act was in fact “specifically designed” to support that party if there are no obvious links between the person carrying out the act and the party to the conflict.⁵⁶

Distance from the area of active hostilities may make it more difficult to determine when an act was carried out as an integral part of the hostilities of an armed conflict. However, since IHL applies in the territory of all the parties to an armed conflict, the notion of direct participation in hostilities is not geographically bound to the primary sphere of hostilities. This does not mean that a person directly participating in hostilities can carry the conflict with him/her, but rather that conduct amounting to direct participation in hostilities is regulated by IHL in areas in which the legal regime is applicable, including the territory of an intervening State, as discussed above. The physical placement of the person is no longer of importance to the application of IHL because due to advancements

52 This criterion caused some debate during the discussions on the Interpretive Guidance. See Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” *Harvard National Security Journal*, Vol. 1, 5 May 2010.

53 ICRC Interpretive Guidance, above note 51, p. 50.

54 *Ibid.*, p. 46.

55 For more information see *ibid.*, p. 44.

56 During the drafting of the Interpretive Guidance, a number of experts opposed the requirement that an organized armed group should belong to a party to the conflict in order to qualify as an armed force and found instead that the belligerent nexus criterion should “be framed in the alternative: an act in support or to the detriment of a party”. This understanding opens up to a broader application of the notion of direct participation in hostilities according to which persons who do not belong to or support one of the parties to the armed conflict could lose protection.

in technology, military operations nowadays can be conducted from, on, or with effects that occur in the entire territory of the parties to the conflict.⁵⁷

A foreign fighter who, for example, travels to Denmark directly from an IS training camp with the intention of carrying out, or instruction to carry out, a specific attack, likely to adversely affect the military operations or military capacity of Denmark or to inflict death, injury or destruction on protected persons or objects, will continue to take a direct part in hostilities. According to the ICRC Interpretive Guidance, “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act”.⁵⁸ However, it seems that once there is a longer period of time between the departure from Syria and the manifestation of the attack in Denmark, or this period is prolonged by further planning in Denmark, loss of protection from attack will depend on the State’s understanding of the temporal scope of the notion of direct participation in hostilities.

Deciding when an individual will regain protection has been the cause of much controversy and has not been settled in State practice. The ICRC Interpretive Guidance considers that individuals whose involvement in hostilities is spontaneous, sporadic or temporary will only lose protection “unless and for such time as” they are taking direct part in hostilities.⁵⁹ A number of States have, however, expressed a broader understanding of the temporal scope of the loss of protection from attack.⁶⁰

For members of the armed forces of a party to the armed conflict, in contrast to civilians, there is no issue of temporality. The ICRC Interpretive Guidance considers that fighters who maintain a continuous combat function are not civilians, meaning that “members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function”.⁶¹ The Danish Military Manual implements the notion of continuous combat function in a similar way to that introduced in the Interpretive Guidance, with the understanding that persons who have lost their protection as continuous participants in the activities

57 Michael Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017, p. 378. See also J. Pejic, above note 38.

58 ICRC Interpretive Guidance, above note 51, p. 65. According to Michael N. Schmitt, an alternative view popular among the group of experts discussing the Interpretive Guidance “looked instead to the chain of causation and argued that the period of participation should extend as far before and after a hostile action as a causal connection existed”: M. N. Schmitt, above note 52. According to this approach, any preparations causal to the act are considered direct participation, including, for example, the acquisition of materials, the construction of specific devices used for the attack, and their emplacement.

59 ICRC Interpretive Guidance, above note 51, p. 75. The same is reflected in Article 51(3) of AP I and customary law. See ICRC Customary Law Study, above note 50, Rule 6.

60 For example, see US Department of Defence, *Law of War Manual*, 2015, section 5.9. According to the Manual, the law of war as applied by the United States gives no “revolving door” protection, and considers that only when a direct participant has permanently ceased that participation will s/he regain protection, “because there would be no military necessity for attacking them”.

61 ICRC Interpretive Guidance, above note 51, p. 71.

of an armed group will only regain protection if they actively demonstrate that they have withdrawn from the armed group.⁶² The manual explains that this can, for example, be done by laying down one's weapons or by expressly renouncing one's membership and dissociating oneself from the armed group.⁶³

Though IHL applies to Danish territory, and while a foreign fighter who does not uphold a continuous combat function after having returned can, in theory, continue to take a direct part in hostilities in Denmark, given the nature of the situation in Syria and Iraq and the geographical disjunction between the location of the foreign fighter and the primary battlefields, it will be difficult to determine when the objective purpose of an attack is to inflict harm in support of a party to an armed conflict.

The relationship between IHL and the law enforcement regime

Concluding that IHL applies to Danish territory and that a returned foreign fighter may be considered as taking a direct part in hostilities on Danish territory, it is necessary to examine how IHL interacts with the law enforcement regime.

International human rights law

In armed conflict the use of force is governed by the conduct of hostilities paradigm, while international human rights law continues to apply at the same time.⁶⁴

The right to life applies without any territorial restrictions: all States⁶⁵ are bound by a negative obligation not to arbitrarily deprive someone of their life.⁶⁶ Denmark has ratified the European Convention of Human Rights (ECHR), and a Danish foreign fighter will be subject to the protections under the Convention while on Danish territory.

The rules governing the use of force in IHL and in human rights law are based on different assumptions. Under IHL, military necessity is presumed where force is used against legitimate targets. Thus, the assessment of necessity depends on the qualification of a person/object as a legitimate target. By applying the

62 Danish Ministry of Defence, *Military Manual*, September 2016, p. 144, available at: <https://tinyurl.com/ydg959x7>. An English translation of the Manual will be published in the beginning of 2019.

63 *Ibid.*, p. 144.

64 See, for example, International Court of Justice (ICJ), *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, p. 226, paras 24–25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106. The applicability of human rights obligations during armed conflict is further confirmed by the presence of provisions for derogation in many human rights instruments, which allows States to derogate in times of war or public emergency.

65 It is debated whether non-State actors are also bound by human rights. See, for example, Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Review of the Red Cross*, Vol. 88, No. 863, 2006.

66 The prohibition of arbitrary deprivation of life is a *jus cogens* principle and customary norm. Human Rights Committee, General Comment on Article 6, 114th Session, 2015; Human Rights Committee, General Comment 6, "Article 6 (Sixteenth Session, 1982)", UN Doc. HRI/GEN/1/Rev.1, 1994, p. 6, para. 1.

principle of proportionality in IHL, however, an attack against a legitimate target is considered unlawful if it “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”.⁶⁷ In contrast, under human rights law the principles of absolute necessity and proportionality also protect members of the armed forces, and the use of force can only be undertaken exceptionally in order to maintain public security. The principle of proportionality in human rights law requires a balance between the risks posed by the individual and the potential harm to that individual, as well as to bystanders. Only if the person poses an imminent threat of death or serious injury, and this threat cannot be prevented through lesser means, will the use of lethal force be lawful.⁶⁸

Contrary to case law of the International Court of Justice⁶⁹ and the Inter-American Commission on Human Rights,⁷⁰ the European Court of Human Rights (ECtHR) has resolved cases on the use of force in armed conflict based exclusively on human rights law.⁷¹ The ECtHR has analyzed the right to life in a number of cases involving conduct of hostilities. In some cases where the victims were alleged terrorists, the Court applied the whole catalogue of human rights safeguards for the right to life, including the necessity to avoid force, to use weapons which will avoid lethal injuries and to give warning.⁷² In cases concerning security operations against Kurdish rebels in Turkey and Chechen rebels in Russia, however, the ECtHR has used language that is much closer to IHL than to human rights law.⁷³

In an analysis of human rights jurisprudence, Cordula Droegge finds that the case law of the ECtHR can be broadly distinguished in two kinds of situations: on the one hand, “situations like *McCann*, *Gül*, *Ogur* or *Kaplan*, in which individual

67 ICRC Customary Law Study, above note 50, Rule 14.

68 See the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9, adopted by UNGA Res. 45/166, 18 December 1999.

69 ICJ, *Nuclear Weapons*, above note 64; ICJ, *Wall*, above note 64; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005. See also Marco Milanovic, “The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law”, in Jens D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge University Press, Cambridge, 2015.

70 E.g. Inter-American Court of Human Rights, *The Prosecutor v. Juan Carlos Abella*, Series C, No. 11.137, Judgment, 18 November 1997, para. 161.

71 A selection of cases has been described in Nils Melzer, *Targeted Killing in International Law*, 1st ed., Oxford University Press, Oxford, 2008; Cordula Droegge, “Elective Affinities? Human Rights and Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, 2008; William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, No. 4, 2005.

72 See European Court of Human Rights (ECtHR), *McCann and Others v. United Kingdom*, Appl. No. 18984/91, 27 September 1995, para. 194; ECtHR, *Gül v. Turkey*, Appl. No. 22676/93, 14 December 2000, para. 84; ECtHR, *Güleç v. Turkey*, Appl. No. 54/1997/838/1044, 27 July 1998, para. 67.

73 For more information, see ECtHR, *Ergi v. Turkey*, Appl. No. 23818/94, 28 July 1998; ECtHR, *Akkum and Others v. Turkey*, Appl. No. 21894/93, 24 March 2005; ECtHR, *Akpınar and Altun v. Turkey*, Appl. No. 56760/00, 27 February 2007; ECtHR, *Mansuroğlu v. Turkey*, Appl. No. 43443/98, 26 February 2008; ECtHR, *Özcan v. Turkey*, Appl. No. 46221/99, 5 December 2005; ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005; ECtHR, *Bazorkina v. Russia*, Appl. No. 69481/01, 27 July 2006.

members of armed groups or alleged members of such groups are killed and insufficient precautions are taken to avoid the use of lethal force altogether, including against those persons”; and on the other, “situations like *Ergi*, *Özkan* or *Isayeva, Yusupova and Bazayeva* and *Isayeva*, in which the government forces are engaged in military counterinsurgency operations or fully fledged combat against an armed group”.⁷⁴

Droege concludes that the ECtHR appears to use standards that are inspired by IHL and points out that the Court applies the criterion of whether incidental civilian loss was avoided to the greatest extent possible: “[The Court] does not question the right of government forces to attack opposition forces, or require that lethal force be avoided even in the absence of an immediate threat.”⁷⁵ She finds, however, that the Court

appears to go a little further than traditional humanitarian law, in particular when it requires that the local population be warned of the probable arrival of rebels in their village, or that the fire from the opposition group which could endanger the villagers’ lives be taken into account.⁷⁶

The use of force against armed opposition groups during hostilities has so far not been considered a breach of Article 2 of the ECHR, and collateral damage is seen in light of the military advantage anticipated by the State. The understanding of when a person is taking part in an armed conflict, however, is not necessarily similar to that under IHL. It seems that the ECtHR restricts the notion of direct participation in hostilities to situations in which the person is militarily engaged, excluding any preparatory acts and limiting the time frame for when a person can be said to be taking part in the conflict.⁷⁷

Accordingly, one approach which (it seems) has been embraced by the ECtHR serves to restrict the use of lethal force by applying norms according to the existence of “hostilities”, in which there is a high intensity of violence and lack of control over the area and over the circumstances, and where the person is “militarily engaged”. Applied to the scenario laid out above, a returned foreign fighter could be considered to be directly participating in hostilities, and thus lose protection from attack, if the situation is such that the Danish authorities lack control over an area which is at the same time dominated by a high intensity of violence.

74 C. Droege, above note 71, p. 532. The cases referred to are ECtHR, *McCann*, above note 72; ECtHR, *Gül*, above note 72; ECtHR, *Ogur v. Turkey*, Appl. No. 21594/93, 20 May 1999; ECtHR, *Hamiyet Kaplan v. Turkey*, Appl. No. 36749/97, 13 September 2005; ECtHR, *Ergi*, above note 73; ECtHR, *Özcan*, above note 73; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. Nos 57947/00, 57948/00, 57949/00, 24 February 2005.

75 C. Droege, above note 71, p. 533.

76 *Ibid.*

77 See, for example, ECtHR, *Kononov v. Latvia*, Appl. No. 36376/04, 17 May 2010; and ECtHR, *Korbely v. Hungary*, Appl. No. 9174/02, 19 September 2008, paras 86–94, in which the Court discussed the notion of direct participation in hostilities and *hors de combat*. See also analysis by W. Abresch, above note 71; Philip Leach, “The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights”, *European Human Rights Law Review*, No. 6, 2008; C. Droege, above note 71.

Danish criminal law

By virtue of participating in a non-international armed conflict, foreign fighters are subject to domestic prosecution. Combatant immunity exists only in the context of international armed conflicts.⁷⁸ In the context of a non-international armed conflict, IHL makes no reference to combatants or prisoners of war, nor does it attach any other formal status to members of armed groups. Governments may choose to prosecute individuals under national law independently of whether or not the accused have complied with IHL.⁷⁹ A wide range of conduct normally committed in times of armed conflict is already criminalized by most domestic legal systems, and States are free to enforce their domestic regulations at times of non-international armed conflict.

Mere participation in hostilities does not violate IHL and would therefore not be subject to prosecution in the international courts, should they have jurisdiction. Participation in an armed conflict may, however, be subject to criminal prosecution under domestic law.

The Danish policy on countering foreign fighters includes a combination of coercive and preventive measures. In addition to initiating a number of de-radicalization programmes, such as the De-radicalization Targeted Intervention launched by the municipality of Aarhus in 2007 and the 2011 Back on Track programme aimed at tackling radicalization in prisons, the Danish Parliament has made changes to existing rules on revoking passports and residency permits. The risk that a person may take part in “activities” outside Denmark which “could involve or enhance an existing risk against the Danish State and society, or against other States and their societies”, allows for the revocation of passports and residency permits.⁸⁰ The new laws also allow the authorities to issue travel bans.⁸¹

Among the punitive measures adopted in light of the foreign fighters phenomenon, the Danish Parliament adopted a new law on treason in 2016, making it illegal for Danish citizens and residents to be affiliated with the armed

78 Combatant immunity implies that combatants remain protected from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict. See ICRC Interpretive Guidance, above note 51, pp 83–84.

79 See Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 61; ICRC Commentary on APs, above note 36, p. 1359, para. 4489.

80 “Når der er grund til at antage, at den pågældende i udlandet vil deltage i aktiviteter, hvor dette kan indebære eller forøge en fare for statens sikkerhed, andre staters sikkerhed eller en væsentlig trussel mod den offentlige orden”: see Danish Aliens Act No. 1117, 2 October 2017, Art. 21(b), and Danish Law on Passports, Arts 1(2), 2(1)(4), 2(2–3) (Law No. 176 of 24 February 2015 Amending the Act on Passports to Danish Citizens, etc., the Aliens Act and the Code of Criminal Procedure (Strengthened Recruitment Against Armed Conflicts Abroad, etc.)).

81 Danish Law on Passports, Art. 2(b). Applied in two city court cases: City Court of Esbjerg, *The Prosecutor v. Jakobsen*, Case No. 31-2931/2016, 5 December 2016; and City Court of Copenhagen, *The Prosecutor v. Palani*, Case No. SS 2-30641/2015, 4 February 2015.

forces of a party to an armed conflict to which Denmark is also a party.⁸² While the law only applies to persons who are affiliated with the military wing of the party to the conflict, it is not required that the person in question takes part in hostilities, and conduct of hostilities is considered an aggravating circumstance. “Affiliation” does not refer to direct participation in hostilities or participation in other support functions outside the conduct of hostilities.⁸³ Article 101a of the Danish Criminal Code criminalizes mere entry into the armed forces rather than any specific conduct.⁸⁴

The implementation of UN Security Council Resolution 2178 on “Foreign Terrorist Fighters” in Danish law did not result in changes of the Danish Criminal Code, nor has a general ban on participation in armed conflict been adopted, as was, for example, introduced in Norwegian law.⁸⁵ The Danish Ministry of Justice concluded in a parliamentary report of 2016 that travelling with the purpose of committing terrorism, as well as “participation in an armed conflict”, is already covered by the broad scope of the Danish counterterrorism regulation.⁸⁶ In 2017, new laws on training for terrorism, participation in a “terrorist organization” and so-called “no-go zones” have been introduced in the Danish counterterrorism legislation.⁸⁷

Danish counterterrorism legislation is regulated by Articles 114–114(a–e) in the Danish Criminal Code. Articles 114–114(a) regulate terrorism acts, while different support acts are regulated in articles 114(b–e), including the financing of terrorism, recruitment for terrorism, training for terrorism and participation in a terrorist organization.

Danish counterterrorism laws implement, *inter alia*, EU Framework Decision 2002/475/JHA,⁸⁸ the UN International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention),⁸⁹ the UN International

82 Danish Criminal Code, Act No. 977, 9 August 2017, Art. 101(a): “During an armed conflict to which Denmark is a party, anyone who has Danish citizenship or residency in the Danish State and who is affiliated with the enemy armed forces of a party to the armed conflict will be punished by imprisonment for up to ten years. Under particularly aggravating circumstances, the penalty may increase to life imprisonment. Direct participation in the conduct of hostilities is considered aggravating circumstances” (author’s translation).

83 *Ibid.*

84 *Ibid.*

85 Parliamentary Report No. 44L, Prop. 44L (2015–2016), “Endringer i straffeloven mv. (militær virksomhet i væpnet konflikt m.m.)”.

86 Parliamentary Report No. 1556, *Betænkning om Straffelovrådets udtalelse om visse spørgsmål vedrørende deltagelse i og hvervning til væbnede konflikter i udlandet, som den danske stat er part i*, 2015. It is not explained in the report what is meant by “participation in an armed conflict”, but Danish counterterrorism legislation covers training, financing and recruiting for terrorism, public provocation, and incitement, as well as travelling for terrorism, in accordance with European Council Framework Decision 2002/475/JHA, 13 June 2002, amended in Decision 2008/919/JHA.

87 Danish Criminal Code, above note 82, Arts 114(c–e), 114(j) (Law No. 1880 of 28 December 2015 Amending the Criminal Code (Association for Hostile Armed Forces) and Law No. 642 of 8 June 2016 on the Amendment of the Criminal Code and the Repeal of the Law, which Prohibits the Danish Territory from Supporting War Crimes (Armed Conflicts Abroad, etc.)).

88 Framework Decision 2002/475/JHA, above note 86.

89 International Convention for the Suppression of Terrorist Bombings, No. 37517, 15 December 1997.

Convention for the Suppression of the Financing of Terrorism,⁹⁰ and the Council of Europe Convention on the Prevention of Terrorism, all of which include a clause restricting the scope of application in times of armed conflict.⁹¹ The restriction of the scope of application was confirmed in Parliament during the implementation process of EU Framework Decision 2002/475/JHA into Danish law.⁹²

The wording of the scope-of-application restriction, which in essence is repeated in all of the aforementioned conventions, was first introduced in Article 19(2) of the Terrorist Bombings Convention:

The activities of armed forces during an armed conflict, as those terms are understood under IHL, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Accordingly, Article 19(2) exempts from the scope of the Convention activities of armed forces during armed conflict, and activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law. Article 19(2) does not define “armed forces” or “armed conflict”, but refers to how they are understood under IHL. Recordings of the negotiations of the article indicate disagreement among the negotiating parties as to its scope, and the final wording was only introduced in the final hours by the representatives of the United States, who were looking to protect the right of peoples to self-determination.⁹³ Until then, the draft Convention had included only an exception of activities carried out by State military forces in the performance of their official duties. Several States advocated to ensure the right to

90 International Convention for the Suppression of the Financing of Terrorism, No. 38349, 9 December 1999. The Convention includes a slightly different wording to Article 19(2) of the Terrorist Bombings Convention.

91 Other conventions that include a similar clause to Article 19(2) of the Terrorist Bombings Convention are the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Art. 4(2)), the 2010 Convention on the Suppression of Unlawful Acts relating to International Civil Aviation (Art. 6(2)), the consolidated text of the draft comprehensive convention (*Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/57/37, A/62/37, A/64/37, A/65/37, A/68/37; *Report of the Coordinator on the Results of the Informal Consultations on a Draft Comprehensive Convention on International Terrorism*, UN Doc. A/59/894; *Report of the Working Group 6th Committee*, UN Doc. A/C.6/60/L.6, A/C.6/65/L.10; *Summary Record of the 28th Meeting*, UN Doc. A/C.6/69/SR.28 7). See also EU Council GA Doc. 6655/16, preamble § 19(a); LIBE Orientation Vote Doc. 11169/16, preamble § 6(b).

92 See discussions at the Danish Parliament, FT 2001/02, 2. saml., A843; FT 2001/02, 2. saml., B.1466.

93 Proposal by the United States on Art. 3 of the Terrorist Bombings Convention, first draft, 30 September 1997. The negotiations are reproduced in Carlos Fernando Diaz-Paniagua, “Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997–2005”, PhD diss., City University of New York, 2008.

self-determination,⁹⁴ but only the US proposal left the understanding of “armed forces” to be determined by IHL.

Under IHL the term “armed forces” refers to the armed forces of both State and non-State parties to the armed conflict. This view is shared by a number of legal scholars⁹⁵ and has also been adopted in domestic case law concerning foreign fighters.⁹⁶ The ICRC concluded in its 2016 Commentary on common Article 3 that “in the context of common Article 3, the term ‘armed forces’ refers to the armed forces of both the State and non-State Parties to the conflict”.⁹⁷ Therefore, by allowing the understanding of “armed forces” to comply with existing international law, it was ensured that non-State actors remain within the understanding of armed forces for the purposes of the Terrorist Bombings Convention.

In light of the above, Danish counterterrorism legislation would not apply to activities committed by members of armed forces in an armed conflict. A returned foreign fighter may be considered a member of an armed force of a non-State armed group and can be considered to be participating in hostilities even after having returned to Denmark, as discussed previously. Conduct of hostilities is not regulated by the national counterterrorism legislation, however. This restriction in the scope of application ensures a distinction between those who are taking part in an armed conflict and those whose actions are not connected to the hostilities of an armed conflict.

Deliberate attacks on civilians are always illegal under international law. IHL includes an absolute ban on terrorism in Article 51(2) of Additional Protocol

94 Proposals by Belgium, Syria, Pakistan, Argentina and New Zealand on Arts 1.4, 3, 5, 2bis, 10bis and 12ter, UN Doc. A/C.6/52/WG.1/CRP.11, 23 September 1997; by Belgium, China and Egypt on Art. 12ter, UN Doc. A/C.6/52/WG.1/CRP.28, 25 September 1997; and by Belgium on Art. 3, UN Doc. A/C.6/52/WG.1/CRP.39, 30 September 1997. The proposals are reprinted in UN General Assembly, *Report of the Working Group on Measures to Eliminate International Terrorism*, UN Doc. A/C.6/52/L.3, 3 October 1997, pp. 23–24. The negotiations are reproduced in C. F. Diaz-Paniagua, above note 93.

95 Marco Sassóli, “Joint Series – Direct Participation in Hostilities: What Are the Issues and Where Are the Controversies?” *ICRC Intercross Blog*, 8 September 2014, available at: <http://intercrossblog.icrc.org/blog/direct-participation-in-hostilities-what-are-the-issues-and-where-are-the-controversies/>; Stéphane Ojeda, “Global Counter-Terrorism Must Not Overlook the Rules of War”, *ICRC Humanitarian Law and Policy Blog*, 13 December 2016, available at: <http://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>. See also the discussion by the present author in Anna Andersson, Sofie A. E. Hogestøl and Anne Christine Lie (eds), *Fremmedkrigere: Forebygging, straffefølgning og rehabilitering i Skandianavia*, Gyldendal, Copenhagen, 2018, p. 111–117.

96 For example, in Norwegian case law, see Oslo City Court, Case No. 09-200483MED-OTIR/03, 6 December 2010; in Swedish case law, see Gothenburg City Court, Case No. B 9086-15, 14 December 2015; Attunda City Court, Case No. B 4352-15, 15 February 2017; and in Belgian case law, see Antwerp City Court, Case No. FD35.98.47-12, 11 February 2015; Court of First Instance of Brussels, Case No. FD.35.98.212/11, 6 November 2015; *The Turkish state v Fahriye Alptekin and 35 other Kurdish politicians*, Case Nos FD.35.98.634/06, FD.35.98.502/07, FD.35.98.54/09 (Brussels City Court, 3 November 2016), FD.35.97.8-15 (Brussels City Court, 18 July 2016), FD35.98.374-14 (Brussels City Court, 27 January 2016), FD.35.97.15/12 (Court of Appeal of Brussels, 14 April 2016), FD.35.98.374-14 (Court of First Instance of Brussels, 27 January 2016), FD.35.97.15/12 (Court of Appeal of Brussels, 14 April 2016), FD.35.97.8-15 M. R. (Court of First Instance of Brussels, 18 July 2016). The Danish courts have not considered the applicability of Danish counterterrorism legislation in armed conflict directly (however, on indirect application, see, among others, Danish Supreme Court, Case No. U2009.1453H, 2009).

97 2016 Commentary on GC I, above note 33, para. 180.

I and Article 13(2) of AP II. The definition of terrorism under IHL is, however, restricted in accordance with the principle of distinction, prohibiting only deliberate attacks on civilians.⁹⁸ The Statute of the International Criminal Court does not include a crime of terrorism, but deliberate attacks on civilians are criminalized as war crimes. The Danish Criminal Code does not include specific provisions on war crimes, and violations of the Geneva Conventions and customary international law are punishable only in accordance with the regular crimes of the Danish Criminal Code.⁹⁹

Contrary to the acts prohibited under counterterrorism laws, war crimes can only be committed in armed conflict. The difference between the Danish counterterrorism laws and the regular crimes of the Danish Criminal Code lies mainly in their protective scope of application: the counterterrorism laws are in general much broader in their scope of protection, criminalizing conduct which would normally not be covered by rules on attempt and aiding and abetting.

Attempting to commit a crime under Danish law is criminalized primarily according to the intention of the perpetrator. According to section 21 of the Danish Criminal Code, “acts that are aimed to promote or accomplish an offence shall when the offence is not completed be punished as an attempt”.¹⁰⁰ Conspiracy, financing of crimes, preparation of a crime (including travelling to the place where the crime is intended to be committed), offences relating to organizations whose main activities are criminal, etc., are criminalized as attempts under Danish law. Conduct that is not covered by the scope of the regular crimes of the Criminal Code, but is criminalized as terrorism, will presumably not include acts of participation in hostilities and will thus be subject to counterterrorism laws, even if committed during armed conflict. This author submits that conduct which indirectly harms the party to the conflict or creates room for harm at a later stage will not reach the requirement of direct causation under the notion of direct participation in hostilities.¹⁰¹ Examples of such conduct could be collecting information about Danish infrastructure or receiving training in conduct of hostilities, which will constitute direct participation in hostilities only if the information is used in the preparation of a specific attack or the person receiving the training is specifically recruited and trained for the execution of a predetermined hostile act. A Danish IS fighter who returns to Denmark and gets a job with the intention of financially supporting an armed group in Syria or Iraq likewise cannot be considered to be taking a direct part in the hostilities. Such acts could therefore be prosecuted under domestic counterterrorism laws.

98 Geneva Convention IV, Art. 33; AP I, Art. 51(2); AP II, Art. 13(2). See also ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para. 56.

99 Law on the International Criminal Court, No. 342, 16 May 2001. Genocide is criminalized in the Law on Genocide, No. 132, 29 April 1955.

100 Danish Criminal Code, above note 82, Art. 21 (author’s translation).

101 However, see ICRC Interpretive Guidance, above note 51, p. 55, according to which the temporal proximity of the inflicted harm does not influence the requirement of direct causation between the act and the harm inflicted.

Further, persons who are not sufficiently affiliated with a party to an armed conflict are not members of an armed force according to IHL and will therefore be subject to Danish counterterrorism laws. Persons, who, on the other hand, are considered members of the armed forces of a party to an armed conflict, and are therefore exempted from the counterterrorism laws, may be prosecuted for treason.

Those whose involvement in the hostilities is spontaneous, sporadic or temporary will lose protection from attack and may at the same time be prosecuted for both treason and terrorism, for otherwise lawful acts of war under IHL, as they cannot be considered members of the armed forces of a party to an armed conflict. An attack reaching the threshold of harm likely to adversely affect the military operations or military capacity of a party to an armed conflict will, in addition, be in breach of regular crimes of the Criminal Code, even if the attack does not constitute a war crime and the person carrying out the attack is a member of the armed forces of a party to an armed conflict.¹⁰²

Thus, though Danish counterterrorism laws do not apply to the conduct of hostilities, when a foreign fighter continues to take a direct part in hostilities or upholds the status of a continuous combat function after having returned to Denmark, domestic criminal laws would apply in most cases of returned foreign fighters acting on behalf of IS against Danish citizens or interests.

Conclusion

This article has attempted to point to some of the questions which arise regarding the application of different legal regimes, should a foreign fighter return to the State in which s/he is a citizen and/or resident and continue to take a direct part in hostilities or retain a continuous combat function. The fact that the State is a party to an armed conflict taking place on the territory of another State, parallel with the participation of its own citizens, dissolves the concept of an actual “battlefield” as it has traditionally been understood and creates new issues concerning a situation which is very scarcely regulated. While there are currently no active hostilities taking place in Denmark, and the appropriate legal framework to apply is the law enforcement regime, membership in the armed forces of a party to an armed conflict and even affiliation with an armed group may influence the legal assessment in the criminal prosecution, subsequent to an attack or other conduct committed with a nexus to the armed conflict in Iraq and Syria.

102 The implications of the present state of the law, caused by the lack of regulation in non-international armed conflicts, have been discussed, among others, by S. Krähenmann, above note 4.