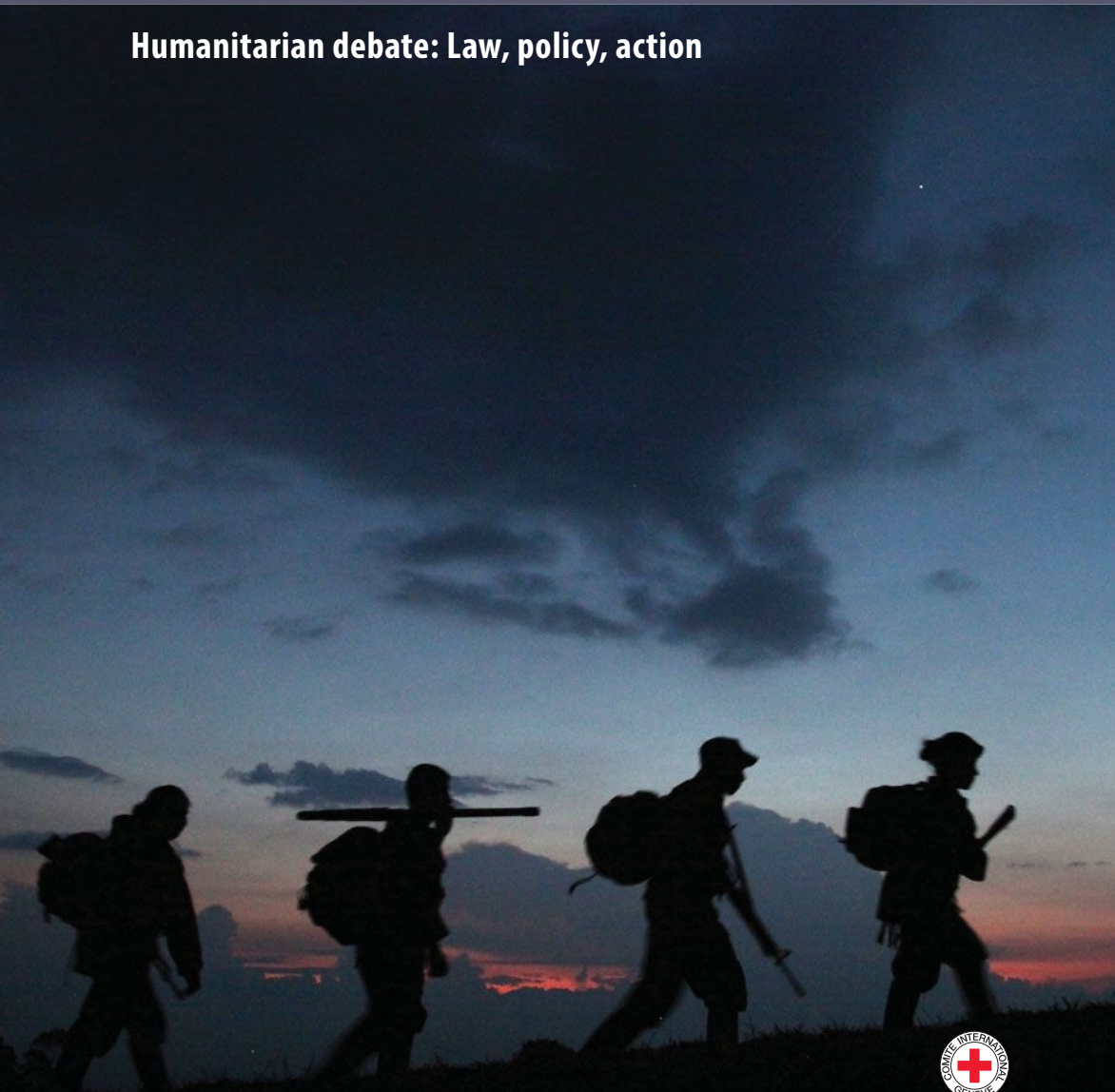


Volume 105 Number 923

# International Review

of the Red Cross

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



## Organized Crime



ICRC

# International Review

of the Red Cross

## Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal 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 International Red Cross and Red Crescent 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 Movement.

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International Review of the Red Cross  
19, Avenue de la Paix, CH 1202 Geneva  
CH - 1202 Geneva  
t +41 22 734 60 01  
e-mail: review@icrc.org

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## EDITORIAL

# ORGANIZED CRIME IN ARMED CONFLICTS AND OTHER SITUATIONS OF VIOLENCE

**Robert Muggah**

Principal of the SecDev Group and Co-Founder of the Igarape Institute

Email: [r.muggah@secdev.com](mailto:r.muggah@secdev.com), [robert@igarape.org.br](mailto:robert@igarape.org.br)

Organized crime is more easily described than defined. A generic overview provided by the 2000 United Nations Convention on Transnational Organized Crime (UNTOC) describes organized crime in generic terms as consisting of a structured group of three or more people involved in coordinated activities with the intention of seeking material benefits.<sup>1</sup> On this score, organized crime certainly delivers the goods: all told, criminal actors generate at least \$9 trillion in earnings every year, depending on who's counting.<sup>2</sup>

Not surprisingly, organized crime is also detrimental to peace and security. In some cases, armed criminal groups fighting with State actors or with one another generate exceedingly high levels of violence and casualty rates far exceeding those occurring in some war zones. The human costs of violent criminality are catastrophic, including hundreds of thousands of lives lost and disappeared, tens of millions of ruined livelihoods, far-reaching restrictions on access to health and educational services and the corrosion of State and societal institutions.

This issue of the *Review* features a carefully curated slate of articles examining the intersections between organized crime, armed conflict and other situations of violence. A particular focus of legal scholars is on the applicability of international humanitarian law (IHL) and international human rights law to organized crime groups in settings that are categorized as non-international armed conflicts or that fall just below that threshold. Other social scientists and humanitarian practitioners, in turn, emphasize the insidious collusion between organized crime and other State and non-State actors, and the opportunities available to mitigate its effects on the delivery of protection and assistance.

A vexing question for lawyers, humanitarians, police and military alike is whether and when organized criminals fall under the provisions of IHL. Resolving this query is especially pressing in settings already beset by armed conflict or other situations of violence. Several contributors to this issue believe that criminals may be automatically excluded from IHL, since only groups pursuing political motives can be party to a conflict and thus be subject to that body of law. Others take an opposing view, arguing that it is pointless to impute

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

subjective motives to an actor, that *de facto* actions (“facts on the ground”) and outcomes are what counts, and that in certain cases criminal groups are on par with insurgents and constitute legitimate armed opposition.

One reason why it is difficult to determine whether and when humanitarian law applies to organized crime is because organized criminals are themselves a blurry category. The UNTOC offers frustratingly limited guidance in this regard – despite the reality that on the ground, across the Americas, Africa and Asia, the distinctions between criminal organizations and conventional armed non-State actors are often negligible. In settings characterized by active armed conflict or other situations of violence, the determination of whether an organized crime group qualifies as armed opposition has far-reaching implications for everything from the rules of engagement and the proportional use of force to the protection of civilians and the treatment of detainees.

Seen up close, there are several ways in which supposedly economically motivated organized criminal groups operate similarly to politically motivated non-State armed actors. Consider powerful drug trafficking factions in Brazil that routinely take up arms against rival factions and co-opt State and city governments and police forces to protect their interests. Likewise, in Colombia, gangsters and self-defence groups have evolved into powerful militia and paramilitary-style organizations that control large swathes of territory and even the apparatus of the State itself. And in Haiti, heavily armed gangs that have long been recruited by State and non-State actors – including political and economic elites – to do their dirty work are now controlling key ports, road networks and critical infrastructure.

Unsurprisingly, humanitarian, law enforcement and military experts do not always agree on the criteria that should be applied to determine whether IHL can or should apply to organized criminal groups. Some metrics that are frequently invoked are the ideological posture of the group in question, the extent of territory under its control, its relative level of command and control, and even the types of weapons being used. Another set of indicators relate to the intensity of violence and the extent of organization of the group in question. If the scale and duration of violence and the extent of organizational coherence of the group exceed a certain threshold, then the violence could potentially be classified as an armed conflict, in which case IHL applies.

What are less in dispute are the ways in which organized crime and criminal organizations are evolving and influencing the dynamics of armed conflicts around the world. From Afghanistan to Libya and Mali to Sierra Leone, ostensibly criminal actors are fundamentally connected to extreme violence, contributing to casualties, displacement and immense instability. Often, these

- 1 See Global Initiative against Transnational Organized Crime, *Global Organized Crime Index 2021*, 2021, available at: <https://globalinitiative.net/wp-content/uploads/2021/09/GITOC-Global-Organized-Crime-Index-2021.pdf> (all internet references were accessed in January 2023).
- 2 See United Nations, “Tax Abuse, Money Laundering and Corruption Plague Global Finance”, Department of Economic and Social Affairs, 24 September 2020, available at: [www.un.org/development/desa/en/news/financing/facti-interim-report.html](http://www.un.org/development/desa/en/news/financing/facti-interim-report.html).

actors are not operating autonomously, but rather symbiotically with State and non-State parties to an armed conflict. Indeed, all of these entities are frequently enmeshed in criminal economies ranging from drugs to diamonds that benefit from rents and monopolies associated with extraction, trade and theft. Prolonged instability may be the object of tensions, not the by-product. Of course, organized criminal groups are hardly homogeneous – heavily armed elements may operate alongside white-collar money launderers, for example. Yet social scientists are finding that as often as not, criminal groups are not necessarily opposing State entities, but rather seeking to collude with, control and coerce them. In areas of high scarcity, the State itself may be the prize, allowing criminal groups to reach greater scale and immunity.

In certain cases, the distinctions between non-State, semi-State and State actors and their interests and actions are disappearing. The lines are particularly blurred in situations of extreme violence that fall below the threshold of armed conflict. Examples include parts of Brazil, Guatemala, Mexico, Pakistan and South Africa where impunity is pervasive and the prevalence of lethal violence exceeds most war zones. In some neighbourhoods of Acapulco, Rio de Janeiro, Karachi and Durban, drug trafficking cartels, militia and mafia engage in pitched battles with heavily armed military, paramilitary and police units. In these situations, some national and subnational governments are exploring the selective application of IHL and the lowering or even suspension of human rights.

At the very least, the explosion of organized criminal violence in non-war settings is challenging cherished notions of what constitutes armed conflict, and by extension, the applicability of IHL. Article 1(1) of Additional Protocol II to the 1949 Geneva Conventions sets out, for the purposes of that treaty, the scope of application of what constitutes a non-international armed conflict, including the involvement of armed forces and dissident armed forces or organized groups under the leadership of a responsible command and with the capacity to carry out continuous and organized military operations. Article 8(2)(f) of the 1998 Rome Statute of the International Criminal Court also adds a temporal dimension, while International Committee of the Red Cross (ICRC) opinions and international jurisprudence emphasize the intensity of violence and the level of organization of non-State actors.<sup>3</sup> Yet the rise of mega-cartels, super-gangs and hyper-violent extremist organizations begs the question of whether new rules are needed.

These questions have gained added salience with the emergence of strident war narratives and militarized approaches to confronting organized crime, not least the so-called wars on drugs, terrorism and crime. The five-decade-old “war on drugs”, in particular, has progressively militarized and privatized counter-narcotics measures around the world. The spectacular growth of private military and security companies is often tightly correlated with violence, raising questions about the applicability of IHL and the limits of human rights law. The two-

3 See Dustin A. Lewis, “The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019.

decade-old “war on terror” has raised new dilemmas, including those related to the distinction between combatants and civilians and the rules of engagement outside war zones.

Many of the contributors to this issue of the *Review* ask to what extent IHL applies in non-conflict settings where States are confronting criminal and extremist groups with the ability to challenge State authority and control territory. Several conclusions emerge, some more controversial than others. One that appears more than a few times is that international human rights law is necessary, but may prove insufficient in situations that fall below the threshold of armed conflict. Across all the contributions is some level of anxiety that existing international legal regimes are not keeping pace with changes in peace, crime and war.

A more hopeful observation is that IHL and international human rights law are complementary and should be regarded as such in situations of extreme organized crime. The Inter-American Court of Human Rights, for example, has demonstrated this complementarity in rulings regarding both Colombia and Mexico.<sup>4</sup> Situations can be classified as armed conflicts for the duration of confrontations in particular settings, even in the absence of all-out conflict elsewhere. IHL can offer opportunities to strengthen protection of civilians and regulate hostilities between two or more parties, but has limited bearing on law enforcement; human rights law, on the other hand, can offer more protections against the excessive use of police force and deprivation of freedoms.

There is nevertheless a widespread assumption that IHL and human rights law are still insufficiently adapted to regulate situations involving organized crime. To be sure, the use of human rights law to complement IHL in international and non-international armed conflicts is accepted practice. This is not necessarily the case, however, in other situations of violence that fall below the threshold of armed conflict, such as the widespread banditry facing northern and central Nigeria or the maras operating across Central America’s Northern Triangle, where human rights law is the baseline legal regime. The law will need to adapt in order to respond to evolving challenges ranging from the rising threat of organized criminal organizations to the militarization of law enforcement and the privatization of military services.

Several of this issue’s contributors venture the idea that new legal frameworks and rules may be needed that could specifically address violence between State forces and organized crime groups, including drug cartels. They contend that rigid legal categories such as “fighters” with continuous combat functions or “unarmed civilians” do not reflect the realities on the ground. Existing law enforcement paradigms are also inadequate to address situations where the intensity and organization of violence approaches levels meeting the requirements of IHL. Some scholars contend that in the absence of new rules, IHL should be applied to discrete settings or actors such as heavily armed drug

4 See Christina M. Cerna, “The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 2, 2011; Inter-American Commission on Human Rights, *Situation of Human Rights in Mexico*, Doc. 44/15, Washington, DC, 2015.

cartels. But in the longer run, changes in the nature of non-international armed conflict and the technologies of violence necessitate new rules.

Approaches to addressing organized crime are likewise in urgent need of a serious upgrade. The UNTOC and its protocols are the principal instruments for fighting organized crime, and set the standards for States to follow. The 2003 UN Convention against Corruption is relevant as well.<sup>5</sup> All of these instruments are managed by the UN Office on Drugs and Crime. Meanwhile, the International Criminal Police Organization, known as Interpol, provides support to national law enforcement agencies, while the European Union supports measures through Europol. Given the gravity of the challenge, however, global efforts to develop collective responses are fragmented, piecemeal and ineffective.<sup>6</sup> For its part, the UNTOC has struggled to remain relevant as criminal groups and their tactics evolve, and experts believe a more comprehensive and reinvigorated approach is needed.

While scholars wrestle with legal frameworks and norms, humanitarian organizations need to be pragmatic and get on with the challenging task of delivering assistance in complex environments. For its part, the ICRC devises its strategies based on dynamic needs assessments, the availability of partners, the humanitarian consequences, and its own capacity to respond. Along with the Fundamental Principles of the International Red Cross and Red Crescent Movement, including those of neutrality, impartiality and independence, a fundamental guiding principle in situations involving complex organized crime and conflict dynamics is complementarity – that is, working with multiple stakeholders such as the National Red Cross and Red Crescent Societies, non-governmental organizations and local authorities. While the efforts of these stakeholders are not easily scaled, as the examples of safer access to public services in Brazil and support for displaced families in Honduras show, they can be impactful.

While some are more controversial than others, several contributions to this issue of the *Review* explore new avenues for engaging directly and indirectly with organized crime groups. Truces, negotiations and even amnesties are more common than is widely appreciated, raising tricky questions of ethics, practice and policy.<sup>7</sup> In the absence of a formal peace deal, there are few incentives for States to openly negotiate with criminal organizations, and there are high political costs and moral hazards to opting instead for heavy-handed enforcement operations. Even so, international law can play a role in de-risking the political costs and complications associated with negotiations, and could be geared toward dialogue opportunities.

5 See UN Convention against Corruption, UNGA Res. 58/4, 31 October 2003, available at: [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

6 See Council on Foreign Relations, “Global Governance Monitor: Crime”, 2021, available at: [www.cfr.org/global-governance-monitor/#!/crime](http://www.cfr.org/global-governance-monitor/#!/crime).

7 See Robert Muggah, Ami C. Carpenter and Topher McDougal, “The Inconvenient Truth about Gang Truces in the Americas”, *Freedom From Fear*, Vol. 2016, No. 10, 2016, available at: [www.un-ilibrary.org/content/journals/25190709/2016/10/12](http://www.un-ilibrary.org/content/journals/25190709/2016/10/12).



The convergence of armed conflict and organized crime raises vexing legal, ethical and operational questions for scholars and practitioners alike. These challenges are not going away – rather, there are signs that conflict and crime are becoming more complex and lethal, not less.<sup>8</sup> Moreover, new fronts are emerging that raise difficult issues related to the application of international human rights law and IHL, not least the migration of conflict, crime and violence to the digital domain. Gathering evidence of, and assigning attribution to, digital harms is exceedingly difficult in stable contexts, let alone in settings beset by extreme insecurity.<sup>9</sup> Ultimately, by sharpening the analytical lens and advancing new agendas, the contributors to this issue of the *Review* will help advance the cause of humanitarian action in a volatile era.

8 See, for example, International Institute for Strategic Studies, *The Armed Conflict Survey 2022*, Routledge, London, 2022; Interpol, *2022 Interpol Global Crime Trend Summary Report*, Lyon, 2022.

9 See ICRC, “Cyber-Attack on ICRC: What We Know”, 16 February 2022, available at: [www.icrc.org/en/document/cyber-attack-icrc-what-we-know](https://www.icrc.org/en/document/cyber-attack-icrc-what-we-know).

## SPEECH



# Speech by Mirjana Spoljaric Egger, President of the International Committee of the Red Cross

Delivered at the Graduate Institute, Geneva, 28 November 2022\*

*Mirjana Spoljaric Egger is President of the International Committee of the Red Cross (ICRC), commencing in October 2022.*

*Prior to taking up the presidency, from August 2018 Spoljaric served as the United Nations (UN) Assistant Secretary-General, Assistant Administrator of the UN Development Programme, and Director of the Regional Bureau for Europe and the Commonwealth of Independent States.*

*Spoljaric previously had many years of distinguished service with the Swiss Diplomatic Corps. More recently she served as Ambassador and Head of the United Nations and International Organizations Division of the Swiss Federal Department of Foreign Affairs (FDFA), where she was instrumental in shaping coherent Swiss policies and priorities in all main UN organs and conferences, represented Switzerland in multilateral processes, and had responsibility for International Geneva and Switzerland's host country policy.*

\* Please note that this speech is published here as delivered.

*Spoljaric served in several assignments at the FDFA in Bern, and as Counsellor and Head of the Political Team at the Permanent Mission of Switzerland to the United Nations in New York.*

*From 2010 to 2012, Spoljaric was seconded to the Office of the Commissioner-General of the UN Relief and Works Agency for Palestine Refugees in the Near East as Senior Adviser covering organizational development, management reforms and external relations.*

*Earlier in her career Spoljaric worked in the Embassy of Switzerland in Cairo, Egypt, and was Desk Officer at the Foreign Economic Affairs Directorate (International Finance Institutions) of the Swiss State Secretariat for Economic Affairs.*

*Spoljaric studied philosophy, economics and international law at the University of Basel and University of Geneva, and holds a master's degree. From 2004 to 2006 she was a part-time lecturer on global governance at the University of Lucerne.*

*Spoljaric speaks fluent German, English, French and Croatian. She is married and has a son and a daughter.*

: : : : : :

Ladies and gentlemen,

Dear colleagues,

It is a pleasure to be speaking with you this evening, my first public address since I commenced as president of the International Committee of the Red Cross.

As president, one of my chief responsibilities is to be able to represent the needs of communities affected by conflict – to those with the power to improve their circumstances.

During these first weeks I have been heavily engaged on the work of our major operations. I have travelled to the north of Mali, to Washington, New York, Paris. I also went to Dublin for the important declaration to limit the use of explosive weapons in populated areas.

Over this short time, two things have struck me:

**First, what level of human suffering caused by conflict and violence is tolerable?**

In the north of Mali, people have suffered enormously from violence, reinforced by the negative impact of the climate crisis. I saw children who do not have food to nourish them, nor clothing, nor any hope of ever seeing the inside of a school.

In the Russia–Ukraine international armed conflict we see unacceptable levels of destruction, leading to senseless suffering among the civilian population.

And not only there: From Ethiopia to Yemen, Afghanistan to Israel and the occupied territories, from Syria to Somalia, armed violence is compounded by the effects failing economies, causing hunger and utter despair.

**Second, it is obvious why international humanitarian law and the very function of the International Committee of the Red Cross exist.**

Conflict is bloody, ruins lives. Conflict is the very act of dehumanization, destroying of another by force.

In the logic of survival, room for humanity is difficult to find. But it is precisely for these intractable circumstances that neutral and impartial humanitarian action was designed.

International humanitarian law provides minimum standards of humanity that must be respected in armed conflict. Its rules must be applied by all parties, irrespective of their motivation to go to war.

I particularly welcome this moment to speak with you, for I see that this is a decisive time for the world.

Relationships between powerful states are strained, while multilateralism struggles to preserve its value and legitimacy in an atmosphere of division.

States and media speak of large-scale, international armed conflict almost as if they were inevitable. Nuclear weapons continue to threaten all of us. And new ways of causing death and destruction are developed in lockstep with scientific advancements.

While there is good reason to be concerned about a resurgence of conflict between states after a long period of mainly non-international armed conflicts, the established trends of the last two decades show no sign of letting up.

Many non-international armed conflicts drag on, some of them worsening.

**Armed groups continue to elude responsibility; and states, operating through state and non-state proxies, do the same.**

Technology is rapidly developing, with cyberoperations, autonomous weapons, and the use of outer space raising questions regarding the application and interpretation of IHL.

And the overlapping effects of global financial pressures, rising inequalities, and the climate crisis make everything worse.

All the while, respect for international humanitarian law is, at best, uneven.

This also means that warring parties too frequently try to exclude whole categories of people from the humanitarian protection of the law. And that war crimes are committed every day with impunity.

**Yet, as I assume the important role of president of the ICRC I am realistic, but hopeful.**

Yes, there are urgent and grave problems to address.

But we hold in our possession something extremely valuable: an international consensus.

Every single state has signed onto the Geneva Conventions.

Every state has freely and voluntarily agreed to be legally bound by the rules they embody.

Every state has decided that no matter the circumstances that give rise to war, limiting its human cost is a legal obligation that cannot be swept aside.

At a time when division hampers multilateralism, we must not underestimate the strength of the world's agreement on the basic rules of armed conflict.

We cannot let the air of uncertainty about the future of peace make us doubt the world's overwhelming certainty about the limits of war.

To the contrary, now is the moment to elevate the laws of war to a political priority; to harness this unique consensus and empower international humanitarian law to do the work it was meant to do at a moment in history when the worst has become too easily imaginable.

Today, I propose three ways of doing so.

**First: We must preserve the hard-won gains we have made.**

Too often, the positions and practices of governments, whether in statements, policies or positions in multilateral negotiations, weaken interpretations of the law.

We recognize that some state or other will always have an interest in carving out a new exception to the application of IHL's protections to suit an immediate policy objective.

The counterterrorism narrative of recent decades has been invoked countless times to say that a certain situation is so unique, IHL simply cannot handle it – or, worse, that some people are so evil they don't deserve IHL's protection.

This, frankly, is one reason we have ended up with camps in north-east Syria where tens of thousands of children from dozens of countries have been left stranded in inhuman conditions in full sight of the international community.

We also recognize that some governments and non-state armed groups question the legitimacy of international humanitarian law: they take the view that IHL constitutes foreign imposition and use this argument to undercut its force.

But isn't the principle of humanity universal?

**Humanity is age-old. Tables can turn in the long term – no State is immune from one day seeing its own fighters, civilians, or cities in enemy hands.**

And when their own people are vulnerable, states will not want life-saving rules to have been swallowed by ill-conceived exceptions.

The impacts of conflicts too, are not retained in borders. Millions of people globally have had to flee for their lives to more safe countries. In past months we are also seeing in Africa a looming food crisis, and in Europe electricity and gas shortages.

Frighteningly, we also know that the impacts of any use of nuclear weapons would be widespread and cause irreversible destruction.

**In other words: we all have something at stake. International humanitarian law protects everyone, it protects us all.**

In terms of concrete action, preserving our gains means using our voices to reaffirm the universality and relevance of IHL on every possible occasion – in multilateral fora, in conversations with leaders, in academia.

It means not letting the language of the law – agreed universally and enshrined in treaty – to be eroded by the political exigencies of the day.

And it means invoking the rules with the confidence – that, no matter how different the next conflict is from all those that came before, IHL is fit for purpose, and questions about its relevance must be put to rest.

**Second: Preparedness is critical – but I also want to talk more about prevention. For the ICRC, prevention means having all the tools in place to ensure IHL is respected if armed conflict breaks out.**



Prevention is about states passing legislation implementing IHL, training the military on the rules of war, issuing orders that respect the law, and fostering a culture of accountability.

It means, states must plan to accommodate detainees with dignity, to provide them with legal process, and prevent disappearances; it means states must put in place targeting practices that avoid civilian casualties and protect homes, schools, hospitals, and cultural property; and it means states must plan military operations in a way that spares essential services like health care and the provision of clean water.

Prevention is also about political will to investigate the conduct of states' own armed forces – to seriously examine the facts surrounding allegations of IHL violations. Effective investigations do not exist solely to deter and punish misconduct, but they help identify systemic shortcomings and allow armed forces to correct course.

The ICRC works closely with states, whether by assisting them with legislation, encouraging them to sign onto new treaties, or by training their armed forces, judges, parliamentarians, and diplomats on the rules of war.

Whatever states do to prepare for the conflicts of the future, prevention of IHL violations must be an integral part.

### **Third: We must confront the problem of noncompliance.**

IHL, as a living body of law, is respected daily. Harm that never occurs is difficult to quantify.

There is no doubt that in the more than one hundred armed conflicts ongoing in the world today, the implementation of IHL by the parties has spared civilian lives and property, prevented torture and disappearance, safeguarded hospitals, and kept horrific weapons off the battlefield.

The ICRC staff bears witness to the protective effects of IHL every day. Our own ability to work – visiting detainees, repatriating mortal remains, supporting hospitals, and moving freely on both sides of the front lines to assist those in need and document allegations of violations – is owed to IHL's efficacy.

And yet, flagrant violations of the most basic norms occur regularly. Torture is committed as a matter of policy. Civilians are targeted to sow fear. Hospitals are destroyed with brutal disregard. Cultural sites are desecrated.

Among the many challenges confronting IHL today, noncompliance is the most critical.

But we need to be clear about the appropriate response. Too often, war crimes are met with more uncertainty than resolve.

Is international humanitarian law still relevant?

Does anyone still care about the Geneva Conventions?

Well-meaning observers are calling into question the adequacy of IHL in the face of violations of its most basic tenets.

**When the law is broken, it doesn't need to be fixed, it needs to be enforced.**

And there are many ways of doing this.

The parties to the conflict, first and foremost, need to respond with effective investigations and criminal prosecutions where appropriate.

In an era of coalitions and partnered operations, supporting countries must ensure that they are not encouraging or contributing to IHL violations. They have a unique role to play in using their influence to put an end to violations by their partners.

For states that provide arms to parties to conflicts, international rules governing the transfer of weapons are designed to prevent them from being put in the hands of violators.

And even uninvolved states, far from the battlefield, have tools to deploy.

Diplomatic and other forms of pressure from states can help convince a party to a conflict to come into compliance.

**When suspected war criminals cross international borders, the Geneva Conventions and the doctrine of universal jurisdiction empower any state to prosecute them before their courts, regardless of where the conduct occurred.**

Complemented by international tribunals and monitoring mechanisms – with all their strengths, weaknesses and limitations – there are plenty of tools available for states to confront noncompliance with international humanitarian law.

States are the very architects of the laws of war. Rather than express self-doubt about their creation, they must demonstrate the tenacity to enforce them.

The ICRC, for its part, works within the framework of IHL to promote compliance with the law. Our bilateral, confidential protection dialogue with states and non-state armed groups is aimed at drawing attention to allegations of violations and pressing for corrective measures.

We reach out to non-state armed groups, no matter their motives or their structure, to alert them to the most basic principles of humanity, and their responsibility to spare civilians, care for the wounded, and safeguard the dignity of detainees.

Working through our mode of confidentiality, ICRC can support states to hold those who commit international crimes accountable, ensuring that all parties to the conflict are aware of their obligation to investigate and prosecute.

Ladies and Gentlemen,

Dear colleagues,

I want to conclude by stating the following:

For most states in peaceful times, armed conflict is something for the history books. But for us, for the International Committee of the Red Cross, armed conflict is ever-present.

**Since its founding, the ICRC has constantly lived among and between warring factions. So today, I stand on the shoulders of many courageous colleagues when I say that the current global climate is inviting calamity.**

As states prepare for the potential conflicts of the future, they risk making that very future more likely. We cannot let ourselves drift into a world where multiple, powerful states accept armed conflict as a political instrument, and mass civilian casualties as a necessary by-product of war.

Should war break out along the fault lines we are seeing today, the ramifications and humanitarian consequences would be beyond overwhelming. And there is nothing that IHL, the ICRC or the whole of the world's humanitarian movement could do to make it bearable.

States alone are responsible for the direction our future will take.

As a humanitarian leader, I will always avoid political entanglements. But I will implore states at every turn to consider their responsibility to maintain peace. We will do our work to promote IHL, to assist states with their obligations to prevent violations, and to protect civilian and military victims of armed conflicts when they will arise.

For all states, as parties to the Geneva Conventions, it is their responsibility to prevent war from occurring in the first place, and, when conflict occurs, to minimize the suffering of civilians.

In this, states must succeed.

And humanitarian organizations and societies at large must not unwittingly provide them with the comfort to fail. This means me, you, it means the media, community and business leaders, and academia.

**The Geneva Conventions were made for us all and it is for us all to play our part. We cannot for a moment allow apathy to be our ruler.**

The avoidance of war is imperative. Even when wars break out, respect for international humanitarian law has been and will continue to be the only way to preserve a minimum of humanity, to stave off the worst atrocities, and ultimately, to pave the way back to peace and prosperity.

## Hidden stories: Survivors of organized crime

*Though organized crime is the subject of numerous treaties, traditionally it has not been central to conversations about international humanitarian law (IHL) and the conduct and regulation of armed conflict. There is currently no unanimity as to the criteria to be included so that IHL applies to criminal groups. The articles in this issue of the Review explore how organized crime and the groups that carry it out can be, should be and in fact are regulated through the international legal framework governing armed conflict and other situations of violence.*

*While the objective of this issue is to clarify the role of criminal groups in armed conflicts and how IHL applies to them, the collection of testimonies presented below has no such aim. This sole purpose of this compilation of testimonies is to give a voice to the victims of organized crime so that their stories, which are usually hidden and silenced, can shed new light on the short- and long-term effects of organized crime on those who suffer from it. These stories provide unique insights into the personal and societal impacts of organized crime, as well as the ways in which victims cope with and resist these criminal networks.*

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### Keila's return

The clock on the bus leaving Tapachula migrants' centre was showing midnight. On board, thirty-seven Hondurans, including Keila, were being deported from various

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

parts of Mexico. Most of the migrants on the bus were men, but the seat next to Keila was occupied by Dania, another young Honduran woman. The young woman was sweating profusely and complaining of intense abdominal pain. She was running a fever. Twice, Keila tried to inform the driver about the girl sitting beside her, but she was ignored both times. The driver was intent on making sure that the bus continued its journey.

Her worry increased as time passed, so Keila spoke again to the driver, who replied: “I can’t stop. I have to keep to the timetable, and that means reaching Honduras by the early hours of the morning.”

The bus continued its journey through the dark. Suddenly Keila screamed for help as the young woman beside her started bleeding from between her legs. The driver ignored it and carried on. It did not take long for Dania to pass out from the loss of blood. She was suffering a miscarriage.

In a burst of solidarity, and out of anger at his lack of compassion, the other migrants shouted at the driver and threatened him. The driver finally stopped somewhere in the darkness, right in the middle of the México 200 motorway.

About an hour later, a Mexican Red Cross ambulance arrived. Keila offered to accompany Dania to the nearest hospital but was told that she had to stay on the bus with the other migrants. Dania was then taken away in the ambulance, alone.

Keila and the other migrants continued their journey to Honduras. She remembers the driver saying, “It’s still going to take us about ten hours to get to Honduras.”

Today, Keila wonders what happened to that young woman. Did she survive, despite losing so much blood? Did she get back to Honduras alive?

Keila, on her side, did get back to Honduras, but she was not able to return to her home.

More than a year ago, Keila’s husband was taken away by men posing as police officers. There were six of them, all masked and wearing blue uniforms. It was about six in the morning, and they had forced their way into Keila’s home. “We’ve got a few outstanding issues to resolve with your husband”, Keila remembers them shouting, before she was locked with her three children in the bathroom. “Don’t speak and don’t shout, or you’ll die with him”, they threatened.

The men threw her husband to the ground and beat him. Then, they dragged him out of the house and put him in a black van with no number plates.

A few hours later, still in a state of shock, Keila went to the local police station, located in a dangerous part of San Pedro Sula. She asked if her husband was being held there. The police officer she spoke with informed her that they had not carried out any operations that night. They also had no one in the police station’s only cell. “They just found a dead body, though. Go and see if it’s him”, the officer suggested.

It was.

The so-called police officers – apparently members of a non-State armed group – had tortured Keila’s husband before they killed him. Keila’s



brother-in-law attended the forensic examination with her. Her husband was unrecognizable; the only way they managed to identify him was from a scar on his arm. His face had to be rebuilt before he could be given a dignified wake and funeral.

Before all this happened, Keila's husband had been paying a "war tax" to the group that controlled their neighbourhood. He drove a lorry, transporting goods for firms and private customers. Each month, he was paying 5,000 lempiras (about \$250) in protection money. One day his lorry was damaged, and he fell a couple of months behind with his payments.

From that moment on, he received constant threats. He was told that if he did not pay up, something would happen to him and his family. He became ill and depressed. Keila noticed the change; her husband became reserved, and he hardly slept. He was no longer the hard-working, dedicated and cheerful father and husband he had been. Keila tried to ignore the situation as much as she could, to prevent her worry and distress from affecting their children – two little girls and a boy.

After her husband's murder, Keila stayed in the same neighbourhood with her children, for lack of other options.

"I had nowhere else to go – and two weeks after my husband's murder, it was my turn to receive threats", she recalls, visibly upset. "One night, two men arrived on a motorbike taxi and came into the house. I didn't know what they were looking for. I just ran out with my daughters and my son."

That night, she stayed with family members nearby. When she went back home the following week, she found threatening notes on her door reading "It's your turn next", "If you say anything, you're dead", and "We won't leave any loose ends". She realized that her tormentors had got hold of her mobile number when she started receiving calls instead of notes. During one of those calls, she was given twenty-four hours to leave her home or they would kill her, her children, and the rest of her family.

"I didn't think twice", she says. "I left the neighbourhood the following day."

When she left home for good, Keila was wearing just a white blouse, beige shorts and a pair of plastic sandals. She was only carrying a few clothes for her children. She left the neighbourhood with no clear destination in mind; her only aim was for her and her family to avoid meeting the same fate as her husband.

Keila finally decided that she would emigrate to the United States and leave her children with relatives – but she was stopped before she reached her destination. She only got as far as Tapachula, Mexico, where she was detained. She was held in a migrants' centre for three days before being sent back by the migration authorities without being able to apply for any kind of protection. When she returned to Honduras, she went back to live with her children and the rest of her family in the interior of the country, far from the threats and dangers of the city.

Now located in a house in the middle of the forest, Keila sleeps with her children in a small wooden room. They all share one double bed and are slotted together like the pieces of a jigsaw. Some nights, the girls have nightmares about the strangers who haunted them in their previous house. They wake up and ask their mother who these people were.

“Life’s not easy here in the countryside”, explains Keila. “There’s no work, no hospitals. You have to travel a long way to find food, and the school’s a long way away. But at least we’re left in peace.”



Keila in her new house.

## Michelita's prayer

I once had a friend whose mummy was poor. Criminals were pressuring her. So, her mummy decided to become a “wetback”. It was hard to say goodbye, but she knew that God was with her. Her daughter was so sad that even her grades at school started to go down. She cried and prayed to God for her mummy to come home. She was also worried about the stories she heard of migrants dying of thirst, hunger, heat or cold, or being bitten by animals. The funny part of this story is that because her mummy didn't know what the immigration people looked like, they caught her and, thanks to God, she came home safe and sound, and everyone was happy to see her alive.

Michel is a slender 8-year-old girl. She wears her hair in a ponytail, tied up with a Minnie Mouse hair band. Michel is cheerful and eloquent, and one of the best pupils in her class. Her brown eyes light up every time she greets her mother with a hug at the entrance of her school.

Every August, the government holds an “irregular migration prevention week”. This year, the teacher had asked the children to write a letter as part of a class assignment. For Michelita, as her friends call her, this was a painful exercise. Not so long ago, she had been separated from her mother for over a month.

It all started when her mother, Ángela, had become the subject of extortion and regular attacks on the little family shop. Ángela had a kiosk near a popular high school in San Pedro Sula. Business was good, and she was making enough for Michelita to attend a private bilingual school and learn English.

One dreadful day, Ángela received a visit from “El Chino” (“the Chinaman”). El Chino was a 21-year-old man whom Ángela had known since he was little. He had recently joined one of the armed gangs that control the neighbourhoods of San Pedro Sula.

He entered the shop and said awkwardly, “I want to talk to you. I've been told to ask you to sell... some stuff... in your shop.”

“What kind of stuff?”, Ángela asked, with a mixture of surprise and anger.

El Chino, this young man who as a little boy had come to her kiosk to buy sweets, was “making her an offer she couldn't refuse”. He wanted her to sell drugs in her shop. The profits would go to the group, but they would give Ángela a small percentage.

Ángela refused. As El Chino left and the door shut, she burst into tears.

After that day, the shop was attacked several times. Ángela regularly saw masked men hanging around. Sales fell drastically, and she got into debt. She and her family had to sell everything, including some video game devices, a drinks cooler and a couple of football tables. The whole family then had to move to another neighbourhood.

But violence continued in their new home. Two men broke into the house and robbed Ángela's 18-year-old sister Karla at gunpoint. Karla has mobility problems because she had polio as a child.

"They turned up in the middle of the afternoon", recalls Karla. "They pointed a black pistol at me and took my mobile phone and the headphones I was using to listen to music."

After this, Ángela decided to move again to another neighbourhood – somewhere more peaceful, yet still affordable. "But the landlady of the house refused to sign the lease when she heard we'd suffered extortion and attacks by armed groups", she explains.

Overwhelmed and helpless, Ángela decided to emigrate, in order to find some way of covering her debts and paying for Michelita's bilingual school.

Michelita's classmate recalls, "I prayed to God that the coyotes would not eat her mummy."

"I too prayed every night while mummy was away", says Michelita. "Apart from the coyotes, I was afraid of the intense cold at night, the heat and the dehydration in the desert, and the crocodiles in the Rio Bravo that they told us about at school."

During irregular migration prevention week, the children heard lots of stories at school about the various dangers, including the coyotes that attack people, along the route towards the United States. The teachers told the children these stories to put them off irregular migration.

Her mother's absence had affected Michelita's performance at school. "Before all this happened, Michel had always had good grades", says Ángela. "At least 90%."

"My grades went down to average, to 70%, in three subjects – even in science, which is my favourite", Michel tells us.

Ángela asks, "Why is science your favourite subject?"

"Because I want to be a doctor when I grow up, so I can heal people who are hurt", Michel replies, giving her mother a hug.

In Mexico, Ángela did not find a safe place to rebuild her life. She was sent back from a migrants' centre in Mexico a few months ago.

Michelita is happy to have her back. She says her prayers have been answered. Her grades have improved, and she has regained her place on the class honour roll. The family has moved to the outskirts of San Pedro Sula. They have managed to obtain a small plot of land by their own means, and the International Committee of the Red Cross (ICRC) is providing support so they can afford somewhere to live.

"We've always dreamt of owning our own home. Now we have that, we're hoping to start our lives again", says Ángela as she holds her daughter's hand and thanks her for her prayers.





## **No quarantine and no respite from violence in the midst of COVID-19**

COVID-19 has made it harder for people to earn a living and for victims of violence to find effective protection. The ICRC has been supporting Judith and Tania, two mothers who have been suffering from violence, in their relocation efforts through its assistance programme for people displaced by violence. Both Judith and Tania have been taking part in an ICRC-supported mask-making project, which has given them employment and enabled them to survive and to cope with their situation, albeit temporarily. These are their stories.

### **Judith**

Judith worked as a seamstress in her home in Tegucigalpa, Honduras. As a mother of two sons, her income was only enough to allow her and her family to survive. Like Keila's family, Judith also had to pay a "war tax" to an armed gang.

Just when she was expecting a third child, Judith got behind on her payments. This led to an unwelcome visit from the armed gang that ended in a beating. Her then-partner intervened, and he was injured as well. The gang gave them just a few days to leave. Her partner decided to leave on his own for another part of the country, so Judith was left alone, pregnant and with two young children.

Judith's children often asked her why these people were persecuting them and why their father had abandoned them. She did not know what to say, and was feeling overwhelmed. "Sometimes I felt like ending it all", she recalls.

As a single mother, Judith was struggling to balance her own mental health with the challenges that her sons were facing. She tried to reintegrate and restart their lives in another part of the country, in the face of displacement and a pandemic.

Judith and her family received mental health support from the ICRC. "The psychosocial support enabled us to cope with the situation and heal the open wounds", she explains. "I smile every time I see my boys in the morning. Today, I can say that I'm enjoying life again."

### **Tania**

Tania is a single mother living in Honduras. She has two small daughters and had to flee from one part of the country to another. She has had to move on more than one occasion, in constant fear of being found by armed groups. Tania was forced to abandon her home and then her husband after he was badly beaten. He was a truck driver and had to emigrate because of threats and extortion.

For the time being, Tania and her little girls are safe, far away from danger, with the support of the ICRC. For Tania, keeping the kitchen well stocked is important in a pandemic, but the most important thing is to feel safe, even behind several gates. When she goes out to work, she leaves her daughters with a



neighbour. Although they do not leave the house, the girls find ways of playing and using their imagination, so they can forget the gates and the barriers around them.

Carolina, the oldest girl, is 10 years old. She goes up on the roof to see the people and vehicles passing by, but especially to get some fresh air and play hide-and-seek with her little sister, who is one and a half years old.

COVID-19 has added a supplementary challenge to the displacement that was already making life difficult for Tania and her daughters. “My biggest worry is how to make sure Carolina can keep up with her distance learning”, she explains. “I have to make sure I always have enough credit and internet access, so she doesn’t miss any lessons. And right now, unemployment is high, and incomes are low.”

For the time being, Tania has a job in a mask-making workshop. “It’s enough to feed the girls”, she says. “That’s all I need”.

## Sandra

When Sandra utters the name of her son, Daniel, her voice breaks. Daniel, the loving young man who organized football tournaments in his neighbourhood. Daniel, the boy who loved eating *baleadas*<sup>1</sup> and *pollo chuco*,<sup>2</sup> and who called home every day. Daniel, the boy who wanted to go to the United States to find better economic opportunities. Daniel, the young Honduran man who was shot dead in Mexico.

“Losing a child is something I wouldn’t wish on anyone”, Sandra says. “There are no words to describe how you feel. It’s like having something ripped out of your insides.”

Daniel had received threats from armed groups. For two years and eight months he lived in hiding, leaving home very early every morning and returning after midnight – until even this strategy failed to protect him.

Sandra smiles when she remembers her son. “He was a hyperactive boy; he was very loving too, but that was just his way of being”, she recalls. “He was a good boy. He gave me lots of headaches, but lots of happiness too. He helped lots of people in the community.”

## Alba

Alba’s body feels the pain of the death of her son, who was barely 18. Losing him has worsened her illnesses. She has diabetes and kidney problems; her whole body is affected.

Alba remembers that it was 8.45 a.m. She was just finishing breakfast when she received a call from the hospital. Her son was there. He had been shot several times, and had not survived. With her son gone, something died inside of her,

1 A type of tortilla.

2 A popular Honduran chicken dish.



Sandra holds a photo of her son Daniel.



Some of Daniel’s personal items, photos and school certificates.

and her life changed forever. “I’ve suffered many illnesses because of this, and it’s affected the entire family”, she says.

Ten years have passed. Alba says that she can now talk more calmly about what happened, but the pain and the effects remain. She is sitting next to her mother, Mrs Máxima, who was like a mother to the young man, as many grandmothers are to their grandchildren. Alba remembers that her son used to cook and that his culinary inventions were delicious.

“It took me years to accept his death”, she recalls. “It’s the kind of pain you can’t put into words. How could you? There are no words to express this pain, this anger, everything you feel... there are no words that could express everything you go through.”

Alba remembers her son as loving. “He was a very handsome boy, and I’m not just saying that because he was my son. He was very intelligent, very loving, very special. He used to look at me sideways and say, ‘Lie down, mum. I’m going to rub your shins. I’m going to feed you.’ He wasn’t so good at studying, it wasn’t his thing, but if you told him where to go he would find his way. Eventually he said he did want to study – he wanted to be a chef.”



## **A community together: Health and education in Apopa**

“My daughter doesn’t go out. Not just because of the pandemic, but because it simply isn’t safe.”

Ana is a 9-year-old girl. She grew up in an area of El Salvador affected by violence. She is used to her mother’s fear that something bad will happen to her. She lives without enough space for recreation, and with nowhere to run or play safely with other children.

“Not going out to play affects every aspect of children’s lives”, explains Lorena, Ana’s mother. “They speed up emotionally and become more rebellious. When you’re confined, you imagine all sorts of things. Children need to be playing together, burning calories. Getting out to play motivates them, and right now they’re lacking that motivation.”

Violence has many consequences, and not only the obvious ones such as death and injury. Violence weakens the fabric of the community and affects mental health, which in turn causes fear and anxiety and limits development.

After holding workshops to find out what the communities needed, the ICRC started working with the Salvadorean Red Cross Society. They focused on a community in Apopa, which included 1,300 families. By doing so, they were hoping to strengthen the social fabric and community interactions, and to improve community life.

“You provide the material, and we provide the labour, along with the town council”, explains Hugo, one of the community leaders. He is talking about the infrastructure projects that have been launched to improve living conditions in the area. The scheme has been agreed with local residents, who are managing and implementing it with the ICRC’s support.

The work addresses issues that the community has identified as most urgent, following a consultation process initiated by the ICRC and the Salvadorean Red Cross Society. This process was essential to ensuring that the project reflects the needs and opinions of the community. As well as identifying needs, the community has committed to taking an active part in the construction work. This ensures that they feel a sense of ownership and are the agents of the change that is taking place.

“We’re going to improve the community centre, to create a safe place to meet up”, Hugo continues. “We’re going to flatten this area” – he points to a mountain of sand and grass – “and create a park for the children, with a wall around it so that balls don’t get lost. And finally, we’re going to create a walkway, so the children can go to school safely. The existing walkway is really dangerous.”

In the centre of the community, far away from the boundaries with other neighbourhoods and armed groups, an outdoor sports area will be created where children and young people – who make up over half the population of the neighbourhood – can play basketball, football and volleyball.

“This is a priority because the children have no safe spaces”, says the community association’s sports coordinator. “The existing facility lies at the boundary of our area, near other groups. It’s difficult for the children to run away when shooting starts.” She also explains that once the sports area is finished, they will set up a neighbourhood football academy.

All the new facilities will have ramps, to make them accessible to people with disabilities, those with limited mobility and older people. “The idea is to create spaces of togetherness that help us to live better, that give us joy”, says Hugo, who is well aware that joining forces is better than working individually.



There are plans for local artists to paint a mural at the sports ground in order to make the area more attractive, reflect the community's aspirations and give it a sense of ownership.

Another project that the community has prioritized is a pedestrian walkway to connect the neighbourhood with the local school situated in the adjacent neighbourhood. The quickest route for now is the main road, where there are often clashes between armed groups. The only alternative route crosses open ground; this route is safer, in that it is not a battleground between armed groups, but it becomes boggy when it rains, and the children have to cross a river with steep banks, so there is a danger of slipping or falling. Nonetheless, this route is the best way to avoid violence on the way to school.

"It will be a relief to have a footbridge on this route", says a mother. "The older children will even be able to go to school on their own." This type of project improves access to education and helps to prevent children and young people from dropping out of school.



Violence is also preventing people from obtaining health care in many localities. Not only is there a lack of medical facilities, but ambulances are often unable to get through in an emergency. The ICRC has responded by providing community first-aid training, enabling communities to provide emergency treatment.

The ICRC and the Salvadorean Red Cross Society also intend to set up a health committee made up of first responders. This will enable neighbours to help each other and receive medical care.

Delivering first aid in the community could save many lives. The best example of this is Gabriel, a nurse who supports the community when there are health emergencies such as heart attacks, falls or strokes, which are usually caused by violence.

“When I saw young people getting shot, I realized I had to do something”, Gabriel says. “I learned first aid, and then I began purchasing supplies and put together my own first-aid kit so I could provide care to my community. If it’s very serious we evacuate the person. Otherwise, I take care of them myself. The important thing is to be able to deal with emergencies, whether they’re caused by violence or something else, such as a heart attack or a fall.

“I had to stitch up one guy’s thyroid without anaesthesia, ‘Rambo-style’, because there are a lot of lymph nodes there and I didn’t dare anaesthetize him. I told him to breathe in and he just held on. I put in four stitches and managed to help him.”



As well as providing first-aid training for the community, the aim is to establish links with the nearest Community Health Unit so that relationships and channels of communication can be created, enabling the community to express their needs and take advantage of the health services. “Medical days” have been set up as part of the project, at the initiative of the Ministry of Health, bringing health services to the community. On these days, people can see a doctor, get vaccinated or obtain medicines.

Alongside the creation of the community health committee and medical teams, there have been efforts to raise awareness of how important it is to respect health personnel and facilities, and to highlight that any threat to health services is a threat to the whole community.

## Renata

“Day by day we work to bring this school up to a high standard”, says Renata Bersot. “It’s a hard job: there are obstacles in the way, and violence is one of them. It affects students as they come and go, for one thing. A student who lives in an atmosphere of violence every day is not a calm student. Very often, school is the calmest environment they experience outside their family.”

Renata is a mother, a teacher and the principal of a school with a thousand pupils between 6 and 15 years old. She must deal with armed violence on a daily basis; every day, armed violence directly impacts access to the school. Renata lives in the same area in which the school is located, in the state of Rio de Janeiro, so she also feels the impact of violence in her own daily life.

“I came here to bring my children up in peace and quiet, as this used to be a quiet neighbourhood”, she recalls. “Over the years it has turned into a violent one. We’re black, we’re poor, we live in an area where everything is very difficult and we have to keep to the straight and narrow, as there are different paths to choose from, and all these paths have consequences.”

For seven years, Renata has been the principal of Paulo Mendes Campos Municipal School (Integrated Centre for Public Education 318) in Saracuruna, Duque de Caxias, Rio de Janeiro. Now she sees that all this dedication has borne fruit.

“We’ve succeeded in earning respect from the community”, she says, with affection in her voice. “I think that people seeing me here, and knowing I belong to the same place, makes things a lot easier for me when I’m talking to parents, dealing with a father or a mother. Even though I’m the school principal, I think they see me as an equal.

“If you asked me if my journey has been a happy one, I’d say yes, it has. I really love working in education, and I love being in a public school. Do I feel completely fulfilled? No. I say that because of the losses we’ve had over the years. They make you feel you’ve failed along the way, both as a school and as a person. I feel we must take our share of the blame, as a society. And here I feel a failure in a way for not having taken enough care of those children who landed here. Those children grow up, and at some point, they’re lost to violence. We go looking for them, we stage an intervention, but they’re not able to turn back. And then later we get the news: ‘They’ve killed so-and-so.’ That’s awful, really awful. It’s one of the worst moments imaginable. And you pick yourself up, you wipe away your tears, and you just get on with it. That’s how it is.”

Renata, who has been teaching since 1992, says she has already experienced several brutal situations where armed violence has impacted the lives of families and communities. “It’s very hard to pull a young person away from violence”, she

explains. “And the mother gets worn out. She cries, you know. One day a mother came to me and said, ‘Renata, I can’t do it.’ And then you cry with that mother because she really can’t do it. And she blames herself, but it’s not her fault.”

Renata needs to find strength and motivation every day in order to carry on with her commitment to all the students and families in the school community. “What motivates me are the children”, she says. “I get pretty tired, but it’s them, you know. I believe things will work out. They didn’t work out well for one, but for others they will”.

Renata has been trained in the Safer Access to Essential Public Services methodology (see below), which she regards as an important tool for ensuring that students can access school. Since the training, she and the other education professionals have become better able to spot signs of risk or crisis. This helps the whole school community in deciding what to do and taking action in times of need. “Thanks to the training, we’ve gotten good at spotting if something different is going on, and we know we need to use this or that particular tool.”





A safer school means calmer students. “I’ve noticed that here in our school they feel safe, which is great”, Renata says. “If they need to leave early, they don’t want to: they want to stay on at school. They feel good in the schoolyard, they feel good in the school. For them, the school is a benchmark of safety.”

Despite the impacts of violence on the school environment, Renata believes that education is transformative. Speaking about it, she becomes emotional: “Somewhere along the way, something went right. And that’s why I keep going. I’m sorry I’m getting upset, but I can’t talk about education without feeling emotional. I feel so deeply about education.”

## Safer Access to Essential Public Services

The Safer Access to Essential Public Services methodology is designed to prevent, reduce and mitigate the consequences of a community’s exposure to situations of armed violence.

The Safer Access Framework (SAF) draws on the ICRC’s internal guidelines and protocols, which are based both on the organization’s extensive experience of working in situations of armed conflict and armed violence over the world, and on the values shared by all its staff. It was developed to enable the ICRC to carry out its humanitarian activities with the least risk to all concerned. The bases and recommendations of the SAF methodology, which are adapted to the real-life situation of Brazil’s essential public services, take into account the particular aspects of the various contexts and scenarios of armed violence, focusing on the different situations of both the professionals providing the services and the people they cater for.

Honed collaboratively over time, with ongoing contributions and active participation from its partner organizations, the SAF is continually improving its methodology in order to respond with strategies uniquely tailored to people’s needs.



## The humanitarian impact of armed violence on communities – the Americas perspective: Interview with Sophie Orr

Regional Director for the  
Americas, ICRC

*Sophie Orr oversees International Committee of the Red Cross (ICRC) operations in North, Central and South America (the ICRC Americas Region), providing strategic steering for the organization's response and contributing to humanitarian diplomacy efforts at different levels. The delegations and missions in the region work on addressing a wide range of needs of people affected by present and past situations of conflict and armed violence.*

*Prior to her appointment as Regional Director for the Americas, Ms Orr worked in many different and often complex environments, first as a foreign affairs producer and journalist with the UK's Channel 4 News. She has previously worked for the ICRC in several countries, mainly in protection and management positions, and*

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*later at headquarters, first as Strategic Adviser to the Director of Operations from 2012 to 2016 and then leading the ICRC's operational cooperation with National Red Cross and Red Crescent Societies and their International Federation.*

**Keywords:** armed violence, access, armed groups, armed forces, security forces, essential services, partnerships.



### ***What impact does organized crime and gang violence have on people's lives?***

Recently, an International Committee of the Red Cross [ICRC] head of delegation summed up very well the impact of armed violence: “Violence is not only what we see immediately, but there is a whole series of longer-term consequences that really affect the lives of people forever.”

Worldwide, situations of armed violence linked to organized crime and gang violence can generate serious humanitarian consequences and are often synonymous with chronic insecurity. Millions of lives are affected, whether directly or indirectly. The consequences are both visible and invisible.

The most obvious visible harms are death and injury. As the global study on homicides that the United Office on Drugs and Crime [UNODC] published in 2019 showed, organized crime across the world kills as many people as all armed conflicts combined.<sup>1</sup> But these deaths are only the tip of the iceberg.

Given that much of the ICRC's work on responding to the humanitarian consequences of this type of armed violence is being carried out in the Americas region, allow me to zoom in on this continent. The human cost goes far beyond those wounded or killed in the violence. Hundreds of thousands are forced to abandon their homes and livelihoods, and others remain but have little or no access to essential public services such as health or education. There are also the hundreds of thousands of missing persons and their families.

Other humanitarian consequences, just as serious, are invisible. People live in fear and most remain silent about the violence because members of the armed groups, linked to organized crime, usually live in the same communities or neighbourhoods. After all, this is for the most part not a violence that comes from outside, but rather a violence that is embedded in the community and has somehow become “normality”. The territorial control of the armed groups generates the so-called “invisible borders” that prevent people from moving around freely. This impedes not only access to essential services but in many contexts even access to economic and employment opportunities, an impact that is particularly significant in urban environments.

Migration is another situation where organized crime has an impact, as hundreds of thousands of migrants have no choice but to pass through areas controlled by armed groups or where they are present, in particular remote rural regions or borders between countries. The risks that migrants have to take are

1 UNODC, *Global Study on Homicide 2019*, Vienna, 2019, Booklet 1, Executive Summary.

very high and the violations they suffer are appalling, such as extortion, being held hostage for money, sexual violence, injury and even death. And overall, it's also important to note that humanitarian consequences are not only caused by armed groups – in many cases the response of States to this type of armed violence can also have a massive impact. For example, there are a number of countries in the Americas that have the highest lethality rates for public security forces operations worldwide. And often, partly due to heavy-handed law enforcement operations and general stigmatization of the communities themselves, people end up having to leave to find safer environments for their families and better opportunities.

These issues greatly affect penitentiary systems as well, which are strained because they are not prepared to absorb the significant increases in the prison population due to organized crime or to manage the complexity of prisons with hostile gang members in the same facilities, which can lead to violence and riots.

***What is the legal framework through which the ICRC emerges as a relevant actor in these contexts?***

An important part of ICRC's operations worldwide takes place in situations of armed conflict. In those situations, the organization's mission and work derive from its specific and unique mandate under international humanitarian law [IHL], whether the conflict is an international armed conflict or a non-international armed conflict [NIAC].<sup>2</sup> Article 3 common to the four Geneva Conventions of 1949 explicitly grants the ICRC the right to offer its services to parties to a conflict.

Gang violence and organized crime do generally involve situations of collective violence that cause very serious humanitarian consequences. However, when these specific situations of violence are analyzed from a legal perspective, they tend to fall short of reaching the threshold to be classified as NIACs. Nevertheless, the ICRC cannot turn its back on the acute and long-term suffering of people affected by these situations. Since its creation, the ICRC has carried out humanitarian operations whenever and wherever its action could provide a meaningful response to the humanitarian consequences that people were suffering, regardless of whether the situation of collective violence was considered an armed conflict or not.

In addition to the ICRC's historical operational practice, the Statutes of the International Red Cross and Red Crescent Movement [the Movement], in Article 5.3, reflect the right of initiative of the ICRC in other situations of violence. The Statutes were adopted by consensus by all the States that are party to the Geneva Conventions as well as the other components of the International Red Cross and Red Crescent Movement during the 1986 International Conference.

And so, even when IHL does not apply, the ICRC may still offer its humanitarian services to governments without that offer constituting an

2 NIACs are conflicts between State armed forces and non-State armed groups, or between non-State armed groups.

interference in the internal affairs of the State concerned. It's important to underline here that it is neither the armed groups' motivation nor the causes of the violence that prompt the ICRC's involvement, but the gravity of the humanitarian impact.

***What added value does the ICRC bring in contexts affected by violence generated by organized crime and gangs?***

Responding to humanitarian needs in environments with dynamics of armed violence is extremely challenging. From context to context, the armed groups are very different, as are the forms of violence and the resulting humanitarian needs.

In the Americas specifically, the ICRC, together with its partners, including the National Red Cross Societies, works both to apply lessons learned from other Americas contexts and to gain experiences from new realities. We remain very much focused on affected people and communities, working directly with them; we concentrate on responses that contribute to improving their daily lives, alleviating their longer-term suffering, mitigating the risks of violence and promoting respect for applicable law.

In parallel, and drawing from this real practice on the ground and its proximity to the affected communities, the ICRC in the Americas aims to have sustained and bilateral dialogue with authorities and to influence policy and legislation related to the region's protection concerns.

***How does the ICRC operationalize its response to address the humanitarian impacts of armed violence?***

As in any other context, the ICRC in the Americas develops its strategies and objectives over a set period based on an analysis of the environment, the stakeholders, the humanitarian consequences and its capacity to respond to needs, in complementarity with other organizations.

Because of the presence of a variety of stakeholders – the affected communities themselves, authorities and civil society, including National Red Cross and Red Crescent Societies – the complementary roles and responses of these partners must obviously also be taken into account. This is key, as there are multiple layers of complexity to the humanitarian consequences, some of which we do not necessarily have the expertise or the mandate to respond to. For example, in this type of context, the violence exercised by armed groups is often mixed with other forms of violence, such as interpersonal violence, with problems clearly also rooted in poverty or even related to natural disasters, among other factors. So, the collective response of several stakeholders is crucial, as this can also contribute to implementing broader and more ambitious objectives such as the Sustainable Development Goals.

In practice, once all the stakeholders and our potential partners have been identified and we are convinced that the ICRC can bring added value, our multidisciplinary teams – professionals in protection matters, water and habitat,

health, legal advisers etc. – work together to find concrete solutions to mitigate the consequences of armed violence. The responses developed are always elaborated and implemented in consultation with, and with the direct participation of, the people affected by the violence in order to strengthen their self-protection mechanisms. The methodology follows a standard project cycle with analysis, planning, implementing and evaluation phases, the latter being key to ensuring that we are able to adapt our work to better respond to the fast-evolving needs and to measure the impact of our responses in order to replicate or scale up when it makes sense.

***What concrete examples illustrate ICRC action in such contexts?***

Amongst the various responses, I'd like to highlight two examples from the Americas that I believe reflect well how the ICRC responds to these situations.

The first is the Safer Access to Essential Public Services programme that the ICRC implements in Brazil together with the local authorities of several cities. The idea for this approach came when the ICRC started engaging some years ago with the communities in several *favelas* [slums] in Rio de Janeiro that were heavily affected by armed violence. The ICRC team noticed that both health and education services had often been suspended temporarily or closed down due to professionals' fear of the situation. Based on its experience in situations of armed conflict around the world, the ICRC, together with local authorities, developed a methodology to prevent and to mitigate the risks of armed violence incidents in and around public services structures.

The objective was to generate resilience in essential public services in order to enable them to continue operating despite these situations of violence. Amongst the results was a significant reduction in the number of closures of these public services. The ICRC then worked with the authorities to give them the necessary tools to ensure that they could replicate the methodology in other municipalities or areas affected by the same violence and ensure a scaling-up of the programme. Part of this involved creating a system of real-time notifications of the armed violence taking place in the communities – i.e., fighting between gangs, attacks on civilians, clashes with security forces – through phone applications for the professionals, as well as developing a software programme for the entire training process to be online in order to reach a greater number of public services and professionals. Finally, to ensure the sustainability of the programme, it was also necessary to help the authorities to make legislation changes. Today this programme is implemented in nine cities in Brazil and has an impact on over 4 million people.

The second example comes from Honduras and the ICRC response to forced displacement due to the armed violence taking place there. A significant number of individuals and families are threatened by armed groups and are forced to abandon their homes and livelihoods, then make the difficult decision to leave the country altogether. Often, they have no other option because of the

lack of assistance and protection mechanisms inside the country. The ICRC, together with the Honduran Red Cross, launched a programme a few years ago to support people forcibly displaced with immediate assistance, as well as a few months' further support, to enable them to rebuild their lives elsewhere in the country. This programme not only covered a need where there was a gap, but also enabled the ICRC to influence the authorities and to contribute to the adoption, in December 2022, of a landmark legislation to address the internal displacement phenomenon. The field experience of the ICRC and other partners of the Movement and the partnership with other organizations such as the Office of the UN High Commissioner for Refugees have been key in the creation of this proposal to the government of Honduras.

***What challenges do the ICRC and other humanitarian actors face in these contexts?***

The primary challenge arises from the nature of the context itself: the multiplicity of armed groups, the fact that this type of violence is difficult to predict and the reality that the violence often moves from one area to another with relative frequency. Along the same lines, the invisibility of the victims makes it difficult to identify them. They are often afraid to come forward, and it must always be kept in mind that the armed groups are in direct contact with the communities and often live in the same communities as the victims. In addition, given the invisibility of the victims, the humanitarian consequences of this violence, and the breadth and deep-rootedness of the issues involved, the authorities do not always have the capacity to address the problems, which creates a challenge for humanitarian action.

Secondly, the way humanitarian situations are often defined does not always allow the issues and needs of these contexts to be addressed in the right way or to attract the attention they deserve. Distinctions made between armed conflict that is regulated by IHL, on the one hand, and other extremely violent contexts that do not reach the threshold of armed conflict, on the other, can lead to the neglect of populations at risk. War attracts attention, funding and response, even though in several Americas countries, the levels of armed violence and the humanitarian consequences are often even higher than those of certain armed conflicts. Despite the very serious impact of violence in these settings, the resources allocated to the humanitarian response and donor funding are very limited.

These factors also make scaling-up of impactful responses and the mid- to long-term sustainability of humanitarian or development programmes in these contexts very challenging.

***Do you establish dialogue with armed groups linked to organized crime and gang violence?***

Worldwide, whether areas are affected by armed conflict or high levels of armed violence, the ICRC approach is similar: in order to have access to the communities

and to be accepted, we try to have dialogue with all weapons bearers, whether they belong to armed groups or State armed forces and police, and we work according to the principles of neutrality, impartiality and independence. In the case of areas affected by organized crime and gang violence, we aim to reduce the impact of the violence on people in the communities through contact with all weapons bearers.

***What would you highlight in terms of the operational response after several years of working in these contexts?***

As an institution, over the years we have learned and adapted our way of working to have a greater impact in contexts where violence is produced by armed groups linked to organized crime, and where a State can also generate negative consequences due to the excessive or arbitrary use of force in its response.

In the Americas, through our different experiences and approaches in a variety of contexts, there have been a number of results at both the community level, supporting victims directly, and at the more systemic level. There have been changes in legislation and the creation of response mechanisms in favour of internally displaced persons, migrants and missing persons, as well as an increase in the resilience of public services and communities.

Today the ICRC and the Movement on the continent are better equipped to work in these areas and know how high levels of armed violence can impact communities in a multitude of ways. We now have experience in how to address the different needs of individuals, of communities, of systems. We've learned how best to improve access to public services in areas with the presence of armed groups, or how to help a hospital to manage emergencies in places where there are significant numbers of wounded due to the armed violence, and so on. There are concrete and visible results, not to mention plenty of positive impacts that are less visible.

Another important outcome in the Americas – and one that has had an impact on our humanitarian response – is the process of working together with others, either implementing together in a concrete partnership or working in parallel with other organizations and thereby having a collective impact. As I mentioned earlier, organized crime and gang violence are at the root of multiple needs and therefore responses and results are much more effective when carried out by various stakeholders and with mixed tools of both humanitarian and development action.

The results we see today, such as in the example of Brazil, are not immediate, coming after quite a long process. Armed violence linked to organized crime usually spreads and becomes chronic, and therefore the humanitarian response needs to go through a number of adaptations to ensure that it continues to be effective over time.

The positive outcomes of today are the result of efforts that began years ago, and I am sure that as the responses evolve and we continue to learn together with others, we will increase the impact and bring learning to future institutional approaches in the Americas and beyond.





## (Transnational) Organized crime and corruption in conflict settings: Interview with Ms Ghada Waly

*Ghada Waly is the Director-General of the United Nations Office at Vienna and the Executive Director of the United Nations Office on Drugs and Crime. She holds the rank of Undersecretary-General of the United Nations. She previously served as Minister of Social Solidarity of Egypt and chaired the Executive Council of Arab Ministers of Social Affairs. She has also served as Assistant Resident Representative at the United Nations Development Program. Ms Waly holds an MA and a BA in humanities from Colorado State University.*

**Keywords:** UNODC, organized crime, armed conflict, corruption, UN Convention against Transnational Organized Crime, UN Convention against Corruption, organized criminal groups, trafficking.

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***Can you briefly describe the mandates of the United Nations Office on Drugs and Crime [UNODC], as well as the legal instruments and initiatives it oversees that are related to armed conflict, organized crime and corruption?***

UNODC is mandated with making the world safer from drugs, crime, corruption and terrorism. We work for and with UN member States, in cooperation with other international and regional organizations, civil society, academia and the private sector, to promote justice, integrity and the rule of law and to build more resilient societies.

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Our support to member States is threefold: we provide tailored technical assistance and capacity-building, including through our field network; we produce research to inform evidence-based policies, including our flagship annual *World Drug Report*; and we provide Secretariat services to a number of key intergovernmental bodies in order to foster international cooperation.

In terms of legal instruments, the Office is the primary entity responsible for supporting States Parties in the implementation of the three International Drug Control Conventions,<sup>1</sup> the UN Convention against Transnational Organized Crime [UNTOC],<sup>2</sup> UNTOC's Protocols<sup>3</sup> and the UN Convention against Corruption [UNCAC].<sup>4</sup> We also support countries in the effective implementation of the UN standards and norms on crime prevention and criminal justice, as well as the international conventions and protocols related to counterterrorism.

Through its cross-cutting mandates, UNODC contributes to global peace and security, to the realization and protection of human rights and development, and to the achievement of the 2030 Agenda for Sustainable Development and its seventeen Sustainable Development Goals [SDGs].<sup>5</sup>

***Organized criminal groups may destabilize States, threaten the rule of law and take advantage of systemic weaknesses created by other factors such as endemic corruption or armed conflicts. What is the nexus between armed conflicts and organized crime? What mechanisms do organized crime groups use to operate in such contexts? Which lucrative activities do they typically engage in when a country or a region is affected by conflict?***

States and regions affected by conflict are considered environments conducive to crime – and particularly organized crime, which takes advantage of weak institutions and the absence of law enforcement and good governance. In turn, organized criminal activity erodes stability and the rule of law, and may contribute to prolonging, inflaming or expanding conflicts by providing revenue streams for non-State armed groups. High-profit criminal activities can be taken over by armed groups, who often rely on professional financial facilitators such as lawyers, accountants and banking staff to manage their sources of income.

For instance, situations of armed conflict can foster the conditions for more drug production and trafficking. We recently saw the epicentres of production for methamphetamine and “captagon” move to conflict areas, as evidenced by drug

- 1 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), 976 UNTS 105, 30 March 1961 (amended 8 August 1975); Convention on Psychotropic Substances, 1019 UNTS 179, 21 February 1971 (entered into force 16 August 1976); UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95, 20 December 1988 (entered into force 11 November 1990).
- 2 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000 (entered into force 29 September 2003).
- 3 2237 UNTS 319, 2241 UNTS 507, 2326 UNTS 208.
- 4 UN Convention against Corruption, 2349 UNTS 41, 31 October 2003 (entered into force 14 December 2005).
- 5 See the SDGs website, available at: <https://sdgs.un.org/goals> (all internet references were accessed in January 2023).

seizure data relating to Syria and Myanmar respectively.<sup>6</sup> Non-State armed groups often take advantage of existing drug markets by taxing illicit drug production in areas under their control or becoming directly involved in the illicit production and trade.

***Corruption can be both a cause and a consequence of armed conflict. Can you tell us more about how corruption can fuel conflict, and what can be done to prevent and fight corruption in conflict situations?***

Curbing corruption is vital in post-conflict environments and in contexts with high risks of conflict, in order to establish trust in public institutions and build resilience. Corruption undermines the rule of law, the ability to govern and State legitimacy. It also facilitates organized crime and illicit financial flows, which can fuel and prolong conflict.

A concrete example of this is how corrupt officials can help divert weapons from unsecured national arms stockpiles to the illicit market, including to terrorist and armed groups. This can happen at any phase of a conflict, as well as in non-conflict settings, particularly in regions where there is a large supply of legacy weapons – that is, arms recycled from prior armed conflicts.

Vulnerabilities in financial infrastructure are also exploited by groups vying to become a quasi-State or to dominate the economy of a country or region. Identifying existing or potential vulnerabilities and adopting risk mitigation measures are key when planning investigations and conducting operations to counter money laundering and the financing of terrorism.

The Security Council and the General Assembly have both stressed the importance of anti-corruption in peacekeeping and peacebuilding efforts. In this regard, the UNCAC, which is the sole legally binding international instrument against corruption and has 189 States Parties, can be a critical tool in post-conflict settings. The treaty's Implementation Review Mechanism, a unique peer review process which can help identify technical assistance needs, is particularly useful.

It is important for UN Country Teams and the international assistance community to incorporate anti-corruption elements in all programming and strategic planning in peacebuilding and post-conflict settings, in order to rebuild public sector institutions and strengthen public confidence.

***The so-called “curse of natural resources” is often brought up in relation to armed conflict in resource-rich regions and mainly refers to resources such as gold, diamonds and minerals and the role of resource exploitation in prolonging conflict. Does this still hold true? What can be done to prevent the illegal***

6 UNODC, *World Drug Report 2022*, June 2022, p. 66, available at: [www.unodc.org/res/wdr2022/MS/WDR22\\_Booklet\\_2.pdf](http://www.unodc.org/res/wdr2022/MS/WDR22_Booklet_2.pdf).

***exploitation of natural resources by organized criminal groups in armed conflicts?***

Illegal mining is increasingly being conducted by organized criminal groups, spearheaded by illegal mining syndicates, usually in areas not under the full control of the State. It causes serious damage to the environment while diverting resources from sustainable development to illicit revenue, further fuelling conflict and instability. Beyond minerals and metals, organized criminal groups in conflict areas also illicitly exploit forests and wildlife for material gain.

Organized crime that affects the environment poses much greater challenges in conflict settings, where governments often lack the capacity to adequately regulate and manage their natural resources, and where State control is typically weak and may be contested by non-State armed groups.

States require capacity-building across the entire criminal justice chain to address these challenges. UNODC supports countries in building effective court systems and community-oriented policing, and going beyond seizures to identify the organized criminal groups involved, as well as on corruption prevention, financial investigations and asset recovery.

Essentially, we are striving to make it difficult for criminal groups to find a market for their products through a combination of prevention and enforcement, while confiscating illicitly obtained assets to possibly make them available for communities and their development.

***Gender norms and the differential roles and expectations they create persist in societies all around the world, both during and outside of armed conflict. Do corruption and organized crime affect people differently on the basis of their gender?***

Corruption impacts everybody in society differently – men and women, youths and people living with disabilities – because of our different needs for public services. The experiences of victims of organized crime and corruption are also shaped by gender. It shapes how people are victimized by organized crime, as well as their experiences within the criminal justice system.

For example, sexual corruption, or “sextortion”, as it is often called, occurs when the currency of corruption is sexual favours or acts of a sexual nature. This type of corruption is highly underreported due to social norms and societal stigma.<sup>7</sup> Another part of the problem is that, in many cases, these victims do not realize that what they are experiencing is a form of corruption. While this form of corruption impacts women more frequently than men, it does impact men too.<sup>8</sup>

Another example of how gender shapes the organized crime cycle is human trafficking, where 60% of detected victims, and 91% of all detected victims of

7 UNODC, *The Time Is Now: Addressing the Gender Dimensions of Corruption*, 2020, available at: [www.unodc.org/documents/corruption/Publications/2020/THE\\_TIME\\_IS\\_NOW\\_2020\\_12\\_08.pdf](http://www.unodc.org/documents/corruption/Publications/2020/THE_TIME_IS_NOW_2020_12_08.pdf).

8 *Ibid.*, p. 99.

trafficking for sexual exploitation, are female (women and girls).<sup>9</sup> At the same time, conversely, the issue of masculinity can be a barrier to identifying male victims and accurately referring them to protection and assistance services.

Women and girls are also overwhelmingly victims of online sexual violence and exploitation, as seen through the non-consensual distribution of intimate images by organized criminal groups. This is a common tactic used by online traffickers to recruit, control and exploit victims.<sup>10</sup>

During and outside of armed conflict, gender norms also contribute to normalizing all forms of violence against children, both for girls and for boys. This normalization of violence leads to situations where violence is not recorded and is rarely prosecuted or punished.

Gender is critical in creating and exacerbating vulnerabilities, in the forms of exploitation to which victims are subjected, and in devising responses. Recognizing the differential impact of gender allows us to develop more comprehensive approaches to combating organized crime and corruption.

***In times of conflict, organized criminal groups frequently seek to exploit civilian populations. Women and children as well as disadvantaged communities are among those particularly vulnerable to various forms of exploitation and are therefore in greatest need of protection. Which forms of abuse are they particularly exposed to at the hands of organized criminal groups in armed conflict contexts, and how does the international community respond to uphold the rights of victims and of the most vulnerable?***

The insecurity that characterizes conflict settings allows organized criminal and armed groups to commit crimes and violence against women and children such as their recruitment and exploitation.

Research on exploitative practices in conflict settings has shown that women and girls are exposed to sexual exploitation by members of armed and criminal groups, including those designated as terrorist groups, as well as to being forcibly married to combatants.<sup>11</sup> Other forms of exploitation that may affect members of society who are put in positions of vulnerability in the context of armed conflicts include the removal of organs to treat wounded fighters or to make profits, and enslavement as a tactic of terrorism.

Children are also particularly vulnerable to recruitment and exploitation by armed and organized criminal groups, including terrorist groups, due to their age

9 UNODC, *Global Report on Trafficking in Persons 2022*, January 2023, pp. 25, 33, available at: [www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP\\_2022\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf).

10 UNODC, *Successful Strategies for Addressing the use of Technology to Facilitate Trafficking in Persons and to Prevent and Investigate Trafficking in Persons*, background paper prepared by the Secretariat, 23 July 2021, available at: [www.unodc.org/documents/treaties/WG\\_TiP\\_2021/CTOC\\_COP\\_WG.4\\_2021\\_2/ctoc\\_cop\\_wg.4\\_2021\\_2\\_E.pdf](http://www.unodc.org/documents/treaties/WG_TiP_2021/CTOC_COP_WG.4_2021_2/ctoc_cop_wg.4_2021_2_E.pdf).

11 UNODC, *Countering Trafficking in Persons in Conflict Situations*, thematic paper, 2018, available at: [www.unodc.org/res/e4j/data/\\_university\\_uni\\_/countering\\_trafficking\\_in\\_persons\\_in\\_conflict\\_situations\\_html/17-08776\\_ebook-Countering\\_Trafficking\\_in\\_Persons\\_in\\_Conflict\\_Situations.pdf](http://www.unodc.org/res/e4j/data/_university_uni_/countering_trafficking_in_persons_in_conflict_situations_html/17-08776_ebook-Countering_Trafficking_in_Persons_in_Conflict_Situations.pdf).

and ongoing cognitive and physical development. The UN Secretary-General<sup>12</sup> reported 8,521 cases of child recruitment and exploitation in 2020 alone, and it should be borne in mind that these numbers are highly likely to reflect under-reporting. Importantly, the way a child is recruited does not necessarily determine the type of role he or she will play, which may include being used as an informant or as a human shield, or assisting with the transport or sale of illicit materials and goods. Children are also sometimes sold, trafficked or sexually exploited.

States should address conflict-related trafficking in persons and sexual violence by identifying, protecting and assisting victims and ensuring that they are not punished for involvement in unlawful activities resulting directly from their trafficking, while at the same time holding perpetrators accountable. They should also treat children associated with armed, terrorist and organized criminal groups as victims, with a focus on rehabilitation and reintegration.

UNODC works with partners to advocate for such approaches and to help States develop the necessary capacities to implement them.

***How do terrorist groups benefit from organized crime and corruption? How does UNODC address this linkage?***

Both terrorist organizations and organized criminal groups exploit and benefit from conflicts, instability, porous borders, high levels of corruption and weak law enforcement. Evidence indicates that most criminal and terrorist groups operational from the 1990s onwards have developed the capacity to engage in both criminal and terrorist activities, shifting their operational focus as needed.<sup>13</sup>

Terrorists can benefit from organized crime, whether domestic or transnational, as a source of financing or logistical support, through trafficking in arms, persons, drugs and cultural property, the illicit trade in natural resources and wildlife, and the laundering of proceeds of criminal activities such as kidnapping for ransom, extortion, bank robbery and crimes at sea.

There can also be collusion between terrorist and organized criminal groups, for example in cases where terrorist groups collect taxes from criminal

12 *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/75/873-S/2021/437, 6 May 2021, available at: <https://tinyurl.com/mt5j5zzd>.

13 *International Cooperation against Terrorism and Links between Terrorism and Other Criminal Activities in the Context of the Work of the United Nations Office on Drugs and Crime*, UN Doc. A/CONF.203/5, working paper prepared by the Secretariat, 11th UN Congress on Crime Prevention and Criminal Justice, Bangkok, 2005; Tamara Makarenko, "The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism", *Global Crime*, Vol. 6, No. 1, 2004; *Action Taken by Member States and United Nations Entities to Address the Issue of Linkages between Terrorism and Organized Crime: Report of the Secretary-General*, UN Doc. S/2020/754, 29 July 2020, paras 4-5, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/58/PDF/N2019058.pdf?OpenElement>. In its Resolution 2482, the UN Security Council emphasized that "the combined presence of terrorism, violent extremism conducive to terrorism, and organized crime ... may exacerbate conflicts in affected regions and may contribute to undermining affected States", noting also that "organized criminal groups and terrorists benefiting from organized crime" can "complicate conflict prevention and resolution efforts". UNSC Res. 2482, 19 July 2019, Preamble.

groups for moving contraband through territory they control. In other cases, a terrorist group may reduce its terrorist activity and increase criminal practices over time, or conversely, a criminal organization may become highly politicized and alter the focus of its activities.

In building the capacity of their criminal justice systems to combat terrorism, States must keep in mind that terrorist groups are frequently involved in various forms of crime, and that their conspiracies can sometimes be effectively disrupted by focusing on related criminal activities.

UNODC is actively engaged in helping States to address the linkages between organized crime and terrorism and related threats. The report of the Secretary-General on the issue, which was prepared by UNODC together with the UN Office of Counter-Terrorism, identifies a number of good practices which can serve as useful guidance for further action, such as greater inter-agency cooperation, the establishment of strong counterterrorism financing and illicit financial flows measures, the building of border security capacity, and the safe management of violent extremist prisoners, all of which are supported by UNODC through technical assistance.<sup>14</sup>

***The engagement of organized criminal groups in illicit trafficking, especially in persons and firearms, can play an instrumental role in armed conflicts. How does international law address these forms of trafficking? What effects can these activities have on armed conflicts, and how can organized criminal groups be held accountable for their actions?***

In conflict settings, armed groups may traffic people to enhance their military capacity, including, for example, through the forcible recruitment of child soldiers. They may also traffic people to impose fear in the territories they control, and for so-called “personal” purposes, such as the sexual exploitation of women, buying brides or forcing men and children into domestic labour. In 2020, about 12% of detected victims of trafficking originated from a country affected by conflict.<sup>15</sup>

Certain acts associated with trafficking in the context of armed conflict may constitute war crimes. When trafficking in persons is committed as part of a widespread or systematic attack directed against a civilian population, it may also amount to a crime against humanity.

Under the Trafficking in Persons Protocol to the UNTOC and other applicable international law, victims of trafficking have the same rights to protection and assistance in conflict and post-conflict situations as they have otherwise.<sup>16</sup> Victims or potential victims of trafficking may also be eligible for

<sup>14</sup> *Action Taken by Member States*, above note 13.

<sup>15</sup> UNODC, above note 9, p. 52.

<sup>16</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 12 December 2000 (entered into force 25 December 2003) (Trafficking in Persons Protocol), Art. 14.



international protection as refugees under the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees.<sup>17</sup>

The Trafficking in Persons Protocol also provides a strong basis for robust criminal justice responses and legal frameworks aimed at dismantling human trafficking networks and holding perpetrators accountable.

Another prominent form of trafficking in conflict settings, firearms trafficking, is also covered by a dedicated protocol under the UNTOC.

To effectively counter illicit arms flows, in line with the Firearms Protocol, it is essential to look beyond individual seizures and to promote broader criminal justice responses that combine preventive and control measures, aimed at enhancing legal controls and strengthening the criminal chain from detection and seizure to systematic identification, recording and tracing, to dismantling the illicit trafficking flows and bringing perpetrators to justice.

***On the subject of illicit arms flows, what are the interdependencies in this triangle of arms, crime and conflict?***

The trafficking and misuse of firearms is intrinsically linked to criminal organizations and terrorist groups. Illicit firearms are facilitators of violent crimes, as tools for perpetrating power and as lucrative trafficking commodities that fuel armed conflicts, crime and insecurity.

Organized crime groups can supply weapons and ammunition to non-State armed groups and governments facing sanctions, and smaller groups may also illicitly acquire arms as a result of such flows. Both organized crime groups and non-State armed groups may directly engage in firearms trafficking in order to secure their own arms and as a source of revenue.

***Effective law enforcement action in areas affected by armed conflict can be particularly difficult. What are the specific challenges to successful investigations and prosecutions of organized crime and corruption in situations of armed conflict? How can the international community better support law enforcement authorities in their efforts?***

In conflict settings, weak rule of law and institutions, as well as competition for territory and legitimacy, create significant obstacles to law enforcement. In addition, two of the main challenges in conflict and post-conflict environments are capacity and resources, as those contexts often lack experienced investigators and prosecutors with adequate investigative tools.

In providing assistance to countries emerging from conflict, the international community should ensure that sufficient resources are allocated to provide the necessary investigative tools, and that evidence collected using such

17 *Ibid.*; Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).



tools is later admissible in judicial proceedings. Training and capacity-building programmes are essential, while short-term deployment of skilled experts can prove useful for addressing more complex cases.

Addressing the needs of vulnerable people that fall victim to organized crime in areas affected by conflict, such as children and women, is another major challenge, one that requires effective coordination of efforts across institutions and also, where appropriate, with the private sector and civil society, in order to better detect and assist victims.

***You have recently launched UNODC's Strategic Visions for Africa and Latin America and the Caribbean, which aim to provide more safety to people, governments and institutions from drugs, crime, corruption, terrorism and illicit financial and arms flows, with a view to accompanying the realization of the SDGs. Could you tell us more about the contribution that these Strategic Visions will make to peace and security in those regions?***

The two Strategic Visions<sup>18</sup> build on UNODC's decades of partnership with the people and countries in the two regions, and represent a renewed pledge to work together towards achieving the SDGs.

In line with our global strategy for 2021–25,<sup>19</sup> the two regional Strategic Visions frame how UNODC and its member States will strengthen responses to drug control, transnational organized crime, terrorism, corruption and illicit financial flows in order to accelerate progress as we enter the Decade of Action towards the SDGs.

Our Strategic Visions represent a transformative approach to our work, aiming to adopt an integrated, people-centred and human-rights-based approach to addressing the security–development nexus, through actions which recognize security as a multidimensional goal that is linked to development and requires investments in diverse fields; these include crime prevention, criminal justice and appropriate sentencing laws.

The Strategic Visions are also living documents that will evolve through implementation and dialogue, first and foremost with the authorities and the people in the two regions and their countries, as well as with UN and other partners.

***Many challenges lie ahead of governments and the international community in the years to come, not least those related to protecting the environment and to the sustainable use of natural resources, as well as those concerning cyber security, which can all have direct implications in conflict. UNODC is engaged in addressing these issues and preparing, together with States, frameworks for***

18 UNODC, *UNODC Strategic Vision for Africa 2030*, available at: [www.unodc.org/unodc/en/strategy/africa-vision.html](http://www.unodc.org/unodc/en/strategy/africa-vision.html); UNODC, *UNODC Strategic Vision for Latin America and the Caribbean 2022–2025*, available at: [www.unodc.org/res/strategy/STRATEGIC\\_VISION\\_LATIN\\_AMERICA\\_AND\\_THE\\_CARIBBEAN\\_2022\\_2025\\_ENE17\\_EDsigned.pdf](http://www.unodc.org/res/strategy/STRATEGIC_VISION_LATIN_AMERICA_AND_THE_CARIBBEAN_2022_2025_ENE17_EDsigned.pdf).

19 UNODC, *UNODC Strategy 2021–2025*, available at: [www.unodc.org/unodc/strategy/index.html](http://www.unodc.org/unodc/strategy/index.html).

***preventing and tackling those emerging forms of criminality and cooperating across borders to that end. What are the milestones in this regard?***

The adoption of the UNTOC in 2000 was a critical milestone in the global fight against organized crime. This instrument remains the sole international legally binding instrument against organized crime and the main tool for promoting international cooperation in this field. Similarly, the adoption of the UN Convention against Corruption in 2003 constituted a breakthrough in the prevention and tackling of corruption at the global level.

The States Parties to those conventions have recently emphasized<sup>20</sup> that they remain relevant and flexible in scope, permitting their use against new and emerging forms of illicit activities, including those that affect the environment.

As the guardian of the UNTOC and UNCAC, UNODC has a vital role to play in assisting States as they translate their commitments into actions.

On crimes that affect the environment, UNODC is exploring the climate–crime nexus and raising awareness of the need to integrate criminal justice responses as part of a holistic approach to the triple planetary crisis of biodiversity loss, pollution and climate change. Our environment team is expanding its work to support countries in preventing and combating crimes such as trafficking in flora and fauna, trafficking in plastic waste, illegal mining, and fisheries crimes.

Among the crimes that have emerged since the adoption of the UNTOC, cyber crime is without a doubt among the most urgent. In this context, the UN General Assembly appointed UNODC as the Secretariat of an intergovernmental process to negotiate a new convention on cyber crime, to be presented to the General Assembly for adoption before it closes its 78th Session in September 2024. If the negotiations are successful, the convention will represent a major milestone as the first ever UN instrument on the topic.

20 UNTOC CoP Res. 10/6, 2020, available at: [www.unodc.org/documents/treaties/UNTOC/COP/SESSION\\_10/Resolutions/Resolution\\_10\\_6\\_-\\_English.pdf](http://www.unodc.org/documents/treaties/UNTOC/COP/SESSION_10/Resolutions/Resolution_10_6_-_English.pdf).

# Can criminal organizations be non-State parties to armed conflict?

**Pablo Kalmanovitz\***

Pablo Kalmanovitz is Professor in the Department of International Studies at ITAM, Instituto Tecnológico Autónomo de México. Email: [pablo.kalmanovitz@itam.mx](mailto:pablo.kalmanovitz@itam.mx).

## Abstract

*The motivations of armed groups are widely considered to be irrelevant for the applicability of international humanitarian law (IHL). As long as organized violence is of sufficient intensity, and armed groups have sufficient capacity to coordinate and carry out military operations, there is an armed conflict for purposes of international law. It follows that large-scale criminal organizations can, in principle, be treated legally on a par with political insurgent groups. Drug cartels in particular, if sufficiently armed and well organized, can constitute armed opposition groups in the legal sense when their confrontation with State forces is sufficiently intense. This article problematizes this interpretation. It corroborates standing legal doctrine in finding that subjective motives are not a sound basis to exclude the application of IHL, but it argues that a workable distinction can be made between the strategic*

<sup>†</sup> The original version of this article was published with an error in the title. A notice detailing this has been published and the error rectified in the online PDF and HTML versions.

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*logic and the organizational goals of criminal groups and those of political insurgents. Drawing on a growing body of empirical studies on the political economy of criminal violence, a strong presumption is defended against qualifying as armed conflict organized violence involving criminal organizations.*

**Keywords:** criminal violence, organized crime, non-international armed conflict, *Tadić* ruling, threshold of IHL application, drug trafficking, drug cartels, Latin America.

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## Introduction

Over the past two decades, the use of military force or militarized police against large-scale organized crime has been widespread in Latin America.<sup>1</sup> Governments in Colombia, Peru, Mexico, El Salvador and Brazil have notably treated armed organized criminal groups as enemies of the State, and have deployed against them levels and means of force typically associated with non-international armed conflicts (NIACs). The capacity for coordinated action of these non-State armed groups, and the toll in violent deaths and destruction derived from either governmental “wars on crime” or “turf wars” among criminal groups, appear to be at the level of situations of violence that have been qualified as NIACs in international law. The huge revenues derived from illicit markets, drug trafficking in particular, have allowed criminal organizations to create paramilitary forces with weaponry and manpower to match or exceed the armed capabilities of political insurgent groups.

Some of these situations of violence have been qualified as NIACs by legal and security experts, sometimes by States, and in rare cases, by the International Committee of the Red Cross (ICRC) itself. In the case of Colombia, six overlapping NIACs were identified by the ICRC for 2021.<sup>2</sup> Of these, five involve non-State groups that appear to be predominantly criminal, with unclear ideological orientations, and only half involve State forces. In 2015, twelve members of the drug trafficking organization Clan del Golfo were killed in aerial bombings carried out by the Colombian air forces; since 2016, carrying out such bombings has become official policy of the Ministry of Defence and the National Prosecutor’s Office, which, relative to these groups, operate under the hostilities paradigm.<sup>3</sup> More recently, in early 2022, fifteen members of the Clan del Golfo were killed in bombardments that took place notwithstanding the 2016 peace

- 1 See, generally, Gustavo Flores-Macías and Jessica Zarkin, “The Militarization of Law Enforcement: Evidence from Latin America”, *Perspectives on Politics*, Vol. 19, No. 2, 2019; Juan Albarracín and Nicholas Barnes, “Criminal Violence in Latin America”, *Latin American Research Review*, Vol. 55, No. 2, 2020.
- 2 International Committee of the Red Cross (ICRC), *Retos Humanitarios 2022: Colombia*, Bogotá, 2022; “Pico más alto de violencia en Colombia en los últimos cinco años fue en 2021: CICR”, *El Espectador*, 23 March 2022.
- 3 “Bombardean campamento del ‘Clan Úsuga’ en Chocó”, *Revista Semana*, 3 November 2015; Ana Balcazar Moreno *et al.*, *The War Report 2017: Gang Violence in Colombia, Mexico, and El Salvador*, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), 2018, pp. 2–6.

accords between the Colombian government and the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) guerrillas. The peace accords were supposed to mark the beginning of the end of Colombia's decades-long NIAC.<sup>4</sup>

In the case of Peru, while expert opinion has not qualified as NIAC the organized violence in the coca-producing VRAEM region (the valley of the rivers Apurimac, Ene and Mantaro), the Peruvian government has issued legislation and emergency decrees since 2007 that declare drug trafficking organizations in the area "hostile groups" and as such lawful targets under international humanitarian law (IHL). A leading figure in a prominent local group was killed at the end of 2020, along with three others, in aerial bombings carried out by the Peruvian army.<sup>5</sup>

In contrast to Peru, many legal and security experts have found Mexico's "war on drugs" to be a case of NIAC, at least in certain regions and for certain periods of time since 2006.<sup>6</sup> The 2017 *War Report* of the Geneva Academy describes Mexico as "armed gang violence sliding into armed conflict", and the Academy's 2018 *War Report* and Rule of Law in Armed Conflict (RULAC) platform have qualified as a NIAC the violence between the Mexican authorities and the Sinaloa Cartel and Jalisco New Generation Cartel (Cartel Jalisco Nueva Generación, CJNG).<sup>7</sup> Unlike Colombia and Peru, Mexican authorities have not invoked IHL in the context of their "war on drugs", notwithstanding this expert opinion.<sup>8</sup> Neither have authorities in El Salvador, even though legal and security experts have qualified as a NIAC the violence involving State forces and the

4 "Al menos 15 muertos deja como saldo operación contra el 'clan del Golfo'", *El Tiempo*, 2 February 2022. On the Colombian peace accords as an opportunity to "supercede IHL", see Pablo Kalmanovitz, "Ius post Bellum and the Imperative to Supercede IHL", *American Journal of International Law Unbound*, Vol. 110, 2016.

5 Alonso Gurmendi, *Conflicto armado en el Perú*, Fondo Editorial Universidad del Pacífico, Lima, 2019, pp. 149–152; Parker Asmann and Laura Ávila, "Shining Path Commander's Death Strikes Blow to Peru Rebel Group", *Insight Crime*, 31 March 2021, available at: <https://insightcrime.org/news/shining-path-death-peru/> (all internet references were accessed in August 2022).

6 Carina Bergal, "The Mexican Drug War: The Case for a Non-International Armed Conflict Classification", *Fordham International Law Journal*, Vol. 34, No. 4, 2011; Callin Kerr, "Mexico's Drug War: Is It Really a War?", *Texas Law Review*, Vol. 54, No. 1, 2012; Craig Bloom, "Square Pegs and Round Holes: Mexico, Drugs, and International Law", *Houston Journal of International Law*, Vol. 34, No. 2, 2012; Carrie Comer and Daniel Mburu, "Humanitarian Law at Wits' End: Does the Violence Arising from the 'War on Drugs' in Mexico Meet the International Criminal Court's Non-International Armed Conflict Threshold?", *Yearbook of International Humanitarian Law* 2015, T. M. C. Asser Press, The Hague, 2015; Grotius Centre for International Legal Studies, Universiteit Leiden, *La situación de la violencia relacionada con las drogas en México del 2006 al 2017: ¿Es un conflicto armado no internacional?*, bilingual ed., Instituto Tecnológico y de Estudios Superiores de Occidente and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, Guadalajara, 2019, available at: <https://tinyurl.com/39zekcdv>; Ana Gabriela Rojo Fierro, "La guerra contra el narcotráfico en México: ¿Un conflicto armado no internacional no reconocido?", *Foro Internacional*, Vol. 60, No. 4, 2020.

7 Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy, Geneva, 2018, p. 83; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy, Geneva, 2019, p. 33. The RULAC study is available at: [www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico](http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico).

8 Pablo Kalmanovitz and Alejandro Anaya-Muñoz, "To Invoke or not to Invoke: International Humanitarian Law and the 'War on Drugs' in Mexico", unpublished manuscript, 2022.

gangs Mara Salvatrucha and Barrio 18, including, notably, in the 2016 and 2017 *Armed Conflict Surveys* by the International Institute for Strategic Studies.<sup>9</sup>

For all the differences and controversies regarding the qualification of these situations of organized violence, all legal assessments agree on the well-established principle according to which, in the process of establishing the applicability of IHL, the armed actors' motives and proclamations are irrelevant. According to the well-known formulation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".<sup>10</sup> If the level of violence is sufficiently high, and the groups engaged in violence sufficiently organized, then a NIAC exists in which relevant IHL norms apply.

What counts as sufficient violence and collective organization can be spelled out through a number of indicia produced in jurisprudence and legal commentary, which have been widely recognized as authoritative for establishing the applicability of Article 3 common to the four Geneva Conventions and of customary IHL, as well as the war crime regimes in international criminal law.<sup>11</sup> These indicia do not include the actors' motives. The applicability of IHL depends on existing patterns of violence and modes of organization, which can be recognized without reference to subjective motives. As Sivakumaran concludes in his authoritative study of the law of NIAC, "the reasons that motivate the fighting are irrelevant insofar as the existence of a non-international armed conflict is concerned".<sup>12</sup>

While the rationale for such exclusion was not elaborated at length in ICTY jurisprudence, the 2011 report of the 31st International Conference of the Red Cross and Red Crescent does make a strong case for agnosticism about motives:

Under IHL, the motivation of organized groups involved in armed violence is not a criterion for determining the existence of an armed conflict. Firstly, to introduce it would mean to open the door to potentially numerous other motivation-based reasons for denial of the existence of an armed conflict. Secondly, political objective is a criterion that would in many cases be difficult to apply as, in practice, the real motivations of armed groups are not always readily discernible; and what counts as a political objective would be controversial. Finally, the distinction between criminal and political

9 See also Ximena Galvez Lima, "Inked or Not: Maras and Their Participation in El Salvador's Recent Armed Conflict", *Journal of International Humanitarian Legal Studies*, Vol. 10, No. 2, 2019; Kirsten Ortega Ryan, "'Urban Killing Fields': International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador", *International and Comparative Law Review*, Vol. 20, No. 1, 2020. The Geneva Academy's 2017 *War Report* did not qualify violence in El Salvador as a NIAC, but deems its own position "controversial": see A. Bellal (ed.), *The War Report: 2017*, above note 7, p. 64.

10 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

11 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 164–182; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 117–158.

12 S. Sivakumaran, above note 11, p. 182.

organizations is not always clear-cut; it is not rare for organizations fighting for political goals to conduct criminal activities in parallel and vice versa.<sup>13</sup>

To open the Pandora's box of motives would make the assessment of the nature of violence impossibly difficult and would thereby obstruct humanitarian action. By resorting instead to factual criteria, which can be verified on the basis of observable evidence, excessive politicization is avoided, as well as legal paralysis and betrayal of humanitarian imperatives.

In fact, the very distinction between political and criminal violence appears empirically dubious, as political insurgents can be driven by all sorts of motives, often including "greed" and exploitation of illicit markets.<sup>14</sup> The literature on "new wars" has emphasized how twenty-first-century insurgencies are impossible to distinguish from large-scale organized criminality, as both have little incentive to negotiate peace or take over the tasks of political rule in "failed" States.<sup>15</sup> When organized armed groups can extract abundant revenues from extortion and illicit business, even ideologically driven rebels can make of war a way of life, rather than an instrument for State-level political change.

The present article pushes back against this consensus in legal doctrine. While sceptics are correct to question the practical viability of using subjective motives as a criterion for distinguishing between political and criminal violence, this article argues that there are other ways of making this distinction which are objective, observable, and relevant for the normative assessment of large-scale organized violence.

Specifically, the article draws on a growing empirical literature on the political economy of criminal violence, which has studied the strategic dynamics of criminal violence and the criminal governance of illicit markets. Leveraging this literature, it is argued that criminal and political violence can and should be distinguished on the basis of the contrasting strategic logics that govern resort to violence, which in turn follow from their specific and contrasting organizational goals. Diverging strategies and organizational goals lead to contrasting approaches to State authorities. Centrally for present purposes, it is usually in the interest of criminal groups to *avoid* direct confrontations with State forces and resort to violence in a limited manner.<sup>16</sup> The article's central normative thesis is that, given the ways in which criminal organizations are known to operate vis-à-vis State authorities, there are good reasons for a *presumption against* qualifying situations of large-scale criminal violence as NIAC.

13 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 11.

14 Paul Collier and Anke Hoefler, "Greed and Grievance in Civil War", *Oxford Economic Papers*, Vol. 56, No. 4, 2004.

15 Mary Kaldor, "In Defence of New Wars", *Stability*, Vol. 2, No. 1, 2013; Christine Chinkin and Mary Kaldor, *International Law and New Wars*, Cambridge University Press, Cambridge, 2017.

16 Diego Gambetta, *The Sicilian Mafia*, Harvard University Press, Cambridge, MA, 1993; Richard Snyder and Angélica Durán-Martínez, "Does Illegality Breed Violence? Drug Trafficking and State-Sponsored Protection Rackets", *Crime Law and Social Change*, Vol. 52, No. 3, 2009.



Following this introduction, the first section of the article reinforces the claim that subjective motives are not a sound basis for NIAC qualification by showing that insurgent groups and large-scale criminal organizations have both economic and political motives. The second section draws on recent empirical literature on organized criminal violence to show that criminal and political violence have contrasting organizational goals and strategic reasons for resort to force, and argues that a legally workable distinction can be made on this basis. The third section discusses the implications of this reworked distinction for NIAC qualifications. It argues that criminal organizations are unlikely to have responsible command structures and the capacity to comply with IHL. The fourth section makes a *jus ad bellum* case against resort to military force by States in order to fight organized criminal organizations. On the basis of the arguments in the third and fourth sections, the fifth section concludes by proposing and defending a presumption against NIAC qualifications of organized criminal violence.

## Motives

It is natural and common to posit motives as the criterion for distinguishing conceptually between criminal and political violence. While agents of political violence are driven by ideology and an interest in effecting political change, those engaged in criminal violence are driven by profit and an interest in maximizing illegal revenues. Motives have been used in this way both in empirical studies of violence and in international policy fora dedicated to transnational crime.

As Phillips succinctly puts it in his study on the undesirable effects of decapitation of criminal organizations, “it is motives, not methods, that separate criminal groups from terrorists and insurgents”.<sup>17</sup> Contrasting motives can help explain why decapitating criminal organizations leads to an increase in criminal violence, not a decrease as one would expect in the case of political insurgent groups. Whereas charismatic commanders can make a crucial difference in political insurgencies, and their loss can gravely affect troops’ morale, in the case of organized crime, decapitation leads to fragmentation and in-group fighting for illegal market control. Similarly, for Kalyvas, the fact that “criminal organizations lack both an ideological profile and an explicit political agenda” would explain differences in the characters and dynamics of criminal versus political violence, including the onset and termination of such violence, the sources of group cohesion and loyalty, and the strategic use of violence.<sup>18</sup>

Motives also serve to define the scope of application of the United Nations (UN) regime for combating transnational organized crime. The UN Convention against Transnational Organized Crime defines organized crime on the basis of motives and in contrast to political organizations. As it states in Article 2(a):

17 Brian Phillips, “How Does Leadership Decapitation Affect Violence?”, *Journal of Politics*, Vol. 77, No. 2, 2015, p. 327.

18 Stathis Kalyvas, “How Civil Wars Help Explain Organized Crime – and How They Do Not”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015.



“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, *in order to obtain, directly or indirectly, a financial or other material benefit* [emphasis added].

As Hauck and Peterke report, this definition was driven by “the dominant view that organized crime is not driven by political motives but is primarily out to make a profit”; in particular, it was meant to exclude terrorist and insurgent organizations from the Convention’s purview in order to avoid it becoming “overly politicized”.<sup>19</sup> The UN regime against organized crime focuses only on those transnational groups that are driven by material interests, not on those which pursue political agendas.

While seemingly natural, there are two important sets of reasons to question the practical viability and empirical validity of distinguishing between criminal and political violence on the basis of subjective motives.

The first set is associated with the well-documented existence of mixed motives in ostensibly political violence. As the empirical literature on civil wars has long debated, insurgent groups often engage in illicit business, which makes it hard to characterize accurately whether, or to what extent, “greed or grievance” is their driving motivation.<sup>20</sup> While armed groups do have strategic interests in earning legitimacy and support by presenting themselves as being driven primarily by political ideals, their motivations can in fact be largely private and material, as the “new wars” literature has emphasized.<sup>21</sup> Kalyvas’s path-breaking work on civil wars revealed how private motives often drive the use of violence at the micro level; political macro-narratives and ideologies, which publicly frame violence, may have less causal impact on the dynamics of violence than their public visibility would lead one to believe.<sup>22</sup> In fact, complex arrays of micro- and macro-motives, oriented by both private and public interests and by both genuine and strategically professed ideologies, drive the use of violence during civil wars.<sup>23</sup>

The second set of reasons why motives do not make a sound basis for distinction is related to the also well-documented fact that large-scale criminal organizations also have an interest in power and influence as instruments for preserving or enlarging their illicit business, very much like their licit counterparts do. This is arguably the key difference between petty and organized crime.<sup>24</sup> Specifically, large-scale criminal organizations have an interest in

19 Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 422.

20 P. Collier and A. Hoeffler, above note 14; Christopher Blattman and Edward Miguel, “Civil War”, *Journal of Economic Literature*, Vol. 48, No. 1, 2010.

21 M. Kaldor, above note 15.

22 Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, Cambridge, 2006.

23 Francisco Gutierrez Sanin and Elisabeth Jean Wood, “Ideology in Civil War: Instrumental Adoption and Beyond”, *Journal of Peace Research*, Vol. 51, No. 2, 2014.

24 Thomas Schelling, “What Is the Business of Organized Crime?”, in Thomas Schelling (ed.), *Choice and Consequence*, Harvard University Press, Cambridge, MA, 1984.

influencing political processes in order to facilitate their business, in particular by dampening law enforcement against themselves and redirecting it against their rivals.<sup>25</sup> Given the prospects of crippling law enforcement, political influence can be vital for the success of illicit business, and as such has to be counted among the goals and drivers of illegal entrepreneurs. Furthermore, while a great deal of illicit business activity takes place in the peripheries of the State, criminal organizations also need to infiltrate public infrastructure and authorities in seaports and airports, the banking and financial systems, and more.<sup>26</sup>

In addition to investing in political influence, organized criminal organizations are also known to seek territorial control in ways instrumental to their business, in particular for the production and trafficking of illegal substances.<sup>27</sup> This includes securing corridors for the transportation of such substances, and safe areas for their cultivation and production. In order to secure territorial control, large criminal organizations often engage in distinct forms of legitimization that allow them to recruit local informants, exclude rivals, and rule local illicit economies more efficiently. In some cases, criminal organizations have developed forms of governance and public service provision comparable to those provided by insurgent groups and even State authorities, including security provision, dispute settlement mechanisms and basic social assistance.<sup>28</sup> Conquering and managing territory through the strategic use of legitimization and coercion are, of course, eminently political enterprises.

Many organized criminal organizations, in particular those capable of creating and maintaining militias, are unquestionably driven by political agendas – they have an interest in acquiring and managing power. Power, furthermore, is acquired for the sake of business but need not be used exclusively in the pursuit of business. When organizations grow and acquire power, it may become impossible to disentangle political and pecuniary motives. Most Colombian paramilitary groups were originally drug cartels that became politicized, but as the dynamics of insurgent violence and the drug trade changed in the country, so too did the motives of these actors.

## Contrasting strategies of violence and organizational goals

From the claim that motives are not a sound criterion for distinguishing between criminal and political violence, it does not follow that there is no distinction to

25 Guillermo Trejo and Sandra Ley, *Votes, Drugs, and Violence*, Cambridge University Press, Cambridge, 2020; Angélica Durán-Martínez, *The Politics of Drug Violence*, Oxford University Press, Oxford, 2018.

26 Gustavo Duncan, *Más que plata o plomo: El poder político del narcotráfico en Colombia y México* Debate, Bogotá, 2014.

27 Nicholas Barnes, “Criminal Politics: An Integrated Approach to the Study of Organized Crime, Politics, and Violence”, *Perspectives on Politics*, Vol. 15, No. 4, 2017.

28 Enrique Desmond Arias, “The Impacts of Differential Armed Dominance of Politics in Rio de Janeiro, Brazil”, *Studies in Comparative Development*, Vol. 48, No. 3, 2013; Vanda Felbab-Brown, “Conceptualizing Crime as Competition in State-Making and Designing an Effective Response”, Brookings Institution, 2010, available at: [www.brookings.edu/on-the-record/conceptualizing-crime-as-competition-in-state-making-and-designing-an-effective-response/](http://www.brookings.edu/on-the-record/conceptualizing-crime-as-competition-in-state-making-and-designing-an-effective-response/); N. Barnes, above note 27.

make. Intuitively, it appears clear that Mexican drug cartels are a different kind of organization to the Colombian FARC guerrillas. As the empirical literature on criminal violence has emphasized, even though drug cartels have political agendas, and guerrillas may profitably engage in drug trafficking and other illicit business, the two types of actors pursue diverging strategies, follow different organizational goals and have contrasting relationships with State authorities.

In a nutshell, insurgents are, by constitution, enemies of the State, and their enmity is usually publicly declared and known. We would not call the activities of an armed group a “political insurgency” unless the group used its firepower to oppose and fight State authorities, according of course to its capacities and opportunities, which may be very limited indeed. Criminal organizations, by contrast, tend to avoid direct and large-scale confrontations with State forces; their preference is to bribe and co-opt rather than attack State authorities.

A consistent finding in comparative research on “drug wars” in Latin America is that, when cartels use force against the State, they tend to do so reactively and selectively, either to defend themselves against crackdowns or to intimidate law enforcers and ease their co-optation.<sup>29</sup> For the sake of illicit business, the first preference of criminal organizations is typically to lay low, bribe and co-opt rather than to create and fund expensive standing militias, which can undertake large-scale attacks but can also generate public outcry and destructive State counter-responses.<sup>30</sup> According to Arias’s characterization of gang control in Rio de Janeiro’s *favelas* (shanty towns), “criminals depend on contacts with politicians and legitimate market actors to undertake certain types of illegal activities and generally have little interest in or ability to cause a system-wide political or institutional crisis”.<sup>31</sup> Arrangements of joint profit, in particular delivering votes in exchange for law enforcers turning a blind eye to the criminal group’s activities or directing their attention towards its rivals, have been common in Brazil. Even when criminal organizations directly aim their armed capabilities at State forces, they tend to do so in a manner that falls short of “all-out war for territorial hegemony”.<sup>32</sup> Their aim is not to defeat and capture the State, but rather to “subvert and co-opt” it in limited areas.<sup>33</sup>

29 Angélica Durán-Martínez, “To Kill and Tell? State Power, Criminal Competition, and Drug Violence”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015; Javier Osorio, “The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015; Benjamin Lessing, “Logics of Violence in Criminal War”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015.

30 Benjamin Lessing, *Making Peace in Drug Wars*, Cambridge University Press, Cambridge, 2018, pp. 37–81; G. Duncan, above note 26.

31 E. D. Arias, above note 28, p. 264.

32 N. Barnes, above note 27, p. 973.

33 Andrea Nill Sánchez, “Mexico’s Drug ‘War’: Drawing a Line between Rhetoric and Reality”, *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 488. The *Limaj* case at the ICTY is often cited as a key ruling on the irrelevance of motives for NIAC qualification. As the Tribunal held in para. 170, “the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties[;] the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant”. And yet the ruling continues as follows: “[I]t is not apparent to the Chamber that the immediate purpose of the military apparatus of each side during the relevant period, was not directed to the defeat of the opposing party, even if some further or

Lessing's work has emphasized how rare it is for criminal organizations to attack State authorities, which makes the cases of Mexico and Colombia anomalous within the larger universe of organized crime. A central element in his explanation of this anomaly is that criminal groups use all-out force against States only when they expect the State to use force unconditionally against them. When criminal organizations know that the State will use force against them not in reaction to their own use of force but rather as a policy of elimination based on group membership, criminal violence tends to flare up. Conversely, when States use violence only in reaction to violence, and are relatively tolerant of other illicit conducts, criminal violence tends to remain low or de-escalate.<sup>34</sup> Political insurgent groups behave differently. They may avoid confrontation with State forces at certain times and places for strategic reasons, but their defining organizational goal is to attack State forces when feasible, and to outcompete the State vis-à-vis the population's allegiance and support. This is, again, a conceptual point: we would not refer to an organization that preferred a peaceful and lucrative *modus vivendi* with State authorities as an "insurgent" group.

However, and crucially for present purposes, organized criminal violence is generated not only in the context of clashes involving State authorities, but also via "turf wars" among or within criminal organizations – that is, violent competition for the control of illicit markets. In the case of Mexico, the first drug-related private militia was created by the Tijuana cartel in the early 1990s after State-sponsored protection rackets broke down. Rival cartels saw this breakdown as an opportunity to take over the lucrative Tijuana corridor to the United States, which the Tijuana cartel successfully defended with its newly created coercive means.<sup>35</sup> State-sponsored protection rackets can generate remarkably peaceful equilibria among criminal groups, and, conversely, their breakdown can lead to shockingly high levels of violence in inter-cartel disputes. In the absence of State-sponsored assurances, cartels may need to resort to highly visible forms of violence in order to signal their toughness and deter non-State rivals.<sup>36</sup>

In these contexts, studies of criminal violence have identified two forms of coercion used by criminal groups. They may create their own standing militias and deploy them under relatively strict command ("insourcing"), or they may hire youth gangs and hitmen in a less controlled fashion ("outsourcing"). While outsourcing is cheaper, it encourages gang proliferation and can unleash spirals of violence that

ultimate objective may also have existed. *The two forces were substantially engaged in their mutual military struggle*" (emphases added). Arguably, a background assumption in *Limaj* is that the non-State parties in a conflict aim for the defeat of their State opponents, an assumption that may not hold for organized criminal violence. ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170.

34 B. Lessing, above note 29; B. Lessing, above note 30.

35 Guillermo Trejo and Sandra Ley, "Why Did Drug Cartels Go to War in Mexico? Subnational Party Alternation, the Breakdown of Criminal Protection, and the Onset of Large-Scale Violence", *Comparative Political Studies*, Vol. 51, No. 7, 2018.

36 R. Snyder and A. Durán-Martínez, above note 16; A. Durán-Martínez, above note 29.

eventually escape the cartels' control.<sup>37</sup> The most violent cases of turf war – those which can reach NIAC levels of intensity of violence – occur when criminal organizations fiercely compete for illegal markets and *outsource* violence.<sup>38</sup> As Nill Sánchez argues in her study on the qualification of Mexican violence, “even in the deadliest regions of Mexico, an overwhelming majority of the deaths taking place are more properly characterized as discrete criminal murders, not mass casualties inflicted by military onslaughts”.<sup>39</sup> By contrast, political insurgencies can be expected largely to refrain from outsourcing coercion, as they are themselves coercive organizations that need to deploy violence in a controlled fashion in order to earn and secure territorial control and some measure of civilian support.<sup>40</sup>

Differences between political and organized criminal violence can also be found in contrasting forms of territorial control. While political insurgency is eminently a “process of competitive State-building”,<sup>41</sup> in which insurgents seek to secure exclusive power at least in localized strongholds, criminal organizations prefer to strike arrangements of mutual benefit with State agents. In addition to deflecting and redirecting law enforcement, these arrangements include the use of police surveillance, ports, and financial systems as infrastructures for carrying out illicit business. While drug cartels may often aim to acquire territorial control at the margins of State territory in order to produce and transport drugs, they are also in many ways parasitic on State institutions, particularly when it comes to money laundering, which takes place mostly in the financial centres and not at the peripheries of States.<sup>42</sup>

By contrast, territorially based insurgent groups typically do not seek cooperation with State authorities but rather dispute territory and aspire to forms of autonomous “rebel governance”.<sup>43</sup> The strategic goal of insurgent groups is usually to consolidate exclusive control over populations in more or less well-defined territories, not to bribe and co-opt State authorities in order to sustain parallel systems of illicit market rule.

## NIAC qualification and organized crime

Once we recognize the contrasting strategies and goals of organized crime versus political insurgencies, we are in a position to re-evaluate current understandings of the applicability of IHL to organized criminal violence. Subjective motives may be irrelevant for the qualification of violence as a NIAC, but contrasting strategies

37 Eduardo Guerrero Gutiérrez, “Pandillas y cárteles: La gran alianza”, *Revista Nexos*, June 2010; A. Durán-Martínez, above note 25, pp. 14–18.

38 A. Durán-Martínez, above note 25, p. 18.

39 A. Nill Sánchez, above note 33, p. 483.

40 S. Kalyvas, above note 22.

41 *Ibid.*, pp. 218–219.

42 G. Duncan, above note 26.

43 Ana Arjona, Nelson Kasfir and Zachariah Mampilly, *Rebel Governance in Civil War*, Cambridge University Press, Cambridge, 2015.

and organizational goals are not. While it may be simple to establish that the intensity of criminal violence has reached the level of NIACs, the criterion of organization of non-State armed groups is far less clear.

Insofar as the intensity of violence goes, relevant NIAC qualification indicia include the number of violent incidents; the level, duration, and geographical spread of violence; the State's resort to the use of military forces; the mobilization of individuals and distribution of weapons to them; the use of military-level weaponry; the conclusion of ceasefires and peace agreements; and the involvement of third parties, in particular the UN Security Council.<sup>44</sup> In all but one (Peru) of the Latin American cases mentioned above, most of the intensity indicia have been met. Indeed, the reason why NIAC qualifications have been considered in these cases is the shocking levels of killings, forced disappearances, forced displacements and other gross human rights violations that occur in situations of organized criminal violence.

Regarding the organization of non-State armed groups, relevant indicia include the existence of responsible command, which is necessary for the group to act and speak in a unified manner; the existence of internal regulations and disciplinary procedures that allow non-State groups to comply with IHL; group members receiving military training and having the ability to operate in designated zones; the ability to control territory; the ability to procure, transport and distribute arms; and the ability to recruit new members and to coordinate their actions.<sup>45</sup>

To assess the extent to which these indicia can be satisfied in contexts of criminal violence, it is important to recall the distinction between insourced and outsourced coercion. When criminal organizations outsource coercion, they typically rely on gangs to carry out executions, extortions and more. Mexican cartels have been documented to outsource violence often and to rely extensively on more or less cohesive and small-scale coercive organizations, particularly youth gangs.<sup>46</sup> Often, enforcement actions are carried out by hitmen and gangs, or by fragments of cartels and “non-aligned freelancers” hired to execute operations of narrow scope.<sup>47</sup> For this reason, Mexican violence has been described as “multiple incidents of micro-violence at local levels”, rather than “macro-violence at the strategic level” – that is, a confrontation between two or more well-organized and disciplined military structures in a context of hostilities.<sup>48</sup> Given such atomization of drug violence, and the fragmentation of illegal markets of coercion into multiple small-scale gangs, it is doubtful that when violence is outsourced, there can be responsible command as required by the organization criterion. Instead of command and control hierarchies, there is really a market for violent services, and the ever-present possibility of fragmentation and infighting.

44 S. Sivakumaran, above note 11, pp. 167–170.

45 *Ibid.*, pp. 170–172.

46 E. Guerrero Gutiérrez, above note 37; A. Durán-Martínez, above note 25.

47 Patrick Gallahue, “Mexico’s ‘War on Drugs’: Real or Rhetorical Armed Conflict?”, *Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011, p. 43.

48 A. Nill Sánchez, above note 33, pp. 485–486.

In the case of criminal organizations that insource violence (that is, those which create and maintain their own militias), there may be some sort of command structure, the ability to sustain operations in well-defined areas, and even the ability to control territory. In Mexico, the cases of the Zetas and the CJNG are noteworthy. The former was composed of defectors from the Mexican army who turned into hitmen for the Gulf Cartel in turf wars against rival cartels, but eventually became independent and known for public displays of gruesome violence.<sup>49</sup> The CJNG originated as a splinter group of the Sinaloa Cartel, and is estimated to have gained presence in every Mexican state over the past ten years. Its military operations are based in a handful of states surrounding the Lázaro Cárdenas seaport in the Pacific, but it has fought rival organizations and police forces fiercely in pursuit of territorial expansion.<sup>50</sup>

It is not the case, however, that paramilitary organizations such as the Zetas and CJNG can be expected to comply with IHL regulations. Indeed, the distinction between civilians and military objectives is alien to their *modus operandi*, particularly with respect to extortive practices. These organizations have neither financial incentives nor strategic reasons to discipline their members into respecting IHL. And if such an expectation can hardly be sustained in the case of the Zetas and CJNG, there is less reason to expect it from smaller militias or youth gangs that are recruited by larger criminal organizations and lack any sort of military training. As Durán-Martínez notes in the case of youth gangs, most of them “are not professional killers who follow the ‘rules’ of violence specialists such as mercenaries, enforcement agents serving traffickers, or privatized security firms”.<sup>51</sup> They can hardly be expected to comply with IHL.

It is no accident that the use of violence by Mexican criminal organizations is largely decentralized and fragmented when outsourced, and alien to the internal disciplinary procedures required by IHL compliance when insourced. Since the objective of criminal organizations is not to confront and substitute the State, it would be inefficient and indeed bad business practice to invest heavily in large standing militias. The level of force that organized crime needs should be enough to dissuade competing organizations and intimidate law enforcers, but it is rarely in the interest of criminal organizations to fund a militia that can engage State forces in sustained military operations.

The contrast with political insurgencies is again revealing. Insurgent groups are known to invest in training and compliance with IHL because they have an interest in earning recognition and political legitimacy – their interest in international legitimacy in particular has been found to be an important self-disciplining mechanism.<sup>52</sup> Criminal organizations have no equivalent interest.

49 Víctor Manuel Sánchez Valdés and Manuel Pérez Aguirre, *The Origin of the Zetas and Their Expansion in Northern Coahuila*, Colegio de México, Mexico City, 2018.

50 Insight Crime, “Cartel de Jalisco Nueva Generación (CJNG)”, available at: <https://es.insightcrime.org/noticias-crimen-organizado-mexico/cartel-jalisco-nueva-generacion-cjng/>.

51 A. Durán-Martínez, above note 25, p. 16.

52 Hyeran Jo, *Compliant Rebels*, Cambridge University Press, Cambridge, 2015; Jessica Stanton, *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law*, Cambridge University Press, Cambridge, 2016.



They do have an interest in local legitimacy in their areas of control, and that interest may contribute to relative restraint and discrimination in their use of violence against local populations – but this is far from the sort of training, knowledge and internal controls required for compliance with IHL norms.

If we take responsible command and the ability to comply with IHL norms to be necessary features of non-State armed groups in NIACs,<sup>53</sup> then we should in principle be sceptical of NIAC qualifications of organized criminal violence. Outliers cannot be ruled out, certainly, but if a criminal organization were to invest in a militia that satisfied the organization criterion for NIACs, its priorities would probably have shifted in a more ideological direction: presumably the point of investing in large paramilitary forces is to directly confront State forces – or insurgent forces jointly with State forces, as in Colombia – in order to gain control over strategic territory.

### **The *jus ad bellum* case against resort to military force against organized crime**

An important implication of the previous discussion of NIAC qualification should now be considered. Policy arguments are often made in favour of militarized responses to organized crime: given the intensity of the violence and the capacity for harm of some organized criminal organizations, in some cases the threats they pose to States and citizenry are as serious, if not more so, than those created by insurgencies in contexts of political violence, and equivalent State responses are therefore warranted.<sup>54</sup> As Bergal puts it for the case of Mexico, “innocent lives could be saved if the Mexican military undertook the appropriate level of defensive force against the cartels as outlined by the laws of NIAC”.<sup>55</sup> Along somewhat similar lines, in its 2004 report, the UN High-Level Panel on Threats, Challenges, and Change identified transnational organized crime as a particularly urgent threat to international peace and security, and requested the UN Secretary-General to include organized crime in strategies of conflict prevention and analysis.<sup>56</sup> While this request did not lead to a UN validation of militarized responses to organized crime – nor were any implications on the applicability of IHL drawn – it does suggest that the kind of threat posed by these organizations could warrant such responses.

As is well known, when organized violence is qualified as a NIAC, the hostilities paradigm comes into effect to regulate the use of force predominantly on the basis of IHL. In hostilities contexts, States can permissibly resort to levels

53 S. Sivakumaran, above note 11, pp. 174–180. There is some doctrinal debate on this claim: see A. Cullen, above note 11, pp. 155–157.

54 See e.g. P. Hauck and S. Peterke, above note 19, p. 411; C. Bergal, above note 6.

55 C. Bergal, above note 6, p. 1087.

56 Pierre Thielbörger, “The International Law of the Use of Force and Transnational Organised Crime”, in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organized Crime*, Oxford University Press, Oxford, 2016, pp. 377–378.

of force that would be impermissible under the law enforcement paradigm, in which the more restrictive protections of international human rights law in peacetime apply in full. As the ICRC describes this contrast,

the conduct of hostilities does not prohibit the killing of legitimate targets, provided that, among others, the IHL principles of proportionality and precautions are fulfilled. Under law enforcement, lethal force may be used only as [a] last resort in order to protect life.<sup>57</sup>

Under the IHL principle of proportionality, more “incidental loss” of civilian life is permitted than under the proportionality assessment of the law enforcement paradigm, in which lethal State force is proportional only to unlawful imminent lethal threats.<sup>58</sup> Legitimate targets in hostilities include both civilians directly participating in hostilities and members of non-State armed groups who have a “continuous combat function”, and as such may be lawfully targeted, regardless of the actual level of threat they pose when targeted (assuming, that is, they are neither *hors de combat* nor detained).

The empirical literature on criminal violence has shown that when States implement status-based targeting policies – force used not in reaction to imminent threats of violence by members of non-State groups but on the basis of group membership – collective violence escalates. In the Mexican case, president Calderón’s war declaration in 2006 was, in a sense, a self-fulfilling prophecy: violent deaths and other gross human rights violations skyrocketed after the Mexican armed forces became involved in counter-narcotics and internal security operations, and eventually reached a point that, according to many experts, does constitute a NIAC.

One concerning effect of a NIAC qualification in such contexts is that it makes group-based targeting policies lawful, and in this way enable the escalation of violence. When criminal organizations are treated as non-State parties to a NIAC, at least some of their members come to have a “continuous combat function”, whereby they become lawful targets “on a continuous basis” by virtue of their membership, and regardless of the actual level of immediate threat they pose at the time of targeting.<sup>59</sup> As the empirical literature on criminal violence has shown, however, status-based targeting policies in militarized counter-narcotics operations usually lead to escalations of violence, which can eventually reach levels of “public emergency” in which military force comes to appear justified.<sup>60</sup> But the escalation which led to that point, and the logic of criminal violence that propelled the escalation, disappear from view in static and formal

57 ICRC, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, 2013, p. iv.

58 ICRC, *The Use of Force in Law Enforcement Operations*, Geneva, 2022.

59 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 33–34, 72.

60 According to Hauck and Peterke, “the violence of organized crime and gangs, although worrying, is non-ideological and principally clandestine in nature and therefore does not usually destabilize a country in a way that would justify rating the situation as a public emergency”: P. Hauck and S. Peterke, above note 19, p. 431. As the Mexican case shows, however, organized criminal violence can escalate to levels that are

qualifications of organized criminal violence, and for this reason, such qualifications can ultimately be counterproductive.<sup>61</sup>

If the distinctive dynamics of organized criminal violence are taken into account in more nuanced assessments, then the use of military force by States appears in a different light, particularly given the availability of less violent policies that can be more successful in preventing harm.<sup>62</sup> The fundamental question here is whether resort to military force by the State is *justified in the first place*, rather than whether specific military operations are lawful when organized criminal violence is governed by the hostilities paradigm. This question belongs not to the legal doctrine of *jus in bello* but rather to considerations of sound policy and what may be called the law of “internal *jus ad bellum*”, which should regulate *domestic* resort to military force by States.<sup>63</sup> While not an established area of public international law, considerations of internal *jus ad bellum* can strengthen the presumption against NIAC qualifications that will be defended in the next and final section of this article.

We have seen, in the above section on strategies of violence and organizational goals, that in general, organized criminal organizations prefer to co-opt rather than directly attack State authorities; the best scenario for illicit entrepreneurs is to operate discreetly and carry on their illicit business undisturbed by law enforcement. It is far from clear that these actors pose the kind of threats for which State resort to armed force would be a necessary and proportional response *as a matter of jus ad bellum* – the kind of threat that a well-equipped insurgent group keen on capturing the State could conceivably pose. As Lieblich has argued, it is useful to think about the principles of necessity and proportionality in internal *jus ad bellum* in analogy with the traditional *jus ad bellum* principles for inter-State armed conflicts. By analogy, domestic resort to armed force appears justified only in response to imminent threats or attacks “the scale and effects of [which] must at least mirror that of an ‘armed attack’ – whether against civilians or armed forces – on the international level”.<sup>64</sup> Of course, by definition organized criminal organizations violate State law, but whether such violation constitutes a form of threat or harm of such a level would have to be shown, not assumed. And given what we know about the dynamics of organized criminal violence, the assumption appears doubtful.

Ultimately, the question is whether an organized criminal organization causes harm – or poses a threat of harm – for which a State’s resort to military force would be a necessary and proportional response. As many academic experts

deeply destabilizing. Militarization and its legal sanction in the form of NIAC qualification are not apt remedies but rather causes of such destabilization.

61 See, further, Alejandro Rodiles, “Law and Violence in the Global South: The Legal Framing of Mexico’s ‘Narco War’”, *Journal of Conflict & Security Law*, Vol. 23, No. 2, 2018.

62 Guillermo Trejo and Sandra Ley, “Federalism, Drugs, and Violence: Why Intergovernmental Partisan Conflict Stimulated Inter-Cartel Violence in Mexico”, *Política y Gobierno*, Vol. 23, No. 1, 2016.

63 Eliav Lieblich, “Internal *Jus ad Bellum*”, *Hastings Law Journal*, Vol. 67, No. 3, 2016. Lieblich makes clear that the doctrine of internal *jus ad bellum* that he sketches remains far from crystallizing in international law.

64 *Ibid.*, p. 742.

have noted in the case of drug trafficking, if States stopped enforcing the prohibition of drug trafficking, the result would probably be far lower levels of death and harm than those unleashed by a militarized “war on drugs”.<sup>65</sup> For this reason, resort to armed force is not a proportional response. Militarized responses do not appear necessary either, nor are they a fitting means to the end of protecting people from organized criminal harm. States do have alternative and less lethal policy options, including systematic investigation of money laundering and social policies aimed at youth communities, which are vulnerable to recruitment as outsourcers of criminal violence.

An important objection to this analysis is that it does not take into account the manifold types of harm generated by competition among criminal organizations in “turf wars”, which can potentially reach NIAC levels of intensity and organization. While criminal organizations may prefer to avoid confrontation with the State, competition among themselves for illicit markets can become highly conflictive and violent, and can have appalling humanitarian effects on communities living in disputed territories. In turf wars, attacks occur not in reaction to State law enforcement but rather as a consequence of violent competition over territories and communities among non-State groups. States, the objection concludes, should intervene with military means when necessary to overwhelm non-State armed groups and suffocate their violent conflicts, for this is the only way to protect populations from the effects of turf wars.

While there is no question that third parties must be protected from inter-cartel violence, it remains unclear that the deployment of military forces is an apt means to that end. State military interventions that are not matched by sound prosecutorial strategies and social policies that help prevent recruitment into youth gangs may lead either to further escalation or to only temporary suspension, rather than suffocation, of inter-gang conflict.<sup>66</sup> This is not to deny that criminal organizations may grow to the point of conquering territory and become serious threats to State authorities and populations – the aggressive expansion of the CJNG in Mexico may be a recent case in point – but given what we know about organized criminal violence, such cases are outliers. Ultimately, regaining State control over territories that are *de facto* ruled by criminal organizations, and effectively protecting populations in such territories, requires the hard and long-term work of State institution- and trust-building, and transnationally coordinated law enforcement action against organized crime. The United Nations Convention against Transnational Organized Crime tried to lay down a basic framework for coordinated State responses to transnational organized crime, but it did not go far, as US pressure for militarized counter-narcotics ultimately prevailed.<sup>67</sup>

65 B. Lessing, above note 30; A. Durán-Martínez, above note 25; G. Trejo and S. Ley, above note 25, pp. 143–179; B. Phillips, above note 17. For a high-profile contribution in a similar vein from a policy perspective, see Global Commission on Drug Policy, *War on Drugs: Report of the Global Commission on Drug Policy*, Geneva, 2011.

66 G. Trejo and S. Ley, above note 62; J. Osorio, above note 29; B. Lessing, above note 29.

67 Sven Peterke and Joachim Wolf, “International Humanitarian Law and Transnational Organised Crime”, in P. Hauck and S. Peterke (eds), above note 56, pp. 400–402.

## Presumption against NIAC qualifications of organized criminal violence

To see how the preceding discussion can motivate a presumption against the qualification of organized criminal violence as NIAC, it is important to note, firstly, that the organizational goals of a group are not subjective or dependent on the mental state of group members, but rather are observable and detectable in collective behaviour. Allegations of political motives are only one element in a broader constellation of observable elements, against which they can be contrasted, verified or refuted. These further elements include actual practices of violence, documented relationships with State authorities, the training and indoctrination received by group members, and the strategic priorities revealed in conduct. Secondly, for any given group, determining its organizational goals can take time. While some groups may be easily catalogued as either organized criminal organizations or insurgents, others may fall in a grey area that resists classification – FARC “dissidents” in Colombia and “terrorist remnants” in Peru come to mind in this regard.

There are two sets of reasons that motivate the presumption against a NIAC qualification. The first follows from the empirical literature on organized criminal violence, which generates doubts as to the capacity of criminal organizations to satisfy the IHL conditions of responsible command and capacity to comply with IHL norms. The second set of reasons follows from considerations of sound policy and internal *jus ad bellum*. Drawing on the empirical literature on criminal violence, it has been argued that State military interventions tend to exacerbate violence rather than protect people from harm. Furthermore, unlike in the case of political insurgencies, where military inaction can lead to State capture and violent regime change, military inaction in the case of illicit business may lead to unlawful enrichment, particularly from the traffic of illicit substances, but not necessarily to increasing violence or threats of harm. For this reason, resort to military force appears to be neither necessary nor proportional, as a matter of internal *jus ad bellum*, in the case of violent organized crime. There are no pre-existent threats to the State or populations that would justify resort to military force, and the alternative of the law enforcement paradigm – possibly combined with regulation of some illicit markets – is feasible and far less destructive than military force.

Like any presumption, this one may be defeated. There is no logical impossibility in criminal organizations becoming aggressive, developing and maintaining paramilitary forces under responsible command, and becoming capable of complying with IHL norms (for example, in order to expand and legitimize their territorial control, or in order to signal a change in organizational goals). But the preceding arguments have shown that this situation is unlikely, and that we should take a hard look at each individual case before reaching a NIAC qualification – particularly with regard to the existence of command structures and the capacity to comply with IHL norms. As long as these have not

been well established, we should presume that the applicable paradigm is law enforcement, not hostilities.

An important effect of this presumption is the avoidance of opportunistic invocations of IHL by States. The cases of Peru after the capture of Abigael Guzmán and Colombia after the 2016 peace accords should give legal and security policy experts pause when assessing the legal nature of organized violence. It can be tempting for States to follow the popular but ineffective road of militarized “iron fist” policies, instead of the harder and longer road of dismantling illicit businesses, preventing youth recruitment for outsourced violence, prosecuting money laundering, and so forth. It is important that IHL preserves its humanitarian vocation and does not lend itself to such opportunistic uses; the values of due process of law, presumption of innocence, and life protection should also be protected from this temptation.

It may be replied that a presumption against NIAC qualifications of organized criminal violence would come at the prohibitive cost of undermining humanitarian action. This is a fair rejoinder, for organized criminal violence, like political insurgencies and international wars, can produce forms of threat and harm that require urgent humanitarian protection. But there is also no logical necessity tying imperatives of humanitarian protection to NIAC qualifications; on the contrary, the distinctive dynamics of organized criminal violence require novel approaches to humanitarian protection. The old connection between humanitarian relief and IHL needs to be updated in light of new forms of violence. The ICRC’s concept of “situations of violence below the threshold of armed conflict” has great potential in this regard.<sup>68</sup> While we should be careful not to give the impression that being “below the threshold of armed conflict” makes a situation of violence less intense, threatening or in need of humanitarian action, organized criminal violence, particularly in Latin America, calls for new international legal understandings and conceptualizations of humanitarian work. Detaching humanitarian imperatives of protection from IHL may be a necessary step.

68 ICRC, “The ICRC’s Role in Situations of Violence below the Threshold of Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014.

# Can criminal organizations be non-State parties to armed conflict? – CORRIGENDUM

**Pablo Kalmanovitz**

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The above article was published with an error in the title. The full title should read *Can criminal organizations be non-State parties to armed conflict?*

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# Negotiating with organized crime groups: Questions of law, policy and imagination

**Mark Freeman<sup>\*</sup> and Mariana Casij Peña**

Mark Freeman is the founder and Executive Director of the Institute for Integrated Transitions (IFIT).

Email: [mfreeman@ifit-transitions.org](mailto:mfreeman@ifit-transitions.org).

Mariana Casij Peña is an Associate at the Institute for Integrated Transitions (IFIT).

Email: [mcasij@ifit-transitions.org](mailto:mcasij@ifit-transitions.org).

## Abstract

*Negotiations with organized crime groups occur more often than realized, and raise complex questions of ethics, practice and policy. Currently, law provides few incentives for States to choose the path of negotiation, and thus the political costs and moral hazards remain very high and a mano dura (“firm hand”) approach prevails. This paper examines some of the challenges faced by those who in good faith might initiate or participate in negotiations with such groups, offering an assessment of how those challenges can be mitigated and an inquiry, in particular, into how law and policy might be improved or reimaged to make such negotiation more feasible and effective in contexts of armed conflict or other situations of violence.*

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**Keywords:** organized crime groups, peace negotiation, armed conflicts, international humanitarian law, international law of peace negotiations.

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## Introduction

The option of peace negotiation with violent organized crime groups – whether intended to reduce or end widespread violence – is not a theoretical proposition. It is a reality of practice, and it is global.

Those who in good faith initiate or participate in such negotiations can nevertheless expect to face immense obstacles and risks. These include not only matters of personal safety, reputational integrity and psychological stress, but also legal uncertainty and malicious prosecution.

This paper examines key parameters of the challenge from the perspective of an imagined good-faith negotiator or facilitator, offering an overview of the most common risks and obstacles and an inquiry into how law and policy might be improved or reimagined to make the option of negotiation with organized crime groups – including in the context of armed conflicts – more feasible and effective. The article draws directly on prior original work published by the Institute for Integrated Transitions (IFIT),<sup>1</sup> including case studies on Bangladesh (pirates of the Sundarbans), Colombia (Pablo Escobar and the “Extraditables”), Denmark (motorcycle gang truce), Ecuador (gang legalization), El Salvador (*mara* truce), Honduras (*mara* truce), Haiti (bargaining with gangs), Italy (the *trattativa Stato-mafia*), Jamaica (August Town truce), Norway (Oslo police dialogue model), Pakistan (gang boss truce), South Africa (COVID-19 gang truce), Spain (gang legalization), Timor-Leste (martial arts groups negotiations) and Trinidad and Tobago (local and national gang negotiations).<sup>2</sup>

The paper begins with a discussion of relevant features of organized crime groups that must be considered during a negotiation process, and of the continued public preference for a *mano dura* (“firm hand”) approach in dealing with these groups. Next, it delves into questions of law and policy, underscoring not only a hidden bias in international law which complicates conflict prevention and resolution, but also organized crime’s ambiguous position under international law. The article concludes by considering certain realities of negotiating with organized crime groups and proposes a reimagined legal framework to facilitate potential good-faith efforts at dialogue with them.

1 See, in particular, Mark Freeman and Vanda Felbab-Brown, *Negotiating with Violent Criminal Groups: Lessons and Guidelines from Global Practice*, IFIT, Barcelona, March 2021, available at: <https://ifit-transitions.org/wp-content/uploads/2021/03/001-Negotiating-with-Violent-Criminal-Groups-v4.pdf> (all internet references were accessed in August 2022).

2 *Ibid.*, pp. 7–11.

## Organized crime groups

It is often imagined that organized crime groups all fall within a single narrow archetype, according to which their presumed overriding function is committing crimes in pursuit of financial or material benefits. While self-enrichment is a fundamental characteristic of organized crime groups, so too are issues such as identity, dignity and social exclusion. The latter are very relevant to the prospect of any serious negotiation effort with organized crime groups, especially in the context of the brutal violence they often perpetrate and the frequently weak institutional response.

The following section discusses characteristics of organized crime relevant to the prospect of negotiation, the threat that organized crime poses to national peace and security, and the obstacles that routinely prevent or complicate successful negotiations.

### Group features of relevance to negotiation possibilities

The assumption that organized crime exists solely for the pursuit of illicit self-enrichment is misguided. While the pursuit of self-enrichment is a central feature of these groups – one that is programmed into their corporate DNA – organized crime groups are, in fact, highly diverse in their origin, nature, size, structure, sophistication, aspirations and identity, as well as in the scope of their territorial and social control. Varying from martial arts gangs in Timor-Leste to the *maras* in El Salvador, and from pirates in Bangladesh to Mexican cartels or Italian mafia, the spectrum of organized crime is eclectic.

In some cases, criminal activity emerges through necessity and the anarchic void left by the State's absence or dysfunction. Yet, it can also arise as part of a quest for personal survival or protection or for the vindication of a forged group identity – such as the Latin Kings in Spain and Ecuador, and the biker gangs in Denmark and Norway. Moreover, research shows that organized crime groups can offer collective protection in communities rife with poverty, exclusion and stigmatization – including after processes of migration or mass deportation. The role played by organized crime groups in offering local communities various forms of security, in turn, produces complex forms of allegiance and social interaction that must inform any serious effort to negotiate reduced violence.

The familial nature, identity and sense of belonging of these types of organized crime groups can both assist and hinder negotiations with them. Families of the biker gangs of Denmark and Norway, the Italian mafia, and MS-13 and M-18 in El Salvador and Honduras all involve a certain amount of enmeshing of families, sometimes quite strong. For example, in the negotiations between the Oslo Police District and biker chapters in the city in Norway,<sup>3</sup> and

3 Interview with former advisor of Oslo Police Department directly involved in the design of the dialogue method with the motorcycle gangs, virtual, December 2020 (on file with the authors).

between the government and the *maras* in El Salvador,<sup>4</sup> wives and children were influential promoters and trustworthy back channels for negotiation efforts at key junctures. In Bangladesh, rough living conditions in the Sundarbans and the separation of pirates from their families was a key incentive for their engagement with the government.<sup>5</sup>

Identity may also manifest through internal codes, symbols and physical appearance styles. Repressive approaches aiming to undermine the association and the sense of self-identity of organized crime groups with these features tend to worsen the problem; this is a pattern present in many of the cases examined in IFIT's research. By contrast, in Ecuador, the government decided to legalize some gangs – namely, the Sacred Tribe Atahualpa of Ecuador (STAE), the Netas and the Masters of the Street – allowing them to keep their identity (including distinctive clothes) and social cohesion, as well as associate with each other in public, producing a significant decline in homicides.<sup>6</sup>

Inter-group violence is another matter. This can reach heightened levels in the face of threats to identity or familial honour, prestige grievances and *lex talionis* (the law of retaliation) – described by a mediator in the Gonzalez gang truce in Trinidad and Tobago as “issues of prior misdeeds”.<sup>7</sup> In 2012, 90% of deaths in El Salvador were reportedly attributed to inter-gang confrontation;<sup>8</sup> between 1994 and 1997, a war between motorcycle gangs in Denmark, Finland, Norway and Sweden resulted in the killing and wounding of many, using heavy military weapons such as explosives;<sup>9</sup> in Belize, inter-gang violence made it one of the most violent countries in terms of homicide rates in 2012;<sup>10</sup> and in Jamaica, war between rival gangs over territorial control involved entire populations being barricaded.<sup>11</sup> Such realities are challenging for any effort to negotiate peace or violence reduction, since the reality is that most organized crime groups operate within a larger criminal market.

When organized crime groups proliferate in weak and easily co-opted States where corruption is deep-seated and ubiquitous, they can often achieve surprising levels of social and territorial control, filling governance gaps and achieving competitive advantages *vis-à-vis* the State. In Bangladesh, for example, pirates have imposed taxes on local communities and rules on fishing and

4 Interview with diplomat directly involved in Salvadoran negotiations, virtual, September 2019 (on file with the authors).

5 Interview with former pirate, virtual, October 2020 (on file with the authors).

6 Interview with former gang leader of the Latin Kings involved in the negotiations with the government, virtual, September 2020 (on file with the authors).

7 Interview with researcher involved in the negotiations among the gangs in Gonzalez, virtual, October 2020 (on file with the authors).

8 Interview with ex-El Salvador official involved in the negotiations with the *maras*, virtual, October 2019 (on file with the authors).

9 RCMP Gazette, “Blood Spilled”, in Arthur Veno (ed.), *The Mammoth Book of Bikers*, The Running Press, Philadelphia, PA, 2007, position 7628 (Kindle edition).

10 Geneva Centre for Security Sector Governance, “Belize Country Profile”, Geneva, 2 February 2015, available at: <https://issat.dcaf.ch/Learn/Resource-Library2/Country-Profiles/Belize-Country-Profile>.

11 Amnesty International, “Jamaica: Poor Communities Held Hostage to Gang Violence and Government Neglect”, 25 March 2008, available at: [www.amnesty.org/en/latest/news/2008/03/jamaica-poor-communities-held-hostage-gang-violence-and-government-negle/](http://www.amnesty.org/en/latest/news/2008/03/jamaica-poor-communities-held-hostage-gang-violence-and-government-negle/).

trade;<sup>12</sup> in Jamaica, gangs have filled vacuums left by the State and controlled important aspects of the life of inner-city communities, like August Town, involving the collection of “extortion taxes”, allocation of jobs, distribution of food and the punishment of those who transgressed gang rules.<sup>13</sup> In contexts such as Haiti and Cape Town, South Africa, local and international non-governmental organizations are often obliged to negotiate their entry into certain neighbourhoods to deliver humanitarian aid.

Unlike conventional militant armed groups, organized crime groups do not have grand political aims. They do not seek to advance major social or political transformations based on high-minded ideals. Rather, the political component of organized crime groups’ activity typically amounts to manufacturing the right environment for their illicit activity – for example, by co-opting and colluding with institutional and political sectors to gain territorial control or dividends (as in the case of Latin American *maras* in Honduras and El Salvador) or by trying to shift governmental decisions and public debates in their favour (as in the case of powerful mafia and cartels).

This connection with politics is ripe for exploitation by politicians themselves, who may seek to gain the political dividends of clamping down hard on crime. The result is a vicious cycle that chips away at the perceived legitimacy of any prospect of negotiation – or even interaction – between the two worlds. Efforts are either scorned as vile pacts between self-serving politicians and criminals for mutual gain or offered as evidence that the State has been co-opted by an illicit force.

## The seriousness of the threat

Whether organized crime manifests itself as sporadic and opportunistic expressions of violence, or as an entrenched and sophisticated enterprise, the phenomenon poses a substantial threat to peace and security, often in ways that transcend national borders.

Locally, the violence perpetrated by organized crime groups can rip through the fabric of society, destroying national stability and social cohesion in its wake. In the 1990s, the Cosa Nostra targeted State officials and civilians in Italy through bombings and political campaign killings, terrorizing the whole country.<sup>14</sup> Meanwhile, in Colombia the brutal and debilitating violence of Pablo Escobar and his “Extraditables” inflicted similar agony. However, smaller and more local groups can also be devastating for communities. In Jamaica, communities have lived in fear of the actions of comparatively small gangs;<sup>15</sup>

12 Interview with local journalist involved in negotiations between the pirates in the Sundarbans and the Government of Bangladesh, virtual, September 2020 (on file with the authors).

13 Interview with former police official involved in the negotiations among gangs and government authorities in August Town, virtual, September 2020 (on file with the authors).

14 Organized Crime and Corruption Reporting Project, “Italian Trial Looks at Mafia–State Pact”, 14 May 2013, available at: [www.occrp.org/en/investigations/1955-italian-trial-looks-at-mafia-state-pact](http://www.occrp.org/en/investigations/1955-italian-trial-looks-at-mafia-state-pact).

15 Amnesty International, above note 11.

piracy in the Suburban region of Bangladesh had a devastating impact on local communities where kidnappings once were a weekly occurrence;<sup>16</sup> and in Pakistan, assassinations, shootouts and grenade attacks between rival gangs in Lyari led to thousands of civilian deaths at its peak.

External shocks, such as COVID-19 lockdowns, can make things worse. Ecuador, located on a strategically important drug trafficking route, saw killings nearly double and experienced the deadliest prison gang riots in its history with the onset of the pandemic.<sup>17</sup> Meanwhile, in Colombia, record levels of cocaine production arose, even on reduced acreage, as crime groups developed larger production sites and better extraction techniques.<sup>18</sup> In Mexico, regional and local elections saw organized crime make increased forays into public spaces,<sup>19</sup> and in places like South Africa, Afghanistan and Syria organized crime tightened its grip over certain territories by providing emergency aid to vulnerable communities and taking control of struggling licit businesses.<sup>20</sup>

The situation tends to be even more dire when organized crime interlinks with formal armed conflicts.<sup>21</sup> Wars provide a golden opportunity to entrench economic, political and social influence through corruption, rent-seeking, predation and criminal governance – ultimately blurring the nature of the conflict itself. On top of this, criminal agendas have a well-known habit of wrecking peace processes, especially at the implementation stage when defections by militants foreseeably arise and security vacuums – at least initially – grow rather than shrink. During efforts to negotiate a truce among the local *maras* in Honduras in 2013, transnational drug cartels reportedly attempted to prevent a truce because they feared it would be bad for their illegal business operations.<sup>22</sup>

16 Kate Lamb and Ali Ahsan, “The Bangladeshi Crab Farmers Battling Climate Crisis – and Pirates”, *The Guardian*, 18 October 2019, available at: [www.theguardian.com/environment/2019/oct/18/the-sundarbans-crab-farmers-battling-climate-crisis-and-pirates-bangladesh](http://www.theguardian.com/environment/2019/oct/18/the-sundarbans-crab-farmers-battling-climate-crisis-and-pirates-bangladesh).

17 El Universo, “Hasta el 30 de diciembre van 2.464 asesinatos en Ecuador; en 2020 fueron 1.362 casos”, 30 December 2021, available at: [www.eluniverso.com/noticias/seguridad/hasta-el-30-de-diciembre-van-2464-asesinatos-en-ecuador-en-2020-fueron-1362-casos-nota/](http://www.eluniverso.com/noticias/seguridad/hasta-el-30-de-diciembre-van-2464-asesinatos-en-ecuador-en-2020-fueron-1362-casos-nota/); and BBC, “Ecuador Prison Riot: New Fighting at Guayaquil Jail Kills 68”, 14 November 2021, available at: [www.bbc.com/news/world-latin-america-59276428](http://www.bbc.com/news/world-latin-america-59276428).

18 Juan Diego Posada and Seth Robbins, “Colombia’s Cocaine Keeps on Reaching New Heights: UNODC Report”, *InSight Crime*, 30 July 2021, available at: <https://insightcrime.org/noticias/colombia-cocaine-keeps-reaching-new-heights-unodc/>.

19 Eduardo Moncada and Gabriel Franco, “COVID-19 and Organized Crime: The Politics of Illicit Markets, States, and the Pandemic”, *Georgetown Journal of International Affairs*, 19 May 2021, available at: <https://gjia.georgetown.edu/2021/05/19/covid-19-and-organized-crime-the-politics-of-illicit-markets-states-and-the-pandemic/>.

20 United Nations Office on Drugs and Crime (UNODC), *The Impact of COVID-19 on Organized Crime*, July 2020, available at: [www.unodc.org/documents/data-and-analysis/covid/RB\\_COVID\\_organized\\_crime\\_july13\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/covid/RB_COVID_organized_crime_july13_web.pdf).

21 The 2004 report of the High-Level Panel on Threats, Challenges and Change highlighted the role of organized crime in fuelling violence and financing terrorists and militias. See the Report of the High-Level Panel on Threats, Challenges and Change on a More Secure World: Our Shared Responsibility, UN Doc. A/59/565, 2 December 2004, available at: [www.un.org/ruleoflaw/files/gaA.59.565\\_En.pdf](http://www.un.org/ruleoflaw/files/gaA.59.565_En.pdf).

22 Interview with diplomat directly involved in Honduran negotiations, virtual, September 2019 (on file with the authors).

Organized crime is also sometimes linked with processes of mass deportation and migration, as in the youth gangs from Ecuador and Spain, or the *maras* in El Salvador, Honduras and the United States.<sup>23</sup> More generally, globalization has had the perverse effect of enabling drug trafficking, human smuggling and illegal arms trading to thrive in ever more sophisticated and cooperative global markets. It is estimated that nearly 70% of illicit profits find their way into the global financial system.<sup>24</sup>

### The public preference for *mano dura*

Given the inherently illegal nature of organized crime groups, the public appetite and political bandwidth for constructively engaging or negotiating with them is understandably limited. This is not only because these groups sometimes perpetrate bewildering acts of violence, but also because people suspect that any laxness or compromise will only encourage further crime.

When the State apparatus is weak and steeped in distrust, public aversion to constructive engagement with criminal groups often increases. As described in the prior section, organized crime groups regularly manipulate political situations to their own advantage.

Under these circumstances, State-led negotiations are immediately assumed to reflect collusion, connivance or partisan pursuits that undermine rather than advance security and good governance. This is especially the case when public institutions, including law enforcement, are demonstrably infiltrated by members of the very same criminal groups with which the government is negotiating.

As a result, negotiations are usually seen as dirty deals, and negotiators accused of conspiracy or criminal association. Members of the Special Operative Forces of the Carabinieri who purportedly negotiated with the Cosa Nostra in a bid to quell mafia violence in Italy have been sentenced for charges of criminal corruption.<sup>25</sup> Similarly, in El Salvador, despite Organization of American States and Catholic Church participation, negotiators remain under investigation for conspiracy to commit crimes.

An additional and more subtle challenge is in the realm of the imagination. Officials and members of the public find it difficult to conceive of organized crime groups as reliable interlocutors in a negotiation, and are unclear how any talks could

23 Interview with scholar and lead mediator between the gangs and the Ayuntamiento, virtual, August 2021 (on file with the authors); Interview with scholar directly involved in the gang's legalization process, virtual, September 2020 (on file with the authors); Laila Abu Shihab, Melissa Velásquez Loaiza, Luis Alejandro Amaya and Juan Marra, "Guerra de Trump a las maras en EE.UU. pone en jaque a Centroamérica [Trump's War on US Gangs Puts Central America in Check (IFIT translation)]", *CNN en español*, 28 April 2017, available at: <https://cnnespanol.cnn.com/2017/04/28/guerra-de-trump-a-las-maras-en-ee-uu-pone-en-jaque-a-centroamerica/>.

24 UNODC, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes*, October 2011, p. 5, available at: [www.unodc.org/documents/data-and-analysis/Studies/Illicit\\_financial\\_flows\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf).

25 M. Freeman and V. Felbab-Brown, above note 1, p. 9.



create a pathway for them to transform institutionally and legalize operationally into a new form that society can peacefully coexist with.

States have therefore tended to adopt heavily repressive (or *mano dura*) policies, understanding this as a political imperative as well as a practical necessity. In perhaps the best-known example, iron-fist policies – involving the arrest of tens of thousands throughout the Northern Triangle of Central America – have turned prisons into universities for crime, hardened gang members and resulted in appalling conditions in prisons that are effectively controlled by gangs. Likewise, in cities in the United States struggling with organized crime – such as Los Angeles or Chicago – overly repressive approaches often had the effect of enhancing the identity of the gangs.<sup>26</sup>

## International law's relation to negotiating with organized crime groups

In asking how those who in good faith might initiate or participate in negotiations with organized crime groups might do so effectively, one must consider not only the harsh practical challenges and risks associated with such a bold undertaking but also the limitations of current international law.

This section examines the absence of a body of international law governing and guiding peace negotiations. It then assesses international law's overall approach to organized crime, including specific analysis regarding international humanitarian law (IHL).

### A hidden bias in international law

When it comes to conflict prevention and resolution, a critical gap in international law is holding back progress. While there is international law to regulate armed conflicts and war, no clear counterpart exists to encourage, support and sustain peace negotiations.

While peace and security are at the heart of the United Nations (UN) Charter, and conflict prevention and resolution are listed as central ideals for all States and peoples, the provisions encouraging the peaceful settlement of disputes are microscopic. They are limited to conflicts that are likely to endanger the maintenance of international peace and security and short on the kind of details that could make recourse to dialogue a more attractive option for governments.<sup>27</sup>

As things stand, out of the 560-plus multilateral treaties in force today – which cover everything from human rights to disarmament, trade, climate change, and much more – none sets out targeted incentives and benefits to

26 Interview with ex-government official of Los Angeles and a key actor during the Watts Truce, virtual, October 2019 (on file with the authors).

27 Charter of the United Nations of 26 June 1945 (entered into force 24 October 1945), 1 UNTS XVI, Chapter VI: Pacific Settlement of Disputes.

promote the use of negotiation to prevent and resolve non-international armed conflicts or other violent crises.

At first blush, one might think that this gap is deliberate, reflecting a reticence to codify or standardize the format of negotiations to protect much-needed flexibility during peace talks. However, there is no evidence of such intent; only evidence of the omission. The consequence is that confrontation – the less politically risky option for governments in the face of publicly vilified enemies – becomes the default choice.

IHL is a limited exception to this fact because it is the only area of international law that openly recognizes the inherent need of legal concessions and flexibility to end wars. Article 6(5) of Additional Protocol II to the Geneva Conventions (AP II) provides: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”<sup>28</sup>

Although the International Committee of the Red Cross (ICRC) has sought to narrow the interpretation of this rule in the age of the International Criminal Court, claiming that the provision was never meant to encompass war crimes, the historical record shows otherwise.<sup>29</sup> Moreover, the continued use of amnesty by States, together with their categorical reluctance to codify any international prohibition of amnesties, undermines any serious claim that an anti-amnesty norm has become settled law.<sup>30</sup>

But if Article 6(5) is a useful norm for peace-making, it is not nearly enough on its own to incentivize recourse to dialogue by conflict parties. Peace negotiations are notoriously hard to mount, involving large political risks and controversies for governments and a myriad of complex policy and design questions. To meet the challenge, only an upgraded international law could help de-risk the up-front political costs and complications for any government that announces it will be sitting down with an enemy that the population has come to fear or repudiate after years of violence.

However, negotiations are not only hard to start; they are also hard to sustain. They involve constant ups and downs, interruptions and crises, often over a period lasting many years. It is therefore important for any negotiation-incentivizing international law to give as much stability, support, and political and legal embedding as possible so that at every juncture, the process has a higher chance of advancing to the next stage. Currently, international law does no such thing.

28 Protocol Additional (II) 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 1978) (AP II), Art. 6(5).

29 Mark Freeman and Louise Mallinder, “Negotiating Amnesties, Peace and Justice: A New Path”, IFIT, 28 February 2022, available at: <https://ifit-transitions.org/commentaries/negotiating-amnesties-peace-and-justice-a-new-path/>.

30 *Ibid.*

Finally, if ultimately a peace agreement is reached – a rare but often transcendental moment – the agreement’s legality and legitimacy under international law cannot be left vague and uncertain. A UN Security Council (UNSC) resolution, though difficult to obtain, may be helpful in this regard.<sup>31</sup> However, the larger point is that the current lack of a streamlined certification process creates legal uncertainty and disincentivizes the recourse to peaceful conflict resolution mechanisms.<sup>32</sup>

The good news is that all of this is fixable and already the object of a global initiative to incentivize conflict prevention and resolution through a purpose-built treaty.<sup>33</sup> Where existing law is unclear, the new international law treaty aims to provide greater clarity (for example, around recurrent questions such as the use of conditional amnesties). Where existing law lacks an institutional framework to ensure structured progress efforts to negotiate the prevention or resolution of non-international armed conflicts, the new treaty seeks to provide one (for example, by creating technical support mechanisms and State obligations of preparedness, education and training). Also, where existing law is absent, the new treaty aims to create modern definitions, norms and procedures that match the changed realities of conflict and the needs of peace-making in the twenty-first century.

## International law and organized crime

According to research by the Global Initiative Against Transnational Organized Crime, out of the 1113 UNSC resolutions passed between 2000 and 2017, 387 of them (34.8%) either referenced or discussed organized crime in relation to armed conflict settings.<sup>34</sup> By 2021, this climbed to 49% of all resolutions. Yet, this reality is only weakly reflected in international law.

Of the multitude of global and regional legal norms *vis-à-vis* the phenomenon of organized crime, the most significant is the UN Convention Against Transnational Organized Crime (UNOTC).<sup>35</sup> States that ratify the UNOTC commit to several measures to fight transnational organized crime,

31 Article 39, in accordance with Article 25 of the UN Charter, confers upon the UNSC the power to make recommendations and adopt binding measures to particular situations or disputes for the maintenance of international peace and security. See, for example, UNSC Resolution 2307, 13 September 2016, through which the UNSC endorsed the Colombian peace agreement. Although this resolution was not binding for all UN Member States, the endorsement lent legitimacy to the Colombian peace process at the international level.

32 By way of example, the transitional justice system included in the 2016 peace agreement between the government of Colombia and the FARC (Fuerzas Armadas Revolucionarias de Colombia; “Revolutionary Armed Forces of Colombia”) is being reviewed by the Inter-American Court of Human Rights. Any decision affecting the substance of the agreement might have difficult implications for the peace agreement in the country.

33 See IFIT, The Peace Treaty Initiative, available at: <https://ifit-transitions.org/peace-treaty-initiative/>.

34 Global Initiative Against Transnational Organized Crime, “From Resolutions to Responses: Organized Crime and the UN Security Council”, 18 June 2019, available at: <https://globalinitiative.net/analysis/toc-unscl/>.

35 United Nations Convention Against Transnational Organized Crime of 15 November 2000, UN General Assembly (UNGA) Resolution 55/25 (entered into force 29 September 2003).

including the criminalization of participation, money laundering, corruption and obstruction of justice by such groups; the adoption of new frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance and cooperation.<sup>36</sup> The additional protocols to the UNOTC cover obligations such as the prevention and combat of trafficking in persons;<sup>37</sup> and the prevention, combat and eradication of the illicit manufacturing and trafficking of firearms, their parts and components and ammunition.<sup>38</sup>

Yet, from the vantage point of violence prevention, the UNOTC and its protocols appear one-dimensional. They provide States with a single, often counterproductive option: confrontation and punishment. This leaves very little room for policymakers to think creatively, making the already bedevilling challenge of overcoming organized crime even worse.

By contrast, IHL is more nuanced (as already noted above). According to Article 1(1) of AP II, IHL applies in all situations of armed conflict where a group must demonstrate structural similarities to that of conventional armed forces. In particular, there must be a reasonable degree of coordination, operational coherence and ability “to carry out sustained and concerted military operations”.<sup>39</sup>

Importantly, through jurisprudence there are more flexible definitions of what armed conflict is. The broadest is found in *Prosecutor v. Tadić*, which states that armed conflicts occur “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”.<sup>40</sup> Later decisions (i.e. *Prosecutor v. Haradinaj et al.* and *Prosecutor v. Limaj et al.*)<sup>41</sup> outlined a more detailed definition of armed conflict. Together, these developed a set of factors related to the intensity of violence and the organizational complexity of the armed groups required to establish the existence of an armed conflict.

The implication of all this is that organized crime groups fall under the scope of IHL when they produce violence that reaches a level of intensity and organizational complexity that creates a situation of armed conflict. While any such match is likely to be the exception rather than the rule, the laws of war – like all other bodies of law – must be dynamic and adaptable to new realities.

36 *Ibid.*, Arts 5, 6, 8, 14, 16, 18, 23, 27 and 29.

37 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 15 November 2000, Supplementing the United Nations Convention Against Transnational Organized Crime, UNGA Resolution 55/25 (entered into force 25 December 2003).

38 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition of 31 May 2001, UNGA Resolution 55/255 (entered into force 3 July 2005).

39 AP II, above note 28, Art. 1(1).

40 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić a/k/a “DULE”*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

41 ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84; ICTY, *The Prosecutor v. Fatmir Limaj, Isak Musliu and Haradin Bala*, Case No. IT-03-66.

It is also noteworthy that the ICRC has been widening its field of action to account for atypical situations of violence which would otherwise fall below the threshold of armed conflict (including those generated by organized crime and terrorism). These “other situations of violence” are characterized by acts of a “definite degree of violence”, “perpetrated collectively” and involving “significant humanitarian consequences”.<sup>42</sup> The ICRC justifies this departure from the traditional scope of situations governed by IHL on the basis of Article 5(3) of the Statutes of the International Red Cross and Red Crescent Movement. It is now considered a component of customary IHL.<sup>43</sup>

## The realities of negotiating with organized crime groups

We have already described some of the features of organized crime groups, as well as some facts of international law and policy related to the prospect of negotiating with them. We now consider some key lessons from actual negotiations with such groups, whether they were arranged or mediated by the church, community leaders, academics, State agencies, the international community or even organized crime leaders themselves.

First, the brutal violence frequently deployed by organized crime groups, as well as the fact that public institutions in fragile States are so often infiltrated and corrupted by them, means that any attempt to negotiate comes with great moral hazard. Because of this, talks with organized crime groups are often held in secret, which allows them – to some extent – to bypass spoilers and enable a more protected space for confidence-building between the parties. At the same time, secrecy is operationally complex, tends to exclude important actors from direct participation, and produces outcomes that are more likely to be questioned if they ever become public.

A second point about negotiating violence-reduction pacts with organized crime groups is that those who, in good faith – and at great personal and/or institutional risk – initiate or participate in such talks deserve to have the best chance possible in their efforts. The question of ensuring the legal and physical safety of government or third-party representatives who mediate is therefore central. The defence attorney who successfully negotiated the truce between motorcycle gangs in Denmark in the 1990s sought to protect himself by requiring up-front government buy-in for his efforts and arranging for a televised national

42 ICRC, “The International Committee of the Red Cross’s (ICRC’s) Role in Situations of Violence Below the Threshold of Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, available at: <https://international-review.icrc.org/sites/default/files/irrc-893-policy.pdf>.

43 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Oxford, 2003, p. 355, in Miriam Bradley, “From Armed Conflict to Urban Violence: Transformations in the International Committee of the Red Cross, International Humanitarianism, and the Laws of War”, *European Journal of International Relations*, Vol. 26, No. 4, 2020, p. 1066, available at: <https://journals.sagepub.com/doi/10.1177/1354066120908637>.

broadcast once an agreement was eventually reached – actions that helped but nevertheless proved insufficient to protect him. The experience is commonplace.

A third issue concerns the scope and sustainability of any negotiation effort. Since a key premise embedded in the archetype of organized crime is the absence of political aims, comprehensive agreements are seldom pursued. Rather, limited-scope agreements are the norm. However, as poverty and exclusion are often drivers of organized crime, and governance is often weak in fragile States, even limited-scope agreements are hard to enforce. Likewise, the implementation of any agreed social measures can prove infeasible, leading to the collapse of the deal and an uptick in violence: a tough but foreseeable risk.

Fourth, as previously noted, organized crime groups exist within a criminal market in which they typically carry out as much violence against competitor groups as they do against State actors or society. As such, engaging all the relevant parties and finding valid interlocutors are not easy tasks. In Gonzalez, a neighbourhood in Trinidad and Tobago, a short-lived truce reached between three out of the seven local gangs was interrupted after the killing of two gang members by non-participating gangs. Inter-gang warfare promptly resumed.<sup>44</sup>

Naturally, adequate conditions for negotiation depend on the existence of a credible threat, without which there is neither the capacity to deter violence nor bargaining power in any negotiation. Yet, sticks (deterrents) are insufficient on their own; carrots (incentives) are also needed. Those incentives must be tailored to the target group's origins, identity, codes, structure, goals and strategies – just as needs to be done when negotiating with conventional guerrillas. These variables, in turn, are closely related to what the groups might expect to attain in the negotiation itself, which might include recognition of their identity; legalization of their right to association; safe passage through rival turf; temporary ceasefire; social inclusion measures; better prison conditions; or legal leniency measures, such as amnesty or a halt to extradition.<sup>45</sup>

## Reimagining law and policy to enable good-faith negotiations

International law can and should serve as a powerful tool for de-risking the predictable political costs and complications of negotiations. It should be gearing conflict actors toward dialogue opportunities; providing effective guidance on vital substantive and procedural questions; encouraging governments to bolster their technical readiness for negotiation and mediation; protecting participants in the talks; and stabilizing and legitimating agreements reached.

We are already in an era of new and growing kinds of armed conflict: climate wars, cyber-wars, gang wars, and more. New armed groups keep springing up and morphing in ways that endanger civilians in every region of the

44 M. Freeman and V. Felbab-Brown, above note 1, p. 11.

45 *Ibid.*, p. 18.

world. The fighting no longer occurs on a clearly marked battlefield with a clear separation between combatants and civilians.

As such, we need to be better prepared to face the new realities of armed conflict and violence with the most proven tool that history has provided: the tool of negotiation. It deserves all the protection and incentives that international law can offer. In that regard, the Geneva Conventions and their Additional Protocols, as well as the UN Charter, are best understood as foundations to build upon, not another turf to protect. A new international law of peace negotiation, flexible in its understanding of the complex forms that organized violence can take, can offer just that.



# Targeting drug lords: Challenges to IHL between *lege lata* and *lege ferenda*

Chiara Redaelli<sup>1,2\*</sup> and Carlos Arévalo<sup>3\*\*</sup>

<sup>1</sup>Research Fellow at the Geneva Academy of International Humanitarian and Law and Human Rights, Geneva, Switzerland

<sup>2</sup>Adjunct Professor at the Catholic University of Lille, Lille, France

<sup>3</sup>Professor and Dean of the Law and Political Sciences School of Universidad de La Sabana, Colombia

\*Email: [chiara.redaelli@graduateinstitute.ch](mailto:chiara.redaelli@graduateinstitute.ch)

\*\*Email: [carlos.arevalo1@unisabana.edu.co](mailto:carlos.arevalo1@unisabana.edu.co)

## Abstract

*This article aims to clarify how international humanitarian law (IHL) rules on targeting apply when drug cartels are party to a non-international armed conflict. The question of distinguishing between a cartel's armed forces and the rest of the cartel members is a pertinent matter. It is crucial to avoid considering every drug dealer a legitimate target, just as we do not consider that everyone working for the government is a legitimate target. Nevertheless, it is unclear at what point a member of a cartel would change from being a criminal to being a member of the armed wing of the cartel, hence becoming a legitimate target. The present article will suggest a teleological approach to solving this conundrum.*

**Keywords:** non-international armed conflicts, targeting, drug cartels, armed non-State actors, international humanitarian law.

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## Introduction

Over the past decades, drug cartels have posed a serious threat to public security: some of the most lethal episodes of armed violence take place in countries where these criminal organizations operate. Generally speaking, these groups prefer to work in a clandestine way and to avoid direct confrontations with State forces. Nonetheless, they do sometimes engage in armed violence against governmental armed forces, and in specific contexts, such as Colombia or Mexico, there have been arguments that the violence meets the threshold of a non-international armed conflict (NIAC), provided that the criteria of intensity and organization are fulfilled.

This article aims at clarifying how international humanitarian law (IHL) rules on targeting apply when drug cartels are party to a NIAC. A non-State party to an armed conflict usually comprises an armed wing and other supportive members of the civilian population, such as political or humanitarian wings. Only fighting forces of the non-State party qualify as an armed group under IHL, and accordingly, only the members of the armed wing are legitimate targets. It is therefore of paramount importance to determine whether individuals are members of the armed wing, and hence legitimate targets, or whether they engage in non-military functions within the group party to the NIAC. In practice this determination is challenging, as memberships in armed groups tend to be flexible in nature.

This conundrum is particularly problematic with regard to drug cartels. How can we distinguish the parties to the conflict – i.e., the cartel’s armed forces – from the rest of the cartel members? It is crucial to avoid considering every drug dealer a legitimate target, just as we do not consider that everyone working for the government is a legitimate target. Nevertheless, it is unclear at what point a member of a cartel would shift from being a criminal to being a member of the armed wing of the criminal organization. In fact, it is even dubious whether cartels have military wings in the first place, or if any armed member of the cartel could potentially be considered to have a continuous combat function. If it is established that the cartel has a military wing, could members of this wing be considered legitimate targets even if they are not engaging in armed confrontations?

In order to address these and related conundrums, this article is structured as follow. Firstly, it will focus on the challenges of “criminal” NIACs. Notably, it will analyze whether the cartels are prevented from being party to a NIAC, inasmuch as they are economic actors. As is well known, a NIAC is deemed to exist “whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>1</sup> However, some scholars posit that a further criterion exists: the motivations of the armed groups involved.

1 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

Does this mean that criminal organizations can never become party to a NIAC due to the reasons that motivate their fighting? Furthermore, this article will consider the fact that several States which engage in intense armed violence against drug cartels refuse to recognize that the situation amounts to a NIAC, while deploying their armies to fight against these criminal organizations. This leads to confusion as to the applicable legal framework, and this confusion has the potential to jeopardize the protection of the civilian population. The situation in Mexico will be analyzed to exemplify these challenges.

Secondly, the article will focus on the question of targeting of particular members of drug cartels. In practice, determining whether an individual is a member of the armed wing of a group is extremely challenging, as membership in the majority of armed groups tends to be flexible in nature.<sup>2</sup> The International Committee of the Red Cross (ICRC), in its *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance), has suggested that a member of a non-State party is a legitimate target if they have a continuous combat function – i.e., if they have a “lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict”. In the authors’ view, the ICRC is correct in this regard: it is necessary to distinguish between the party to the conflict (the drug cartels) and their armed forces. The article will investigate whether such distinction is possible with regard to drug cartels and will suggest possible solutions for applying IHL rules on targeting to criminal organizations that are party to NIACs.

## **“Criminal” non-international armed conflicts**

When criminal organizations operate in a country and engage in armed violence against State forces, the question emerges as to whether the situation amounts to a NIAC. This question is not purely theoretical, as its answer determines the applicable legal framework. This part of the article will investigate in what circumstances drug cartels can be considered organized armed groups under IHL, and therefore possibly parties to a NIAC. Furthermore, it will focus on the militarization of the so-called “war on drugs”.

### **Drug cartels: Criminal organizations or organized armed groups?**

Criminal organizations are primarily economic actors. Unlike traditional rebel groups, they do not aim to become the new government; instead, their primary objective is to run their business and make a profit. Armed violence often results from this goal, and it can reach extremely high levels. On the one hand, armed confrontations often take place between cartels that are fighting to gain control of

<sup>2</sup> Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretative Guidance), p. 33.

certain areas or specific markets; on the other, the government might engage in armed actions to counter criminal activities or to regain control of part of a State's territory.<sup>3</sup> Nevertheless, criminal organizations usually have no interest in confronting the government, unless it is necessary to pursue their business. In light of these peculiarities, the question that arises is whether criminal organizations can be considered organized armed groups and thus become party to a NIAC under IHL.

A number of scholars posit that only organized armed groups that pursue political motives can be a party to a NIAC, provided that they meet the other criteria required by IHL, namely level of organization and intensity of violence. According to this interpretation, only groups aiming at achieving political objectives can be a party to a NIAC. Criminal organizations flourish when the government is weak, and their illicit activities *de facto* challenge the State's control. However, the latter is not the main purpose of their activities, but only a collateral effect.<sup>4</sup> Accordingly, some scholars assert that the economic purposes of criminal organizations would prevent them from being party to a NIAC. These scholars provide three main arguments to support their claims.<sup>5</sup>

Firstly, a number of authors have pointed out that the motives of the cartels should be taken into consideration "for policy reasons".<sup>6</sup> In the words of Hauck and Peterke:

While the qualification as an organized armed group is based on objective criteria in order to avoid the application of subjective elements such as the group's motivation, the law is not completely "blind" in that respect. ... [T]he organizational criterion, by demanding an objectively verifiable military strategy or capacity to carry out military operations, rules out entities that rely exclusively on terrorist, guerrilla, and other perfidious methods.<sup>7</sup>

Therefore, the argument goes, the UN Convention against Transnational Organized Crime (UNTOC), rather than IHL, seems a better fit for addressing the challenges posed by criminal organizations.<sup>8</sup> To be sure, several conventions aimed at tackling drug trafficking have been adopted over the last century, and the UNTOC undoubtedly marked a positive development in the fight against organized crime.

3 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 11.

4 Esteban Arratia, "¿Existe un conflicto armado interno en México según el derecho internacional? Los Convenios de Ginebra y su aplicación en la guerra contra el narcotráfico (2006–2012)", *Revista de Estudios en Seguridad Internacional*, Vol. 2, No. 1, 2015, p. 28; Héctor Carreón and Edgar Téllez, "¿Existe un conflicto armado interno en México? Análisis a la luz del Derecho Penal Internacional", *Lex*, Vol. 2, No. 10, 2012, p. 28.

5 See e.g. Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Cambridge University Press, Cambridge, 2015, p. 186; Cecilie Hellestveit, *Tribes, Thugs, Terrorists and the Law: Can Non-Conventional Armed Violence Be Regulated?*, NOREF–Norwegian Peacebuilding Resource Centre, May 2015, p. 8; Pierre Hauck and Sven Peterke, "Organized Crime and Gang Violence in National and International Law", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 5; Andrea Nill Sánchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, 2013, pp. 502–503.

6 E. Crawford, above note 5, p. 186.

7 P. Hauck and S. Peterke, above note 5, p. 433.

8 E. Crawford, above note 5, p. 186.

Nevertheless, the fact that specific conventions address transnational organized crimes does not necessarily exclude criminal organizations from the possibility of also becoming party to a NIAC, should they meet the threshold required by IHL.<sup>9</sup>

Secondly, it has been highlighted that it could even be counterproductive to apply IHL to violence between the government and cartels. As explained by Crawford:

One would also have to question whether IHL would aid the parties involved. Designating the violence in Mexico as an armed conflict would allow the Mexican authorities to employ the armed forces in response to the cartels; however, the Mexican armed forces are already being employed against the cartels, if only in a law enforcement capacity.<sup>10</sup>

One of the main challenges in this regard would be the principle of proportionality under IHL, which prohibits military attacks that “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>11</sup> In other words, during armed conflicts, collateral damage is lawful as long as it is proportionate to the military advantage anticipated. Crawford concludes:

It seems unlikely that the Mexican government would publicly embrace such an approach, that the loss of dozens, if not hundreds of civilian lives would be acceptable if it meant destroying a major cartel production facility.<sup>12</sup>

However, this conclusion is questionable for two reasons. On the one hand, it is at least doubtful that killing “hundreds of civilians” as collateral damage during a military operation targeting a “major cartel production facility” would be lawful under IHL. On the other, the application of the law governing armed conflicts does not depend on whether a State is willing to apply it or acknowledges the existence of an armed conflict: IHL is applicable as soon as there is an armed conflict, as defined by the relevant treaty and customary rules.

Lastly, part of the scholarship has claimed that allowing criminal organizations to be parties to NIACs would grant them legitimacy and increase their standing, while “[t]his is beyond what international law concedes”.<sup>13</sup> As explained by Arratia:

9 Chiara Redaelli, “Engaging with Drug Lords: Protecting Civilians in Colombia, Mexico, and Honduras”, in Annysa Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford, 2015, pp. 513–514.

10 E. Crawford, above note 5, p. 189.

11 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 51(5)(b); 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 14, available at: <https://ihl-databases.icrc.org/customaryihl/eng/docs/v1> (all internet references were accessed in January 2023).

12 E. Crawford, above note 5, p. 189.

13 C. Hellestveit, above note 5, p. 8.

Misdiagnosing the Aztec situation as a non-international armed conflict has the disadvantage of granting implicit political legitimacy to the cartels, as they would potentially be considered as “belligerents” vis-à-vis the government, making them a *de facto* power.<sup>14</sup>

Interestingly, this argument has been raised by States and scholars alike against the classification of a situation as a NIAC even when the non-State actors involved pursue political motives.<sup>15</sup> Nevertheless, from a legal point of view, “the application of parts or all of IHL never confers any legal status upon an armed group”.<sup>16</sup> Indeed, it is widely accepted that applying IHL to a situation of violence involving non-State actors neither changes their status nor grants them legitimacy. There is no reason to believe that this principle would not be applicable to certain non-State actors due to their reasons for fighting, especially if we consider that all opposition groups are substantially unlawful under domestic law.<sup>17</sup>

It should also be noted that the inclusion of political motives as a necessary element for classifying a situation of violence as a NIAC does not have a legal basis under the current legal framework.<sup>18</sup> This has been confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Limaj* case, where the Tribunal clarified that

[t]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties[. T]he purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.<sup>19</sup>

Furthermore, the UN Security Council has acknowledged the possibility that IHL applies to groups which do not pursue political objectives. In its Resolution 1851 of 2008, which addresses the issue of piracy in Somalia, the Security Council authorizes States and regional organizations

to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea ... provided,

14 E. Arratia, above note 4, p. 32 (authors’ translation). The “Aztec situation” refers to the violence context experienced in Mexico during President Calderon’s six-year term.

15 United Kingdom, *Manual of the Law of Armed Conflict*, 2004, § 15.3.1; Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 2008, § 1202.

16 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, p. 31.

17 Jean-Marie Henckaerts et al., “Article 3: Conflicts not of an International Character”, in 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 (ICRC Commentary on GC I), para. 865. See also the opinion of the Constitutional Court of Colombia on the conformity of Additional Protocol II: Constitutional Case No. C-225/95, Judgment, 1995, para. 15.

18 Dapo Akande, “International Law and the Classification of Conflicts”, in Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 52; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 209, 546–549; ICRC Commentary on GC I, above note 17, paras 449–450.

19 ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170. See also 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. 78.

however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.<sup>20</sup>

Maintaining that only non-State actors which pursue political objectives can become party to a NIAC is not legally sound, and it seems to raise more questions than it answers. Indeed, this approach would open the possibility of other “motives-based reasons” to deny the existence of a NIAC.<sup>21</sup> Furthermore, the objectives pursued by a non-State actor may vary over time. There might be several reasons – both political and economic – and they might not always be discernible.<sup>22</sup> Consequently, the distinction between criminal and political organizations might not always be clear-cut.<sup>23</sup>

The situation in Colombia can exemplify this point. Colombia has been engaging for decades in a number of NIACs against different non-State actors.<sup>24</sup> The Revolutionary Armed Forces of Colombia – People’s Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP or FARC) and the National Liberation Army (Ejército de Liberación Nacional, ELN) can be considered “traditional” opposition groups pursuing political objectives, but their relationship with criminal organizations in general and the drug market in particular differs substantially. For years, the ELN has been opposed to any involvement in drug cultivation and trafficking, an approach that has enhanced its close ties with the local community.<sup>25</sup> Due to a steady military decline and subsequent economic needs, however, the group has started opening itself to the drug market in order to fund its fight against the government, while always being careful in maintaining close links with the local population.<sup>26</sup>

By contrast, in the 1980s the FARC realized that criminal activities could be an invaluable source of income to finance its military struggle. Accordingly, it started controlling coca fields and then expanded its business from cultivation to trafficking,<sup>27</sup> to the point that it was defined as one of the most powerful cartels in Colombia “in terms of numbers, military capability, territorial control and

20 UNSC Res. 1851, 16 December 2008. See also D. Akande, above note 18, p. 52; Robin Geiß, “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, pp. 139–140.

21 ICRC, above note 3, p. 11.

22 Ana Gabriela Rojo Fierro, “La guerra contra el narcotráfico en México: ¿Un conflicto armado no internacional no reconocido?”, *Foro Internacional*, Vol. 60, No. 4, 2020, p. 1450.

23 ICRC, above note 3, p. 11.

24 According to the ICRC, there are currently six NIACs in Colombia: Colombian government v. ELN; Colombian government v. Autodefensas Gaitanistas de Colombia; Colombian government v. former members of FARC-EP not currently covered by the Peace Agreement; ELN v. Autodefensas Gaitanistas de Colombia; former members of FARC-EP not currently covered by the Peace Agreement v. Segunda Marquetalia; former members of FARC-EP not currently covered by the Peace Agreement v. Comandos de la Frontera – EB. ICRC, *Humanitarian Challenges 2022: Colombia*, Bogotá, 2022.

25 International Crisis Group (ICG), *Left in the Cold? The ELN and Colombia’s Peace Talks*, Latin America Report No. 51, 26 February 2014, p. i.

26 C. Redaelli, above note 9, p. 517.

27 ICG, *Colombia: Peace at Last?*, Latin America Report No. 45, 25 September 2012, p. 11.



earnings from the drug trade”.<sup>28</sup> Moreover, before the signing of the 2016 Peace Agreement, the FARC concluded alliances with a number of Colombian criminal organizations as well as Mexican drug cartels.<sup>29</sup> At times, the relationship between the FARC and certain BACRIMs (*bandas criminales*, criminal organizations) has been so close that the acronym FARCRIM was coined.<sup>30</sup> At other times, however, relationships have turned tense, and the groups have engaged in armed confrontations with each other. In light of the FARC’s close relationship with the drug market, it might be possible to question whether it was a purely political armed group. It is therefore clear that the line between criminal organizations and armed non-State actors pursuing political objectives is often blurred.<sup>31</sup>

Another clear example that emerges from the Colombian context is the coalition of paramilitary groups known as the United Self-Defences of Colombia (Autodefensas Unidas de Colombia, AUC), which demobilized in 2006. Although being recognized as a right-wing-oriented group, they did not express any political ideology or discourse; their primary objective was to eliminate guerrilla groups.<sup>32</sup> The AUC’s non-political character was judicially recognized by national courts, which highlighted the fact that this group could not be regarded as being responsible for political crimes, precisely because of their lack of political motives.<sup>33</sup> Since its inception, the AUC has always had strong connections with drug trafficking, and consequently, its demobilization resulted in the birth of a number of criminal organizations. The most prominent example is the group called Los Urabeños, also known as Autodefensas Gaitanistas de Colombia, which is primarily dedicated to transnational drug trafficking, does not pursue political motives,<sup>34</sup> and is currently party to a NIAC against the Colombian government.<sup>35</sup>

28 Jeremy McDermott, “The FARC, the Peace Process and the Potential Criminalisation of the Guerrillas”, *InSight Crime*, May 2013, p. 18.

29 ICG, “Improving Security Policy in Colombia”, Latin America Briefing No. 23, Bogotá and Brussels, 29 June 2010, pp. 9–10.

30 Jeremy McDermott, “The Future of the BACRIM and Post-Conflict Colombia”, *InSight Crime*, 2 May 2014, p. 2.

31 David Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Versoix, 2000, p. 5; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 112; S. Vité, above note 19, p. 78.

32 See e.g. Marcela Barón-Soto and Alejandro Gómez-Velásquez, “New Drug Trafficking Armed Groups in Colombia and the Applicability of International Humanitarian Law”, *EAFIT Journal of International Law*, Vol. 6, No. 1, 2014, p. 54.

33 Corte Suprema de Justicia, Sala de Casación Penal, Proceso 291213, 20 February 2008, Magistrado Ponente: Yesid Ramírez Bastidas; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 28629, 24 April 2008, Magistrado Ponente: Jorge Luis Quintero Milanés; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 31421, 1 April 2009, Magistrado Ponente: Yesid Ramírez Bastidas; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 34958, 21 September 2010, Magistrado Ponente: Sigifredo Espinosa Pérez; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 34482, 24 November 2010, Magistrado Ponente: María del Rosario González de Lemos; Corte Suprema de Justicia, Sala de Casación Penal, Proceso 36965, 27 July 2011, Magistrado Ponente: José Luis Barceló Camacho.

34 “Urabeños – Gulf Clan”, *InSight Crime*, 24 October 2021, available at: <https://insightcrime.org/colombia-organized-crime-news/urabenos-profile/>.

35 ICRC, above note 24, p. 34.

In light of the foregoing, determining whether an armed non-State actor can be a party to a NIAC depending on its motivations for fighting could turn into a challenging – if not impossible – task. Accordingly, drug cartels can be party to a NIAC, should they meet the organization and intensity requirements. However, this is not the end of the story: it is also crucial to analyze how to identify the relevant legal framework in specific circumstances. The next section will be devoted to this complex question.

## Militarizing the war on drugs

When criminal organizations in general and drug cartels in particular are parties to a NIAC, the relevant legal framework becomes IHL, as opposed to international human rights law. As is well known, the shift from a law enforcement paradigm to an armed conflict one has crucial consequences on the lawfulness of using force against members of armed non-State groups. Under the law enforcement framework, the lawful use of force, with specific regard to firearms, against individuals is limited to cases of

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.<sup>36</sup>

Furthermore, law enforcement officials shall

give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.<sup>37</sup>

On the other hand, IHL applicable to NIACs rests on the distinction between civilians, members of State forces, and non-State fighters, whereby only the latter two groups are legitimate targets. A number of scholars have suggested that the use of force against legitimate targets would be lawful only when capturing them is not possible. The rationale underpinning this position rests on the principle of military necessity as a restriction on all violence<sup>38</sup> and the prohibition against treacherous killing.<sup>39</sup> According to this view, killing an enemy when it would be possible to capture them (without causing additional risks for the operating

36 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, Art. 9.

37 *Ibid.*, Art. 10.

38 Jean Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff, Dordrecht, 1985, pp. 75–76.

39 See e.g. United Kingdom, *Manual on Military Law*, Part III: *The Law of War on Land*, UK War Office, London, 1958, § 115.

forces) would “defy the basic notions of humanity”.<sup>40</sup> Nevertheless, the majoritarian view seems to support the contrary – namely, that killing the adversary is lawful even when capture would be a feasible option.<sup>41</sup> For instance, it has been clarified that

[i]n evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and is not restricted to considering only the demands of the specific situation. ... For example, the law of war does not require that enemy combatants be warned before being made the object of attack, nor does the law of war require that enemy combatants be given an opportunity to surrender before being made the object of attack.<sup>42</sup>

It is therefore clear that applying IHL or international human rights law has substantial consequences for the parties involved in episodes of violence. While the automatic applicability of IHL to situations that amount to armed conflict is unquestionable, scholars have suggested that the application of IHL to the so-called war on drugs would increase the risk of killing civilians or other non-targetable persons. Kerr, for instance, asserts:

Applying the laws of war to the Mexican drug war, the Mexican government could openly kill a cartel member without any attempt to subdue him, arrest him, or question him. Nor would the government actor have to wait for the cartel member to present an immediate threat before using lethal force.<sup>43</sup>

Similar concerns have been expressed by other authors.<sup>44</sup> Notably, they posit that applying IHL to the war on drugs would mean that any member of a cartel could become a legitimate target. In other words, “[i]t would simply be absurd to suggest that police could lawfully employ deadly force against suspected criminals based solely on a determination [that] an individual was a member of a criminal group”.<sup>45</sup> The situation is further complicated by the fact that often, States deploy the army to fight against criminal organizations in general and drug cartels in particular. One clear example is the militarization of the war on drugs in Mexico.

In December 2006, Felipe Calderón was elected as the president of Mexico, and almost immediately, he launched the so-called “war on drugs”. Since the Mexican government has always claimed that it is not engaging in a NIAC

40 ICRC Interpretative Guidance, above note 2, p. 82.

41 Marco Sassòli and Laura M. Olson, “The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 606; Louise Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 902; Vincent-Joel Proulx, “If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists”, *Hastings Law Journal*, Vol. 56, No. 5, 2005, pp. 882–883.

42 US Department of Defense, *Law of War Manual*, Office of General Counsel, June 2015, § 2.2.3.1.

43 Callin Kerr, “Mexico’s Drug War: Is It Really a War?”, *South Texas Law Review*, Vol. 54, 2012, p. 218.

44 See e.g. P. Hauck and S. Peterke, above note 5, p. 431; E. Crawford, above note 5, p. 189.

45 Geoffrey Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 77.

against drug cartels, the expression seems more political rhetoric than reality. Nevertheless, from the beginning of his mandate, Calderón initiated a militarization of the war on drugs, which was then continued by subsequent presidents. Notably, the day after being sworn in, he announced the deployment of thousands of federal troops to counter drug cartels in Michoacán.<sup>46</sup> Two years later, the Calderón administration started “Operación Chihuahua” as a reaction to the ongoing intense violence between cartels operating in Ciudad Juárez. By 2009, the city was completely militarized.<sup>47</sup>

[T]he government deployed 4,000 troops, 180 vehicles, three Hercules C-130 cargo planes and a Boeing 707 throughout the State of Chihuahua, and provided military training to 1,182 municipal police officers. In February 2009, the federal government sent another 5,000 soldiers to take control of the Ciudad Juarez Police Department.<sup>48</sup>

The following presidents continued the militarization of the war on drugs started by Calderón. Enrique Peña Nieto, who took office in December 2012, created the Gendarmería Nacional, a paramilitary group that was deployed in the rural areas most affected by violence.<sup>49</sup> Later, President Andrés Manuel López Obrador, who was elected on 2 July 2018, created the National Guard,<sup>50</sup> which is largely composed of members of the army. While constitutionally the National Guard has a civil nature, in practice its composition is mixed as it is composed of members of the police as well as the army.<sup>51</sup>

The militarization of the fight against the drug cartels has raised serious concerns with regard to the protection of individuals. The Inter-American Court of Human Rights (IACtHR) analyzed this phenomenon in 2018 in the case of *Alvarado Espinoza v. México*. Notably, the Court acknowledged the increasing militarization of the war on drugs and highlighted the dangers that this trend poses to human rights:

[A]lthough the States Parties to the [American Convention on Human Rights] could deploy the Armed Forces to perform tasks other than those strictly related to armed conflicts, this use of the military should be limited to the maximum extent possible and respond to conditions of strict exceptionality to address situations of criminality or internal violence, because the military forces are

46 Mike Lasusa, “Mexico’s War on Crime: A Decade of (Militarized) Failure”, *InSight Crime*, 6 December 2016, available at: [www.insightcrime.org/news/analysis/mexico-drug-war-decade-failure/](http://www.insightcrime.org/news/analysis/mexico-drug-war-decade-failure/).

47 Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *The Situation of Drug-Related Violence in Mexico from 2006–2017: A Non–International Armed Conflict?*, Guadalajara, 2019, paras 138–139.

48 *Ibid.*

49 George W. Grayson, *The Impact of President Felipe Calderón’s War on Drugs on the Armed Forces: The Prospects for Mexico’s “Militarization” and Bilateral Relations*, US Army War College, Strategic Studies Institute, 2013, pp. 66–67.

50 A. G. Rojo Fierro, above note 22, p. 1432.

51 Elizabeth Melimopoulos, “Mexico’s National Guard: What, Who and When”, *Al Jazeera*, 30 June 2019, available at: [www.aljazeera.com/news/2019/06/mexico-national-guard-190630095444350.html](http://www.aljazeera.com/news/2019/06/mexico-national-guard-190630095444350.html).

trained to defeat an enemy and not to protect and control civilians, which is the specific training provided to police forces.<sup>52</sup>

Accordingly, the Court concluded that “as a general rule, the Court reaffirms that maintaining internal public order and public safety should, above all, be reserved to civil police agencies”.<sup>53</sup> As a reaction to this decision, in 2020 President Obrador concluded a presidential agreement authorizing the use of the armed forces in security tasks, which established that the permanent armed forces can “participate in an extraordinary, regulated, supervised, subordinate and complementary manner with the National Guard in the public security functions in charge of the latter, during the time in which said police institution develops its structure, capabilities and territorial implantation”.<sup>54</sup>

The increasing militarization of law enforcement and public security was addressed by the Mexican Supreme Court in a crucial decision, wherein the Court affirmed that

[t]he problem of illicit drug production and trade is not only a public security problem, but also a problem of internal and external security of the State ... all of which makes necessary an increasing participation of the armed forces in their capacity as coadjutants of the federal ministerial authority.<sup>55</sup>

Asked whether the deployment of members of the army to fight against criminal organizations was constitutional, the Court concluded that

[t]he illicit drug trade constitutes a public security problem, and due to its seriousness, it is possible to require the support of the armed forces to assist in the prosecution of such illicit activities, under the command and direction of the federal ministerial authority.<sup>56</sup>

The Court went on to state that the involvement of the army in the fight against the cartels is constitutional under two conditions:

Therefore, from the harmonic interpretation of section VI of Article 89 [of the Political Constitution of the United Mexican States] with numeral 129 [referring to Article 129 of the Political Constitution of the United Mexican States] under analysis, it follows that within the functions that have an exact connection with the military discipline referred to in the latter numeral, there is the function of assisting the civilian authorities when, due to the circumstances of the case, they require military force to safeguard the internal security of the nation. This means that the armed forces cannot, by

52 IACtHR, *Alvarado Espinoza et al. v. México*, Merits, Reparations and Costs, Judgment, Series C, No. 370, 28 November 2018, para. 179.

53 *Ibid.*, para. 182.

54 Acuerdo por el que se dispone de la Fuerza Armada permanente para llevar a cabo tareas de seguridad pública de manera extraordinaria, regulada, fiscalizada, subordinada y complementaria, 11 May 2020, Artículo Primero (authors' translation).

55 Suprema Corte de Justicia de la Nación, Sentencia del Pleno, Acción de Inconstitucionalidad 1/96, 5 March 1996.

56 *Ibid.* (authors' translation).

themselves, intervene in matters within the competence of civilian authorities. It is imperative that their participation be required. Subsequently, having fulfilled this requirement, it will be necessary that in the operations in which they intervene they are subordinated to the civilian authorities and, in addition, that they adjust to the strict legal framework provided for in the Constitution, the laws emanating from it and the treaties that are in accordance with it, in accordance with the provisions of Article 133 thereof.<sup>57</sup>

Accordingly, the militarization of the war on drugs is constitutional, at least in principle, under Mexican constitutional law. Nevertheless, it has been widely criticized in light of the violations of human rights committed by the forces involved. For instance, following a *visita in loco* of the Inter-American Commission on Human Rights (IACHR) in Mexico in 2015, the IACHR concluded that

[t]his fighting context against drug trafficking and the consequent militarization of areas of the country has resulted on several occasions in an increase in violence and human rights violations, as well as in higher levels of impunity. In other words, the attribution to the armed forces of roles that would correspond to civilian police forces and the deployment of joint operations between the armed forces and State and municipal security institutions in different parts of the country have resulted in greater human rights violations.<sup>58</sup>

Similar concerns have been raised by Human Rights Watch, which has highlighted how violence and victims related to drug violence have dramatically increased since President Calderón started implementing the militarization of the war on drugs.<sup>59</sup> It is worth recalling that the Mexican government has always denied the existence of any NIACs in Mexico,<sup>60</sup> and the situation has therefore been assessed vis-à-vis the human rights legal framework. However, the deployment of members of the army and the ensuing increase in violence have a significant impact on the classification of the situation as a NIAC.

The analysis conducted so far has highlighted that the militarization of the war on drugs raises concerns regarding the protection of individuals suspected to be members of cartels. Nevertheless, violence between State forces and drug cartels can amount to a NIAC. Whether the government recognizes the existence of an armed conflict is irrelevant for the purposes of applying IHL; however, the classification made by the State determines the legal framework that it might deem applicable. As mentioned, the situation is further complicated by the deployment of armed forces that are trained to apply IHL but asked to apply a law enforcement paradigm. These circumstances bring particular challenges with regard to

57 *Ibid.* (authors' translation).

58 "Observaciones preliminares de la visita *in loco* de la CIDH a México", 31 December 2015, available at: [www.oas.org/es/cidh/prensa/comunicados/2015/112a.asp](http://www.oas.org/es/cidh/prensa/comunicados/2015/112a.asp) (authors' translation).

59 Human Rights Watch, *Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"*, 9 November 2011, available at: [www.hrw.org/report/2011/11/09/neither-rights-nor-security/killings-torture-and-disappearances-mexicos-war-drugs](http://www.hrw.org/report/2011/11/09/neither-rights-nor-security/killings-torture-and-disappearances-mexicos-war-drugs).

60 A. G. Rojo Fierro, above note 22, p. 1424.

targeting. Furthermore, identifying who is a legitimate target among the members of the cartels is equally problematic. The following sections will address this fascinating conundrum. The discussion will first focus on IHL rules for determining membership in an armed group, and will then analyze how these rules apply to membership in drug cartels.

## Targeting drug lords under IHL

When drug cartels are party to a NIAC, one of the main challenges is to understand who is a legitimate target among the members of the group. This part of the article seeks to clarify at what point a member of a cartel would change from being a criminal to being a member of the armed wing of the cartel, hence becoming a legitimate target. In order to solve this conundrum, the authors will suggest a teleological approach.

### The notion of membership in an organized armed group

The principle of distinction is the cardinal rule of IHL.<sup>61</sup> It has two prongs. On the one hand, it is necessary to distinguish between civilians and combatants during the targeting process; on the other, members of State forces have to distinguish themselves from the civilian population.<sup>62</sup> Since the combatant status does not exist in NIACs, according to the majoritarian view, members of State and non-State parties to a conflict can be targeted at all times, by analogy to combatants in international armed conflicts (IACs).<sup>63</sup> This seems to be a logical consequence of the rules presented in Additional Protocol II to the 1949 Geneva Conventions. Indeed, according to the Protocol, “armed forces”, “dissident armed forces” and “other organized armed groups” can “carry out sustained and concerted military operations”.<sup>64</sup> On the other hand, the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations ... unless and for such time as they take a direct part in hostilities”.<sup>65</sup> It therefore seems fairly clear that members of armed non-State groups cannot be considered as civilians. Nevertheless, how their status plays out in practice is controversial.

While State troops are easily identifiable thanks to their distinctive signs, there is debate as to whether members of armed non-State groups have an

61 ICRC Customary Law Study, above note 11, Rules 1, 7.

62 Laurie R. Blank, “Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians”, *Valparaiso University Law Review*, Vol. 46, No. 3, 2012, p. 766.

63 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 358. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4789: “those belonging to armed forces or armed groups may be attacked at any time”.

64 Protocol Additional (II) 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 1978), Art. 1.

65 *Ibid.*, Art. 13.



obligation to distinguish themselves from the civilian population. While treaty rules applicable to NIACs are silent on the matter, some authors affirm that fighters should have an obligation to distinguish themselves from the civilian population, and that the rules regulating distinction in Additional Protocol I should apply *mutatis mutandis* to NIACs.<sup>66</sup> The reasoning underpinning this interpretation is that if members of armed groups did not distinguish themselves from civilians, the principle of distinction would be “meaningless and impossible to apply”.<sup>67</sup> Be that as it may, in practice non-State fighters may not distinguish themselves from civilians, and this is particularly true for members of drug cartels. This raises the challenge of determination of membership in an armed group in practice. Furthermore, it should be recalled that wearing a uniform would not necessarily solve the problem, as not all members of an armed group are legitimate targets – only those belonging to the armed wings of such groups are. However, there are cases when all wings of a specific non-State armed group wear the same uniform.<sup>68</sup>

Membership in an organized armed group determines whether an individual is a legitimate target or not, but since it does not always seem possible to rely on uniforms or other distinctive signs to indicate such membership, how does one determine if an individual can be targeted in a NIAC? In order to solve this problem, scholars have suggested three solutions.

First, membership in an organized armed group could be based on conduct. According to this view, “targeting is justified solely on the manifestation of hostile conduct”.<sup>69</sup> This approach has the benefit of avoiding, with relative certainty, the possibility of civilians being erroneously considered members of armed groups and therefore targeted. It would be particularly useful when targeting members of drug cartels, most notably as it would synthesize the law enforcement model and the IHL one.<sup>70</sup> In other words, applying this approach in NIACs to which drug cartels are parties would address the human rights concerns analyzed above. However, this approach could be considered unreasonable because it would create a substantial disparity between members of State forces, who can be targeted at all times, and members of armed non-State groups, who can be lawfully targeted only while they are directly participating in hostilities. Furthermore, it would nullify the distinction between civilians and fighters: if the latter could be targeted only while participating in hostilities, then it would mean that all members of organized armed groups party to a NIAC would “remain part of the civilian population”.<sup>71</sup>

Another option could be to look at whether the armed group considers an individual as a member, with the aim of determining membership based on status.<sup>72</sup>

66 M. Sassòli, above note 63, p. 228.

67 *Ibid.*, p. 276.

68 S. Sivakumaran, above note 18, p. 367.

69 Jimmy Gurule and Geoffrey S. Corn, *Principles of Counter-Terrorism Law*, West, St. Paul, MN, 2011, p. 77.

70 C. Kerr, above note 43, p. 219.

71 ICRC Interpretative Guidance, above note 2, pp. 27–28; Gloria Gaggioli, “Targeting Individuals Belonging to an Armed Group”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2018, p. 911.

72 G. Gaggioli, above note 71, p. 911.

The problem with this approach is that irregularly constituted organized armed groups might determine membership based on a number of idiosyncratic features, to the point that membership might be involuntary, or it might be related to “membership in a clan, tribe, or family”.<sup>73</sup> Since such membership depends on the context, it would not be recognizable to State forces and would therefore not be useful for targeting purposes. Furthermore, while the first solution presented above would result in excessively limiting targeting, the second solution under examination would excessively broaden the notion of membership.<sup>74</sup> Accordingly, the ICRC Interpretive Guidance clarifies that “membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse”.<sup>75</sup>

Lastly, the ICRC has suggested that the crucial criterion for determining if an individual is a member of an armed group is whether the person assumes a continuous combat function.<sup>76</sup> In other words, individuals whose specific function in the group is “to continuously commit acts that constitute direct participation in hostilities”<sup>77</sup> are not civilians and are thus legitimate targets. The position put forward by the ICRC, and widely accepted by the scholarship,<sup>78</sup> rests on the crucial premise that non-State parties to a conflict comprise both fighting forces and a non-military wing. The term “organized armed group” refers only to the armed wing, not also to individuals who support the group without participating in hostilities. However, the question remains as to how to distinguish, in practice, a member of the armed wing from other civilians supporting the group. It has been suggested that “[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict”.<sup>79</sup> Furthermore, those involved in the planning of attacks, or who command the commission of acts that amount to direct participation in hostilities, similarly are seen to be engaged in a continuous combat function.<sup>80</sup> On the other hand,

[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, ... remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.<sup>81</sup>

73 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 321.

74 Michael John-Hopkins, “Extrapolation of Criminal Law Modes of Liability to Target Analysis under International Humanitarian Law: Developing the Framework for Understanding Direct Participation in Hostilities and Membership in Organized Armed Groups in Non-International Armed Conflict”, *Journal of Conflict and Security Law*, Vol. 22, No. 2, 2017, p. 279.

75 ICRC Interpretative Guidance, above note 2, p. 33.

76 *Ibid.*: an individual is a member of an organized armed group if he or she “assumes a continuous function for the group involving his or her direct participation in hostilities”.

77 M. Sassòli, above note 63, p. 359.

78 G. Gaggioli, above note 71; S. Sivakumaran, above note 18.

79 ICRC Interpretative Guidance, above note 2, p. 34.

80 G. Gaggioli, above note 71, p. 913.

81 ICRC Interpretative Guidance, above note 2, p. 34.

In the absence of clear distinctive signs, how can enemy forces identify a member of an armed group when the person is not directly participating in hostilities? Furthermore, there might be cases when an individual holds both civilian and military functions, hence blurring the lines between the two wings and making it more difficult to assess whether that person is a legitimate target or not. In light of these difficulties, we might be tempted to agree with the idea that members of an organized armed group should be targeted only while they are directly participating in hostilities. However, this conclusion would result in an excessive disparity between members of State forces, who can be targeted at all times, and members of non-State groups, who can be targeted only while engaging in hostile acts. Accordingly, it is necessary to investigate further how to distinguish between legitimate targets and civilians. The next section will focus on this dilemma with specific regard to membership in drug cartels.

### Targeting drug dealers: A teleological approach

In order to establish which members of cartels are legitimate targets, we must first consider the belligerent nexus. According to the traditional approach, violent acts of members of an organized armed group are regulated by IHL. On the other hand, when an individual uses force for personal reasons, such as criminal purposes, the applicable legal framework will be law enforcement. The belligerent nexus is expressly required by the ICRC Interpretative Guidance with regard to civilians who are directly participating in hostilities. Notably, the ICRC clarifies that this notion does not refer to the subjective *animus* of the individual; instead, it “relates to the objective purpose of the act”.<sup>82</sup> This raises crucial challenges with regard to drug cartels. Inasmuch as drug cartels are primarily economic actors that fight in order to pursue their illicit business, the reason why they fight has crucial consequences for the establishment of the belligerent nexus.

This is confirmed by one emblematic episode related to the capture of El Chapo’s son, Ovidio Guzmán. El Chapo was the head of the Sinaloa Cartel, one of the most powerful cartels in Mexico. On 18 October 2019, during a routine search, some police officers found Ovidio Guzmán in the city of Culiacán, the capital of Sinaloa state. Following his capture, members of the cartels launched a heavy-armed attack against State forces: they took control of strategic points in the city, and they “shut down the airport, roads, and government buildings and exchanged fire with security forces for hours, leaving at least eight people dead”.<sup>83</sup> This episode clearly highlights how the establishment of the belligerent nexus as interpreted in the traditional sense is problematic. It is therefore suggested that, when cartels are party to NIACs, the belligerent nexus and the criminal one overlap due to the fact that the ultimate reason for cartels to engage

<sup>82</sup> *Ibid.*, p. 59.

<sup>83</sup> Ioan Grillo, “How the Sinaloa Cartel Bested the Mexican Army”, *Time*, 18 October 2019, available at: <https://time.com/5705358/sinaloa-cartel-mexico-culiacan/>. The Sinaloa Cartel and Mexico are parties to a NIAC: see Geneva Academy, “Non-International Armed Conflicts in Mexico”, *RULAC*, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico](http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico).

in hostilities is to run their criminal activities. In other words, the objective of cartels is to engage in illegal business, and in order to do so, they might engage in armed violence against the government, to the point that the situation might amount to a NIAC. When the threshold is met, and IHL is applicable, the reason underpinning why the cartels engage in hostilities against governmental forces, or against other cartels, remains economical and criminal in nature.

While drug cartels often do not have a military wing in the traditional sense of the term, there might be cases where some members of the drug cartel can be identified as a military wing in the IHL sense. One clear example is provided by Los Zetas. In 1997, thirty-one members of the Mexican Army's elite Airborne Special Forces Group defected and joined the Gulf Cartel to work as hitmen, bodyguards and drug runners.<sup>84</sup> Soon thereafter, other former members of the army joined the group, including former members of the Guatemalan army's elite Kaibil unit.<sup>85</sup> Following the arrest and extradition of Osiel Cárdenas Guillen, head of the Gulf Cartel, tensions started to emerge between Los Zetas and the cartel, until Los Zetas became an independent group in 2010.<sup>86</sup> While they were within the Gulf Cartel, Los Zetas' role as an elite armed unit would suggest that they had a continuous combat function, and therefore that they qualified as the armed wing of the cartel and would have been legitimate targets under IHL.<sup>87</sup> However, this does not imply that other members of the Gulf Cartel would not have a continuous combat function. Indeed, while Los Zetas were a special, elite unit, other members of the cartel were armed and engaged in hostilities. How can we establish whether they had a continuous combat function?

In practice, it might be difficult to identify members of the cartel that have a continuous combat function, unless and for such time as they take direct part in hostilities.<sup>88</sup> However, concluding that they should be targeted only based on their behaviour does not seem to be a feasible solution. Notably, it would create an unreasonable disparity between members of State forces, who can be targeted at all times, and those who have a continuous combat function in the cartel, who would be legitimate targets only while directly engaging in hostilities.<sup>89</sup>

According to the ICRC Interpretative Guidance, "membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group".<sup>90</sup> The crucial criterion is continuity: in order to assume a continuous combat function, an individual needs

84 "Zetas", *InSight Crime*, 6 August 2022, available at: <https://insightcrime.org/mexico-organized-crime-news/zetas-profile/>.

85 ICG, *Peña Nieto's Challenge: Criminal Cartels and Rule of Law in Mexico*, Latin America Report No. 48, 19 March 2013, p. 12.

86 *Ibid.*

87 At the time, the Gulf Cartel was party to a NIAC against the Mexican government. See C. Redaelli, above note 9.

88 Fen Osler Hampson, "Afghanistan 2001–2010", in E. Wilmschurst (ed.), above note 18, p. 199.

89 Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 693–694.

90 ICRC Interpretative Guidance, above note 2, p. 72.

to be integrated into the organization in a permanent and stable fashion. As correctly noted by Gaggioli,

[w]hat matters is continuity regarding membership, which merely means that the person that has been given a specific function in the group has not disengaged from his/her fighting function. The member must become part of a group and his/her acts are not performed outside the organization in a sporadic or unorganized manner.<sup>91</sup>

A number of indicia might be used to determine whether an individual has a continuous combat function, such as if they were trained by the organized group, if they received weapons, and if they received selected targets.<sup>92</sup> How should we apply these criteria to drug cartels?

While the internal organization of the cartels varies substantially, it has some common features. Notably, it is characterized by specialization and detailed division of labour. Furthermore, a number of cartels employ contractors to manage their business, from chemists to armed individuals and assassins.<sup>93</sup> How do we identify the legitimate targets? Is it legally correct to posit that all members of the cartel could be the object of an attack?

It is submitted that, lacking a clear military wing, continuous combat function in drug cartels should be assessed using a teleological approach. The rationale underpinning the discussion around the identification of individuals with a continuous combat function, and ultimately the rationale underpinning the principle of distinction, is the fact that fighters can be targeted at all times, while civilians cannot be the object of direct attack.<sup>94</sup> The reason why fighters can be targeted is that they might also attack enemy forces (while it should be recalled that in NIACs, there is no such thing as combatant privilege). Accordingly, since it is often not possible to identify something comparable to an armed wing in drug cartels, members of the cartels should be considered to have a continuous combat function if their role within the cartel encompasses using force against enemy soldiers. In practical terms, if a drug dealer is trained by the cartel, which provides him or her with weapons and authorizes him or her to use force not only in self-defence but also to attack, then the drug dealer should be considered a legitimate target. This solution seems to be preferable because, should we consider that armed drug dealers are not legitimate targets, we would reach the conclusion that nearly no member of a drug cartel has a continuous combat function, unless the criminal organization has an elite armed unit similar to Los Zetas.

The present authors do acknowledge that this raises crucial human rights issues. Indeed, as Corn has claimed, “[i]t would simply be absurd to suggest that police could lawfully employ deadly force against suspected criminals based solely

91 G. Gaggioli, above note 71, p. 913.

92 *Ibid.*, p. 915; S. Sivakumaran, above note 18, p. 361.

93 Ami C. Carpenter, “Beyond Drug Wars: Transforming Factional Conflict in Mexico”, *Conflict Resolution Quarterly*, Vol. 27, No. 4, 2010, p. 404.

94 ICRC Customary Law Study, above note 11, Rule 1.

on a determination [that] an individual was a member of a criminal group.” In a similar vein, Kerr has asserted that this approach

will not only increase the level of violence in Mexico but will also expose the civilian population to a gruesome war likely to take place on the busy streets of Mexico. Mexican officials will have to take these factors into consideration in determining how to fight the drug cartels.<sup>95</sup>

In order to address these legitimate concerns, it is crucial to analyze in concrete terms how this would play out in practice. How concretely may a State determine that a person has assumed a continuous combat function within a cartel? It is contended that the principle of precaution would play a crucial role here.

It is often propounded that in the “fog of war”, intelligence is limited and is not always reliable or certain. This could have potentially dramatic consequences when soldiers are unable to distinguish between an individual who has a continuous combat function in a drug cartel and an individual who is a member of the cartel but whose activities do not involve the use of force. In practical terms, accountants, lawyers and financial analysts working for the cartel retain their civilian status; the main question concerns drug dealers, who are often armed. However, it has been noted that the idea that the nature of combat is fundamentally chaotic might be outdated.<sup>96</sup> According to John-Hopkins, “the targeting cycle may not necessarily take place in the ‘fog of war’”; rather, “targeting decisions may be made well in advance of their execution and will often be made jointly at high levels of military and political leadership on the basis of human and signals intelligence”.<sup>97</sup>

This is particularly true for the fight against the drug cartels. Due to the aforementioned peculiarities of having criminal organizations be parties to a conflict, State armed forces often have the opportunity to plan military operations against drug cartels in advance, and this is where the principle of precaution comes into play. This principle requires that

[i]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>98</sup>

Accordingly, when planning an armed attack against a drug cartel, the army needs to take all feasible precautions, including making sure that the individuals who are going to be targeted have a continuous combat function within the group. As clarified by John-Hopkins,

absent a direct and immediate lethal threat, assessing the existence of a “continuous combat function”, and even distinguishing it from many

95 C. Kerr, above note 43, p. 218.

96 M. John-Hopkins, above note 74, p. 289.

97 *Ibid.*, p. 290.

98 ICRC Customary Law Study, above note 11, Rule 15.

supportive forms of direct participation in hostilities, is a process that can only take place in the context of targeted operations that are planned at the operational level of command.<sup>99</sup>

In practical terms, the army can rely not only on intelligence, surveillance and reconnaissance capabilities, but also on social network analysis that seeks to “understand the social dynamic that sustains ongoing fighting”.<sup>100</sup>

In sum, while considering armed members of drug cartels as individuals having a continuous combat function, and therefore legitimate targets, could raise concerns with regard to the protection of civilians, in practice these concerns are counterbalanced by the reality of military operations against drug cartels. Notably, the principle of precautions in attack, coupled with the fact that most military operations are planned in advance, would drastically mitigate such risks. Clearly, concerns would remain in a case like the arrest of El Chapo’s son, which led to intense fighting between State forces and the Sinaloa Cartel.<sup>101</sup> However, these episodes are relatively rare and do not reflect the nature of the daily fighting.

## Conclusion

When a drug cartel is a party to a NIAC, crucial challenges emerge. The first question concerns the fact that drug cartels are primarily economic actors and do not pursue political aims, unless such aims are necessary to run their illicit business. While an organized armed group’s reasons for fighting do not prevent the group from being party to a NIAC, the fact that its ultimate aim is not political raises a number of problems. Notably, the criminal aims of cartels have an impact on their structure as well as on the way they fight. Furthermore, the duration of the conflict might be potentially never-ending. Criminal groups engage in armed confrontations inasmuch as it is necessary to run their illicit activities; accordingly, they do not have strong reasons to take part in peace talks or to put an end to armed confrontations.

Some authors have suggested that applying IHL to the war on drugs would increase the risk of killing civilians, as any member of a drug cartel party to a NIAC would be a legitimate target. IHL applicable to NIACs originally emerged to regulate armed conflicts between governmental forces and rebel groups that engage in armed hostilities for political reasons. The current legal framework may therefore seem unfit to deal with situations of violence between State forces and criminal organizations, or between such organizations.

In light of this observation, it has been suggested that a different legal framework should be negotiated at State level to create new rules that would specifically address violence between State forces and drug cartels, as well as

99 M. John-Hopkins, above note 74, p. 280.

100 *Ibid.*, p. 290.

101 At the time, the Sinaloa Cartel was party to a NIAC against the Mexican government. See Geneva Academy, above note 83.



between such cartels.<sup>102</sup> Categories such as civilians directly participating in hostilities and fighters having a continuous combat function do not reflect the reality on the ground and do not seem useful in guiding enemy soldiers in their targeting decisions. In this article, we have propounded a solution that would allow applying the current IHL rules to drug cartels. Absent a new treaty on the matter, IHL remains the relevant legal framework, and it is paramount to understand how to apply it to NIACs involving the participation of drug cartels.

Do we need new rules? In many ways, we do. IHL was created taking specific conflicts into consideration, namely IACs, at a time when digital technology and high-tech weaponry did not play a major role in warfare and where NIACs were exceptional. As NIACs have largely outnumbered IACs in recent decades, scholarship and practice have been gripped by questions not only on how to adapt IHL, but on whether we should have new rules altogether. While this article has demonstrated that the current legal framework can be applied to drug cartels, the peculiarities of criminal organizations beg for new rules. Notably, while the law enforcement paradigm does not seem adequate to address situations where the intensity of violence meets the IHL requirement, applying IHL and its rules on targeting raises serious challenges and concerns which would be better addressed if new, *ad hoc* rules were negotiated. In the meantime, the teleological interpretation of the current legal framework seems to offer the best solution to address these challenges.

102 C. Kerr, above note 43, p. 221.

# Harvesting vulnerability: The challenges of organ trafficking in armed conflict

**Thomas Martial\***

Thomas Martial is a law clerk in the International Arbitration Group of Freshfields Bruckhaus Deringer in Frankfurt am Main, Germany.

## Abstract

*Armed conflicts leave populations vulnerable to organ trafficking, a criminal enterprise with little international regulation when viewed separately from human trafficking. The Council of Europe's Convention against Trafficking in Human Organs is the only instrument to contemplate the responsibility of actors involved in organ trafficking, but traffickers may go unpunished due to its limited scope. Yet in armed conflict, international humanitarian law offers additional protection. The rules protecting the living and the dead against ill-treatment provide the basic level of protection necessary to consider the international responsibility of organ trafficking networks and the individual criminal responsibility of their members.*

**Keywords:** organ trafficking, mutilation, international humanitarian law, non-State armed groups, armed conflict, nexus, international criminal law.

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## Introduction

With global demand for organs for transplantation far outpacing supply, organ trafficking and transplant tourism<sup>1</sup> have become a lucrative business for criminal organizations, generating up to \$1.7 billion each year.<sup>2</sup> In 2017, an estimated 140,000 solid organ transplants were performed globally, a significant increase compared to the 118,127 procedures performed in 2013.<sup>3</sup> Yet, these figures account for only 10% of the global demand for organ transplants.<sup>4</sup> Given the severe shortage of living and deceased organ donors, organ traffickers have stepped in to provide desperate patients with an alternative to internationally and domestically regulated organ transplant frameworks.<sup>5</sup>

According to a 2007 study conducted by the World Health Organization (WHO), 5–10% of organ transplants worldwide are conducted illegally,<sup>6</sup> but despite these estimates, the actual extent of organ trafficking remains elusive. Reliable empirical data is hard to obtain because the crime is clandestine in nature and unreported.<sup>7</sup>

Organ trafficking covers a range of criminal activities, including the recruitment of living or deceased donors, the harvesting of organs, transportation, and transplantation.<sup>8</sup> It is also understood that this crime “primarily involves the

- 1 According to the Declaration of Istanbul, travelling for transplantation is not in itself unlawful but becomes transplant tourism if it involves trafficking in persons for the purpose of organ removal or trafficking in human organs. Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2018, p. 2, available at: [www.declarationofistanbul.org/](http://www.declarationofistanbul.org/) (all internet references were accessed in August 2022).
- 2 Channing May, *Transnational Crime and the Developing World*, Global Financial Integrity, Washington, DC, March 2017, pp. xi–xii; Parliamentary Assembly of the Council of Europe, Res. 2327, 31 January 2020.
- 3 World Medical Association (WMA) General Assembly, “WMA Statement on Measures for the Prevention and Fight Against Transplant-Related Crimes”, Cordoba, 31 October 2020, available at: [www.wma.net/policies-post/wma-statement-on-measures-for-the-prevention-and-fight-against-transplant-related-crimes/](http://www.wma.net/policies-post/wma-statement-on-measures-for-the-prevention-and-fight-against-transplant-related-crimes/); United Nations Office on Drugs and Crime (UNODC), *Assessment Toolkit: Trafficking in Persons for the Purposes of Organ Removal*, Vienna, 2015 (UNODC Toolkit), p. 10.
- 4 WMA General Assembly, above note 3; UNODC Toolkit, above note 3, p. 10.
- 5 See C. Rudge, R. Matesanz, F. L. Delmonico and J. Chapman, “International Practices of Organ Donation”, *British Journal of Anaesthesia*, Vol. 108, No. 1, 2012.
- 6 UNODC Toolkit, above note 3, p. 11; Yosuke Shimazono, “The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information”, *Bulletin of the World Health Organization*, Vol. 85, No. 12, 2007, p. 959; Gabriel M. Danovitch *et al.*, “Organ Trafficking and Transplant Tourism: The Role of Global Professional Ethical Standards—The 2008 Declaration of Istanbul”, *Transplantation Journal*, Vol. 95, No. 11, 2013, p. 1307.
- 7 The UNODC recorded twenty-five victims of human trafficking for the purpose of organ removal in 2017, a number which rose to over forty in 2018: UNODC, *Global Report on Trafficking in Persons*, Vienna, 2020, p. 36. See Michael Bos, *Trafficking in Human Organs*, European Parliament, 2015, p. 18; Frederike Ambagtsheer, “Understanding the Challenges to Investigating and Prosecuting Organ Trafficking: A Comparative Analysis of Two Cases”, *Trends in Organized Crime*, 2021, p. 2; Interpol, *Trafficking in Human Beings for the Purpose of Organ Removal in North Africa and West Africa*, July 2021, p. 5. See also Michael P. Heintz, Bo Yu and Duminda Wijesekera, “A Framework to Reveal Clandestine Organ Trafficking in the Dark Web and Beyond” *Journal of Digital Forensics, Security and Law*, Vol. 14, No. 1, 2019, pp. 1–2.
- 8 Congressional Research Service, *International Armed Organ Trafficking: In Brief*, 22 December 2021, p. 1, available at: <https://sgp.fas.org/crs/row/R46996.pdf>; Global Rights Compliance, *Do No Harm: Mitigating Human Rights Risks when Interacting with International Medical Institutions and Professionals in Transplantation Medicine*, Legal Advisory Report, April 2022, p. 7.

movement of people rather than harvested organs”.<sup>9</sup> Organs are supplied through organized networks linking recipients from “demand countries” (mainly in Europe, North America and the Near East) with “donors”, who often originate from developing countries where organ trafficking networks target vulnerable communities and individuals.<sup>10</sup> Organ traffickers also take advantage of armed conflict, displaced populations and refugees, and the breakdown of the rule of law to harvest and supply organs.<sup>11</sup> According to estimates from Syrian officials, up to 20,000 organ sales have occurred across Syria since the start of the Syrian conflict.<sup>12</sup> As explained by Global Financial Integrity’s *Transnational Crime and the Developing World* report:

Conflict zones are ideal for recruitment, as refugees and internally-displaced persons are more vulnerable and desperate. Like other offenses such as human trafficking and sexual assault, organ trafficking compounds the devastation and suffering of those living in refugee camps. These individuals, with limited employment options and having left most of their possessions behind, feel compelled to sell an organ in order to try to support themselves and their family.<sup>13</sup>

While organ traffickers may simply wish to profit from the chaos of armed conflict by promising money and safe passage to those willing to pay the price with their organs, others, such as non-State armed groups, may turn to organ trafficking to treat injured combatants or provide a steady flow of revenue.<sup>14</sup> In Iraq, the so-called Islamic State group (IS) has engaged in the harvest and sale of organs from fighters, captives and hostages.<sup>15</sup> In that context, IS is said to have sanctioned the harvesting of organs from “apostates” for the purpose of “transplanting healthy organs into a Muslim person’s body in order to save the latter’s life or replace a

9 C. May, above note 2, p. 29.

10 UNODC Toolkit, above note 3, pp. 11–12; C. May, above note 2, pp. xii, 32–33; Interpol, above note 7, p. 14. See, e.g., UN General Assembly, *Trafficking in Persons, Especially Women and Children*, UN Doc. A/68/256, 2 August 2013, paras 25–30.

11 Jamille Bigio and Rachel Vogelstein, *The Security Implications of Human Trafficking*, Council on Foreign Relations, New York, October 2019, p. 8; UNODC, *Countering Trafficking in Persons in Conflict Situations*, Vienna, 2018, p. 1.

12 Ahmad Haj Hamdo, “The Underbelly of Syria’s War: A Thriving Trade in Human Organs”, *UPI*, 12 May 2016, available at: [www.upi.com/Top\\_News/World-News/2016/05/12/The-underbelly-of-Syrias-war-a-thriving-trade-in-human-organs/5301462896201/](http://www.upi.com/Top_News/World-News/2016/05/12/The-underbelly-of-Syrias-war-a-thriving-trade-in-human-organs/5301462896201/).

13 C. May, above note 2, p. 32.

14 Although in the case of IS, organ trafficking may not account for a significant source of funding compared to IS’s other sources, such as extortion and oil theft. See UN General Assembly, *Trafficking in Persons, Especially Women and Children*, UN Doc. A/71/303, 5 August 2016, para. 24; J. Bigio and R. Vogelstein, above note 11, p. 8; C. May, above note 2, p. 33; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2016*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, March 2017, p. 37.

15 International Organization for Migration, *Addressing Human Trafficking and Exploitation in Times of Crisis*, Geneva, 2015, p. 15; Ray Sanchez, “United Nations Investigates Claim of ISIS Organ Theft”, *CNN*, 19 February 2015, available at: <https://edition.cnn.com/2015/02/18/middleeast/isis-organ-harvesting-claim/index.html>; Anne Speckhard, “ISIS Defector Reports on the Sale of Organs Harvested from ISIS-Held ‘Slaves’”, *Huffington Post*, 1 January 2016, available at: [www.huffpost.com/entry/isis-defector-reports-on-sale-of-organs\\_b\\_8897708](http://www.huffpost.com/entry/isis-defector-reports-on-sale-of-organs_b_8897708).

damaged organ”.<sup>16</sup> There are also reports of black markets selling human organs in IS-controlled territory, and corpses have been discovered in IS-controlled areas bearing indications that their organs were forcibly removed.<sup>17</sup> Other conflicts, such as the 1998–99 Kosovo conflict, have also given rise to organ trafficking. An investigation by the Council of Europe has indeed revealed that in the aftermath of the conflict, Kosovo Liberation Army (KLA) militants were using prisoners as a source of organs and killing captives before performing cadaver kidney extractions.<sup>18</sup> These reports show that regardless of the motivations for engaging in organ harvesting and trafficking, this crime has become part and parcel of the risks that the living and the dead must endure during armed conflict.

The link between conflict and organized crime is of such concern that the United Nations (UN) has, in the past years, highlighted the need for a stronger international response.<sup>19</sup> At the global level, the fight against organized crime is coordinated through the United Nations Convention against Transnational Organized Crime (UNTOC),<sup>20</sup> adopted in 2000, which requires that States Parties criminalize an individual’s participation in an organized criminal group.<sup>21</sup> Through its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the UNTOC also obliges States Parties to criminalize trafficking in persons for the purpose of organ removal.<sup>22</sup> The Protocol’s definition of trafficking in persons for the purpose of organ removal entails the conjunction of three constituent elements: an act of trafficking in persons, means, and a purpose (i.e., the removal of organs).<sup>23</sup> However, it does not apprehend organ trafficking as a stand-alone offence. The wide international

16 Warren Strobel, Jonathan Landay and Phil Stewart, “Exclusive: Islamic State Sanctioned Organ Harvesting in Document Taken in U.S. Raid”, *Reuters*, 25 December 2015, available at: [www.reuters.com/article/us-usa-islamic-state-documents-idUSKBN0U805R20151225](http://www.reuters.com/article/us-usa-islamic-state-documents-idUSKBN0U805R20151225).

17 “Islamic State Accused of ‘Harvesting Organs’”, *Sky News*, 18 February 2015 available at: <https://news.sky.com/story/islamic-state-accused-of-harvesting-organs-10370984>; Joint Counterterrorism Assessment Team, *First Responder’s Toolbox: International Partnerships among Public Health, Private Sector, and Law Enforcement Necessary to Mitigate ISIS’s Organ Harvesting for Terrorist Funding*, Directorate of National Intelligence, National Counterterrorism Center, Washington, DC, 11 May 2017, p. 1, available at: [www.dni.gov/index.php/nctc-how-we-work/joint-ct-assessment-team/first-responder-toolbox](http://www.dni.gov/index.php/nctc-how-we-work/joint-ct-assessment-team/first-responder-toolbox).

18 The events reported by the Council of Europe cover the post-conflict period, but there are also allegations that such events occurred during the conflict. See Dick Marty, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. 12462, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 7 January 2011, paras 136, 162, 166. See also Owen Bowcott, “Kosovo Organ Trafficking Inquiry Chief Vows to Investigate All Evidence”, *The Guardian*, 16 September 2016, available at: [www.theguardian.com/world/2016/sep/16/kosovo-organ-trafficking-inquiry-chief-prosecutor-vows-to-investigate-all-evidence](http://www.theguardian.com/world/2016/sep/16/kosovo-organ-trafficking-inquiry-chief-prosecutor-vows-to-investigate-all-evidence).

19 UN General Assembly, above note 14, para. 24; UNSC Res. 2482, 19 July 2019, para. 8. See also UNSC Res. 2462, 28 March 2019; Michael Plachta, “Transnational Organized Crime and Counterterrorism: Security Council Adopts Resolution on Linkages between Organized Crime and Terrorism”, *International Enforcement Law Reporter*, Vol. 35, No. 8, 2019, pp. 309–311.

20 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000 (entered into force 29 September 2003) (UNTOC).

21 *Ibid.*, Art. 5.

22 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000 (entered into force 25 December 2003), Art. 3(a).

23 UNODC Toolkit, above note 3, pp. 17–18.

recognition of trafficking in persons for the purpose of organ removal and the international humanitarian law (IHL) framework and responsibility attached to it has already been discussed elsewhere and does not call for further consideration in this article.<sup>24</sup>

The crime of organ trafficking is thus distinct from trafficking in persons for the purpose of organ removal.<sup>25</sup> To date, the Council of Europe's Convention against Trafficking in Human Organs,<sup>26</sup> known as the Santiago de Compostela Convention (SCC), is the only international instrument to oblige States to adopt measures prohibiting organ trafficking.<sup>27</sup> The SCC criminalizes organ harvesting by prohibiting the intentional removal of human organs from living or deceased donors without their consent (or in the case of deceased donors, where the removal is not authorized under domestic law), or where such consent was obtained in exchange for "financial gain or comparable advantage" for the donor or a third party.<sup>28</sup> It contemplates the criminal responsibility of every actor – save for the donor and recipient, on the assumption that their conduct is compelled by necessity – involved in organ trafficking, from procurement to transport and transplantation, whether committed individually or as part of a criminal organization.<sup>29</sup> This is not to say that patients receiving organs will never be held criminally liable – indeed, almost every country criminalizes the purchase of organs by patients participating in transplant tourism.<sup>30</sup> However, such conduct is not regulated by the SCC.<sup>31</sup>

The SCC leaves no stone unturned in its efforts to better apprehend organ trafficking, but its scope is inherently limited to its signatories, the majority of which are members of the Council of Europe. Jurisdiction over organ trafficking offences does not extend to those committed beyond the SCC's territorial scope by persons who are neither nationals nor residents of a State party.<sup>32</sup> Thus, persons committing the act of organ harvesting may very well evade accountability, particularly in States that do not expressly criminalize organ trafficking and prosecute traffickers through domestic rules prohibiting bodily harm or theft.<sup>33</sup> Adding the fact that, at the global

24 See Michael Ramsden, "The International Responsibility of War Profiteers for Trafficking in Persons", in Nina H. B. Jørgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers*, Cambridge University Press, Cambridge, 2020.

25 UNODC Toolkit, above note 3, p. 17.

26 Convention against Trafficking in Human Organs, CETS No. 2016, 25 March 2015 (entered into force 1 March 2018) (SCC).

27 Alessandra Pietrobon, "Challenges in Implementing the European Convention against Trafficking in Human Organs", *Leiden Journal of International Law*, Vol. 29, No. 2, 2016, p. 486.

28 SCC, above note 26, Art. 4(1). Article 3 of the SCC states that the Convention applies without discrimination, including on the basis of age, thus granting minors the same protection as adults. However, Article 4(2) permits derogations from Article 4(1) "in exceptional cases and in accordance with appropriate safeguards or consent provisions under its domestic law".

29 *Ibid.*, Arts. 5–9; A. Pietrobon, above note 27, p. 486.

30 Frederike Ambagtsheer *et al.*, "Cross-Border Quest: The Reality and Legality of Transplant Tourism", *Journal of Transplantation*, Vol. 2012, 2012, p. 4.

31 A. Pietrobon, above note 27, p. 486.

32 SCC, above note 26, Art. 10; A. Pietrobon, above note 27, pp. 499–500.

33 See, e.g., Seán Columb, "Excavating the Organ Trade: An Empirical Study of Organ Trading Networks in Cairo, Egypt", *British Journal of Criminology*, Vol. 57, No. 6, 2017, p. 1316.

level, few cases appear to have been identified and prosecuted despite the estimated prevalence of the crime, one can only surmise that organ traffickers will further benefit, in terms of evading accountability, from a breakdown of the rule of law during armed conflict.<sup>34</sup> In such a situation, does IHL offer any protection against organ trafficking by criminal organizations?

As will be discussed, IHL imposes an absolute prohibition on the *sine qua non* of organ trafficking – i.e., the act of harvesting organs from the living and the dead. IHL's protective framework also requires that parties to a conflict take positive measures to protect the dead from organ harvesting. However, in order for IHL's protection to apply, it is necessary to determine whether it can regulate organ trafficking networks, either directly, as parties to a conflict, or indirectly, by attributing their conduct to a party to a conflict or establishing the international criminal responsibility of their members.

## The prohibition of organ harvesting under IHL

IHL imposes an absolute prohibition on organ harvesting during armed conflict. In an international armed conflict (IAC), IHL applies to the entire territory of the parties to the conflict.<sup>35</sup> In a non-international armed conflict (NIAC), the geographical reach of IHL is still strongly debated.<sup>36</sup> However, it is accepted that the IHL of NIACs applies at least to “the whole territory under the control of a party, whether or not actual combat takes place there”.<sup>37</sup>

The protective framework against illegal organ harvesting is shaped by several sources and provisions of IHL. These rules protect the living as well as the dead.

## Rules protecting the living against organ harvesting

Protection against organ trafficking is achieved through the prohibition of organ harvesting. Elements of this prohibition are found in, firstly, specific provisions of Additional Protocols I and II (AP I, AP II) of 1977 regulating medical procedures; secondly, IHL's fundamental prohibition against mutilation; and

34 See J. Bigio and R. Vogelstein, above note 11, p. 8; F. Ambagtsheer, above note 7, p. 2.

35 Emily Crawford, “The Temporal and Geographic Reach of International Humanitarian Law”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 65.

36 See, e.g., *ibid.*, pp. 71–75; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham and Northampton, 2019, paras 6.47–6.53.

37 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction (Trial Chamber), 10 August 1995, para. 69; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-04, Judgment (Trial Chamber), 2 September 1998, para. 635. See also M. Sassòli, above note 36, para. 6.47; E. Crawford, above note 35, pp. 71–72.



thirdly, the prohibition of murder. Finally, parties to a conflict also have a positive obligation to protect the wounded, sick and shipwrecked from ill-treatment.

### *The regulation of medical procedures by the Additional Protocols*

Article 11 of AP I and Article 5(2)(e) of AP II regulate the performance of medical procedures by parties to an armed conflict. The protection granted by AP I covers nationals who are in the power of the adverse party,<sup>38</sup> as well as any person, regardless of nationality, “interned, detained or otherwise deprived of liberty” as a result of an IAC.<sup>39</sup> Due to the impracticality of nationality-based criteria in NIACs, AP II’s protection is more limited in scope and covers only persons interned or detained for reasons related to the armed conflict.<sup>40</sup> This excludes less stringent means of detention permitted under AP I, such as confinement to a designated residence.<sup>41</sup> Those deprived of liberty for reasons unrelated to the conflict are, of course, excluded from IHL’s scope of protection.<sup>42</sup>

Importantly, these provisions apply neither to free nationals of the party performing the procedure under AP I<sup>43</sup> nor to “free persons” under AP II,<sup>44</sup> due to a presumption that parties to a conflict will provide the best possible care to their own. Those persons therefore set the benchmark by which the “generally accepted medical standards”<sup>45</sup> guiding the performance of medical procedures by a party are to be assessed.<sup>46</sup>

In the context of an IAC, Article 11(2)(c) of AP I expressly prohibits the “removal of tissue or organs for transplantation” and rejects the protected person’s consent as a justification for performing the procedure. In contrast, Principle 3 of the WHO *Guiding Principles on Human Cell, Tissue and Organ Transplantation* recognizes the validity of live donations with the informed and

38 The term “in the power of” the adverse party simply requires that a person fall into the hands or be in the territory of the adverse party. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, International Committee of the Red Cross (ICRC), Geneva, 1987 (ICRC Commentary on the APs), paras 468–469.

39 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 1, 11(1).

40 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 5(1).

41 See ICRC Commentary on the APs, above note 38, paras 470, 4582.

42 The requirement of a link between the deprivation of liberty and the armed conflict excludes “ordinary criminals” prosecuted and detained under normal rules of criminal law from the scope of AP I Article 11 and AP II Article 5. See ICRC Commentary on the APs, above note 38, para. 4568.

43 AP I, Art. 11(1).

44 AP II, Art. 5(2)(e).

45 These standards are neither defined by AP I nor universally codified at the international level and remain scattered across several soft-law instruments such as the WHO Guiding Principles and standards developed by the World Medical Association. Yet, they help to shape a global minimum standard of medical care which may guide the interpretation of “generally accepted medical standards” of IHL. See ICRC Commentary on the APs, above note 38, para. 476.

46 See *ibid.*, para. 477.

voluntary consent of the live donor, “free of any undue influence or coercion”.<sup>47</sup> As a cornerstone of medical ethics, the validity of a donor’s freely given consent would normally be recognized by domestic regulations on organ transplantation.<sup>48</sup> Such consent would be valid under international human rights law, although it remains debatable for persons deprived of liberty.<sup>49</sup> At first glance, this prohibition unduly burdens access to organ transplantation. However, IHL’s categorical prohibition on organ harvesting acts as a *lex specialis* to safeguard protected persons against abuse by parties who might perceive them as a readily available source of organs.<sup>50</sup> In any event, consent given by enemy aliens and detainees would be invalid due to lack of a real choice under the circumstances.<sup>51</sup>

The prohibition against organ harvesting suffers only two exceptions. The first results from AP I Article 11(1) and 11(2)’s authorization of procedures “indicated by the state of health of the person concerned”. However, this exception may never operate in practice, as harvesting healthy organs cannot improve the health of the donor and, indeed, can seriously impact it.<sup>52</sup> The second exception relates to blood donations for transfusions and the donation of skin for skin grafts, permitted under Article 11(3) provided the procedure is consented to freely.<sup>53</sup> Nonetheless, given the limited scope of these exceptions, it is safe to say that harvesting organs from persons protected by IHL is absolutely prohibited during an IAC.<sup>54</sup>

In the context of a NIAC, Article 5(2)(e) of AP II only prohibits medical procedures which are “not indicated by the state of health of the person concerned”. Yet, the mere requirement that medical procedures be performed for the benefit of the donor’s state of health inevitably leads to the prohibition of organ harvesting. Furthermore, even though it is not expressly stated, AP I’s rejection of consent-based justifications and exceptions for blood and skin donations are applicable by analogy to NIACs.<sup>55</sup> Overall, an equivalent protection

47 WHO, *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, WHO/HTP/EHT/CPR/2010.01, 2010, p. 3.

48 See UNODC Toolkit, above note 3, pp. 15–16.

49 See International Covenant on Civil and Political Rights, 999 UNTS 171, 19 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 7; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976), Art. 21. On the question of prisoner consent to organ donation, see, e.g., Lawrence O. Gostin, “Prisoners Shouldn’t Be Allowed to Donate Their Organs”, *New York Times*, 26 April 2013, available at: [www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/prisoners-shouldnt-be-allowed-to-donate-their-organs](http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/prisoners-shouldnt-be-allowed-to-donate-their-organs); Norbert W. Paul *et al.*, “Human Rights Violations in Organ Procurement Practice in China”, *BMC Medical Ethics*, Vol. 18, No. 11, 2017, p. 1; Lainie Friedman Ross and J. Richard Thistlethwaite, “Prisoners as Living Donors: A Vulnerability Analysis”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 7, No. 1, 2018.

50 See ICRC Commentary on the APs, above note 38, paras 468–469, 478.

51 See N. W. Paul *et al.*, above note 49, p. 1.

52 ICRC Commentary on the APs, above note 38, paras 475, 482; Eizuke Nakazawa *et al.*, “Will You Give My Kidney Back? Organ Restitution in Living-Related Kidney Transplantation: Ethical Analyses”, *Journal of Medical Ethics*, Vol. 46, 2020, pp. 144–145.

53 ICRC Commentary on the APs, above note 38, para. 486.

54 *Ibid.*, para. 482.

55 *Ibid.*, paras 4588, 4594.

against organ harvesting is granted in IACs and NIACs, with violations of AP I Article 11 and AP II Article 5(2)(e) amounting to war crimes.<sup>56</sup>

*The prohibition against organ harvesting as an essential component of the prohibition against mutilation*

As the Geneva Conventions were adopted prior to the first successful organ transplant, their provisions did not contemplate the regulation of organ harvesting.<sup>57</sup> However, protection against organ harvesting is achieved through the long-standing prohibition against mutilation.<sup>58</sup> Wide acceptance of this prohibition, along with State practice, has entrenched its status as a rule of customary IHL in both IACs and NIACs.<sup>59</sup> Surprisingly, IHL does not define “mutilation” and relies on international criminal law (ICL) to fill that gap.<sup>60</sup> Fortunately, ICL considers mutilation to cover the act of removing an organ or appendage,<sup>61</sup> as would result from organ harvesting, and criminalizes it as a war crime in both IACs and NIACs.<sup>62</sup>

No matter the source of the prohibition on mutilation, its regime remains the same. Mutilation may only be justified on strict medical grounds, to the same extent as the removal of tissue or organs for transplantation under the Additional Protocols, and consent-based justifications are also unavailing.<sup>63</sup> This confirms the absolute character of the prohibition on organ harvesting as a mutilation with no health benefits for the donor.

In IACs, mutilation is expressly prohibited by two specific provisions of Geneva Conventions III and IV (GC III, GC IV):<sup>64</sup> Article 13 of GC III,

56 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Arts 8(2)(b)(x), 8(2)(e)(ix). AP I, however, does not extend this characterization to a party’s own nationals: see AP I, Art. 11(4).

57 The first successful transplant of a functioning kidney without rejection was in 1954. Henry W. Randle, “The History of Organ Transplantation”, in Clark C. Otley and Thomas Stasko (eds), *Skin Disease in Organ Transplantation*, Cambridge University Press, Cambridge, 2010, p. 9.

58 The first iteration of this prohibition dates back to the Lieber Code of 24 April 1963. See 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. 321, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 1589.

59 ICRC Customary Law Study, above note 58, Rule 92. p. 320.

60 ICRC Commentary on GC III, above note 58, para. 638.

61 See, e.g., International Criminal Court (ICC), *Elements of Crimes*, adopted by the Assembly of State Parties, First Session, New York, 3–10 September 2002, Official Records ICC-ASP/1/3 (ICC *Elements of Crimes*), Art. 8(2)(b)(x)-1.

62 Rome Statute, above note 56, Arts 8(2)(b)(x), 8(2)(e)(ix). See also Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955, 8 November 1994 (last amended 13 October 2006), Art. 4; Statute of the Special Court for Sierra Leone, UNSC Res. 1315, 14 August 2000, Art. 3.

63 ICRC Commentary on GC III, above note 58, para. 643; ICRC Commentary on the APs, above note 38, para. 479; ICC *Elements of Crimes*, above note 61, Arts 8(2)(c)(i)-2, 8(2)(b)(x)-1 fn. 46, 8(2)(e)(xi)-1 fn. 69.

64 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); 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) (GC IV).

protecting prisoners of war, and Article 32 of GC IV, protecting enemy civilians in the hands of an adverse party or Occupying Power, as well as those who were refugees or stateless before the beginning of hostilities.<sup>65</sup> Geneva Conventions I and II (GC I, GC II) do not expressly prohibit mutilation,<sup>66</sup> but they both impose, in Article 12(2), an obligation of humane treatment of the wounded, sick and shipwrecked, and prohibit violence against persons protected under these two Conventions.<sup>67</sup> Though organ harvesting is not expressly listed as a prohibited act of violence, the non-exhaustive nature of Article 12(2) undoubtedly extends to this practice.<sup>68</sup> In particular, it prevents a party from using the wounded and the sick, who may be viewed as disposable, as a readily available source of organs for transplantation.

Furthermore, AP I has expanded the scope of the prohibition on mutilation through two key provisions. Firstly, AP I Article 11's regulation of medical procedures equally prohibits mutilations, primarily to clarify the regime applicable to the wounded, sick and shipwrecked, whether civilian or military.<sup>69</sup> Secondly, Article 75(2)(iv) of AP I expands the protection against mutilation beyond nationality criteria. This is done by establishing a minimum standard of treatment for "persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions", provided they are affected by an armed conflict.<sup>70</sup> This applies to a party's own nationals, "unlawful combatants", nationals of co-belligerent or neutral States, and persons who become refugees after the beginning of hostilities.<sup>71</sup> While such an expanded protection against mutilation is welcome, it could also result in a blanket ban on all organ harvesting procedures, were it not for AP I Article 75's express nexus requirement.<sup>72</sup> Although its exact scope is unclear, the nexus is understood to cover only measures taken against a person because of an armed conflict;<sup>73</sup> organ harvesting procedures undertaken in the ordinary course of business would therefore not exhibit the required nexus. The same would apply to organ harvesting by ordinary criminals regardless of the existence of an armed conflict, thus limiting the applicability of IHL. Conversely, Article 75 of AP I would

65 See AP I, Arts 4, 73.

66 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) (GC I); 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) (GC II).

67 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 (ICRC Commentary on GC I), paras 1397–1399.

68 *Ibid.*, para. 1399.

69 AP I, Art. 9; ICRC Commentary on the APs, above note 38, para. 460.

70 ICRC Commentary on the APs, above note 38, para. 3037.

71 *Ibid.*, paras 3024, 3027–3028; Marina Mancini, "Content and Customary Nature of Article 75 of Additional Protocol I", in Fausto Pocar and Gian Luca Beruto (eds), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, Milan, 2018, p. 86.

72 ICRC Commentary on the APs, above note 38, para. 2926; Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 67.

73 ICRC Commentary on the APs, above note 38, para. 3011; M. Mancini, above note 71, p. 85.

prohibit a party from harvesting organs from its own nationals for the purpose of treating wounded soldiers or financing the war effort.

In NIACs, protection against mutilation is ensured by the fundamental obligation of humane treatment found in Article 3 common to the four Geneva Conventions, which also specifically prohibits mutilation.<sup>74</sup> This prohibition is reiterated in Article 4(2)(a) of AP II, the NIAC counterpart of AP I Article 75.<sup>75</sup> The purpose of common Article 3 is to protect all persons not actively participating in hostilities, be they civilians or persons *hors de combat*,<sup>76</sup> and regardless of whose power they are in or which party they identify with.<sup>77</sup> This is also true of AP II.<sup>78</sup>

The application of common Article 3 “without adverse distinction” to persons taking no active part in hostilities calls for two observations. Firstly, common Article 3’s protection of all civilians could result in a blanket ban on organ harvesting activities during an armed conflict, if one were to disregard the nexus requirement in NIACs.<sup>79</sup> Contrary to Article 75 of AP I, common Article 3 does not expressly provide for a nexus requirement limiting its application to persons “affected by the armed conflict”. Yet, as will be discussed further below in the section on “International Criminal Responsibility of Members of Organ Trafficking Networks”, the need for a sufficient nexus to characterize a war crime entails that common Article 3 does not automatically apply in all situations.<sup>80</sup> The result is, therefore, the same as with Article 75 of AP I: organ harvesting procedures unrelated to the armed conflict are not prohibited.

Secondly, cases brought before the International Criminal Tribunals and International Criminal Court (ICC), and specifically the *Ntaganda* case, have shown that parties to a conflict do not shy away from mistreating their own combatants.<sup>81</sup> As a result, common Article 3 has been interpreted to apply to members of a party’s own armed forces.<sup>82</sup> In *Ntaganda*, the ICC justified this approach in the context of intra-party sexual violence, based on the victim’s inability to directly participate in hostilities “during the specific time when they were [being] subject[ed] to acts of sexual nature”.<sup>83</sup> The same could be said of organ harvesting, which inherently requires the temporary immobilization or

74 See, e.g., GC III, Art. 3(1)(a); ICTY, *Tadić*, above note 37, para. 69; ICRC Commentary on GC III, above note 58, paras 552–553.

75 AP II, Arts 4(1), 4(2)(a); ICRC Commentary on the APs, above note 38, paras 4515, 4520.

76 *Hors de combat* covers anyone who (1) is in the power of an adverse party, (2) is defenceless because of unconsciousness, shipwreck, wounds or sickness, or (3) has expressed an intention to surrender and abstains from any hostile acts or escape attempts. ICRC Customary Law Study, above note 58, p. 164.

77 ICRC Commentary on GC III, above note 58, para. 580.

78 AP II, Art. 4(1).

79 See M. Sassòli, above note 36, paras 6.80–6.84.

80 *Ibid.*, paras 6.80–6.84.

81 See, e.g., ICTY, *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005, paras 560–561; ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment (Appeals Chamber), 15 June 2017, para. 65.

82 ICRC Commentary on GC III, above note 58, para. 581.

83 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda (Pre-Trial Chamber), 9 June 2014, para. 79. See also Cómán Kelly and Yvonne McDermott, “The Expanding Protection of

incapacitation of the person whose organs are being removed. This interpretation would ensure that a party's own armed forces are not used as a source of organs to finance the war effort or treat other combatants.

### *The prohibition on murdering persons to harvest organs*

In times of peace, it goes without saying that murdering a person to harvest their organs is prohibited under both ordinary rules of criminal law and as a violation of the right to life under international human rights law.<sup>84</sup> However, IHL distinguishes between protected persons and combatants for a reason. The former cannot be targeted, while the latter can benefit from combatant immunity, allowing them to target and kill those who directly participate in hostilities without fear of prosecution.<sup>85</sup> Yet, as will be seen below in the section on “Rules Protecting the Dead”, even deceased combatants are worthy of protection from organ harvesting. In any event, and as can be inferred from the reports on the KLA and IS, organ harvesting is more likely to occur on combatants who have been captured and detained, and who are thus *hors de combat* at the time their organs are removed.

In IACs and NIACs, it is considered a war crime to intentionally target or kill persons *hors de combat*<sup>86</sup> and civilians not directly participating in hostilities.<sup>87</sup> This protection is notably ensured by common Article 3, which acts as a “minimum yardstick” in both IACs and NIACs.<sup>88</sup> These rules are considered customary in nature, which ensures their application to all armed conflicts.<sup>89</sup> Through the prohibition against murder, IHL protects persons against the gravest forms of abuse such as the removal of vital organs from a living person or killing for the purpose of organ extraction.<sup>90</sup> This protection is all the more important given the reality of forced organ harvesting on prisoners.<sup>91</sup>

Members of a Party's Own Armed Forces under International Criminal Law”, *International and Comparative Law Quarterly*, Vol. 68, No. 4, 2019, p. 947.

84 See, e.g., ICCPR, above note 49, Art. 6(1).

85 Samuel G. Walker, “Lawful Murder: Unnecessary Killing in the Law of War”, *Canadian Journal of Law & Jurisprudence*, Vol. 25, No. 2, 2012, pp. 418–419.

86 GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; AP I, Arts 41(1), 85(3)(e); Rome Statute, above note 56, Arts 8(2)(b)(vi), 8(2)(c)(i).

87 GC IV, Art. 147; AP I, Arts 51(2–3), 85(3)(a); Rome Statute, above note 56, Arts 8(2)(a)(i), 8(2)(b)(i), 8(2)(c)(i), 8(2)(e)(i).

88 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 218.

89 ICRC Customary Law Study, above note 58, pp. 164–170, 313–314.

90 See C. May, above note 2, p. 32; N. W. Paul *et al.*, above note 49; Matthew P. Robertson and Jacob Lavee, “Execution by Organ Procurement: Breaching the Dead Donor Rule in China”, *American Journal of Transplantation*, Vol. 22, No. 7, 2022; UN Office of the High Commissioner for Human Rights, “China: UN Human Rights Experts Alarmed by ‘Organ Harvesting’ Allegations”, 14 June 2021, available at: <https://tinyurl.com/ycksm4k>.

91 Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, Judgment, 1 March 2020, available at: <https://chinatribunal.com/final-judgment/>.

### *The positive obligation to protect the wounded, sick and shipwrecked from ill-treatment*

Last but not least, IHL imposes that parties to a conflict take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment in both IACs (GC I Article 15, GC II Article 18, GC IV Article 16) and NIACs (AP II Article 8).<sup>92</sup> This is also customary IHL according to Rule 111 of the International Committee of the Red Cross (ICRC) Customary Law Study.<sup>93</sup> The importance of this provision cannot be understated, as it is one of the few that expressly obliges parties to a conflict to protect the wounded against organ harvesting. However, as this is an obligation of means, it is difficult to determine *in abstracto* the extent to which a party could be held responsible for its violation, other than a clear failure to take proactive protective steps.<sup>94</sup>

Importantly, IHL also imposes an obligation of restraint on civilians, who must respect the wounded, sick and shipwrecked.<sup>95</sup> This duty is not a positive obligation to protect but a duty to refrain from committing acts of violence.<sup>96</sup> As this rule is applicable to civilians, it also binds members of criminal organizations. Even if the consequences of a breach of this positive obligation remain unclear, the harvesting of organs from a protected person would, in any event, constitute a self-standing violation of IHL.

### Rules protecting the dead

AP I and AP II's prohibition on organ removal for transplantation, the prohibition on mutilation, and the prohibition on murder presuppose that the victim is alive at the time the act is committed.<sup>97</sup> Therefore, these prohibitions cannot be extended to the dead. However, IHL would not provide an effective protection against organ harvesting without a continuing obligation to respect the bodies of those that have died in an armed conflict.

The rules protecting the dead are predominantly found in the four Geneva Conventions and AP I. The only provision explicitly relating to the dead in NIACs is Article 8 of AP II. Any gaps in protection are filled by the customary nature of these rules in both IACs and NIACs – save for Rule 114 on the return of the mortal remains and personal effects of the dead, which has not yet attained customary status in NIACs.<sup>98</sup>

92 See ICRC Customary Law Study, above note 58, pp. 403–404.

93 *Ibid.*, p. 403.

94 ICRC Commentary on GC I, above note 67, para. 1499.

95 AP I, Art. 17; GC I, Art. 18. In NIACs, this protection is effected by the fundamental guarantees given to persons *hors de combat*.

96 ICRC Customary Law Study, above note 58, pp. 404–405.

97 Commentary on GC III, above note 58, paras 647, 1600.

98 There is, however, an increasing recognition of this obligation by parties in NIACs: see ICRC Customary Law Study, above note 58, pp. 411–412. See also Anna Petrig, “The War Dead and Their Gravesites”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 343–344.



The main obligations imposed by IHL in IACs and NIACs are the obligation to search for and collect the dead (Rule 112), the obligation to protect the dead against mutilation and despoliation (Rule 113), the obligation to dispose of the bodies of the dead and to maintain and respect gravesites (Rule 115), and the obligation to identify and record information on the dead (Rule 116).<sup>99</sup> Among these obligations, the obligation to search for and collect the dead and the obligation to protect the dead against mutilation and despoliation are relevant to the issue of organ harvesting.

### *The obligation to search for and collect the dead*

The starting point for the protection of the dead against organ harvesting is the obligation to search for and collect the dead.<sup>100</sup> This obligation is reflected in Rule 112 of the ICRC Customary Law Study, which provides that “[w]hen circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction”.<sup>101</sup> It is in the immediate aftermath of a person’s death that their organs are the most valuable for harvesting, and without collection, the bodies of the deceased cannot be protected. This rule is thus the *sine qua non* of the effectiveness of, and compliance with, all other obligations relating to the dead by parties to a conflict.<sup>102</sup>

The obligation to search for and collect the dead applies without adverse distinction to all conflict-related deaths.<sup>103</sup> Although not expressly stated, this principle is reflected in various provisions of the Geneva Conventions and their Additional Protocols.<sup>104</sup> For instance, the obligation to search for, collect and prevent the dead from being despoiled applies to deceased military personnel regardless of the party to the conflict to which they belong.<sup>105</sup> Deceased civilians are similarly covered by other provisions in GC IV, AP I, AP II and customary IHL.<sup>106</sup>

The search for the dead must be performed as soon as possible after an engagement, as stated in GC I Article 15, GC II Article 18 and AP II Article 8, and implied in GC IV Article 16 and AP I Article 33.<sup>107</sup> From the perspective of organ harvesting, this time frame is essential because organs may only be sourced

99 ICRC Customary Law Study, above note 58, pp. 406, 409, 414, 417.

100 See GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Arts 32, 33; AP II, Art. 8; ICRC Customary Law Study, above note 58, pp. 406–408.

101 ICRC Customary Law Study, above note 58, p. 407.

102 *Ibid.*

103 See *ibid.*, p. 408; 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. 136.

104 ICRC Customary Law Study, above note 58, p. 408; A. Petrig, above note 98, p. 346.

105 See GC I, Art. 15(1); GC II, Art. 18(1).

106 GC IV, Art. 16(2); AP I, Arts 33(1), 33(4); AP II, Art. 8; ICRC Customary Law Study, above note 58, pp. 406–408.

107 ICRC Customary Law Study, above note 58, p. 407; ICRC Commentary on GC IV, above note 103, p. 135; ICRC Commentary on the APs, above note 38, para. 1280.

in the immediate aftermath of a person's death, in a race against time to preserve their viability. Therefore, bodies left unattended on the battlefield are at a greater risk of falling prey to organ traffickers. Yet, the obligation to search for the dead is one of means, effectively limiting the protection of the dead to bodies found and collected by parties conducting a search.<sup>108</sup> Therefore, parties to a conflict cannot necessarily be held responsible for a failure to protect the dead against organ harvesting if those bodies remained unaccounted for in spite of a search.

Finally, it is worth noting that while this obligation has a "protective" purpose, it also has a potential for subversion. Indeed, a party to a conflict seeking unlawful sources of funding could, under the guise of a search, endeavour to collect as many bodies as possible, only to better exploit, and profit from, the remains of the deceased. The obligation to collect the dead is, therefore, the *sine qua non* of the protection of the dead but can only prove effective if followed by an obligation to protect the bodies of the dead.

### *The protection of the dead against mutilation and despoliation*

The bodies of the dead are protected against organ harvesting through the prohibition against mutilation and the obligation to prevent the dead from being despoiled.<sup>109</sup>

Although IHL does not expressly prohibit the mutilation of the dead, common Article 3 provides an equivalent protection through the prohibition of outrages upon personal dignity.<sup>110</sup> This offence has been documented by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in instances where a dead person's body parts were removed or amputated.<sup>111</sup> According to the ICC *Elements of Crimes*, outrages upon personal dignity against the dead constitute war crimes under the Rome Statute.<sup>112</sup> Due to common Article 3's fundamental character, this prohibition covers the dead in IACs and NIACs. Additionally, customary IHL prohibits the "mutilation of dead bodies" in all armed conflicts.<sup>113</sup> As a form of mutilation or outrage upon personal dignity, harvesting organs from the dead is therefore prohibited. However, as in the case of the living, it is safe to assume that there would not be a blanket prohibition on organ sourcing, and that the prohibition would mainly apply to conflict-related deaths and persons that benefited from the rules protecting the living.

Secondly, IHL imposes an obligation to prevent the dead from being despoiled.<sup>114</sup> This obligation is common to IACs and NIACs and is stated in GC

108 See GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP II, Art. 8.

109 ICRC Customary Law Study, above note 58, pp. 409–411.

110 ICRC Commentary on GC III, above note 58, para. 647.

111 See, e.g., ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence (Trial Chamber), 16 May 2003, para. 303; ICTY, *Prosecutor v. Delalić*, Case No. ICTR-96-14-T, Judgment (Trial Chamber), 16 November 1998, para. 849.

112 Rome Statute, above note 56, Arts 8(2)(b)(xxi), 8(2)(c)(ii); ICC *Elements of Crimes*, above note 61, Arts 8(2)(b)(xxi) fn. 49, 8(2)(c)(ii) fn. 57.

113 ICRC Customary Law Study, above note 58, Rule 113, p. 409.

114 See GC I, Art. 15; GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Art. 34(1); AP II, Art. 8.

I, GC II, GC IV, AP I, AP II and customary IHL.<sup>115</sup> Unlike the prohibition on mutilating the dead, the obligation to prevent despoliation protects the belongings of the deceased rather than their physical remains. It is an application of the general prohibition against pillaging, which protects private property.<sup>116</sup> The characterization of organ harvesting as despoliation would therefore call for a discussion of the legal status of human organs and property rights, which exceeds the scope of this article.<sup>117</sup> Suffice to say that from the perspective of organ traffickers, the deceased are no longer valued as human beings and their organs are reduced to the status of a commodity waiting to be harvested and profited from.<sup>118</sup> Additionally, protection against despoliation is a positive obligation which complements the obligation to search for the dead. Accordingly, once collected by the parties to a conflict, “all possible measures” must be taken to protect the bodies of the deceased against organ harvesting, including by third parties. This would, in effect, require parties and their military command to implement measures to confront organ traffickers during armed conflict. According to the International Court of Justice (ICJ), such a duty to act “arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk”.<sup>119</sup> As such, parties to a conflict are expected to act without delay to confront the risk of organ harvesting.<sup>120</sup>

## Regulating the activities of organ trafficking networks through IHL

Although IHL protects the living and the dead against organ harvesting, such protection may only be given effect if organ trafficking networks are bound by IHL. Understanding the structure of organ trafficking networks, will help to determine whether such groups can be characterized as parties to an armed conflict, bound to observe IHL. If not, the attribution of their conduct to parties to a conflict and ICL could provide ways to effectively protect victims of organ trafficking.

### The structure of organ trafficking networks

Before considering the characterization of organ trafficking networks as parties to a conflict, their organizational structure must be fleshed out. This is relevant to

115 ICRC Customary Law Study, above note 58, p. 409.

116 *Ibid.*, pp. 185, 409.

117 See, e.g., B. Björkman and S. O. Hansson, “Bodily Rights and Property Rights”, *Journal of Medical Ethics*, Vol. 32, No. 4, 2006; Jesse Wall, “The Legal Status of Body Parts: A Framework”, *Oxford Journal of Legal Studies*, Vol. 31, No. 4, 2011; Carlo Petrini, “Ethical and Legal Considerations Regarding the Ownership and Commercial Use of Human Biological Materials and Their Derivatives”, *Journal of Blood Medicine*, Vol. 3, 2012.

118 Interpol, above note 7, p. 8. See Nancy Scheper-Hughes, “The Ends of the Body: Commodity Fetishism and the Global Traffic in Organs”, *SAIS Review*, Vol. 22, No. 1, 2002, p. 62.

119 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. 431.

120 See ICRC Commentary on GC I, above note 67, para. 1487.

determining whether such groups display the level of organization required to constitute a non-State armed group in an armed conflict (see the section below on “Organ Trafficking Networks as Parties to an Armed Conflict”). Although the UNTOC is not a prerequisite for the application of IHL, its definition of organized criminal groups constitutes an internationally accepted standard by which to assess the structure of organ trafficking networks.<sup>121</sup> The UNTOC defines organized criminal groups as

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>122</sup>

According to this definition, organized criminal groups display two key elements: a structure and a purpose. Firstly, a “structure” entails a certain level of organization, and the UNTOC captures a spectrum of criminal organizations in this regard.<sup>123</sup> According to a 2002 survey by the UN Office on Drugs and Crime (UNODC), organized criminal groups can be classified into five structures. Two of these are vertical hierarchies (the “standard” and “regional” models).<sup>124</sup> Another one, the “clustered hierarchy”, is considered sufficiently rare so as not to warrant further discussion here.<sup>125</sup> The remaining two structures are more consistent with traditional organ trafficking models, where donors, recipients and health-care professionals are recruited by brokers operating through “sophisticated and specialized networks”.<sup>126</sup> These structures are:

- A “core group”, usually horizontally structured and consisting of a tight and organized core within a loose network.<sup>127</sup> The small size of the core (usually up to twenty individuals) facilitates the maintenance of internal discipline.<sup>128</sup> Criminal operations are controlled by the core members, who also reap the biggest profits, while the loose network at the core’s periphery allows for fluid membership.<sup>129</sup>
- Criminal networks made of several key individuals in shifting alliances, each contributing their skills to a criminal project, and who may not consider

121 With over 190 States Parties, the UNTOC has attracted near-universal participation. Cecily Rose, “The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols”, *American Journal of International Law*, Vol. 114, No. 1, 2020, p. 51.

122 UNTOC, above note 20, Art. 2(a).

123 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Vienna, September 2002 (UNODC Survey), pp. 15–18; Jay S. Albanese, “Transnational Organized Crime”, in Mangai Natarajan (ed.), *International Crime and Justice*, Cambridge University Press, Cambridge, 2014, pp. 233–234.

124 UNODC Survey, above note 123, pp. 34–37.

125 *Ibid.*, pp. 37–39.

126 C. May, above note 2, p. xii.

127 UNODC Survey, above note 123, p. 39. See also Phil Williams, “Transnational Criminal Networks”, in John Arquilla and David Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime and Militancy*, RAND Corporation, Santa Monica, CA, 2001, pp. 72–74.

128 UNODC Survey, above note 123, p. 39.

129 *Ibid.*, pp. 39–40.

themselves as members of a criminal group.<sup>130</sup> Cohesion is maintained through personal loyalties and ties rather than discipline because the various parts of the network may not work closely enough to know each other.<sup>131</sup>

Article 2(c) of the UNTOC clarifies that a group need not “have formally defined roles for its members, continuity of its membership or a developed structure”.<sup>132</sup> Thus, core groups within a loose network and criminal networks are covered by the UNTOC.<sup>133</sup> For instance, networked structures are typical for human trafficking groups, where members each have a role and carry out their part of the crime without knowing the full composition of the group.<sup>134</sup> However, groups “randomly formed for the immediate commission of an offence”, such as *ad hoc* groups in riots, are excluded from the UNTOC.<sup>135</sup>

Secondly, with respect to its purpose, the organized criminal group must seek to “obtain, directly or indirectly, a financial or other material benefit”. This precludes groups primarily driven by political motives from constituting organized criminal groups.<sup>136</sup> As will be seen below in the section on “Organ Trafficking Networks as Parties to an IAC”, this feature may be particularly relevant when attempting to characterize an IAC involving a non-State armed group under Article 1(4) of AP I.

Organ trafficking networks are undoubtedly organized criminal groups under the UNTOC. They typically involve brokers, recruiters, donors/sellers, recipients/buyers, and health-care professionals and facilities (such as transplant surgeons, hospitals and laboratories).<sup>137</sup> Brokers are responsible for connecting donors and recipients, and are organized in small, specialized syndicates.<sup>138</sup> They operate within an established network, which includes local recruiters and health-care professionals and facilities, to harvest, supply and transplant organs.<sup>139</sup> All strategic decisions regarding the operation of the network are handled by brokers who take the biggest cut of the profits.<sup>140</sup> Organ trafficking networks are, therefore, akin to core groups with dense connections among brokers and looser

130 *Ibid.*, p. 41.

131 *Ibid.*

132 UNTOC, above note 20, Art. 2(c).

133 UNODC Survey, above note 123, p. 5.

134 *Ibid.*, p. 39; G. Vermeulen, Y. Van Damme and Wendy De Bondt, “Perceived Involvement of “Organised Crime” in Human Trafficking and Smuggling”, *International Review of Penal Law*, Vol. 81, No. 1–2, 2010, p. 256.

135 UNODC, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, New York, 2006, p. 15.

136 Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 422; UNODC, *Legislative Guides for the Implementation of the United Conventions against Transnational Organized Crime and the Protocol Thereto*, New York, 2004, p. 13, para. 26.

137 M. Bos, above note 7, pp. 20–21; C. May, above note 2, p. 31; M. P. Heintz, B. Yu and D. Wijesekera, above note 7, pp. 3–4; Interpol, above note 7, p. 13. See also S. Columb, above note 33, pp. 1307–1308.

138 C. May, above note 2, p. 31; M. Bos, above note 7, pp. 20–21.

139 C. May, above note 2, p. 31; M. Bos, above note 7, pp. 20–21. See, e.g., F. Ambagtsheer, above note 7, p. 7 (discussing the *Netcare* and *Medicus* cases, which both exposed global organ trafficking networks of brokers, recruiters, and health-care professionals and facilities).

140 M. Bos, above note 7, p. 20.

relationships with, and among, other members of the network, all acting with the purpose of benefiting financially from trafficking. For their part, recipients benefit materially from soliciting brokers to procure organs and could thus be included in the group. They may be acting out of necessity, but their situation is not comparable to that of organ donors, who fall victim to organ harvesting out of coercion or necessity and who suffer a clear physical detriment.<sup>141</sup> These compelling circumstances would weigh heavily against classifying victim donors as part of an organ trafficking network.<sup>142</sup>

### Organ trafficking networks as parties to an armed conflict

The application of IHL is triggered by the existence of an armed conflict, defined by the *Tadić* case as “a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>143</sup> The *Tadić* definition covers both NIACs and IACs, and organ trafficking networks must fall within the scope of one or the other to constitute parties to an armed conflict.

### *Organ trafficking networks as parties to a NIAC*

NIACs are characterized by armed violence between a non-State organized armed group (OAG) and a State or another OAG.<sup>144</sup> According to *Tadić*, a NIAC requires, cumulatively, (1) a certain level of organization within the OAGs and (2) protracted armed violence between the parties.<sup>145</sup> The political purpose of the OAGs is irrelevant, a feature shared by organized criminal groups under the UNTOC and which allows criminal organizations to rise to the level of OAGs.<sup>146</sup> However, whereas the IHL of NIACs is conditioned on the existence of a group carrying out acts of armed violence, such acts are not characteristic of an organized criminal group under the UNTOC.

With respect to the organizational requirement, OAGs must display a minimum level of organization. The requisite level of organization is confirmed through the assessment of several factors, identified by the ICTY in the *Haradinaj* case as:

the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and

<sup>141</sup> See A. Pietrobon, above note 27, p. 486; C. May, above note 2, p. 31.

<sup>142</sup> See UNTOC, above note 20, Art. 11(6).

<sup>143</sup> ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion to Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> See ICRC Commentary on GC III, above note 58, paras 481–485.

logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>147</sup>

In the view of the ICRC, an OAG essentially requires (1) a command structure, with “a certain level of hierarchy and discipline and the ability to implement the basic obligations of IHL”, and (2) the capacity to sustain military operations.<sup>148</sup> These criteria are supplemented for NIACs falling within the scope of AP II by the requirement of territorial control by the non-State armed group.<sup>149</sup>

Organ trafficking networks do not have a hierarchical structure, but the lack of a rigid hierarchy is not dispositive of the existence of an OAG.<sup>150</sup> For instance, the ICTY considered the KLA to be an OAG, operating underground, notwithstanding its apparently horizontal command structure.<sup>151</sup> In fact, the majority of non-State armed groups today, including terrorist groups such as IS, operate as networks rather than centralized armed groups with a strict hierarchy and a clear command and control structure.<sup>152</sup> These networks are organized horizontally, are composed of “small armed groups, whose individual commanders retain considerable decision-making power and responsibility over group members”, and form loosely coordinated alliances with few signs of military discipline.<sup>153</sup>

The possibility of characterizing a network as a non-State OAG makes it conceivable for organ trafficking networks to satisfy the organizational requirement of a NIAC, but this status would likely not encompass the totality of the network.<sup>154</sup> For instance, the hierarchically structured factions of IS operating in Iraq and Syria, with territorial control, a command structure, and disciplinary rules, have been recognized as OAGs.<sup>155</sup> However, IS cells incapable of sustaining

147 See ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84, Judgment (Trial Chamber), 3 April 2008, para. 60. See also ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Trial Chamber), 21 March 2016, para. 134.

148 ICRC Commentary on GC III, above note 58, para. 463; ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, Geneva, 2008, p. 3. See also Jelena Pejic, “Status of Armed Conflicts”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 85–86; Gloria Gaggioli and Pavle Kilibarda, “Counterterrorism and the Risk of Over-Classification of Situations of Violence”, *International Review of the Red Cross*, Vol. 103, No. 916–917, 2021, p. 215.

149 See AP II, Art. 1. However, AP II does not apply to NIACs occurring between non-State armed groups only. ICRC, *How Is the Term “Armed Conflict” Defined?*, above note 148, p. 4.

150 See Peter Margulies and Matthew Sinnott, “Crossing Borders to Target Al-Qaeda and Its Affiliates: Defining Networks as Organized Armed Groups in Non-International Armed Conflicts”, in Terry D. Gill et al. (eds), *Yearbook of International Humanitarian Law 2013*, T. M. C. Asser Press, The Hague, 2015, p. 337.

151 ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, paras 131–133.

152 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, 2018, pp. 38, 46.

153 *Ibid.*, pp. 46–47.

154 See G. Gaggioli and P. Kilibarda, above note 148, p. 220; P. Margulies and M. Sinnott, above note 150, p. 337.

155 G. Gaggioli and P. Kilibarda, above note 148, pp. 217–218; Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, 2020, p. 10; Tom Gal, “Legal Classification of the Conflict(s) in Syria”, in Hilary Moodrick-Even Khen, Nir



military operations or enforcing compliance with IHL by subordinates would not qualify as OAGs.<sup>156</sup> The same logic would apply to organ trafficking networks. A core group of organ brokers, maintaining discipline and cohesion internally, could satisfy the organizational requirement (subject to the group's ability to sustain military operations), but members of the wider network, such as health-care professionals, would not. Their looser organizational links to the core preclude them from forming part of the same OAG, and they are unlikely to display the attributes of OAG membership themselves, especially recruiters acting opportunistically and alone.<sup>157</sup> Crucially, organ trafficking networks would have no interest in ensuring compliance with IHL by members of the group<sup>158</sup> – in fact, that would be entirely inconsistent with the network's activities, which inherently involve violations of IHL when organs are harvested during armed conflict.

Furthermore, while OAGs are not characterized by a political motive, the purpose of such groups is to plan and carry out military operations.<sup>159</sup> This is an essential and objectively verifiable characteristic.<sup>160</sup> For instance, IS is organized with a view to challenging governmental forces and exercising territorial control in Iraq and Syria.<sup>161</sup> By contrast, organ trafficking networks are not organized to conduct hostilities.<sup>162</sup> They are structured for the benefit of brokers, are clandestine and profit-oriented, and remain invisible by avoiding confrontation with law enforcement.<sup>163</sup> They do not need to control territory to carry out their operations; in fact, their lack of attachment to territory and infrastructures is also their strength, because it reduces their visibility and vulnerability to law enforcement.<sup>164</sup> Additionally, any use of armed force would only be in reaction to law enforcement attempts to repress their activities, rather than to carry out

T. Boms and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality*, Cambridge University Press, Cambridge, 2020, pp. 49–50; Agnes Callamard, "Towards International Human Rights Law Applied to Armed Groups", *Netherlands Quarterly of Human Rights*, Vol. 37, No. 1, 2010, pp. 87–90.

156 G. Gaggioli and P. Kilibarda, above note 148, pp. 219–220.

157 See *ibid.*, p. 219; Interpol, above note 7, p. 13.

158 See P. Hauck and S. Peterke, above note 136, p. 433.

159 *Ibid.*

160 *Ibid.* IHL is therefore traditionally concerned with "[a]ll armed groups capable of launching operations with some semblance of a military character". See Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2020, p. 13.

161 G. Gaggioli and P. Kilibarda, above note 148, p. 235.

162 Similarly, although gangs and drug cartels might receive military training and weapons and engage in open violence against the State or a rival in order to maintain their influence and territory, their ability to plan, coordinate and carry out military operations is questionable. P. Hauck and S. Peterke, above note 136, p. 432.

163 See M. Bos, above note 7, p. 25; Stasis N. Kalyvas, "How Civil Wars Help Explain Organized Crime – and How They Do Not", *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015, p. 1520. However, organized criminality is not always motivated by profit. For instance, gangs in El Salvador maintain a "criminal subsistence economy" which supports their activities, without generating major profit revenue. Kirsten Ortega Ryan, "'Urban Killing Fields': International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador", *International and Comparative Law Review*, Vol. 20, No. 1, 2020, p. 116.

164 See P. Williams, above note 127, p. 71.

military operations as part of a defined military strategy.<sup>165</sup> Organ trafficking networks thus have no interest in going head-to-head with either the State or another non-State armed group.<sup>166</sup> In short, a political motive may not be a requirement, but the lack of a “military” purpose *de facto* precludes organ trafficking networks from constituting OAGs.<sup>167</sup>

With respect to the existence of protracted armed violence, NIACs must display a minimum level of intensity.<sup>168</sup> According to the ICTY in the *Haradinaj* case, the intensity of the conflict can be assessed based on a non-exhaustive list of indicators, including:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.<sup>169</sup>

Anything below the required intensity threshold would only amount to internal disturbances and tensions to which IHL would not apply.<sup>170</sup> Implicit in the ICTY’s list of indicators is the idea that armed violence between the parties has reached such a high level that it can no longer be contained by law enforcement and requires the intervention of military force.<sup>171</sup> Such can be the case in confronting terrorist groups,<sup>172</sup> and potentially gangs,<sup>173</sup> which can generate violence of sufficient intensity for a NIAC. For instance, armed violence by IS, considered a terrorist organization, has created a NIAC in Iraq and Syria, while violence by drug cartels in Mexico is sufficiently destabilizing to call for military intervention.<sup>174</sup> Organ trafficking networks, however, are not reported to engage in acts of violence against States or OAGs, let alone at a level intense enough to amount to protracted armed violence. The success of their illegal trade relies on discretion and on evading law enforcement, not confronting it.<sup>175</sup> Furthermore, organ trafficking does not need an armed conflict to operate. Conflict may be a

165 P. Hauck and S. Peterke, above note 136, p. 432.

166 *Ibid.*, p. 433.

167 G. Gaggioli and P. Kilibarda, above note 148, p. 234.

168 *Ibid.*, p. 221.

169 ICTY, *Haradinaj*, above note 147, para. 49. See also ICC, *Bemba*, above note 147, para. 137.

170 Rome Statute, above note 56, Art. 8(f). See also AP II, Art. 1(2).

171 See P. Hauck and S. Peterke, above note 136, p. 431; G. Gaggioli and P. Kilibarda, above note 148, pp. 221–223, 234; ICRC, *How Is the Term “Armed Conflict” Defined?*, above note 148, p. 3.

172 ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 190; G. Gaggioli and P. Kilibarda, above note 148, pp. 220–224.

173 P. Hauck and S. Peterke, above note 136, p. 431. In the case of El Salvador, it has been argued that widespread gang violence and its effects on the civilian population has met the threshold of protracted armed violence. See K. Ortega Ryan, above note 163, pp. 107–114.

174 Eurojust, above note 155, p. 7. See Carina Bergal, “The Mexican Drug War: The Case for Non-International Armed Conflict Classification”, *Fordham International Law Journal*, Vol. 34, No. 4, 2011, p. 1084. But see Andrea Nill Sanchez, “Mexico’s Drug “War”: Drawing a Line between Rhetoric and Reality”, *Yale Journal of International Law*, Vol. 38, No. 2, 2013, pp. 468, 491.

175 Interpol, above note 7, p. 30; P. Hauck and S. Peterke, above note 136, p. 431.

catalyst for the exploitation of vulnerabilities such as poverty, injury and desperation, but opportunities to harvest organs abound outside of war.<sup>176</sup> Therefore, organ traffickers would have little need to engage in armed violence.

Although organ trafficking networks make a poor case for OAGs, non-State armed groups have been known to engage in organized crime to generate revenue by establishing “in-house” capabilities and links to the criminal underworld.<sup>177</sup> The cases of IS and the KLA engaging in organ trafficking are a clear demonstration of this phenomenon, and by harvesting organs during armed conflict, these OAGs would have committed violations of IHL. Therefore, organ trafficking is more likely to fall within the scope of IHL as a subsidiary activity of OAGs than as the main activity of organ trafficking networks.<sup>178</sup>

### *Organ trafficking networks as parties to an IAC*

When it comes to IACs, the protection against organ trafficking faces an important limit because the IHL of IACs applies only between States party to the conflict.<sup>179</sup> A clear statement of this rule is provided by common Article 2, according to which the Geneva Conventions apply to all armed conflicts between the High Contracting Parties.<sup>180</sup> By exception to this principle, the IHL of IACs would apply to non-State armed groups in either of the two following scenarios: (1) the regime of AP I Article 1(4) applies, or (2) a non-State armed group is fighting a State on behalf of another State.

The first scenario is the extension, by Article 1(4) of AP I, of the regime of IACs to non-State armed groups “fighting against colonial domination or occupation and against racist regimes in the exercise of the right to self-determination” (i.e., wars of liberation).<sup>181</sup> To benefit from this provision, organ trafficking networks would need to (1) engage in armed violence against a State and (2) do so with a political motive described by Article 1(4). However, organ trafficking neither entails nor requires a political motive or the use of armed force against a State. If organ trafficking networks had such a motive, they would no longer be considered as organized criminal groups by the UNTOC.<sup>182</sup> In addition, the conditions for invoking Article 1(4), its reservations, and the fact

176 C. May, above note 2, para. 32.

177 Emilio C. Viano, “Unholy Alliances and Their Threat: The Convergence of Terrorism, Organized Crime and Corruption”, *International Annals of Criminology*, Vol. 58, No. 1, 2020, p. 92. See, generally, Laura Adal, *Organized Crime in the Levant: Conflict, Transactional Relationships and Identity Dynamics*, Global Initiative against Transnational Organized Crime, Geneva, 2021. It was estimated in 2016 that IS had raised up to \$2 billion worth of assets, through smuggling, extortion and the seizure of oil fields: A. Bellal (ed.), above note 14, p. 37.

178 See Regina Menachery Paulose, “Towards a New Framework in the Law of War: Incorporating Transnational Organised Crime”, *University of Western Sydney Law Review*, No. 17, 2013, p. 70.

179 M. Sassòli, above note 36, para. 6.61.

180 See, e.g., GC IV, Art. 2.

181 See also Sven Peterke and Joachim Wolf, “International Humanitarian Law and Transnational Organised Crime”, in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime*, Oxford University Press, Oxford, 2020, pp. 383–390.

182 See P. Hauck and S. Peterke, above note 136, p. 422.

that, if successful, organ trafficking networks would be prohibited by IHL from harvesting organs, against their profit-driven interests, make the application of this Article unlikely.<sup>183</sup>

The second scenario is a matter of armed conflict internationalization, the parameters of which are still subject to debate.<sup>184</sup> On the one hand, the ICJ considers that acts of non-State armed groups may only be attributable to a State if the groups are either *de facto* organs, acting in complete dependence on a State, or under a State's *effective control*.<sup>185</sup> On the other hand, ICL accepts that *overall control* may be sufficient to attribute the acts of groups to a State.<sup>186</sup> However, the ICJ has acknowledged the relevance of the overall control test for purposes of conflict classification only, and has thus created the possibility of conflicts being classified as IACs with no possibility of attributing State responsibility for lack of effective control.<sup>187</sup> Putting aside this debate for now, the question of State control and attribution is nevertheless essential to establishing responsibility for organ harvesting by organ trafficking networks.

## Establishing responsibility for violations of IHL by organ trafficking networks

IHL addresses not only parties to an armed conflict but also individuals who commit violations. It is binding on States and is also admitted to be binding on non-State armed groups.<sup>188</sup> While parties to a conflict may engage in organ harvesting directly, organ trafficking networks may also take advantage of an armed conflict to carry out their activities with greater impunity. As IHL does not seek to regulate “ordinary” criminality, organ harvesting by private actors may only amount to a violation of IHL and give rise to reparations if it is attributable to the parties to a conflict. However, even if attribution is not feasible, individuals responsible for these violations could still incur criminal responsibility for war crimes.<sup>189</sup>

183 See Julie Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 147; Dapo Akande, “Classification of Armed Conflict”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 39. See also S. Peterke and J. Wolf, above note 181, pp. 383–390.

184 D. Akande, above note 183, pp. 44–47. See also Djemila Carron, “When Is a Conflict International? Time for New Control Tests in IHL”, *International Review of the Red Cross*, Vol. 98, No. 903, 2016.

185 ICJ, *Genocide*, above note 119, para. 406.

186 This position is shared by the ICRC: 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, 2016, p. 1238. See, generally, Rogier Bartels, “The Classification of Armed Conflicts by International Criminal Courts and Tribunals”, *International Criminal Law Review*, Vol. 20, No. 4, 2020.

187 ICJ, *Genocide*, above note 119, para. 404; D. Akande, above note 183, p. 47.

188 M. Sassoli, above note 36, paras 6.67–6.71; Ezequiel Heffes and Brian E. Frenkel, “The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules”, *Goettingen Journal of International Law*, Vol. 8, No. 1, 2017, pp. 46–55.

189 Jann K. Kleffner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 450.

## Attributing responsibility for organ harvesting to parties to an armed conflict

Parties to an armed conflict may call upon organized criminal groups for a variety of purposes. For instance, non-State armed groups are known to cooperate with criminal organizations in order to generate revenue.<sup>190</sup> The *Nicaragua* case also shows that using criminal groups may form part of a military strategy, as evidenced by the United States' recommendation that the Contras hire "professional criminals" "to carry out specific selective 'jobs'".<sup>191</sup> Therefore, an alternative to the direct application of IHL to organ trafficking networks would be to attribute their actions to a party to an ongoing armed conflict, whether it be a State or a non-State armed group. Unfortunately, the strict application of the prevailing rules of attribution severely limits the possibility of holding parties accountable.

Firstly, although non-State armed groups are bound to respect IHL, there is a protection gap preventing IHL from being enforced against them.<sup>192</sup> Indeed, the rules of international responsibility, reflected in the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),<sup>193</sup> do not contemplate the collective responsibility of non-State armed groups.<sup>194</sup> The ILC has only recognized that a non-State armed group in the form of an insurrectional movement could be responsible for breaches of IHL to the extent that it has succeeded in establishing a new State capable of bearing responsibility for the movement's actions.<sup>195</sup> Yet, even if the responsibility of non-State armed groups could be argued, including by analogy to States,<sup>196</sup> its consequence remains unclear.<sup>197</sup> IHL is generally silent on the

190 For instance, the Taliban has generated revenue by taxing entities involved in the production, manufacture and trafficking of illicit opiates in Afghanistan. In 2016, non-State armed groups raised around \$150 million from that illicit trade. UNODC, *The Drug Problem and Organized Crime, Illicit Financial Flows, Corruption and Terrorism*, Vienna, 2017, p. 10; E. C. Viano, above note 177, p. 92.

191 ICJ, *Nicaragua*, above note 86, para. 118.

192 ICRC Customary Law Study, above note 58, pp. 497–498, 536.

193 ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001 (ARSIWA).

194 ICRC Commentary on GC III, above note 58, para. 931; ICRC Customary Law Study, above note 58, p. 536; E. Heffes and B. E. Frenkel, above note 188, pp. 57–59; Katharine Fortin and Jann K. Kleffner, "Responsibility of Organized Armed Groups Controlling Territory: Attributing Conduct to ISIS: *Liber Amicorum* Terry D. Gill", in Rogier Bartels et al. (eds), *Military Operations and the Notion of Control under International Law*, T. M. C. Asser Press, The Hague, 2020, p. 314. See, generally, Kirsten Schmalenbach, "International Responsibility for Humanitarian Law Violations by Armed Groups", in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law*, Cambridge University Press, Cambridge, 2015.

195 ARSIWA, above note 193, Art. 10, p. 50; K. Schmalenbach, above note 194, p. 503; Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 5, 2010, p. 9.

196 This can be done by drawing on the characteristics shared by non-State armed groups and States: K. Fortin and J. K. Kleffner, above note 194, pp. 318–325.

197 ICRC Customary Law Study, above note 58, p. 550; Olivia Herman, "Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations", *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1037.

issue of reparations and provides only a right to reparation against States.<sup>198</sup> Therefore, while IS may have sanctioned organ harvesting<sup>199</sup> and potentially relied on organ trafficking networks to carry out these actions, international law does not yet provide a mechanism for holding it responsible and liable for reparations.<sup>200</sup>

Secondly, the threshold for State attribution is an exacting one and may not be adapted to the structure of organ trafficking networks. Such networks are unlikely to constitute *de facto* organs under Article 4 of the ARSIWA because they would need to act in complete dependence on the State and under its complete control.<sup>201</sup> In this situation, organ trafficking networks would be “nothing more than [the State’s] agent[s]” with no real autonomy or independence, such that all of their acts would be attributable to the State.<sup>202</sup> The level of dependence and control required is such that the ICJ found it to be lacking in both the *Nicaragua* case and the *Genocide* case.<sup>203</sup> For instance, any evidence of autonomy or independence on the part of an organ trafficking network, including in cases where it is created by the State which selects and finances its members, would prevent the network from qualifying as a *de facto* organ.<sup>204</sup> Given that organ trafficking networks are loosely structured, with fluid membership, it is doubtful that complete dependence from the entire network could ever be established.

In the absence of complete dependence, violations by organ trafficking networks could be attributable to a State under the effective control test, provided that the group or its members were acting “on the instructions of, or under the direction or control of”, that State under Article 8 of the ARSIWA.<sup>205</sup> Violations of IHL are successfully attributed by establishing that in each operation where they occurred, the State issued specific instructions or controlled the perpetration

198 See AP I, Art. 91; ICRC Customary Law Study, above note 58, Rule 150, p. 537; Luke Moffett, “Violence and Repair: The Practice and Challenges of Non-State Armed Groups in Engaging in Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1062.

199 See W. Strobel, J. Landay and P. Stewart, above note 16.

200 K. Fortin and J. K. Kleffner, above note 194, pp. 324–325; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*, Intersentia, Cambridge, Antwerp and Chicago, IL, 2020, p. 71.

201 ICJ, *Nicaragua*, above note 88, para. 109; ICJ, *Genocide*, above note 119, paras 392–393; K. Fortin and J. K. Kleffner, above note 194, p. 320.

202 ICJ, *Genocide*, above note 119, paras 384, 392–393. See Marko Milanović, “State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken”, *Leiden Journal of International Law*, Vol. 22, No. 2, 2009, pp. 316–317; Vladyslav Lanovoy, “The Use of Force by Non-State Actors and the Limits of Attribution of Conduct”, *European Journal of International Law*, Vol. 28, No. 2, 2017, p. 575.

203 ICJ, *Nicaragua*, above note 88, para. 110; ICJ, *Genocide*, above note 119, paras 394–395; V. Lanovoy, above note 202, p. 575.

204 In the *Nicaragua* case, the ICJ notably considered that approving the organization’s name and selecting and paying its leaders, as well as “the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided”, was not sufficient to prove complete dependency. In the *Genocide* case, the ICJ could not find complete dependence where the non-State actor had “some qualified, but real, margin of independence”. See ICJ, *Nicaragua*, above note 88, paras 111–112; ICJ, *Genocide*, above note 119, para. 394.

205 K. Fortin and J. K. Kleffner, above note 194, pp. 322–323.



of these acts.<sup>206</sup> The difficulty of proving effective control over organ trafficking networks speaks for itself. Their organizational structure is horizontal and their members are loosely connected, save perhaps within the core of the network, such as a syndicate of brokers. Unlike military or paramilitary groups, there is no overarching hierarchy which will ensure that orders are carried out throughout the wider network.<sup>207</sup> Brokers connect with donors through local recruiters but must collaborate with the health-care professionals charged with harvesting and transplanting organs. Crucially, however, it is those performing organ harvesting procedures that directly violate IHL, not the brokers. Instructing the head, or core, of an organ trafficking network would not necessarily imply that all the members of the network were acting on these specific instructions, especially health-care professionals, who may be left in the dark with respect to the true nature of their actions.<sup>208</sup> Compliance with specific instructions at a given time is made all the more difficult by the fluid membership of the network.<sup>209</sup> Therefore, effective control would require proof that the persons performing organ harvesting are personally acting on the specific instructions of a State.

Organ harvesting also poses difficulties in operational terms because it is committed on an individual basis, donor by donor. This raises the question of the specificity of State instructions: can organ trafficking be viewed as a single operation, allowing each instance of organ harvesting to fall within the scope of a State's instructions, or should each instance of organ harvesting be considered as a separate operation? A global approach might be conceivable whereby organ harvesting is repeatedly performed in the same facilities and by the same persons, as this would ensure some continuity in both instructions and operations. However, isolated occurrences would likely require an individual set of instructions. Finally, proving that an organ trafficking network acted under the effective control of a State will be all the more difficult where the network has an established history of organ harvesting, separate from any State instructions that might have been issued. These challenges make attribution under the effective control test far from evident.

A much more pragmatic alternative would be the ICTY's overall control test, which, despite not governing matters of State responsibility, better apprehends the interactions between States and non-State armed groups.<sup>210</sup> According to the *Tadić* Appeals Chamber, the effective control test allows the attribution of acts of private individuals or "a group that is not militarily organised" to the State specifically ordering the performance of the acts.<sup>211</sup> By contrast, the overall control test addresses acts of "organised and hierarchically

206 See ICJ, *Nicaragua*, above note 88, para. 115; ICJ, *Genocide*, above note 119, paras 399–400; 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, No. 4, 2007, pp. 650, 653.

207 See K. Fortin and J. K. Kleffner, above note 194, p. 321.

208 M. Bos, above note 7, p. 21; Interpol, above note 7, p. 13. See K. Fortin and J. K. Kleffner, above note 194, p. 321; K. Schmalenbach, above note 194, p. 500.

209 See K. Schmalenbach, above note 194, pp. 499–500.

210 See ICJ, *Genocide*, above note 119, para. 406; A. Cassese, above note 206, p. 657.

211 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 137.



structured groups”, such as military or paramilitary units.<sup>212</sup> Acts of these groups can be attributed to a State without the need for specific instructions or control over an operation.<sup>213</sup> Rather, overall control would only require that a State equip, finance and organize an armed group, in addition to generally coordinating and planning its actions.<sup>214</sup> In the case of organ trafficking networks, this level of control is appealing. Overall control could indeed be established through a State’s designation of targets for organ harvesting, such as the wounded, and its provision of medical personnel, facilities and equipment. However, the *Tadić* Appeals Chamber expressly stated that the overall control test does not benefit groups which are not militarily organized.<sup>215</sup> Here again, organ trafficking networks would fall short of the level of organization required for overall control, due to their lack of military structure. However, military or paramilitary groups like IS or the KLA would display the requisite level of organization.<sup>216</sup>

Finally, a criminal organization’s conduct could potentially be attributed through a State’s acknowledgment and adoption of that conduct under Article 11 of the ARSIWA.<sup>217</sup> This could allow statements such as those made by IS, when officially sanctioning organ harvesting from “apostates”, to be used as a hook for purposes of attribution.<sup>218</sup> However, the acknowledgment and adoption of conduct must be clear and unequivocal, going beyond mere approval or endorsement, and must reflect an intent to accept responsibility.<sup>219</sup> In that sense, IS’s statements would be too broad and unspecific to be taken as an admission of responsibility.<sup>220</sup> Furthermore, conduct can only be adopted subsequent to the violation of IHL, meaning that, in any event, future acts of organ harvesting would not be covered by those statements.<sup>221</sup>

### *International criminal responsibility of members of organ trafficking networks*

Given the limited success in characterizing organ trafficking networks as parties to an armed conflict or attributing their acts to States or non-State armed groups, ICL might be the only way to ensure that persons engaged in organ trafficking are held accountable. Establishing the criminal responsibility of these persons would also allow for reparations to be made to victims of organ trafficking under Article 75 (2) of the Rome Statute of the ICC.<sup>222</sup>

212 *Ibid.*, paras 120, 131, 137.

213 *Ibid.*

214 *Ibid.*, paras 131, 137.

215 *Ibid.*, para. 137.

216 See ICTY, *Limaj*, above note 151, paras 131–133; G. Gaggioli and P. Kilibarda, above note 148, pp. 217–218.

217 See ARSIWA, above note 193, p. 53; K. Fortin and J. K. Kleffner, above note 194, p. 323.

218 See W. Strobel, J. Landay and P. Stewart, above note 16.

219 ARSIWA, above note 193, p. 53.

220 See K. Fortin and J. K. Kleffner, above note 194, p. 324.

221 *Ibid.*

222 Rome Statute, above note 56, Art. 75(2).

As organ trafficking networks are not parties to an IAC or a NIAC, their members are not combatants but civilians.<sup>223</sup> Importantly, however, war crimes are not limited to the actions of combatants and can also be committed by civilians.<sup>224</sup> Given that organ trafficking networks do not operate exclusively during armed conflict, a distinction must be made between organ harvesting as an ordinary crime and as a war crime.<sup>225</sup> This function is fulfilled by the nexus requirement, which “prevents random or isolated criminal occurrences from being characterised as war crime[s]”.<sup>226</sup> This is why the ICC *Elements of Crimes* consistently require that war crimes be “associated with an international armed conflict [or a NIAC]”.<sup>227</sup> In *Ntaganda*, the ICC Trial Chamber explained that in order to satisfy the nexus requirement,

[t]he existence of an armed conflict must have, at a minimum, played a substantial part in the perpetrator’s ability to commit the crime, the decision to commit it, the purpose of the commission, or the manner in which the crime was committed.<sup>228</sup>

The Trial Chamber also articulated a non-exhaustive list of factors, similar to those used by the ICTY and ICTR in the *Kunarac* and *Rutaganda* cases respectively, to establish the existence of a nexus:

[T]he Chamber may take into account, *inter alia*: (i) the status of the perpetrator and victim, and whether they had a role in the fighting; (ii) whether the act may be said to serve the ultimate goal of a military campaign; and (iii) whether the crime is committed as part of, or in the context of, the perpetrator’s official duties.<sup>229</sup>

While it is undeniable that an armed conflict may increase an organ trafficking network’s ability to harvest organs and influence or facilitate its *modus operandi*, it would be difficult for its members to satisfy, *in abstracto*, the *Ntaganda* factors. As previously explained,<sup>230</sup> organ trafficking networks are mainly for-profit criminal organizations, which conduct their activities covertly. Their members do not inherently engage in hostilities and are likely to be non-combatants, especially health-care professionals responsible for harvesting organs. They are also likely to

223 See ICRC Customary Law Study, above note 58, Rule 3, p. 11.

224 *Ibid.*, p. 573; Robert Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 275. See, e.g., ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32, Judgment (Trial Chamber), 29 November 2002, paras 57–60.

225 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgment (Trial Chamber), 8 July 2019, para. 731; Antonio Cassese, “The Nexus Requirement for War Crimes”, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1395, 1397.

226 *Ibid.* See also ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, para. 293.

227 See, generally, ICC *Elements of Crimes*, above note 61. See also ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, paras 57–59.

228 ICTY, *Ntaganda*, above note 225, para. 731; ICTY, *Kunarac*, above note 227, para. 58.

229 ICTY, *Ntaganda*, above note 225, para. 732. See also ICTY, *Kunarac*, above note 227, para. 59; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment (Appeals Chamber), 26 May 2003, para. 570.

230 See the above section on “Organ Trafficking Networks as Parties to a NIAC”.

have no relation to the armed conflict or its goals. It is indeed doubtful that organ harvesting could be said to serve the ultimate goal of a military campaign, unless it were performed specifically to fund that campaign; that could be the case for members of a non-State armed group searching for new sources of revenue. However, already established organ trafficking networks would be more likely to act out of self-interest, increasing their profits by seizing the new opportunities created by armed conflict.<sup>231</sup> As for the commission of a crime in the context of a perpetrator's official duties, the 1947 *Medical Trial* confirms that members of civilian medical services can be prosecuted for war crimes<sup>232</sup> – for instance, a physician harvesting organs while treating conflict-related injuries suffered by combatants and civilians would, without doubt, be acting in the context of his or her official duties. The nexus would be much weaker in the case of a physician performing organ harvesting procedures in a private setting.

Crucially, the ICTY Appeals Chamber in *Kunarac* also considered that the nexus could be satisfied by “establishing that the perpetrator acted in furtherance of or under the guise of the armed conflict”.<sup>233</sup> The “under the guise of the armed conflict” formula suggests that war crimes may result from privately motivated acts, for instance between non-combatants taking advantage of the breakdown of the rule of law during an armed conflict.<sup>234</sup> This would permit members of organ trafficking networks to more easily fall within the purview of ICL. However, this interpretation of the nexus requirement has been criticized for its broadness and could cause “parasitical criminality” to boil over into war crimes.<sup>235</sup> In particular, the ICTR Appeals Chamber in *Rutaganda*, rejecting a broad interpretation of the *Kunarac* nexus, stated that acting “under the guise of the armed conflict” does not allow any circumstance which would not satisfy several of the *Kunarac* (or *Ntaganda*) factors to constitute a war crime.<sup>236</sup>

Fortunately, the nexus requirement may be subject to evolutive interpretation. For instance, the *Kunarac* factors suggested that war crimes could only be committed against combatants or civilians belonging to, or identifying with, the opposing party,<sup>237</sup> but this assumption has since been rebutted by the *Ntaganda* case's admission of intra-party war crimes. This indicates that the

231 See Christina Steenkamp, “The Crime-Conflict Nexus and the Civil War in Syria”, *Stability: International Journal of Security & Development*, Vol. 6, No. 1, 2017, p. 2.

232 United States, Military Tribunal at Nuremberg, *The Medical Trial*, Judgment, 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 2, 1950, p. 186.

233 ICTY, *Kunarac*, above note 227, para. 58.

234 See Harmen van der Wilt, “War Crimes and the Requirement of a Nexus with an Armed Conflict”, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, p. 1125.

235 ICTR, *Rutaganda*, above note 229, para. 570; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 44; H. van der Wilt, above note 234, pp. 1125, 1127; K. Fortin, “The Application of Human Rights Law to Everyday Civilian Life under Rebel Control”, *Netherlands International Law Review*, Vol. 63, 2016, p. 176. See also Gloria Gaggioli, “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, p. 516.

236 ICTR, *Rutaganda*, above note 229, para. 570.

237 ICTY, *Kunarac*, above note 227, para. 59; ICTR, *Rutaganda*, above note 229, para. 569. See A. Cassese, above note 225, pp. 1397, 1413.

nexus requirement is by no means set in stone. In this context, the UN's increasing attention to the links and interplay between organized crime and armed conflict could pave the way to a broadening of the nexus requirement.<sup>238</sup> Organ harvesting by members of an organ trafficking network, taking advantage of the wounded, refugees and displaced civilians under the cover of war, could eventually be considered to be sufficiently associated with the armed conflict as to constitute a war crime. Nevertheless, close attention would still need to be paid to the wording of the Geneva Conventions and their Additional Protocols, which may require that a protected person be in the hands of an enemy for a violation of IHL or a war crime to occur.<sup>239</sup> For instance, Article 11(4) of AP I does not characterize as war crimes organ harvesting procedures performed by a party on its own nationals, even if detained in relation to the conflict.<sup>240</sup>

Assuming that members of organ trafficking networks could be held criminally responsible, several additional hurdles would still need to be overcome before organ harvesting could be successfully prosecuted. Firstly, ICL only contemplates as a war crime the act of organ harvesting.<sup>241</sup> Unlike the Santiago de Compostela Convention, it does not criminalize organ trafficking as a stand-alone offence covering all members of a network. Only the persons physically performing organ harvesting would be responsible as principal perpetrators. Many actors of the network could thus avoid prosecution, including brokers, recruiters, and physicians charged only with transplanting organs. Yet, their responsibility in the commission of organ harvesting could still be established through the Rome Statute's various modes of liability. These are covered by Article 25(3) of the Statute, which extends criminal responsibility to those that have aided, abetted, ordered, solicited or induced the commission of the crime.<sup>242</sup> Under Article 25(3), brokers could be prosecuted based on their responsibility in structuring organ trafficking networks and organizing their operations. It is also worth noting that these modes of liability could expand criminal responsibility beyond the scope of the SCC. For instance, the SCC does not criminalize an organ recipient's solicitation of a network to obtain a compatible organ, but Article 25(3) could.<sup>243</sup> Secondly, and most importantly, organ trafficking is a transnational crime involving participants and acts taking place across various jurisdictions, including beyond the geographical scope of IHL.<sup>244</sup> Therefore, there would be significant evidentiary challenges and jurisdictional difficulties for both the ICC and States wishing to prosecute.<sup>245</sup>

238 UN General Assembly, above note 14, para. 24; UNSC Res. 2482, 19 July 2019, para. 8.

239 ICC, *Ntaganda*, above note 81, paras 23–24. See, e.g., GC III, Art. 13; GC IV, Art. 32.

240 ICRC Commentary on the Additional Protocols, above note 38, para. 493.

241 See the above section on "The Prohibition of Organ Harvesting under IHL".

242 Rome Statute, above note 56. See Global Rights Compliance, above note 8, pp. 29–30.

243 See Rome Statute, above note 56, Art. 25(3)(b); Interpol, above note 7, pp. 13–14.

244 See M. Ramsden, above note 24, p. 249.

245 *Ibid.*, pp. 248–251.

## Conclusion

IHL undeniably protects persons against illegal organ harvesting during armed conflict. The various elements of the prohibition against organ harvesting – i.e., the regulation of medical procedures, the prohibitions against mutilation and murder, and the obligation to protect the wounded against ill-treatment – seek to prevent the exploitation of those living through armed conflict. Together with rules protecting the bodies of the dead, the rules protecting the living guarantee the right of persons impacted by armed conflict not to fall prey to abuse.

These rules place the acts of organ trafficking networks within the reach of IHL. Unfortunately, these networks are unlikely to constitute parties to an armed conflict due to an insufficient organizational structure and the nature of their activities, which do not require the use of armed force. Organ trafficking networks would also not benefit from being bound by IHL as this would interfere with the very purpose for which they are established. Furthermore, the prevailing rules of international responsibility are of little use for attributing the harvesting of organs by trafficking networks to parties to a conflict. The effective control test is too demanding, and the overall control test does not apply to non-militarily organized groups. Additionally, the rules regarding the responsibility of non-State armed groups and their obligation to make reparations are still unclear. In short, greater consideration of the role played by organized criminal groups in armed conflict is needed.

Presently, ICL remains the only viable option for holding members of organ trafficking networks accountable. Yet even there, the requirement of a nexus between organ harvesting and an armed conflict causes a rift that is likely to relegate organ harvesting to the status of an “ordinary” crime. A renewed interpretation of the *Kunarac* nexus, in light of the linkages between organized crime and armed conflict, could be the key to unlocking the international criminal responsibility of organ trafficking networks. Until then, the international community should consider supplementing the UNTOC to criminalize organ trafficking itself, much in the way of the SCC. This would be a welcome first step towards cracking down on organ trafficking, although it might still fail to capture the gravity of the violation suffered by conflict-related victims of organ harvesting.

# The regulation of crimes against water in armed conflicts and other situations of violence

**Mara Tignino<sup>1,2\*</sup>**

<sup>1</sup>Reader, Faculty of Law and Institute for Environmental Sciences, University of Geneva, Switzerland

<sup>2</sup>Lead Legal Specialist, Platform for International Water Law, Geneva Water Hub, Switzerland

Email: [Mara.Tignino@unige.ch](mailto:Mara.Tignino@unige.ch)

## Abstract

*Water is the lifeblood of human beings and society, but threats to water, such as the pollution of rivers, cyber crimes, and attacks against water infrastructure, are increasing. In green criminology, scholars have relied on domestic criminal law to develop the concept of crimes against water. This paper argues that international law could provide several frameworks for addressing these crimes. A number of international treaties and customary rules deal directly or indirectly with crimes against water, and the United Nations Security Council has also dealt with crimes against water committed by terrorist groups and parties to armed conflict. Crimes against water may represent violations not only of domestic criminal laws but also of international humanitarian law and human rights law.*

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**Keywords:** water, critical infrastructure, criminal groups, Security Council, international humanitarian law, international human rights law.

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## Introduction

Crimes against water may impact the availability and quality of water resources necessary for the economic development and security of States and for the health and life of local communities. The consequences of crimes against water are exacerbated by climate change and the increasing risks of water scarcity in different regions.<sup>1</sup> Water is an increasingly precious and rare resource that risks being the object of conflicts at both the international and national levels. Such conflicts may result in the commission of crimes against water by organized criminal groups with negative impacts on the environment and the health of populations, putting at risk even their very survival. Non-State armed groups have controlled or misused water infrastructure to consolidate control over territory or have weaponized water infrastructure such as dams. The use of water infrastructure as a means of warfare by non-State armed groups in the Euphrates–Tigris basin is an example of this conduct. The so-called Islamic State of Iraq and Syria (ISIS) controlled the large dams at Falluja, Mosul, Samarra and Ramadi, and not only interrupted local water supplies but also deprived distant areas in the lower reaches of the Euphrates and Tigris of water by damming and diverting it.<sup>2</sup>

This paper will begin with an introduction to the concept of crimes against water through the lens of green criminology and will underline the various features of crimes against water. The paper will then identify to what extent legal instruments such as the United Nations Convention against Transnational Organized Crime (UNTOC)<sup>3</sup> and United Nations Convention against Corruption (UNCAC)<sup>4</sup> can be used to address crimes related to water. The role of regional frameworks will

1 Vanda Felbab-Brown, “Water Crimes: A Global Crisis on the Rise”, Brookings Institute, 20 February 2015, available at: [www.brookings.edu/on-the-record/water-crimes-a-global-crisis-on-the-rise/](http://www.brookings.edu/on-the-record/water-crimes-a-global-crisis-on-the-rise/) (all internet references were accessed in January 2023).

2 Tobias von Lossow, *Water as Weapon: IS on the Euphrates and Tigris*, SWP Comments 3, German Institute for International and Security Affairs, 2016, available at: [www.swp-berlin.org/fileadmin/contents/products/comments/2016C03\\_lsw.pdf](http://www.swp-berlin.org/fileadmin/contents/products/comments/2016C03_lsw.pdf).

3 UN Convention against Transnational Organized Crime, UN Doc. A/RES/55/25, 15 November 2000 (entered into force 29 September 2003) (UNTOC), available at: [www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html](http://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html). The Convention is further supplemented by three Protocols, which target specific areas of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms.

4 UN Convention against Corruption, UN Doc. A/RES/58/4, 31 October 2003 (entered into force 14 December 2005) (UNCAC). For an analysis of the Convention, see Cecily Rose, “Article 1: Statement of purpose”, and Christina Binder and Jane A. Hofbauer, “Article 3: Scope of Application”, in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention against Corruption: A Commentary*, Oxford University Press, Oxford, 2019.



also be considered in combating crimes against water. Next, the paper will focus on the role of the UN Security Council in dealing with crimes against water. While water is often used as a method or means of warfare and water infrastructure has been targeted during armed conflicts, the Security Council has only recently addressed attacks against water. Given its primary responsibility for the maintenance of international peace and security,<sup>5</sup> the Security Council should play a role in preventing these attacks. In particular, it is crucial that this body addresses the crimes committed by organized criminal groups, which may often operate with other armed non-State groups.

International humanitarian law (IHL) applies in situations of armed conflict and binds the parties involved, but in addition, international human rights law (IHRL) also applies at all times (both in situations of armed conflict and in peacetime). Thus, in cases of specific threat to water, such as the failure to provide basic services to vulnerable groups, this paper discusses the role of IHRL as a framework that could be used to combat crimes against water during armed conflicts or other situations of violence.

## Crimes against water in criminology

Among crimes against the environment, crimes against water have rarely been the focus of specific attention.<sup>6</sup> The interest of academics in this type of crime is only recent.<sup>7</sup> These crimes may have significant impacts on society, for instance by limiting or polluting water resources. Green criminology,<sup>8</sup> examining the linkages between environmental issues and criminology, provides a theoretical framework for developing an analysis of crimes against water.<sup>9</sup>

The emergence of green criminology dates back to the late 1960s and the beginning of the 1970s, when environmental sociologists and critical criminologists first emphasized the problem of environmental pollution. Green criminology adopts multidisciplinary approaches linking the analysis of environmental harm to criminal law and States' responses to violations.<sup>10</sup>

5 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, Art. 24.

6 Lorenzo Segato, Walter Mattioli and Nicola Capello, "Water Crimes within Environmental Crimes", in Katja Eman *et al.* (eds), *Water, Governance and Crime Issues*, Springer Nature, Cham, 2020; Katja Eman and Gorazd Meško, "Water Crimes and Governance: The Slovenian Perspective", *International Criminology*, Vol. 1, 2021.

7 Samantha Bricknell, *Environmental Crime in Australia*, Australian Institute of Criminology, Canberra, 2010, pp. 103–114; Avi Brisman, William McClanahan and Nigel South, "Water Security, Crime and Conflict", in Michael Tonry (ed.), *Oxford Handbooks Online: Criminology and Criminal Justice*, Oxford University Press, Oxford, 2016; Rob White (ed.), *Environmental Crime: A Reader*, Willan, Cullompton, 2009.

8 Gerben J. N. Bruinsma and Shane D. Johnson, "Environmental Criminology: Scope, History and State of the Art", in G. J. N. Bruinsma and S. D. Johnson (eds), *The Oxford Handbook of Environmental Criminology*, Oxford University Press, Oxford, 2018.

9 Rob White and Katja Eman, "Green Criminology, Water Issues, Human Rights and Private Profit", in K. Eman *et al.* (eds), above note 6.

10 L. Segato, W. Mattioli and N. Capello, above note 6, p. 37.

In light of increasing water scarcity and the pollution of water resources, a growing body of crimes against water has emerged, many of which are predicted to increase in the future.<sup>11</sup> Given the link between water and social and ecological justice, scholars are increasingly paying more attention to the linkages between water and criminology. Crimes against water are often recorded under the crimes of fraud and corruption in domestic criminal laws;<sup>12</sup> for example, water resources may be damaged by the pollution of a watercourse or fraudulent water quality reporting. Domestic criminal law serves as a tool for identifying the most common typologies of crimes against water and may operate as a prevention mechanism to avoid harm to water resources.

### The different features of crimes against water

Crimes against water have various features. Water can be the object of a crime or the means of a crime: respective examples include the theft of drinking water and the intentional flooding or poisoning of a water supply.<sup>13</sup> The International Classification of Crime for Statistical Purposes defines a crime as “any punishable contravention or violation of the limits on human behavior as imposed by national criminal legislation”.<sup>14</sup> Based on this, the Water Crimes Project of 2016 defined a crime against water as “any punishable contravention or violation of the limits on human behavior as imposed by national criminal legislation, against surface [water] and groundwater, or against water services”.<sup>15</sup>

A crime against water may be committed by a natural or legal person and may benefit an individual, a group or a company through the exploitation of, damage to, trade in or theft of water. Examples of crimes against water include water theft, river pollution, manipulation of sampling to avoid treatment costs, and unauthorized consumption from the water network. The Water Crimes Project has classified water crimes into seven types:

1. Water corruption, which includes grand corruption (involving political decision-makers and large-scale investors) and petty corruption (when people or companies are requested to pay money to have access to water or to avoid inspections and fines);
2. water organized crime, which involves the activity of a criminal organization that has taken control over water within a territory;
3. water pollution, which consists in offences against the quality of water;
4. water theft, which consists in a reduction of the quantity of water carried out by the users of a water system in order to gain an economic advantage;
5. water fraud, which consists in fiscal artifices carried out in order to change the measure of the quantity or the quality of water and obtain an illicit gain;

11 *Ibid.*, pp. 31–45.

12 *Ibid.*

13 *Ibid.*, p. 37.

14 *Ibid.*, p. 32.

15 *Ibid.*, p. 38.

6. water terrorism, which includes terrorist attacks against water, in particular those threatening its quality (i.e., poisoning) or availability (i.e., attacks against water infrastructure); and
7. water cyber attacks, which include intrusion into the communication systems of water management companies and the manipulation of their information or networks.<sup>16</sup>

The analysis carried out by scholars in criminology points out that there are several typologies of crimes against water which can be identified in the domestic criminal laws of various countries. Crimes against water are more often committed during armed conflicts, but current literature does not specifically focus on crimes against water during or in the aftermath of armed conflicts. In this context, the present paper suggests two main types of crimes against water: crimes that affect the quantity and/or quality of freshwater resources and the ecosystems dependent on these resources, and crimes affecting water installations, works and facilities.

Armed conflicts may amplify the risks of freshwater shortages. In Iraq, for example, the United Nations Environment Programme (UNEP) noted a general decline in water quantity due to sewage pollution of freshwater.<sup>17</sup> Actions of armed non-State actors may cause the displacement of populations, which may in turn significantly impact groundwater extraction in camps.<sup>18</sup> Camps are commonly supplied with water via a network of groundwater boreholes; often, illegal boreholes are excavated to provide water, and their extraction rate is unsustainable and does not allow the aquifer to recharge.<sup>19</sup>

Crimes against water may affect the quality of water resources, and this is directly reflected in the incidence of waterborne diseases in countries affected by armed conflict.<sup>20</sup> For example, in Sudan, in 2007, it was reported that 80% of reported infections in the country were related to water.<sup>21</sup> In situations of protracted armed conflict, there can be a lack of historical data and investment over several decades, with considerable impacts on the quality of water. Pollution may come from agrochemicals and sewage, point source industrial pollution or high levels of suspended sediments. Moreover, the targeting of industrial facilities often involves the risk of pollution of surface and groundwater resources.<sup>22</sup>

Armed conflict affects installations, facilities and works related to international watercourses. Crimes against water often take the form of

16 L. Segato, W. Mattioli and N. Capello, above note 6, pp. 39–40.

17 UNEP, *Desk Study on the Environment in Iraq*, Nairobi, 2003, p. 30.

18 UNEP, *Sudan: Post-Conflict Environmental Impact Assessment*, Nairobi, 2007, p. 92.

19 *Ibid.*, p. 111.

20 For an analysis of the impacts of attacks against water and wastewater services and the outbreak and transmission of infectious disease in Gaza, Yemen and Iraq, see Michael Talhami and Mark Zeitoun, “The Impact of Attacks on Urban Services II: Reverberating Effects of Damage to Water and Wastewater Systems on Infectious Disease”, *International Review of the Red Cross*, Vol. 102, No. 915, 2022, available at: <https://international-review.icrc.org/articles/impact-of-attacks-on-urban-services-ii-damage-to-wastewater-systems-infectious-disease-915>.

21 UNEP, above note 18, pp. 111, 129.

22 UNEP, *Lebanon: Post-Conflict Environmental Impact Assessment*, Nairobi, 2006, p. 112.

intentional damage to water installations. For instance, Iraq has suffered from systematic and extensive sabotage and looting by ISIS.<sup>23</sup> ISIS seized control of critical dams in order to exert hegemony over downstream cities and rural areas by either cutting off water supplies or releasing a flood wave to drown government-controlled areas. The 2014–15 drought in central and southern Iraq largely resulted from ISIS blocking water flows.<sup>24</sup> In 2014, ISIS flooded hundreds of square kilometres of agricultural land downstream of Fallujah, displacing thousands of people.<sup>25</sup> At one point, ISIS controlled dams along the Euphrates River, from the Tabaqa Dam in Syria to Fallujah Barrage near Baghdad. Only Haditha, Iraq's second-largest dam, remained under government control through the support of the US-led coalition.<sup>26</sup>

Installations other than dams and dykes can also be damaged or destroyed during armed conflicts. In the conflict in Darfur, small waterworks such as wells were destroyed.<sup>27</sup> In many conflicts, from Iraq to Yemen, armed non-State actors directly and indirectly targeted a wide array of civilian infrastructures, including water installations and facilities.<sup>28</sup>

Having examined the features of the crimes against water in armed conflicts, the paper will now focus on some key international legal frameworks. These frameworks can be used to address these crimes and may provide a basis for strengthening cooperation between States aimed at gathering evidence and prosecuting crimes by criminal groups such as the intentional pollution of water resources or the destruction of water installations.

## International legal frameworks for addressing crimes against water

Many different international treaties have emerged with the aim of protecting and allocating transboundary water resources. This includes the codification of the customary rule of international law to protect the environment of international watercourses included in the UN Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997 (UN Watercourses Convention)<sup>29</sup> and the UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes

23 UNEP, *Environmental Issues in Areas Retaken from ISIL: Mosul Iraq*, Rapid Scoping Mission Technical Note, July–August 2017, p. 2.

24 *Ibid.*, p. 3.

25 *Ibid.*

26 *Ibid.*

27 UNEP, above note 18, p. 93.

28 Jeannie Sowers and Erika Weinthal, "Humanitarian Challenges and the Targeting of Civilian Infrastructure in the Yemen War", *International Affairs*, Vol. 97, No. 1, 2021.

29 Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997 (entered into force 17 August 2014) (UN Watercourses Convention), Arts 20–23, available at: <https://unece.org/environment-policy/water/un-watercourses-convention>. As of September 2022, the Convention had thirty-seven States Parties.

(UNECE Water Convention).<sup>30</sup> Many of the principles articulated in the 1972 Declaration on the Human Environment<sup>31</sup> and in the 1992 Rio Declaration on Environment and Development<sup>32</sup> have become guiding standards for international agreements regulating the protection of freshwater resources. Since the 1990s, the number of international water agreements that concern the protection of riverine ecosystems and water quality has increased remarkably. For example, the UNECE Water Convention requires an ecologically rational management of waters and addresses the conservation and restoration of damaged ecosystems.<sup>33</sup> Agreements on freshwater resources have established joint commissions in order to deal with the sources and nature of pollution and to put in place measures to fight against contamination.<sup>34</sup> Furthermore, international organizations with a regional scope, such as the UN Economic Commission for Europe and the Council of Europe, have also been active in promoting measures against pollution since the end of the 1960s.<sup>35</sup>

While a myriad of bilateral and basin-level agreements exist in various regions of the world, the situation of armed conflict is rarely addressed in these instruments. An exception is the UN Watercourses Convention, which makes an explicit reference to IHL in order to protect international watercourses and related installations in times of armed conflict.<sup>36</sup>

Most of the agreements do not recognize crimes against water. Instead, they promote cooperation among States for the management of surface and groundwater bodies that cross the boundaries of States. An exception is an Annex on Environmental Protection to the Water Charter of the Niger Basin, which states that the authors and accomplices of bushfires shall be liable to civil and criminal penalties.<sup>37</sup>

30 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992 (entered into force 6 October 1996) (UNECE Water Convention), Arts 2–3, available at: <https://digitallibrary.un.org/record/787804>. As of September 2022, the Convention had forty-six States Parties.

31 Declaration on the Human Environment, UN Doc. A/CONF.48/14, 1972.

32 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, Vol. 1, 1992.

33 UNECE Water Convention, above note 30, Art. 2(2).

34 Some of the numerous examples that can be cited in this context are the Great Lakes Water Quality Agreement between the United States and Canada of 1978, as amended in 1983, 1987 and 2012; the Agreements concerning the protection of the Meuse and Scheldt rivers of 1994, as amended in 2002; and the Convention on Cooperation for the Protection and Sustainable Use of the Danube of 1994. See Laurence Boisson de Chazournes, *Freshwater in International Law*, 2nd ed., Oxford University Press, Oxford, 2021, pp. 161–163.

35 In this regard, see for instance Resolution No. 10, ECE Declaration of Policy on Water Pollution, 1966, containing a set of principles dealing with pollution control. Paragraphs 1 and 9 of this resolution are reproduced in the *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1974, p. 332 fn. 216, available at: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_274.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_274.pdf). See also the Water Charter adopted by the Committee of Ministers of the Council of Europe on 6 May 1968 and Recommendation Rec(2001)14 of the Committee of Ministers to member States on the European Charter on Water Resources (adopted by the Committee of Ministers on 17 October 2001), available at: <https://rm.coe.int/1680504d85>.

36 UN Watercourses Convention, above note 29, Art. 29.

37 Water Charter of the Niger Basin, 30 April 2008 (entered into force July 2010), Annex on Environmental Protection, Art. 71, available at: <https://iea.uoregon.edu/treaty-text/8961>.

A rare example of an international treaty with a specific focus on the protection of the environment through criminal law is the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law (CoE Environment Convention).<sup>38</sup> This instrument, open to signature for non-member States of the Council of Europe, includes various environmental crimes, such as “the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of ... water”.<sup>39</sup> Two other crimes are “the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of ... water” and “the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of ... water”.<sup>40</sup> Thus, the CoE Environment Convention covers crimes related to damage to water resources in its scope of application. The Convention goes further than European Union (EU) legislation categorizing different crimes and specifying sanctions.<sup>41</sup> Although opened for signature in 1998, only one State has ratified the Convention.<sup>42</sup>

The low number of ratifications of the CoE Environment Convention and the absence of provisions on crimes against water in instruments dealing with transboundary water resources illustrate that States still have considerable discretion to regulate and enforce crimes against water. Although according to the Oregon State University’s Database on Freshwater Treaties, more than 600 treaties on water resources had been concluded as of 2007,<sup>43</sup> crimes against water have not been integrated into such legal frameworks.

Besides these legal frameworks, States have started to focus on the interlink between crimes against water, organized crime and corruption. The transnational dimension of organized crime has pushed States to design a multilateral legal framework – the UNTOC with its three Protocols – to encourage and promote

38 Convention on the Protection of the Environment through Criminal Law, European Treaty Series No. 172, 4 November 1998, available at: <https://rm.coe.int/168007f3f4>.

39 *Ibid.*, Art. 2(c).

40 *Ibid.*, Art. 2(d)–(e). See also Art. 2(a)–(b).

41 See Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the Protection of the Environment through Criminal Law, OJ L 328, 6 December 2008 (Environmental Crime Directive), pp. 28–37, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0099>. The Directive requires that EU member States provide effective, proportionate and dissuasive criminal penalties for environmental crimes committed intentionally or as a result of serious negligence.

42 The Convention has been ratified by one country and signed by thirteen States. According to its Article 13 (3), the Convention “shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States have expressed their consent to be bound by the Convention”.

43 An update of this database to 2019 is currently ongoing. The database is available at: <https://transboundarywaters.science.oregonstate.edu/content/international-freshwater-treaties-database>.

international cooperation on the suppression of organized crime. Other global and regional frameworks could also be used to address crimes against water.

### Transnational organized crime and water: The UNTOC

The UNTOC,<sup>44</sup> while enabling cooperation and mutual legal assistance in organized crime investigations, does not define transnational organized crime or list the kinds of crimes that might constitute it. In this way, the Convention could be applied to crimes against water. The UNTOC defines the notions of “organized criminal group”,<sup>45</sup> “serious crime”<sup>46</sup> and “structured group”,<sup>47</sup> and these definitions guide States in the fight against transnational organized crime in national laws.

Water plays only a limited role in this framework agreement. It was only in 2020 that the Conference of the Parties (CoP) to the UNTOC adopted a specific resolution dealing with crimes that impact the environment.<sup>48</sup> While the main focus of this resolution is on trafficking in wildlife, including flora and fauna, timber and timber products and hazardous waste, as well as poaching, the resolution calls on States Parties to qualify crimes that affect the environment as “serious crime” in accordance with Article 2 of the Convention.<sup>49</sup> This resolution could have an impact on the definition of crimes against water as “serious crimes” when they are the result of transnational organized crime.

The UNTOC and its related practice developed by the CoP could promote the qualification of intentional pollution, poisoning of water resources, or cyber crimes which may affect the quality or quantity of water supplies as “serious crimes” when the offence is transnational and involves an organized criminal group. Moreover, States party to the UNTOC should establish effective measures to prevent, investigate, prosecute and punish crimes that affect the environment and fall within the scope of the Convention. This also includes enhancing cooperation between States, including through mutual legal assistance, on preventing, investigating and prosecuting transnational organized crimes that affect the environment, including water resources.<sup>50</sup>

The UNTOC is supplemented by three Protocols that deal with specific activities. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol)

44 As of September 2022, the UNTOC counted 190 States Parties. See the UN Treaty Collection website, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en).

45 UNTOC, above note 3, Art. 2(a).

46 *Ibid.*, Art. 2(b).

47 *Ibid.*, Art. 2(c).

48 Res. 10/6, “Preventing and Combating Crimes that Affect the Environment Falling within the Scope of the United Nations Convention against Transnational Organized Crime”, Tenth Session of the Conference of the Parties, 2020.

49 *Ibid.*, para. 4. See also UNGA Res. 74/177, 18 December 2019, para. 51.

50 Res. 10/6, above note 48, para. 8.



aims to reduce the violence and harm resulting from firearms illegally produced and supplied by organized criminal groups.<sup>51</sup> Firearms and manufacturing may have negative impacts on the environment, including water resources. Lead, copper, zinc, antimony and even mercury can be used in the production of firearms, and these substances can sink into the soil and sometimes leach into groundwater and surface water. Exposure to these contaminants through the soil or water can lead to illness and possibly death for those who spend significant amounts of time in contaminated areas. Therefore, the international system set up by the Protocol for the record-keeping, marking and tracing of arms, as well as the establishment of a licensing and authorization system for the import, transit and export of firearms, contributes to regulating this sector and helps to reduce the risks to the environment.

### Corruption and water: The UNCAC

Another global instrument which might be relevant in the context of crimes against water is the UNCAC.<sup>52</sup> One of the main objectives of this treaty is the promotion, facilitation and support of international cooperation and technical assistance in the prevention of and the fight against corruption.<sup>53</sup> According to its terms, the UNCAC applies to the “prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention”.<sup>54</sup> Corruption may support and facilitate the commission of crimes against water; examples of this include the bribery of high-ranking officials to obtain concessions and permits for access to land, forests or water resources, or corruption within the police and investigative units. The CoP to the UNCAC has adopted a specific resolution to prevent and combat corruption as relating to crimes that have impacts on the environment.<sup>55</sup> This resolution encourages States Parties to establish and develop confidential complaint systems and whistle-blower protection programmes, including protected reporting systems and effective witness protection measures, and to increase awareness of such measures in the context of crimes that have an impact on the environment, including water.<sup>56</sup>

51 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, UN Doc. A/RES/55/255, 31 May 2001 (entered into force 3 July 2005).

52 As of November 2021, the UNCAC has 189 States Parties.

53 According to its Article 1, the purposes of the UNCAC are “(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property.”

54 UNCAC, above note 4, Art. 3(1).

55 Resolution 8/12, “Preventing and Combating Corruption as It Relates to Crimes that Have an Impact on the Environment”, Eight Session of the Conference of the Parties, 2019.

56 *Ibid.*, para. 12.

## Regional frameworks for combating transnational organized crime against water

Regional legal frameworks may also have an impact on preventing and combating transnational organized crime against water. While in 2011 the cost of transnational environmental crime was estimated at between \$70 billion and \$213 billion,<sup>57</sup> in only four years this increased to \$91–258 billion annually.<sup>58</sup> Criminal activities related to the environment deprive countries of future revenues and have an impact on their economic and social development.<sup>59</sup> At the level of the EU, the 2008 Council Framework Decision on the Fight against Organized Crime<sup>60</sup> and the 2008 Directive on the Protection of the Environment through Criminal Law (Environmental Crime Directive) may have an impact on addressing crimes against water. While the former instrument details the main objectives of cooperation between EU countries in combating organized crime, the latter may contribute to harmonizing criminal legislation between EU countries in order to address crimes against water.

Interestingly, in December 2021, the European Commission adopted a proposal for a new Directive on the Protection of the Environment through Criminal Law.<sup>61</sup> The proposal defines new crimes against the environment and introduces more detailed provisions on sanctions, rules for strengthening enforcement, and measures to assist people who report crimes and cooperate with enforcement authorities. The proposal for the new Directive adds a specific crime against water, namely “the abstraction of surface water or groundwater which causes or is likely to cause substantial damage to the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies”.<sup>62</sup> Illegal water abstraction contributes to serious depletion of water resources, and this is a problem which is worsening as a result of climate change. In a 2021 Special Report entitled *Sustainable Water Use in Agriculture*, the Court of Auditors of the EU documents the ineffectiveness of administrative measures for addressing over-abstraction of water and stresses that controls are infrequent

57 See Europol, “Environmental Crime”, available at: [www.europol.europa.eu/crime-areas-and-statistics/crime-areas/environmental-crime](http://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/environmental-crime).

58 Christian Nellmann *et al.* (eds), *The Rise of Environmental Crime: A Growing Threat To Natural Resources, Peace, Development and Security*, UNEP-Interpol Rapid Response Assessment, UNEP and RHIPTO Rapid Response–Norwegian Center for Global Analyses, 2016, p. 4, available at: <https://tinyurl.com/3rf7c82v>.

59 *Ibid.*, p. 4.

60 Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight against Organised Crime, OJ L 300, 11 November 2008, pp. 42–45, available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX%3A32008F0841>.

61 European Commission, “European Green Deal: Commission Proposes to Strengthen the Protection of the Environment through Criminal Law”, press release, 15 December 2021, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6744](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744).

62 Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC, COM/2021/851 final, 15 December 2021, Art. 3(1)(k), available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX:52021PC0851>.

and sanctions too low to ensure effective implementation and compliance with relevant obligations.<sup>63</sup> An approach based on criminal law is therefore supported.

In May 2021, the Council of the EU identified the ten priority crime threats for the EU countries.<sup>64</sup> These priorities include criminal networks involved in crimes against the environment. While the focus is on waste and wildlife trafficking, the document explicitly mentions the mismanagement of water resources. Moreover, another priority indicated by the Council which might have implications for addressing crimes against water is the fight against cyber crimes.<sup>65</sup> Although this is not explicitly affirmed by the Council of the European Union, European countries should collaborate to disrupt criminal groups or individuals carrying out cyber attacks. In the last few years, cyber crime has become more aggressive and confrontational, and the rapid digitalization of society has created new vulnerabilities in the water sector that can be exploited by criminals involved in cyber crime. Cyber attacks may also involve the water sector, particularly limiting the provision of water supplies or putting the quality of drinking water for the population at risk.<sup>66</sup>

The EU Agency for Law Enforcement Cooperation (Europol) also plays an important role in the EU, supporting police cooperation and information exchange. Every four years, Europol produces the *European Union Serious and Organised Crime Threat Assessment* report. The last report, of 2021, only explicitly mentions the illegal trafficking of waste;<sup>67</sup> other forms of crimes having an impact on the environment have not been explicitly included in the report. However, other illegal activities such as drug trafficking and counterfeiting goods may also have an impact on water resources – for example, improperly produced pesticides can pollute the air, water and soil for an extended period. The impact on health is not only limited to farmers and the farming community but also extends to the consumers of cultivated food products.<sup>68</sup>

Recent years have seen an increase in the institutionalization of cooperation to address crimes against water. The 2008 Environmental Crime Directive aimed to provide a harmonized legal framework for facilitating cross-border cooperation on crimes against the environment. However, despite the progress in creating an EU-wide common set of definitions of crimes against the environment and more dissuasive

63 European Court of Auditors, *Sustainable Water Use in Agriculture: CAP Funds More Likely to Promote Greater rather than More Efficient Water Use*, Special Report No. 20/2021, 2021, p. 35, available at: [www.eca.europa.eu/en/Pages/DocItem.aspx?did=59355](http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=59355).

64 Council of the EU, “Fight against Organised Crime: Council Sets Out 10 Priorities for the Next 4 Years”, press release, 26 May 2021, available at: [www.consilium.europa.eu/en/press/press-releases/2021/05/26/fight-against-organised-crime-council-sets-out-10-priorities-for-the-next-4-years/](http://www.consilium.europa.eu/en/press/press-releases/2021/05/26/fight-against-organised-crime-council-sets-out-10-priorities-for-the-next-4-years/).

65 *Ibid.*

66 Jim Magill, “U.S. Water Supply System Being Targeted by Cybercriminals”, *Forbes*, 25 July 2021, available at: [www.forbes.com/sites/jimmagill/2021/07/25/us-water-supply-system-being-targeted-by-cybercriminals/?sh=3f97ba2d28e7](https://www.forbes.com/sites/jimmagill/2021/07/25/us-water-supply-system-being-targeted-by-cybercriminals/?sh=3f97ba2d28e7).

67 EU and Interpol, *European Union Serious and Organised Crime Threat Assessment: A Corrupting Influence: The Infiltration and Undermining of Europe’s Economy and Society by Organized Crime*, 2021, p. 13, available at: [www.europol.europa.eu/publication-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-socta-2021](http://www.europol.europa.eu/publication-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-socta-2021).

68 *Ibid.*, p. 8.

sanctions, member States still struggle to reconcile their respective understandings of crimes against the environment,<sup>69</sup> and the primary responsibility for fighting organized environmental crime still rests with the individual EU member States.

There is increasing recognition of the impact of criminal activities on water resources, but the impacts of overexploitation of water resources and pollution are not yet clearly included in the international legal frameworks protecting the environment through criminal law. International law is still in its infancy in this domain. The next section of the paper will focus on the linkages between crimes against water and armed conflicts and will also present some examples of crimes against water committed by non-State armed groups.

## **Crimes against water committed by terrorist and non-State armed groups during armed conflicts and other situations of violence**

Terrorist and non-State armed groups may threaten water in various ways. The first form of threat is when water supplies are intentionally contaminated by introducing biological or chemical contaminants into a publicly accessible city water supply. In 2015, a criminal group sympathetic to ISIS threatened to poison water supplies in Pristina; the police were able to prevent the attack just before it was carried out.<sup>70</sup> In the United States, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 contains a specific chapter on “drinking water security and safety”.<sup>71</sup> The Act requires vulnerability assessments and emergency response plans for most community water systems against terrorist attacks and other intentional acts.

The second form of threat to water involves attacks against water infrastructure. For example, an attack might target a large hydroelectric dam on an important river and limit the energy used for the water supply of a city. Terrorists might not be able to cause serious structural damage to a big dam, but the adverse consequences of a failure in a major dam should be assessed and reduced in good time. A failure in the physical operation of a dam can kill

69 European Commission, *Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the Protection of the Environment through Criminal Law*, Commission Staff Working Document, SWD (2020) 259 final, Brussels, 28 October 2020, Part I, pp. 63–65, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0259>.

70 “Kosovo Cuts Pristina Water Supply over Alleged ISIS Plot to Poison Reservoir”, *The Guardian*, 11 July 2015, available at: [www.theguardian.com/world/2015/jul/11/kosovo-cuts-pristina-water-supply-over-alleged-isis-plot-to-poison-reservoir](http://www.theguardian.com/world/2015/jul/11/kosovo-cuts-pristina-water-supply-over-alleged-isis-plot-to-poison-reservoir).

71 Public Health Security and Bioterrorism Preparedness and Response Act, 2002, *Public Law*, 12 June 2002, pp. 107–188, available at: [www.govinfo.gov/content/pkg/PLAW-107publ188/pdf/PLAW-107publ188.pdf](http://www.govinfo.gov/content/pkg/PLAW-107publ188/pdf/PLAW-107publ188.pdf). Title IV provides: “Each community water system serving a population of greater than 3,300 persons shall conduct an assessment of the vulnerability of its system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe and reliable supply of drinking water. The vulnerability assessment shall include, but not be limited to, a review of pipes and constructed conveyances, physical barriers, water collection, pretreatment, treatment, storage and distribution facilities, electronic, computer or other automated systems which are utilized by the public water system, the use, storage, or handling of various chemicals, and the operation and maintenance of such system”. See also Peter H. Gleick, “Water and Terrorism”, *Water Policy*, Vol. 8, No. 6, 2006, p. 500.

thousands of people, and even more modest damage might interrupt power generation or affect the operation of water supplies. In this context, an example is the ISIS control of strategic dams on the Tigris and Euphrates rivers in Syria and Iraq. ISIS's control over these water installations allowed the group to draw on large amounts of water and energy to sustain the extraction, processing and sale of crude oil that provided funding for its operations.<sup>72</sup> There can also be attacks against smaller infrastructure than dams, which may greatly impact the population. In the first half of 2022, the WASH Cluster of Burkina Faso reported several attacks against water wells in Djibo and sabotage of the electrical network, with a consequent interruption of water services, in Dori, as well as acts of intimidation against women collecting water.<sup>73</sup> While those responsible for these attacks are not identified in the WASH Cluster report, it should be noted that various actors operate in Burkina Faso, including non-State armed groups and criminal groups. In this context, with the support of the UN Office on Drugs and Crime (UNODC), Burkina Faso is implementing a battlefield evidence collection project covering terrorism cases<sup>74</sup> which could potentially cover attacks against water installations.

The third form of threat to water is cyber crime. For instance, in February 2021, hackers broke into the city of Oldsmar's water treatment facility in Florida and changed chemical levels, making the water unsafe to consume.<sup>75</sup> Similarly, in 2020 Israel claimed that there were attempted cyber attacks against its water treatment plants aimed at raising chlorine level in the national water supply system.<sup>76</sup> These new typologies of attacks against water systems and infrastructure pose a real and significant risk to human life, the economy, and the security of States. Cyber operations might disrupt essential civilian services such as access to water supplies without damaging or destroying civilian infrastructure.<sup>77</sup> Armed conflicts create conditions for organized crime and cyber crime to flourish, and this may amplify the risks to the internal security of States.<sup>78</sup>

72 T. von Lossow, above note 2, p. 3.

73 WASH Cluster, Burkina Faso, *Alerte sur l'intensification des attaques aux points d'eau et tensions autour des points d'eau au Burkina Faso*, 15 April 2022, available at: <https://tinyurl.com/5n6nkaxt>.

74 UNODC, "Burkina Faso", available at: [www.unodc.org/westandcentralafrica/en/westandcentralafrica/countries/Burkina\\_Faso.html](http://www.unodc.org/westandcentralafrica/en/westandcentralafrica/countries/Burkina_Faso.html).

75 Frances Robles and Nicole Perlroth "‘Dangerous Stuff’: Hackers Tried to Poison Water Supply of Florida Town", *New York Times*, 8 February 2021, available at: [www.nytimes.com/2021/02/08/us/oldsmar-florida-water-supply-hack.html](http://www.nytimes.com/2021/02/08/us/oldsmar-florida-water-supply-hack.html).

76 Tyler Wall, "Throwback Attack: Hackers Attempt to Flood Israeli Water Supply with Chlorine", *Industrial Cybersecurity Pulse*, 26 May 2022, available at: [www.industrialcybersecuritypulse.com/facilities/throwback-attack-hackers-attempt-to-flood-israeli-water-supply-with-chlorine/](http://www.industrialcybersecuritypulse.com/facilities/throwback-attack-hackers-attempt-to-flood-israeli-water-supply-with-chlorine/).

77 See Geneva Water Hub, *Principle: Cyber Operations: Annex to the Geneva List of Principles on the Protection of Water Infrastructure*, 2021, available at: [www.genevawaterhub.org/news/annex-geneva-list-principles-protection-water-infrastructure-cyber-operations-principle](http://www.genevawaterhub.org/news/annex-geneva-list-principles-protection-water-infrastructure-cyber-operations-principle).

78 For example, cyber attacks have increased since the Russia military aggression in Ukraine. In March 2022, the EU justice and home ministers convened an extraordinary meeting to reinforce their cooperation including on cyber crimes. Council of the EU, "Extraordinary Meeting of the EU Justice and Home Ministers", press release, 28 March 2022, available at: [www.consilium.europa.eu/en/meetings/jha/2022/03/28/](http://www.consilium.europa.eu/en/meetings/jha/2022/03/28/).

Crimes against water, in particular intentional attacks against installations providing water supplies to the civilian population, have been addressed by the UN Security Council. In this context, the paper will now focus on terrorist threats against water supplies and the protection of objects indispensable to the survival of the civilian population, such as water installations, during armed conflicts.

## The role of the Security Council in addressing threats to water

The Security Council has addressed threats to critical infrastructure – including attacks against water installations by terrorist groups<sup>79</sup> – and the protection of objects indispensable to the survival of the civilian population<sup>80</sup> in its resolutions. The resolutions adopted by the Security Council do not create international norms, but they may be evidence of general principles of law<sup>81</sup> or reflect *opinio juris*.<sup>82</sup> Unanimous Security Council resolutions may be of “great relevance to the formation of *opinio juris*”<sup>83</sup> and may influence State behaviour.<sup>84</sup> Although resolutions alone will rarely reflect the generality of State practice,<sup>85</sup> they may provide an additional evidence of international customary law.<sup>86</sup> In this regard, the International Law Commission (ILC), in its Draft Conclusions on the Identification of Customary International Law, has noted that “[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law”.<sup>87</sup> Although the ILC has limited the cases in which international organizations can develop customary international law, it has indicated that the practice of an international organization may reflect a customary rule of international law.<sup>88</sup> As noted by Fox *et al.*:

Treating Council resolutions as evidence of customary law is, first and foremost, a function of the Council’s role in the law of international peace and security.

79 UNSC Res. 2341, 13 February 2017.

80 UNSC Res. 2573, 27 April 2021.

81 Peter Hulsroj, “The Legal Function of the Security Council”, *Chinese Journal of International Law*, Vol. 1, No. 1, 2002, p. 70.

82 Perrin de Brichambaut, “The Role of the United Nations Security Council in the International Legal System”, in Michael Byers (ed.), *The Role of International Law in International Politics*, Oxford University Press, Oxford, 2001, p. 273.

83 International Criminal Tribunal for Former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Interlocutory Appeal, 2 October 1995, para. 133.

84 Oscar Schachter, “The Quasi-Judicial Role of the Security Council and the General Assembly”, *American Journal of International Law*, Vol. 58, No. 4, 1964, p. 963.

85 Vera Gowlland-Debbas, “The Functions of the United Nations Security Council in the International Legal System”, in M. Byers (ed.), above note 82, p. 300.

86 Gregory H. Fox, Kristen E. Boon and Isaac Jenkins, “The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law”, *American University Law Review*, Vol. 67, 2018, pp. 693–712.

87 International Law Commission, “Draft Conclusions on Identification of Customary International Law, with Commentaries”, *Yearbook of the International Law Commission*, Vol. 2, Part II, A/73/10, 2018, p. 130.

88 *Ibid.*, p. 131.

To ignore or marginalize Council practice, treating it as no more important than or, potentially, less important than state practice, would be inconsistent with the central role in conflict mitigation that states have already assigned to the Council.<sup>89</sup>

In this context, the present paper argues that Resolution 2341 of 2017 and Resolution 2573 of 2021 are evidence of the customary rule prohibiting attacks against water installations by terrorist groups and all parties to an armed conflict, including criminal groups. The Security Council has over the last two decades addressed armed non-State actors directly (using the expressions “all parties” and “factions” or referring directly to the groups by name) and has called on them to respect IHL and IHRL. In 2011, for example, it condemned “human rights violations perpetrated by the FPR” (Front Populaire pour le Redressement) in the Central African Republic<sup>90</sup> and called on the UN Integrated Peacebuilding Office in the Central African Republic “to report on human rights violations perpetrated by armed groups particularly against children and women”.<sup>91</sup>

## Security Council Resolution 2341

Resolution 2341, unanimously adopted by the fifteen member States of the Security Council in 2017, calls on States to establish “terrorist acts as serious criminal offences in domestic laws and regulations” and “to ensure that they have established criminal responsibility for terrorist attacks intended to destroy or disable critical infrastructure, as well as the planning of, training for, and financing of and logistical support for such attacks”.<sup>92</sup> Among the various forms of critical infrastructure, Resolution 2341 explicitly covers water and energy installations which may be targeted by terrorist attacks.<sup>93</sup> In particular, the Security Council

directs the Counter-terrorism Committee ... to examine Member States efforts to protect critical infrastructure from terrorist as relevant to the implementation of resolution 1373 (2001) with the aim of identifying good practices, gaps and vulnerabilities in this field.<sup>94</sup>

Although Resolution 2341 does not create binding obligations as such, it can provide additional evidence of the existence of a customary rule prohibiting attacks intended to destroy or disable critical water infrastructure by terrorist groups.<sup>95</sup> This resolution develops further the existing law, supporting the development of

89 G. H. Fox, K. E. Boon, and I. Jenkins, above note 86, p. 697.

90 UNSC Res. 2031, 21 December 2011, para. 13; see also UNSC Res. 2088, 24 January 2013, para. 13.

91 UNSC Res. 2031, above note 90, para. 14.

92 UNSC Res. 2341, above note 79, para. 3.

93 *Ibid.*, p. 2.

94 *Ibid.*, para. 10.

95 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 54, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1>.



domestic criminal laws establishing criminal responsibility for terrorist attacks intended to destroy or disable critical water infrastructure, as well as the planning of, training for, and financing of and logistical support for such attacks. Such legislation may act as a mechanism for preventing attacks against critical water infrastructure by terrorist groups.

While there are a number of conventions and protocols dealing with terrorism, the topic of water infrastructure is not explicitly addressed in these instruments.<sup>96</sup> Moreover, the UNTOC only covers terrorist groups if they engage in material pursuits to fund their activities.<sup>97</sup> While the Security Council had already recognized the linkages between terrorist groups and organized crime in previous resolutions,<sup>98</sup> Resolution 2341 attests to the existence of the customary prohibition against the destruction or disabling of critical water infrastructure by both terrorist groups and organized criminal groups.

## Security Council Resolution 2573

Like Resolution 2341, Resolution 2573 of 2021 was also unanimously adopted by the member States of the Security Council. This resolution also represents an additional evidence of the customary rule that prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population. This rule applies to *all* parties to an armed conflict. In its resolution, the Security Council

96 At the global level, there are nineteen universal anti-terrorism instruments: the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1979 International Convention against the Taking of Hostages; the 1980 Convention on the Physical Protection of Nuclear Material; the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of the Financing of Terrorism; the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material; the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; and the 2014 Protocol to the Convention on Offences and Certain other Acts Committed on Board Aircraft. For information on these instruments and the number of ratifications, see: <https://bit.ly/3DI19cq>.

97 Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2018, pp. 132–334.

98 UNSC Res. 2195, 19 December 2014, para. 8. The Security Council affirmed that “terrorists benefit from transnational organized crime in some regions, including from ... the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil”.

demands that *all* parties to armed conflict fully comply with their obligations under international humanitarian law regarding taking due care to spare the civilian population, civilians and civilian objects, refraining from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, and respecting and protecting humanitarian personnel and consignments used for humanitarian relief operations.<sup>99</sup>

Thus, the Security Council reminds all parties to an armed conflict of their obligations under Article 54 of Additional Protocol I (AP I) and Article 13 of Additional Protocol II (AP II), which explicitly protect water supplies.<sup>100</sup> Furthermore, the Security Council “strongly condemns the use of starvation of civilians as a method of warfare in a number of armed conflict situations which is prohibited by international law and may constitute a war crime”.<sup>101</sup> Starvation is a crime entailing individual criminal responsibility in both international and non-international armed conflicts.<sup>102</sup>

Having examined the role of the Security Council in addressing attacks against water infrastructure by terrorist groups and criminal groups, the paper will now examine the relationship between crimes against water, IHL and IHRL. In so doing, the following sections will discuss how attacks against water during armed conflicts or other situations of violence are addressed under these two areas of international law.

## **The application of IHL to organized non-State armed groups and criminal groups**

Criminal groups may become parties to an armed conflict.<sup>103</sup> The qualification as an organized armed group would allow for their members to be held responsible for international crimes,<sup>104</sup> including those related to water. Organized criminal groups may operate in armed conflicts both of international and non-

99 UNSC Res. 2573, above note 80, para. 3 (emphasis added).

100 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 610, 8 June 1977 (entered into force 7 December 1978) (AP II).

101 UNSC Res. 2573, above note 80, para. 4.

102 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Arts 8(2)(b)(xxv), 8(2)(e)(xix), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/585?OpenDocument>.

103 Chiara Radaelli, “The War on Drugs: Challenges for International Humanitarian Law”, *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, March 2021, p. 5; Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 433; David Petrusek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Versoix, 2000, p. 5, available at: <https://reliefweb.int/report/world/ends-and-means-human-rights-approaches-armed-groups>.

104 P. Hauck and S. Peterke, above note 103, p. 417.

international character; for example, in the Sahel region, the presence of criminal groups has increased in the last few years.<sup>105</sup>

Organized criminal groups may sometimes be directly involved in an armed conflict and act as non-State armed groups. Two main legal sources must be examined in order to determine the application of IHL to these groups: Article 3 common to the four Geneva Conventions of 1949, and Article 1 of AP II. In order to distinguish an armed conflict from less serious forms of violence such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. Two criteria are usually used in this regard.<sup>106</sup> First, the hostilities must reach a minimum level of intensity – this may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.<sup>107</sup> Second, non-governmental groups involved in the conflict must be considered as “parties to the conflict”, meaning that they possess organized armed forces. For example, these forces have to be under a certain command structure and must have the capacity to sustain military operations.<sup>108</sup>

Judgments and decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) shed further light on the definition of non-international armed conflicts. The ICTY determined the existence of a non-international armed conflict “whenever there is ... protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>109</sup> The ICTY thus confirmed that the definition of “non-international” in the sense of common Article 3 encompasses situations where “several factions [confront] each other without involvement of the government’s armed forces”.<sup>110</sup> Since this first ruling on the *Tadić* case, each judgment of the ICTY has taken this definition as a starting point. Given this jurisprudence, IHL applies to organized criminal groups when there is protracted armed violence between governmental authorities and these groups or even between such groups within a State.<sup>111</sup> The application of IHL encompasses situations where several factions confront each other even in the case of the absence of a government’s armed forces.

Organized criminal groups may engage in armed violence against the government, including through the pollution of water resources, the corruption of officials and even the destruction of water infrastructure. These actions can have

105 Adama Dieng, “Editorial: The Sahel: Challenges and Opportunities”, *International Review of the Red Cross*, Vol. 103, No. 918, 2022, pp. 768–769.

106 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment, 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.

107 For a detailed analysis of this criteria, see ICTY, *Limaj*, above note 106, paras 135–170.

108 See 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, p. 147. For a detailed analysis of this criterion, see ICTY, *Limaj*, above note 106, paras 94–134.

109 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

110 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4461.

111 ICTY, *Tadić*, above note 109, para. 70.

a dramatic impact on the population. State practice, international case law and scholarship all agree that common Article 3 and customary IHL apply to all categories of armed non-State actors that are parties to non-international armed conflicts.<sup>112</sup>

Crimes against water can be related to war crimes committed during non-international armed conflicts. The intentional deprivation of water supplies may constitute a war crime: under the Rome Statute of the International Criminal Court (ICC), intentionally using starvation of civilians as a method of warfare, by depriving them of objects indispensable to their survival such as drinking water supplies, is recognized as a war crime during non-international armed conflicts.<sup>113</sup> Moreover, the intentional poisoning of water, for example through the contamination of wells, may also constitute a war crime during non-international armed conflicts.<sup>114</sup>

In non-international armed conflicts, the Rome Statute does not consider launching an attack against civilian objects, including works or installations containing dangerous forces such as dams and dykes in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as a war crime. In international armed conflicts, however, the Statute criminalizes such attacks.<sup>115</sup> Besides this, grave breaches under AP I include indiscriminate attacks affecting civilian objects and attacks against works and installations containing dangerous forces in the knowledge that such attacks will be disproportional.<sup>116</sup>

AP II grants special protection to works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. Even if they constitute military objectives, these installations must not be made the object of attack if such attack may cause the release of forces contained therein, and consequent severe losses among the civilian population.<sup>117</sup> Moreover, dams and dykes are also protected under customary IHL. Rule 42 of the International Committee of the Red Cross (ICRC) Customary Law Study states:

Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population.<sup>118</sup>

112 In *Nicaragua v. United States of America*, the International Court of Justice (ICJ) confirmed that common Article 3 was applicable to the Contras (an armed non-State group). “The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character.” See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports 1986, para. 219.

113 Rome Statute, above note 102, Art. 8(2)(e)(xix).

114 *Ibid.*, Art. 8(2)(e)(xiii).

115 *Ibid.*, Arts 8(2)(b)(iv), 8(2)(b)(xxv).

116 *Ibid.*, Arts 85(3)(b)–(c).

117 AP I, Art. 56(1).

118 ICRC Customary Law Study, above note 95, Rule 42.

This rule is applicable in both international and non-international armed conflicts and is binding on armed non-State actors. Customary IHL criminalizes “serious violations” of IHL, both in international and non-international armed conflicts, as war crimes.<sup>119</sup> The Geneva Conventions also call upon High Contracting Parties to “suppress” *all acts* contrary to their provisions, including criminalizing conducts contrary to common Article 3 in non-international armed conflicts.<sup>120</sup> As indicated below, there are State practices supporting the idea of criminalizing violations, including those relating to water and water infrastructure, in non-international armed conflicts.<sup>121</sup>

Under customary IHL, criminal groups are also bound by the general principles on the conduct of hostilities related to the environment. According to customary IHL, “no part of the natural environment may be attacked, unless it is a military objective”. Moreover, the “destruction of any part of the natural environment is prohibited, unless required by imperative military necessity” and “launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited”.<sup>122</sup>

Article 8.2(b)(iv) of the Rome Statute criminalizes attacks against the environment only in international armed conflicts. However, some provisions of the Statute, which do not directly concern the environment, make it possible to criminalize such attacks during non-international armed conflicts. Under Article 8.2(c), “serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949” are prohibited. The term “serious violations” encompasses a panoply of crimes against the person, such as violence to life, cruel treatment and torture or committing outrages upon personal dignity, including humiliating and degrading treatment.<sup>123</sup> Criminal responsibility for crimes against the environment and water could be incurred on the basis of the reference to violence to the life and dignity of the person. Acts which make water unsafe for the population could fall into the category of violence to life. Polluted water or lack of access to water can affect human health, food production and living conditions and have negative consequences on the human rights to water, food and/or health. In this context, the next section of the paper will address the applicability of IHRL to criminal armed groups.

119 *Ibid.*, Rule 56.

120 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), Art. 49; 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), Art. 50; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 129; 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), Art. 146. See also ICTY, *Tadić*, above note 83, para. 94.

121 See e.g. Australia, Criminal Code Act, 1995 (amended 2007), Art. 268(94)(1)(c); Democratic Republic of the Congo, Military Penal Code, 2002, Art. 166.

122 ICRC Customary Law Study, above note 95, Rule 43.

123 Rome Statute, above note 102, Art. 8(2)(c)(i)–(ii).

## IHRL and criminal armed groups

The UN Human Rights Council has addressed violations of IHL and IHRL in its resolutions, and has made reference to organized criminal groups. In multiple resolutions on Mali, the Council condemned

the excesses and abuses committed in the Republic of Mali, particularly in the north of the country, by, among others, the rebels, terrorist groups and other organized transnational crime networks, which include violence against women and children, ... pillaging, [and] destruction of cultural and religious sites ... as well as all other human rights violations.<sup>124</sup>

Although not common, this reference to “transnational crime networks” in the resolutions on Mali shows that the Human Rights Council is prepared to address violence committed by various armed non-State actors, including transnational crime networks. In another resolution entitled “The Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups”, the Council expressed its deep concern about

the increasing and dramatic human rights violations and abuses and violations of international humanitarian law in Iraq resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the Levant and associated terrorist groups against the Iraqi people.<sup>125</sup>

It also condemned

in the strongest possible terms the systematic violations and abuses of human rights and violations of international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the Levant and associated groups taking place since 10 June 2014 in several provinces of Iraq, which may amount to war crimes and crimes against humanity, and strongly condemn[ed] in particular all violence against persons based on their religious or ethnic affiliation, as well as violence against women and children.<sup>126</sup>

In another resolution entitled “Atrocities Committed by the Terrorist Group Boko Haram and Its Effect on Human Rights in the Affected States”, the Council “condemn[ed] in the strongest terms the gross abuses of international human rights law and violations of international humanitarian law perpetrated by the terrorist group Boko Haram”.<sup>127</sup>

This practice shows that organized criminal groups may be bound by IHRL. Although it has been argued that the objective of human rights treaties is to establish norms for regulating the relationship between States and individuals

124 HRC Res. 20/17, 17 July 2012, para. 2; HRC Res. 21/25, 19 October 2012, para. 1; HRC Res. 22/18, 10 April 2013, para. 1.

125 HRC Res. S-22/1, 1 September 2014.

126 *Ibid.*, para. 1.

127 HRC Res. S-23/1, 21 May 2015, para. 1.

within their territory and subject to their jurisdiction, and that in consequence human rights treaties are “neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups”,<sup>128</sup> scholars do not unanimously support this interpretation of human rights law. For example, it has been noted that “the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity. The implication is that these natural rights should be respected by everyone and every entity.”<sup>129</sup>

The argument that human rights law does not apply to criminal groups would challenge the foundations of human rights law. Rules of IHL included in treaty and customary law afford a significant level of protection to civilians, but their scope of application is limited to acts directly associated with armed conflict. Moreover, the main purpose of IHL is to regulate armed conflicts and limit their negative impacts on victims and those who have laid down their arms. It does not cover all violations of international law that occur in these situations. More generally, unlike IHRL, IHL does not regulate the everyday life of people in situations of non-international armed conflict.<sup>130</sup> In addition, if States are primarily responsible under international law for ensuring that the human rights of persons under their jurisdiction are respected, during situations of armed conflict or in other situations of violence, States may lose control over part of their territory and population. IHL may not apply in situations where its conditions of applicability are unfulfilled – for example, when violence is insufficiently intense or the armed non-State actor is insufficiently organized. In such cases, the only remaining legal framework other than domestic law is IHRL. This would become problematic if IHRL were to only bind States, especially where a State’s institutions have failed. In this context, experts from the Institute of International Law, in a resolution adopted at its Berlin session in 1999, considered that

[t]o the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental human rights under the scrutiny of the international community.<sup>131</sup>

The practice of intergovernmental organizations such as the UN strongly suggests that armed non-State actors must respect human rights law when they exercise governmental functions or have *de facto* control over territory and a

128 See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p 54.

129 Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, 1 February 2010, p. 24, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1569636](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636).

130 See Katharine Fortin, “The Application of Human Rights Law to Everyday Civilian Life under Rebel Control”, *Netherlands International Law Review*, Vol. 63, 2016.

131 Institut de Droit International, *The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties*, Berlin Session, 1999, Art. X.



population.<sup>132</sup> *De facto* authorities have been defined as “entities, which exercise effective authority over some territory, no matter whether they are engaged in warfare with the sovereign or are subsisting in times of peace”.<sup>133</sup> The Office of the UN High Commissioner for Human Rights (UN Human Rights), for instance, has consistently taken the position that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control”.<sup>134</sup> The Commission of Inquiry on Syria also addressed the issue of armed non-State groups’ responsibility in situations where IHL is not applicable: in February 2012, the Free Syrian Army (FSA) did not exercise any effective control over territory and the Commission considered that IHL was not yet applicable, leaving IHRL as the only normative framework for assessing the FSA’s conduct.<sup>135</sup> This illustrates the importance of considering the applicability of human rights law to organized criminal groups.

## The human right to water

Found to be implicitly included in the International Covenant on Economic, Social and Cultural Rights,<sup>136</sup> the human right to safe and affordable drinking water was formally recognized both by the General Assembly and the Human Rights Council of the UN in 2010.<sup>137</sup> The right to access safe, clean drinking water is now an internationally recognized right and is very broadly

132 Office of the UN High Commissioner for Human Rights (UN Human Rights), *The International Legal Protection of Human Rights in Armed Conflict*, 2011, p. 24.

133 House of Lords, *Arantzazu Mendi*, L.R. [1939] A.C. 256, Judgment, 23 February 1939, para. 65. See also Michael Schoiswohl, “De Facto Regimes and Human Rights Obligations – the Twilight Zone of Public International Law?”, *Austrian Review of International and European Law*, Vol. 6, 2001, p. 50; Jonte Van Essen, “De Facto Regimes in International Law”, *Utrecht Journal of International and European Law*, Vol. 28, No. 74, 2012.

134 UN Human Rights, *Human Rights Violations Emanating from Israeli Military Attacks and Incursions in the Occupied Palestinian Territory, Particularly the Recent Ones in the Occupied Gaza Strip: Report of the High Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 7/1*, UN Doc. A/HRC/8/17, 6 June 2008, para. 9. UN Human Rights reiterated its position in a 2011 publication on the international legal protection of human rights in armed conflict: “Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law.” See UN Human Rights, *The International Legal Protection of Human Rights in Armed Conflict*, 2011, p. 24.

135 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012, para. 106.

136 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15, “The Right to Water (Arts. 11 and 12 of the Covenant)”, UN Doc. E/C.12/2002/11, 20 January 2003, para. 2, available at: [www.refworld.org/docid/4538838d11.html](http://www.refworld.org/docid/4538838d11.html).

137 UNGA Res. 64/292, 3 August 2010. Subsequently, the Human Rights Council, in September 2010, affirmed this recognition and clarified that the right to safe and affordable drinking water is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. For further details on the resolution adopted by the Human Rights Council on the right to water and sanitation, see HRC Res. 15/9, 6 October 2010, paras 2–3.

endorsed.<sup>138</sup> Derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity, the human right to water is recognized as a right that is essential for the full enjoyment of life and all human rights.<sup>139</sup>

Independently of States' obligation to protect the human right to water against abuses within their territory and/or jurisdiction by third parties, the baseline duty of non-State actors is to respect the right to water.<sup>140</sup> This implies that organized criminal groups must not deny or limit equal access to adequate water, unlawfully diminish or pollute water (for example, through use and testing of weapons), or limit access to or destroy water services or infrastructure as a punitive measure.<sup>141</sup> These are immediate obligations that must be respected by both States and non-State actors. A State, in addition to fulfilling its immediate obligations, must show the progress achieved and monitor the policies aimed at achieving its goals related to the right to water, and is accountable when the measures are not adopted. These also include the adoption of criminal laws which address the intentional pollution or the over-abstraction of water resources carried out by criminal groups which might affect local communities.<sup>142</sup>

Protecting water through human rights law also gives access to a number of international mechanisms which may potentially address crimes against water committed by organized criminal groups, non-State armed groups or terrorist groups. For example, the Human Rights Council has investigated issues of water contamination or poisoning in the context of armed conflicts. According to the Commission of Inquiry on Syria, on 23 December 2016, the Damascus Water Authority announced that it had cut off water supplies because armed groups had contaminated the water with fuel, leaving close to 5.5 million people without regular access to water. However, the Commission, after having thoroughly investigated the available evidence, concluded that "there are no reports of people suffering from symptoms of water contamination on or before 23 December nor other indications that the water was contaminated prior to this date"; on the contrary, it accepted that shrapnel had damaged stores of fuel and chlorine, which had contaminated the water, and therefore concluded that neither side had intentionally contaminated the water.<sup>143</sup>

Under IHL, the prohibition against poison or poisoned weapons is a long-standing rule of customary international law already recognized in the Lieber Code

138 Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*, Hart, Oxford and Portland, OR, 2012, p. 76.

139 HRC Res. 15/9, 6 October 2010, paras 2–3; CESCR, above note 136, para. 2.

140 Thorsten Tiefer and Catherine Brölmann, "Beyond State Sovereignty: The Human Right to Water", *Non-State Actors and International Law*, Vol. 5, No. 3, 2005.

141 CESCR, above note 136, para. 21.

142 See of the Criminal Code of Burkina Faso, Law No. 025-2018/AN, 13 December 1996, Art. 357-1: "Est puni d'une peine d'emprisonnement de six mois à cinq ans et d'une amende de deux cent cinquante mille (250 000) à trois millions (3 000 000) de francs CFA, quiconque a, par inattention, imprudence ou négligence porté atteinte à la santé de l'homme, des animaux, des plantes en altérant soit l'équilibre du milieu naturel, soit les qualités essentielles du sol, de l'eau ou de l'air."

143 *Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic*, 21 July 2016–28 February 2017, UN Doc. HRC/34/CRP.3, 10 March 2017, paras 33–35.

and the Hague Regulations.<sup>144</sup> The prohibition against poison or poisoned weapons is set forth in numerous military manuals.<sup>145</sup> The use of poison or poisoned weapons is a crime under the legislation of many States.<sup>146</sup>

There are a few judicial decisions where the issue of poisoning water resources has been addressed. In this regard, a critical case was presented before the South African Constitutional Court in 2005. The *Basson II* case involves Mr Basson, the head of the secret chemical and biological warfare project carried out during the apartheid era. He was charged with a different set of crimes committed before 1994, both within and outside South Africa, but acquitted of all other charges, and the Supreme Court also rejected the prosecutor's appeal. Finally, the prosecutor turned to the Constitutional Court. One of the charges against Basson was the provision of cholera bacteria for placement in water supplies of persons regarded as opponents of the Pretoria government. In its judgment, the Constitutional Court indicated that the provision of cholera bacteria for placement in water supplies as means of warfare is abhorrent to humanity and forbidden by international law.<sup>147</sup> In another case related to the conflict throughout the Darfur region, brought before the ICC, it was reported that "[m]ilitia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned ... wells so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed."<sup>148</sup>

The human right to water could ensure an additional protection for individuals and communities that can be affected by criminal groups. Such protection is relevant during armed conflict as well as other situations of violence.

## Domestic criminal law and organized criminal groups

Domestic criminal laws integrating crimes related to water may also play a role during armed conflicts or other situations of violence. The existence of domestic

144 *Instructions for the Government of Armies of the United States in the Field* (Lieber Code). 24 April 1863, Art. 70, available at: <https://ihl-databases.icrc.org/ihl/INTRO/110>; 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 (Hague Regulations), Art. 23(a), available at: <https://ihl-databases.icrc.org/ihl/INTRO/195>.

145 See, for example, the military manuals of Argentina (para. 12), Australia (paras 13–14), Belgium (para. 15), Bosnia and Herzegovina (para. 16), Canada (paras 17–18), Colombia (para. 19), the Dominican Republic (para. 20), Ecuador (para. 21), France (paras 22–24), Germany (para. 25), Indonesia (para. 26), Israel (paras 27–28), Italy (para. 29), Kenya (para. 30), the Republic of Korea (para. 31), the Netherlands (paras 32–33), New Zealand (para. 34), Nigeria (paras 35–37), the Russian Federation (para. 8), South Africa (para. 39), Spain (para. 40), Switzerland (paras 41–43), the United Kingdom (paras 44–45), the United States (paras 46–51) and Yugoslavia (para. 52).

146 See, for example, Albania, Penal Code, 1995, Art. 281; Algeria, Penal Code, 1966, Arts 260–261; Australia, Criminal Code Act, 1995 (amended 2007), Chap. 8, p. 336, para. 268.55; Mali, Penal Code, 2001, Art. 31(i) (17); Norway, Penal Code, 1902 (amended 2008), para. 107(a); Senegal, Penal Code, 1965 (amended 2007), Art. 431-3(b)(15); Switzerland, Penal Code, 1937 (amended 2011), Arts 264b, 264h(1)(a).

147 Constitutional Court of South Africa, *Basson II*, Judgment, 9 September 2005, paras 180–182.

148 ICC, *Annex A to the Public Redacted Version of the Prosecutor's Application under Article 58 (Situation in Darfur, Sudan)*, Case No. ICC-02/05, 14 July 2008, para. 176; ICC, *The Prosecutor v. Omar Hassan Ahmad al Bashir*, Case No. ICC-02/05-01/09, 12 July 2010, p. 7.

criminal law may help to prevent crimes by criminal groups. In this regard, it should be noted that, in contrast to AP I,<sup>149</sup> AP II only contains an obligation to disseminate IHL.<sup>150</sup>

The ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict* may reinforce the inclusion of crimes against water in domestic laws.<sup>151</sup> Rule 27, entitled “National Implementation of IHL Rules Protecting the Natural Environment”, affirms that “States must act in accordance with their obligations to adopt domestic legislation and other measures at the national level to ensure that IHL rules protecting the natural environment in armed conflict are put into practice”.<sup>152</sup> According to the ICRC, the term “implementation” covers “the enactment of legislation establishing relevant regulatory systems or imposing sanctions that can be applied by national courts”.<sup>153</sup> Furthermore, as indicated by its commentary, the Rule “promotes the implementation of international obligations in domestic law and practice” and is in line with the obligation to respect and ensure respect for IHL as well as with “States’ obligation to take measures necessary to suppress all acts contrary to the 1949 Geneva Conventions and the 1977 Additional Protocol I”.<sup>154</sup>

IHL contains rules that are relevant not only in times of armed conflict but also in peacetime. Amongst them is the requirement to adopt and implement legislation to institute penal sanctions for war crimes and to take measures to repress breaches and grave breaches of IHL.<sup>155</sup> Therefore, crimes related to water, including the use of poison or starvation (which may include the deprivation of water), must be criminalized in domestic laws.

States may also have national implementation obligations relevant to crimes against water in armed conflict flowing from other treaties, besides IHL treaties, to which they are party. For example, a State party to the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques “undertakes to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control”.<sup>156</sup> To this end, States party to that Convention should enact criminal legislation, including during peacetime, to outlaw and repress the

149 AP I, Art. 85.

150 AP II, Art. 19.

151 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020, available at: [www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating](http://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating).

152 *Ibid.*, p. 107.

153 *Ibid.*, para. 308.

154 *Ibid.*, para. 307.

155 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, para. 199, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>; AP I, Art. 85.

156 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976 (entered into force 5 October 1978), Art. IV, available at: [www.un.org/disarmament/enmod/](http://www.un.org/disarmament/enmod/). As of September 2022, the Convention had seventy-eight States Parties.

use of prohibited techniques within their territory and anywhere else under their jurisdiction or control.<sup>157</sup>

## Conclusion

Organized criminal groups may have a strong negative impact on the living conditions of local communities, and on their human rights, in situations of armed conflict or outside these contexts. Crimes against water may be the result of the actions of these groups and can include attacks against water installations, destruction of wells or intentional pollution of water sources. Criminal groups often exploit the needs of vulnerable communities and operate in States with weak national legal systems which are poorly implemented by police forces and judicial mechanisms.

Weak national institutions heighten the risks of crimes against water. Organized criminal groups may also be involved in other types of crimes such as water fraud, water theft and corruption. For example, a monopoly over the water supply may reinforce the power that organized criminal groups have over vulnerable communities living in marginalized areas like slums. Often, the populations living in these places can access water only through a criminal group.<sup>158</sup> More attention is needed on both crimes against water and the role of organized criminal groups in threatening the supply and quality of water.<sup>159</sup> The participation of local communities and grassroots initiatives may help to prevent these crimes. The most vulnerable groups are those who suffer the most from the activities of organized criminal groups.<sup>160</sup>

Domestic criminal laws integrating crimes against water may play a role in the context of armed conflicts and other situations of violence. Such crimes may be committed by organized criminal groups during armed conflicts and may thereby be subject to IHL. This is the case when protracted armed violence exists between governmental authorities and organized armed groups or between such groups within a State, and when the non-State armed group has the requisite level of organization (for example, a command structure and disciplinary rules and mechanisms).<sup>161</sup> Crimes against water are prohibited under IHL and may amount to war crimes. For example, under the Rome Statute, intentionally using starvation of civilians as a method of warfare – by depriving them of objects indispensable to their survival such as drinking water supplies – and the intentional poisoning of water are recognized as war crimes during non-

157 ICRC, “1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques”, Advisory Service on International Humanitarian Law, legal fact sheet, Geneva, 31 January 2003.

158 K. Eman and R. White, above note 9, p. 52.

159 *Ibid.*, p. 56.

160 *Ibid.*

161 See Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts*, Oxford University Press, Oxford, 2012.

international armed conflicts.<sup>162</sup> Criminal groups may also be bound under human rights law. IHL only covers acts related to armed conflicts and does not cover all the possible harmful actions that criminal groups may perpetrate against a civilian population. International criminal law establishes the criminal responsibility of individual members of armed groups when international crimes have been perpetrated, including international crimes not committed in the context of an armed conflict; examples of this include the crime of genocide and crimes against humanity. Violations of human rights, including the human right to water, can overlap with these crimes. The widespread or systematic destruction of water supplies, for example, may be a violation of several human rights, including the rights to health, food and water, and constitutes a crime against humanity.

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162 Rome Statute, above note 102, Arts 8(2)(e)(xix), 8(2)(e)(xiii).

# The question of definition: Armed banditry in Nigeria's North-West in the context of international humanitarian law

## Tosin Osasona

Tosin Osasona is the programme delivery manager for Lagos State at Coffey with experience in legal research and public policy analysis, programme management and security sector reform and governance. He is interested in policy-centred and other interventions focusing on effective, efficient and accountable service delivery by security and justice agencies in sub-Saharan Africa and particularly in Nigeria.

Email: tosasos@gmail.com.

## Abstract

*In terms of its disruptive impact and intensity of violence, banditry is the gravest security threat that Nigeria currently faces, and it is driving her worst national humanitarian crisis in decades. There are contests about the origin, nature and the drivers of banditry and how well bandits by their modus operandi fit into the various definitional frameworks of an organized criminal group. The article examines what is known about bandits and banditry in light of existing definitional and conceptual paradigms of organized crime and criminal groups,*

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*and interrogates the applicability of international humanitarian law to this security crisis that characterizes the current face of conflict in the West African Sahel.*

**Keywords:** bandits, North-West Nigeria, international humanitarian law, organized criminal groups.

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## Introduction

Nigeria's two geopolitical regions at the edge of the Sahel are sites of two different ongoing conflicts that have developed and evolved independently.<sup>1</sup> In the North-East, the decade-long fundamentalist insurgency led by Boko Haram and its spawns has caused around 350,000 deaths,<sup>2</sup> displaced over three million residents<sup>3</sup> and destroyed public infrastructure in a region already blighted by poverty and poor socio-economic outcomes.<sup>4</sup> In the North-West, groups of violent non-State actors, widely referred to as bandits, are laying siege to Nigeria's most populated geopolitical zone, with distressing consequences, that at some point outweighs the fatalities from Boko Haram's insurgency. In 2019, bandits were reportedly responsible for almost half of all violent deaths in Nigeria.<sup>5</sup>

Bandits are a loose collection of various criminal groups involved in kidnap-for-ransom, armed robbery, cattle rustling, rape and other sexual violence, pillage and attacks on traders, farmers and travellers – particularly in Nigeria's North-West region. The first written reference to banditry in the region dates back to more than 120 years and the term was used in a colonial correspondence to describe a 1901 attack on a 12,000-camel trade caravan that resulted in the death of around 210 traders.<sup>6</sup> Essentially, the colonial and recent conceptualizations and definitions of banditry are largely socio-political, and this problem of definitional haziness has continued to define discussions around the theme. The intensity of the attacks by bandits on communities and residents of

- 1 James Barnett, Murtala Ahmed Rufa'i and Abdulaziz Abdulaziz, "Northwestern Nigeria: A Jihadization of Banditry, or a 'Banditization' of Jihad?", CTC Sentinel, Vol. 15, No. 1, 2022, p. 46, available at: <https://ctc.westpoint.edu/wp-content/uploads/2022/01/CTC-SENTINEL-012022.pdf> (all internet references were accessed in June 2022).
- 2 Paul Carsten and Felix Onuah, "Northeast Nigeria Insurgency Has Killed Almost 350,000 – UN", *Reuters*, 24 June 2021, available at: <https://www.reuters.com/world/africa/northeast-nigeria-insurgency-has-killed-almost-350000-un-2021-06-24/>.
- 3 United Nations High Commissioner for Refugees (UNHCR), "Nigerian Refugees in Chad, Cameroon and Niger", 28 February 2022, available at: [https://data2.unhcr.org/en/situations/nigeriasituation#\\_ga=2.155809531.1973709748.1571844796-1590759838.1571844796](https://data2.unhcr.org/en/situations/nigeriasituation#_ga=2.155809531.1973709748.1571844796-1590759838.1571844796).
- 4 Saskia Brechenmacher, "Stabilizing Northeast Nigeria After Boko Haram", Carnegie Endowment for International Peace, 3 May 2019, available at: <https://carnegieendowment.org/2019/05/03/stabilizing-northeast-nigeria-after-boko-haram-pub-79042>.
- 5 Daily Trust, "Bandits Kill More Nigerians Than Boko Haram, Robbers, Kidnappers, Cultists, Others", 22 September 2019, available at: <https://dailytrust.com/bandits-kill-more-nigerians-than-boko-haram-robbers-kidnappers-cultists-others>.
- 6 Murtala Ahmed Rufa'i, "Cattle Rustling and Armed Banditry along Nigeria–Niger Borderlands", *IOSR Journal of Humanities and Social Science*, Vol. 4, No. 4, 2018, p. 67.

North-West Nigeria has triggered the campaign for the classification of bandits as terrorists by policymakers, security agencies, the media and citizens.<sup>7</sup> The Nigerian government in January 2022 officially declared two of the numerous bandit groups as terror organizations,<sup>8</sup> leaving many of these bandit groups outside the purview of the anti-terrorism law in Nigeria.<sup>9</sup>

Putting in perspective national and international regimes of classification, are bandits terrorists or is banditry the latest form of terrorism? Do their operations fall within the definitional parameters of organized criminal groups or are they a motley group of opportunists? More critically, are definitions and framing of any importance? In addition, this article seeks to answer the question of the required threshold of intensity and organizational capacity in the operations of bandits in the Nigerian North-West for the rules of international humanitarian law (IHL) to apply. Looking at conflict trends in the West African Sahel, of which the Nigerian North-East region is an important part, the dominant parties to the conflict do not fall neatly within existing IHL non-international armed conflict (NIAC) frameworks and yet these various armed groups ruinously affect communities the way ordinary criminals cannot.

## Loosely structured v. organized: The question of definitional adequacy

There are three competing theories about the origin and nature of banditry in Nigeria. The most prominent narrative in literature attributes banditry to out-of-control farmer–pastoralist conflicts in some of Nigeria's volatile geopolitical zones.<sup>10</sup> The second perspective considers banditry as a new form of terrorism and a continuation of the historical Fulani *Jihad* of the 20th century that targeted farming communities across northern Nigeria.<sup>11</sup> However, the third perspective, which is the most controversial, views banditry as government-sanctioned

7 Tosin Osasona, "New Lords of Nigeria's North West. Bandits: Terrorists or Criminal Gangs?", *The Republic*, 5 July 2021, available at: <https://republic.com.ng/june-july-2021/new-lords-nigeria-northwest/>.

8 Federal Republic of Nigeria, Terrorism (Prevention) Proscription Order Notice, 2021: The activities of Yan Bindiga Group, Yan Ta'adda Group and other similar groups in Nigeria are declared to be terrorism and illegal in any part of Nigeria, especially in the North-West and North-Central Regions of Nigeria and are proscribed pursuant to sections 1 and 2 of the Terrorism (Prevention) Act, 2011, *Official Gazette*, 29 November 2021, Vol. 108, No. 212, available at: <https://thenigerialawyer.com/wp-content/uploads/2022/01/Gazette-declaring-bandits-TheNigerialawyer.pdf>.

9 Federal Republic of Nigeria, Terrorism (Prevention and Prohibition) Act, 2022, *Official Gazette*, 16 May 2022, Vol. 91, No. 109, available at: [https://www.nfiu.gov.ng/Home/DownloadFile?filePath=C%3A%5Cnfiu%5Cwwwroot%5Cdocuments%5CTPp\\_DfV8G6](https://www.nfiu.gov.ng/Home/DownloadFile?filePath=C%3A%5Cnfiu%5Cwwwroot%5Cdocuments%5CTPp_DfV8G6).

10 Mohammed J. Kuna and Jibrin Ibrahim, *Rural Banditry and Conflicts in Northern Nigeria*, Centre for Democracy and Development, Centre for Democracy and Development, Abuja, 2016, p. 15, available at: <https://cddwestafrica.org/wp-content/uploads/2017/09/ruralbanditryinnorthernigeria1.pdf>.

11 Institute for Economics and Peace, *Global Terrorism Index 2016*, available at: <https://www.economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>; SBM Intelligence, *Terror in the Food Basket: A Look Into the Violence in North-Central Nigeria*, October 2015, available at: [https://sbmintel.com/wp-content/uploads/2015/12/201510\\_Terror-in-Nigerias-Food-Basket.pdf](https://sbmintel.com/wp-content/uploads/2015/12/201510_Terror-in-Nigerias-Food-Basket.pdf).

violence geared towards depopulation of communities and Islamization of the extended northern Nigeria, particularly non-Hausa- and Fulani-dominated regions. This third perception coheres around public discontent with the government's handling of pastoralists' violence in northern Nigeria.<sup>12</sup>

Irrespective of the theories about origin and intent, the rise of banditry coincides with the timeline of Nigeria's return to democratic governance in 1999. The last two decades of the post-military government era have witnessed the hitherto unknown explosion of violent non-State actors – ethnic militants, gangs and cult groups, and political thugs among others – and these groups have dominated national and sub-national security agendas in Nigeria.<sup>13</sup> These groups have taken advantage of the relative freedom provided by democratic governance, particularly the repeal of restrictive military-era laws and restrictions of the civic space.

While there are contests about the origin, nature and ultimate objectives of banditry, the description of bandits is uncomplicated. Bandits are an assortment of the various criminal groups involved in extensive cattle rustling, sexual violence, kidnapping, armed robbery, pillage and attacks on gold mineral and traders particularly in North-West Nigeria.<sup>14</sup> In essence, banditry is a composite crime and that underlines the absence of a singular legislation in Nigeria that describes and proscribes banditry as a crime, although the component crimes are criminalized in extant legislations.<sup>15</sup>

The number of bandit groups in the North-West is a subject of conjecture. However, one of Nigeria's authoritative researchers on banditry opined that there are around 120 bandit camps in the region and bandits are in possession of more than 60,000 AK-47 rifles.<sup>16</sup> One of the stakeholders appointed by bandit groups as liaison with the government stated that there are more than 100,000 armed bandits in the North-West region.<sup>17</sup> A traditional ruler in one of the six States affected by armed banditry in the region claimed that there are more than 30,000 armed bandits operating in just one of the six States of the geopolitical zone.<sup>18</sup>

12 ACAPS, "Nigeria: Banditry Violence and Displacement in the Northwest", Short Note, 24 July 2020, available at: [https://www.acaps.org/sites/acaps/files/products/files/20200723\\_acaps\\_short\\_note\\_northwest\\_banditry\\_crisis\\_nwbc\\_nigeria.pdf](https://www.acaps.org/sites/acaps/files/products/files/20200723_acaps_short_note_northwest_banditry_crisis_nwbc_nigeria.pdf).

13 European Union Agency for Asylum, "Nigeria: Non-State Actors, Common Analysis", February 2019, available at: <https://euaa.europa.eu/country-guidance-nigeria/12-non-state-actors>.

14 International Crisis Group, "Violence in Nigeria's North West: Rolling Back the Mayhem", *Africa Report* No. 288, 18 May 2020, p. 6, available at: [https://d2071andvip0wj.cloudfront.net/288-violence-in-nigerias-north-west\\_0.pdf](https://d2071andvip0wj.cloudfront.net/288-violence-in-nigerias-north-west_0.pdf).

15 Kidnapping and Cattle Rustling (Special Provisions) Law of Niger State, 2021; Olaide Oyelude, "Katsina Gov Approves Death Sentence for Kidnapping, Cattle Rustling", *Punch*, 24 May 2019, available at: <https://punchng.com/katsina-gov-approves-death-sentence-for-kidnapping-cattle-rustling/>; Emeka Mamah, "Kaduna Outlaws Kidnapping", *The Vanguard*, 15 October 2009, available at: <https://www.vanguardngr.com/2009/10/kaduna-outlaws-kidnapping/>.

16 Murtala Rufa'i, "I Am a Bandit: A Decade of Research in Zamfara State Bandit's Den", Public Lecture at the Department of History, Usman Danfodiyo University (UDUS), Sokoto, Nigeria, delivered on 9 September 2021.

17 Samson Folarin, "No School is Safe Until Govt Negotiates with Bandits, Says Gumi", *Punch*, 21 June 2021, available at: <https://punchng.com/no-school-is-safe-until-govt-negotiates-with-bandits-says-gumi/>.

18 Attahiru Ahmed, "There Are More Than 30,000 Bandits with Sophisticated Weapons in Zamfara, Emir Tells Service Chiefs", *The Nigerian Tribune*, 9 March 2021, available at: <https://tribuneonline.ng.com/there-are-more-than-30000-bandits-with-sophisticated-weapons-in-zamfara-emir-tells-service-chiefs/>.

Some of these bandits are well resourced, have a large network of informants and patrons within the larger society and are familiar with the complicated geography of the region.<sup>19</sup>

Organizationally, bandit groups operate independently; they do not have formalized structures and identities and are organized around personalities. There are instances of intergroup collaboration, for instance, when there are opportunities for pillage and protection of their operational bases in rural communities and forest reserves from attack (often from formal and informal security actors).<sup>20</sup> Operationally and resource-wise, bandit groups do collaborate. However, there are also records of intergroup conflicts and turf wars between and among bandit groups.<sup>21</sup>

According to multiple studies and the media, Nigerian citizens of the Fulani ethnic stock dominate these criminal groups.<sup>22</sup> This is explainable by the fact that these groups are mostly products of local conflicts between farmers and pastoralists.<sup>23</sup> According to one of the State governors affected by the activities of these groups:

[The] majority of those involved in this banditry are Fulanis [sic] whether it is palatable or it is not palatable but that is the truth. I am not saying 100% of them are Fulani but majority of them are, and these are people who live in the forest and their main occupation is rearing of cattle.<sup>24</sup>

Profit and personal enrichment drive banditry, rather than political, ideological or any sectional interest.<sup>25</sup> Bandits are indiscriminate in their attack, and they have plundered different communities of faith and ethnicity across the region with the same level of brutality. Bandits have attacked pastoralist Fulani communities, who have claimed that hundreds of their members have been kidnapped by bandits and 30% of their cattle lost to attacks.<sup>26</sup> Likewise, bandits have destroyed

19 Laleye Dipo, "Bandits Have Informants in Kidnapped District Head's Community, Says Niger Gov", *This Day*, 4 January 2021, available at: <https://www.thisdaylive.com/index.php/2021/01/04/bandits-have-informants-in-kidnapped-district-heads-community-says-niger-gov/>.

20 Yusuf Anka, "Leaders of Bandit Groups in Northwest Agree to Unite, Escalate Attacks on Communities", *HumAngle*, 20 May 2020, available at: <https://humanglemedia.com/leaders-of-bandit-groups-in-northwest-agree-to-unite-escalate-attacks-on-communities/>.

21 Ibrahim Hassan Wuyo, "Bandits Fight Each Other in Kaduna Forest, Kingpin Nasiru Kachalla, Others Killed", *The Vanguard*, 28 December 2020, available at: <https://www.vanguardngr.com/2020/12/bandits-fight-each-other-in-kaduna-forest-kingpin-nasiru-kachalla-others-killed/>.

22 Idris Saminu, Che Mohd Aziz Yacoob and Shazwanis Binti Shukri, "Identity and 'Fulanization' of Banditry in Nigeria: The Fulani as a 'Criminal Tribe'", *Zamfara Journal of Politics and Development*, Vol. 3, No. 1, 2022, p. 1.

23 Ibrahim Hassan Wuyo, "Banditry: It's Hausa-Fulani War, Zamfara Traces Origin of Hostilities", *The Vanguard*, 3 April 2021, available at: <https://www.vanguardngr.com/2021/04/banditry-its-hausa-fulani-war-zamfara-traces-origin-of-hostilities/>; J. Barnett, M. A. Rufa'i and A. Abdulaziz, above note 1, p. 47.

24 Kayode Oyero, "Most Bandits are Fulani Who Profess Same Religious Beliefs as Me – Masari", *Punch*, 6 September 2021, available at: <https://punchng.com/most-bandits-are-fulani-who-profess-same-religious-beliefs-as-me-masari/>.

25 Suleiman Ladan and Abdul Iguda, "Analysis of Contemporary Insecurity in Katsina State, Nigeria", *Journal of Scientific and Industrial Research*, Vol. 6, No. 7, 2019, p. 98.

26 Nduka Orjinmo, "Katsina: The Motorcycle Bandits Terrorising Northern Nigeria", *BBC News*, 5 July 2020, available at: <https://www.bbc.com/news/world-africa-53009704>.

hundreds of villages settled by Hausa farmers.<sup>27</sup> Although the Nigerian president is an ethnic Fulani, bandits have repeatedly attacked the president's hometown<sup>28</sup> and kidnapped leaders from his community.<sup>29</sup> Also, traditional leaders of Fulani ethnic extraction from the region have been kidnapped by Fulani-dominated bandit groups and ransom reportedly paid to secure their release.<sup>30</sup>

Banditry also has a transnational component. Extortion, ransom and other criminal funds from banditry drive the regional trade in small arms and light weapons and lubricates transnational crime in the wider Sahel region.<sup>31</sup> There is also continuous inflow of non-Nigerians into these criminal groups across the region's poorly policed 800-kilometre international boundaries with the Benin Republic and the Republic of Niger.<sup>32</sup> Equally worrisome is the cross-border kidnapping for ransom across the Nigerian–Nigerien international border.<sup>33</sup>

How one thinks about how well bandits and banditry fit into the existing paradigm of organized crime and criminal groups depends on a spectrum of equally valid definitions and conceptualizations of the contested term “organized criminal groups”.<sup>34</sup> On one end of the spectrum are definitions that conceive of organized crime as very sophisticated criminal activities that are situated in some forms of complex illicit markets and transactions. This class of definitions is based on indicators of criminality.<sup>35</sup> The second end of the definitional spectrum defines “organized crime” in terms of criminal organizations such as the Italian *mafia*, South American drug cartels and the Japanese *yakuza*.<sup>36</sup>

Another method is to review the organizational structure and the structure of the various markets within which these criminal groups operate. At one end,

- 27 Ebnuloluwa Olafusi, “Yari: In Five Years, Bandits Have Killed Over 3000 in Zamfara”, *The Cable*, 9 April 2019, available at: <https://www.thecable.ng/yari-in-five-years-bandits-have-killed-over-3000-in-zamfara>.
- 28 Francis Sardauna and Seriki Adinoyi, “Kidnappers Attack Daura, Abduct District Head, Umar”, *This Day*, 2 May 2019, available at: <https://www.thisdaylive.com/index.php/2019/05/02/kidnappers-attack-daura-abduct-district-head-umar/>; Sahara Reporters, “Again, Bandits Attack President Buhari’s Home State, Kill Three, Abduct Businessman”, 1 July 2021, available at: <https://saharareporters.com/2021/07/01/again-bandits-attack-president-buhari%E2%80%99s-home-state-kill-three-abduct-businessman>.
- 29 Sani Tukur, “District Head of Buhari’s Hometown, Daura, Kidnapped”, *Premium Times*, 1 May 2019, available at: <https://www.premiumtimesng.com/news/headlines/328014-district-head-of-buharis-hometown-daura-kidnapped.html>.
- 30 Mohammed Babangida, “Zamfara Emir Kidnapped Along Kaduna–Abuja Road”, *Premium Times*, 15 September 2021, available at: <https://www.premiumtimesng.com/news/headlines/484904-zamfara-emir-kidnapped-along-kaduna-abuja-road.html>; Mohammed Lere, “Bandits Abduct Kaduna Emir, 3 Wives, 2 Grandchildren, Staff”, *Premium Times*, 11 July 2021, available at: <https://www.premiumtimesng.com/news/headlines/472898-just-in-bandits-abduct-kaduna-emir-10-others.html>.
- 31 John Campbell, “Kidnapping and Ransom Payments in Nigeria”, *Council on Foreign Relations Blog*, 18 February 2021, available at: <https://www.cfr.org/blog/kidnapping-and-ransom-payments-nigeria>.
- 32 Goodluck Jonathan Foundation, *Terrorism and Banditry in Nigeria: The Nexus*, 2021, p. 29, available at: <https://www.gejfoundation.org/terrorism-and-banditry/>.
- 33 Idrees Ali, “U.S. Special Forces Rescue American Held in Nigeria: Officials”, *Reuters*, 31 October 2020, available at: <https://www.reuters.com/article/us-usa-nigeria-military-idUSKBN27G0JI>.
- 34 Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, pp. 408–9.
- 35 Alan Wright, *Organised Crime*, Willan Publishing, New York, 2006, pp. 48–9.
- 36 United Nations Office on Drugs and Crime, *Global Programme Against Transnational Organized Crime, Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, September 2002, p. 30, available at: [https://www.unodc.org/pdf/crime/publications/Pilot\\_survey.pdf](https://www.unodc.org/pdf/crime/publications/Pilot_survey.pdf).

organized criminal groups are sophisticated organizations with well-defined organizational capacity, which makes the organization exist independently of the people it is composed of at any particular point in time. A contrasting view to this argues that organized crime groups are more akin to informal rather than formal organizations. According to this school of thought, organized crime groups are largely composed of localized sets of loosely structured relationships that derive from kin, ethnicity, cultural affinity and other forms of intimate association. The organizational context is less formal and bureaucratic and more of shared cultural understandings and cooperation.<sup>37</sup>

There is no consensus among African scholars about the definition of organized crime in the African context nor is there a uniquely Nigerian definition.<sup>38</sup> The United Nations Convention against Transnational Organized Crime offers a definition that is growingly being accepted as the standard working definition of organized crime globally.<sup>39</sup> Article 2(a) defines organized crime as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. Paragraph 2(c) of the same article defines a structured group as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”.<sup>40</sup>

Bandit groups in Nigeria are organized criminal groups but are closer in structure and operation to the Russian *mafia*<sup>41</sup> than the *Cosa Nostra* (Sicilian *mafia*). The Russian *mafia* do not have a homogeneous hierarchical structure under the leadership of any single individual unlike the structured organizational outlook of the *Cosa Nostra*. Bandits like the Russian *mafia* operate based on a loose, opportunistic, flexible and adaptive network to evolving security realities; members are recruited for their knowledge of terrain and operational capabilities. Bandits do not have a singular or permanent hierarchy, even though each bandit group tends to adhere around the personality of a bandit lord.<sup>42</sup>

Also, each bandit group is led by an independent crime entrepreneur, who is responsible for financing, recruitment, arming and direct overall operational

37 James O. Finckenauer and Elin J. Waring, *Russian Mafia in America: Immigration, Culture, and Crime*, Northeastern University Press, New York, 1998, p. 12.

38 African Union, *Comprehensive Assessment of Drug Trafficking and Organised Crime in West and Central Africa*, January 2014, p. 3, available at: [https://au.int/sites/default/files/documents/30220-doc-organized\\_crime\\_in\\_west\\_and\\_central\\_africa\\_-\\_july\\_2014\\_-\\_abridged\\_summary\\_english.pdf](https://au.int/sites/default/files/documents/30220-doc-organized_crime_in_west_and_central_africa_-_july_2014_-_abridged_summary_english.pdf).

39 Ian Tennant, “Fulfilling the Promise of Palermo? A Political History of the UN Convention Against Transnational Organized Crime”, *Journal of Illicit Economies and Development*, Vol. 2, No. 1, 2021, p. 54.

40 United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, Annex I, UN GAOR, 55th Sess., Supp. No. 49, at 44, UN Doc. A/45/49, Vol. I, 2001 (entered into force 29 September 2003).

41 United Nations Office on Drugs and Crime, Global Programme Against Transnational Organized Crime, above note 36, p. 8.

42 Centre for Democracy and Development, “Northwest Nigeria’s Bandit Problem: Explaining the Conflict Drivers”, 5 April 2022, p. 4, available at: <https://cddwestafrica.org/northwest-nigerias-bandit-problem-explaining-the-conflict-drivers/>.



control of the group.<sup>43</sup> However, there is shared ethnic, linguistic and cultural kinship between the various bandit groups and this shared affinity is the basis on which these groups relate and engage with the wider community.

The consequence of this organizational fluidity and independence is a lack of formal structure and centralized control system, which drives internal violence as well as intergroup conflicts between and among bandit groups. This goes a long way in determining how bandits fit into the paradigms of organized criminal groups and by extension operate under the purview of IHL.

## Violent extremism v. banditry: Delineating lines

The Nigerian National Security Strategy, which outlines the major security concerns of the country, and the various strategies to meet them, differentiated between terrorism and violent extremism on one hand and armed banditry and kidnapping on the other. According to the strategy document of the Nigerian government, “kidnapping and armed banditry and militia activities have become a serious threat to Nigeria’s national security. Collectively, they constitute about forty per cent of national insecurity in Nigeria.”<sup>44</sup> The reason is seemingly straightforward, though the drivers of banditry and violent extremism in Nigeria are mostly different.

Globally, there are different manifestations of banditry, and the classification of banditry is based on its peculiar drivers.<sup>45</sup> The main driver of banditry in North-West Nigeria is mostly economic. The region that is the epicentre of banditry in Nigeria is blighted by endemic poverty. Further, illiteracy in the region is among the highest in Nigeria, with high levels of substance abuse, a near-total lack of economic opportunities and a high rate of rural unemployment. When added to failure of governance that is manifested in the poor management regime of Nigeria’s international borders, inadequate presence of policing actors, poor policing of rural communities, and past human rights abuses and unresolved communal conflicts, the current security crisis in the region becomes relatable.<sup>46</sup> The alluring prospect of wealth that banditry offers in that region, where poverty and lack of economic opportunity are a common denominator, is beyond what farming and herding – the primary occupation of the region – can provide.

There are many differing views on what terrorism is. However, the position of most experts is that there is a religious, ideological or even political imperative to

43 J. Barnett et al., above note 1, p. 50.

44 Federal Government of Nigeria, *National Security Strategy 2019*, December 2019, p. 24, available at: <https://ctc.gov.ng/wp-content/uploads/2020/03/ONSA-UPDATED.pdf>.

45 Ray Kea, “‘I Am Here to Plunder on the General Road:’ Bandits and Banditry in the Pre-Nineteenth Century Gold Coast”, in Donald Crummey (ed.), *Banditry, Rebellion, and Social Protest in Africa*, James Currey, London, 1986, p. 117.

46 D. Ekpa, O. I. Oladele and M. Akinyemi, “Poverty Status of Climate Smart Agricultural Farmers in North West Nigeria – Application of Foster Greer and Thorbecke Model”, *American Journal of Rural Development*, Vol. 5, No. 5, 2017, p. 138.



terrorism.<sup>47</sup> In addition, a synthesis of the various definitions by governments shows the following key criteria as *sine qua non*: target, objective, motive, perpetrator, and legitimacy or legality of the act as the fundamental hallmark of acts of violence that are categorized as terrorism.<sup>48</sup> Irrespective of the angle of examination, there is little ideological or organized thought in the actions of the bandit groups other than violence and the opportunities that accrue to them from it.

Nothing highlights the non-ideological nature of banditry than the acceptance in the past, by the leadership of some of these groups, to abandon crime and take on legitimate businesses in exchange for monetary compensation and general amnesty for their crimes against local communities.<sup>49</sup> However, this does not exclude the fact that some extremist groups have operational bases in the same geographical spaces that bandits have colonized.<sup>50</sup> There is also the possibility that some bandit groups might have adopted more of a religious *modus operandi* on their own initiative or through contact with extremist groups,<sup>51</sup> pointing to a developing crime–terror nexus in the region.

The crime–terror nexus refers to either the environmental or operational convergence of violent non-State actors and terror groups that have divergent objectives and that would naturally utilize differing tactics to achieve their goals.<sup>52</sup> Globally, criminal groups and extremist groups have been documented to converge in the following five ways. The first is co-existence, which implies the operation of criminal and terrorist groups in the same territorial space. The second is the appropriation of activity; this is criminal organizations deploying terrorist tactics and terrorist organizations engaged in criminal activities for strategic advantages. The third refers to alliances between terrorist groups and criminal gangs, a symbiotic collaboration where criminal and terrorist organizations collaborate and contribute in their areas of expertise to achieve their respective goals. The fourth refers to the merger of criminal groups with terrorist organizations, or vice versa. The fifth is the transformation of criminal gangs into terrorist organizations and vice versa.<sup>53</sup>

47 J. B. S. Hardman, "Terrorism", in Edwin R. A. Seligman and Alvin Saunders Johnson (eds), *Encyclopaedia of the Social Sciences*, The Macmillan Company, New York, 1937, Vol. 14, p. 575; Michael Stohl, "Demystifying Terrorism: The Myths and Realities of Contemporary Political Terrorism", in M. Stohl (ed.), *The Politics of Terrorism*, Mark Dekker, New York, 1988, p. 3; Lesley Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford, Vol. 2, N–Z, 1993, p. 32.

48 Bruce Hoffman, *Inside Terrorism*, Columbia University Press, New York, 1988, p. 17.

49 Daily Trust, "Sokoto Villagers Heave Sigh of Relief After Bandits Surrender Arms", 28 May 2017, available at: <https://dailytrust.com/amp/sokoto-villagers-heave-sigh-of-relief-after-bandits-surrender-arms>.

50 Ifeanyi Onwuzuruigbo, "Enclaves of Banditry: Ungoverned Forest Spaces and Cattle Rustling in Northern Nigeria", *African Studies Review*, Vol. 64, No. 1, 2021, p. 168; Agence France Presse (AFP), "Boko Haram Terrorists Now Training Bandits in Kaduna, Other North-West States – Military Sources", *Nigerian Tribune*, 24 September 2021, available at: <https://tribuneonline.ng.com/boko-haram-terrorists-now-training-bandits-in-kaduna-other-north-west-states-military-sources/>.

51 James Barnett, "Investigating the 'Boko Haram' Presence in Niger State", Hudson Institute, 30 April 2021, available at: <https://www.hudson.org/research/16878-investigating-the-boko-haram-presence-in-niger-state>.

52 Tamara Makarenko, "The Crime–Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism", *Global Crime*, Vol. 6, No. 1, 2004, p. 130.

53 Chris Dishman, "Terrorism, Crime, and Transformation", *Studies in Conflict and Terrorism*, Vol. 24, No. 1, 2001, pp. 43–7.

The crime–terror nexus in Nigeria becomes more complicated with the huge number of bandit groups, their continuous organizational evolution and the number of changes in the operational strategy of these bandit groups. However, it is the preponderant opinion of scholars that criminal organizations and terror groups remain what they are at their inception, irrespective of subsequent activities or how they evolve to make money.<sup>54</sup>

The evidence is not conclusive on the exact areas and nature of collaboration between bandits and Islamist fundamentalists in the region. There is evidence, however, of collaboration and of violent confrontation between the bandit groups and Islamist fundamentalist groups in the region. Bandits dominate Nigeria’s North-West region in terms of human resources, social networks and military assets.<sup>55</sup>

## Humanitarian impacts of banditry

Undoubtedly, global attention in the last decade has been on Boko Haram and other Islamist fundamentalist groups in the North-East, yet the impacts of banditry on local populations have been more devastating, and this is so for three reasons. With a population of 35.7 million people,<sup>56</sup> the region is the most populous in Nigeria. Unlike the Islamic insurgency in the North-East that is contained primarily within Borno State, banditry affects all the six States in the region and is able to spread out with a pace unmatched by terror groups.

Banditry has had great ruinous impact on rural communities, and this is more poignant when the low rate of urbanization in the region is put in perspective and these rural communities and forest reserves are the operation theatres of bandits. In Zamfara State, one of the six States affected by banditry in the region, between 2011 and 2019, bandits killed at least 6319 people, kidnapped 3672 people and burnt more than 500 villages.<sup>57</sup> In that State alone, 700,000 rural residents are currently displaced.<sup>58</sup> In Kastina State, another State in the region, bandits killed 213 residents and kidnapped 676 persons between July and October 2021.<sup>59</sup> In Kaduna State in 2021, bandits killed at least 1192 residents and

54 Louise I. Shelley *et al.*, “Methods and Motives: Exploring Links Between Transnational Organized Crime & International Terrorism”, US Department of Justice, 23 June 2005, available at: <https://www.ojp.gov/pdffiles1/nij/grants/211207.pdf>.

55 J. Barnett, M. A. Rufa’i and A. Abdulaziz, above note 1, p. 50.

56 Ojo Maduekwe, “These Figures Explain Why the North-West is Anti Restructuring”, *The Cable*, 9 October 2017, available at: <https://www.thecable.ng/these-figures-explain-why-the-north-west-is-anti-restructuring>.

57 This Day, “Over 3,000 Killed, 500 Villages Affected in Zamfara, Says Yari”, 10 April 2019, available at: <https://www.thisdaylive.com/index.php/2019/04/10/over-3000-killed-500-villages-affected-in-zamfara-says-yari/>.

58 Mohammed I. Yaba, “700,000 People Displaced by Bandits in Zamfara – Gov’t”, *Daily Trust*, 20 March 2022, available at: <https://dailytrust.com/700000-people-displaced-by-bandits-in-zamfara-govt>.

59 Francis Sardauna, “Bandits Kill 213, Kidnap 676 Persons in Four Months in Katsina”, *This Day*, 19 November 2021, available at: <https://www.thisdaylive.com/index.php/2021/11/18/bandits-kill-213-kidnap-676-persons-in-four-months-in-katsina/>.

kidnapped another 3348.<sup>60</sup> Understanding that banditry disproportionately affects rural communities and that they are disconnected from urban governance, it is difficult to get an exact picture of fatalities from these criminal groups.

Bandits primarily target rural communities who are responsible for producing a substantial percentage of Nigeria's agricultural output. The impact on Nigeria's food security is grim, driving the highest increase in food prices in more than fifteen years and close to 20% consumer inflation in 2021.<sup>61</sup> This has worsened socio-economic outcomes for rural communities in the region where agriculture is the main source of livelihood and where most communities are rural.

Serial targeting of schoolchildren for kidnap for ransom by bandits has worsened Nigeria's abysmal out-of-school numbers. In 2021, bandits attacked more than twenty different schools in the North-West region, kidnapped 1436 students and killed another sixteen while in school,<sup>62</sup> resulting in school closures across the region. Even without banditry, only 58% of primary schoolchildren across the region finish six years of primary education and the literacy rate among young women is just 27%.<sup>63</sup> Banditry has made it even worse – around twelve million children are out of school across Nigeria.<sup>64</sup>

Women across the region bear the most significant impact of banditry due to the wanton sexual violence routinely used by bandits against rural communities.<sup>65</sup> Bandits weaponize sexual violence against communities to exact compliance. In one community in Zamfara, bandits randomly raped women as punishment for not paying the levies imposed by the group.<sup>66</sup> There is a pattern to this sexual violence by bandits. In a neighbouring State, bandits reportedly raped more than thirty women to enforce compliance by a community.<sup>67</sup>

60 Mohammed I. Yaba, "Kaduna: Bandits Killed 1,192, Kidnapped 3,348 in 2021", *Daily Trust*, 1 February 2022, available at: <https://dailytrust.com/kaduna-bandits-killed-1192-kidnapped-3348-in-2021>.

61 Tope Alake, "Nigeria's Buhari Warns Rising Banditry a Threat to Food Security", *Bloomberg*, 13 May 2021, available at: <https://www.bloomberg.com/news/articles/2021-05-13/nigeria-s-buhari-warns-rising-banditry-a-threat-to-food-security>; Premium Times, "Insecurity: Buhari Pledges Action Against Bandits", 13 May 2021, available at: <https://www.premiumtimesng.com/news/headlines/461321-insecurity-buhari-pledges-action-against-bandits.html>.

62 The Vanguard, "In Nigeria: 20 Attacks on Schools, 1,436 Students Abducted, 16 Dead", 16 September 2021, available at: <https://www.vanguardngr.com/2021/09/in-nigeria-20-attacks-on-schools-1436-students-abducted-16-dead/>.

63 UNICEF, *Education: Literacy Among Young Women*, 2021, available at: <https://www.unicef.org/nigeria/media/1631/file>.

64 Ronke Idowu, "Insurgency, Banditry Have Forced Over 12m Children Out of School, Says Presidency", *Channels Television*, 27 October 2021, available at: <https://www.channelstv.com/2021/10/27/insurgency-banditry-forcing-children-out-of-school-says-presidency/>.

65 Oluwole Ojewale and Omolara Balogun, "Banditry's Impacts on Women and Children in Nigeria Needs a Policy Response", *LSE Blog*, 10 January 2022, available at: <https://blogs.lse.ac.uk/africaatlse/2022/01/10/banditry-impacts-on-women-children-in-nigeria-needs-policy-response-kidnappings-ssi-education/>.

66 Dunamis Ogalah, "Bandits Rape Women, Loot Zamfara Community for Not Paying Levy", *Daily Post*, 15 November 2021, available at: <https://dailypost.ng/2021/11/15/bandits-rape-women-loot-zamfara-community-for-not-paying-levy/>.

67 John Adam, "Mass Gang-Rape of Women, Girls by Bandits in Niger Communities", *The Sun*, 24 November 2021, available at: <https://www.sunnewsonline.com/mass-gang-rape-of-women-girls-by-bandits-in-niger-communities/>.

North-West Nigeria is a very poor region and banditry is fast becoming the lucrative pathway out of poverty for many young men and women, not only in Nigeria but also across the region. Funds gained from kidnapping for ransom drive the trade in small arms and light weapons and lubricate transnational crime in the wider Sahel region, aggravating insecurity in a region much wrecked by conflicts.<sup>68</sup> Banditry is attracting criminals from across the region, with the continuous influx of non-Nigerians into their ranks and the internationalization of kidnapping for ransom across the Nigerian–Nigerien international border.<sup>69</sup>

## Banditry and the future of IHL in the Sahel

Armed banditry in North-West Nigeria manifestly highlights the face of conflicts in the West African Sahel and the challenges of IHL in dealing with some of the features of this typology of conflicts across the Sahel. There is no doubt that the other dominant conflict in the region – Islamist fundamentalist insurgency – falls into the purview of NIAC not only as defined by Article 3 common to the four Geneva Conventions but also in line with Article 1 of Additional Protocol II of the Geneva Conventions.<sup>70</sup>

However, as highlighted in the preceding section, banditry has superseded fundamentalist insurgency in North-West Nigeria in terms of humanitarian impact. One of the features of conflict in the West African Sahel in the last decade is that conflicts occur on the margins, fought for reasons other than acquiring State power by a range of non-State actors including warlord factions, clans, tribes and various types of militias.<sup>71</sup> The background to these conflicts is fragile and failing States, that have unremittingly abandoned all manifestations of governance in communities in the Sahel, resulting in a swath of territories where criminal groups and other non-State actors have replaced both formal and informal governance structures.<sup>72</sup>

Another notable feature of conflicts across the region is the prevalence of incoherent parties to conflicts and their interests. A number of ongoing conflicts in the region involve multiple stakeholders – formal State actors, ethnic militias, private armed groups and opportunistic criminal groups. Many of these groups are difficult to define, as their interests are concretely unknown, they have

68 J. Campbell, above note 31.

69 I. Ali, above note 33.

70 Amuda-Kannike Abiodun and Abila, Sylvanus Elijah, “A Review of The Boko Haram Insurgency and Armed Conflicts in Nigeria Under International Humanitarian Law”, *Journal of Law, Policy and Globalization*, Vol. 73, 2018; Oshoma Aduku, “Legal Classification of Conflict in Nigeria (Boko Haram Case Study)”, SSRN, 28 July 2021, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3861496](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861496).

71 Scott Straus, “Wars Do End! Changing Patterns of Political Violence in Sub-Saharan Africa”, *African Affairs*, Vol. 111, No. 443, 2012.

72 Dele Olowu and Paulos Chanie, “Introduction: Renewed Interest in State Weakness and Fragility”, in D. Olowu and P. Chanie (eds), *State Fragility and State Building in Africa: Cases from Eastern and Southern Africa*, United Nations University Series on Regionalism, No. 10, Springer, London, 2016.

decentralized operational structures and their political and economic agendas are fuzzy; engaging with these groups creates distinct risks of its own.<sup>73</sup>

The third feature of conflicts in the Sahel is the dearth of information and knowledge about armed conflicts, as knowledge about ongoing conflicts in the region rests on weak foundations. Understanding that armed violence by armed non-State actors (ANSAs) poses a significant threat to human security, IHL has established a threshold that bounds ANSAs in conflict; however, this has not helped the debates on the credibility and relevance of required levels of intensity and characterization of parties.<sup>74</sup> A number of conflicts across the West African Sahel occur in remote and often inaccessible locations, so there is always the constant challenge of collating comprehensive information about this violence.<sup>75</sup> There is a critical gap in the documentation of organized violence in the region and data on casualties, victims are often unreliable, and available information is either unreliable or contested.

It is beyond contest that bandits are members of various organized criminal groups and culpable under the Nigerian criminal law regime and, also, that they are responsible for some of the most egregious human rights violations in the West African Sahel. However, how does IHL, that primarily exists to promote humane standards of behaviour in situations of armed conflict, intervene in Nigeria's latest security crisis and interdict indiscriminate brutality by bandits across the North-West, particularly with the Nigerian State seeming impotent?

Knowing that there is no hierarchy of prioritization and that irrespective of the nomenclature of the conflict – international armed conflicts or NIACs, the principles of IHL apply. A NIAC is deemed to exist “whenever there is prolonged armed violence between government authorities and organized armed groups or between such groups within a State”.<sup>76</sup> Essentially, beyond the classifications provided by common Article 3 and Additional Protocol II, the cases of *Tadić* and *Haradinaj et al.* have provided jurisprudential direction on the twin thresholds of application – “the ‘organization’ of the non-State armed group and the ‘intensity’ of the violence between it and its opponent(s)”.<sup>77</sup>

Excluded from these classifications are “situations of internal disturbances and tensions, such as protests, isolated and sporadic acts of violence, and other acts of a similar nature”.<sup>78</sup> While the Additional Protocol did not specifically mention

73 Paul D. Williams, “Continuity and Change in War and Conflict in Africa”, *PRISM*, Vol. 6, No. 4, 2017, p. 34.

74 Graduate Institute of Geneva, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Geneva, Academy In-Brief No. 7, 2016, p. 4, available at: [https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7\\_web.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf).

75 David T. Burbach and Christopher J. Fettweis, “The Coming Stability? The Decline of Warfare in Africa and Implications for International Security”, *Contemporary Security Policy*, Vol. 35, No. 3, 2014, p. 423.

76 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. IT-94-I-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

77 ICTY, *The Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, para. 49 c.

78 Protocol Additional (II) 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 1978), Art. 1(2).

banditry in the range of activities excluded from the application of the Protocol, an International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber distinguished an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities.<sup>79</sup> The Commentaries on the first and fourth Geneva Conventions state that the criteria “are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection”.<sup>80</sup>

Some IHL scholars have included banditry in the range of events excluded from the definitional parameters of armed conflict. According to an International Committee of the Red Cross (ICRC) Opinion Paper “in order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or *acts of banditry*, the situation must reach a certain threshold of confrontation”.<sup>81</sup> According to Eric David, “the nature of hostilities and the quality of the actors are used as defining criteria to distinguish an armed conflict from *banditry*, terrorism, and short rebellions”.<sup>82</sup> Also, Yoram Dinstein<sup>83</sup> and Anthony Cullen<sup>84</sup> distinguished between *banditry* and armed conflict in IHL.

In addition, not all situations of prolonged violence equate to a NIAC, as parties to a NIAC are expected to “have a minimum degree of organization and discipline, that allows them to respect international humanitarian law, and that is sufficient to be recognized as a party to the conflict”.<sup>85</sup> Even where there is intensity of violence, as organized criminal groups are wont to use extreme violence, this does not automatically imply that the intensity requirement defined by the IHL is met.<sup>86</sup>

While the catastrophic humanitarian impact of banditry is undeniable, however, banditry fails some of the thresholds of intensity and organization established by the ICTY and International Criminal Court, particularly the requirements – “on the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles;

79 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, 36 ILM 908 and 920.

80 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. I: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, International Committee of the Red Cross (ICRC), Geneva, 1952.

81 ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, March 2008, available at: <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> (emphasis added).

82 Eric David, “Internal (Non-International) Armed Conflict”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014 (emphasis added).

83 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, 2nd ed., Cambridge University Press, Cambridge, 2021, p. 43.

84 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, p. 37.

85 ICRC, “Armed Conflicts Linked to the Disintegration of State Structures”, preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on International Humanitarian Law, Geneva, 19–23 January 1998, available at: <https://www.icrc.org/en/doc/resources/documents/misc/57jplq.htm>.

86 Michael N. Schmitt, “The Status of Opposition Fighter in a Non-International Armed Conflict”, *International Law Studies*, Vol. 88, 2012, p. 123.

the blocking or besieging of towns and the heavy shelling of these towns”.<sup>87</sup> Bandits are mostly criminal entrepreneurs, who operate mainly in independent clusters and rely on small and light weapons and motorcycles for mobility.

Essentially, bandits by their organizational structure and operational systems hardly meet the set criteria for the application of IHL rules applicable in NIAC and, for now, the current legal framework may seem inadequate to deal with situations of violence predicated by these criminal groups against vulnerable communities that IHL evolved to protect.

## Conclusion

In terms of its disruptive impact and intensity of violence, banditry is the gravest security threat that Nigeria currently faces, as bandits have beaten the notorious Boko Haram into the second spot. Bandits remain an assortment of non-ideologically but economically driven organized criminal groups gangs involved in large-scale cattle theft, sexual violence, extortion rackets, kidnapping for ransom, armed robbery, pillage, and targeting road users in the Nigerian North-West.

Banditry typifies the current nature and actors of armed conflict in the West African Sahel as well as the incapacity of the State. Unfortunately, the established rules of IHL exclude the humanitarian crimes of bandits within the current framework, raising questions about the ability of IHL and even International Human Rights Law to confront future conflicts in the zone. Although IHL may not implicitly apply to banditry in North-West Nigeria, the activities of bandits can constitute crimes against humanity, and they can be prosecuted nationally or by the International Criminal Court.

87 ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment (Trial Chamber II), 10 July 2008, para. 177, footnotes with references to ICTY case law deleted; ICTY, *The Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, paras 49 and 90–9; ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgment (Trial Chamber II), 30 November 2005, paras 90 and 135–70; see International Criminal Court, *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber I), 14 March 2012, para. 538; International Criminal Court, *The Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber II), 7 March 2014, para. 1187; and International Criminal Court, *The Prosecutor v. Bemba*, Judgment (Trial Chamber III), 21 March 2016, paras 137–41.



# Symbiosis in violence: A case study from Sierra Leone of the international humanitarian law implications of parties to the conflict engaging in organized crime

## Sally Longworth

Sally Longworth, LL.M., is a doctoral candidate in international law at Stockholm University's Faculty of Law, specializing in international human rights, and international humanitarian and international criminal law. Her PhD research focuses on the right to freedom of expression in armed conflict.

Email: Sally.Longworth@juridicum.su.se.

## Abstract

*This article aims to demonstrate that respect for international humanitarian law (IHL) may help reduce the impact of organized crime in areas affected by armed conflict through a case study of the conflict in Sierra Leone (1991–2002). In this conflict, a symbiosis in violence was created, with diamond smuggling being essential to achieve the parties' military objectives, and those objectives being increasingly shaped by involvement in diamond smuggling. This led to further*

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*violence connected with the conflict and breaches of IHL. Ensuring compliance with IHL may therefore reduce the impact of these activities in armed conflicts. An important tool in securing this compliance is the influence of other States not party to the conflict, further to their obligation to ensure respect for IHL.*

**Keywords:** armed groups, organized crime, international criminal law, international humanitarian law, legal frameworks, Sierra Leone.

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## Introduction

Organized crime fuels armed conflict, making the situation more protracted, more violent and increasing the hardships of those living in affected areas.<sup>1</sup> This link has been particularly noted since the 1990s<sup>2</sup> and was keenly demonstrated in the role of diamond smuggling in the armed conflict in Sierra Leone that took place between 1991 and 2002.<sup>3</sup> An analysis of this conflict also demonstrates how respect for international humanitarian law (IHL) may contribute to reducing the impact of organized crime in areas affected by armed conflict.

Although IHL is aimed at limiting the effects of armed conflicts rather than addressing organized crime, IHL can be directly applicable to such criminal conduct where there is a sufficient nexus between the conduct and the conflict, especially when perpetrated by the parties to the armed conflict.<sup>4</sup> In addition, activities connected with organized crime can amount to violations of IHL and other international crimes.<sup>5</sup> Compliance with IHL therefore has the potential to limit

- 1 Ekaterina Stepanova, “Armed Conflict, Crime and Criminal Violence”, in Stockholm International Peace Research Institute, *SIPRI Yearbook 2010: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2010, pp. 37–60. See also Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2006.
- 2 Sebastian von Einsiedel, Louise Bosetti, James Cockayne, Cale Salih and Wilfred Wan, *Civil War Trends and the Changing Nature of Armed Conflict*, United Nations University Centre for Policy Research, Occasional Paper 10, March 2017, New York, pp. 4–5. See also James Cockayne, “Chasing Shadows: Strategic Responses to Organised Crime in Conflict-Affected Situations,” *RUSI Journal*, Vol. 158, No. 2, 2013.
- 3 Note, diamond smuggling was not the only illicit trade conducted by the parties to the conflict. Details are included in the judgments of the Special Court for Sierra Leone (SCSL) and Final Report of the Sierra Leone Truth and Reconciliation Commission (TRC Report) relating to trade in drugs, arms and other natural resources, to name a few.
- 4 This connection has been noted in relation to other conduct described as organized crime, such as terrorism. See further, International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflicts on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019, pp. 57–64. See further, Tilman Rodenhäuser, “The Legal Protection of Persons Living Under the Control of Non-State Armed Groups”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020.
- 5 See, for example, SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Accused)*, Case No. SCSL-04-15-T, Trial Judgment (Trial Chamber I), 2 March 2009 (*Revolutionary United Front (RUF) Trial Judgment*), on crimes connected with diamond mining in Sierra Leone; and Human Rights Council, “They Came to Destroy”: ISIS Crimes Against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016, on slavery and genocide in Iraq.

the impact of organized crime perpetrated by the parties to the conflict on the civilian population in situations of armed conflict. This is based on the fundamental principle of IHL to reduce the suffering of those not participating in the hostilities from the impact of the conflict.<sup>6</sup>

These points will be demonstrated through a case study of the armed conflict in Sierra Leone through the judgments of the Special Court for Sierra Leone (SCSL) and the Final Report of the Sierra Leone Truth and Reconciliation Commission (TRC Report). Although the judgments of the SCSL were marred by failings in the proceedings and management of the court, which impacts the quality and reliability of the factual and legal findings contained, they do form part of the legacy of the conflict analysing the conduct of the parties in relation to the applicable IHL.<sup>7</sup> The findings of the TRC Report, a further and important part of that same legacy, are included in part as a way to mitigate these shortcomings.<sup>8</sup>

This article will first provide a general background to the armed conflict in Sierra Leone and the role played by diamond smuggling during the conflict. It will go on to demonstrate the symbiosis between the conflict and diamond smuggling, and how diamond smuggling led to further breaches of IHL and international criminal law. The analysis will then turn to the obligations under IHL applicable to diamond smuggling activities, and develop the argument that respect for these obligations may assist in relieving the civilian population from the effects of organized crime. This is especially so when organized crime is perpetrated by the parties to the armed conflict, as IHL is directly applicable to their conduct in relation to the civilian population. Finally, the article will analyse how the duty of other States not party to the armed conflict to ensure respect for IHL may aid in upholding these obligations.

6 ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, Cambridge University Press, Cambridge, 2020, paras 151 and 584–5; International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 136, para. 79.

7 See further, Antonio Cassese, *Report on the Special Court for Sierra Leone. Submitted by the Independent Expert Antonio Cassese*, 12 December 2006, available at: [www.rscsl.org/documents.html](http://www.rscsl.org/documents.html) (all internet references were accessed in August 2022); Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, 2 November 2005, available at: [www.hrw.org/report/2005/11/02/justice-motion/trial-phase-special-court-sierra-leone](http://www.hrw.org/report/2005/11/02/justice-motion/trial-phase-special-court-sierra-leone); and Wayne Jordash and Scott Martin, “How the Approach to JCE in *Taylor* and the RUF Case Undermined the Demands of Justice at the Special Court for Sierra Leone”, in Charles Chernor Jalloh (ed.), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, Cambridge, 2013.

8 See further, Sierra Leone Truth and Reconciliation Commission, “The TRC and the Special Court for Sierra Leone”, in Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (TRC Report), Vol. Three B, Chapter 6, Freetown, 2004, available at: [www.sierraleonetr.com/index.php/view-the-final-report/table-of-contents](http://www.sierraleonetr.com/index.php/view-the-final-report/table-of-contents); Alpha Sesay, “To Compete or to Complement? Assessing the Relationship between the Sierra Leone Special Court and the Truth and Reconciliation Commission”, in C. C. Jalloh, *ibid.*

## Background to the conflict

The non-international armed conflict (NIAC) in Sierra Leone, that took place between approximately 1991 and 2002,<sup>9</sup> was marred by excessive violence and a noted lack of respect for IHL by all parties to the conflict.<sup>10</sup> Alongside the use of child soldiers and amputations of members of the civilian population, “blood diamonds” became synonymous with the conflict.<sup>11</sup>

The conflict began in 1991 between the Sierra Leone Army and the Revolutionary United Front (RUF),<sup>12</sup> a group led by Foday Sankoh, with significant connections to armed groups fighting in Liberia, as well as with Charles Taylor, who would go on to become President of Liberia in 1997.<sup>13</sup> The rise of the RUF followed many years of discontent with oppression and abuses of the ruling All Peoples Congress party and rise of revolutionary thinking, inspired by the ideology of Pan-Africanism.<sup>14</sup> After five years of conflict, a peace agreement was signed in Abidjan in November 1996, but broke down in early 1997 and hostilities resumed.<sup>15</sup>

Following a *coup d'état* by former and serving members of the Sierra Leonean Armed Forces in May 1997, the Armed Forces Revolutionary Council (AFRC) joined the conflict, led by Johnny Paul Koroma.<sup>16</sup> Part of the reasons behind this coup were the AFRC's discontent with Government failings and support to the Kamajors and other traditional hunter groups that were fighting on behalf of the Government and were formed into the Civil Defence Forces

9 *RUF Trial Judgment*, above note 5, paras 7–44; SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, Case No. SCSL-04-16-T, Trial Judgment (Trial Chamber II), 20 June 2007 (*Armed Forces Revolutionary Council (AFRC) Trial Judgment*), paras 155–209; SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Trial Judgment (Trial Chamber II), 18 May 2012 (*Taylor Trial Judgment*), paras 18–70.

10 See further, “Nature of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 4.

11 See further, “Historical Antecedents to the Conflicts”, in TRC Report, above note 8, Vol. Three A, Chapter 1; and “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 1–71.

12 See further, “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 86–113. Prior to the start of the conflict, there had been incursions by the RUF and the National Patriotic Front of Liberia (NPFL) from Liberia in the 1990s, characterized by the TRC as “cross-border raised”. See paras 85 and 122–89.

13 See further, “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 32–54 for history and connection with the conflict in Liberia from 1991, and paras 114–21 for Taylor's link with his strategy in the conflict in Liberia. See also *Taylor Trial Judgment*, above note 9; and *RUF Trial Judgment*, above note 5, paras 722–4.

14 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 16–23. See also paras 123–6, particularly para. 125. See further, paras 24–31 on early formations of the group and the rise of Foday Sankoh as leader.

15 *AFRC Trial Judgment*, above note 9, paras 162–3.

16 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 646–93; *RUF Trial Judgment*, above note 5, paras 743 and 745. This followed an earlier coup in 1992 when junior ranks of the Sierra Leone Army staged a coup under the command of Captain Valentine Strasser and established the National Provisional Ruling Council (NPRC) Government. Elections were subsequently held in 1996. The leader of the AFRC, Johnny Paul Koroma had also staged an earlier attempt of a coup in September 1996, but was unsuccessful, and subsequently jailed. See *AFRC Trial Judgment*, above note 9, paras 158 and 161. See further, “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 273–343 and 580–621.

(CDF) in 1997.<sup>17</sup> Shortly after the coup, the AFRC invited the RUF to join them in ruling the country.<sup>18</sup> It is during this period that the exploitation of diamonds expanded significantly. The TRC Report highlights that although the RUF was partly financed through diamond trafficking from the early stages of the conflict, it was not until 1997 that diamonds yielded significant revenues for the RUF, coinciding with the partnership with the AFRC.<sup>19</sup> Even from the start, the relationship between the RUF and AFRC was not easy. As the *AFRC trial judgment* acknowledges, “the coalition between the two factions ... was not based on longstanding common interests”.<sup>20</sup> The founders and many members of the AFRC had been fighting against the RUF as members of the Sierra Leone Armed Forces since 1991, and the military structures were never completely integrated.<sup>21</sup>

In response to the coup and joining of the forces of the organized armed groups, the Economic Community of West African States (ECOWAS) authorized the intervention of the ECOWAS Monitoring Group (ECOMOG) into the conflict on behalf of the ousted Government of Sierra Leone led by President Ahmad Tejan Kabbah, adding a further party to the armed conflict. Kabbah’s government was restored to power in March 1998.<sup>22</sup> At this stage, the AFRC/RUF launched an attack to retake control of the diamond-rich Kono District.<sup>23</sup>

Following the attack on Kono, the relationship between the RUF and AFRC deteriorated, culminating in the arrest of the AFRC’s leader and the split of the groups around the end of April 1998.<sup>24</sup> The AFRC subsequently launched a brutal attack on Freetown on 6 January 1999, but was repelled by ECOMOG forces.<sup>25</sup> The Sierra Leone government and the RUF signed a peace agreement in Lomé on 7 July 1999, which set out a deal for power sharing between the Kabbah government and the RUF, according to which Sankoh was Vice President.<sup>26</sup> The AFRC was not represented in the negotiations.<sup>27</sup> However, hostilities between the government side and the RUF resumed shortly thereafter, leading to the United Nations (UN) Security Council authorizing the deployment of a 6000-strong UN peacekeeping mission to Sierra Leone (UNAMSIL) to assist in the implementation of the Lomé Peace Accord.<sup>28</sup> A cessation of hostilities was agreed upon by the then interim leader of the RUF, Issa Sesay, and the Kabbah

17 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 558–79. See further, paras 694–849. See also *RUF Trial Judgment*, above note 5, para. 743; and *AFRC Trial Judgment*, above note 9, paras 159, 161 and 164.

18 *RUF Trial Judgment*, above note 5, para. 747. See also *Taylor Trial Judgment*, above note 9, para. 6749.

19 “Mineral Resources, Their Use and their Impact on the Conflict and the Country”, in TRC Report, above note 8, Vol. Three B, Chapter 1, para. 8.

20 *AFRC Trial Judgment*, above note 9, para. 169. See also *Taylor Trial Judgment*, above note 9, para. 6749.

21 *RUF Trial Judgment*, above note 5, para. 763; *AFRC Trial Judgment*, above note 9, paras 169 and 171–2.

22 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 850–86. See further, paras 905–9. See also *RUF Trial Judgment*, above note 5, paras 777–8.

23 *RUF Trial Judgment*, above note 5, paras 787–91; *AFRC Trial Judgment*, above note 9, para. 179.

24 *RUF Trial Judgment*, above note 5, para. 820. See further, paras 817–19. See also *AFRC Trial Judgment*, above note 9, para. 189.

25 *RUF Trial Judgment*, above note 5, paras 879–87.

26 *AFRC Trial Judgment*, above note 9, para. 209.

27 *Ibid.*

28 *Ibid.*, para. 43.

government in November 2000, but it was only in January 2002 that a final cessation of hostilities was declared.<sup>29</sup>

This brief summary is intended to give an overview of the complex and evolving backdrop against which diamond smuggling took place. It does not aim to do justice to the complexities of the events and intrigues that took place during the conflict.<sup>30</sup>

## The role of diamonds in the conflict

Diamond smuggling played a specific and significant role in this conflict. The judgments of the SCSL concerning this relate to the activities conducted by the RUF and AFRC, and Charles Taylor's role in diamond smuggling. Whilst the RUF and AFRC are the most notorious for their involvement in diamond mining and smuggling, allegations were made against members of the CDF and ECOMOG as well.<sup>31</sup>

As the TRC Report succinctly concludes, the conflict was not initiated simply to gain control over diamonds.<sup>32</sup> Rather, it was "years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable".<sup>33</sup> The TRC Report concluded that the narrative attributing the cause of the conflict to control over diamonds fails to capture numerous complexities, including "the reasons for the decay of the state in Sierra Leone and the role minerals played prior to and during the conflict".<sup>34</sup> Diamond smuggling had been a longstanding problem in

29 *Ibid.*, para. 209. Issa Sesay was voted as interim leader after Sankoh was arrested in May 2000 following an incident at his house where his bodyguards killed several civilian protestors. *RUF Trial Judgment*, above note 5, para. 42. See further, *Taylor Trial Judgment*, above note 9, paras 6611–12.

30 See further, "Historical Antecedents to the Conflict", "Governance" and "The Military and Political History of the Conflict", in TRC Report, above note 8, Vol. Three A, Chapters 1–3; Lansana Gberie, *A Dirty War in West Africa: The R.U.F. and the Destruction of Sierra Leone*, Hurst, London, 2005; David Keen, *Conflict & Collusion in Sierra Leone*, James Currey, Oxford, 2005; and Charles C. Jalloh, "The Sierra Leone Conflict", in C. C. Jalloh, *The Legal Legacy of the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2020.

31 See "The Military and Political History of the Conflict", in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 751–2; and "Mineral Resources, Their Use and their Impact on the Conflict and the Country", in TRC Report, above note 8, Vol. Three B, Chapter 1, paras 147 and 148. See also *RUF Trial Judgment*, above note 5, para. 1247. The TRC Report also highlights that in the earliest stages of the conflict, NPFL fighters also engaged in "looting and mining activities, using mostly forced labour" when they first took control of the southern front, Pujehun District: "The Military and Political History of the Conflict", in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 231–2.

32 "Mineral Resources, Their Use and their Impact on the Conflict and the Country", in TRC Report, above note 8, Vol. Three B, Chapter 1, para. 7.

33 Sierra Leone Truth and Reconciliation Commission, *Summary of the Findings and the Core Recommendations of the Sierra Leone Truth and Reconciliation Commission (TRC)*, para. 1, available at: <https://reliefweb.int/report/sierra-leone/summary-findings-and-core-recommendations-sierra-leone-truth-and-reconciliation>. See further, Sierra Leone Truth and Reconciliation Commission, "Findings", in TRC Report, above note 8, Vol. Two, Chapter 2.

34 "Mineral Resources, Their Use and their Impact on the Conflict and the Country", in TRC Report, above note 8, Vol. Three B, Chapter 1, para. 7.

Sierra Leone prior to the outbreak of the conflict.<sup>35</sup> As mentioned above, the RUF had a political ideology,<sup>36</sup> which the SCSL described as an “integral part of the movement”, according to which they aimed to use weapons to fight to overthrow a “corrupt military Government in order to realise the right of every Sierra Leonean to true democracy and fair governance”.<sup>37</sup> To do so, the RUF would “procure arms for a broad-based struggle so that the rotten and selfish government is toppled”.<sup>38</sup> The leader of the RUF is even reported to have advised new recruits in the TRC Report that “a fighter without political ideology is a criminal”.<sup>39</sup> Although the AFRC did not share the RUF’s ideology, the group had their own purported goals linked to the government’s failings.<sup>40</sup> When the two groups joined forces in 1997, however, they both declared they were doing so to bring peace and political stability to Sierra Leone.<sup>41</sup>

Diamonds did, however, fuel the conflict.<sup>42</sup> The parties to the conflict used resources gained from diamond smuggling to fund their objectives.<sup>43</sup> Control over mining ensured the biggest gain, and, as such, control over diamond mining areas became a critical part of the fighting parties’ strategy. An example of the strategic importance of this can be seen in the events following ECOMOG’s successful intervention in Freetown in February 1998, leading to the withdrawal of AFRC and RUF troops.<sup>44</sup> Immediately following the retreat from Freetown, the AFRC and RUF planned a joint attack on Kono, an area of major importance for diamond mining. The attack took place in the second half of February 1998.<sup>45</sup> The capital of Kono District, Koidu, was captured in early 1998.<sup>46</sup> The timing of the attack, just after losing control of the capital, indicates the importance in controlling this diamond-rich area.

Prior to this, between 1992 and 1997, control over Kono District had seen-sawed between the RUF and government forces. Diamond exploitation and smuggling carried on unabated during that period.<sup>47</sup> After this, control over

35 *Ibid.*, paras 11–16.

36 *RUF Trial Judgment*, above note 5, paras 652–6. See further, “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 21–31 for history and links with the Pan-Africanism movement. See also “External Actors and Their Impact on the Conflict”, in TRC Report, above note 8, Vol. Three B, Chapter 2, paras 5–13. See also the RUF manifesto, “Footpaths to Democracy: Toward a New Sierra Leone”, published by the group in 1995, available at: [www.sierra-leone.org/footpaths.html](http://www.sierra-leone.org/footpaths.html).

37 *RUF Trial Judgment*, above note 5, paras 652–3.

38 *Ibid.*, para. 652.

39 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A Chapter 3, para. 171. See also, “The Military and Political History of the Conflict”, paras 225–7, which includes an RUF mantra, “Arms to the People, Power to the People, Wealth to the People”.

40 *RUF Trial Judgment*, above note 5, para. 743; *AFRC Trial Judgment*, above note 9, para. 164.

41 *AFRC Trial Judgment*, above note 9, para. 169; *Taylor Trial Judgment*, above note 9, para. 6749.

42 “Mineral Resources, Their Use and their Impact on the Conflict and the Country”, in TRC Report, above note 8, Vol. Three B, Chapter 1, para. 207. See further, UN General Assembly Resolution 57/302, UN Doc. A/RES/57/302, 30 April 2003.

43 *RUF Trial Judgment*, above note 5, para. 23.

44 *Ibid.*, paras 776–82.

45 *Ibid.*, paras 787–91.

46 *Ibid.*, paras 794 and 796.

47 “Mineral Resources, Their Use and their Impact on the Conflict and the Country”, in TRC Report, above note 8, Vol. Three B, Chapter 1, para. 50.



diamonds became fused with the parties' military objectives, smuggling diamonds being a necessity in being able to wage the conflict, and those objectives being increasingly shaped by greater involvement in diamond smuggling.

## Violence begets violence

Ensuring control over the diamond mining areas led to further violence in breach of IHL. The symbiosis in violence between the armed conflict and organized crime is perhaps most evident in the order that followed the attack on Koidu in early 1998. Johnny Paul Koroma, the leader of the AFRC, declared Koidu a "no go area" for civilians, ordering that no civilian was permitted to remain in Koidu, and any civilian who was not willing to support the rebel movement was to be executed to prevent them from passing information to the Kamajors. In addition, Koroma ordered that Koidu should be burnt to the ground.<sup>48</sup>

The declaration of a "no go area" for civilians and order of execution on sight was in complete disregard of the obligation to distinguish between civilians and civilian objects and military objectives, and the obligations to abstain from prohibited acts of violence against persons not participating in the hostilities and treat them humanely under IHL.<sup>49</sup> Displacement of the civilian population in whole or in part in NIACs is only lawful where the security of the civilians involved, or imperative military reasons, so demand.<sup>50</sup> Restrictions on the free movement of civilians would also have impacts on other obligations under IHL, including the freedom of movement of humanitarian personnel.<sup>51</sup>

The symbiosis in violence is further demonstrated by the particularly violent means of regaining and losing control of diamond mining areas. Ensuring control over the diamond mining areas contributed to unlawful attacks against persons not taking part in the hostilities being carried out by the parties to the conflict, and IHL therefore has a role in addressing related conduct. Whilst attacking ECOMOG would very likely fall within the definition of a military objective,<sup>52</sup> the order to burn all property indicates an indiscriminate attack. The total destruction and devastation of all property within an area fails to adequately distinguish sufficiently between civilians or civilian objects and military objectives.<sup>53</sup> The extent of the destruction ordered would also indicate non-compliance with the prohibition of attacking, destroying, removing or rendering

48 *RUF Trial Judgment*, above note 5, para. 799.

49 Article 3(1)(a) common to the Geneva Conventions of 1949; and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (entered into force 7 December 1978) (AP II), Arts 4(1), 4(2)(a) and 13. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 1.

50 AP II, Art. 17; J.-M. Henckaerts and L. Doswald-Beck, *ibid.*, Rule 129.

51 J.-M. Henckaerts and L. Doswald-Beck, *ibid.*, Rule 56.

52 J.-M. Henckaerts and L. Doswald-Beck, *ibid.*, Rule 8.

53 J.-M. Henckaerts and L. Doswald-Beck, *ibid.*, Rules 11 and 12. See further, Alexander Schwarz and Maria Grigat, "Scorched Earth Policy", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2015, para. 8.

useless objects indispensable to the survival of the civilian population, such as food stuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation work, as all of these were also encompassed in the order to burn Koidu to the ground.<sup>54</sup> These methods were also seen in the retreat of the RUF/AFRC when ECOMOG retook control of Koidu in early April 1998,<sup>55</sup> with the retreating forces being ordered to burn Koidu Town to the ground.<sup>56</sup>

## Crime begets crime

The judgments of the SCSL also detail how efforts to control diamonds led to further international crimes, including enslavement of the civilian population to extract the diamonds.<sup>57</sup> Detailed descriptions are given relating to mining at various locations, with variations in the structure, extent of violations and rules imposed between the different locations.<sup>58</sup> Broadly, conditions included that civilians were forcibly captured from surrounding villages on certain “government days”, which were days civilians were brought to the mines, including with the use of physical restraints, and forced to work for the armed groups in control of the mines.<sup>59</sup> Armed guards would be present during the work, and would beat or kill those who attempted to escape or committed perceived breaches of the mining rules, such as private mining.<sup>60</sup> Miners were forced at times to work naked, and were not permitted to move freely on the mining sites.<sup>61</sup>

54 AP II, Art. 14; J.-M. Henckaerts and L. Doswald-Beck, *ibid.*, Rule 54.

55 *RUF Trial Judgment*, above note 5, para. 813. The AFRC and RUF troops managed to maintain control over much of Kono District during this period, however. The RUF made further attempts in August 1998 and December 1998 to retake Koidu from ECOMOG. The attack in December was successful and the RUF regained control of the area. See *RUF Trial Judgment*, above note 5, paras 814, 823 and 861–5.

56 *Ibid.*, para. 813.

57 *Ibid.*, paras 1118–19. See further, J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rules 94 and 95.

58 See, for example, description of mining at Cyborg Pit in Tongo Field, Kenema, one of the largest diamond-producing areas in Sierra Leone at *RUF Trial Judgment*, above note 5, para. 1118, *AFRC Trial Judgment*, above note 9, paras 1280–90; and *Taylor Trial Judgment*, above note 9, paras 1616–22. The same conditions were found to have been implemented throughout Kono District from December 1998 until January 2000: *RUF Trial Judgment*, above note 5, para. 1328. The Trial Chambers findings relating to diamond mining were largely held up on appeal. Two grounds of appeal were granted in relation to Sesay and one in relation to Kallon. See SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Judgment (Appeals Chamber), 26 October 2009, paras 91–5, 146–51, 662–713, 863–75, 928–34, 998–1022 and 1071–99. See also SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008, paras 82, 170–4 and 260–5; and SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment (Appeals Chamber), 26 September 2013, paras 260–73.

59 *RUF Trial Judgment*, above note 5, paras 1119, 1243–7 and 1250; *AFRC Trial Judgment*, above note 9, paras 229 and 1291–3; and *Taylor Trial Judgment*, above note 9, para. 1627. There are some differences noted in the judgments of these rules and structure during different timeframes and in different places in the conflict. See, for example, *RUF Trial Judgment*, above note 5, paras 1248 and 1250.

60 *RUF Trial Judgment*, above note 5, para. 1119. See also para. 1248; *AFRC Trial Judgment*, above note 9, paras 1292–3; and *Taylor Trial Judgment*, above note 9, para. 1627. The judgments also include different descriptions of mining rules. See, for example, *Taylor Trial Judgment*, above note 9, para. 1624.

61 *RUF Trial Judgment*, above note 5, para. 1119. See also paras 1129–30 and paras 1251–2. See further, *Taylor Trial Judgment*, above note 9, para. 1627.

These activities involved the parties to the armed conflict using violence and force against persons not directly participating in the hostilities, and thus also engaging the direct application of IHL.<sup>62</sup> These conditions clearly call into question IHL requirements of humane treatment and forced labour.<sup>63</sup> They also constitute outrages upon personal dignity, in particular, humiliating treatment, and inhumane or degrading treatment, prohibited under IHL.<sup>64</sup> The killing of civilians forced to engage in mining by members of the party to the armed conflict is a violation of the prohibition of violence to life, including murder, prohibited under Article 3(1)(a) common to the Geneva Conventions of 1949, Article 4(2)(a) of Additional Protocol II (AP II) and Customary IHL.<sup>65</sup> The use of armed guards and lack of compensation also indicates forced labour. These conditions were compounded by a lack of food, medical aid and mining equipment, which the SCSL notes were not provided.<sup>66</sup>

Senior commanders are pointed out in the judgments as having run private mining, using the same model of mining for their own private enterprise by forcing civilians to mine for them and pocketing the proceeds for their personal gain, rather than the resources going to the armed group.<sup>67</sup> This violence is a symptom of the situation created in the conflict where such unlawful conduct was tolerated<sup>68</sup> and is a clear example of how criminal conduct related to diamond smuggling led to further crimes. Again, as violent and forceful acts against persons not taking direct part in the hostilities by a member of a party to the armed conflict, IHL is applicable. The critical role of senior commanders in ensuring respect for IHL of their subordinates is explicitly recognized in IHL,<sup>69</sup> and their criminal conduct will likely have guided others to carry out similarly violent acts in other contexts.<sup>70</sup>

62 See further, T. Rodenhäuser, above note 4, pp. 995–6 and pp. 1001–9. In addition, these events also raise issues relating to the application of international human rights law and international criminal law, to name a few. As the focus of this article is to highlight how IHL may add to this mix of legal protections in relieving the impact of organized crime in armed conflict on those not participating in the hostilities, the application and standards of these other fields will not be considered further.

63 Common Article 3(1); AP II, Art. 4(1); and J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rules 87 and 95.

64 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 90.

65 *RUF Trial Judgment*, above note 5, paras 1106–7. See J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 89. See further, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Arts 6, 7 and 8; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Arts 7, 10(3), 11 and 12; African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 1520 UNTS 217 (entered into force 21 October 1986), Arts 4, 5, 6, 15, 16 and 21.

66 *RUF Trial Judgment*, above note 5, paras 1119, 1129–30 and 1251–2; *Taylor Trial Judgment*, above note 9, para. 1625.

67 *RUF Trial Judgment*, above note 5, para. 1259.

68 The judgment also includes details on RUF commanders similarly forcing civilians to work on farms owned by them privately, of which proceeds would go to the commander and not the general RUF. *RUF Trial Judgment*, above note 5, paras 1425–6.

69 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 153. See further, Rule 139.

70 This has been observed in other contexts, such as in the armed conflict in Myanmar, where an environment of impunity leads to further violations of IHL. See Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018, paras 1380–4.

One potential international crime connected with diamond smuggling that was not prosecuted before the SCSL related to the alleged rape of the wife of the AFRC leader.<sup>71</sup> The *RUF*, *AFRC* and *Charles Taylor* judgments all briefly mention this incident, as does the TRC Report, but with few details.<sup>72</sup> According to the *RUF* judgment, the alleged rape took place in March 1998, shortly after the re-capture of Kono by the AFRC/RUF, in which Johnny Paul Koroma had led the command of the troops.<sup>73</sup> Tensions were high between the AFRC and RUF. When large areas of Kono District were under AFRC/RUF control, Koroma announced that he was going to travel abroad, via Kailahun District, a stronghold of the RUF. The purpose of the trip was to organize logistics for the troops.<sup>74</sup> He had in his possession a large amount of diamonds.<sup>75</sup> Among his entourage, he travelled with his wife. He was led to believe that he would be welcomed by the RUF in Kailahun. However, when he arrived, he was arrested by the RUF leadership.<sup>76</sup> Koroma was stripped and searched for diamonds, which were removed from him.<sup>77</sup>

All three judgments state that at this point Mrs Koroma was either raped or sexually assaulted.<sup>78</sup> The most detail of this alleged crime is given in the *RUF* judgment, which states only that RUF Commander Issa Sesay drove her “to a nearby location and raped her”.<sup>79</sup>

This alleged assault took place in the context of an armed conflict, and has a sufficient nexus to the conflict to potentially constitute a war crime. It was allegedly carried out by a member of the fighting forces, and the conflict clearly played a substantial role in the ability to commit the crime, as well as the manner in which it was allegedly committed.<sup>80</sup> The fact that the crime took place where no fighting was taking place is irrelevant in determining the nexus.<sup>81</sup> As mentioned

71 *RUF Trial Judgment*, above note 5, paras 801 and 804. See further, J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 93.

72 *AFRC Trial Judgment*, above note 9, para. 188; *RUF Trial Judgment*, above note 5, para. 801; *Taylor Trial Judgment*, above note 9, para. 6754; and “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, footnote 535 in para. 1080.

73 *RUF Trial Judgment*, above note 5, para. 801. See further, paras 802 and 804.

74 *AFRC Trial Judgment*, above note 9, para. 184.

75 “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, footnote 535 in para. 1080. See also *RUF Trial Judgment*, above note 5, paras 801 and 804.

76 *AFRC Trial Judgment*, above note 9, para. 188.

77 *Ibid.* Johnny Paul Koroma also informed that AFRC Commander Gullit also possessed diamonds, and Sesay was sent to arrest him, and his diamonds were also seized. Sam Bockarie of the RUF subsequently reorganized the command structure of the AFRC/RUF, appointing himself as the most senior commander for military operations. See *RUF Trial Judgment*, above note 5, paras 803–12.

78 *AFRC Trial Judgment*, above note 9, para. 188; *RUF Trial Judgment*, above note 5, para. 801; *Taylor Trial Judgment*, above note 9, para. 6754; and “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, footnote 535 in para. 1080.

79 *RUF Trial Judgment*, above note 5, paras 801 and 804. “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, footnote 535 in para. 1080 also provides further details on the background to these events. It states that “Koroma and his wife were captured, searched and allegedly brutalised by RUF combatants under the command of Sam Bockarie (alias Mosquito).”

80 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, paras 568–9.

81 *Ibid.*, para. 568.

above, very few details are included about this alleged crime, and the focus of all three judgments is on the events surrounding Johnny Paul Koroma and the tensions between the RUF and AFRC, rather than on the crime Mrs Koroma was allegedly the victim of. Irrespective, it is obvious that her association with the leader of the AFRC played a part in the alleged assault. The fact that these acts, together with the AFRC leader's arrest, led to the split of the AFRC and RUF further demonstrates the connection with the conflict. The alleged rape does not form part of the charges brought against Sesay. However, it demonstrates the symbiosis between the conflict and diamond smuggling, and how involvement in diamond smuggling led to the perpetration of further international crimes connected to the armed conflict.

## The application of IHL to diamond exploitation

The SCSL did not elaborate in depth on IHL in its determinations of the crimes connected to diamond smuggling. These crimes were found by the SCSL to amount to crimes against humanity, rather than war crimes. Even though the context of the conflict was important in establishing the elements of these crimes,<sup>82</sup> the activities were not prosecuted as war crimes, i.e. breaches of IHL amounting to criminal conduct.<sup>83</sup> The reasoning behind this is not detailed in the judgments, but the conclusions that the conduct was part of a widespread and systematic attack against the civilian population gives some indication that the Prosecution was aiming to encapsulate a pattern of conduct in prosecuting the crimes in this way.<sup>84</sup> A cursory glance might therefore raise the question what IHL had to do with diamond mining and smuggling in Sierra Leone. A more detailed analysis demonstrates how IHL was applicable to conduct related to exploiting diamonds. IHL was applicable to the attacks to gain control of diamond mining areas, such as the attack on Kono in 1998.<sup>85</sup> IHL was also applicable to the mistreatment of the civilian population by the parties to the conflict in the diamond mines and diamond mining areas.

82 *RUF Trial Judgment*, above note 5, para. 948.

83 Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, C. H. Beck and Hart Publishing, Munich and Oxford, 2008, 2nd ed., pp. 300–5, 323, 446–88 and 493. Interestingly, the *AFRC Trial Judgment* and *Taylor Trial Judgment* both concluded that the AFRC/RUF were the government of Sierra Leone during the period from the coup in May 1997 until ECOMOG's intervention in February 1998. See *AFRC Trial Judgment*, above note 9, paras 225–66; and *Taylor Trial Judgment*, above note 9, para. 6765. Although trade in diamonds was still done through illicit means, so in no way changing the criminal character of the conduct relating to exploitation of natural resources, this conclusion does have implications for other obligations under international law owed towards the civilian population, namely international human rights law. Such considerations were beyond the scope of the SCSL's jurisdiction and, unfortunately, this article.

84 See Stephen J. Rapp, "The Challenge of Choice in the Investigation and Prosecution of International Crimes in Post-Conflict Sierra Leone", in C. C. Jalloh, above note 7, pp. 25–6.

85 See further, Sandesh Sivakumaran, "Conduct of Hostilities", in S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2014.

## IHL norms on obtaining resources

IHL does include norms on how parties to the conflict obtain resources. Most obvious in this is the prohibition against pillage, applicable in both international armed conflicts (IACs) and NIACs.<sup>86</sup> The SCSL used the definition that pillage involved the unlawful appropriation of private or public property during armed conflict.<sup>87</sup> The Commentary to Article 4(2)(g) of AP II describes the prohibition applicable in NIACs as of “a general tenor”, applicable to both State-owned and private property, and thus would cover the exploitation of natural resources.<sup>88</sup> The law applicable in IACs, and particularly under the law of occupation, is more developed in relation to when the exploitation of natural resources amounts to pillage or not.<sup>89</sup>

Under the law of occupation, diamonds together with other natural resources, such as water and oil, constitute public immovable property.<sup>90</sup> There are limitations under IHL on how the Occupying Power can use public immovable property.<sup>91</sup> For example, the Occupying Power may not use them for their own domestic purposes.<sup>92</sup> The property can be used to meet the security needs of the Occupying Power to the extent necessary for the current administration of the territory and to meet the essential needs of the population.<sup>93</sup> In other words, use of natural resources for the general war effort of the Occupying Power would not be permitted, but it would be permitted to address the specific security situation in the occupied territory. This is consistent with the General Assembly’s Resolution on “Permanent Sovereignty over Natural Resources” which provides that the right must be exercised in the interest of the national development and of the well-being of the people of the State

86 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 52; AP II, Art. 4(2).

87 *RUF Trial Judgment*, above note 5, paras 205–12. See further, International Criminal Court, *Elements of Crimes*, The Hague, 2011, Art. 8(2)(e)(v), p. 36; and Yulia Nuzban, “‘For Private or Personal Use’: The Meaning of the Special Intent Requirement in the War Crime of Pillage under the Rome Statute of the International Criminal Court”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020.

88 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4542.

89 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 51. See further, Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 167–82 and 195–260; and Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 122–3.

90 E. Benvenisti, *ibid.*, p. 123.

91 Hague Convention (IV) on War on Land and its Annexed Regulations, 18 October 1907 (entered into force 26 January 1910), Art. 55: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

92 E. Benvenisti, above note 89, p. 123.

93 *Ibid.*



concerned.<sup>94</sup> Excessive exploitation, through over-mining for example, is forbidden<sup>95</sup> and may constitute pillage.<sup>96</sup>

Organized armed groups exercising effective control in a NIAC have no similar right to exploit the natural resources found there under IHL or any other body of international law. Whilst it has been suggested that the relevant principles on the exploitation of natural resources applicable in occupation could be developed to apply in NIACs,<sup>97</sup> such a development is in my view unlikely given the sensitivities around the legality of organized armed groups exploiting natural resources in armed conflict and evidenced use of these resources to fuel conflict. To date, there has been no development in State practice to this end.<sup>98</sup> Indeed, arguments pertaining to how the law of occupation might be extended to apply before the SCSL were dismissed.<sup>99</sup> The law of occupation creates an exception to the norm under public international law that the State retains sovereignty over its natural resources, but in doing so, it reinforces the norm that the territorial State has sovereignty by defining limitations on how another State in the exceptional circumstances of occupation can use such property.<sup>100</sup> It does not transfer the sovereign right. Creating an exception for non-State armed actors would run counter to the general principle under public international law that it is the State that has the right to dispose of natural wealth and resources.<sup>101</sup>

That said, the norms under the law of occupation can be used as interpretative guidance of the norms that are applicable in NIACs, such as in determining whether exploitation of natural resources is excessive so as to

94 UN General Assembly Resolution 1803 (XVII), 14 December 1962, para. 1. Held by the ICJ to be custom in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, para. 244.

95 Hague Regulation (IV), 1907, above note 91, Art. 55.

96 ICJ, *Armed Activities* case, above note 94, paras 246–50.

97 Daniëlla Dam-de Jong, “Between Paradox and Panacea: Legalizing Exploitation of Natural Resources by Armed Groups in the Fight Against Conflict Resources, Armed Groups and International Law Blog”, *Armed Groups and International Law*, 18 June 2019, available at: [www.armedgroups-internationallaw.org/2019/06/18/between-paradox-and-panacea-legalizing-exploitation-of-natural-resources-by-armed-groups-in-the-fight-against-conflict-resources/](http://www.armedgroups-internationallaw.org/2019/06/18/between-paradox-and-panacea-legalizing-exploitation-of-natural-resources-by-armed-groups-in-the-fight-against-conflict-resources/).

98 See Philip Spoerri, “The Law of Occupation”, in Andrew Clapham and Paula Gaeta (eds), *The Oxford Handbook of International Armed Conflict*, Oxford University Press, Oxford, 2014, p. 185. See further, ICRC, *Commentary on GC III*, 2020, above note 6, paras 226 and 362–6. Note that the concept of “protected persons” under GC IV has developed to include persons of the same nationality as the attacking party, but who lack allegiance to the State of their nationality; see ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72-A, Judgment (Appeals Chamber), 15 July 1999, para. 166; International Criminal Court, *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, paras 289–93. Note, however, that nationality is not relevant in determining protected status in NIACs. See further, common Article 3; and AP II, Arts 4(1) and 13(1).

99 *RUF Trial Judgment*, above note 5, paras 982–8.

100 Gael M. Graham, “Protection and Reversion of Cultural Property: Issues of Definition and Justification”, *The International Lawyer*, Vol. 21, No. 3, 1987, p. 759.

101 Note the implications of the conclusions of the AFRC and Taylor judgments that the AFRC/RUF were the “government” during the junta period. Whilst the AFRC/RUF continued to exploit diamonds through illicit trade, it raises an interesting point in relation to when non-State actors exercise State powers. See further, Jean-Marie Henckaerts and Cornelius Wiesener, “Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Policy*, Springer, Sydney, 2020.



constitute pillage.<sup>102</sup> How and what the property was used for, and where the proceeds of the exploitation of the natural resources were spent could be relevant facts in determining whether the conduct amounted to pillage, for example. Where the proceeds of the exploitation are used for the general effort of the party to continue the armed conflict, this could indicate pillage, for example.<sup>103</sup> This is consistent with the rulings of the International Criminal Tribunal for the former Yugoslavia, such as in the Čelebići judgment that pillage includes acts “committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of systematic economic exploitation of occupied territory”,<sup>104</sup> and historical precedents following the Second World War.<sup>105</sup> It is also consistent with the exceptions recognized in the law of occupation that permits Occupying Powers to exploit natural resources in the occupied territory for the needs of the civilian population of the occupied territory and administration and security needs of the Occupying Power in relation to the occupied territory outlined above.

Although the SCSL determined that diamonds were exchanged on numerous occasions for arms and ammunition,<sup>106</sup> suggesting that the proceeds from diamond mining were used for the general fighting effort of the group rather than the needs of the civilians in the areas under the group’s control, whether the exploitation of diamonds amounted to pillage was not considered by the SCSL. In the *RUF* case, the Trial Chamber declined to consider whether the systematic and unlawful appropriation of diamonds throughout Kono District was also pillage, as the indictment only referred to pillage of civilian property.<sup>107</sup> However, in future cases the extent of exploitation and what the natural resources are used for could be relevant factors in determining whether or not any war crime was committed in their exploitation.

## Conditions of labour

At a minimum, organized armed groups are obliged to respect fundamental guarantees of individuals not participating or no longer participating in the conflict.<sup>108</sup> This requires that people be treated humanely.<sup>109</sup> Whilst conditions of

102 AP II, Art. 4(2)(g); J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 52.

103 See, for example, ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić and Esad Landžo also known as “Zenga”* (Mucić et al.), Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998 (Čelebići judgment), para. 590; and *N.V. De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore Law Reports, 1956, p. 65. See further, James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Justice Initiative, New York, 2011, para. 16.

104 ICTY, *The Prosecutor v. Mucić et al.*, Trial Judgment, 1998, *ibid.*, para. 590. See further, J. G. Stewart, *ibid.*, paras 16–19.

105 See further, J. G. Stewart, above note 103, para. 16.

106 See, for example, *RUF Trial Judgment*, above note 5, paras 828, 1042 and 1088; and *Taylor Trial Judgment*, above note 9, paras 6139–49.

107 *RUF Trial Judgment*, above note 5, para. 1339.

108 AP II, Art. 4.

109 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 87. See further, T. Rodenhäuser, above note 4, p. 1000.

diamond mining were harsh before the armed conflict, there is no doubt that things got worse during the conflict. A lack of food is noted in the judgments and the TRC Report,<sup>110</sup> and areas difficult to reach in other circumstances become impossible to reach during the violence. It is exactly these difficult conditions that IHL aims to address in requiring that parties to the conflict do not make things even worse by mistreating the civilian population. Whilst Trial Chamber I acknowledged in the *RUF* judgment that the RUF did provide the civilian population with “certain basic facilities and services”, it emphasized that it relied on forced labour to facilitate its war effort “at the expense of providing for the needs of the civilian population”.<sup>111</sup>

## **The potential to limit the impact of organized crime in armed conflict through compliance with IHL**

The application of IHL during the armed conflict provides a potential mechanism to assist in relieving the impact of the effects of diamond smuggling on the civilian population during that period. Other international legal standards are also relevant in these circumstances, international human rights law, international criminal law and international labour standards being obvious examples in the specific context of diamond smuggling in Sierra Leone. As a tool in this multifaceted toolbelt of those seeking to address the impact of organized crime in armed conflict, IHL adds value in being directly applicable to the activities of the non-State parties to the armed conflict in their treatment of persons not or no longer participating in the armed conflict.<sup>112</sup>

It is not suggested here that respect for IHL would have provided any legal basis for the parties to the conflict to engage in forced labour and enslavement of adults and children and illicit diamond extraction and trade, or that compliance would have resulted in the parties to the conflict not engaging in diamond smuggling. However, had there been more humane conditions for labourers and less involvement of armed elements of the groups in supervision of mining activities, certain acts of violence would probably have been reduced, such as killings and physical mistreatment of civilians working in the mines by armed guards. Ensuring compliance with IHL may therefore reduce the impact of organized crime in armed conflicts. This is consistent with other areas of research into broader social, economic and political challenges in conflict areas.<sup>113</sup> In addition, ensuring compliance with IHL is also something all States have a legal interest in, which is explored further in the next section.

110 See, for example, *RUF Trial Judgment*, above note 5, para. 1420; and “Children and the Armed Conflict in Sierra Leone”, in TRC Report, above note 8, Vol. Three B, Chapter 4, paras 126–33 and 149–50.

111 *RUF Trial Judgment*, above note 5, para. 986. See also para. 1093.

112 See further, Jann Kleffner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

113 See, for example, ICRC, *Displacement in Time of Armed Conflict: How International Humanitarian Law Protects in War, and Why it Matters*, Geneva, 2019.

The basic reasoning behind obligations to treat protected persons humanely is to provide a minimum standard of treatment in situations of armed conflict recognizing the inherent human dignity of all persons.<sup>114</sup> This is one of the cornerstones of IHL and most basic means in which parties to the armed conflict can reduce the impact of the military operations on those not engaged in the hostilities. The obligation to treat persons not or no longer participating in the hostilities humanely permeates all aspects of how such persons should be treated, including situations where such persons can be obliged to engage in work.<sup>115</sup> A detailed analysis of these provisions reveals factors required for treatment in such work to be humane. Again, it is not suggested that compelling or forcing civilians to carry out mining work would have been lawful under IHL or otherwise. There is nothing in AP II, common Article 3 or Customary IHL that provides a legal basis for this. However, even in situations where the use of forced labour is not permitted under IHL, such persons are still protected and still entitled to be treated humanely as a minimum standard of treatment.

The provisions relating to other situations where protected persons may be compelled to work indicate a number of conditions for such work to be humane. Under Article 5(1)(e) of AP II, if persons who are deprived of their liberty for reasons related to the conflict are made to work, they shall benefit from similar working conditions and safeguards as those enjoyed by the local civilian population. Note that the requirement is for “similar” conditions and safeguards, and not “the same”. This can be contrasted with provisions applicable in IACs relating to compelled labour of protected persons that must not be inferior to those enjoyed by the nationals of the Detaining Power employed in similar work.<sup>116</sup>

Using the interpretive guidance of norms applicable in IACs, a number of factors can be identified as minimum requirements in satisfying the “conditions” and “safeguards” for compelled labour also applicable in NIACs. The provision of payment for works done is one fundamental condition. The requirement that persons compelled to work must receive a fair wage is included in Article 51 of the Fourth Geneva Convention (GC IV). The Third Geneva Convention (GC III) includes detailed provisions on the working pay due to prisoners of war, which must be “a fair working rate of pay” paid by the detaining authorities direct.<sup>117</sup> In addition to the requirement that fair wages be paid, Article 51(3) of GC IV lists “hours of work, equipment, preliminary training and compensation for occupational accidents and diseases” as working conditions and safeguards. GC III similarly includes limitations on the hours of work,<sup>118</sup> as well as requirements for medical supervision of

114 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, Cambridge University Press, Cambridge, 2017, paras 1372, 1417 and 1418.

115 *Ibid.*, para. 1418; ICRC, *Commentary on GC III*, 2020, above note 6, para. 1573.

116 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) (GC IV), Art. 51(1).

117 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 62(1). See further, Arts 54 and 58–68.

118 GC III, Art. 53; and GC IV, Art. 51(3).

workers,<sup>119</sup> and the provision of medical care required by any accidents in connection with their work, or disease contracted in the course of or in consequence of their work.<sup>120</sup> Medical attention, the payment of wages and ensuring that compensation is received for occupational accidents and diseases are similarly included in Article 95 of GC IV, which sets out working conditions for civilian security internees employed by the Detaining Power. Whilst it is acknowledged that the differences between IACs and NIACs mean that these standards cannot be applied *mutatis mutandis* and using the standards in IACs as interpretive guidance must take into account this reality, there are identified working conditions that are within the reach of any organized armed group, such as the limitations on the hours of work. Whilst other standards and conditions may be more difficult for organized armed groups to implement, this incapacity or inability does not make the treatment itself less inhumane.

Humane treatment in conditions of labour is also a limitation on the type of work that can be undertaken. Certain work will be inhumane because it is too unhealthy, dangerous or humiliating.<sup>121</sup> This is consistent with the norms applicable in IACs which on the whole include more detailed limitations on the type of work protected persons can be compelled to engage in.<sup>122</sup> For example, Article 52 of GC III, applicable in IACs, prohibits the Detaining Power employing prisoners of war for unhealthy or dangerous labour or for labour that is looked upon as humiliating for a member of the Detaining Power's own forces. This again would be a standard that all organized armed groups could implement.

An unfortunate reality in Sierra Leone was that conditions for people working in diamond mining before the conflict were by no means as fair as they should have been, and living up to these standards does not necessarily provide sufficient guidance on what constitutes humane treatment. This was compounded further by the lack of respect for IHL demonstrated by all parties to the conflict. Understanding these factors may, however, assist in identifying alternative strategies to bring about changes in behaviour of the parties to the conflict, and build on current efforts in relieving the suffering of those who do not or are no longer participating in the conflict from the effects of hostilities.<sup>123</sup>

## **The obligation of other States to ensure respect as a means of bolstering compliance**

The influence of other States on the parties to the conflict can significantly assist in reducing the suffering of those that do not participate in the hostilities brought about by organized crime connected to the conflict.<sup>124</sup> This is linked to the

119 GC III, Art. 55.

120 GC III, Art. 54(2).

121 See Y. Sandoz *et al.*, above note 88, para. 4579.

122 See further, GC III, Arts 49–57; and GC IV, Arts 51(2), (3) and (4), and 95 and 96. See also GC IV, Art. 52.

123 ICRC, above note 113, p. 40.

124 See further, ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War*, Geneva, 2021.

external dimension of the obligation to ensure respect for IHL under Article 1 common to the Geneva Conventions of 1949.<sup>125</sup> This includes ensuring respect for common Article 3 and is therefore also applicable in NIACs.<sup>126</sup> The obligation to ensure respect requires States not party to an armed conflict to take measures to prevent and address violations of IHL by both State and non-State armed groups that are parties to armed conflicts.<sup>127</sup> State practice and the findings of the International Court of Justice confirm that this positive obligation is reflective of customary international law.<sup>128</sup>

States must take positive measures to induce parties to armed conflicts to comply with their obligations under IHL where violations have occurred or where the State has knowledge that there is a serious risk that they will occur.<sup>129</sup> This is an obligation of means and what is adequate to discharge it will vary depending on the context, but should be sufficient to address the breach or potential breach of IHL.<sup>130</sup> Influence should therefore be interpreted broadly. Factors identified in determining the scope of the obligation in the International Committee of the Red Cross's Commentary include the foreseeability of the violations and the State's knowledge thereof, the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over the individuals concerned.<sup>131</sup>

Knowledge of actual and potential breaches of IHL will probably arise in different circumstances for different States, and the scope of measures available to address breaches of IHL and influence the group will vary between different States. For example, States that are a long distance from the territory where the NIAC is ongoing with few connections, such as through trade or culture, to the State or the organized armed groups involved are less likely to be aware of breaches of IHL compared with neighbouring States with close connections. Examples of such close connections include through common membership in regional organizations. The influence of Charles Taylor over the conduct of the

125 Common article 1 of the Geneva Conventions of 1949. See further, Robin Geiß, "Obligation to Respect and Ensure Respect", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 120–3. See also Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

126 ICRC, *Commentary on GC II*, 2017, above note 114, para. 146.

127 R. Geiß, above note 125, pp. 120–3.

128 J.-M. Henckaerts and L. Doswald-Beck, above note 49, Rule 144; ICJ, *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. United States of America)*, Judgment, 26 November 1984, *ICJ Reports* 1986, p. 392, para. 220. See also ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *ICJ Reports* 2007, p. 43, para. 162. See further, ICRC, *Commentary on GC II*, 2017, above note 114, paras 193–5.

129 R. Geiß, above note 125, pp. 124–30.

130 *Ibid.*, p. 123.

131 ICRC, *Commentary on GC III*, 2020, above note 6, para. 183. See further, Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability*, Routledge, London and New York, 2016, pp. 55–137.

parties to the armed conflict in Sierra Leone is an example of such a close connection. The judgments of the SCSL highlight examples of measures aimed at addressing violations of IHL, such as when Taylor used his influence over the leader of the RUF to facilitate the release of UN peacekeepers taken hostage by this group, as well as when he influenced the leader of the AFRC to facilitate the release of UN peacekeepers taken captive by the breakaway AFRC group the “West Side Boys”.<sup>132</sup> The Trial Chamber’s findings highlight the particular influence that Taylor had over the leadership in the RUF.<sup>133</sup> However, whilst engaged in activities to address violations of IHL and bring about peace, Taylor was also trading in diamonds for arms and ammunition with the RUF, as well as calling on the RUF to send forces to help him fight his own enemies in Liberia.<sup>134</sup> This in itself was a breach of the negative obligation not to encourage, aid or assist violations of IHL under the obligation to ensure respect.<sup>135</sup>

Proximity is not, however, a determining factor in determining the means available to discharge the obligation. For example, other States involved in diamond trading were also aware of obscurities in the trade as a result of diamond smuggling in Sierra Leone.<sup>136</sup> Proximity is also not relevant when ensuring accountability for international crimes.<sup>137</sup> The impact of the illicit trade in diamonds in the Sierra Leone armed conflict contributed to the introduction of the Kimberley Process certification scheme as a means to reduce the trade in illicit diamonds by organized armed groups fuelling armed conflict. Whilst this has been praised by some for reducing illicit trade in diamonds, resulting in an increase in official exports of diamonds, it has been criticized by others as failing to address the root causes of the problems in diamond mining industry and trade that themselves fuel conflict.<sup>138</sup>

The Sierra Leone conflict highlights an area of extreme delicacy, but also tension, in States not party to the conflict using influence to address violations of IHL. Whilst those more proximate in relationship and location often have more

132 *Taylor Trial Judgment*, above note 9, para. 6345. See further, *RUF Trial Judgment*, above note 5, paras 40, 44, 556, 896 and 1610–11; and “The Military and Political History of the Conflict”, in TRC Report, above note 8, Vol. Three A, Chapter 3, paras 640, 1031–8, 1111 and 1113 on the West Side Boys.

133 See, for example, *Taylor Trial Judgment*, above note 9, paras 6414 and 6450.

134 *Ibid.*, paras 6139(i), (ii) and (v), and 6140–3 and 6145.

135 ICRC, *Commentary on GC III*, 2020, above note 6, paras 191–6.

136 See further, UN Security Council, Resolution 1306 (2000), S/RES/1306 (2000), 5 July 2000.

137 See, for example, details of a criminal case relating to international crimes connected with diamond smuggling in Belgium: Civitas Maxima, “Michel Desaeleleer”, available at: <https://civitas-maxima.org/legal-work/our-cases/michel-desaeleleer/>. See, also, prosecution related to arms smuggling in the United States: Jonathan Stempel, “Russian Arms Dealer Viktor Bout’s U.S. Conviction Upheld”, *Reuters*, 27 September 2013, available at: [www.reuters.com/article/us-usa-crime-bout-idUSBRE98Q0PG20130927](http://www.reuters.com/article/us-usa-crime-bout-idUSBRE98Q0PG20130927). See further, Jason Ryan, “New Charges Against ‘Merchant of Death’ Viktor Bout”, *ABC News*, 17 February 2010, available at: <https://abcnews.go.com/Blotter/russian-arms-dealer-viktor-bout-charges-merchant-death/story?id=9865996>.

138 See, for example, Global Witness, *Briefing: The Kimberly Process*, 1 April 2013, available at: [www.globalwitness.org/en/campaigns/conflict-diamonds/kimberley-process/](http://www.globalwitness.org/en/campaigns/conflict-diamonds/kimberley-process/); and Global Witness, *Return of the Blood Diamond: The Deadly Race to Control Zimbabwe’s New-Found Diamond Wealth*, 2010, available at: [www.globalwitness.org/documents/10521/return\\_of\\_blood\\_diamond.pdf](http://www.globalwitness.org/documents/10521/return_of_blood_diamond.pdf). See also Audrie Howard, “Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe”, *Washington University Global Studies Law Review*, Vol. 15, No. 1, 2016.

measures at their disposal to influence the parties to the conflict,<sup>139</sup> they will also have other interests that have an impact on their actions. In Sierra Leone, this led to even further violations of IHL. As an obligation of good faith, other States must therefore be vigilant in ensuring that influence is not exercised counter to this requirement, as part of their own obligation to ensure respect.

## Conclusion

What can we learn today from the armed conflict in Sierra Leone that ended over 20 years ago? Much has since changed in the relationship between organized crime and armed conflict. Moving forward in the 2020s, paying heed to historical lessons should give a better understanding of what lies ahead. For one, it is as true today as it was during the armed conflict in Sierra Leone that organized crime in one conflict area also fuels conflict in other areas.<sup>140</sup> Models similar to that implemented by the parties to the conflict in Sierra Leone in carrying out illicit trade remain a feature of conflict situations today.<sup>141</sup> Understanding how IHL may apply to conduct related to organized crime, and how it may assist in relieving the suffering of the civilian population from its impact is therefore still relevant. An important tool in this regard is identifying the varying and most effective measures available to States not party to the conflict to influence the parties, further to their obligation to ensure respect for IHL.

There are innumerable ways in which organized crime can thrive in conflict settings, and it is acknowledged that IHL may not be applicable in relation to all these criminal activities. Whilst IHL is by no means the only or even the primary legal framework aimed at addressing activities described as organized crime, where IHL is applicable, the lessons to be learned from the Sierra Leone conflict demonstrate that compliance with IHL can add a further layer of relief to address the impacts on the civilian population. In Sierra Leone, a symbiosis in violence was created with diamond smuggling being essential to achieve the parties' military objectives, and those objectives being increasingly shaped by greater involvement in diamond smuggling. This led to further violence connected with

139 ICRC, *Commentary on GC III*, 2020, above note 6, para. 200.

140 Amado Philip de Andrés, "West Africa Under Attack: Drugs, Organized Crime and Terrorism as the New Threats to Global Security", *UNISCI Discussion Papers*, No. 16, January 2008. See also Ismail Rashid, "Sierra Leone: The Revolutionary United Front", in Michelle Hughes and Michael Miklaucic (eds), *Impunity: Countering Illicit Power in War and Transition*, Center for Complex Operations, National Defense University, Washington, DC, 2016, p. 201, available at: <https://cco.ndu.edu/News/Article/780201/chapter-8-sierra-leone-the-revolutionary-united-front/>, referencing Diane Frost, *From Pit to Market: Politics and the Diamond Economy in Sierra Leone*, James Currey, New York, 2012, p. 76.

141 Such as, for example, following the peace agreement between the Government and the Revolutionary Armed Forces of Colombia (FARC) in Colombia. See Mission to Support the Peace Process in Colombia of the Organization of American States, *Twenty-Third Report of the Secretary General to the Permanent Council on the Organization of American States Mission to Support the Peace Process in Colombia* (MAPP/OAS), 2016, p. 2. See also International Alert, *The Role of the Exploitation of Natural Resources in Fuelling and Prolonging Crisis in the Eastern DRC*, January 2010, available at: [www.international-alert.org/wp-content/uploads/2021/09/DRC-Natural-Resources-Conflict-EN-2010.pdf](http://www.international-alert.org/wp-content/uploads/2021/09/DRC-Natural-Resources-Conflict-EN-2010.pdf).



the conflict and breaches of IHL, including unlawful attacks, forced labour and mistreatment of the civilian population.

The symbiosis between diamond smuggling and the armed conflict in Sierra Leone also demonstrates an important relationship in the economic and political driving forces to the conflict. These driving forces are apparent in conflicts today and can aid in understanding the conduct of the parties to the conflict, as well as addressing potential violations of IHL. It is not surprising that there is a propensity for organized armed groups in NIACs to engage in organized crime, considering the level of organization required for these actors to classify as a party to the conflict and engagement in violent conduct.

As noted above, even if the RUF/AFRC had treated civilians forced to mine more humanely, it does not change either the criminal conduct of using forced labour or the illicit trade in diamonds. However, it may help address some of the resulting suffering. Updating our understanding is critical to appreciate when IHL may apply. Nevertheless, context is important, and the potential results should not be overemphasized so that unrealistic expectations are not created as to how the problems associated with organized crime in armed conflict might be addressed.

# Opening Pandora's box: The case of Mexico and the threshold of non-international armed conflicts

**Juan Francisco Padin\***

Juan Francisco Padin is a Teaching Assistant at the University of Buenos Aires and a member of the Argentine Observatory of IHL. He holds an LLM from the Geneva Academy of International Humanitarian Law and Human Rights.

## Abstract

*This article addresses the situation of Mexican cartels in relation to the applicability of international humanitarian law (IHL). The analysis starts with a theoretical examination of the International Criminal Tribunal for the former Yugoslavia criteria on intensity of violence and level of organization established for assessing the existence of an organized armed group in the context of a non-international armed conflict. The article further examines legal and non-legal literature with the purpose of providing elements to consider the rightness of applying IHL to criminal organizations, also considering similar scenarios in Latin America. The aim of this assessment is to provide additional elements for the consideration of whether IHL is suitable when addressing confrontations between certain criminal gangs and*

\* This article is written in a personal capacity and does not represent the official position of any institution. Translations of quotes originally in Spanish were made by the author for the purposes of this paper. The author would like to thank Annyssa Bellal and Ezequiel Heffes for their inputs and commentaries.

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*States. Additionally, the article assesses how the commercial purposes of these groups affect their organization and the nature of the violence in which they engage.*

**Keywords:** Mexico, cartels, organized armed groups, criminal gangs, violence.

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## Introduction

During the night of 7 February 2017, a helicopter of the Mexican Navy started shooting, with a machine gun, over a residential area in the state of Nayarit, Mexico. While individuals in the targeted building responded to the fire with automatic weapons and grenades, a joint command composed of units of the Mexican Navy, the Army and the Federal Police advanced on the ground with the intention of capturing Juan Francisco Patrón Sanchez (known as “H2”), leader of the Beltrán Leyva Organization (BLO), a cartel headed by the five Beltrán Leyva brothers.<sup>1</sup> The operation ended with the death of “H2” and seven other members of the cartel.<sup>2</sup>

Two years later, on 17 October 2019, an operation to capture Ovidio Guzmán (son of the leader of the Sinaloa Cartel, Joaquín “El Chapo” Guzmán), in Culiacán, resulted in intense clashes between governmental forces and cartel gunmen.<sup>3</sup> While security forces managed to capture Guzmán, members of the Sinaloa Cartel threatened to start a “massacre” by killing more than 200 individuals while they placed the city under lockdown. The violence stopped only once the officials released Guzmán within minutes of his detention. After the operation, the current president of Mexico, Andrés Manuel López Obrador, made a statement arguing that “there is no war against drug trafficking”.<sup>4</sup> Still, the episodes of violence connected with drug cartels continue to proliferate, even during the current coronavirus pandemic.

1 “Así fue la brutal cacería para asesinar al H2”, *Diario Debate*, 10 January 2017, available at: [www.debate.com.mx/mexico/Asi-fue-la-brutal-caceria-para-asesinar-al-H2-VIDEO-20170210-0087.html](http://www.debate.com.mx/mexico/Asi-fue-la-brutal-caceria-para-asesinar-al-H2-VIDEO-20170210-0087.html) (all internet references were accessed in August 2022). The Beltrán Leyva Cartel started as an armed branch for the protection of the Sinaloa Cartel against the armed wing of the enemy Gulf Cartel (Los Zetas). Since the capture of founding member Arturo Beltrán Leyva in 2009, the cartel has been broken up into different cells distributed along the south and northwest of Mexico. See Wilson Center, Mexico Institute, “Beltrán Leyva Organization (BLO)”, available at: [www.wilsoncenter.org/beltran-leyva-organization-blo](http://www.wilsoncenter.org/beltran-leyva-organization-blo).

2 “Desde hace más de 2 meses, la Marina cazaba a ‘El H2’ en Nayarit”, *Diario Milenio Digital*, 10 February 2017, available at: [www.milenio.com/policia/2-meses-marina-cazaba-h2-nayarit](http://www.milenio.com/policia/2-meses-marina-cazaba-h2-nayarit).

3 “El Chapo: Mexican Police Capture then Release Drug Boss’s Son after Battle with Cartel”, *The Guardian*, 18 October 2019, available at: [www.theguardian.com/world/2019/oct/17/el-chapo-violence-breaks-out-in-mexican-city-amid-rumours-of-sons-arrest](http://www.theguardian.com/world/2019/oct/17/el-chapo-violence-breaks-out-in-mexican-city-amid-rumours-of-sons-arrest); Andréa Schmidt, “Episode 20: ‘The Siege of Culiacán’”, *New York Times*, 15 November 2019, available at: [www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html](http://www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html).

4 Fisher Linthicum, “This Was the Moment Mexican Forces Captured the Son of ‘El Chapo.’ Soon After, They Freed Him”, *Los Angeles Times*, 30 October 2019, available at: [www.latimes.com/world-nation/story/2019-10-29/video-shows-mexican-soldier-begging-son-of-el-chapo-to-order-his-cartel-fighters-to-stand-down](http://www.latimes.com/world-nation/story/2019-10-29/video-shows-mexican-soldier-begging-son-of-el-chapo-to-order-his-cartel-fighters-to-stand-down); Ioan Grillo, “How Mexico’s Drug Cartels Are Profiting from the Pandemic”, *New York Times*, 7 July 2020, available at: [www.nytimes.com/2020/07/07/opinion/sunday/mexico-drug-cartels-coronavirus.html](http://www.nytimes.com/2020/07/07/opinion/sunday/mexico-drug-cartels-coronavirus.html).

These episodes reflect the complexity of the situation of Mexico, where incidents linked to drug trafficking erupt in a context of generalized violence. To determine whether these episodes are part of an armed conflict or a situation of tensions or internal disturbances is particularly challenging. Both the Rule of Law in Armed Conflict (RULAC) project and the *War Report* of the Geneva Academy have confirmed the existence of a non-international armed conflict (NIAC) between the Government of Mexico and (at least) the Jalisco New Generation Cartel (Cartel Jalisco Nueva Generación, CJNG) and Sinaloa Cartel.<sup>5</sup> This view has also been supported by the International Humanitarian Law Clinic of Leiden University.<sup>6</sup> Moreover, the International Institute for Strategic Studies has classified this situation as one of the most violent conflicts in the world, even surpassing Iraq and Afghanistan.<sup>7</sup>

The purpose of this article is not to provide a conclusive view on the classification of the confrontation between the cartels and the Mexican government. Instead, the following pages will try to assess whether the requirements of violence and organization needed for international humanitarian law (IHL) are applicable to this type of criminal organization. It will conclude by suggesting a new set of elements that can be applied when analyzing drug cartels. This assessment may also be useful for assessing the applicability of IHL to other criminal groups around the world.

Cartels present an interesting case study for testing the suitability of the parameters used to assess the existence of a NIAC. In order to address the threshold of applicability of Article 3 common to the Geneva Conventions of 1949 (common Article 3, CA3), it is necessary to ascertain whether these groups fulfil the two-pronged test as presented by the International Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case: a degree of organization within the armed group, and protracted armed violence.<sup>8</sup>

5 According to RULAC, “[t]he Government of Mexico is involved in a non-international armed conflict against at least the Cartel Jalisco Nueva Generación”. See Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), “Non-International Armed Conflicts in Mexico”, RULAC, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico#collapse4accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico#collapse4accord). See also Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy, Geneva, 2019, p. 27; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy, Geneva, 2018, pp. 83–91.

6 Including other cartels as well. See Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH), *The Situation of Drug-Related Violence in Mexico from 2006–2017: A Non-International Armed Conflict?*, Leiden IHL Clinic Report Series No. 28, The Hague, 2018, p. 207.

7 Anastasia Voronkova, *Is Mexico Really in a State of conflict?*, International Institute for Strategic Studies, 12 May 2017, available at: [www.iiss.org/blogs/analysis/2017/05/mexico-state-conflict](http://www.iiss.org/blogs/analysis/2017/05/mexico-state-conflict).

8 ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; ICTY, *The Prosecutor v Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 11 November 1999, para. 562. See also International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber I), 2 September 1998, para. 620; 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*, Geneva, 1958 (ICRC Commentary on GC IV), pp. 35–36, 49–50; 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 (ICRC Commentary on GC I), Art. 3, para. 425.

One of the biggest challenges in the interpretation of CA3 is to define which situations fall under its scope.<sup>9</sup> Throughout this article, the author will try to tackle the question of whether the requirements of the two-pronged test are sufficient to classify the situation between the Mexican government and certain drug cartels as a NIAC. As will be explained, the challenge in this particular scenario is that the concepts of organization and violence by drug cartels do not necessarily equate with these concepts under IHL. The author will also argue that the reality of these groups shows that, while their aims may not affect the legal classification, the impact that the ends may have on the organization and the nature of the violence may well do so. This analysis will not go into depth regarding Additional Protocol II, as the degree of control that cartels exercise over territories is still controversial.<sup>10</sup> Territorial control as understood by cartels is equated to the monopoly of distribution of drugs.<sup>11</sup>

Dealing with the situation of Mexico in relation to IHL is opening a Pandora's box. It may well change our perception of other situations where the proliferation of criminality is inciting this discussion, such as in Brazil or El Salvador.<sup>12</sup> Discerning whether and how IHL and/or international human rights law (IHRL) are applicable to criminal organizations<sup>13</sup> is of fundamental importance for determining the proper tools to ameliorate the situation of thousands of victims of criminal violence; for defining the rights that protect individuals and the obligations of States when using force; and for offering transparency and proper legal remedies for victims and preventing human casualties.

## Mexico: A challenge for IHL?

Since President Felipe Calderón (2006–12) declared the “war against drugs”, the question of whether this is a metaphorical war or a proper armed conflict has

- 9 Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford, 2011, p. 102.
- 10 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 1.1; Protocol Additional (II) 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 1978).
- 11 Angélica Ospina-Escobar, “Territorios bajo control del crimen: El impacto de la guerra contra las drogas más allá de los homicidios”, *Nexos*, 23 November 2017, available at: <https://economia.nexos.com.mx/?p=699>.
- 12 On a similar methodology to this article, it has been argued elsewhere that IHL is applicable to criminal drug gangs in El Salvador. See Ximena Galvez Lima, “Inked or Not: Maras and Their Participation in El Salvador’s Recent Armed Conflict”, *Journal of International Humanitarian Legal Studies*, Vol. 10, No. 2, 2019. See also the situation of Brazil in A. Bellal (ed.), *The War Report: 2018*, above note 5, pp. 73–82; and the situation of El Salvador in A. Bellal (ed.), *The War Report: 2017*, above note 5, pp. 64–70. See also Robert Muggah, “Rethinking the Intensity and Organization of Violence in Latin America and the Caribbean”, World Peace Foundation, 16 February 2012, available at: <https://sites.tufts.edu/reinventingpeace/2012/02/16/part-i-rethinking-the-intensity-and-organization-of-violence-in-latin-america-and-the-caribbean/>.
- 13 For the purposes of this article, see the definition of criminal organizations in United Nations Convention against Transnational Organized Crime, UNGA Res. 55/25, 15 November 2000, Art. 2(a).

been raised.<sup>14</sup> Indeed, it seems that highly organized groups operating in Mexico put the governability of the State into question. However, their structure is based on the pursuance of profitable activities that are not necessarily equated to the characteristics of organized armed groups.

Drug cartels can be defined as “large, highly sophisticated organizations composed of multiple DTOs [drug trafficking organizations] and cells with specific assignments such as drug transportation [and] security/enforcement”.<sup>15</sup> DTOs are complex organizations with highly defined command and control structures that produce, transport and/or distribute large quantities of one or more illicit drugs.<sup>16</sup> While drug trafficking started in Mexico in the 1930s, cartels emerged in the 1980s with the purpose of taking control of distribution routes and protecting themselves from government intervention.<sup>17</sup> An agreement between the most prominent gangs in the 1980s divided the market into territories known as *plazas*. The roots of drug violence can be traced to control of these areas.<sup>18</sup> While the cohesion of these criminal structures changes continuously, existing organizations include the Sinaloa Cartel, the CJNG, the BLO and the Juárez Cartel.<sup>19</sup>

The issue of criminality and gang violence in relation to drug cartels reflects one of the current challenges of IHL. While criminality has traditionally been considered to be outside the scope of IHL, Mexico raises questions over the potential applicability of IHL to criminal groups.<sup>20</sup> The impact of violence on the population and the military-grade capacity of some cartels to respond to rival gangs and the State has led many people to believe that Mexico is in a NIAC between the government and some of these groups. While there are also persuasive arguments to suggest the contrary, one thing is certain: waging a “war” against cartels made the country fall into a spiral of violence and death that has continued for the last fourteen years while the official discourse struggles

14 Patrick Gallahue, “Mexico’s ‘War on Drugs’—Real or Rhetorical Armed Conflict?”, *Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011, p. 34.

15 US Department of Justice, “Drug Trafficking Organizations”, in *National Drug Threat Assessment 2010*, National Drug Intelligence Center, February 2010, available at: [www.justice.gov/archive/ndic/pubs38/38661/dtos.htm](http://www.justice.gov/archive/ndic/pubs38/38661/dtos.htm).

16 *Ibid.*

17 Carlos Perez Ricart, “La temprana (y permanente) militarización de la seguridad pública en México: Un estudio histórico”, *Contextualizaciones Latinoamericanas*, Vol. 10, No. 19, 2018, p. 11; Froylan Enciso, “Los fracasos del chantaje: Régimen de prohibición de drogas y narcotráfico”, in Mónica Serrano and Arturo Alvarado Mendoza (coords), *Los grandes problemas de México: Seguridad nacional y seguridad interior*, Colegio de México, Mexico City, 2010, p. 99.

18 Kristina Davis, “A Short History of Mexican Drug Cartels”, *San Diego Union-Tribune*, 21 October 2016, available at: [www.sandiegouniontribune.com/news/border-baja-california/sd-me-prop64-sidebar-20161017-story.html](http://www.sandiegouniontribune.com/news/border-baja-california/sd-me-prop64-sidebar-20161017-story.html); Noel Alvarado, “Pelean las plazas a muerte seis cárteles mexicanos”, *La Prensa*, 7 July 2020, available at: [www.la-prensa.com.mx/policiaca/pelean-las-plazas-a-muerte-seis-carteles-mexicanos-5460859.html](http://www.la-prensa.com.mx/policiaca/pelean-las-plazas-a-muerte-seis-carteles-mexicanos-5460859.html).

19 See, for example, US Drug Enforcement Administration, *National Drug Threat Assessment*, December 2019, pp. 99–100.

20 See 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. 78; International Law Association (ILA), Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague, 2010, p. 3.

to find an appropriate legal response. The lack of a stance on the applicable legal paradigm has found the government without appropriate institutional mechanisms to address cartels.<sup>21</sup> Mexico shows the problems of not reaching a clear legal approach in the implementation of (either or both) the law enforcement and conduct of hostilities paradigms.<sup>22</sup>

This topic illustrates the necessity of revisiting the division line between internal violence and NIACs. The discussion is relevant throughout Latin America. Exponential growth of criminality and drug-related violence can be observed in the entire region, even outside of the context of armed conflicts.<sup>23</sup> This eruption of criminal violence led the Geneva Academy's *War Report* to start addressing the potential applicability of IHL to other Latin American countries besides Mexico.<sup>24</sup> On the other hand, certain clearly defined organized armed groups, like the Revolutionary Armed Forces of Colombia, have engaged in profitable activities in order to fund their endeavours (e.g., taxation, human trafficking, production and selling of drugs).<sup>25</sup> Mexican cartels may be close to both scenarios, as they present analogous features to certain armed groups (particularly access to equipment and weapons) but also to many criminal gangs around the world.

An expert meeting of the International Committee of the Red Cross (ICRC) has explicitly mentioned drug cartels to exemplify that powerful criminal groups resorting to armed violence may fall "short of an armed conflict".<sup>26</sup> This, however, does not lower the importance of ascertaining which are the available

21 See, for example, "Mexican President Sticks to No-War Approach and Refuses to Use Force on Drug Cartels Despite Fighters Showcasing Their Weapons in Viral Videos as Murders Hit New High of 17,439 for the First Half of 2020", *Daily Mail*, 20 July 2020, available at: [www.dailymail.co.uk/news/article-8542137/Mexican-president-sticks-no-war-approach-shocking-cartel-video.html](http://www.dailymail.co.uk/news/article-8542137/Mexican-president-sticks-no-war-approach-shocking-cartel-video.html).

22 "Il y a des situations de chevauchement entre DH [droits humains] et DIH [droit international humanitaire] quant au champ d'application rationis situationis puisque les DH s'appliquent aujourd'hui en période de conflit armé et que le DIH s'applique également dans des situations de conflit purement interne. Rappelons cependant l'évidence: le DIH ne peut pas s'appliquer en temps de paix ou de troubles intérieurs (à moins que les Etats en conviennent par accords spéciaux). Par contre, il est censé s'appliquer automatiquement en période de conflit armé, et les Etats ne peuvent pas déroger à ces règles. Les DH, quant à eux, s'appliquent en tout temps à moins que les Etats décident d'y déroger dans la stricte mesure où la situation l'exige pour faire face à un conflit armé ou à tout autre état d'urgence menaçant la vie de la nation. Cette différence est essentielle; elle est consubstantielle à la nature du DIH conçu pour les conflits armés, contrairement aux DH qui ont une portée plus générale." Gloria Gaggioli, "L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie", doctoral thesis, No. D. 833, Université de Genève, Geneva, 2011, p. 148.

23 Most countries in Central America and the Caribbean showed significant increases in homicide rates in the last three decades. See United Nations Office on Drugs and Crime (UNODC), "Victims of Intentional Homicide, 1990-2018", available at: <https://dataunodc.un.org/data/homicide/Homicide%20victims%20worldwide>; Steven Malby, "Homicide", in Stefan Harrendorf, Markku Heiskanen and Steven Malby (eds), *International Statistics on Crime and Justice*, UNODC, 2010, pp. 16–17.

24 See the situation of Brazil in A. Bellal (ed.), *The War Report: 2018*, above note 5, pp. 73–82; and the situation of El Salvador in A. Bellal (ed.), *The War Report: 2017*, above note 5, pp. 64–70.

25 Jennifer Hazen, *What Rebels Want: Resources and Supply Networks in Wartime*, Cornell University Press, Ithaca, NY, 2013, pp. 2, 36, 171.

26 Gloria Gaggioli, *The Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Hostilities Paradigms*, ICRC Expert Meeting Report, Geneva, 2013, p. 32.



legal tools to address this situation. The fact that the humanitarian consequences of violence in Mexico are similar to those experienced by countries with armed conflict was noted in 2017 by former ICRC president Peter Maurer, who stated: “We have always recognized that the situation of Mexico is very specific and that we cannot simply transfer our experience of conflicts and wars to Mexico, but there are recurrent problems and the humanitarian impact is very similar sometimes.”<sup>27</sup>

## The organization criterion

### Organized to confront?

In relation to the level of organization of armed groups, the ICTY and International Criminal Court (ICC) have developed a series of exemplificative indicators to assess this criterion. These include the existence of a command structure; the ability to gain access to weapons, military equipment, recruits and military training; and the ability to plan, coordinate and carry out military operations.<sup>28</sup> While a loose interpretation has been utilized to define the organization criteria, requiring a case-by-case analysis, three broad elements can be identified from practice and jurisprudence: (1) a collective entity with a command structure; (2) the ability to implement basic humanitarian norms; and (c) the capacity to engage in sufficiently intense violence.<sup>29</sup> Underlying this is the implicit requirement that these groups are not a mere juxtaposition of individuals but a collective entity.<sup>30</sup>

According to international jurisprudence, the organizational capabilities of armed groups must be focused on the capacity of parties “to confront each other with military means”.<sup>31</sup> Nevertheless, according to other theories, analyzing only the ability of groups to confront would make the distinction between organization and armed violence redundant.<sup>32</sup> Therefore, these organizations

27 “Consecuencias de violencia en México, equiparables a países en guerra: Cruz Roja”, *Aristegui Noticias*, 21 October, 2017, available at: <https://aristeginoticias.com/2110/mexico/consecuencias-de-violencia-en-mexico-equiparables-a-paises-en-guerra-cruz-roja/>.

28 ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84, Judgment (Trial Chamber I), 3 April 2008, para. 60; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 195. See also 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; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgement Pursuant to Article 74 of the Statute, 21 March 2016, paras 134–136; ICRC Commentary on GC I, above note 8, Art. 3, para. 425.

29 Tillman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 63.

30 *Ibid.*, p. 64; ICC, *Situation in the Republic of Kenya*, No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II), 31 March 2010, para. 102; ICC, *Lubanga*, above note 28, para. 536; ICC, *Bemba*, above note 28, para. 134.

31 ICTY, *Haradinaj*, above note 28, para. 60. UN, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Geneva, 25 January 2005, para. 131.

32 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 68.

must also be able to implement the obligations imposed by CA3.<sup>33</sup> A third position suggests that the ability of a group to engage in armed violence may compensate for the inability of the organizational structure to implement IHL obligations.<sup>34</sup> Accordingly, these groups must reach at least a “sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict”.<sup>35</sup>

From the perspective of cartels, however, these criteria, used in IHL, may not be suitable. It can be argued that these groups have a commercial structure. While this implies a degree of organization, a society for profit is not sufficient in itself. Moreover, as will be further explained in the following section, the aims of a group, whether commercial or political, do not alter their legal status. Nevertheless, these purposes may well have an impact on the organizational design of the group, altering the legal classification of the group as such. As the degree of organization is key to qualifying a collective as an armed group within the existence of a NIAC, the lack of this element converts these collectives to mere criminal associations, whose legal characterization would depend on domestic criminal legislation.

### Organized for commerce?

In Mexico, the organizational structure of the cartels has been transformed over the past two decades. The implementation of the so-called “kingpin strategy” by President Calderón, which is based on the killing or capture of the leaders of each organization, has resulted in the disintegration of some cartels and the strengthening of others. In general, however, the absence of leaders has occasioned power struggles between ranks, resulting in more violence and less cohesion in each organization.<sup>36</sup> For example, in the case of the BLO, the capture of founding member Arturo Beltrán Leyva in 2009 resulted in the dissolution of the group into independent cells that lost any sense of common membership.<sup>37</sup> The disappearance of kingpins has led to the creation of many smaller and more violent drug gangs, struggling for a share of the market and with no clear cohesive element between them, apart from opportunistic alliances.<sup>38</sup> This shows the difficulties of finding the links between the groups that could allegedly compose a party to a conflict. Cartels such as the BLO do not show a *de facto* relationship of belonging to a hierarchy or the existence of leadership that exerts overall control of these cells.<sup>39</sup>

33 ICTY, *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber), 12 November 2002, para. 87.

34 A. Bianchi and Y. Naqvi, above note 9, p. 129.

35 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 32.

36 Marcos Palacios and Mónica Serrano, “Colombia y México: Las violencias del narcotráfico”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, p. 134.

37 CMDPDH, above note 6, p. 206.

38 Council on Foreign Relations, “Mexico’s Long War: Drugs, Crime, and the Cartels”, 26 February 2021, available at: [www.cfr.org/backgrounder/mexicos-drug-war#chapter-title-0-1](http://www.cfr.org/backgrounder/mexicos-drug-war#chapter-title-0-1).

39 For the theoretical discussions on this, see T. Rodenhäuser, above note 29, pp. 80–85.

Some general characteristics can be extracted from the situation of most of these organizations. Most cartels have diversified into other profitable activities (kidnapping, extortion) and have become more decentralized in their organizations in order to maximize their profit.<sup>40</sup> Consequently, these groups present a structure that is organized not with the aim of confronting the government, but with the aim of pursuing profitable activities.<sup>41</sup> The alliances between the cells and the main organization are primarily commercial. Cells are franchises, not branches – they fight each other for drug distribution chains (*plazas*).<sup>42</sup> Moreover, the International Law Association has suggested that as long as the aim of these groups is not to topple the government but to protect their criminal activities, the situation cannot be classified as a NIAC.<sup>43</sup>

In this regard, it should be noted that the ICTY has asserted in the *Limaj* case that “the purpose of the armed forces to engage in acts of violence or also achieve some further objective is ... irrelevant”.<sup>44</sup> In response, Vité has stressed that “[t]he reverse position would, moreover, raise problems that it would be difficult to resolve in practice. The motives of armed groups are never uniform and cannot always be clearly identified.”<sup>45</sup> The applicability of IHL depends on objective elements, irrespective of the approach taken by the parties or how they are denominated.<sup>46</sup> One could argue, however, that the aims of the cartels condition the way in which they are organized. As will be addressed in the section below entitled “A Surge of Violence in Mexico?”, violence, in this context, represents a by-product of drug trafficking and not a direct consequence.<sup>47</sup>

The structure of cartels puts into question their suitability under the organization requirement of CA3. Cartels are designed not to engage in armed confrontation but to protect *plazas*.<sup>48</sup> These organizations fall more appropriately

40 Laura Calderon, Kimberly Heinle, Octavio Rodríguez Ferreira and David A. Shirk, *Organized Crime and Violence in Mexico: Analysis through 2018*, Justice in Mexico Project, University of San Diego, San Diego, CA, 2019, p. 4.

41 ILA, above note 20, p. 3.

42 In regards to Los Zetas’ “franchising model”, Tom Wainwright notes: “[I]t comes with all the same advantages and disadvantages [of franchising]. One of the big advantages is that it has allowed the Zetas to grow much more quickly. One of the disadvantages though, and this is something you often see in the legitimate franchising business, is that the franchisees often start to quarrel among each other, and the trouble is that the interest of these franchisees, the local criminals, aren’t very well-aligned with the interests of the main company.” “‘Narconomics’: How The Drug Cartels Operate Like Wal-Mart and McDonald’s”, *NPR*, 15 February 2016, available at: <https://tinyurl.com/38k2mw8h>.

43 ILA, above note 20, p. 28.

44 ICTY, *The Prosecutor v. Fatmir Limaj, Isak Musliu and Haradin Bala*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170.

45 S. Vité, above note 20, p. 78.

46 “With respect to the beginning of the applicability of common Article 3, no specific provision is necessary: common Article 3 becomes applicable as soon as a non-international armed conflict comes into existence.” ICRC Commentary on GC I, above note 8, para. 484. See also Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 461.

47 Javier Dondé Matute, “¿Por qué considero que no hay crímenes de guerra en México?”, in *México y la Corte Penal Internacional*, Comisión de Derechos Humanos del Distrito Federal, Mexico City, 2014, p. 157.

48 *Ibid.*

under the provisions of the UN Convention against Transnational Organized Crime than the notion of CA3.<sup>49</sup> In other words, the structure of most cartels is not suitable for IHL implementation because they are not usually prepared to engage in armed confrontations as required by CA3, arguably, under the element of organization. Cartels usually outsource violent actions to exogenous organizations or hire hitmen for specific actions.<sup>50</sup> When these branches start to work as an armed wing for a cartel, the experience shows that these links are transitory. Most of the time such associations are sporadic or limited in duration; for example, the BLO started as an armed branch for the protection of the Sinaloa Cartel against the armed wing of the enemy Gulf Cartel (Los Zetas), until it began to operate as an autonomous organization.<sup>51</sup> Another relevant example is the CJNG, which posted a video on social media showing its military-grade weapons and armoured vehicles,<sup>52</sup> but which relies on alliances with local gangs and individuals to advance over new markets within the country.<sup>53</sup> Because of these ephemeral structures, it is doubtful that cartels could have the ability to implement IHL.

It is clear from a legal perspective that, for the purposes of identifying the entity behind violent acts, there must be a cohesive and organized structure with the ability to engage in military confrontations. Without dismissing the interpretation of the ICTY in the *Limaj* case, it can be argued that the aims of the cartels have moulded the way in which they organize, as well as the patterns of violence that are associated with them. This latter element may have an impact on the classification of the situation, so it is therefore necessary to analyze the characteristics of the violence in Mexico to assess whether there is an armed confrontation between the cartels and the government.

## Is it sufficient to talk about protracted armed violence?

In relation to CA3, States argued during the 1949 Diplomatic Conference of Geneva that the scope of the article did not include all forms of violence.<sup>54</sup> Many States

49 Convention against Transnational Organized Crime, above note 13, Art. 2(a); Andrea Nill Sanchez, "Mexico's Drug 'War': Drawing a Line between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 504.

50 "Major Mexican drug cartels, such as the Sinaloa or Zetas, ally themselves with local providers of violence and protection according to transnational trafficking needs": Ivan Briscoe, *Non-Conventional Armed Violence and Non-State Actors: Challenges for Mediation and Humanitarian Action*, Norwegian Peacebuilding Resource Centre, May 2013, p. 3; Juliana Fregoso, "Tercerización narco: Los grupos sin fama que hacen el trabajo sucio para los grandes cárteles mexicanos", *Infobae*, 11 June 2017, available at: [www.infobae.com/america/mexico/2017/06/11/tercerizacion-narco-los-grupos-sin-fama-que-hacen-el-trabajo-sucio-para-los-grandes-carteles-mexicanos/](http://www.infobae.com/america/mexico/2017/06/11/tercerizacion-narco-los-grupos-sin-fama-que-hacen-el-trabajo-sucio-para-los-grandes-carteles-mexicanos/)

51 Wilson Center, above note 1.

52 C. Duncan, "Mexican Drug Cartel Shows Off Uniformed Troops with Military Weapons and Armoured Vehicles in Video", *The Independent*, 18 July 2020, available at: [www.independent.co.uk/news/world/americas/mexico-drug-cartel-video-jalisco-new-generation-weapons-military-cjng-a9626246.html](http://www.independent.co.uk/news/world/americas/mexico-drug-cartel-video-jalisco-new-generation-weapons-military-cjng-a9626246.html)

53 Victoria Dittmar, "Why the Jalisco Cartel Does Not Dominate Mexico's Criminal Landscape", *InSight Crime*, 11 June 2020, available at: [www.insightcrime.org/news/analysis/jalisco-cartel-dominate-mexico/](http://www.insightcrime.org/news/analysis/jalisco-cartel-dominate-mexico/).

54 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, Federal Political Department, Berne, 1949, p. 10.

considered at the time that situations of violence between individuals, crimes, and riots, should be excluded, as their inclusion would give criminal organizations a pretext for claiming the benefits of CA3.<sup>55</sup> Still today, however, there is no clear-cut definition of the minimum threshold of violence that must be reached to trigger the applicability of CA3.<sup>56</sup> According to some authors, it is only through “creative ambiguity” that an agreement over the wording of CA3 could be reached at its inception.<sup>57</sup>

The notion of violence, legally and symbolically speaking, is fundamental to understanding the nature of events in Mexico. In relation to the concept of violence within IHL, the ICTY further explored the requirement of protracted armed violence in the *Haradinaj* case. The Trial Chamber established that the analysis must focus on the intensity of the violence rather than on its duration.<sup>58</sup> Regarding the indicative factors to be used, the ICTY has referred to non-exhaustive elements such as the number, duration and intensity of the confrontations; the types of weapons and military equipment used; the number and calibre of the munitions fired; and the number of casualties.<sup>59</sup> The ICTY revisited almost immediately the question of the intensity of violence in the *Boškoski* case. Amongst the indicative factors of violence, it is possible to highlight the existence of armed clashes and the mobilization and distribution of weapons to the parties; the types of weapons and military equipment used; the number of casualties caused by shelling or fighting; the quantity of troops deployed; and the closure of roads.<sup>60</sup> These criteria have also been reaffirmed by the ICC Trial Chamber in the *Lubanga* case.<sup>61</sup>

Yet, it is challenging to interpret these elements in a context of generalized violence, where many of them may get entangled with unrelated crimes. Engagements in activities involving armed force or armed violence do not seem to be an exclusive prerogative of armed groups under IHL, according to the ICRC.<sup>62</sup> Many non-State actors that are not necessarily engaged in armed conflicts are involved in violent actions.<sup>63</sup> In defining armed conflict, the International Law Commission has explicitly referred to armed force in its Draft Articles relating to the Effects of Armed Conflicts on Treaties.<sup>64</sup> The ICRC has defined NIACs as protracted armed confrontations that must reach a minimum

55 *Ibid.*, pp. 10–15, 121, 325–339; ICRC Commentary on GC IV, above note 8, p. 32; ICTY, *The Prosecutor v. Slodoban Milošević*, Case No. IT-02-54-T, Decision on the Motion for Judgement of Acquittal (Trial Chamber), 16 June 2004, para. 26.

56 T. Rodenhäuser, above note 29, p. 38.

57 S. Sivakumaran, above note 32, p. 161.

58 ICTY, *Haradinaj*, above note 28, para. 49.

59 *Ibid.*

60 ICTY, *Boškoski*, above note 28, para. 177.

61 ICC, *Lubanga*, above note 28, para. 538.

62 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, p. 50.

63 *Ibid.*, fn. 67.

64 International Law Commission, “Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries”, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2011, Art. 2(b).

level of intensity;<sup>65</sup> this allows us to distinguish NIACs from other situations of mass violence and civil unrest.<sup>66</sup> Still, it seems that the ambiguity persists.

Again, the question of the threshold of intensity for distinguishing NIACs from internal disturbances presents several challenges. A situation involving a high number of casualties would not necessarily entail the existence of a NIAC, as shown by the cautious approach of the ICRC in classifying the unrest in Syria as an armed conflict.<sup>67</sup> The historical patterns of criminality in Mexico demonstrate how ambiguous the implementation of these elements can be.

## A surge of violence in Mexico?

Mexico has experienced a resurgence in violence since 2007 (see Figure 1), presenting a record number of registered homicides since 2018.<sup>68</sup> These patterns of violence are “highly localized, sporadic, and geographically specific”.<sup>69</sup> At the same time, most of these violent actions have been attributed to organized crime.<sup>70</sup> It is commonly believed that the fragmentation produced by the kingpin strategy has resulted in confrontations between the middle ranks of the leadership and has had a direct impact on the increase in violence.<sup>71</sup>

Moreover, while the resurgence in homicide rates could be attributed to the declaration of the “war against drugs” by President Calderón, there are other factors that may explain this phenomenon, such as the historical roots of violence in Mexico, the weakening of political institutions, and persistent social inequality.<sup>72</sup> While prior to 2007 the homicide rate was diminishing, other crimes (kidnapping, extortion, drug trafficking) were exponentially growing.<sup>73</sup>

The fact that cartels may be involved in thousands of individual homicides does not necessarily discount these actions from being part of a hypothetical armed conflict, as IHL also regulates unlawful acts of violence, such as attacks directed at civilians.<sup>74</sup> However, the core of this question is to define which kinds of acts

65 ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, March 2008, p. 5, available at: [www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm](http://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm).

66 ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Judgment (Appeals Chamber), 17 December 2004, para. 341.

67 Lindsay Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 412.

68 L. Calderon *et al.*, above note 40, p. 3.

69 *Ibid.*, p. 4.

70 UNODC, *Global Study on Homicide: Executive Summary*, 2019, p. 20.

71 Carlos Pérez Ricart, “La Kingpin Strategy: ¿Qué es y cómo llegó a México?”, *Naxos*, 21 October 2019, available at: <https://seguridad.nexos.com.mx/?p=1646>.

72 Marcelo Bergman, “La violencia en México: Algunas aproximaciones académicas”, *Desacatos: Revista de Ciencias Sociales*, No. 40, 2013, p. 68.

73 *Ibid.*, pp. 70–72; Jaime Arredondo Sánchez Lira, Zulía Orozco, Octavio Rodríguez Ferreira and David A. Shirk, *The Resurgence of Violent Crime in Tijuana*, Justice in Mexico Policy Brief, February 2018, p. 7.

74 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32nd International Conference of the Red Cross and Red Crescent, 2015, p. 17.

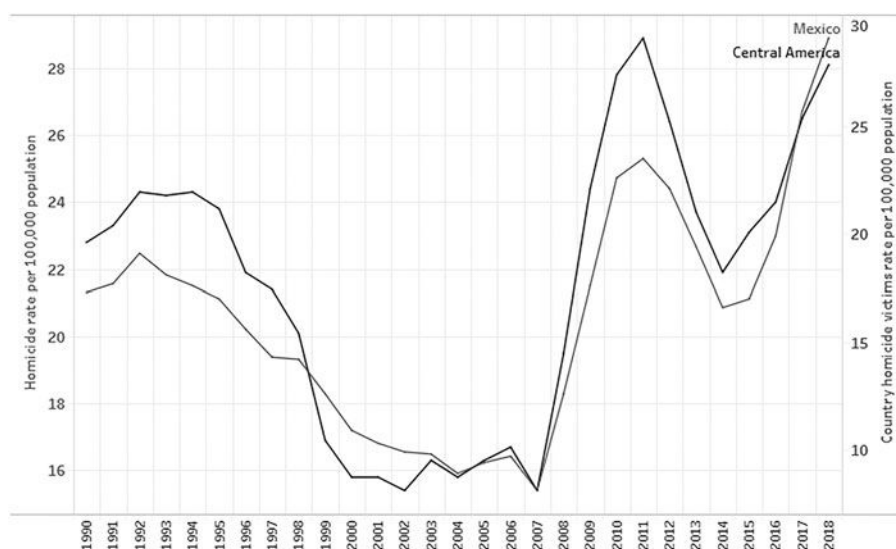


Figure 1. Victims of intentional homicide in Mexico and Central America, 1990–2018. Source: © United Nations Office on Drugs and Crime, 2020.

may fall outside of armed conflict and which may fall within.<sup>75</sup> A common misunderstanding is to attribute all violence that occurs in the context of drug trafficking to specific criminal organizations. While criminal gangs are frequently held responsible for urban violence, there are no reliable data on which crimes are directly linked to group actions.<sup>76</sup> Moreover, high levels of criminality are not exclusive to countries where IHL is (or may be) applicable. Other countries have suffered high levels of homicide associated with criminality and drug trafficking, such as Guatemala and El Salvador.<sup>77</sup>

Another common misconception is to excessively rely on the participation of military forces in law enforcement operations since 2007 for the affirmation of an armed conflict between the government and some cartels.<sup>78</sup> These assessments disregard the historical role of the Mexican armed forces in law enforcement operations against drug trafficking and criminal organizations since the 1930s.<sup>79</sup>

<sup>75</sup> *Ibid.*, p. 18.

<sup>76</sup> Jennifer Hazen, “Understanding Gangs as Armed Groups”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 372. See also M. Palacios and M. Serrano, above note 36, p. 110: “[I]n Mexico a great part of the problem of the knowledge of the phenomenon of violence originates from the indeterminacy of the agents of homicide and kidnapping: which are related to the conflict with the guerrillas, which with drug-trafficking and which ones are related to other types and forms of criminality, either organized or spontaneous.”

<sup>77</sup> M. Bergman, above note 72, p. 67.

<sup>78</sup> CMDPDH, above note 6, p. 209.

<sup>79</sup> “The historical analysis provided allows us to make three tentative conclusions: 1) throughout the history of Mexico the military have had a predominant position in public security operations; 2) the police have not been able to function without a strong military dimension; 3) never in the history of this country has it been possible to make a clear delimitation between police and military work.” C. Perez Ricart, above note 17, p. 12.



The intervention of armed forces may be an indicator of IHL applicability, but it is not determinative in itself.<sup>80</sup>

2019 was one of the most violent years in the history of Mexico, with a consistent rise in the number of homicides, which remained stable until the end of 2020.<sup>81</sup> However, many of these homicides cannot necessarily be attributed to the cartels as an entity, as they are related to other sources of criminality.<sup>82</sup> Moreover, with the notable exception of Los Zetas (currently disarticulated),<sup>83</sup> studies show that most cartels use armed violence only as a last resort, prioritizing bribing and extortion.<sup>84</sup> While Los Zetas have resorted frequently to violent actions with visual impact (e.g., decapitated bodies, mass executions), these were part of a communication strategy rather than done for military purposes.<sup>85</sup> The final aim of this strategy was to generate revenues by intimidating and extorting less powerful gangs and the local population.<sup>86</sup>

An analysis of trends in homicide rates is certainly revealing. As shown by data from the United Nations Office on Drugs and Crime (UNODC), Mexico's homicide rate is one of the highest in the world, but it is still lower than those of countries such as El Salvador, Jamaica and Venezuela.<sup>87</sup> In 2021, there were 28,262 intentional homicides in Mexico, of which only 1.41% (401) resulted in the death of security forces officials.<sup>88</sup> At the same time, since López Obrador took power in 2018, there has been a general increase of almost 5.5% in the homicide rate.<sup>89</sup> While there are no public data regarding alleged members of cartels being killed, these trends show that only a small amount of cases are related to violence between State officials and others (groups or individuals). This opens two questions regarding the applicability of IHL: how to establish which

80 S. Sivakumaran, above note 32, p. 169.

81 Instituto Belisario Domínguez, *Temas estratégicos*, No. 85, Senado de la República, Mexico, 2020; Will Grant, "Mexico Crime: Could This Become the Bloodiest Year on Record?", *BBC News*, 12 July 2020, available at: [www.bbc.com/news/world-latin-america-53332756](http://www.bbc.com/news/world-latin-america-53332756).

82 Alberto Nájara, "Violencia en México: El récord de homicidios en 2019 durante el primer año de gobierno de AMLO", *BBC News*, 21 January 2020.

83 "The Zetas are not like any other large criminal organization in Mexico. They are enforcers first, businessmen second. ... They are less interested in controlling the distribution chains and more interested in controlling the territory in which the business is done." Steven Dudley, "The Zetas and the Battle for Monterrey", *InSight Crime*, 2012, p. 11, available at: [www.insightcrime.org/images/PDFs/2016/zetas\\_monterrey.pdf](http://www.insightcrime.org/images/PDFs/2016/zetas_monterrey.pdf); June Beittel, *Mexico: Organized Crime and Drug Trafficking Organizations*, R41576, US Congressional Research Service, 28 July 2020, pp. 22–23.

84 UNODC, *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment*, 2012, p. 23.

85 A parallelism can be established in relation to the strategy of terrorist organizations: see A. Bianchi and Y. Naqvi, above note 9, p. 109.

86 George Grayson and Samuel Logan, *The Executioner's Men: Los Zetas, Rogue Soldiers, Criminal Entrepreneurs, and the Shadow State They Created*, Transaction, New Brunswick, NJ, 2012, pp. 90, 94.

87 Statistics can be found on the UNODC data portal, available at: <https://dataunodc.un.org/>.

88 Secretaría de Seguridad y Protección Ciudadana, *Informe de Incidencia Delictiva Fuero Común*, Mexico, 20 January 2022; Causa en Común, "Registro de policías asesinados 2021", available at: <http://causaencomun.org.mx/beta/registro-de-policias-asesinados-2021/>.

89 Arturo Angel, "Pese a Guardia Nacional crece la violencia: Van más de 32 mil homicidios desde su despliegue", *Animal Político*, 30 June 2020, available at: [www.animalpolitico.com/2020/06/guardia-nacional-violencia-homicidios-despliegue-amlo/](http://www.animalpolitico.com/2020/06/guardia-nacional-violencia-homicidios-despliegue-amlo/).

homicides were part of armed confrontations, and how to determine whether the persons engaged in these episodes belonged to a “party”.

The case of the city of Tijuana can be revealing in this regard. As a result of a violent campaign by the Sinaloa Cartel against rivals and former allies, Tijuana went from the national average of homicides to becoming the most violent city in Mexico.<sup>90</sup> Confrontations between former partner cartels resulted in a surge of many new criminal organizations, from small-scale drug traders up to the involvement of macro-organizations such as the Sinaloa Cartel and CJNG.<sup>91</sup> Most confrontations occur between organizations that want to contest the control of the Sinaloa Cartel over the drug distribution in the city.<sup>92</sup> This has shaped the concept of violence in Tijuana, which has converted from high-profile confrontations into a multiplication of lower-profile homicides resulting from battles over the control of shares of the distribution market (from street corners to entire neighbourhoods).<sup>93</sup>

Indeed, there is a link between the increase in the rate of homicides and drug-related homicide. However, sociological studies suggest that the patterns of homicide and violence in Mexico are mainly explained by drug consumption combined with inequality and poverty, which also explains why most of these crimes are concentrated in the marginal neighbourhoods in urban areas.<sup>94</sup> While many of these cases may be connected with cartels, they are not necessarily relevant to assessing the existence of protracted armed violence. Most situations involve cells or individuals that are connected to cartels in a business relationship but do not belong to a hierarchical command structure.<sup>95</sup> In the hypothesis of an armed conflict, the nexus between the parties and the violent actions would be extremely frail.<sup>96</sup>

Therefore, it seems that not all crimes in which Mexican cartels are engaged are suitable for ascertaining the intensity of violence in relation to the requirement of CA3. This challenge is maximized in the case of criminal organizations whose

90 J. Arredondo Sánchez Lira *et al.*, above note 73, p. 4.

91 *Ibid.*, p. 5.

92 V. Dittmar, above note 53.

93 “Still, it is also notable that the character of the violence in 2015–17 differs significantly from the highly visible, high impact violence that characterized the city’s previous public security crisis in 2008–10. In the earlier period of violence, there was a far greater frequency of high profile violence – running gun battles in the streets, mass casualty incidents, bodies hanging from bridges, gangland-style executions .... Violence in 2015–17 has tended to be geographically concentrated in the city’s poor and marginalized areas, with a lesser impact on the daily life of wealthy and middle class residents. ... [R]ather than a few large, powerful criminal organizations whose differences can be settled by a surreptitious “pax mafiosa,” authorities are now confronting many micro-level criminal organizations battling over neighborhoods and street-corners. In this sense, the surge in small-scale, lower profile homicides represents a very different problem than the spectacular violence that authorities confronted in the past.” *Ibid.*, p. 6.

94 See Carlos Villalta and Robert Muggah, “What Explains Criminal Violence in Mexico City? A Test of Two Theories of Crime”, *Stability: International Journal of Security & Development*, Vol. 5, No. 1, 2016. See also Fernando Escalante Gonzalbo, “Panorama del homicidio en México: Esquema del análisis territorial 1990–2007”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, p. 327.

95 See above section “Organized for Commerce?”.

96 See below section “The Question of the Nexus”.

violent actions are intrinsic to their (profitable) activities.<sup>97</sup> Two potential solutions, when analyzing the intensity of violence and the capacity to fulfil the organization criterion for the purposes of the application of IHL, would be either to focus on the notion of armed confrontation or to dismiss the applicability of IHL altogether and to address the (sole) suitability of the law enforcement paradigm.

## Towards a theory of armed confrontation?

When analyzing the concept of a “party” in NIACs, the *War Report* of the Geneva Academy has referred to a factual requirement. According to the *Report*, these groups must be “in regular and intense armed confrontations with armed forces or other organized armed groups. ... There must be actual combat.”<sup>98</sup> This approach goes in line with the ICRC’s 2016 Commentary on CA3, referring to the capacity to engage in (and the existence of) highly armed confrontations.<sup>99</sup>

International jurisprudence and practice have advanced in defining the content of armed violence. In the *Abella v. Argentina* case, the Inter-American Commission on Human Rights (IACHR) established, whilst affirming that a military engagement that lasted less than forty-eight hours constituted a CA3 NIAC, that “the attackers involved carefully planned, coordinated and executed an armed attack, i.e. a military operation, against a quintessentially military objective – a military base.”<sup>100</sup> The Court of Justice of the European Union<sup>101</sup> and the *San Remo Manual on the Law of Non-International Armed Conflict* have also raised the concept of armed confrontations when referring to the concept of NIACs under IHL. While assessing the level of violence in Kosovo in 1998, the ICTY referred to “armed clashes” between the Kosovo Liberation Army and the Serbian Armed Forces.<sup>102</sup> According to the Geneva Academy *War Report*, certain actions such as emplacing improvised explosive devices or landmines are not sufficient to assess the existence of a NIAC if not combined with direct “hostilities”.<sup>103</sup>

97 “Drug-trafficking is a social, cultural, economic and health phenomenon; insecurity is just one of its expressions.” José Luis Pardo Veiras, “México cumple una década de duelo por el fracaso de la Guerra contra el Narco”, *New York Times*, Spanish ed., 7 October 2016, available at: [www.nytimes.com/es/2016/09/07/espanol/opinion/mexico-cumple-una-decada-de-duelo-por-el-fracaso-de-la-guerra-contra-el-narco.html](http://www.nytimes.com/es/2016/09/07/espanol/opinion/mexico-cumple-una-decada-de-duelo-por-el-fracaso-de-la-guerra-contra-el-narco.html).

98 A. Bellal (ed.), *The War Report: 2017*, above note 5, p. 25.

99 ICRC Commentary on GC I, above note 8, Art. 3, para. 434.

100 IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 18 November 1997, paras 154–156. “Protracted armed conflict” indicates “the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”: ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 243. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), Case No. ICC-02/05-01/09-1, 4 March 2009, para. 60.

101 The definition was not relevant to the case, but the interpretation can be made from the negative reference. See Court of Justice of the European Union, *Aboubacar Diakité v. Commissaire Général aux Réfugiés et aux Apatrides*, Case No. C-285/12, Judgment (Fourth Chamber), 30 January 2014, para. 35.

102 ICTY, *Limaj*, above note 44, para. 172.

103 A. Bellal (ed.), *The War Report: 2017*, above note 5, p. 26.

As shown in the previous section, defining the violence connected to Mexican cartels as “armed confrontations” can be challenging. Most of the violence related to cartels is connected to limiting competing organizations’ influence over shares of the market or curtailing the expansion of other groups. It is possible to pinpoint certain examples of armed confrontation, such as the targeting of “H2” or the capture of Ovidio Guzman; other notable examples are the failure to capture “El Mencho” (leader of the CJNG) in 2015 when members of the CJNG shot down a Mexican military helicopter, or the recent attack on the secretary of public security in Mexico City.<sup>104</sup> These are notable exceptions, however; most cases of drug-related violence are connected to homicides that cannot be equated to armed confrontations. This can be observed in the wave of isolated and unconnected murders that followed the capture of “El Marro” (head of the Santa Rosa de Lima Cartel).<sup>105</sup> In addition, Cartels usually avoid engaging in open confrontation with State forces; moreover, a tangible trend in the targeting of State officials is connected with cases of corrupt officials who are *de facto* working with other cartels, turning attacks against them into revenge crimes.<sup>106</sup> In many crimes connected to drug-related violence, such as the Ayotzinapa massacre, some State officials acted together with, not against, cartels.<sup>107</sup>

Notably, the analysis of the ICTY in relation to armed confrontations has related to cases of intensive artillery bombardment and prolonged shelling.<sup>108</sup> Again, international tribunals have affirmed that violence (as with organization) must be assessed on a case-by-case basis.<sup>109</sup> It seems that equating cases of direct confrontation with all violence emanating from criminal organizations would entail conflating criminality with armed confrontation. Indeed, Mexico presents a situation of extreme violence that has generated the displacement of over 345,000

104 “Seven Killed in Mexico after Gunmen Down Helicopter in Series of Attacks”, *The Guardian*, 2 May 2015, available at: [www.theguardian.com/weather/2015/may/02/seven-killed-in-mexico-after-gunmen-down-helicopter-in-series-of-attacks](http://www.theguardian.com/weather/2015/may/02/seven-killed-in-mexico-after-gunmen-down-helicopter-in-series-of-attacks); “Jalisco New Generation Cartel Ambushes Mexico City Police Chief in Brazen Attack with Military-Grade Weapons”, *La Política Online*, 2 July 2020, available at: [www.lapoliticaonline.es/nota/84977-jalisco-new-generation-cartel-ambushes-mexico-city-police-chief-in-brazen-attack-with-military-grade-weapons/](http://www.lapoliticaonline.es/nota/84977-jalisco-new-generation-cartel-ambushes-mexico-city-police-chief-in-brazen-attack-with-military-grade-weapons/).

105 Adry Torres, “More than 60 People Are Murdered in Mexico’s Most Dangerous State Following the Arrest of Fuel Theft Cartel Leader El Marro”, *The Daily Mail*, 10 August 2020, available at: [www.dailymail.co.uk/news/article-8612143/More-60-people-murdered-Mexicos-dangerous-state-arrest-cartel-boss-El-Marro.html](http://www.dailymail.co.uk/news/article-8612143/More-60-people-murdered-Mexicos-dangerous-state-arrest-cartel-boss-El-Marro.html).

106 A. Nill Sanchez, above note 49, p. 503.

107 “We have to ask whether a clear-cut distinction between the security forces of the state and criminal organizations does not obscure the fact that what happens in multiple regions of the country, as shown by the Ayotzinapa case, is a phenomenon of macrocriminality that implies mixed criminal structures in which it is hard to draw the line between state and non-state agents”: CMDPDH, above note 6, p. 146. See also Jo Tuckman, “Mexico Ayotzinapa Massacre: New Theory Suggests Illicit Cargo Motivated Attack”, *The Guardian*, 23 October 2015, available at: [www.theguardian.com/world/2015/sep/23/mexico-bush-ambush-43-missing-students-new-report](http://www.theguardian.com/world/2015/sep/23/mexico-bush-ambush-43-missing-students-new-report).

108 See the analysis of the *Haradinaj* and *Tadić* cases in A. Nill Sanchez, above note 49, p. 482.

109 ICTY, *Limaj*, above note 44, para. 84. See also ICTY, *Boškoski*, above note 28, para. 175; ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3, Judgment (Trial Chamber), 6 December 1999, para. 92.

persons and thousands of deaths over the years.<sup>110</sup> However, it is difficult to distinguish these episodes of violence from similar situations in El Salvador or Venezuela.

The idea of armed confrontation shows the necessity of ascertaining which violence is relevant for the purposes of affirming the existence of an armed conflict. The statistics in relation to the death of State officials in Mexico reveal that the percentage relevant for this analysis (i.e., in terms of overall homicide cases) may be quite limited. This does not dismiss the applicability of IHL in itself, but it reduces the bulk of pertinent violence, which is relevant to analyzing the fulfilment of the threshold.

### The question of the nexus

In order to affirm the existence of an armed confrontation, it is necessary to assess which acts of violence are relevant for that purpose. In this sense, it is fundamental to focus on the notion of nexus, as not all violent actions that have a link with the group will be relevant. IHL can only apply to conducts connected with an armed conflict. According to Marco Sassòli, the standard for nexus developed by international criminal law may well be suitable for IHL purposes.<sup>111</sup> In this sense, according to the ICTY, there must be a nexus between the acts of individuals and the armed conflict. Action must be “closely related” to the hostilities.<sup>112</sup>

The concept of nexus is fundamental to distinguishing ordinary crimes related to gang violence from violence derived from hostilities.<sup>113</sup> For the purposes of IHL, only those acts with the “impetus to vanquish the foe in the NIAC” are relevant, while ordinary crimes “spurred by personal stimuli (anger, revenge, fear, greed, lust)” are not.<sup>114</sup> Even in the context of a NIAC, fighters can commit ordinary crimes despite their personal connection to the conflict. For the purposes of IHL, there must be a direct link.<sup>115</sup> Notably, in the *Kunarac* case, the ICTY mentioned the purposes of the action and military goals as elements for distinguishing war crimes from domestic offences.<sup>116</sup> Based on this interpretation, Fortin has suggested that issues which do not have a clear nexus with an armed

110 According to data provided by the Internal Displacement Monitoring Centre (IDMC), available at: [www.internal-displacement.org/countries/mexico](http://www.internal-displacement.org/countries/mexico). See also IDMC, *New Humanitarian Frontiers: Addressing Criminal Violence in Mexico and Central America*, 2015; A. Nill Sanchez, above note 49, p. 483.

111 M. Sassòli, above note 46, p. 201.

112 ICTY, *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 445; ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 225.

113 ICTY, *Boškoski*, above note 28, para. 69.

114 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, p. 12.

115 *Ibid.*, pp. 12, 14; ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-12, Judgment (Trial Chamber II), 1 May 1999, para. 600.

116 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 58.

conflict (based on individual status, membership, or military strategy) should only be regulated by IHRL.<sup>117</sup>

As seen in the case of Mexico, the statistics show that only a small percentage of violent crimes may be relevant as armed confrontations. This fact does not exclude the possibility that some of these confrontations have become so intense and sustained in relation to a specific cartel as to suggest the existence of a NIAC.

## Comprehending the process of militarization

From the international law perspective, if a situation does not reach the threshold of an armed conflict, the conduct of hostilities paradigm is inapplicable.<sup>118</sup> This entails the sole applicability of human rights obligations of the State involved.<sup>119</sup> In other words, the concept of law enforcement involves all actions taken by a State to impose public security, law and order under IHRL (as applicable to the State).<sup>120</sup> Under the law enforcement paradigm, any situation entailing the use of force must be in accordance with the application of the principles of legality, necessity, proportionality and precaution under IHRL.<sup>121</sup> The use of lethal force is highly restricted and must be limited to what is strictly necessary to achieve a legitimate aim.<sup>122</sup> Furthermore, it is expected that States develop non-lethal incapacitating weapons to reduce potential injuries or casualties.<sup>123</sup> Even when the use of violent means is inevitable, force should be used to “stop a suspect” (“shooting to stop” rule) and only intended to be lethal when unavoidable in order to save another life.<sup>124</sup> Any other scenario would entail a clear violation of the right to life due to arbitrary deprivation of a person’s life.<sup>125</sup> It must be recalled that the fact that military authorities participate in law enforcement operations does not directly entail the application of IHL.<sup>126</sup>

117 Katherine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 51.

118 G. Gaggioli, above note 26, p. 32.

119 ICRC, *Violence and the Use of Force*, Geneva, 2015, p. 16.

120 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2009, pp. 88–89.

121 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990 (BPUFF), Principle 5; UN General Assembly, *Code of Conduct for Law Enforcement Officials*, UNGA Res. 34/169, 17 January 1979 (CCLEO), Art. 3 (strictly necessary and to the extent required).

122 “Law enforcement officials may resort to the use of force only when all other means of achieving a legitimate objective have failed (necessity) and the use of force can be justified (proportionality) in terms of the importance of the legitimate objective (legality) to be achieved”: ICRC, above note 119, p. 43. See also BPUFF, above note 121, Principle 9.

123 BPUFF, above note 121, Principle 3.

124 Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Academic In-Brief No. 6, Geneva Academy, 2016, pp. 11–13; Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/26/36, 1 April 2014, para. 70.

125 International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), Art. 6.

126 CCLEO, above note 121, Art. 1.

The applicability of the law enforcement paradigm was foreseen in the original Commentaries to the Geneva Conventions for situations that fall short of being an armed conflict, particularly for tensions, when force is used preventively to maintain respect for law and order, and for internal disturbances, when the State uses armed force to maintain order.<sup>127</sup>

As we have seen, cartels are involved in numerous violent activities that could certainly trigger the response of the State under the law enforcement paradigm. Notwithstanding the fact that law enforcement operations may occur during armed conflicts, cartels' activities are not necessarily relevant to establishing the existence of an armed conflict.<sup>128</sup>

In 2006, the Government of Mexico started a process of deployment of armed forces to shadow the work of police forces and oversee domestic law enforcement.<sup>129</sup> The institutional participation of armed forces in law enforcement operations has focused on the notion of "internal security", which entails cases of social instability that are not of sufficient gravity to be considered a threat to national security.<sup>130</sup> The government of President Enrique Peña Nieto (2012–18) passed a law of internal security that allowed the direct intervention of the military in law enforcement operations.<sup>131</sup> While the legislation of the Peña Nieto administration was repealed by the Supreme Court of Justice of Mexico as unconstitutional, the issue of participation of the military in law enforcement operations was revisited by the current administration of President López Obrador and ultimately formalized via a presidential decree.<sup>132</sup> While the existent legal framework has faced criticism from an IHRL perspective in relation to the principles of the use of force (legality, necessity, proportionality, prevention and protection of the right to life) by organizations such as Amnesty International, it provides a certain improvement from former regulations in the country and a step forward in a region where many countries lack any regulation on the matter whatsoever.<sup>133</sup> Proper review mechanisms, however, are necessary to provide

127 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4477. These same definitions are applicable to CA3: see ICRC Commentary on GC I, above note 8, para. 386. See also ICRC, above note 119, p. 19.

128 ICRC, above note 74, p. 36.

129 David Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, Special Report No. 60, Council on Foreign Relations, New York, 2011, p. 10.

130 Víctor Manuel Saavedra Salazar and Joel Romo Navarro, "Seguridad pública en México: Del cuestionamiento teórico-legal, a la realidad empírica del papel militar en responsabilidades civiles", *Revista de Estudios en Seguridad Internacional*, Vol. 5, No. 1, 2019.

131 Congreso General de los Estados Unidos Mexicanos, *Ley de Seguridad Interior*, 21 December 2017.

132 David Agren, "López Obrador accused of Militarizing Mexico with New Security Decree", *The Guardian*, 11 May 2020, available at: [www.theguardian.com/world/2020/may/11/mexico-lopez-obrador-armed-forces-decree](https://www.theguardian.com/world/2020/may/11/mexico-lopez-obrador-armed-forces-decree); ACUERDO por el que se dispone de la Fuerza Armada permanente para llevar a cabo tareas de seguridad pública de manera extraordinaria, regulada, fiscalizada, subordinada y complementaria, Presidential Decree, 11 May 2020.

133 Amnesty International, *Mexico: When Words are Not Enough*, 2019, pp. 10–12; Human Rights Watch, "Latin America, It's Time to End Police Abuse", 18 November 2020, available at: [www.hrw.org/news/2020/11/18/latin-america-its-time-end-police-abuse](https://www.hrw.org/news/2020/11/18/latin-america-its-time-end-police-abuse).



effective remedies to the use of force and avoid lack of accountability.<sup>134</sup> Despite the possibilities for improvement, the approach of the government has been explicitly to be consistent in the interpretation of these standards under IHRL, using armed forces in support of public security operations.<sup>135</sup> This may be an additional indication that IHL is not applicable, as it has been argued that the applicability of the law enforcement paradigm systematically may be an indication that IHL is unsuitable.<sup>136</sup>

The current implementation of the law enforcement framework against cartels may be an indicative factor of how the Mexican government interprets the limitation on the use of force below the threshold of armed conflict.<sup>137</sup> A parallelism can be drawn, in this regard, from the experience of the Mexican forces fighting against the Zapatista Army of National Liberation (Ejército Zapatista de Liberación Nacional, EZLN), particularly during the uprising in the State of Chiapas in 1994. While there was a military deployment based on a “war strategy” against the EZLN, the strategy in 2006’s “war against drugs” was one of defence or reaction.<sup>138</sup>

## Concluding observations

When establishing the existence of a NIAC, analyses should focus on the notion of armed confrontation in order to assess the violence. Mexico is an important example of the suitability of the armed confrontation test when assessing the twofold criteria of NIACs. The fluctuant nature of the violence in Mexico makes classification challenging: it is difficult to assess when the intensity of violence has reached the threshold of armed conflict and when to affirm that the conflict has ended.<sup>139</sup> However, the case of Mexico can provide tools for assessing situations in which the dividing line between law enforcement and IHL is even more blurred, such as in Brazil or El Salvador.

Classifying the legal nature of the response of governments and criminal organizations to the issue of drug- and gang-related violence is not a purely legalistic issue. The “war against drugs” has left thousands of severe humanitarian consequences, including the displacement of thousands of persons, enforced disappearances and generalized torture by action (or omission) of State officials.<sup>140</sup> Pragmatic and legally clear definitions are needed to protect people

134 Human Rights Watch, “Mexico: Overhaul Police Forces”, 24 July 2020, available at: [www.hrw.org/news/2020/07/24/mexico-overhaul-police-forces](http://www.hrw.org/news/2020/07/24/mexico-overhaul-police-forces).

135 Comisión Nacional de Derechos Humanos, *Pronunciamiento*, Mexico, 11 May 2020.

136 A. Bianchi and Y. Naqvi, above note 9, p. 128.

137 “In situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force”: ICTY, *Boškoski*, above note 28, para. 178.

138 Carlos Montemayor, “Los movimientos guerrilleros y los servicios de inteligencia (notas reiteradas y nuevas conclusiones)”, in M. Serrano and A. Alvarado Mendoza (coords), above note 17, pp. 42, 45–47.

139 ICRC, above note 74, p. 10.

140 IACHR, *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II, Doc. 44/15, 31 December 2015, pp. 31–39; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2019*, Mexico, 2020, p. 157.

affected by the scourge of drug-related violence, whether through IHL, IHRL or both.<sup>141</sup>

One should not dismiss the magnitude of the problem of criminality in Mexico and in the region. Nevertheless, when analyzing the suitability of IHL application to the cartels, one should take into account that IHL does not necessarily always provide the best answer for this type of violence. There are several justifications to affirm that applying IHL as broadly as possible could have negative effects.<sup>142</sup> “Over-application” of IHL could lead to depriving persons of better protection applicable in peace and weakens the willingness to apply IHL in situations in which it should be applied.<sup>143</sup> This does not entail accepting the legal vacuum and conceding a carte blanche to the State in dealing with the cartels. As explained, IHRL, and more precisely the law enforcement paradigm, provides a legal framework that grants rights to individuals and confers obligations to the State in relation to any use of force against (at least) most of these criminal groups.

Some overall conclusions can be taken from the Mexican case in relation to the applicability of IHL and IHRL:

1. In order to surpass the threshold of CA3, one should distinguish between organizations for commercial purposes (not relevant) and organizations prepared for confrontation.<sup>144</sup> As explained in the above section entitled “Organized for Commerce?”, the purposes or aims of the armed groups are not relevant as an indication of the organization element required for the existence of a NIAC. Protracted armed violence, however, must be committed by identifiable groups that have a degree of organization which enables them to enter into a military confrontation. The fact that these groups are part of a commercial structure is not relevant to the organization criterion under IHL. The ability of a group to engage in armed confrontation cannot exist without an organization to that end. Organized armed violence can only come from organized groups prepared, at least, to confront.<sup>145</sup>
2. In order to analyze violence for the purposes of establishing an armed conflict, one must only examine those acts that show a level of minimum intensity necessary to be considered as armed confrontations between the identifiable parties, and must dismiss criminal actions (criminal homicides) which cannot be clearly attributed to the confrontation as collateral damage from a

141 While Sassòli uses this argument to defend the applicability of IHL, the same argument could be made regarding IHRL applicability. See Marco Sassòli, “L’administration d’un territoire par un groupe armé peut-elle être régie par le droit?”, in Michel Hottelier, Maya Hertig Randall and Alexandre Flückinger (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, Schulthess Éditions Romandes, Zürich, 2019, p. 268.

142 Marco Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 51.

143 *Ibid.*

144 ICTY, *Limaj*, above note 44, para. 89. See also ICC, *Lubanga*, above note 28, para. 537; L. Moir, above note 67, p. 408.

145 Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian Law and Human Rights*, Ashgate, Farnham, 2016, p. 18.

particular clash. In order to make such an attribution, there must be a direct nexus between the violent action and the armed confrontation.

3. Membership in a group can only be established when there is a hierarchical relationship in an armed wing that allows for the coordination of military confrontations. In the case of cartels, this can only be observed in the biggest cartels and for a limited period of time (such as through the establishment of armed wings).
4. Unlawful acts that one has to consider under the conduct of hostilities paradigm (e.g., breach of the principle of distinction) may not be suitable when ascertaining the existence of a NIAC. For the purposes of reaching the threshold of armed conflict, the stress should be on the intensity of the armed confrontation between the hypothetical parties.
5. The inapplicability of IHL does not generate a legal vacuum. On the contrary, the law enforcement paradigm provides stringent conditions that governments must comply with when using force against criminal organizations. In order to use force in law enforcement operations, however, countries such as Mexico must establish the proper legal mechanisms to be in compliance with the requirements set out by IHRL.

# Is Rio de Janeiro preparing for war? Combating organized crime versus non-international armed conflict

**Najla Nassif Palma**

Civilian Federal Prosecutor, Rio de Janeiro, Brazil

Email: [najla.palma@mpm.mp.br](mailto:najla.palma@mpm.mp.br)

## Abstract

*The idea that Rio de Janeiro has been plunged into an actual “war” against organized crime is widely discussed and is supported by an ever-increasing number of people in Brazil. Not surprisingly, such discourse has led to less protection for the civilian population, particularly in the so-called favelas, while allowing security forces to carry out operations with even greater relative impunity. This article argues that although urban violence in Rio de Janeiro is indeed a serious problem, it does not reach the threshold required to be considered a non-international armed conflict.*

**Keywords:** non-international armed conflict, IHL, organized crime, police, armed forces.

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## Introduction

Over the past decade, the idea that the city of Rio de Janeiro has been plunged into a “war against organized crime” has gained traction amongst an ever-increasing

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number of Brazilian officials, especially from the executive and Armed Forces. The motivation behind this emerging trend is twofold: it aims to lower international human rights standards when carrying out security operations targeting organized crime in Rio de Janeiro's so-called *favelas* (shanty towns), and to shield security forces from prosecution when they use excessive force against the *favelas'* residents.

In Rio de Janeiro, urban violence stemming from organized crime is an integral part of daily life, and for many, it seems like an insurmountable challenge. Faced with strong, well-equipped and well-organized criminal groups, security forces have failed to stand up to the task at hand and instead have decided to fight extreme violence with extreme violence, with its obvious consequences to the population.

Those who support the concept of an ongoing “war” in Rio de Janeiro back their argumentation in a rather unstructured way, based on a number of “criteria” which can include the death toll, the calibre of the armaments used by the organized criminal groups, and the areas which they control.

Given the failure of the police to tackle organized crime in Rio de Janeiro, the federal government has deployed the Armed Forces to the city to support, and sometimes replace, the work of the police. In peacetime, the Brazilian Constitution allows for such deployment in special circumstances.<sup>1</sup>

Fuelled by mounting militarized rhetoric from government officials and a section of the media, many *cariocas* (residents of Rio de Janeiro) have shown support for the use of lethal force against organized criminal groups and see it as an acceptable alternative to proper law enforcement operations. This warmongering narrative is particularly worrisome when the war expression “collateral damage” is carelessly used by security forces to try to justify extrajudicial killings.

While some decision-makers assert that the situation in Rio de Janeiro amounts to a non-international armed conflict (NIAC), others argue that international human rights standards should be lowered while combating organized crime in the *favelas*, which these criminal groups have elected to use as their base.

This article will argue that although violent crime in Rio de Janeiro is indeed a serious problem calling for a robust State response, the threshold required for the situation to be qualified as a NIAC is not met.

## Welcome to Rio De Janeiro: The daily life of *cariocas*

The word “contrast” could very well define the so-called “Marvellous City”, as Rio de Janeiro is known to Brazilians and visitors alike. The city is a combination of sea,

1 Constitution of the Federative Republic of Brazil, 5 October 1988 (Brazilian Constitution), Art. 142; Complementary Law 97/1999, modified by Complementary Law 117/2004 and Complementary Law 136/2010, available at: [www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp97.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp97.htm) (all internet references were accessed in April 2023).

mountains, lagoons and the largest urban tropical forest in the world.<sup>2</sup> For the population, however, this contrast also translates to unfair income distribution and access to housing, transport, health care, sanitation, education and security, and is better defined as plain inequality.<sup>3</sup>

The city of Rio de Janeiro has a land area of 1,200,329 square kilometres and an estimated population of 6,775,561,<sup>4</sup> of which 45.6% are male and 54.4% are female.<sup>5</sup> The vast majority of *favela* residents are of African descent.<sup>6,7</sup>

A *favela* is a cluster of dwellings that are disorderly, inadequately built, and lacking in access to essential public services.<sup>8,9</sup> Rio de Janeiro's largest *favelas* are found on the hillsides and are characterized by precarious housing conditions, basic sanitation and little to no access to security, health care and education.<sup>10</sup>

There are 1,074 *favelas* in Rio de Janeiro.<sup>11</sup> Their combined population is estimated at 1,434,975, approximately 22% of the city's population.<sup>12</sup> Among the largest and best-known *favelas* are Rocinha, with 69,356 inhabitants; Rio das Pedras, with 54,793 inhabitants; Jacarezinho, with 37,839 inhabitants; the cluster of seventeen *favelas* called Complexo da Maré, with 129,770 inhabitants; and another cluster of thirteen *favelas* called Complexo do Alemão, with 69,143 inhabitants. Although the average demographic density of the city is 5,556 inhabitants per square kilometre,<sup>13</sup> the region with the highest demographic density is in Rocinha, with 48,258 inhabitants per square kilometre.<sup>14</sup>

In terms of security, the more affluent and touristic areas of the city enjoy ostensive policing, a method of employing the police force in public security activities, strategically developed to generate visual impact and provide a deterrent effect in which police are identified at a glance, either by the uniform or

2 See Unidades de Conservação no Brasil, "Parque Estadual da Pedra Branca", available at: <https://uc.socioambiental.org/pt-br/arp/1288>; Unidades de Conservação no Brasil, "Parque Nacional da Tijuca", available at: <https://uc.socioambiental.org/pt-br/arp/996>.

3 See Casa Fluminense, "Inequality Map", 2020, available at: [http://casafluminense.org.br/wp-content/uploads/2020/07/mapa-da-desigualdade-2020-final\\_compressed.pdf](http://casafluminense.org.br/wp-content/uploads/2020/07/mapa-da-desigualdade-2020-final_compressed.pdf).

4 2021 data from the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística, IBGE), available at: [www.ibge.gov.br/cidades-e-estados/rj/rio-de-janeiro.html](http://www.ibge.gov.br/cidades-e-estados/rj/rio-de-janeiro.html).

5 2019 data from the Data.rio website of the Pereira Passos Municipal Institute of Urbanism, available at: [www.data.rio/pages/rio-em-sntese-2](http://www.data.rio/pages/rio-em-sntese-2).

6 More information on Afro-Brazilians can be found on the Minority Rights Group International website, available at: <https://minorityrights.org/minorities/afro-brazilians/>.

7 See above note 3. See also Will Carless, "A Brazilian Student Mapped Out Rio's Racial Segregation. What He Found Was Startling", *The World*, 5 November 2015, available at: <https://theworld.org/stories/2015-11-02/brazilian-student-mapped-out-rios-racial-segregation-what-he-found-was-startling>.

8 Definition given by the IBGE.

9 In Rio de Janeiro, the word "community" has been used to talk about these spaces in order to include their aspect of conviviality and reduce the immediate association between *favelas* and violence.

10 See IBGE, "Favelas resistem e propõem desafios para urbanização", 20 February 2018, available at: <https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/20080-favelas-resistem-e-propoe-desafios-para-urbanizacao>.

11 See above note 5.

12 See above note 5.

13 See above note 5.

14 See above note 5.

by the equipment, armament or vehicle.<sup>15</sup> In some *favelas*, police presence is haphazard and is often limited to patrolling the *favela*'s main entrance.<sup>16</sup>

Organized criminal groups are embedded in Rio de Janeiro's *favelas*, and there are two types of *favelas*: those controlled by drug traffickers and those controlled by private militia groups (akin to mafia-style criminal operations). Violent crime rates are highest in the *favelas*, with frequent exchanges of fire either between rival factions fighting for control or between criminal groups and security forces.<sup>17</sup>

The feeling of insecurity is much greater among *favela* residents than among those living outside the *favelas*.<sup>18</sup> Exchanges of fire in such densely populated areas frequently result in casualties and serious bodily harm, including to children, and interruptions of access to already scarce public services such as schools and hospitals.<sup>19</sup> Criminal factions entice and arm children and adolescents to work for them, especially on drug trafficking, and may threaten businesses and residents considered to be non-compliant with the "law" they impose in the *favelas* they control.<sup>20</sup> Both drug traffickers and militia groups feed a very well-oiled corruption scheme of officials, which is single-handedly the main obstacle to confronting organized criminal factions in Rio de Janeiro.<sup>21</sup>

15 See State of Santa Carina Military Police, *Ostensive Police Techniques Manual*, 2011, available at: [www.scribd.com/document/354007014/Manual-de-Policamento-Ostensivo](http://www.scribd.com/document/354007014/Manual-de-Policamento-Ostensivo).

16 According to a report by the Office of the Prosecutor of the State of Rio de Janeiro, the pattern of police action prioritizes the fight against drug trafficking and the fight in the *favelas*, instead of preventive actions such as patrolling criminal spots and ostensive policing. See Centro de Pesquisas do Ministério Público do Estado do Rio de Janeiro, *Letalidade policial no Rio de Janeiro em 10 pontos*, 26 September 2019, available at: [www.mprj.mp.br/documents/20184/540394/letalidade\\_policial\\_no\\_rio\\_de\\_janeiro\\_em\\_10\\_pontos\\_1.pdf](http://www.mprj.mp.br/documents/20184/540394/letalidade_policial_no_rio_de_janeiro_em_10_pontos_1.pdf).

17 See below note 20; Grupo de Estudos dos Novos Ilegalismos (GENI), *Police Killings*, Fluminense Federal University, May 2022, available at: [https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2022\\_Relatorio\\_Chacinas-Policiais\\_Geni\\_ALT2.pdf](https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2022_Relatorio_Chacinas-Policiais_Geni_ALT2.pdf).

18 See below note 20. See also Rafael Soares, "Favelas têm taxa de homicídios por tiros três vezes maior do que as demais áreas do Rio", *Extra*, 21 August 2017, available at: <https://extra.globo.com/casos-de-policia/favelas-tem-taxa-de-homicidios-por-tiros-tres-vezes-maior-do-que-as-demais-areas-do-rio-21728048.html>.

19 See International Committee of the Red Cross (ICRC), "Programa Acesso Mais Seguro", 7 July 2016, available at: [www.icrc.org/pt/document/o-programa-acesso-mais-seguro](http://www.icrc.org/pt/document/o-programa-acesso-mais-seguro).

20 See Luke Dowdney, *Children of Traffic*, Federal University of Rio de Janeiro, 2003, available at: [http://necvu.com.br/wp-content/uploads/2020/11/DOWDNEY\\_Criancas-do-Trafico-2003.pdf](http://necvu.com.br/wp-content/uploads/2020/11/DOWDNEY_Criancas-do-Trafico-2003.pdf); Favelas Observatory, *Rotas de fuga*, 2009, available at: [https://of.org.br/wp-content/uploads/2016/03/RotasdeFuga\\_Pesquisa.pdf](https://of.org.br/wp-content/uploads/2016/03/RotasdeFuga_Pesquisa.pdf); Observatório Legislativo da Intervenção Federal na Segurança Pública do Estado do Rio de Janeiro (OLERJ), "Grupos criminosos armados no estado do Rio de Janeiro", available at: <http://olerj.camara.leg.br/retratos-da-intervencao/grupos-criminosos-armados-no-estado-do-rio-de-janeiro>; Luiza Franco, "Maioria dos jovens do RJ entra no tráfico para ajudar a família", *Globo.com*, 31 July 2018, available at: <https://epocanegocios.globo.com/Brazil/noticia/2018/07/jovens-do-rj-entram-no-traffic-para-ajudar-familia-e-ganhar-muito-dinheiro.html>.

21 See Fluminense Federal University, *The Expansion of Militias in Rio de Janeiro: Use of State Force, Housing Market and Armed Groups*, May 2021, available at: [https://geni.uff.br/wp-content/uploads/sites/357/2021/04/boll\\_expansao\\_milicias\\_RJ\\_v1.pdf](https://geni.uff.br/wp-content/uploads/sites/357/2021/04/boll_expansao_milicias_RJ_v1.pdf). See also Andréa Ana do Nascimento, "A corrupção policial e seus aspectos morais no contexto do Rio de Janeiro", *Brazilian Journal of Public Security*, Vol. 5, No. 9, 2011, available at: [www.forumseguranca.org.br/storage/revista\\_09.pdf](http://www.forumseguranca.org.br/storage/revista_09.pdf); Henrique Coelho and Márcia Brasil, "PMs investigados pelo MP criaram no WhatsApp o grupo 'Os Mercenários', com imagem do filme", *Globo.com*, 26 May 2022, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2022/05/26/pms-investigados-pelo-mp-criaram-no-whatsapp-o-grupo-os-mercenarios-com-imagem-do-filme.ghtml> (collective interview with the Special Task Force in Combating Organized Crime of the Office of Public Ministry of the State of Rio de Janeiro).



## The “militarization” of security: The escalation of warmongering rhetoric and the role of the Armed Forces

Public security is a duty of the State and must be provided by the police at the federal and regional levels.<sup>22</sup> However, the possibility for the Armed Forces to undertake law and order roles in peacetime is prescribed in the Brazilian Constitution<sup>23</sup> under exceptional circumstances and under specific legislation.<sup>24</sup> The decision to deploy the military domestically is the responsibility of its supreme commander, the president, on his own initiative or at the request of the Supreme Court, Senate or Lower House,<sup>25</sup> and should only occur when the chief of the Executive Branch (at federal or regional levels) formally recognizes that law enforcement actions carried out by the police are unavailable, non-existent, or insufficient.<sup>26</sup>

The participation of the Brazilian Armed Forces in the United Nations Stabilization Mission in Haiti (MINUSTAH) from 2004 onwards paved the way for renewed attempts by officials, including within the Armed Forces, and politicians to justify the use of military personnel in law enforcement operations instead of the police.<sup>27</sup> The image presented to Brazilians of troops successfully providing a stable and safe environment in Haiti<sup>28</sup> made the environment favourable for the use of the military in the fight against domestic crime. The message was that the Armed Forces could do in the *favelas* what they were doing in Haiti; to a layperson’s eye, law enforcement operations look similar to those carried out in countries such as Haiti.<sup>29</sup>

22 Brazilian Constitution, above note 1, Art. 144.

23 *Ibid.*, Art. 142.

24 Complementary Law 97/1999, above note 1.

25 *Ibid.*, Art. 15, para. 1.

26 *Ibid.*, Art. 15, para. 3.

27 The defence minister of Brazil stated in 2008 that the military had the expertise to deal with urban problems considering the Army’s operations in Haiti, where civilians mingle with criminal gangs, and that he intended to create a statute for the Armed Forces to act in *favelas*. “Jobim quer criar estatuto para que as Forças Armadas atuem em favelas”, *Extra*, 14 December 2010, available at: <https://extra.globo.com/noticias/brasil/jobim-quer-criar-estatuto-para-que-as-forcas-armadas-atuem-em-favelas-526306.html>. See also Natali Hoff and Ramon Blanco, *From Haiti to Rio de Janeiro and Vice Versa: Pacification as Peacebuilding in a Brazilian Way*, paper presented at the 44th Meeting of the National Association of Graduate Studies and Research in Social Sciences, 2020, available at: <https://rbed.abedef.org/rbed/article/view/75254>; Najla Nassif Palma, “Peacekeeping (in Haiti) and Justice (in Brazil): A Reflection on the Impact of MINUSTAH on the Brazilian Military Legal System”, in Instituto Igarape, *Brasil e Haiti: Reflexões sobre os 10 anos da missão de paz e o futuro da cooperação após 2016*, January 2015, available at: <https://igarape.org.br/wp-content/uploads/2015/01/Artigo-estrategico-13-Minustah-final3-1.pdf>.

28 In 2017, the Brazilian chancellor referred to the Brazilian participation in Haiti as a success story ( “Missão da ONU no Haiti foi ‘sucesso’, afirma Aloysio Nunes”, *Estado de Minas*, 2 June 2017, available at: [www.em.com.br/app/noticia/internacional/2017/06/02/interna\\_internacional,873845/missao-da-onu-no-haiti-foi-sucesso-afirma-alloysio-nunes.shtml](http://www.em.com.br/app/noticia/internacional/2017/06/02/interna_internacional,873845/missao-da-onu-no-haiti-foi-sucesso-afirma-alloysio-nunes.shtml)); the Brazilian Army organized an international symposium called “Brazil in Haiti: A Success Story 2004–2017” (Luiz Padilha, “Simpósio Internacional ‘Brasil no Haiti, um caso de sucesso’”, *Defesa Aerea & Naval*, 9 October 2017, available at: [www.defesaareanaval.com.br/aviacao/simposio-internacional-brasil-no-haiti-um-caso-de-sucesso](http://www.defesaareanaval.com.br/aviacao/simposio-internacional-brasil-no-haiti-um-caso-de-sucesso)); and the Army and the think tank Instituto Igarape organized the publication *Brazil’s Participation in MINUSTAH (2004–2017)*, issued in November 2017 (available at: <https://igarape.org.br/wp-content/uploads/2018/03/Brazils-Participation-in-MINUSTAH-2004-2017.pdf>).

It was in this context that, in 2004 and 2010, changes were made to Complementary Law 97/99, regarding the organization, preparation and deployment of the Armed Forces.<sup>30</sup> The use of troops in law enforcement operations became possible when security forces are considered unavailable, non-existent or insufficient for the regular performance of their mission.<sup>31</sup>

In December 2010, these legislative changes, linked with the existing political alignment in the spheres of government, gave rise to an unprecedented agreement between the Federal Executive Power (the Union) and the state of Rio de Janeiro, allowing the use of the Armed Forces to fight crimes in the city's *favelas*.<sup>32</sup> The role of the military acting in a domestic environment was also reinforced by major events in Rio de Janeiro at which troops provided security.<sup>33</sup> Since then, the line between the distinctive roles of the police and the military in law enforcement has been blurred.

In order to contextualize the main law enforcement activities carried out by the armed forces in Rio de Janeiro, we will now track the rise of warmongering rhetoric and the government's main attempts to fight crime in Rio de Janeiro over the past fifteen years.

The police force in the state of Rio de Janeiro is divided into the Military Police, an ostensive uniformed institution that has the function of policing to preserve public order and the safety of people and property, and the Civil Police, an institution that has the function of the judiciary police and investigation of criminal infractions.<sup>34</sup> Both these branches of the police have militarized forces<sup>35</sup> that normally carry out operations in *favelas*. These specialized units of the police, which are not subordinated to the Armed Forces in peacetime, have armoured vehicles, heavy weapons and helicopters.

In 2007, the then secretary of public security of the state of Rio de Janeiro declared that "police action is not violent by design. We don't go there to seek to entice violence, but every time we go there, we are repelled." Referring to the

29 See Eduardo Italo Pesce and Iberê Mariano da Silva, "Armed Forces and Law Enforcement Actions", *Monitor Mercantil*, 28 July 2008, available at: <https://monitormercantil.com.br/foruas-armadas-e-garantia-da-lei-e-da-ordem/>.

30 See above note 28.

31 Complementary Law 97/1999, above note 1, Art. 15, para. 3.

32 Law enforcement actions were provided in Rio de Janeiro by troops in Complexo do Alemão from 2010 to 2012, in Complexo da Maré from 2014 to 2015, and with no defined area from July 2017 to December 2018. On the agreement between the Federal Executive Power and the state of Rio de Janeiro, see also "Cabral e Jobim assinam acordo para ação do Exército no Alemão", *Globo.com*, 23 December 2010, available at: <https://g1.globo.com/politica/noticia/2010/12/cabral-e-jobim-assinam-acordo-para-acao-do-exercito-no-alemao.html>.

33 Examples of large events in Rio de Janeiro in which troops provided security: the Pan American Games (2007), the World Military Games (2011), the Rio+20 Conference (2012), the Confederations Cup (2013), Pope Francis' visit (2013), World Youth Day (2013), the World Cup (2014) and the Olympic and Paralympic Games (2016).

34 See the Military Police website, available at: <https://sepm.rj.gov.br/>; and the Civil Police website, available at: [www.policiacivil.rj.net.br/](http://www.policiacivil.rj.net.br/).

35 The specialized unit in the Military Police is the Batalhão de Forças Especiais (see: [www.facebook.com/bopeoficial.pmerj/](http://www.facebook.com/bopeoficial.pmerj/)); in the Civil Police, the specialized unit is the Coordenadoria de Recursos Especiais (see: [www.facebook.com/COREPCERJ/](http://www.facebook.com/COREPCERJ/)).

need to use force, he stated that “we cannot make a cake without breaking some eggs”.<sup>36</sup> This type of reference made by decision-makers contributed to the idea of the necessity of a greater militarization of the police.

In 2008, the implementation of the so-called “Pacifying Police Units” (PPUs) began. This project of the State Government of Rio de Janeiro was aimed at taking over and occupying the *favelas* with police in order to disrupt the criminal factions, introduce community policing, and open the way for essential public services.<sup>37</sup> At that time, the debate about using military personnel to support the police in fighting crime was gaining more traction and popular support.

Given the levels of urban violence and its ensuing effects in the daily lives of *favela* residents, the International Committee of the Red Cross (ICRC) developed and implemented a scheme called the Rio Project in some *favelas* from 2009 to 2013.<sup>38</sup> This was a set of initiatives in partnership with municipal and State agencies, neighbourhood associations and the Brazilian Red Cross aimed at mitigating the humanitarian consequences of urban armed violence to the population. The experience resulted in combined activities in health care and education that sought to enhance the resilience of people living and/or working in *favelas* in Rio de Janeiro. The Safer Access to Essential Public Services<sup>39</sup> project was such a success that, at the request of local governments, this methodology was replicated in other Brazilian cities.

In November 2010, the Armed Forces effectively joined the fight against crime in Rio de Janeiro due to a series of criminal attacks that paralyzed the city. These attacks occurred in reaction to the law enforcement project that was in the process of being implemented, with buses burned, police booths machine-gunned, and exchanges of fire. The attacks served to justify a robust military operation that included combat vehicles and helicopters and led to the occupation of the Vila Cruzeiro and Complexo do Alemão *favelas* by the Military Police and Civil Police of Rio de Janeiro, the Federal Police and a large contingent of military troops.<sup>40</sup> At the time, the spokesperson for the Military Police, an institution that has the function of preserving public order and the safety of people and property, unapologetically declared that the police did not start this “war” but would

36 See “Para Beltrame, desarticular cv é a prioridade”, *Globo.com*, 27 June 2007, available at: <https://g1.globo.com/Noticias/Brasil/0,,AA1574684-5598,00-PARA+BELTRAME+DESARTICULAR+CV+E+A+PRIORI+DADE.html>.

37 See OLERJ, “Unidade de Polícia Pacificadora, UPP”, available at: <http://olerj.camara.leg.br/retratos-da-intervencao/unidade-de-policia-pacificadora-upp>.

38 See ICRC, “Projeto Rio: Programas ajudaram a reduzir as consequências humanitárias da violência no Rio de Janeiro”, 12 October 2016, available at: [www.icrc.org/pt/document/projeto-rio](http://www.icrc.org/pt/document/projeto-rio).

39 See ICRC, “Programa Acesso Mais Seguro”, 7 July 2016, available at: [www.icrc.org/pt/document/o-programa-acesso-mais-seguro](http://www.icrc.org/pt/document/o-programa-acesso-mais-seguro).

40 See TV Brasil, “Retrospectiva a ocupação do Complexo do Alemão”, *YouTube*, 27 December 2010, available at: [www.youtube.com/watch?v=CKprHc4jHW8](http://www.youtube.com/watch?v=CKprHc4jHW8). See also Carlos Alberto de Lima, *The 583 Days of the Pacification of the Penha and Alemão Complexes*, Agência 2A Comunicação, Rio de Janeiro, 2012; “Polícia e Militares invadem Complexo do Alemão”, *BBC News Brasil*, 28 November 2010, available at: [www.bbc.com/portuguese/noticias/2010/11/101128\\_rio\\_invasao\\_fn](http://www.bbc.com/portuguese/noticias/2010/11/101128_rio_invasao_fn).

emerge victorious.<sup>41</sup> The new idea was that military troops would occupy the *favelas* in a “pacification”<sup>42</sup> effort in order to continue the rollout of the PPUs. The Armed Forces thus delimited an area of operation to be occupied by military personnel for an extended period. In this area, the military was tasked with carrying out ostensive policing with powers to arrest and detain, in theory without prejudice to the police force. In typical UN peacekeeping mission fashion, the military started civic-social activities with the community in cooperation with non-governmental organizations and agencies.<sup>43</sup>

The so-called “pacification” forces remained in Complexo do Alemão<sup>44</sup> from 2010 to 2012, and in Complexo da Maré<sup>45</sup> from 2014 to 2015. Although there was some initial success, over the time the “pacification” policy started to fail because it was focused on a militarized perspective and was carried out by police and military personnel who lacked training and experience in community policing.<sup>46</sup> Armed confrontations with criminals multiplied, and the policy often did not result in basic sanitation and education being delivered to the communities. In addition, the systemic and rampant corruption of government and law enforcement officials contributed to turning the PPU’s promise into failure.<sup>47</sup>

An important symbol of this downfall of the pacification policy was the Amarildo case. In 2013, the bricklayer Amarildo Dias de Souza, 42 years old and a resident of Rocinha, was taken by policemen of that *favela*’s PPU due to suspicion of involvement with drug trafficking and was never seen again.

41 See Ana Cláudia Costa, Gustavo Goulart and Vera Araújo, “Com apoio da Marinha, estado prepara ação na Vila Cruzeiro para acabar com atentados”, *Extra Notícias*, 24 November 2010, available at: <https://m.extra.globo.com/noticias/rio/com-apoio-da-marinha-estado-prepara-acao-na-vila-cruzeiro-para-acabar-com-atentados-21899.html>.

42 See Conor Foley, *Pelo Telefone: Rumors, Truths and Myths in the “Pacification” of the Favelas of Rio de Janeiro*, Humanitarian Action in Situations Other than War (HASOW) Discussion Paper No. 8, International Relations Institute, Catholic University of Rio de Janeiro (IRI-PUC), March 2014, available at: <https://igarape.org.br/wp-content/uploads/2016/04/Pelo-telefone-Rumors.pdf>.

43 See Frank Müller and Andrea Steinke, “Criminalising Encounters: MINUSTAH as a Laboratory for Armed Humanitarian Pacification”, *Global Crime*, Vol. 19, No. 3–4, 2018. See also Moacir Fabiano Schmitt, Valentina Gomes Haensel Schmitt and Luis Moretto Neto, “Cultural Conflicts in the Pacification Process in the Complexo do Alemão/Rio de Janeiro”, *Review of the Superior School of War*, Vol. 31, No. 63, 2016.

44 See Ministry of Defence, “Forças Armadas permanecerão no complexo do Alemão enquanto for necessário, garante Jobim”, 9 May 2011, available at: [www.gov.br/defesa/pt-br/centrais-de-conteudo/noticias/ultimas-noticias/09052011-defesa-forcas-armadas-permanecerao-no-complexo-do-alemao-enquanto-for-necessario-garante-jobim](http://www.gov.br/defesa/pt-br/centrais-de-conteudo/noticias/ultimas-noticias/09052011-defesa-forcas-armadas-permanecerao-no-complexo-do-alemao-enquanto-for-necessario-garante-jobim).

45 See Ministry of Defence, “Ocupação das Forças Armadas no Complexo da Maré acaba hoje”, 30 June 2015, available at: [www.gov.br/defesa/pt-br/centrais-de-conteudo/noticias/ultimas-noticias/ocupacao-das-forcas-armadas-no-complexo-da-mare-acaba-hoje](http://www.gov.br/defesa/pt-br/centrais-de-conteudo/noticias/ultimas-noticias/ocupacao-das-forcas-armadas-no-complexo-da-mare-acaba-hoje).

46 See Esther Werling, *Rio’s Pacification: Paradigm Shift or Paradigm Maintenance?*, HASOW Discussion Paper No. 11, IRI-PUC, August 2014, available at: <https://igarape.org.br/wp-content/uploads/2016/04/Rio%E2%80%99s-Pacification-.pdf>.

47 See Guilherme Azevedo, “UPP fracassou porque só ela não basta, diz ex-secretário nacional de Segurança”, *UOL Notícias*, 6 January 2017, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2017/01/06/upp-fracassou-porque-so-ela-nao-basta-diz-ex-sub-da-seguranca-do-rj.htm> (interview with a former national secretary of public security). See also by Security and Citizenship Studies Centre, “The Failure of the PPUs”, 1 July 2017, available at: <https://cesecseguranca.com.br/participacao/falencia-das-upps/>.

According to the charges, he was tortured to death inside the PPU.<sup>48</sup> Since then, the project of the PPUs has definitely lost the support of public opinion.<sup>49</sup>

In July 2017, cashing in on the infrastructure that had been set up in the city for the security of the 2016 Olympic Games and still envisioning a militarized solution for public security, Rio de Janeiro was chosen by the Federal Government to be the test bed for yet another law enforcement experiment, in which the Armed Forces would support the implementation of the National Security Plan.<sup>50</sup> At that time, a reserve general who had been the military commander of UN peacekeeping missions in Haiti and the Democratic Republic of the Congo held the title of national public security secretary.<sup>51</sup>

In August 2017, the chief of the Institutional Security Cabinet within the Office of the President (a general) declared that there was a “war” in Rio de Janeiro and that “undesirable incidents” were foreseeable.<sup>52</sup> The general added that the success of military participation in law enforcement operations depended on support given by society in general, as well as on the media’s adherence to the narrative.

Unlike what had taken place in Complexo do Alemão and Complexo da Maré previously, the new military “law enforcement” operations were redesigned for short-term actions, with large contingents and without prior notice of deployment. The military was to provide “dynamic stabilization”, with a base far away, a base close by and, if necessary, incursions to enable police work, such as serving arrest and search and seizure warrants in *favelas* controlled by criminal factions. The military troops also removed barricades and performed typical police duties, like ostensive patrols and approaching civilians for body searches.<sup>53</sup>

In October 2017, the commander of the Brazilian Army, who was a critic of the Armed Forces’ participation in law enforcement activities, concerned with the legal security of troops and using war terminology, stated that the cost of “collateral damage of innocent civilians” should be carefully considered and

48 The commander of the Rocinha PPU and twelve other policemen were convicted for torture followed by death, concealment of a human body, and procedural fraud. See “Caso Amarello”, *Globo.com*, 28 October 2021, available at: <https://memoriaglobo.globo.com/jornalismo/coberturas/caso-amarildo/noticia/caso-amarildo.ghtml>.

49 See above note 47.

50 See Decree of 28 July 2017, available at: [www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2017/dsn/Dsn14485.htm#textoimpressa](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/dsn/Dsn14485.htm#textoimpressa).

51 See Murilo Ramos, “Gen Santos Cruz é novo Secretário Nacional de Segurança Pública”, *Época*, 20 April 2017, available at: <http://epoca.globo.com/politica/expresso/noticia/2017/04/governo-desiste-de-indicar-beltrame-para-secretaria-nacional-de-seguranca-publica.html>; “Santos Cruz: General na linha de frente”, *Diálogo Américas*, 19 June 2017, available at: <https://diálogo-americas.com/pt-br/articles/santos-cruz-general-na-linha-de-frente/#.YzB3kXbMLIU>.

52 Cecília Olliveira, “Verdadeiramente assustador”: Ex-Comandante da PMERJ critica visão de general sobre ocupação militar no Rio”, *The Intercept Brasil*, 4 August 2017, available at: <https://theintercept.com/2017/08/04/verdadeiramente-assustador-ex-comandante-da-pmerj-critica-visao-de-general-para-a-ocupacao-militar-no-rio/>.

53 See Gabinete da Intervenção Federal, “Comando Conjunto e Secretaria de Segurança realizam operações conjuntas em diferentes partes do RJ”, 9 May 2018, available at: [www.intervencaoefederalrj.gov.br/imprensa/notas-oficiais/comando-conjunto-e-secretaria-de-seguranca-realizam-operacoes-conjuntas-em-diferentes-partes-do-rj](http://www.intervencaoefederalrj.gov.br/imprensa/notas-oficiais/comando-conjunto-e-secretaria-de-seguranca-realizam-operacoes-conjuntas-em-diferentes-partes-do-rj). See also the rules of engagement for troops in law enforcement actions, available at: <https://s3-sa-east-1.amazonaws.com/nexojournal/www/docs/Engajamento+oficial.pdf>.

evaluated.<sup>54</sup> This general pointed out that the Army is understandably equipped with artillery capable of a high degree of lethality, range and transfixation ability, and has little experience and training with regard to deployment in urban, densely populated areas.

Even so, and increasingly marking this idea of a “war against crime”, in 2018, the then president signed an unprecedented “federal intervention” decree<sup>55</sup> with the aim of ending a crisis of public order, and appointed an active-duty Army general as the “intervener”.<sup>56</sup> This exceptional, temporary and specific measure as provided by the Constitution,<sup>57</sup> which did not imply any suspension or restriction of fundamental rights, lasted from February to December 2018 and had as its main objectives (1) the restoration of the operational capacity of the local security forces, and (2) the gradual reduction of crime rates and, consequently, an improvement in the perception of security in Rio de Janeiro.<sup>58</sup>

The general in charge appointed another active-duty general, who commanded the military occupation in Complexo da Maré, to be Rio de Janeiro’s public security secretary. The military took over the command of the police forces and, during the Federal Intervention in Public Security in Rio de Janeiro, military values and governance were strengthened in the public security forces.<sup>59</sup> At the time, reinforcing a warmonger perspective in public security, the minister of justice compared the Federal Intervention to an asymmetrical war.<sup>60</sup> The minister added that there is no war that is not lethal.

In the same month that the Federal Intervention was made official, the president created the Ministry of Public Security and appointed the then defence minister to this portfolio.<sup>61</sup> Additionally, the president appointed a general to lead the Ministry of Defence, effectively putting an end to a twenty-year-old tradition of having civilians as the head of defence.<sup>62</sup> The governor of the state of

54 See Luis Kawaguti, “Comandante do Exército diz que insegurança jurídica pode inibir ação de tropas no Rio”, *UOL Notícias*, 2 October 2017, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2017/10/02/comandante-do-exercito-diz-que-e-preciso-debater-efeitos-colaterais-do-combate-ao-crime-organizado.htm>.

55 See Decree No. 9.288, 16 February 2018, available at: [www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2018/Decreto/D9288.htm#textointpressao](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Decreto/D9288.htm#textointpressao).

56 On 16 February 2018, the president of Brazil, Michel Temer, appointed as intervenor General Walter Souza Braga Netto, then commander of the Eastern Military Command covering the states of Rio de Janeiro and Espírito Santo and part of the state of Minas Gerais. See *ibid*.

57 Brazilian Constitution, above note 1, Art. 34(III).

58 To learn more about the Federal Intervention in Public Security in Rio de Janeiro, see the Strategic Plan at: [www.intervencaoefederalrj.gov.br/arquivos/plano-revisado.pdf](http://www.intervencaoefederalrj.gov.br/arquivos/plano-revisado.pdf).

59 “General Richard Nunes será o secretário de Segurança do RJ”, *Globo.com*, 22 February 2018, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/general-richard-nunes-sera-o-secretario-de-seguranca-do-rj.ghtml>.

60 “‘Não há guerra que não seja letal’, diz ministro da Justiça sobre intervenção no Rio”, *Estado de Minas*, 20 February 2018, available at: [www.em.com.br/app/noticia/politica/2018/02/20/interna\\_politica,938791/nao-ha-guerra-que-nao-seja-letal-diz-ministro-da-justica.shtml](http://www.em.com.br/app/noticia/politica/2018/02/20/interna_politica,938791/nao-ha-guerra-que-nao-seja-letal-diz-ministro-da-justica.shtml).

61 Alex Rodrigues, “Jungmann vai chefiar novo Ministério da Segurança Pública”, *Agência Brasil*, 26 February 2018, available at: <https://agenciabrasil.ebc.com.br/politica/noticia/2018-02/jungmann-vai-chefiar-novo-ministerio-da-seguranca-publica>.

62 “Silva e Luna é efetivado no cargo de ministro da Defesa”, *Globo.com*, 13 June 2018, available at: <https://g1.globo.com/politica/noticia/silva-e-luna-e-efetivado-no-cargo-de-ministro-da-defesa.ghtml>.



Rio de Janeiro, when justifying the acceptance of military troops in law enforcement, stated that Rio de Janeiro alone could not “win the war”.<sup>63</sup>

Vila Kennedy, a *favela* with 41,555 inhabitants controlled by the Comando Vermelho drug trafficking group, located in the west of the city, was chosen by the military as a kind of laboratory during the federal military intervention.<sup>64</sup> For about three months, the military had a continuous presence during the day in the *favela*, breaking down barricades, policing together with the military police, and officially supporting the Civil Police in carrying out arrest warrants. This methodology did not give the expected results and was not replicated elsewhere.<sup>65</sup>

The general in charge of the Federal Intervention declared that the role of the Armed Forces in Rio de Janeiro’s law enforcement was not a war but cited the need for police training to avoid civilian casualties that he called “collateral damage”. By employing this typical war expression used to refer to the death of civilians on the battlefield, the general strengthened the atmosphere of militarization of the police.<sup>66</sup>

The investments made by the Federal Government during the Federal Intervention contributed to the re-equipment of the Military Police and the Civil Police but were insufficient for a full operational restoration.<sup>67</sup> Despite a reduction in crime rates that year, there was an increase in extrajudicial killings.<sup>68</sup>

To guide the behavioural norms of the military in law enforcement activities, especially regarding the progressive and/or differentiated use of force and the exercise of police power with regard to civilians, a protocol was elaborated and baptized the “rules of engagement”,<sup>69</sup> a term borrowed from UN peacekeeping missions in which Brazilian had troops participated, especially MINUSTAH.

The need to face criminals and not enemies, to deal with protests and to be sensitive to the social problems and cultural aspects of the region challenged the

63 Bernardo Caram, Guilherme Mazui and Roniara Castilhos, “Pezão diz que Rio, sozinho, não consegue deter guerra de facções”, *Globo.com*, 16 February 2018, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/pezao-diz-que-rio-sozinho-nao-consegue-deter-guerra-de-faccoes.ghtml>.

64 Julia Dias Carneiro, “Nascida da remoção de favelas, Vila Kennedy vive ‘déjà-vu’ após virar bairro-piloto de intervenção no Rio”, *BBC News Brasil*, 12 April 2018, available at: [www.bbc.com/portuguese/brasil-43720716](http://www.bbc.com/portuguese/brasil-43720716).

65 Marcela Lemos, “Com rotina de tiroteios, ‘laboratório da intervenção’ vê aumento de mortes”, *UOL Notícias*, 7 March 2018, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2019/02/14/laboratorio-da-intervencao-vila-kennedy.htm>.

66 “Isso não é uma guerra, diz General Braga Netto sobre Rio”, *UOL Notícias*, 2 September 2018, available at: [www.band.uol.com.br/videos/isso-nao-e-uma-guerra-diz-general-braga-netto-sobre-rio-16532776](http://www.band.uol.com.br/videos/isso-nao-e-uma-guerra-diz-general-braga-netto-sobre-rio-16532776).

67 Federal Government of Brazil, “Qual o Legado da Intervenção Federal para o Estado do Rio de Janeiro?”, available at: [www.intervencaoefederalrj.gov.br/imprensa/copy\\_of\\_legado-da-intervencao-federal-na-area-de-seguranca-publica-do-estado-do-rio-de-janeiro](http://www.intervencaoefederalrj.gov.br/imprensa/copy_of_legado-da-intervencao-federal-na-area-de-seguranca-publica-do-estado-do-rio-de-janeiro).

68 In 2018, the number of deaths caused by State agents was 36% higher than the previous year. See the database of the Institute of Public Security, available at: [www.ispvisualizacao.rj.gov.br/](http://www.ispvisualizacao.rj.gov.br/). See also Human Rights Watch, “Brasil: Letalidade policial bate recorde no Rio”, 19 December 2018, available at: [www.hrw.org/pt/news/2018/12/19/325453](http://www.hrw.org/pt/news/2018/12/19/325453).

69 Rules of Engagement for Operation Rio de Janeiro, Ministerial Directive 16/2017, 21 July 2017.



Army.<sup>70</sup> The rules of engagement were improved over the course of law enforcement actions, moving away from more warlike terms and incorporating the terminology and principles best suited to actions of a police nature.<sup>71</sup> During the Federal Intervention, the Brazilian Military Prosecutor's Office, a civilian institution composed only of civilian prosecutors working in the Brazilian military justice system, recommended specific training in human rights for military troops engaged in law enforcement actions and the development of a protocol for interacting with the population, especially with regard to the most vulnerable groups.<sup>72</sup> However, although there are guidelines in law enforcement actions<sup>73</sup> and training with non-lethal weapons in the Armed Forces, troops are not traditionally and effectively prepared to interact with the population, but rather to neutralize the enemy.

Since the end of the Federal Intervention in December 2018, there are no longer law enforcement operations against crime carried out by the military in the city. The Federal Executive Branch has called for greater legal protection for military personnel fighting crime before such operations can resume.<sup>74</sup>

An event that marked the Executive's greatest caution in placing troops on the streets of Rio de Janeiro was the Guadalupe case. In April 2019, not acting on a law enforcement mission, but used for law enforcement purposes, eight military personnel fired eighty-two rifle shots at a civilian car they thought was being used by criminal to flee a crime scene in the Guadalupe neighbourhood. As a result, they killed the driver, injured the passenger and killed a passer-by that came to the car to offer help.<sup>75</sup>

70 Tahiane Stochero, "Para Exército, ocupar Alemão é mais difícil que guerra e missão no Haiti", *Globo.com*, 15 August 2012, available at: <https://g1.globo.com/brasil/noticia/2012/08/para-exercito-ocupar-alemao-e-mais-dificil-que-guerra-e-missao-no-haiti.html>.

71 Expressions such as "hostile act" or "hostile intent" were replaced by "threatening act" or "threatening intent", and expressions such as "adversary" or "enemy" were replaced by "agent disturbing public order". See Rules of Engagement for the Pacification Force in Rio de Janeiro, Ministerial Directive 15/2010, 4 December 2010, available at: [www.gov.br/defesa/pt-br/arquivos/File/2010/mes12/regras.doc](http://www.gov.br/defesa/pt-br/arquivos/File/2010/mes12/regras.doc).

72 Walter Souza Braga Netto, "Protocolo de abordagem em operações durante a Intervenção Federal", 23 April 2018, available at: [www.mpm.mp.br/portal/wp-content/uploads/2018/06/pgjm-protocolo-abordagem-23-4-18.pdf](http://www.mpm.mp.br/portal/wp-content/uploads/2018/06/pgjm-protocolo-abordagem-23-4-18.pdf).

73 See Ministry of Defence, *Garantia da lei e da ordem*, 2013, available at: [www.gov.br/defesa/pt-br/arquivos/File/doutrinamilitar/listadepublicacoesEMD/md33a\\_ma\\_10a\\_gloa\\_1a\\_ed2013.pdf](http://www.gov.br/defesa/pt-br/arquivos/File/doutrinamilitar/listadepublicacoesEMD/md33a_ma_10a_gloa_1a_ed2013.pdf).

74 As will be seen later, the Federal Executive Branch has presented bills to the Congress intending to "tighten" the interpretation of what would constitute a situation of threat or aggression in which security agents (police or troops in law enforcement actions) would be allowed to use force, including lethal force, exempting themselves from criminal liability for excesses committed. With regard to military personnel, see Luis Kawaguti, "Bolsonaro defende segurança jurídica para militares envolvidos em tiroteios", *UOL Notícias*, 7 March 2019, available at: <https://noticias.uol.com.br/politica/ultimas-noticias/2019/03/07/bolsonaro-defende-seguranca-juridica-para-militares-envolvidos-em-tiroteios.htm>.

75 One officer and seven non-commissioned officers were convicted by the military justice. The defence appealed to the Superior Military Court, which has not yet judged the appeal. See Cleber Rodrigues, Lucas Madureira and Leandro Resende, "Oito militares do Exército são condenados por mortes de músico e catador no RJ", *CNN Brasil*, 14 October 2021, available at: [www.cnnbrasil.com.br/nacional/oito-militares-do-exercito-sao-condenados-por-mortes-de-musico-e-catador-no-rj/](http://www.cnnbrasil.com.br/nacional/oito-militares-do-exercito-sao-condenados-por-mortes-de-musico-e-catador-no-rj/); "Homem morre após ser baleado em ação do Exército na Zona Oeste do Rio", *Globo.com*, 7 April 2019, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/04/07/homem-morre-apos-carro-ser-atingido-em-acao-do-exercito-na-zona-oeste-do-rio.ghtml>.

Turning back to the Regional Executive Branch, in January 2019, the new governor of Rio de Janeiro changed the recent integrated structure organized by the Armed Forces during the Federal Intervention and dismantled the State's Secretariat of Public Security, splitting it into one secretariat for the Civil Police and another for the Military Police.<sup>76</sup> This initiative produced an empowerment of the police forces to act independently, viewed by some critics as harmful to integrated public security policies.<sup>77</sup>

While politically distancing himself from the Federal Intervention commanded by the military, the governor began his term by investing heavily in the war narrative in public security. In his inauguration speech, he said that a “war on drugs” would be declared and that drug dealers would be treated as “terrorists”.<sup>78</sup> He then rolled out militarized police interventions characterized by high levels of police brutality.<sup>79</sup> The governor even created, by decree, the rank of general for the Military Police and Fire Department,<sup>80</sup> but a month later he had to back out of this due to legal impediments.<sup>81</sup>

The situation of exacerbated urban violence in Rio de Janeiro is also a concern of the highest court of the judicial power. Arguing that the security policy of the state of Rio de Janeiro was marked by “excessive and increasing lethality of police action”, at the end of 2019, a political party filed a lawsuit in the Supreme Court for breach of fundamental precept. Known as ADPF 635 but nicknamed “ADPF of the *Favelas*”, it was intended to recognize and remedy serious violations of fundamental constitutional rights. Civil society quickly joined the suit. In a nutshell, the Supreme Court ordered that the state of Rio de Janeiro should produce a plan to reduce police lethality and investigate and mitigate human rights violations committed by security forces including the Military Police and Civil Police. This plan was to include objective measures, specific timelines, and the necessary resources for its implementation.<sup>82</sup>

76 See Decree 46.544, 1 January 2019, available at: <http://aeerj.net.br/file/2019/Decreto-46544-estrutura%20de%20governo.pdf>; Luiza Damé, “Witzel confirma extinção da Secretaria de Segurança Pública”, Agência Brasil, 12 December 2018, available at: <https://agenciabrasil.ebc.com.br/politica/noticia/2018-12/witzel-confirma-extincao-da-secretaria-de-seguranca-publica>.

77 See Bruna Fantti, “Fim da Secretaria de Segurança divide opiniões”, O Dia, available at: <https://odia.ig.com.br/rio-de-janeiro/2018/11/5589101-fim-da-secretaria-de-seguranca-divide-opinioes.html>.

78 “‘Traficantes serão tratados como terroristas’, diz Witzel em cerimônia de transmissão de governo”, *R7 Notícias*, 2 January 2019, available at: <https://recorDTV.r7.com/cidade-alerta-rj/videos/traficantes-serao-tratados-como-terroristas-diz-witzel-em-cerimonia-de-transmissao-de-governo-18022020>.

79 “‘Guerra às drogas’ de Witzel tem ‘altos níveis de violência’ e ‘violações de direitos humanos’, diz Anistia”, *Globo.com*, 27 February 2020, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/02/27/guerra-as-drogas-de-witzel-tem-altos-niveis-de-violencia-e-violacoes-de-direitos-humanos-diz-anistia.ghtml>.

80 Rafael Sores, “Witzel cria a patente de general para Polícia Militar e bombeiros”, *Globo.com*, 31 July 2019, available at: <https://oglobo.globo.com/rio/witzel-cria-patente-de-general-para-policia-militar-bombeiros-23846463>.

81 Quintino Gomes Freire, “Witzel acaba com general na PM e no Corpo dos Bombeiros”, *Diário do Rio*, 6 September 2019, available at: <https://diariodorio.com/witzel-acaba-com-general-na-pm-e-no-corpo-dos-bombeiros/>.

82 Public Ministry of the State of Rio de Janeiro (MPRJ), “ADPF 635”, available at: [www.mprj.mp.br/adpf-635](http://www.mprj.mp.br/adpf-635); Supreme Federal Court, “ADPF 635”, available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5816502>.

ADPF 635 also addresses the following issues: prohibition of using helicopters as a platform for shooting “targets” on the ground; protection of schools; guarantees of civilian oversight over security policies; access to justice and full participation of civil society in investigations into cases of extrajudicial killings; and systemic prosecution in cases of crimes committed by security agents.<sup>83</sup>

In June 2020, the Supreme Court ordered the temporary suspension of police raids in the *favelas* during the COVID-19 pandemic, except in exceptional cases that must be duly justified and accompanied by robust due diligence measures to prevent further danger to the population, the provision of health services, and humanitarian action, and subject to communication to the Public Prosecutor’s Office.<sup>84</sup>

Police lethality decreased by 34% in 2020,<sup>85</sup> but despite the Supreme Court’s decision, security operations continued,<sup>86</sup> often motivated by pure retaliation for the killing of a police officer and/or attacks against police units.<sup>87</sup> Since May 2021, Rio de Janeiro has recorded three of the four most lethal police operations in the city’s entire history. During this period, seventy people (sixty-nine civilians and one police officer) were killed in just three police incursions in *favelas*.<sup>88</sup>

Coming back to the scope of the Regional Executive Branch, at the beginning of the 2022 election year, the current governor of Rio de Janeiro State launched the Integrated City project in the *favelas* of Jacarezinho and Muzema. This is a kind of re-edition of the PPU, but without the participation of the military. The programme is officially aimed at taking back control from drug traffickers and militia and serving as a model of police occupation and joint work on social actions. However, it has been criticized for a lack of transparency and the absence of consultation with local leaders or even city government officials.<sup>89</sup>

83 See Supreme Federal Court, “STF determina condições para operações policiais em comunidades no Rio de Janeiro”, 19 August 2020, available at: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=449833&ori=1>; MPJ, above note 82.

84 Supreme Federal Court, above note 83.

85 Daniel Veloso Hirata *et al.*, “Efeitos da suspensão de operações policiais no RJ”, *Fonte Segura*, available at: <https://fontesegura.forumseguranca.org.br/efeitos-da-suspensao-de-operacoes-policiais-no-rj-2/>.

86 See “Polícias do Rio de Janeiro realizaram duas operações em favelas por dia desde decisão do STF restringindo ações”, *Folha de Pernambuco*, 23 July 2022, available at: [www.folhape.com.br/noticias/policias-do-rio-realizaram-duas-operacoes-em-favelas-por-dia-desde/234718/](http://www.folhape.com.br/noticias/policias-do-rio-realizaram-duas-operacoes-em-favelas-por-dia-desde/234718/).

87 Daniel Veloso Hirata, Carolina Christoph Grillo and Renato Dirk, *Efeitos da Medida Cautelar na ADPF 635 sobre as operações policiais na Região Metropolitana do Rio de Janeiro*, GENI, Fluminense Federal University, June 2020, available at: [https://geni.uff.br/wp-content/uploads/sites/357/2021/02/2020\\_Relatorio-efeitos-da-Liminar.pdf](https://geni.uff.br/wp-content/uploads/sites/357/2021/02/2020_Relatorio-efeitos-da-Liminar.pdf).

88 The deadliest police operation in the history of Rio de Janeiro took place in May 2021, in the Jacarezinho *favela*. It resulted in the deaths of twenty-eight people, including a police officer. See Pauline Almeida, “Um ano após operação com 28 mortos, quatro policiais foram denunciados no Rio”, *CNN Brasil*, 6 May 2022, available at: [www.cnnbrasil.com.br/nacional/um-ano-apos-operacao-com-28-mortos-quatro-policiais-foram-denunciados-no-rio](http://www.cnnbrasil.com.br/nacional/um-ano-apos-operacao-com-28-mortos-quatro-policiais-foram-denunciados-no-rio). See also “Em 14 meses, Rio registra 3 das 4 operações mais letais da história, com mais de 70 mortos”, *Globo.com*, 22 July 2022, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2022/07/22/em-14-meses-rio-registra-3-das-4-operacoes-mais-letais-da-historia.ghtml>.

89 See Gabriel Barreira and Henrique Coelho, “Cidade Integrada: O que se sabe, o que falta saber e quais os principais desafios do projeto”, *Globo.com*, 19 January 2022, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2022/01/19/cidade-integrada-o-que-se-sabe-o-que-falta-saber-e-quais-os-principais-desafios-do-projeto.ghtml>.

As we have seen, in the last fifteen years, with or without military personnel carrying out law enforcement actions, a “war approach”<sup>90</sup> has prevailed in the conduct of public security policies in Rio de Janeiro.

In this context, some voices defend the existence of a low-intensity NIAC in the city of Rio de Janeiro and the consequent applicability of international humanitarian law (IHL) in the police/military interventions in *favelas*, or at least a “grey zone conflict”<sup>91</sup> in which the international human rights standard on the use of force<sup>92</sup> is not sufficient to fight organized crime. This war narrative is not official but can be found among some members of the armed forces, police, prosecutors and even judges.<sup>93</sup> The word “war” is also frequently used in the media to refer to extreme urban violence in Rio de Janeiro. In August 2017, a newspaper even created a specialized editorial section called “War in Rio”.<sup>94</sup>

## Urban violence in Rio de Janeiro and the threshold for a non-international armed conflict

Although the extreme urban violence in Rio de Janeiro has been popularly described as a “war”, it does not reach the threshold of intensity of violence and level of organization of non-State armed groups required to be considered a NIAC. Accordingly, IHL should not be used as a legal basis to justify militarized interventions, particularly by a military that has a track record of excessive use of force and extrajudicial killings.

[janeiro/noticia/2022/01/19/cidade-integrada-o-que-se-sabe-do-novo-projeto-de-ocupacao-no-rj-e-quais-os-principais-desafios.ghtml](https://janeiro/noticia/2022/01/19/cidade-integrada-o-que-se-sabe-do-novo-projeto-de-ocupacao-no-rj-e-quais-os-principais-desafios.ghtml).

- 90 In 2009, UN Special Rapporteur Philip Alston had already spoken of a “war approach” adopted by Rio de Janeiro’s government. See Philip Alston, *Promotion and Protection of All Human Rights, Civil, Political, Economical, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions. Addendum: Mission to Brazil*, UN Doc. A/HRC/11/2/Add.2, 23 March 2009, para. 27.
- 91 This term is used to describe “political-military” confrontations between States and armed groups that persist below and sometimes at the threshold of conventional conflict. See Michael John-Hopkins, *The Rule of Law in Crisis and Conflict Grey Zones: Regulating the Use of Force in a Global Information Environment*, Routledge, Abingdon, 2018.
- 92 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, 7 September 1990, available at: [www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement](http://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement).
- 93 Carlos Frederico de Oliveira Pereira, “Grey Zones and Crime Suppression: Between International Human Rights Law and International Law of Armed Conflicts”, *Small Wars Journal*, 2 May 2020, available at: <https://smallwarsjournal.com/jrnl/art/gray-zones-and-crime-suppression-between-international-human-rights-law-and-international>; Carlos Frederico de Oliveira Pereira, *Gangues territoriais e direito internacional dos conflitos armados*, Editora Juruá, Curitiba, 2016; Flávia Ximenes Aguiar de Sousa, *O emprego das em forças armadas situações de conflitos internos graves*, Editora Dialética, São Paulo, 2021; Adriano Alves Marreiros, *Guerra à polícia: Reflexões sobre a ADPF 635*, Editora EDA, Campinas, 2021; Leonardo Novo Oliveira Andrade de Araújo, *Relatos de mais um combatente em uma guerra sem vitória*, Editora Icone, São Paulo, 2020.
- 94 The newspaper justified the creation of the war editorial by saying that it was a way to “shout” to society that urban violence in Rio de Janeiro cannot be trivialized. See “Isso não é normal”, *Extra*, 16 August 2017, available at: <https://extra.globo.com/casos-de-policia/guerra-do-rio/isso-nao-normal-21711104.html>.

For fear of legitimizing insurgencies, losing control of internal order and undermining sovereignty, States are reluctant to produce a comprehensive set of rules that regulate NIACs. The main norms that refer to this type of armed conflict are set out in Article 3 common to the four Geneva Conventions of 1949 (armed conflict not of an international character occurring in the territory of one of the High Contracting Parties) and Additional Protocol II of 1977 (armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups with command, territorial control, the ability to carry out sustained and concerted military operations and the capacity to respect IHL). The Rome Statute of the International Criminal Court added other elements to the notion of NIAC in 1998 (protracted armed conflict between governmental authorities and organized armed groups or between such groups). Brazil is bound by these treaties.

Those who assert that the city of Rio de Janeiro is immersed in a low-intensity NIAC argue that (1) there is a “war on crime”, a “drug war” or a “criminal insurgency” in which the death toll is greater than many situations of armed conflict, (2) the State has used the military in the fight against crime, (3) the criminals use weapons normally used in armed conflicts, (4) the armed groups are well organized, and (5) the armed groups have control over the *favelas*.<sup>95</sup>

The arguments in favour of applying IHL to the situation in Rio de Janeiro are based on the need to provide more “legal certainty” to police and military personnel who fight violent crime, the need to prevent prosecutions in the event of use of lethal force against criminals, the possibility of prosecuting criminals for war crimes, and greater and more specific legal protection for the *favela* populations.<sup>96</sup>

In the following sections, an analysis will be made of the situation in Rio de Janeiro from the perspective of the criteria required for the characterization of a NIAC. Some comments will then be presented on the inadequacy of the arguments in favour of the applicability of IHL.

## Intensity

To evaluate the degree of intensity of armed confrontations, certain aspects can be taken into account, such as the number of casualties, the duration of individual confrontations, the extent of destruction, the type of weapons and combat methods used, the type of forces taking part in the fighting and the number of troops deployed, the number of civilians forced to leave their homes, the attention of international bodies such as the UN Security Council, and even the attempt by representatives of such organizations to broker a ceasefire

95 See C. F. de Oliveira Pereira, “Grey Zones and Crime Suppression”, above note 93; Eduardo Bittencourt Cavalcanti, “Quando haverá um conflito armado no Rio de Janeiro: Os cenários cariocas e o marco legal aplicável à violência de fato vivenciada na cidade”, *Revista do Ministério Público Militar*, Vol. 44, No. 31, 2019, available at: <https://revista.mpm.mp.br/artigos/?idedicao=31>. See also below note 98.

96 See above notes 93 and 95 and below note 98.

agreement.<sup>97</sup> A “convincing combination”<sup>98</sup> of these indicative factors is required to qualify a situation of violence as a NIAC.

In addition, the ICRC has introduced a new approach to coalitions of non-State armed groups. An aggregated intensity for qualifying a NIAC can be assessed based on whether organized armed groups have objectively and effectively adopted a collective approach to fighting a common enemy.<sup>99</sup>

### *Number of deaths*

The number of deaths resulting from crime in Rio de Janeiro is alarming and may even exceed the number of victims in some armed conflicts. Some 1,338 homicides were recorded in the city in 2018, 1,134 in 2019, 957 in 2020 and 790 in 2021.<sup>100</sup> If we consider the metropolitan region of Rio de Janeiro, which includes the capital and twenty-one surrounding municipalities, the numbers of homicides reached 3,577 in 2018, 2,928 in 2019, 2,405 in 2020 and 2,133 in 2021.<sup>101</sup> This data does not include violent deaths stemming from unidentified causes.

Although Rio de Janeiro is not one of the top ten most violent states in the country,<sup>102</sup> the state of Rio de Janeiro has the most lethal police force in Brazil. Official deaths caused by the police in the city of Rio de Janeiro totalled an alarming 558 in 2018 and 726 in 2019.<sup>103</sup> During the coronavirus pandemic, and the prohibition of police operations in the *favelas*<sup>104</sup> by the Supreme Court, there were 415 deaths in 2020 and 458 deaths in 2020. In the metropolitan region, there were 1,381 deaths in 2018, 1,647 in 2019, 1,089 in 2020 and 1,214 in 2021.<sup>105</sup>

As noted previously, the police force in Rio de Janeiro is divided into the Military Police and the Civil Police. The operations conducted by the Civil Police in the *favelas* against drug trafficking groups that result in killings are proportionally more lethal than those of the Military Police.<sup>106</sup>

The Rio de Janeiro police force is also the one that suffers the most losses in the country. In the state of Rio de Janeiro there were 111 police officers killed in

97 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Ramush Hadadinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, para. 394.

98 Sven Peterke, “Urban Insurgency, ‘Drug War’ and International Humanitarian Law: The Case of Rio de Janeiro”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

99 See Jelena Nikolic, Thomas de Saint Maurice and Tristan Ferraro, “Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups”, *Humanitarian Law and Policy Blog*, 7 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/>.

100 Data from the Institute of Public Security, available at: [www.ispvisualizacao.rj.gov.br/](http://www.ispvisualizacao.rj.gov.br/).

101 *Ibid.*

102 See Centro de Pesquisas do Ministério Público do Estado do Rio de Janeiro, above note 16. See also Eduardo Santos, “Estudo revela que 10 das cidades mais perigosas do Brasil, 9 estão no Nordeste; confira a lista”, *Portal de Prefeitura*, 24 February 2023, available at: <https://portaldeprefeitura.com.br/2023/02/24/estudo-revela-que-das-10-cidades-mais-perigosas-do-brasil-9-estao-no-nordeste-confira-lista/>.

103 Data from the Institute of Public Security, available at: [www.ispvisualizacao.rj.gov.br/](http://www.ispvisualizacao.rj.gov.br/).

104 See the case *Ação de Descumprimento de Preceito Fundamental* 635 currently in progress at the Supreme Federal Court.

105 Data from the Institute of Public Security, available at: [www.ispvisualizacao.rj.gov.br/](http://www.ispvisualizacao.rj.gov.br/).

106 GENI, above note 17.



2018, sixty-seven in 2019, sixty-five in 2020<sup>107</sup> and forty-one in 2021.<sup>108</sup> Most of the deaths of police officers took place in the city of Rio de Janeiro, when the officers were off duty.<sup>109</sup>

Regarding military personnel engaged in law enforcement actions, since 2010, thirty-two civilians have been killed by troops and four military personnel have died in armed confrontations with criminals.<sup>110</sup>

Although it is estimated that half of the murders investigated in the capital and the metropolitan region of Rio de Janeiro since 2016 have had some connection to different criminal organizations,<sup>111</sup> the reasons behind killings in the city are often not known.

The state of Rio de Janeiro has one of the lowest intentional homicide investigation resolution rates in Brazil. In fact, only 21.2% of homicides registered in 2018 had been solved by the end of 2020.<sup>112</sup> Among other problems, the low resolution rate prevents analysts from discovering the exact proportion of crimes committed by traffickers and militia. It is not even possible to know whether the majority of homicides in the state are due to organized crime or interpersonal reasons.<sup>113</sup>

Lastly, without disregard to the gravity of the situation, in comparison to other urban areas in the world, Rio de Janeiro was not among the fifty most violent cities in 2022.<sup>114</sup> Since 1 January 2019, there have been no new law

107 Institute of Public Security, *Police Killings in the State of Rio de Janeiro: Overview of the Last Five Years (2016–2020)*, available at: [http://arquivos.proderj.rj.gov.br/isp\\_imagens/uploads/TD05\\_2021-VPERJ-Vitimizacao policial.pdf](http://arquivos.proderj.rj.gov.br/isp_imagens/uploads/TD05_2021-VPERJ-Vitimizacao policial.pdf).

108 See Gabriel Sestrem, “Assassinatos de policiais caem 22% no Brasil; números seguem elevados, dizem especialistas”, *Gazeta do Povo*, 16 April 2022, available at: [www.gazetadopovo.com.br/vida-e-cidadania/assassinatos-de-policiais-caem-22-no-brasil-numeros-seguem-elevados-dizem-especialistas/](http://www.gazetadopovo.com.br/vida-e-cidadania/assassinatos-de-policiais-caem-22-no-brasil-numeros-seguem-elevados-dizem-especialistas/); Carolina Heringer and Diego Amorim, “Sete em cada dez policiais mortos no Rio nos últimos cinco anos por causas não naturais foram assassinados”, *Extra*, 22 September 2021, available at: <https://extra.globo.com/casos-de-policia/sete-em-cada-dez-policiais-mortos-no-rio-nos-ultimos-cinco-anos-por-causas-nao-naturais-foram-assassinados-25207526.html>.

109 See Cristina Índio do Brasil, “Maioria dos policiais mortos no Rio de forma violenta estava de folga”, Agência Brasil, 22 September 2021, available at: <https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2021-09/maioria-dos-policiais-mortos-no-rio-de-forma-violenta-estava-de-folga>.

110 See Natalia Viana, *Dano Colateral: A intervenção dos militares na segurança pública*, Editora Objetiva, Rio de Janeiro, 2021. See also “Exército é acusado de matar inocentes em operações de segurança pública”, Centre for Security and Citizenship Studies, 2018, available at: <https://cesecseguranca.com.br/participacao/exercito-e-acusado-de-matar-inocentes-em-operacoes-de-seguranca-publica/>.

111 Leslie Leitão and Carlos de Lannoy, “RJ tem 1,4 mil favelas dominadas por criminosos, aponta relatório”, *Globo.com*, 6 July 2020, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/07/06/rj-tem-14-mil-favelas-dominadas-por-criminosos-aponta-relatorio.ghtml>.

112 See Institute of Public Security, *Taxa de elucidação criminal: Contribuições para um indicador nacional com base na experiência do estado do Rio de Janeiro*, available at: [http://arquivos.proderj.rj.gov.br/isp\\_imagens/uploads/Textodiscuss%C3%A3oTaxaElucidCriminal.pdf](http://arquivos.proderj.rj.gov.br/isp_imagens/uploads/Textodiscuss%C3%A3oTaxaElucidCriminal.pdf).

113 See Luã Marinatto and Rafael Soares, “A Polícia civil só resolve um homicídio a cada oito no Rio, que tem uma das piores taxas de elucidação do país”, *O Globo*, 11 September 2021, available at: <https://soudapaz.org/noticias/o-globo-policia-civil-so-resolve-um-homicidio-a-cada-oito-no-rio-que-tem-uma-das-piores-taxas-de-elucidacao-do-pais/>.

114 The Mexican non-governmental organization Seguridad, Justicia y Paz has drawn up a ranking of the fifty most violent urban areas in the world, based on the number of people and the number of homicides in each city. Ten Brazilian cities appear in the ranking; in descending order of violence, these are Mossoró (RN), Salvador (BA), Manaus (AM), Feira de Santana (BA), Vitória da Conquista (BA), Natal



enforcement operations led by the Armed Forces in support of or to replace the police in the city, and, as seen above, the number of homicides committed by criminals in the metropolitan region of the city of Rio de Janeiro has been falling since 2018, notwithstanding the fact that killings attributed to the police have increased.<sup>115</sup>

Due to the circumstances seen above, the high number of casualties resulting from violent criminality in Rio de Janeiro does not exactly fit as an indicative factor of a NIAC.

### *Duration of confrontations*

Clashes between criminal factions, or between them and the police, are very frequent and sometimes have a considerable duration. They can range from hours to days of armed violence.<sup>116</sup> There are even apps to alert people about the places where shootings happen in real time in Rio de Janeiro.<sup>117</sup> In 2021, 2,510 shootings were recorded in the city, most of them in the *favelas*.<sup>118</sup> Taking into account that this tragic situation has remained relatively stable for years,<sup>119</sup> it is possible to conclude that armed confrontations are, therefore, of a permanent character in the *favelas cariocas*.

Although international jurisprudence has already recognized the existence of instant NIACs,<sup>120</sup> this permanent environment of armed confrontation could be seen as an indicative factor for qualifying as a NIAC. However, these clashes in the *favelas* of Rio de Janeiro involve violence between criminals or between them and specialized police forces, and the type of forces participating in the fighting is also an important element to be evaluated when considering a situation as an armed conflict. As already seen, the involvement of the Armed Forces in law enforcement actions in Rio de Janeiro is not regular, and when it happens, it is to support missions of a police nature.

(RN), Fortaleza (CE), Recife (PE), Maceió (SE) and Teresina (PI). See Gilson Garret Jr, “As 50 cidades mais violentas do mundo (o Brasil tem 10 na lista)”, *Portal Exame*, 27 March 2023, available at: <https://exame.com/mundo/as-50-cidades-mais-violentas-do-mundo-o-brasil-tem-10-na-lista/>. See also Seguridad, Justicia y Paz, *Metodología del ranking (2022) de las 50 ciudades más violentas del mundo*, 20 February 2023, available at: [http://geonlace.net/seguridadjusticiaypaz/archivo/d86357\\_e0cc9ce8f0.pdf](http://geonlace.net/seguridadjusticiaypaz/archivo/d86357_e0cc9ce8f0.pdf).

115 See above notes 105 and 106.

116 See Paula Bianchi, “Jacarezinho, no Rio, tem 7 mortos em 9 dias de confrontos entre traficantes e policiais”, *UOL Notícias*, 20 August 2017, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2017/08/20/jacarezinho-tem-7-mortos-em-9-dias-de-confrontos-entre-trafficantes-e-policiais.htm>; “Confronto entre policiais e traficantes já dura seis dias no Rio de Janeiro”, *SBT Brasil*, 11 December 2021, available at: [www.sbtnews.com.br/noticia/sbt-brasil/190323-confronto-entre-policiais-e-trafficantes-ja-dura-seis-dias-no-rio-de-janeiro](http://www.sbtnews.com.br/noticia/sbt-brasil/190323-confronto-entre-policiais-e-trafficantes-ja-dura-seis-dias-no-rio-de-janeiro).

117 See the websites of Fogo Cruzado (Crossfire), available at: <https://fogocruzado.org.br/>; and Onde Tem Tiro (Where There Is Shooting), available at: [www.ondetemtiroteio.com.br/](http://www.ondetemtiroteio.com.br/).

118 See Fogo Cruzado, *Relatório anual 2021: Região Metropolitana do Rio de Janeiro*, 2022, available at: <https://fogocruzado.org.br/dados/relatorios/relatorio-anual-grande-rio-2021>.

119 See below note 130.

120 See Inter-American Commission on Human Rights (IACHR), *Juan Carlos Abella v. Argentina*, Case No. 11.137, 18 November 1997, para. 156, available at: [www.cidh.oas.org/annualrep/97eng/argentina11137.htm](http://www.cidh.oas.org/annualrep/97eng/argentina11137.htm).

## Extent of material destruction

Though the situation in Rio de Janeiro is very serious and intense armed clashes occur either between criminal factions that dispute territory or between such factions and the police, the material destruction resulting from violent criminality or the State response is not comparable to what is seen in other NIACs.<sup>121</sup>

An immense amount of ammunition can be fired in a single confrontation in the *favelas*,<sup>122</sup> and gunshot damage to walls and cars frequently occurs. In more extreme cases, there are reports of buses, trucks and even gas stations being burned down in disputes between criminal factions or in protests against police operations.<sup>123</sup> However, there is little reliable data available to verify the actual scale of material destruction resulting from this extreme urban violence, and such a survey would be necessary to classify this aspect as an indicative factor of a NIAC.

## Weaponry

Criminal groups in Rio de Janeiro use high-calibre weapons, some of which are normally restricted to the Armed Forces. In 2019, 2,502 firearms and 974 explosives were seized from criminals in the city of Rio de Janeiro. Of these, 338 (13%) of the firearms were rifles and 525 (53%) of the explosives were grenades.<sup>124</sup> The lack of strict oversight of the arms trade and effective investigations into the theft, loss and trafficking of arms and ammunition contribute to this escalation of arms.<sup>125</sup>

121 In the Syrian civil war, as of November 2017, there were a total of 109,393 detected damaged structures. 2016 witnessed the highest damage with a total count of 77,568 structures; 37% of the detected structures are moderately damaged, 35.3% are severely damaged and the remaining 27.7% are destroyed. Aleppo accounts for 32.7% of the total count of damaged structures. See Ameen Najjar, "Damage Caused by the Syrian Civil War: What the Data Say", *Towards Data Science*, 27 June 2018, available at: <https://towardsdatascience.com/damage-caused-by-the-syrian-civil-war-what-the-data-say-ebad5796fca8>.

122 See "Confronto no Alemão foi tão intenso que munição do BOPE acabou em 2 horas", *O Tempo*, 22 July 2022, available at: [www.otempo.com.br/brasil/confronto-no-alemao-foi-tao-intenso-que-municao-do-bope-acabou-em-2-horas-1.2703929](http://www.otempo.com.br/brasil/confronto-no-alemao-foi-tao-intenso-que-municao-do-bope-acabou-em-2-horas-1.2703929).

123 See Luana Alves, "Postos de combustíveis são incendiados na Zona Oeste; polícia investiga atuação de milicianos", *Globo.com*, 11 November 2021, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2021/11/11/combustiveis-incendio.ghtml>. See also "Rio de Janeiro tem ônibus queimados após ação policial", *Jornal do Comércio*, 3 May 2017, available at: [www.jornaldocomercio.com/\\_conteudo/2017/05/galeria\\_de\\_imagens/560441-rio-de-janeiro-tem-onibus-queimados-apos-acao-policial.html](http://www.jornaldocomercio.com/_conteudo/2017/05/galeria_de_imagens/560441-rio-de-janeiro-tem-onibus-queimados-apos-acao-policial.html); Erick Guimarães, "Rio: 7 ônibus são queimados em confronto entre traficantes rivais", *R7 Notícias*, 3 October 2019, available at: <https://noticias.r7.com/rio-de-janeiro/rio-7-onibus-sao-queimados-em-confronto-entre-trafficantes-rivais-04102019>.

124 Institute of Public Security, *Overview of Firearms and Explosive Device Seizures in the State of Rio de Janeiro in 2019*, available at: [http://arquivos.proderj.rj.gov.br/isp\\_imagens/uploads/Panorama-Armas-de-fogo2020.pdf](http://arquivos.proderj.rj.gov.br/isp_imagens/uploads/Panorama-Armas-de-fogo2020.pdf).

125 See "Entidades apontam falhas no sistema de controle de armas no Brasil que permitem a compra de pistolas e fuzis por criminosos", *Jornal Nacional*, 22 July 2022, available at: <https://g1.globo.com/jornal-nacional/noticia/2022/07/22/entidades-apontam-falhas-no-sistema-de-controle-de-armas-no-brasil-que-permitem-a-compra-de-pistolas-e-fuzis-por-criminosos.ghtml>.

To tackle this destructive potential, the police have carried out some robust operations in the *favelas* with specialized – and militarized – units that have armoured vehicles, heavy weapons and helicopters.<sup>126</sup> During some periods, as seen above, military personnel have also been engaged in law enforcement actions in order to provide a “safe” environment for the police work (execution of arrest and search and seizure warrants).<sup>127</sup>

The use of heavy weapons could be seen as an indicator of high-intensity confrontation, but when this factor is combined with others, the picture of a NIAC does not hold up clearly.

### *Troops deployed*

As already mentioned, armed clashes in the *favelas* of Rio de Janeiro involve violence between groups of criminals or between such groups and specialized police forces, but the Armed Forces have carried out some police operations.

The military contingent deployed in the last law enforcement mission in Rio de Janeiro between July 2017 and December 2018 was very large, with some operations in *favelas* mobilizing up to 4,000 military personnel. However, the operations were not continuous and were developed to support the work of the police, in quick actions, with the purpose of providing a “safe” environment so that the security agents could carry out arrest and search and seizure warrants.<sup>128</sup>

The use of the Armed Forces was preceded by the approval of the planning of each operation by the minister of justice and public security, the minister of defence and the head of the Institutional Security Office of the Presidency of the Republic.<sup>129</sup>

Despite the fact that there were exchanges of fire and deaths in these operations,<sup>130</sup> and that there are precedents of instant NIACs,<sup>131</sup> the police nature of the mission carried out by the Armed Forces on the ground compromises the “number of military deployed” criteria as an indicative factor of a NIAC.

### *Civilian displacement*

Although it is well known that many *favela* residents must adapt their lives around the organized criminal activities that take place there despite them, there are few recent studies that address the issue of migratory flows, and as a result we cannot

126 See above note 35.

127 See above notes 44, 45 and 50.

128 See above note 50.

129 See above note 50.

130 See, for example, Daniele dos Santos and Henrique Coelho, “Operação das forças de segurança na Maré, no Alemão e na Penha tem 1 militar e 5 suspeitos mortos”, *Globo.com*, 20 August 2018, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2018/08/20/operacao-das-forcas-de-seguranca-deixa-mortos-no-rio-ghtml>.

131 See IACHR, *Abella*, above note 120, para. 156.

specify whether there is a significant volume of internal displacement.<sup>132</sup> While urban violence has a strong impact on the daily lives of residents through interruptions in the delivery of specific public services, the phenomenon cannot possibly be compared to the collapse of institutions in times of armed conflict.<sup>133</sup>

### *International concern*

A NIAC results in a very serious security crisis that can sometimes threaten international peace and become a matter of international concern. There are no reports of international bodies perceiving the situation in Rio de Janeiro as a NIAC; the ICRC places the situation in Rio de Janeiro in the category of “armed violence in urban areas”.<sup>134</sup> There is no evidence of involvement on the part of the UN Security Council, nor of any attempts by representatives of international organizations to broker and enforce ceasefire agreements.

### *Aggregated intensity*

Usually, the intensity criteria necessary for qualifying a situation as a NIAC would have to be applied to each armed confrontation between non-State armed groups or between such groups and State forces on a case-by-case basis. It is not possible to generalize between regular forces on one side and criminals on the other, unless there is a sufficient level of coordination in a coalition of non-State armed groups fighting a common enemy and the other criteria of a NIAC are present.<sup>135</sup>

An important part of the harmful effects of urban violence in Rio de Janeiro results from armed disputes over territory between criminal factions and militarized police repression. There are reports that the Bonde do Zinho militia and the Terceiro Comando Puro criminal faction are allied to fight the Comando

132 Throughout 2017, interviews were conducted with residents of disadvantaged communities of Rio de Janeiro who had to leave their homes because of the violence, mainly due to disputes between rival factions and constant police incursions, with armed confrontation in regions close to their homes. See Maiara Folly, “Migrantes invisíveis: A crise de deslocamento forçado no Brasil”, Strategic Article No. 29, Instituto Igarapé, March 2018, available at: <https://igarape.org.br/wp-content/uploads/2018/03/Migrantes-invis%C3%ADveis.pdf>.

133 On the impact of armed conflict situations on essential public services for affected populations, see ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015, p.11; Saúl Franco *et al.*, “The Effects of Armed Conflict on Life and Health in Colombia”, *Revista Ciência & Saúde Coletiva*, Vol. 11, No. 2, 2006, available at: <http://dx.doi.org/10.1590/S1413-81232006000200013>; Geneva Water Hub, *The Protection of Water during and after Armed Conflicts*, Summary Report for the Global High-Level Panel on Water and Peace, University of Geneva, 14 June 2016, available at: [www.genevawaterhub.org/sites/default/files/atoms/files/gwh\\_ghlp\\_roundtable\\_armedconflicts\\_rev\\_march2017nomail\\_0.pdf](http://www.genevawaterhub.org/sites/default/files/atoms/files/gwh_ghlp_roundtable_armedconflicts_rev_march2017nomail_0.pdf).

134 ICRC, “Where We Work: Brazil”, available at: [www.icrc.org/en/where-we-work/americas/brazil](http://www.icrc.org/en/where-we-work/americas/brazil). The Geneva Academy, in its 2018 *War Report*, also refers to the situation in Rio de Janeiro as a high level of armed gang violence but not a NIAC: Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, available at: [www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf](http://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf). See also Robert Muggah, “Rio de Janeiro: A War by Any Other Name”, *Small Wars Journal*, 25 April 2017, available at: <https://smallwarsjournal.com/jrnl/art/rio-de-janeiro-a-war-by-any-other-name>.

135 See above note 99.

Vermelho criminal faction in some areas of Rio de Janeiro in an expansion plan,<sup>136</sup> but this criminal pact is not sufficiently coordinated to justify an assertion of aggregated intensity for the purpose of legally classifying a NIAC.

For the reason given above, the analysis of the intensity criteria indicates that, although some factors may characterize a spiral of violence, their combination does not result in the threshold required to classify the situation of Rio de Janeiro as a NIAC.

## Organization

With regard to the degree of organization required by armed groups, the criteria are the existence of a command structure, disciplinary rules and mechanisms of control within the group; the existence of “headquarters”; territorial control; the ability to have access to weapons and equipment for exclusive use by military troops; military recruitment and training; the ability to plan, coordinate, and execute continuous military operations, including troop movements and logistics; the ability to define a unified military strategy and use military tactics; the ability to speak with one voice and negotiate and conclude ceasefire or peace agreements; and the ability to implement and respect basic IHL obligations.<sup>137</sup> In Rio de Janeiro, some of these criteria are met, some are not so evident, and others are not met in terms of the organization of criminal factions.

It is not an easy task to determine the hierarchical composition of an armed group, but it is possible to identify a command structure, disciplinary rules and mechanisms of control within the group, the existence of “headquarters”, territorial control, the ability to have access to weapons and equipment for exclusive use by military troops, and the existence of military recruitment and training.

### *Command structure, disciplinary rules and mechanisms of control within the group*

The largest and best-known drug trafficking organized criminal groups are the Comando Vermelho (CV), the Terceiro Comando Puro (TCP) and Amigos dos Amigos (ADA), as well as cells of the São Paulo-based Primeiro Comando da Capital.

The militias, on the other hand, are mainly composed of former military personnel and police officers, and they exploit the population by levying illegal “taxes” for services, under the pretext of providing security. However, this gap between drug trafficking and militia-controlled *favelas* is quickly narrowing with the emergence of *narcomilicias* (narco-militias) – i.e., militia groups that are

136 See Herculano Barreto Filho, “Milícia do Rio se une ao tráfico em guerra contra o Comando Vermelho”, *UOL Notícias*, 1 November 2019, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2019/11/01/milicia-do-rio-se-une-ao-trafico-para-enfraquecer-o-comando-vermelho.htm>.

137 See above note 97.

increasingly involved in drug trafficking in the *favelas* they control.<sup>138</sup> The largest militia in Rio de Janeiro was born in the late 1990s as the Liga da Justiça and is now called Bonde do Zinho.<sup>139</sup>

Some might classify the *narcomilicias* as third-generation gangs due to their high degree of organization, international capacity and political goals.<sup>140</sup>

The CV has been described as a network of independent actors rather than a strict hierarchical organization led by a single actor, although there are high ranking-bosses within the structure.<sup>141</sup> The TCP and ADA emerged from disagreements within the CV; the TCP, rather than being a vertical mafia-type organization, functions as a horizontal coalition of local crime bosses that forge alliances based on mutually beneficial interests.<sup>142</sup>

The leader of the ADA faction was captured by police in 2011, and although it is reported that the drug trafficker continued to run the group from prison, in his absence, rival groups such as the CV and dissident ex-members have been fighting for control of the group's strongholds.<sup>143</sup>

The militia have a more structured organization<sup>144</sup> and more obvious political goals than other criminal groups;<sup>145</sup> they act more discreetly and try to avoid armed confrontation with security forces.<sup>146</sup> These organized criminal groups have their

138 On 26 October 2021, the secretary of State for the Military Police created a military judiciary police station specialized in the investigation of *narcomilicias* and complex crimes. Resolution No. 1827, *Diário Oficial*, Vol. 47, No. 205, 28 October 2021, available at: [www.ioerj.com.br/portal/modules/conteudoonline/mostra\\_edicao.php?k=5E72A42E-E19PF-445B-8351-80C4D500519C](http://www.ioerj.com.br/portal/modules/conteudoonline/mostra_edicao.php?k=5E72A42E-E19PF-445B-8351-80C4D500519C). See also above note 136; Kristina Hinz *et al.*, “The Rise Of Brazil’s Neo-Pentecostal Narco-Militia”, *Open Democracy*, 6 May 2021, available at: [www.opendemocracy.net/en/democraciaabierta/rise-narco-militia-pentecostal-brazil-en/](http://www.opendemocracy.net/en/democraciaabierta/rise-narco-militia-pentecostal-brazil-en/).

139 See Marcela Lemos, “Como Liga da Justiça se transformou no Bonde do Zinho, a maior milícia do RJ”, *BOL Notícias*, 26 August 2022, available at: [www.bol.uol.com.br/noticias/2022/08/26/como-liga-da-justica-se-transformou-no-bonde-do-zinho-maior-milicia-no-rj.htm](http://www.bol.uol.com.br/noticias/2022/08/26/como-liga-da-justica-se-transformou-no-bonde-do-zinho-maior-milicia-no-rj.htm).

140 See Carlos Frederico de Oliveira Pereira, “ADPF 635: Entrelaçamento do direito internacional dos direitos humanos e do direito internacional humanitário na repressão às gangues de 3ª geração com domínio territorial no Rio de Janeiro”, *Revista do Ministério Público Militar*, Vol. 46, No. 35, 2021.

141 See “Red Command”, *InSight Crime*, 17 July 2022, available at: [www.insightcrime.org/brazil-organized-crime-news/red-command-profile/](http://www.insightcrime.org/brazil-organized-crime-news/red-command-profile/).

142 See “Pure Third Command”, *InSight Crime*, 26 April 2018, available at: [www.insightcrime.org/brazil-organized-crime-news/pure-third-command/](http://www.insightcrime.org/brazil-organized-crime-news/pure-third-command/).

143 See “Amigos dos Amigos”, *InSight Crime*, 30 March 2018, available at: [www.insightcrime.org/brazil-organized-crime-news/amigos-dos-amigos/](http://www.insightcrime.org/brazil-organized-crime-news/amigos-dos-amigos/).

144 See Carolina Callegari, Luiz Ernesto Magalhães and Vera Araújo, “Milícia do Rio tem fornecedor de armas dos EUA; veja quem é quem na maior organização criminosa do estado”, *Extra*, 29 August 2022, available at: <https://extra.globo.com/casos-de-policia/milicia-do-rio-tem-fornecedor-de-armas-dos-eua-veja-quem-na-maior-organizacao-criminosa-do-estado-25562746.html>.

145 See Mariana Simões, “No Rio de Janeiro, a milícia não é um poder paralelo. É o Estado”, *Exame*, 3 January 2019, available at: <https://exame.com/brasil/no-rio-de-janeiro-a-milicia-nao-e-um-poder-paralelo-e-o-estado/> (featuring an interview with Professor José Claudio Souza Alves from the Federal Rural University of Rio de Janeiro). See also Gil Alessi, “Mais vivo do que nunca, tentáculo político da milícia mira as próximas eleições”, *El País*, 17 May 2018, available at: [https://brasil.elpais.com/brasil/2018/05/14/politica/1526325604\\_449819.html](https://brasil.elpais.com/brasil/2018/05/14/politica/1526325604_449819.html).

146 See GENI, “Historical Map of Armed Groups in Rio de Janeiro”, Fluminense Federal University, September 2022, available at: <https://geni.uff.br/2022/09/13/mapa-historico-dos-grupos-armados-no-rio-de-janeiro/>. See also “Mapa de tiroteios e operações policiais mostra que raramente confrontos acontecem em áreas de milícia”, *Profissão Repórter*, 30 May 2022, available at: <https://g1.globo.com/profissao-reporter/noticia/2022/05/30/mapa-de-tiroteios-e-operacoes-policiais-mostra-que-raramente-confrontos-acontecem-em-areas-de-milicia.ghtml>.

own internal codes of conduct,<sup>147</sup> career paths and even “trafficking tribunals”<sup>148</sup> for those who break their “law”.

### *Territorial control and existence of “headquarters”*

Criminal groups also have restricted areas of operation and share control of organized criminal activity in Rio de Janeiro’s *favelas* and other low-income neighbourhoods, and often use self-made barricades to hinder police operations in back streets and alleyways. “In some areas of Rio de Janeiro, gang control is so absolute, and legitimate state presence so absent, that police can only enter under threat of armed confrontation with traffickers.”<sup>149</sup>

The CV is the largest and oldest drug trafficking group operating in Rio de Janeiro and controls at least 60% of the *favelas* in the southern, central and northern zones of the city where most of the densely populated hillside *favelas* are found.<sup>150</sup> Rocinha, Complexo do Chapadão and Complexo do Alemão are some examples; the latter is where the headquarters of the CV are located.<sup>151</sup>

Compared to this drug trafficking group, the militias may come second in the number of *favelas* they control, but they are first in terms of controlling extensive areas, especially in the west of the city in flatter areas.<sup>152</sup>

The TCP’s bases are mainly concentrated in the north and west zones of Rio. The most recent movements point to the extinction of ADA, an exponential growth of the militia, and, as already noted, an alliance between

147 See Rafael Pereira, “Sob as leis do tráfico”, *Época*, 28 May 2004, available at: <https://revistaepoca.globo.com/Revista/Epoca/0,EDG64597-6014-315,00.html>; Anderson Justino, “Polícia Civil apreende ‘Estatuto’ e ‘10 mandamentos’ do Comando Vermelho”, *Meia Hora de Notícias*, 8 October 2019, available at: [www.meiahora.com.br/geral/policia/2019/10/5807578-policia-civil-apreende-estatuto-e-dez-mandamentos-do-comando-vermelho.html#foto=1](http://www.meiahora.com.br/geral/policia/2019/10/5807578-policia-civil-apreende-estatuto-e-dez-mandamentos-do-comando-vermelho.html#foto=1); Darcianne Diogo, “Estatuto do Comando Vermelho é encontrado dentro de cela de presídio”, *Correio Braziliense*, 21 September 2022, available at: [www.correiobraziliense.com.br/cidades-df/2022/09/5038456-estatuto-do-comando-vermelho-e-encontrado-dentro-de-cela-de-presidio-leia.html](http://www.correiobraziliense.com.br/cidades-df/2022/09/5038456-estatuto-do-comando-vermelho-e-encontrado-dentro-de-cela-de-presidio-leia.html).

148 See Vania Regina do Nascimento, “Dos tribunais do tráfico à mediação de conflitos”, Fluminense Federal University, 2013, available at: <http://ppg antropologia.sites.uff.br/wp-content/uploads/sites/16/2016/07/dos-tribunais-do-tr%C3%A1fico-a-media%C3%A7%C3%A3o-de-conflitos.pdf>. See also “Memória: Como funcionam os tribunais do tráfico nas favelas do Rio”, *Extra*, 23 June 2008, available at: <https://extra.globo.com/noticias/rio/memoria-como-funcionam-os-tribunais-do-trafico-nas-favelas-do-rio-531257.html>; “Supeitos do Tribunal do Tráfico são presos no Rio de Janeiro”, *Jornal da Record*, 22 May 2021, available at: [www.youtube.com/watch?v=1f5UYdOoJk](https://www.youtube.com/watch?v=1f5UYdOoJk).

149 P. Alston, above note 90, para. 7.

150 See Leslie Leitão and Carlos de Lannoy, “RJ tem 1,4 mil favelas dominadas por criminosos, aponta relatório”, *Globo.com*, 6 July 2020, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/07/06/rj-tem-14-mil-favelas-dominadas-por-criminosos-aponta-relatorio.ghtml> (discussing a report by the Civil Police). See also Nucleus for the Study of Violence, “Map of Armed Groups in Rio de Janeiro”, University of São Paulo, 2019, available at: <https://geni.uff.br/2022/09/13/mapa-historico-dos-grupos-armados-no-rio-de-janeiro/>.

151 See GENI, above note 146.

152 See Federal Fluminense University, above note 21.



the TCP and Bonde do Zinho with the aim of taking over *favelas* controlled by the CV.<sup>153</sup>

*Ability to have access to weapons and equipment for exclusive use by military troops, and military recruitment and training*

As mentioned above, organized crime in Rio de Janeiro has access to heavy weapons. A considerable number of rifles and grenades are seized from criminals in the city each year.<sup>154</sup>

Drug trafficking groups and militias even have international suppliers and benefit from a lack of strict oversight of the arms trade.<sup>155</sup> In addition, changes in legislation in recent years have allowed gun collectors to purchase large amounts of weapons and ammunition, and there are reports of alleged collectors supplying the arsenals of drug dealers and militiamen.<sup>156</sup>

With regard to recruitment and training, the experience of former police officers who join the militia is an asset for these criminal groups.<sup>157</sup> There are also indications that former military personnel train new members of drug trafficking groups in urban guerrilla tactics, survival in hostile environments and handling heavy weapons.<sup>158</sup>

*Ability to plan, coordinate, and execute continuous military operations, including troop movements and logistics*

Unlike the aspects of organization mentioned above, the information available does not allow us to assert that drug trafficking groups and militias have the ability to plan, coordinate and execute ongoing military operations, including troop movement and logistics. While there are some reports of members of criminal

<sup>153</sup> See above note 152.

<sup>154</sup> See above note 124.

<sup>155</sup> See Cecília Olliveira and Leandro Demori, “Arsenal global: A origem das munições dos tiroteios do Rio de Janeiro”, *The Intercept Brasil*, 16 December 2019, available at: <https://theintercept.com/2019/12/16/rio-municoes-balas-eua-bosnia-russia-guerra-fria/>; Carolina Callegari, Luiz Ernesto Magalhães and Vera Araújo, “Milícia do Rio tem fornecedor de armas dos EUA”, *Extra*, 29 August 2022, available at: <https://extra.globo.com/casos-de-policia/milicia-do-rio-tem-fornecedor-de-armas-dos-eua-veja-quem-quem-na-maior-organizacao-criminosa-do-estado-25562746.html>.

<sup>156</sup> See Igor Mello, “Exército enviará ao Ministério Público dados sobre colecionador que vendeu arsenal ao Comando Vermelho”, *UOL Notícias*, 27 January 2022, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2022/01/27/exercito-enviara-ao-mp-dados-sobre-colecionador-que-vendeu-arsenal-ao-cv.htm>.

<sup>157</sup> See Alba Zaluar and Isabel Siqueira Conceição, “Favelas sob o controle das milícias no Rio de Janeiro”, *São Paulo em Perspectiva*, Vol. 21, No. 2, 2007, available at: [http://produtos.seade.gov.br/produtos/spp/v21n02/v21n02\\_08.pdf](http://produtos.seade.gov.br/produtos/spp/v21n02/v21n02_08.pdf).

<sup>158</sup> See “No Rio, ex-milares ensinam táticas do Exército a facções”, *Veja*, 15 March 2018, available at: <https://veja.abril.com.br/brasil/no-rio-ex-militares-ensinam-taticas-do-exercito-a-faccoes/>; “Ex-milares treinam tráfico no Rio”, *Folha Online*, 4 February 2022, available at: [www1.folha.uol.com.br/folha/dimenstein/imprescindivel/semana/gd040202a100202.htm](http://www1.folha.uol.com.br/folha/dimenstein/imprescindivel/semana/gd040202a100202.htm); Flávio Costa and Sérgio Ramalho, “Sniper, caçador e silencioso: O ex-Bope que comandava o Escritório do Crime”, *UOL Notícias*, 29 April 2019, available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2019/04/29/capitao-adriano-milicia-ex-bope-escritorio-do-crime-rio-de-janeiro-rj.htm>.

groups circulating with weapons in *favelas* or travelling together in vehicles to frighten the population and carry out criminal activities,<sup>159</sup> these do not constitute continuous military operations to qualify as a non-State armed group in a NIAC.

*Ability to speak with one voice and negotiate and conclude ceasefire or peace agreements, and to implement and respect basic IHL obligations*

The ability to define a unified military strategy, to speak with one voice, to negotiate and to conclude ceasefire or peace agreements and, above all, to implement and respect basic obligations under IHL is not at all evident in the criminal groups operating in Rio de Janeiro.

As already mentioned, confrontations between criminal factions are very frequent and eventual pacts between armed groups do not standardize their way of acting or reflect a general unity. Furthermore, the State has never considered initiating negotiations to conclude ceasefire or peace agreements with drugs trafficking groups or militias.

The social and territorial control exercised by such violent and criminal groups is based on criminal activities and atrocities, and it is not credible to suggest that these groups can implement even the most basic principles of IHL.<sup>160</sup>

Some might argue that aspects of the intensity of the clashes and the organization of non-State actors meet the criteria necessary to qualify a NIAC, but as demonstrated, although the situation in Rio de Janeiro is very serious and challenging for the State response, a convincing combination of the required criteria is not reached and the very nature of the extreme urban violence remains a crime-fighting issue.

Additionally, the arguments in favour of applying IHL to the situation of Rio de Janeiro (more “legal certainty” to police and military personnel who fight violent crime, possibility of prosecuting criminals for war crimes, and greater and specific legal protection for the *favela* populations<sup>161</sup>) misrepresent the essence of IHL. The applicability of IHL cannot be based on apparent practical advantages that this legal system could offer in the fight against organized crime.

Targeting “the enemy” – in this case, criminals in densely populated communities – through incursions in a warlike manner is not the solution to fighting crime. Upholding the pattern of use of force reserved for the conduct of hostilities in wartime<sup>162</sup> in order to exempt police or military personnel involved in law enforcement actions from criminal prosecution for extrajudicial killings is

159 See Diego Haidar *et al.*, “Polícia investiga imagens de bonde de criminosos após morte de Ecko e monitora disputa por sucessão da maior milícia do RJ”, *Globo.com*, 14 June 2021, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2021/06/14/policia-investiga-imagens-de-bonde-de-criminosos-apos-morte-de-ecko-e-monitora-disputa-por-sucessao-da-maior-milicia-do-rio-gh.html>.

160 See above note 98.

161 See above notes 93 and 95.

162 In wartime, targeting and killing the enemy is not a crime because it is a military objective, but in law enforcement actions, the use of lethal force should be the last resort in the face of a serious, proven threat.

an alleged legal form of violation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>163</sup>

The possibility of prosecuting criminals for war crimes, not yet integrated into the Brazilian legal system,<sup>164</sup> seems to be an impact argument used to draw attention to the seriousness of the situation and not a technical argument based on the reality of the terrain. National criminal law has its own instruments for bringing criminal groups to justice, including special legislation to fight against organized crime that came into force as a result of Brazil's ratification of the UN Convention against Transnational Organized Crime.<sup>165</sup> In addition, in 2002 the National Council of Attorneys General established the National Group to Combat Criminal Organizations.<sup>166</sup>

The argument that IHL would provide more protection to the *favela* populations as a special legal framework designed to apply in times of extreme violence is dubious to say the least.<sup>167</sup> In general, the principles of human rights law afford broader and more extensive levels of protection.

Civilians not involved in crime, including children and the elderly, are killed as a result of fighting between criminal factions and, mainly, as a result of militarized police operations to repress violent organized crime.<sup>168</sup> From an IHL perspective, if not disproportionate to the expected military advantage, these killings of *favela* residents would be considered collateral damage<sup>169</sup> and not a serious crime to be investigated and prosecuted.

Adopting a war narrative that justifies the conduct of hostilities in a *favela* will result in greater exposure of the population to the dangers of armed

163 See above note 92.

164 Bill 4038/2008 (available at: <https://tinyurl.com/y2mvmebd>) provides for the crime of genocide; defines crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court; establishes specific procedural rules; and provides for cooperation with the International Criminal Court.

165 See Law No. 12.850/2013 (available at: [www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2013/lei/l12850.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm)), which defines criminal organizations and provides for criminal investigation, means of obtaining evidence, related criminal offences and criminal proceedings.

166 See the official website of the National Group to Combat Criminal Organizations, available at: [www.cnpq.org.br/site/index.php/gncoc-menu](http://www.cnpq.org.br/site/index.php/gncoc-menu).

167 According to the ICRC, "[t]he non-applicability of IHL does not necessarily mean lesser protection for the persons concerned. In such cases, human rights rules and peacetime domestic law would apply; they are more restrictive, for instance, regarding the use of force and detention of enemies, while IHL gives States greater latitude on these two aspects." ICRC, "Fundamentals of IHL", *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/law/fundamentals-ihl>.

168 See the number of victims of violence in Rio de Janeiro by age group in Fogo Cruzado, above note 118.

169 Rule 14 of the ICRC Customary Law Study refers to proportionality in attack, stating: "Launching 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, is prohibited." According to the commentaries on this rule, "[w]hile Additional Protocol II does not contain an explicit reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that, as a result, the principle of proportionality cannot be ignored in the application of the Protocol". 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 14, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

confrontation in a densely populated urban area and even in a social acceptance of extrajudicial killings.

Although the contours of the fight against violent organized crime in Rio de Janeiro do not characterize a NIAC, one may still argue that this is a “grey zone conflict”<sup>170</sup> situated in a space between war and peace where human rights rules are not sufficient to monitor the situation.

Situations of internal disturbance and tensions<sup>171</sup> are governed by domestic law and rules of international human rights law.<sup>172</sup> As already seen, the non-applicability of IHL does not necessarily mean lesser protection for the persons concerned. Human rights rules and domestic law “are more restrictive, for instance, regarding the use of force and detention of enemies, while IHL gives States greater latitude on these two aspects”.<sup>173</sup>

## Attempts to lower international human rights standards during law enforcement operations in Rio de Janeiro

Given that the state of Rio de Janeiro has not been able to tackle urban violence efficiently, some members of the Executive Branch and even some prosecutors and judges advocate lowering applicable human rights standards, particularly concerning the use of force.<sup>174</sup> The argument is based on, again, the need to

170 See Sven Peterke, *Regulating “Drug Wars” and Other Gray Zone Conflicts: Formal and Functional Approaches*, HASOW Discussion Paper No. 2, IRI-PUC, October 2012, available at: <https://igarape.org.br/wp-content/uploads/2016/04/Regulating-Drug-Wars.pdf>. See also C. F. de Oliveira Pereira, “Grey Zones and Crime Suppression”, above note 93.

171 According to the ICRC, internal disturbances involve “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.”

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras 4475–4476.

172 Protocol Additional (II) 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 1978).

173 See ICRC, above note 167.

174 See above note 93 and below notes 175 and 177.

provide “legal guarantees” to security forces or military troops engaged in law enforcement operations, including reducing the accountability of officials who use excessive force and/or carry out extrajudicial killings.

Although this is not the core discussion point of this paper, in order to exemplify some attempts to lower international human rights standards during law enforcement operations in Rio de Janeiro that make the populations of the *favelas* even more vulnerable, some initiatives that reflect a debate on the right to the inviolability of the home and the pattern of the use of force can be mentioned: (1) claims for collective search and seizure warrants;<sup>175</sup> (2) the use of snipers by the police, shooting from helicopters in densely populated areas;<sup>176</sup> and (3) bills intended to give law enforcement officers the presumption of self-defence in the event of an armed confrontation or imminent risk of armed confrontation.<sup>177</sup> In some extreme cases, international human rights treaties allow restrictions or even suspensions of some rights, but the rights to life and physical integrity, for example, are fundamental rights that cannot be derogated.<sup>178</sup>

In Brazil, as provided for in the Federal Constitution, only in exceptional cases of “state of defence” and “state of siege” can certain rights be restricted or suspended.

The “state of defence”<sup>179</sup> can be declared by the president in restricted and determined areas in order to promptly preserve or restore public order or social peace threatened by serious and imminent institutional instability or affected by

175 See “STJ considera ilegal busca e apreensão coletiva em comunidades pobres do Rio”, *Consultor Jurídico*, 5 November 2019, available at: [www.conjur.com.br/2019-nov-05/stj-considera-ilegal-busca-apreensao-coletiva-rio](http://www.conjur.com.br/2019-nov-05/stj-considera-ilegal-busca-apreensao-coletiva-rio). See also Habeas Corpus 435.934 in the Superior Court of Justice, available at: [www.conjur.com.br/dl/hc-stj-comunidades-pobres-rio.pdf](http://www.conjur.com.br/dl/hc-stj-comunidades-pobres-rio.pdf); and Habeas Corpus 154118 in the Supreme Court, available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5370727>.

176 In the scope of ADPF 635, the adoption of measures to reduce police lethality was once again considered by the courts. The Supreme Court ordered a plan and restricted the use of helicopters to cases of strict necessity, to be proven through a full and detailed report submitted at the end of the operation. Supreme Federal Court, “Emb.decl. na medida cautelar na arguição de descumprimento de Preceito Fundamental 635 Rio de Janeiro”, 3 February 2022, available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15351553094&text=.pdf>.

177 In early 2019, the Executive Branch forwarded to Congress a proposal to extend self-defence to security agents who are in armed confrontation or at imminent risk of armed confrontation (in the context of the bill that became known as the “anti-crime package”). The project also provided for the possibility of the judge reducing the penalty or not applying it in case of excessive use of force in police action due to “fear, surprise or violent emotion”. See Bill 882/2019, available at: [www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra?codteor=1712088&filename=PL+882/2019](http://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1712088&filename=PL+882/2019). At the end of 2019, and with the same argument of providing “legal protection to military and security agents”, the Executive Branch forwarded to Congress a new bill that expands the case scenarios of self-defence: see Bill 6125/2019, available at: [www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra?codteor=1836676&filename=PL+6125/2019](http://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1836676&filename=PL+6125/2019). In another attempt, in March 2022, the Executive Branch sent a new proposal to Congress based on the need to provide greater legal protection to security agents: see Bill 733/2022, available at: [www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra?codteor=2153078&filename=PL+733/2022](http://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2153078&filename=PL+733/2022).

178 See, for example, International Covenant on Civil and Political Rights, 171 UNTS 999, 16 December 1966, Art. 4; American Convention on Human Rights, 22 November 1969, Art. 27.

179 Brazilian Constitution, above note 1, Art. 136.

major calamities. In this state of exception, there may be coercive measures such as restrictions on the right to assemble, secrecy of correspondence and secrecy of communications.

If a measure taken during the state of defence is ineffective or in cases of serious commotion with national repercussions, or even in case of a declaration of war or a response to foreign armed aggression, a “state of siege”<sup>180</sup> may be declared by the president. In this state of exception, there may be (1) an obligation to stay in a certain location; (2) detention in a building not intended for those accused or convicted of common crimes; (3) restrictions relating to the inviolability of correspondence, secrecy of communications, the provision of information and/or freedom of the press, radio and television; (4) suspension of freedom of assembly; (5) house searches and seizures; (6) intervention in public service companies; and (7) requisition of goods.<sup>181</sup>

The “state of defence” and the “state of siege” have never been considered in the debate regarding urban violence in Rio de Janeiro. The Inter-American Court of Human Rights (IACtHR) has already decided that the suspension of human rights can hardly be justified in situations where the armed forces are used to control social protest, domestic disturbances, internal violence, public emergencies or criminality.<sup>182</sup>

Particularly with regard to the situation of Rio de Janeiro, international human rights organs have expressed concern about the “war approach”<sup>183</sup> and the consequent growing militarization of the fight against crime. A report of the situation of human rights in Brazil issued by the Inter-American Commission on Human Rights (IACHR) in 2021, calling for a citizen approach to public security, recommended the adoption of measures to revert the militarization of the police and the revision of protocols and guidelines of security forces that carry out law enforcement actions in order to ensure that the use of force respects the principles of legality, proportionality and absolute necessity.<sup>184</sup>

Besides, in the “ADPF of the *Favelas*”,<sup>185</sup> the Supreme Court also ruled that security agents must examine the proportionality and exceptionality of the use of force in concrete situations and in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

180 *Ibid.*, Art. 137.

181 *Ibid.*, Art. 139.

182 IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment (Merits, Reparations and Costs), 4 July 2007, para. 51, available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_166\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_166_ing.pdf).

183 See above note 90.

184 IACHR, *Situation of Human Rights in Brazil*, 2021, available at: [www.oas.org/en/iachr/reports/pdfs/brasil2021-en.pdf](http://www.oas.org/en/iachr/reports/pdfs/brasil2021-en.pdf).

185 See above notes 82–84.

## Concluding remarks

Although urban violence in Rio de Janeiro may be seen by some as “war”, the city is not living a NIAC and the solution to criminality will not be found by resorting to the military and applying IHL.

The political use of the term “war”, including by high-ranking government officials,<sup>186</sup> to try to justify a militarized response while shielding law enforcement agents from criminal liability for any excessive and disproportionate use of lethal force is dangerous for society. The warmongering discourse feeds into a collective fear that can result in an uninformed social acceptance of human rights violations, such as extrajudicial killings.

The notion of solving historical failures in the fight against organized crime through alleged tactical/operational military advantage while applying the “laws of war” means disregard for the rule of law and the effective transfer of responsibility and accountability from the state of Rio de Janeiro in providing internal security to the federal Armed Forces. The military are trained to fight wars and should only act in exceptional situations for a determined period and under tight civilian oversight.

Government initiatives over the last fifteen years have already demonstrated that the “hypermilitarization”<sup>187</sup> of the police and the “policialization” of the Armed Forces,<sup>188</sup> both based on a confrontation-centred policy,<sup>189</sup> do not provide effective and lasting solutions to public security issues. In addition, this militarized response to violent crime has resulted in human rights violations.

The essential scope of IHL is to limit the use of violence and to protect victims of war. In the context of Rio de Janeiro, international human rights law is the prevailing legal framework and IHL can only contribute as a normative inspiration that protects people from the effects of extreme violence: a reference of humanity, put simply. If, in times of war, there are rules that protect the civilian population and restrict means and methods of combat, then *a fortiori*, in other situations of violence, these principles must also be respected.

The failure by the State to tackle violent crime, impunity and police brutality needs to be faced in a determined, ethical, professional, competent and integrated fashion, detached from partisan or ideological interests. The

186 See the above section on “The ‘Militarization’ of Security: The Escalation of Warmongering Rhetoric and the Role of the Armed Forces”.

187 Giovane Matheus Camargo, Marcelo Bordin and Aknaton Toczec Souza, “As intervenções federais no Rio de Janeiro: A hipermilitarização do cotidiano”, *Revista do Núcleo de Estudos Paranaenses*, Vol. 4, No. 2, 2018, available at: <https://revistas.ufpr.br/nep/article/view/63837/37144>.

188 Natalia Viana cites the “PMização” of the Armed Forces, alluding the Military Police of the State of Rio de Janeiro, popularly called the PM (Polícia Militar). N. Viana, above note 110. See also “‘Dano Colateral’ aborda efeitos da atuação dos militares na segurança pública”, *Rede Brasil Atual*, 2 October 2021, available at: [www.redebrasilatual.com.br/politica/dano-colateral-militares-seguranca-publica/](http://www.redebrasilatual.com.br/politica/dano-colateral-militares-seguranca-publica/).

189 See above note 17.



affirmation of human rights and the construction of a citizen-based security policy – away from a model essentially based on confrontation operations – calls for the real engagement of all institutions and needs to be protected from electioneering interests.

# Militarization and privatization of security: From the War on Drugs to the fight against organized crime in Latin America

**Antoine Perret\***

Civil Society Organization Development Manager, International Code of Conduct Association, Geneva, Switzerland

Email: [antoine.perret@gmail.com](mailto:antoine.perret@gmail.com)

## Abstract

*Fifty-two years ago, in 1971, President Nixon declared the “War on Drugs”, identifying drug abuse as a public enemy in the United States. Since then, US drug policy has been militarized and, more recently, privatized. Every year, the US government increasingly contracts private military and security companies to provide intelligence, logistical support and training to armed forces in drug-producing or drug-transit States. In Latin America, this militarization and privatization has increased the intensity of violence and has complexified domestic*

\* Antoine Perret holds a PhD and an LLM in international Law from the European University Institute, and was Research Fellow at the Universidad de Los Andes (Bogotá), Columbia University (New York), the Centro de Investigación y Docencia Económicas (Mexico City) and American University (Washington, DC). The views expressed in this article reflect the author’s views only. Thanks are due to Anjela Jenkins and Cristina Valdés, as well as the peer reviewers and editors of the *Review*, for their constructive comments on previous versions of this article.

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*situations, to the extent that the existing international legal regimes now seem inappropriate to respond to the challenges posed by the War on Drugs. On the one hand, human rights law does not adequately address situations where the State faces organized crime groups that are able to control territory. On the other hand, international humanitarian law (IHL) was not created to address law enforcement situations, which the War on Drugs and the fight against organized crime ostensibly are.*

*This article examines the situation in Latin America, looking at examples of different types of situations through the lens of intensity and organization of the group involved and, in some cases, the group's control over territory. It discusses the application of IHL and human rights law (focusing on the inter-American system of human rights) in these situations and their complementarity, and debates how these bodies of law are adapting or may need to be adapted.*

**Keywords:** Latin America, Mexico, Colombia, War on Drugs, organized crime, IHL, human rights.

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## Introduction

Fifty-two years ago, in 1971, President Nixon declared the “War on Drugs”, identifying drug abuse as a public enemy in the United States.<sup>1</sup> This declaration represented a change in rhetoric for the United States, foreshadowing a change in the country’s approach to fighting drug abuse and drug trafficking.<sup>2</sup> In 1973, Nixon created the Drug Enforcement Administration (DEA) in order to execute “an all-out global war on the drug menace”.<sup>3</sup> Since the mid-1970s, the US government has invested billions of dollars in anti-drug assistance programmes around the world.<sup>4</sup> Initially, the focus was on source countries such as Colombia, Bolivia and Peru.<sup>5</sup> At the beginning of the War on Drugs, the United States treated the fight against drugs as a police problem, providing equipment and supplies to the police for counter-narcotic efforts. Since the 1980s, however, US drug policy has been militarized and, more recently, privatized – every year, the US government contracts more private military and security companies (PMSCs) to provide intelligence, logistical support and training to armed forces in drug-producing or drug-transit States.

1 PBS, “Thirty Years of America’s Drug War: A Chronology”, available at: [www.pbs.org/wgbh/pages/frontline/shows/drugs/cron](http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron) (all internet references were accessed in March 2023).

2 Clare Ribando Seelke, Liana Sun Wyler, June S. Beittel and Mark P. Sullivan, *Latin America and the Caribbean: Illicit Drug Trafficking and U.S. Counterdrug Programs*, Congressional Research Service, Washington, DC, 12 May 2011, pp. 9–10, available at: [www.fas.org/sgp/crs/row/R41215.pdf](http://www.fas.org/sgp/crs/row/R41215.pdf).

3 Claire Suddath, “A Brief History of The War on Drugs”, *Time*, 25 May 2009, available at: <http://content.time.com/time/world/article/0,8599,1887488,00.html>.

4 C. R. Seelke *et al.*, above note 2, pp. 9–10.

5 *Ibid.*, pp. 9–10.

Data suggest that drug trafficking constitutes one of the main activities of organized crime,<sup>6</sup> and large-scale criminal organizations have emerged in a number of contexts of weak governance, such as Colombia and Mexico.<sup>7</sup> These two countries are the site of major investments in militarizing drug policy under US cooperation frameworks known as the Plan Colombia<sup>8</sup> for Colombia and the Merida Initiative<sup>9</sup> for Mexico. In both situations, fighting between State security forces and sophisticated organized groups has been ongoing for decades, and the two countries have been influenced by US anti-narcotics policy implementing the same approach of militarization and privatization of security to fight organized crime, raising questions about the applicability of international humanitarian law (IHL).

The existing international legal regimes seem inappropriate to respond to the challenges posed by the War on Drugs. On the one hand, international human rights law (IHRL) does not adequately address situations where the State faces organized groups with the ability to challenge State authority and control territory. On the other hand, IHL applies only in situations of armed conflict; despite the “War on Drugs” label and the increasing use of military forces, this remains primarily a law enforcement initiative in which a determination of whether IHL applies should depend on an analysis of each context where anti-drug activities are carried out.<sup>10</sup>

The militarization and privatization of security have blurred the line between situations of armed conflict and peacetime, between the military and civilians. The Latin American continent has been the theatre of this evolution for decades, ever since the War on Drugs – long before the “War on Terror” – hit the continent. This article begins by providing a descriptive review of the

6 Letizia Paoli, “What Is the Link between Organized Crime and Drug Trafficking?”, *Rausch*, Vol. 6, No. 4-2017, 2018. The UN Convention on Transnational Organized Crime defines an organized crime group as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences ... in order to obtain, directly or indirectly, a financial or other material benefit”. UN Convention against Transnational Organized Crime and the Protocols Thereto, 2004, Art. 2.

7 Jonathan D. Rosen and Roberto Zepeda, *Organized Crime, Drug Trafficking, and Violence in Mexico: The Transition from Felipe Calderón to Enrique Peña Nieto*, Lexington Books, Lanham, MD, 2016.

8 See, for instance, Michael Shifter, “Plan Colombia: A Retrospective”, *Americas Quarterly*, 18 July 2012, available at: [www.americasquarterly.org/fulltextarticle/plan-colombia-a-retrospective/](http://www.americasquarterly.org/fulltextarticle/plan-colombia-a-retrospective/).

9 See, for instance, Ocampomi, “The Merida Initiative”, US Embassy and Consulates in Mexico, 7 September 2021, available at: <https://mx.usembassy.gov/the-merida-initiative/>.

10 IHL applies to law enforcement situations, while IHL applies to armed conflict. Even though military forces are often involved in law enforcement, the principal actor in law enforcement is the police (who are civilians). The concrete difference is the regulation of the use of force: the principles of necessity, proportionality and precaution are conceived differently. For instance, “under the conduct of hostilities paradigm, the *principle of precaution* requires belligerents to take constant care to spare the civilian population, civilians and civilian objects. On the contrary, under the law enforcement paradigm, all precautions must be taken to avoid, as far as possible, the use of force as such, and not merely incidental civilian death or injury or damage to civilian objects.” Gloria Gaggioli, “Legal Basis and Distinguishing Features of the Two Paradigms”, in Gloria Gaggioli (ed), *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, 2013, p. 9.

evolution of the drug war in Mexico and Colombia and the role of various organized groups, and discusses the application of IHL in this context. The article then analyzes the long-standing approach of the inter-American system of human rights on the interpretation and application of human rights law in light of IHL, concluding that the path opened by the Inter-American Court of Human Rights and its quasi-criminal function could be a model for addressing these hybrid situations of violence.

## Militarization of domestic security: Mexico

Although drug traffickers have operated in Mexico for more than half a century, drug-related violence started around the 1990s, when the drug market became more lucrative and the centralized power of the Mexican government started to slip.<sup>11</sup> Nevertheless, the Mexican government maintained a relatively passive approach to drug trafficking and its related violence until the election of President Calderón in 2006.<sup>12</sup> Shortly after, Calderón “declared war” on organized crime.<sup>13</sup> The United States put its support behind the Calderón administration, supporting the militarization of the fight against drug traffickers, which dramatically escalated the situation of violence.<sup>14</sup> The extent of the violence, in conjunction with other factors, suggests that the situation in Mexico may be an appropriate context in which to apply IHL. This part of the article analyzes and defines the situation of violence in Mexico, suggesting that it meets the legal criteria to be considered an armed conflict in which IHL should apply.

## The War on Drugs in Mexico

Tougher counter-drug efforts in the Gulf of Mexico shifted drug trafficking routes to Mexico in the 1980s,<sup>15</sup> and since 2000, Mexico has risen as a transit country and has

- 11 June S. Beittel, *Mexico: Organized Crime and Drug Trafficking Organizations*, Congressional Research Service, Washington, DC, 2022, available at: [www.fas.org/sgp/crs/row/R41576.pdf](http://www.fas.org/sgp/crs/row/R41576.pdf).
- 12 On the one side, the relationship between Mexican traffickers was cooperative during the 1980s. It can be described as a *Pax Padrino* or “Peace of the Godfather”: see Nathan P. Jones, “The State Reaction: A Theory of Illicit Network Resilience”, PhD diss., University of California Irvine, 2013.
- 13 “Mexico Troops Sent to Fight Drugs”, *BBC News*, 12 December 2006, available at: <http://news.bbc.co.uk/2/hi/americas/6170981.stm>.
- 14 On US–Mexican cooperation, see Clare Ribando Seelke and Kristin Finklea, *U.S.–Mexican Security Cooperation: The Mérida Initiative and Beyond*, Congressional Research Service, Washington, DC, 2017, available at: [www.fas.org/sgp/crs/row/R41349.pdf](http://www.fas.org/sgp/crs/row/R41349.pdf). On the escalation of violence, see, for example, Human Right Watch (HRW), *Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico’s “War on Drugs”*, 2011, available at: [www.hrw.org/sites/default/files/reports/mexico1111webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf).
- 15 David A. Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, Council on Foreign Relations Special Report No. 60, March 2011, available at: [www.cfr.org/sites/default/files/pdf/2011/03/Mexico\\_CSR60.pdf](http://www.cfr.org/sites/default/files/pdf/2011/03/Mexico_CSR60.pdf). See also Luis Astorga and David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context*, Mexico and the United States: Confronting the Twenty-First Century Working Paper Series, 2010, available at: <https://escholarship.org/uc/item/8j647429>.

become a target of US anti-drug assistance programmes.<sup>16</sup> Mexico is now a major supplier for all kinds of drugs – heroin, methamphetamine, marijuana and cocaine – to the US drug market.<sup>17</sup> The drug market between the United States and Mexico is estimated in US government reports as ranging from \$18 billion to \$39 billion in profits annually.<sup>18</sup>

By the time President Calderón took office in 2006, drug violence was already rising.<sup>19</sup> His administration chose to engage in the War on Drugs and heavily militarized the intervention of the Mexican State against the drug trafficking organizations (DTOs).<sup>20</sup> Efforts to counter police corruption, long a problem in Mexico, included replacing the police with military forces for law enforcement.<sup>21</sup> In 2006, the federal government deployed “tens of thousands of troops to man checkpoints, establish street patrols, shadow local police forces, and oversee other domestic law enforcement functions in high-drug violence states”.<sup>22</sup> The following administration did not change the government’s main strategy and continued to militarize the fight against DTOs, the latest example of this being the militarization of the border agency, which has been under military supervision since 2021 in order to support the fight against drug trafficking.<sup>23</sup>

Instead of stabilizing and de-escalating the situation, the involvement of the military in Mexico has caused things to deteriorate further, with increased rates of fatalities and frequency of episodes of violence.<sup>24</sup> The number of deaths related to organized crime has increased each year, from 2,826 in 2007 and 15,273 in 2010<sup>25</sup> to almost 30,000 in 2018.<sup>26</sup>

16 C. R. Seelke *et al.*, above note 2, pp. 9–10.

17 Council on Foreign Relations, “Mexico’s Long War: Drugs, Crime, and the Cartels”, 7 September 2022, available at: [www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels](http://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels).

18 Steven Scott Whitworth, “The Untold Story of Mexico’s Rise and Eventual Monopoly of Methamphetamine Trade”, master’s thesis, Naval Postgraduate School, Monterey, CA, 2008. See also US Department of Justice, Drug Enforcement Administration, 2013 *National Drug Threat Assessment Summary*, Springfield, VA, 2013, available at: [www.dea.gov/sites/default/files/2018-07/DIR-017-13%20NDTA%20Summary%20final.pdf](http://www.dea.gov/sites/default/files/2018-07/DIR-017-13%20NDTA%20Summary%20final.pdf); US Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2011*, 2011, available at: [www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf](http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf).

19 Council on Foreign Relations, above note 17.

20 “Mexico Troops Sent to Fight Drugs”, above note 13.

21 Guillermo Valdés, former director of Mexico’s National Intelligence and Security Center, said in an interview that the military option was the only option available to fight against DTOs in Mexico. Juan Diego Quesada, “El Chapo es un genio de los negocios”, *El País*, 11 December 2013, available at: [http://internacional.elpais.com/internacional/2013/12/11/actualidad/1386718386\\_361181.html](http://internacional.elpais.com/internacional/2013/12/11/actualidad/1386718386_361181.html). On police corruption, see Colleen W. Cook, *Mexico’s Drug Cartels*, Congressional Research Service, Washington, DC, 16 October 2007, p. 10, available at: [www.fas.org/sgp/crs/row/RL34215.pdf](http://www.fas.org/sgp/crs/row/RL34215.pdf).

22 D. A. Shirk, above note 15, p. 10.

23 Darinka Rodriguez, “El Ejército desplaza a Hacienda y se hace cargo de las aduanas mediante una nueva agencia nacional”, *El País*, 15 July 2021, available at: <https://elpais.com/mexico/2021-07-15/el-ejercito-desplaza-a-hacienda-y-se-hace-cargo-de-las-aduanas-mediante-una-nueva-agencia-nacional.html>. On the administration of Peña Nieto (2012–18), see, for instance, Patrick Corcoran, “Mexico Security Under Enrique Peña Nieto, 1 Year Review”, *InSight Crime*, 4 December 2013, available at: [www.insightcrime.org/news-analysis/mexico-security-under-enrique-pena-nieto-one-year-in](http://www.insightcrime.org/news-analysis/mexico-security-under-enrique-pena-nieto-one-year-in).

24 J. S. Beittel, above note 11, p. 7.

25 HRW, above note 14, p. 4.

26 Karina Suárez, “México alcanza un nuevo récord de asesinatos”, *El País*, 22 June 2018, available at: [https://elpais.com/internacional/2018/06/22/mexico/1529620697\\_155674.html#?rel=mas](https://elpais.com/internacional/2018/06/22/mexico/1529620697_155674.html#?rel=mas).

DTOs previously assumed a primarily defensive stance in the face of the War on Drugs.<sup>27</sup> However, starting in 2010, the nature of the violence has been evolving.<sup>28</sup> Attacks by DTOs have increasingly targeted politicians, killing them or making them disappear “presumably because they refused to cooperate with cartels”.<sup>29</sup> Massacres of civilians have become more common.<sup>30</sup>

DTOs in Mexico have evolved into military-type groups. They have access to military artillery, including rockets, grenade launchers and assault rifles,<sup>31</sup> mostly coming from the United States.<sup>32</sup> They have also developed their own new weaponry, such as *narcotankes* (improvised infantry-fighting vehicles),<sup>33</sup> and more recently they have used drones with C4 explosives and ball bearings strapped to them.<sup>34</sup> They are able to enter into direct confrontations and coordinated military actions against government security forces – on 23 July 2013, for example, six separate attacks on police left fifteen officers injured, as well as two dead.<sup>35</sup> Another spectacular example of the strength of Mexican DTOs occurred when State forces arrested Ovidio Guzmán López, son of the former leader of the Sinaloa Cartel: “[a]rmed men were seen firing on police with bodies strewn in the road”, forcing the police to withdraw without Guzmán in their custody in order to avoid further violence.<sup>36</sup> Sullivan and Logan write that the Los Zetas cartel “remain[s] one of the few criminal groups in the Americas willing to deliberately take head on a military checkpoint or patrol”,<sup>37</sup> which means that its military actions more closely resemble those of an insurgent group than a criminal group.

27 Ioan Grillo, “Reporting on the Front Lines of Mexico’s Drug War”, interview with National Public Radio, 24 October 2011.

28 Daniel Tovrov, “Mexico’s President Calderon to Keep Fighting Drug War”, *International Business Times*, 5 December 2011, available at: [www.ibtimes.com/mexicos-president-calderon-keep-fighting-drug-war-378914](http://www.ibtimes.com/mexicos-president-calderon-keep-fighting-drug-war-378914).

29 *Ibid.*

30 For a list of massacres of civilians, see “Factbox: Worst Atrocities in Mexico’s drug war”, *Reuters*, 13 August 2012, available at: [www.reuters.com/article/us-mexico-drugs-idUSBRE87C06820120813](http://www.reuters.com/article/us-mexico-drugs-idUSBRE87C06820120813).

31 Including the AK-47 (and its variant known as the *cuerno de chivo*), as well as modified AR-15s and M-16s. John P. Sullivan and Samuel Logan, “Los Zetas: Massacres, Assassinations and Infantry Tactics,” *The Counter Terrorist*, 24 November 2010, available at: [www.police1.com/terrorism/articles/los-zetas-massacres-assassinations-and-infantry-tactics-P55C81YakRLYCYk5/](http://www.police1.com/terrorism/articles/los-zetas-massacres-assassinations-and-infantry-tactics-P55C81YakRLYCYk5/).

32 Out of the total number of guns that are recovered in crimes in Mexico and traced, 90% are traced back to the United States. N. P. Jones, above note 12, p. 160.

33 John P. Sullivan, “From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America: Implications for Global Security”, Fondation Maison des Sciences de l’Homme Working Paper Series No. 9, April 2012, p. 5, available at: [http://halshs.archives-ouvertes.fr/docs/00/69/40/83/PDF/FMSH-WP-2012-09\\_Sullivan.pdf](http://halshs.archives-ouvertes.fr/docs/00/69/40/83/PDF/FMSH-WP-2012-09_Sullivan.pdf).

34 “CJNG usa drones con explosivos C4 y balines como forma de ataque”, *El Universal*, 18 August 2020, available at: [www.eluniversal.com.mx/nacion/cjng-usa-drones-con-explosivos-c4-y-balines-como-forma-de-ataque](http://www.eluniversal.com.mx/nacion/cjng-usa-drones-con-explosivos-c4-y-balines-como-forma-de-ataque).

35 Dalia Martínez and Marcos Muedano, “Saldo de 22 muertos en emboscadas contra PF”, *El Universal*, 24 July 2013, available at: [www.eluniversal.com.mx/estados/2013/impreso/saldo-de-22-muertos-en-emboscadas-contra-pf-91788.html](http://www.eluniversal.com.mx/estados/2013/impreso/saldo-de-22-muertos-en-emboscadas-contra-pf-91788.html).

36 “El Chapo: Mexican Police Free Drug Lord’s Son as Culiacán Battle Erupts”, *BBC News*, 18 October 2019, available at: [www.bbc.com/news/world-latin-america-50092641](http://www.bbc.com/news/world-latin-america-50092641).

37 J. P. Sullivan and S. Logan, above note 31.



The strategy of militarization, implemented to tackle the DTOs' evolution into military-type groups, has had a consequent impact on human rights. Several criticisms have been raised against the Mexican government for human rights abuses.<sup>38</sup> Since the Mexican government declared war on organized crime in 2006, documented human rights violations have increased substantially.<sup>39</sup> In 2011, Human Rights Watch (HRW) found "credible evidence of torture in more than 170 cases across ... five states"<sup>40</sup> and documented many "disappearances" in which security forces had apparently participated.<sup>41</sup> As part of the same investigation, HRW also found "credible evidence" that security forces had committed extrajudicial killings.<sup>42</sup> HRW concluded that "rather than strengthening public security in Mexico, Calderón's 'war' has exacerbated a climate of violence, lawlessness, and fear in many parts of the country".<sup>43</sup>

Despite a change of administration in 2012 and another in 2018, the militarization of the War on Drugs is still the strategy being implemented in Mexico. In 2018, the current administration backed constitutional reforms to authorize continued military involvement in public security for five years.<sup>44</sup> On the ground, military forces deployed by the previous administration are still in charge, "including in the exact places where Calderon famously sent them at the beginning of his administration".<sup>45</sup>

The militarization of the War on Drugs in Mexico and the significant number of fatalities involved raise the question of the classification of the situation. International lawyers have started to classify the situation as an armed conflict, which would mean that IHL applies in Mexico.<sup>46</sup> However, IHL was not intended to apply to law enforcement initiatives, and such an adaptation would arguably run counter to IHL's goals.

## The applicability of IHL in Mexico: defining the situation and the actors

The legal classification of the situation in Mexico has important consequences, particularly regarding the rules governing the use of force.<sup>47</sup> In case of an armed

38 See, for instance, Transform Drug Policy Foundations, *The War on Drugs: Undermining Human Rights*, Bristol, 1 June 2015, available at: <https://transformdrugs.org/assets/files/PDFs/count-the-costs-human-rights.pdf>.

39 HRW, above note 14, p. 5.

40 *Ibid.*, p. 5.

41 *Ibid.*, p. 6.

42 *Ibid.*, p. 7.

43 *Ibid.*, p. 5.

44 J. S. Beittel, above note 11, p. 12.

45 P. Corcoran, above note 23.

46 See, for instance, Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, p. 4; Antoine Perret, "The Role of the Inter-American System of Human Rights in the Regulation of Private Military and Security Companies (PMSCs) in Latin America", doctoral thesis, European University Institute, Florence, 2014, available at: [https://cadmus.eui.eu/bitstream/handle/1814/33870/2014\\_Perret.pdf](https://cadmus.eui.eu/bitstream/handle/1814/33870/2014_Perret.pdf); Chiara Redaelli, "La guerra contra las drogas: Desafíos para el derecho internacional humanitario", *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, Vol. 2, 2021, available at: <https://tinyurl.com/ynr2dw9e>.

47 G. Gaggioli, above note 10.

conflict, IHL must govern the conduct of hostilities, and both parties to an armed conflict are bound by it.<sup>48</sup> In situations of peace, by contrast, only IHRL applies and “all precautions must be taken to avoid, as far as possible, the use of force”.<sup>49</sup> As for Mexico’s war on organized crime, as there is no international armed conflict (State versus State), the legal classification of the situation is either a non-international armed conflict (NIAC) or a situation of internal tensions.

Even though there is no definition of armed conflict in IHL, international jurisprudence provides two conditions to determine if a situation is one of internal tensions or of armed conflict: the intensity of the violence and the degree of organization of the parties.<sup>50</sup> The intensity of the violence can be analyzed through an examination of factors including the duration of the conflict, the frequency of the acts of violence and military operations, and the nature of the weapons used.<sup>51</sup> Meanwhile, the degree of organization of the parties is often evaluated by considering whether or not an armed group has a chain of command; disciplinary rules and mechanisms within the group; headquarters; the ability to access weapons and military equipment; and the ability to plan, coordinate and carry out operations.<sup>52</sup>

As estimated drug-related violent deaths in Mexico now exceed 30,000 per year, and military forces have been deployed on a large scale,<sup>53</sup> the intensity of the violence is not controversial. With violence ongoing for more than seventeen years, there is also no doubt that the duration requirement is met.<sup>54</sup> Added to this is the fact that DTOs have access to military artillery and are capable of coordinating attacks against State forces. All of these factors suggest that the Mexican situation satisfies the requirement of intensity for classifying the situation as an armed conflict.

One of the most prominent organized crime groups active in Mexico is the Sinaloa Cartel (also known as the Sinaloa Federation), particularly during the period

48 It also important to note that “many rules previously applicable in international armed conflicts are now binding as a matter of customary law in non-international armed conflicts as well”, including the principle of distinction, the prohibition against indiscriminate attacks, and the duty to take precautions in attack. International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003, p. 4, available at: [www.icrc.org/en/doc/assets/files/other/ihlcontemp\\_armedconflicts\\_final\\_ang.pdf](http://www.icrc.org/en/doc/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf).

49 G. Gaggioli, above note 10, p. 9.

50 International Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562; ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66, Judgment (Trial Chamber II), 30 November 2005, paras 84–92. See also 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, pp. 69–70.

51 S. Vité, above note 50.

52 ICTY, *Tadić*, above note 50, para. 60.

53 Almost 30,000 violent deaths were reported in 2018: see K. Suárez, above note 26. The level of violence is not new and has lasted for more than ten years: the Mexican newspaper *Reforma* put the figure at 9,577 organized-crime-style homicides in 2012, while *Milenio* reported 12,390 for that year. See Cory Molzahn, Octavio Rodríguez Ferreira and David A. Shirk, “Drug Violence in Mexico: Data and Analysis through 2012”, Trans-Border Institute, University of San Diego, 2013, available at: <http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf>; Ioan Grillo, above note 27.

54 The Inter-American Commission on Human Rights (IACHR) has characterized a thirty-hour-long confrontation as an armed conflict. See IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, 13 April 1998.

of 2010 to 2014.<sup>55</sup> In order to evaluate the Sinaloa Federation, it is necessary to understand how the organization works. It was established in the 1990s by Joaquín “El Chapo” Guzmán and Héctor Luis Palma Salazar, and was built through a process of alliances between groups and inter-marriages among the leaders’ families.<sup>56</sup> Unlike other DTOs, the Sinaloa Federation concentrates solely on drug trafficking and does not seem to engage in other lucrative activities, such as extortion.<sup>57</sup> It is well known for its innovativeness in achieving its goals, such as building tunnels under the US–Mexico border or using catapults to send drugs over the international border fence.<sup>58</sup>

Although the Sinaloa Federation “is responsible for a great deal of carnage”, its “approach to killing has traditionally been discreet”.<sup>59</sup> The group’s leitmotif is that “[y]ou need to use violence frequently enough that the threat is believable. But overuse it, and it’s bad for business.”<sup>60</sup> That said, the Federation has engaged in at least two confrontations against other drug cartels: Los Zetas and, more recently, the Cartel de Jalisco Nueva Generación (Jalisco New Generation Cartel, CJNG).<sup>61</sup> The Sinaloa Federation began developing armed enforcer groups in 2005 and 2006 to counter Los Zetas’ attacks.<sup>62</sup> These affiliated armed groups were used to carry out paramilitary-style operations;<sup>63</sup> for instance, they were involved in the two-year battle for control of Ciudad Juárez that killed more than 5,000 people.<sup>64</sup> The violence used by the Sinaloa Federation is targeted more against other DTOs than against the State or the population, and its main purpose has been to maintain control over territories for the Federation’s drug trafficking activities.<sup>65</sup> As discussed above, the Federation’s ability to access weapons and military equipment and to plan, coordinate and carry out operations is well established.

55 “Sinaloa Cartel Profile”, *InSight Crime*, 4 May 2021, available at: <https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/>.

56 Patrick Radden Keefe, “Cocaine Incorporated”, *New York Times Magazine*, 15 June 2012, available at: [www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html](http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html).

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 For a history of the CJNG, see “Jalisco Cartel New Generation (CJNG)”, *InSight Crime*, 8 July 2020, available at: <https://insightcrime.org/mexico-organized-crime-news/jalisco-cartel-new-generation/>.

62 Wilson Center, “Sinaloa OCG/Organización del Pacífico [sic]”, available at: [www.wilsoncenter.org/sinaloa-ocgorganizaci%C3%B3n-del-pacifico](http://www.wilsoncenter.org/sinaloa-ocgorganizaci%C3%B3n-del-pacifico).

63 *Ibid.*

64 Ed Vulliamy, “Has ‘El Chapo’ Turned the World’s Former Most Dangerous Place into a Calm City?”, *The Guardian*, 19 July 2015, available at: [www.theguardian.com/world/2015/jul/19/mexico-drugs-cartel-joaquin-guzman](http://www.theguardian.com/world/2015/jul/19/mexico-drugs-cartel-joaquin-guzman).

65 As explained by Malcolm Beith, “[t]here is a level-headedness about the [Sinaloa] leadership that the other groups lack[.] ... To the authorities, first priority always has to be quelling violence. When other groups throw grenades into a crowd of innocents or behead people, it’s obvious what needs to be done. Sinaloa has perpetrated its share of violence, but by and large it did not cause disruption to the general well-being of the population.” Quoted in “How the Sinaloa Cartel Won Mexico’s Drug War”, *GlobalPost*, 28 February 2013, available at: [www.globalpost.com/dispatch/news/regions/americas/mexico/130227/sinaloa-cartel-mexico-drug-war-US-global-economy-conflict-zones](http://www.globalpost.com/dispatch/news/regions/americas/mexico/130227/sinaloa-cartel-mexico-drug-war-US-global-economy-conflict-zones).

In terms of organization, the Sinaloa Federation is an international or transnational enterprise.<sup>66</sup> It is based in the state of Sinaloa in northwestern Mexico and has operatives in at least seventeen Mexican states.<sup>67</sup> It works in numerous countries, such as Panama,<sup>68</sup> El Salvador,<sup>69</sup> Colombia,<sup>70</sup> the United States<sup>71</sup> and Australia.<sup>72</sup> Under the supervision of El Chapo, and now “El Mayo” and Chapo’s sons, the organization works as a federation of smaller groups, in which individual groups “run their operations like franchises”.<sup>73</sup> According to Keefe, “[t]he organizational structure of the cartel also seems fashioned to protect the leadership. No one knows how many people work for Sinaloa.”<sup>74</sup> Thus, it is not clear if the Sinaloa Federation fulfils the requirement of organization of an armed group. On the one hand, the organization is comparable to a multinational enterprise with “cells” around the world – this implies a great capacity of communication.<sup>75</sup> On the other hand, different independent organized crime groups compose the Sinaloa Federation, which means that, even though they receive orders from the same boss, the “chain of command” is flexible and depends on each group within the Federation. However, this *modus operandi* – the use of franchises and the resultant flexibility – is a strategy used for improving the Federation’s efficiency, not the mark of a lack of organization.

To summarize, and considering all the elements of the situation in Mexico discussed above (namely, the organization of some non-State armed groups and the intensity of the violence associated with these groups, including the types of weapons used), the conclusion is that during a specific period of time, the government of Mexico was/is involved in two parallel NIACs.<sup>76</sup> Even though the

66 Samuel Logan, “Tracking the Sinaloa Federation’s International Presence”, *InSight Crime*, 30 April 2013, available at: <https://insightcrime.org/news/analysis/tracking-the-sinaloa-federation-s-international-presence/>; <http://www.insightcrime.org/news-analysis/tracking-the-sinaloa-federations-international-presence>

67 Malcolm Beith, “The Current State of Mexico’s Many Drug Cartels”, *CTC Sentinel*, Vol. 6, No. 9, 2013, available at: <https://ctc.westpoint.edu/the-current-state-of-mexicos-many-drug-cartels/>.

68 See Marguerite Cawley, “4 of Mexico’s Cartels Operate in Panama: Officials”, *InSight Crime*, 17 September 2013, available at: [www.insightcrime.org/news-briefs/four-mexican-cartels-operate-in-panama-officials](http://www.insightcrime.org/news-briefs/four-mexican-cartels-operate-in-panama-officials).

69 See Héctor Silva Ávalos, “UN Confirms Links between El Salvador’s Perrones and Pacific Cartel”, *InSight Crime*, 19 August 2013, available at: [www.insightcrime.org/news-analysis/unodc-study-confirms-links-between-perrones-and-pacific-cartel](http://www.insightcrime.org/news-analysis/unodc-study-confirms-links-between-perrones-and-pacific-cartel).

70 See, for instance, Marguerite Cawley, “Colombia Seizes FARC Cocaine Destined for Sinaloa Cartel: Army”, *InSight Crime*, 18 August 2013, available at: [www.insightcrime.org/news-briefs/colombian-authorities-seize-farc-cocaine-destined-for-sinaloa-cartel](http://www.insightcrime.org/news-briefs/colombian-authorities-seize-farc-cocaine-destined-for-sinaloa-cartel); Marguerite Cawley, “Sinaloa Cartel May Have Presence in Southwest Colombia: Santos”, *InSight Crime*, 15 February 2013, available at: [www.insightcrime.org/news-briefs/sinaloa-cartel-presence-colombia-santos](http://www.insightcrime.org/news-briefs/sinaloa-cartel-presence-colombia-santos).

71 See C. W. Cook, above note 21, pp. 5–6, 8.

72 See Elyssa Pachico, “Court Docs Describe Sinaloa Cartel Expansion in Australia”, *InSight Crime*, 11 February 2013, available at: <https://insightcrime.org/news/brief/court-docs-describe-sinaloa-cartel-expansion-in-australia/>.

73 M. Beith, above note 67.

74 P. R. Keefe, above note 56.

75 *Ibid.*

76 Several authors have discussed the application of IHL to Mexico: see, for instance, A. Perret, above note 46; C. Redaelli, above note 46. The Geneva Academy’s Rule of Law in Armed Conflict (RULAC) portal has previously defined the situation as an armed conflict but recently changed its assessment, explaining that it is now difficult to attribute the ongoing violence and clashes to any particular party. Geneva Academy, “Mexico: Declassification of the Three Armed Conflicts Involving Drug Cartels on RULAC”, *RULAC*,

government does not recognize them as such, the level of organization of the Sinaloa Cartel and the CJNG, as well as the intensity of the armed violence between them and the Mexican armed forces, allows us to classify these two situations as NIACs, at least for some period of time.

However, it is important to note that IHL regulates armed conflict between two or more parties, not law enforcement initiatives. An over-application of IHL does not always yield positive results because it typically occurs at the expense of the application of IHRL, which is potentially detrimental because in certain cases, human rights law can offer better protection against the use of force and the deprivation of freedom.<sup>77</sup>

## Privatization of military intervention: Colombia

This part of the article explores the US intervention in Colombia. The War on Drugs in Colombia takes place in the midst of a NIAC, and the US supports the State in its fight against armed groups that also participate in drug trafficking. The following sections describe the privatization of US support to Colombia and how it must be classified using IHL, concluding that the US government's lack of control over the activities of the PMSCs which it has contracted limits the United States' participation in the NIAC, hence limiting the application of IHL.

### The US War on Drugs in the Colombian armed conflict

For sixty years, Colombia has experienced an armed conflict, which is considered as a NIAC. The presence of various organized armed groups, the intensity of the violence and the duration of the conflict make the classification of the situation as an armed conflict unproblematic, and the NIAC has been recognized for many years.<sup>78</sup> The peace process and the signature of a historical agreement in August 2016 ended the confrontation between the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) and the Colombian government.<sup>79</sup> However, several NIACs continue to exist between the government and various armed groups.<sup>80</sup> The International Committee of the

12 December 2022, available at: [www.rulac.org/news/mexico-declassification-of-the-three-armed-conflicts-involving-drug-cartels](http://www.rulac.org/news/mexico-declassification-of-the-three-armed-conflicts-involving-drug-cartels).

77 Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 19.

78 See, for example, Rafael Nieto Navia, "¿Hay o no hay conflicto armado en Colombia?", *Anuario Colombiano de Derecho Internacional*, Vol. 1, 2008.

79 National Government of Colombia and FARC, *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, 2016, available at: [www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx](http://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx).

80 Angélica Padilla and Ángela Bermudez, "Normalizar el conflicto y des-normalizar la violencia: Retos y posibilidades de la enseñanza crítica de la historia del conflicto armado colombiano", *Revista Colombiana de Educación*, No. 71, 2016, pp. 201–202, available at: <https://revistas.pedagogica.edu.co/index.php/RCE/article/view/4087/3481>.

Red Cross (ICRC) identifies at least five ongoing armed conflicts in Colombia: (1) the National Liberation Army (Ejército de Liberación Nacional, ELN) versus the State; (2) the Gulf Clan versus the State; (3) the Popular Liberation Army (Ejército Popular de Liberación, EPL) versus the State; (4) FARC dissidents versus the State; and (5) clashes between the ELN and EPL.<sup>81</sup>

Since the beginning of the Colombian armed conflict, the United States has been collaborating militarily with the Colombian government. The launch of Plan Colombia in 2000 increasingly militarized the fight against drugs and promoted its privatization, as the US Departments of State and Defense have contracted PMSCs to carry out activities such as providing logistics support for reconnaissance airplanes and maintaining an intelligence database.<sup>82</sup>

As noted above, the concurrent War on Drugs and fight against organized crime in Colombia take place in a situation of armed conflict,<sup>83</sup> and the United States intervenes in Colombia to support the government in its fight against armed groups that also participate in drug trafficking. As the US intervention/support and the NIAC overlap, IHL applies to conduct that has a nexus to the conflict; however, the US intervention has been privatized and its execution outsourced to PMSCs, blurring the line between military and civilian activities.

## Qualification of the US intervention under IHL

In order to assess the applicability of IHL to the US intervention in Colombia, there is a need to classify this intervention. For the ICRC, “armed conflicts involving foreign intervention do not form a third category of conflicts, but merely constitute a specific manifestation, in a particular context, of an IAC [international armed conflict], a NIAC or both types of conflict simultaneously”.<sup>84</sup> As mentioned above, in Colombia there are several NIACs; US support to the Colombian government therefore fits into the situation where there is a foreign intervention in support of the State party to a NIAC.<sup>85</sup>

This is possible to contemplate because the International Court of Justice (ICJ) accepted a fragmented application of IHL in the *Military and Paramilitary Activities in and against Nicaragua* case.<sup>86</sup> In this case, the Court considered two different conflicts: one between the Nicaraguan government and the Contras, and another between the Nicaraguan and US governments.<sup>87</sup> The ICRC refers to this

81 Catalina Oquendo, “Hay cinco conflictos armados hoy en Colombia”, *El País*, 21 July 2019, available at: [https://elpais.com/internacional/2019/07/20/colombia/1563649226\\_997490.html](https://elpais.com/internacional/2019/07/20/colombia/1563649226_997490.html).

82 US Department of State, *Report to Congress on Certain Counternarcotics Activities in Colombia*, 2010.

83 R. Nieto Navia, above note 78.

84 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, p. 1229.

85 *Ibid.*

86 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986.

87 *Ibid.*

approach as “double classification”, which is a “compromise solution according to which IHL of IACs would apply ... between the intervening State and the territorial State, while IHL of NIACs would apply in parallel between the intervening State and the non-State armed group”.<sup>88</sup>

In this case, as the involvement of the United States in Colombia has been privatized, it complexifies the classification of a potential armed conflict. The activities of a private actor, such as a PMSC, can be understood as reflecting the involvement of a State in an armed conflict only if two conditions are met: (1) if the private actor actually takes part in hostilities, *and* (2) if it is acting as an agent of the foreign State when assisting one of the parties to the conflict.<sup>89</sup>

The first condition – the private actor actually taking part in hostilities – is officially not met in the Colombian context because US PMSCs working under Plan Colombia should not participate in hostilities, since the US Congress prohibited all activities that involve direct participation in the armed conflict.<sup>90</sup> Despite this *de jure* prohibition on such participation, however, some US PMSCs, such as DynCorp, *de facto* have participated in the conflict.<sup>91</sup>

The US State Department has contracted DynCorp to fumigate illegally cultivated coca plants.<sup>92</sup> During DynCorp’s fumigation operations, two or three combat helicopters accompany the planes that drop the glyphosate.<sup>93</sup> The helicopters “have a mixed crew composed of both contractors and members of the National Police”.<sup>94</sup> DynCorp’s fumigation contract started in 2000, and between 2001 and 2002, around ten aircraft were attacked per month; this increased in 2003 to reach a peak of seventy-three attacks per month.<sup>95</sup> The number of attacks on fumigation planes decreased for several years, but in 2013, several serious attacks forced the United States and Colombia to stop the fumigation for some time.<sup>96</sup>

88 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, para. 6.10. See also 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, paras 257–264.

89 Éric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012.

90 US law limits the outsourcing of inherently governmental functions; combat is one of these functions. See US Office of Management and Budget, “Circular No. A-76: Performance of Commercial Activities”, revised 2003. See also a detailed study on US law in Kristine A. Huskey and Scott M. Sullivan, *The American Way: Private Military Contractors and U.S. Law after 9/11*, PRIV-WAR National Reports Series No. 02/08, 30 April 2009.

91 Antoine Perret, “Las compañías militares y de seguridad privadas en Colombia: ¿Una nueva forma de mercenarismo?”, Universidad Externado de Colombia, Bogotá, 2009.

92 US Department of State, above note 82.

93 US General Accounting Office, “Drug Control: U.S. Non Military Assistance to Colombia is Beginning to Show Intended Results, but Programs Are not Readily Sustainable” Report to the Honorable Charles E. Grassley, Chairman, Caucus on International Narcotics Control, U.S. Senate, GAO-04-726, 2004, p. 9, available at: [www.gao.gov/new.items/d04726.pdf](http://www.gao.gov/new.items/d04726.pdf).

94 “Mercenarios”, *Semana*, 13 August 2001, available at: [www.semana.com/nacion/articulo/mercenarios/46935-3](http://www.semana.com/nacion/articulo/mercenarios/46935-3).

95 US General Accounting Office, above note 93, p. 1.

96 Andrés Bermúdez Liévano, “Dos meses sin fumigación de coca”, *La Silla Vacía*, 15 December 2013, available at: [www.lasillavacia.com/historias/silla-nacional/dos-meses-sin-fumigacion-de-coca/](http://www.lasillavacia.com/historias/silla-nacional/dos-meses-sin-fumigacion-de-coca/). See also Chris Kraul, “Anti-Coca Spraying Halted in Colombia after 2 U.S. Pilots Shot Down”, *Los Angeles*



DynCorp manages its own fumigation operations, but the legal restrictions on contractors' participation in the conflict mean that the Colombian National Police are responsible for managing and overseeing the helicopter gunship portion of the fumigation operation.<sup>97</sup> However, this oversight does not guarantee that contractors are not participating in the conflict, and it appears that the contractors retain decision-making power regarding the use of force, and use it "preventively".<sup>98</sup> Thus, the presence of DynCorp contractors in these helicopters and their participation in repelling attacks should be considered direct participation in the Colombian armed conflict.

The second condition to classify US participation in a parallel armed conflict in Colombia is to determine whether the PMSCs are acting as an agent of a foreign State (the United States) when assisting one of the parties to the conflict. International law provides that the actions of persons acting *de facto* as an organ of a State on behalf of a State can be attributed to that State.<sup>99</sup> In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ stated<sup>100</sup> that "complete dependence" should be demonstrated:

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.<sup>101</sup>

The acts of a private actor that are directed, controlled or under the instructions<sup>102</sup> of a State can also be attributed to that State.<sup>103</sup> This control has been defined differently in several cases. From the lowest to the highest threshold, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined "overall control" in the *Tadić* case,<sup>104</sup> while the ICJ referred to "effective control" in the *Nicaragua* case.<sup>105</sup>

Translated to the context in Colombia, acts committed by US-contracted PMSCs in the Colombian conflict can only be attributed to the US government if there is a very close relationship, beyond mere supervision, between the PMSCs and the US government, or, to use the same language as the ICJ, if the PMSCs act in "complete dependence" on the sending State.

*Times*, 16 December 2013, available at: <http://articles.latimes.com/2013/dec/16/world/la-fg-colombia-us-planes-20131217>.

97 "Mercenarios", above note 94.

98 Employee of PMSC, Bogotá, September 2008, quoted in A. Perret, above note 91.

99 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 (ARSIWA), Art. 4.

100 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

101 *Ibid.*, para. 392.

102 ARSIWA, above note 99, Art. 8.

103 ICTY, *Tadić*, above note 50, paras 116–119.

104 Overall control is defined as "control going beyond the mere financing and equipping of ... forces and involving also participation in the planning and supervision of ... military operations". *Ibid.*, paras 131, 145.

105 ICJ, *Nicaragua*, above note 86, paras 116, 123.

However, the problem in the Colombian context is that supervision is missing: the US Embassy, which is supposed to monitor all contracts performed under Plan Colombia, is only interested in the results of the contracted-for services and activities, not the process of fulfilling the contracts.<sup>106</sup> A report on “contracting oversight” by the US Senate Committee on Homeland Security and Governmental Affairs reached similar conclusions about the lack of supervision, stating that the “State Department, which has awarded over \$1 billion in counternarcotics contracts in Latin America to one company, DynCorp, has conducted sporadic oversight of that company”.<sup>107</sup> In sum, in light of these facts, the control exercised by the United States is not likely to allow the conclusion that US PMSCs are acting as agents of the United States when assisting the Colombian government.

The lack of control of the US over its Plan Colombia contractors means that the Colombian NIAC is not internationalized and that IHL does not apply to the United States in its War on Drugs in Colombia. Even though PMSC employees perform military work for a State, under IHL, they are civilians who sometimes participate in hostilities – a conclusion that undermines the critical IHL distinction between “civilian” and “military”.

As a result of the above, in Colombia, the United States is supporting the Colombian government in the latter’s fight against several armed groups. The United States’ War on Drugs in Colombia does not internationalize the Colombian NIAC because the United States lends its efforts at the service of, rather than against, the Colombian government. Moreover, there is no parallel armed conflict between the United States and Colombian armed groups. Even though US PMSCs *do*, in some cases, participate in hostilities, inadequate supervision on the part of the United States makes it impossible to conclude that the PMSCs’ acts are attributable to the United States and, hence, that the United States is taking part in the hostilities. To conclude, the manner in which the War on Drugs is implemented is contrary to the logic of IHL. IHL *should* apply to the War on Drugs, but the tactic employed to implement it – through private actors on behalf of the United States – prevents the application of IHL.

In light of the above, it can be observed that the privatization of the War on Drugs challenges the application of IHL and compromises its main objective. In Colombia, as in Mexico, the evolution of the use of force by both States and criminal organizations challenges IHL’s goal of distinguishing between those who participate to hostilities – *military personnel or persons with a continuous fighting function* – and those who do not – *civilians*. International law needs to evolve in order to face these challenges.

106 Employee of the US embassy, Bogotá, 2007, quoted in A. Perret, above note 91.

107 Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs of the US Senate, *New Information about Counternarcotics Contracts in Latin America: Majority Staff Analysis*, 2011, p. 11.

The next part of the article will analyze how the inter-American system of human rights has dealt with similar issues, in order to explore the possibilities stemming from its experience.

## **IHL and human rights law: Following the Inter-American Court of Human Rights' lead**

This article has analyzed how the implementation of the War on Drugs in Mexico and Colombia challenges the applicability of IHL. Firstly, the two cases illustrate that the conduct of the War on Drugs presents challenges for determining what body of law applies to the situation. Secondly, the evolution of criminal groups into organized armed groups (such as the Sinaloa Federation) and the shift to provision of security through the use of PMSCs make it difficult to distinguish between situations in which IHL or IHRL applies. This third part of the article first explores the inter-American system of human rights' practice of using IHL to interpret the American Convention on Human Rights (ACHR), and argues that its "humanitarization" of human rights could help address the challenges posed by the evolution of the use of force in situations of armed conflict, internal tensions, and peace.<sup>108</sup> It then focuses on the relevance of such practice for situations like Mexico and Colombia.

The development of the inter-American system occurred in a context where military and other authoritarian governments were almost the norm in Latin America, from the mid-twentieth century until the early 1980s. "States of emergency have been common in Latin America, the domestic judiciary has often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon."<sup>109</sup> Until the 1980s, the Latin American context was marked by systematic murder, torture, disappearances, censorship of the media, and limitations on political rights. This historical context has shaped inter-American jurisprudence in a manner that it is now – in a context of endless "war" – a relevant example for the international application of IHL and IHRL.

On several occasions the Inter-American Court of Human Rights (IACtHR) has used external sources, such as international treaties other than the ACHR, case law, and even soft law, to interpret the ACHR.<sup>110</sup> This practice has roots in Article 64 of the ACHR, which has been interpreted by the Court in its Advisory Opinion on "*Other Treaties*" *Subject to the Consultative Jurisdiction of*

108 Hélène Tigroudja, "The Inter-American Court of Human Rights and International Humanitarian Law", in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013.

109 Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed, Oxford University Press, New York, 2000, p. 869.

110 See, for instance, IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, 28 August 2002.

*the Court (Article 64 American Convention on Human Rights)*. The Court held that “other treaties” in the sentence of Article 64 meant

any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.<sup>111</sup>

In its first case, the IACtHR cited the UN Human Rights Committee’s views on indemnification for human rights violations.<sup>112</sup> Since then, the Inter-American Commission on Human Rights (IACHR) and the IACtHR have repeatedly sought guidance in sources ranging from international conventions to soft-law instruments in order to inform their interpretation of the ACHR. This practice of referencing non-inter-American international law instruments to interpret the ACHR has occurred frequently enough in the area of IHL that it is accepted that the Court “makes room for extending its competence to assessing IHL concerns”.<sup>113</sup>

The Court has limited the use of external sources to “only” interpreting the ACHR and not directly interpreting IHL. In 1999, however, the IACHR suggested that it could interpret IHL directly and issued an opinion directly addressing violations of IHL.<sup>114</sup> The IACtHR subsequently rectified this position, holding that neither the Commission nor the Court were competent to determine whether a rule of IHL had been breached; rather, these bodies could use Article 3 common to the four Geneva Conventions in interpreting a breach of the ACHR.<sup>115</sup> The ACHR “has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself and not with the 1949 Geneva Conventions”.<sup>116</sup>

The IACtHR has used its ability to interpret the substance and the scope of the ACHR in armed conflict in accordance with the latter’s Article 29(b). For instance, in the *Las Palmeras v. Colombia* case, the Court used IHL to interpret the substance and scope of the ACHR in armed conflict.<sup>117</sup> In the *Mapiripán Massacre v. Colombia* case, the Court referred to common Article 3, as well as Additional Protocol II.<sup>118</sup> Similarly, in the *Ituango Massacres v. Colombia* case,

111 IACtHR, “Other Treaties” *Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, p. 12, para. 52.

112 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 28.

113 Lucas Lixinski, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law”, *European Journal of International Law*, Vol. 21, No. 3, 2010. See also H. Tigroudja, above note 108.

114 The IACHR declared that Argentina had violated common Article 3. IACHR, *Abella*, above note 54.

115 IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment (Merits), 25 November 2000, paras 208–209.

116 IACtHR, *Las Palmeras v. Colombia*, Judgment (Preliminary Objections), 4 February 2000, para. 33.

117 *Ibid.*, para. 33; American Convention on Human Rights, 1969 (ACHR), Art. 29. Restrictions regarding interpretation: “No provision of this Convention shall be interpreted as: ... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

118 IACtHR, *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 15 September 2005, para. 114.

the Court interpreted the freedoms of movement, property, and private and family life in light of IHL.<sup>119</sup>

The late Judge Cançado Trindade played a significant role in integrating other international jurisprudence and promoting the universalism of human rights.<sup>120</sup> He argued, for instance, that common Article 3 is part of *jus cogens*, and that regional courts are encouraged to abandon a traditional legal approach based on a material breach of their constitutive instrument in favour of a focus on the obligation *erga omnes* to protect individuals.<sup>121</sup> He justified his argument by explaining that the ICJ has not been able to protect the human person at the international level, and thus specialized courts have to assume this role.<sup>122</sup>

Using IHL in a human rights framework, as the IACtHR and IACHR have repeatedly done, results in a “humanitarization of the International Law of Human Rights”.<sup>123</sup> This has “contributed to the bridging of rules that are technically different but aim for the same goal, that is, the protection of private persons”.<sup>124</sup> This could be one solution for tackling the current evolution of the use of force if followed by both domestic and international courts.

The way the IACtHR has worked is also relevant for dealing with the current challenges of the militarization and privatization of the fight against organized crime in Latin America. As mentioned above, the Court was confronted with mass State-sponsored violations of fundamental rights from its first contentious case. The dynamics of these violations, in which the State itself systematically committed and then concealed crimes against its citizens, came to shape the Court’s remedial practice. The Court has supervised prosecution,

119 IACtHR, *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, paras 201–235 (freedom of movement), 169–200 (property and private and family life). See also IACtHR, *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 20 November 2013, paras 221, 349, 352, 353.

120 Judge Cançado Trindade himself stated: “I feel grateful because the Court has adopted my reasoning, which today is an *acquis*, a conquest of its *jurisprudence constante* on the matter. Now that my time as Incumbent Judge of this Court expires, a Court which has assumed a vanguard position among the contemporary international courts regarding to this matter in particular, I feel entirely free to point out that this is an advance that admits no stepping back. I insist (considering that very soon, on January 1, 2007, the time to silence *sic* in my present office shall come) that this Court cannot let itself stop or regress its own jurisprudence regarding imperative law (*jus cogens*) within this scope of protection of the human being, regarding both substantive and procedural law.” IACtHR, *La Cantuta v. Peru*, Separate Opinion of Judge A. A. Cançado Trindade, 29 November 2006, para. 61. On the influence of Judge Cançado Trindade on the jurisprudence of the Court, see Elise Hansbury, *Le juge interaméricain et le jus cogens*, eCahiers de l’Institut No. 11, 2011, Chap. 3.

121 IACtHR, *Las Palmeras v. Colombia*, Judgment (Merits), Joint Separate Opinion of Judges A. A. Cançado Trindade and M. Pacheco Gómez, 6 December 2001, paras 7–8. See also IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Judgment (Merits, Reparations and Costs), Dissenting Opinion of Judge A. A. Cançado Trindade, 1 March 2005, para. 40.

122 See also IACtHR, *Serrano-Cruz*, Dissenting Opinion of Judge A. A. Cançado Trindade, above note 121, para. 45.

123 H. Tigroudja, above note 108, p. 473.

124 *Ibid.*, p. 473.

telling the State what lines of investigation it must explore, and it has named individuals that should be investigated. This is an extension of the Court's mandate into a form of quasi-criminal review.<sup>125</sup> The Court has interpreted its "mandate to allow it to order, monitor and guide – in great detail, at random intervals, over an indefinite number of years, and in dialogue with all the litigating parties – the substantive and procedural aspects of national prosecutions as they unfold."<sup>126</sup>

The IACtHR itself will not conduct prosecutorial acts, but its "quasi-criminal jurisdiction should be considered as a complement and, in certain situations, an alternative to the work of the current international and hybrid criminal tribunals".<sup>127</sup> Again, this quasi-criminal jurisdiction is particularly relevant in the current context of evolution of the use of force against organized crime groups and should be replicated internationally or domestically as it allows better accountability and access to justice for the victims.

This approach brings several benefits for the regulation of State activities (particularly the use of force) and for bringing justice to victims, especially in the context of the War on Drugs or the fight against organized crime as it is happening in Mexico and Colombia. The benefits can be listed as follows.

First, the mere existence of the regional Court is a benefit as it is cost-effective compared to any other international justice body and has a better understanding of the reality within the region due to constant monitoring of the situation. Each regional system, in the Americas, Africa and Europe, includes a complaints mechanism through which individuals can seek justice and reparation for human rights violations committed by a State party.<sup>128</sup>

The second benefit comes from the fact that the approach is operational and linked to the existing situation. As discussed above, the evolution of the situation surrounding the fight against organized crime and the War on Drugs, such as in Mexico and Colombia, illustrates the need for the international legal framework to adapt. This adaptation needs to be pragmatic, recognizing the reality of the situation (the threat to the State and its institutions) and the urgent need to regulate the use of force in order to provide justice when needed. As suggested by Clapham, "rather than looking for an overarching theory, the time has come to focus on particular contexts and consider the policy choices available and what is at stake".<sup>129</sup> In this vein, this article suggests following the IACtHR's practice of using IHL to interpret human rights obligations. This will continue to

125 Alexandra V. Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", *American Journal of International Law*, Vol. 107, No. 1, 2013.

126 *Ibid.*, p. 31.

127 *Ibid.*, p. 9.

128 For a comparative analysis of the existing regional systems of human rights, see Alexandra V. Huneeus and Mikael Rask Madsen, "Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems", *International Journal of Constitutional Law*, Vol. 16, No. 1, 2018.

129 Andrew Clapham, "Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability", *Human Rights and International Legal Discourse*, Vol. 12, No. 1, 2018, p. 9.

deepen the relationship between IHL and IHRL,<sup>130</sup> following the interoperability<sup>131</sup> or operational approach.<sup>132</sup>

Interoperability is a central concept in communications and information technology, and “refers to the ability of two complex systems to interact together in a harmonious way to achieve effective functionality, compatibility and mutual outcomes, through various processes including innovation, adaptation and partial standardisation”.<sup>133</sup> The operational approach, meanwhile, has been described in the *Practitioners’ Guide to Human Rights Law in Armed Conflict*, suggesting that in the context of armed conflict there is “not just a choice of frameworks, but that the obligations are cumulative”.<sup>134</sup> In the *Practitioner’s Guide* the “extra obligations that stem from human rights law, even in the context of taking precautions before an attack, are detailed, and the alternative frameworks of ‘active hostilities’ or ‘security operations’ are explained”.<sup>135</sup>

To conclude, IHL and IHRL are complementary, and these two branches of law need to be analyzed and used in combination. The IACtHR has proved its ability to take advantage of this complementarity and could (should) continue to implement it in situations such as Mexico and Colombia.<sup>136</sup> And even though it is often complicated to universalize a regional practice, the example of the IACHR deserves to be seen by other international and regional actors, as States are increasingly using PMSCs and a militarization approach to tackle the challenges posed by organized crime or organized armed groups.

130 The relation between IHL and IHRL has been analyzed by many scholars and is aptly summarized as “concurrent, coexisting, consistent, convergent, coterminous, congruent, confluent, corresponding, cumulative, complementary, compatible, cross-fertilizing, contradictory, competitive, or even in conflict. Our contribution to the debate is best summarized as follows: ‘It’s contextual and it’s complicated.’” Andrew Clapham, “The Complex Relationship between the Geneva Conventions and International Human Rights Law”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 735.

131 Sarah McCosker, “The Limitations of Legal Reasoning: Negotiating the Relationships between International Humanitarian Law and Human Rights Law in Detention Situations”, in Gregory Rose and Bruce Oswald (eds), *Detention of Non-State Actors Engaged in Hostilities*, Brill, Leiden, 2016. See also Françoise J. Hampson, “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law,” *International Law Studies*, Vol. 87, 2011.

132 Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, Oxford University Press, Oxford, 2016, Chap. 5.

133 S. McCosker, above note 131, p. 58.

134 Daragh Murray, *Practitioners’ Guide to Human Rights Law in Armed Conflict*, ed. Dapo Akande, Charles Garraway, Françoise J. Hampson, Noam Lubell and Elizabeth Wilmschurst, Oxford University Press, Oxford, 2016, quoted in A. Clapham, above note 129, pp. 21–22.

135 A. Clapham, above note 129, p. 22. For example: “In non-international armed conflict the ‘active hostilities’ framework regulates the use of force in (a) situations of high intensity fighting involving sustained and concerted military operations and (b) situations where a State does not exercise effective territorial control. The ‘security operations’ framework regulates all other situations, including situations of low-intensity fighting.” A. Clapham, above note 129, p. 22, quoting D. Murray, above note 134.

136 Note that Colombia has repeatedly objected to the IACtHR’s position, arguing the Court does not have a direct competence to apply IHL based on Articles 33 and 62.3 of the ACHR.



## Conclusion

This article has analyzed two cases with the purpose of illustrating the challenge posed by the evolution of violence and security and how it impacts the application of international law, specifically IHL and IHRL. In Mexico, the intensity of the violence and the organization of drug trafficking cartels imply that IHL should technically apply in some cases. However, because the State is implementing a law enforcement paradigm, applying IHL would be inappropriate, as it would make an already vulnerable civilian population even more vulnerable. In Colombia, the challenges to IHL come from a different aspect. IHL applies in the Colombian NIAC, but US support to the Colombian government has been privatized. This privatization means that military contractors – with a civilian status, following IHL rules, as they are not part of armed group or the States forces, nor combatants – are working within the Colombian armed conflict context and are possibly participating in hostilities occasionally. The use of civilians in armed conflict situations tends to blur the distinction between the military and civilians.

These two cases illustrate that IHL and IHRL are not adapted to regulate situations like the War on Drugs and the fight against organized crime. In armed conflict situations, the application of human rights law to complement IHL is widely accepted practice.<sup>137</sup> However, an application of IHL as complementary to human rights law, in peacetime situations, is less common and can be problematic. Nevertheless, the law must adapt to respond to evolving realities, which include the militarization of law enforcement operations, the privatization of military services, and the increasing organization and threat of criminal groups.

This article suggests following the path of the inter-American system of human rights, interpreting human rights obligations by using IHL when the situation meets the requirements. As in Mexico and Colombia, a confrontation between a DTO and government forces in the context of the War on Drugs and the fight against organized crime can meet the requirements to classify the situation as an armed conflict for the duration of the confrontation. The IACHR has characterized a thirty-hour-long confrontation in one location as an armed conflict, making it possible to apply IHL in a localized armed conflict that took place in a confined space, for a short duration of time, even in the absence of an all-out armed conflict over the rest of the country.<sup>138</sup>

Following the inter-American system's practice of using IHL to interpret the ACHR in specific and limited contexts might offer an option for tackling the challenges posed by the evolution of the use of force, while protecting the population.

<sup>137</sup> A. Clapham, above note 129, p. 19.

<sup>138</sup> IACHR, *Abella*, above note 54.

# Crime wars: Operational perspectives on criminal armed groups in Mexico and Brazil

**John P. Sullivan**

John Sullivan is an Instructor at the Safe Communities Institute, University of Southern California. He is a Lieutenant (Retired) of the Los Angeles Sheriff's Department.  
Email: globalwarning1@gmail.com.

## Abstract

*Violent conflicts involving non-State armed groups challenge conventional perceptions of war and armed conflict. Criminal enterprises (transnational organized criminal groups including gangs and cartels) are involved in violent competition for both profit and territorial control in many parts of the world. This paper examines the situation in Mexico and Brazil as case studies to assess the legal challenges to criminal armed violence when criminal groups battle among themselves and the State. The paper focuses on the operational challenges and considerations facing police, military, and security forces and justice institutions to illuminate the legal challenges.*

**Keywords:** criminal armed groups, non-State armed groups, crime wars, criminal insurgencies, non-international armed conflicts.

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## Introduction

Violent conflicts involving non-State armed groups challenge conventional perceptions of war and armed conflict. Criminal enterprises (transnational organized criminal groups including gangs and cartels) are involved in violent competition for both profit and territorial control in many parts of the world. This phenomenon has been viewed as both crime wars and criminal insurgencies. These conflicts span a range of intensity from simple sporadic criminal violence and civil strife to complex sustained non-ideological assaults on the State by criminal armed groups (CAGs). When these conflicts gain operational sophistication, the CAGs can directly confront the State, erode State legitimacy and capacity (collectively, State solvency) and gain *de facto* political power. This power includes both freedom of action and territorial control, challenging the State's monopoly of violence and fuelling State transition.

This paper examines the situation in Mexico and Brazil as case studies to assess the legal challenges to criminal armed violence when criminal groups battle among themselves and the State with sustained levels of intensity and organization, potentially reaching the threshold of non-international armed conflict (NIAC). The paper focuses on the operational challenges and considerations facing police, military, and security forces and justice institutions to illuminate the legal challenges.

Using Mexico and Brazil as case studies, this paper reviews the violent situations in those States through the conceptual lens of crime wars and criminal insurgencies. Specifically, it examines the challenges of violent competition seen in Mexico's criminal conflicts and among gangs, militias and the State in Brazil. In addition, it assesses the intensity of violence and organizational characteristics of the criminal enterprises involved, as well as their use of *narcocultura* and social modification to meet their objectives. The paper further uses these cases to illustrate humanitarian considerations and advanced tactics, techniques and procedures (TTPs) employed by these CAGs, and briefly looks at how COVID-19 amplified criminal governance. Finally, controversies in categorizing conflict in these crime wars are discussed. These factors are discussed in order to illustrate the complexity of high-intensity criminal violence and the difficulty that States face when addressing these situations.

## Crime wars and criminal insurgency

Contemporary conflict often involves a range of warring factions in addition to traditional State actors. These include drug cartels, criminal gangs, militias and terrorists, in addition to military organizations.<sup>1</sup> In this paper, crime wars or

1 Robert Muggah and John P. Sullivan, "The Coming Crime Wars", *Foreign Policy*, 21 September 2018, available at: <https://foreignpolicy.com/2018/09/21/the-coming-crime-wars/> (all internet references were

criminal insurgencies are at the centre of criminal competition with States. Insecurity and violence are at the core of public concern, yet deeper threats to States include corruption, impunity and criminal governance.<sup>2</sup> As we will see, there is still no common lexicon for this type of conflict at the intersection between crime and war; indeed, many prefer to view it as high-intensity organized crime rather than conflict.<sup>3</sup> Crime wars refer to the broad range of criminal conflicts, while criminal insurgency refers to the influence of criminal conflicts and criminal governance on States and interstate institutions.<sup>4</sup>

The actors in these conflicts include gangs, militias, mafias and drug cartels on one side and State security services, police and the military (and intelligence) on the other. In between are corrupt politicians and the various communities terrorized by the violent competition among players for competitive control. Various gangs interact within the criminal networks involved in this conflict landscape. These include small local or street gangs engaged in retail drug sales or working as proxies for larger criminal enterprises or cartels, larger market-based gangs that form alliances or provide services to the mafias and cartels, and, finally, sophisticated transnational territorial or “third-generation” gangs that bridge the gap between traditional gangs and mafia or cartels. These territorial gangs can present themselves as “gangs” or as “militias”. Many militias, such as the *milícias* in Brazil, started as vigilante or enforcement entities intended to suppress gangs and criminal violence but found the profits from the activities that they sought to suppress attractive and lucrative.

The constellation of gangs ranges from “first-generation” turf gangs, to “second-generation” market gangs and, finally, “third-generation” gangs with mercenary and political aims and attributes.<sup>5</sup> In Brazil, the more sophisticated gangs (*ganguês* or *quadrilhas*) and militias (*milícias*) are often referred to as territorial gangs (*ganguês territoriais*) since they can sustain effective control of specific neighbourhoods or *favelas* (slums).<sup>6</sup> In many cases, the distinction

accessed in August 2022); Hal Brands, “Third-Generation Gangs and Criminal Insurgency in Latin America”, *Small Wars Journal*, 4 July 2009, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-and-criminal-insurgency-in-latin-america>; Hal Brands, “Gangs and the New Insurgency in Latin America”, *World Politics Review*, 10 June 2009, available at: [www.worldpoliticsreview.com/articles/3882/gangs-and-the-new-insurgency-in-latin-america](http://www.worldpoliticsreview.com/articles/3882/gangs-and-the-new-insurgency-in-latin-america).

- 2 John P. Sullivan, “From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America. Implications for Global Security”, *Working Paper No. 9*, Fondation Maison des sciences de l’homme, Paris, April 2012, available at: <https://halshs.archives-ouvertes.fr/halshs-00694083/document>.
- 3 Robert J. Bunker, “Introduction: The Mexican Cartels – Organized Crime vs. Criminal Insurgency”, *Trends in Organized Crime*, Vol. 16, 2013, especially Table 1, available at: <https://link.springer.com/article/10.1007/s12117-013-9194-4>.
- 4 John P. Sullivan and Robert J. Bunker, “Rethinking Insurgency: Criminality, Spirituality, and Societal Warfare in the Americas”, *Small Wars & Insurgencies*, Vol. 22, No. 5, 2011.
- 5 John P. Sullivan, “Third Generation Street Gangs: Turf, Cartels and NetWarriors”, *Transnational Organized Crime*, Vol. 3, No. 2, Autumn 1997; John P. Sullivan and Robert J. Bunker (eds), *Strategic Notes on Third Generation Gangs*, Xlibris, Bloomington, IN, 2020.
- 6 John P. Sullivan, “The Challenges of Territorial Gangs: Civil Strife, Criminal Insurgencies and Crime Wars”, *Revista Do Ministério Público Militar (Brasil)*, Vol. XLIV, No. 31, November 2019, available at: <https://revista.mpm.mp.br/artigo/the-challenges-of-territorial-gangs-civil-strife-criminal-insurgencies-and-crime-wars/>.

between crime and conflict complicates approaches to containing gang violence. In most cases, gangs, while a chronic criminal threat, do not rise to the level of NIAC and demand a different lens for crafting legal and policy responses.<sup>7</sup> In an era where some gangs exercise territorial control, perform criminal governance and directly confront the State and its institutions, the interaction between criminal enterprises and States deserves an ongoing assessment and evaluation. After all, some Latin American armed groups, such as Brazil's Primeiro Comando da Capital (PCC), are expanding across borders.<sup>8</sup> They are also building links with other transnational criminal organizations, for example with 'Ndrangheta.<sup>9</sup> In some cases, they create virtual extraterritorial "criminal enclaves" such as the Tri-Border Area at the confluence of Brazil, Paraguay and Argentina.<sup>10</sup>

Traditionally, criminal enterprises, such as gangs and cartels, sought to avoid confrontation with the State in order to maximize profit generated from the illicit and grey economies. This preference was examined by John Bailey and Matthew Taylor in their 2009 paper "Evade, Corrupt, or Confront?". In that assessment, they noted that criminal enterprises seek to evade and elude detection from police and judicial authorities. When they cannot evade, they then seek to corrupt public officials to sustain their criminal activity. When that fails, they may opt to directly confront the State.<sup>11</sup> In these cases, the equilibrium between the State and organized crime is broken.<sup>12</sup> This can be characterized as part of a "crime–conflict nexus".<sup>13</sup> The tactical and operational manifestations of the violence and conflict that follows the broken equilibria in Mexico and Brazil is exemplary of the challenges faced when CAGs embrace violent competition.

- 7 Jennifer M. Hazen, "Understanding Gangs as Armed Groups", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, available at: <https://international-review.icrc.org/articles/understanding-gangs-armed-groups>.
- 8 Jonathan Franklin, "Can Anyone Stop Brazil's PCC?", *Americas Quarterly*, 16 January 2018, available at: [www.americaquarterly.org/fulltextarticle/can-anyone-stop-brazils-pcc/](http://www.americaquarterly.org/fulltextarticle/can-anyone-stop-brazils-pcc/); Becky Kohler da Cruz and José de Arimatéia da Cruz, "Brazil's Transnational Organized Crime (TOC) and its National Security Implications", *Small Wars Journal*, 26 November 2013, available at: <https://smallwarsjournal.com/jrnl/art/brazils-transnational-organized-crime-toc-and-its-national-security-implications>.
- 9 Bryan Harris, "How Brazil's Largest Crime Syndicate Built a Global Drug Empire", *Financial Times*, 28 February 2022, available at: [www.ft.com/content/20fb5c77-baf1-45ab-a886-51cac68cfd4e](http://www.ft.com/content/20fb5c77-baf1-45ab-a886-51cac68cfd4e).
- 10 Pablo A. Baisotti, "The Triple Border, a Criminal Haven", *Small Wars Journal*, 12 November 2021, available at: <https://smallwarsjournal.com/jrnl/art/triple-border-criminal-haven>; John P. Sullivan, "Criminal Enclaves: When Gangs, Cartels or Kingpins Try to Take Control", *Stratfor Threat Lens*, 10 July 2019, available at: [www.academia.edu/39800892/Criminal\\_Enclaves\\_When\\_Gangs\\_Cartels\\_or\\_Kingpins\\_Try\\_to\\_Take\\_Control](http://www.academia.edu/39800892/Criminal_Enclaves_When_Gangs_Cartels_or_Kingpins_Try_to_Take_Control); John P. Sullivan and Robert J. Bunker, "Drug Cartels, Street Gangs, and Warlords", *Small Wars & Insurgencies*, Vol. 13, No. 2, 2002, available at: [www.academia.edu/36483305/Drug\\_Cartels\\_Street\\_Gangs\\_and\\_Warlords](http://www.academia.edu/36483305/Drug_Cartels_Street_Gangs_and_Warlords).
- 11 John Bailey and Matthew M. Taylor, "Evade, Corrupt, or Confront? Organized Crime and the State in Brazil and Mexico", *Journal of Politics in Latin America*, Vol. 1, No. 2, 2009, available at: [www.casade.org/BibliotecaCasade/38-38-1-PB.pdf](http://www.casade.org/BibliotecaCasade/38-38-1-PB.pdf).
- 12 John P. Sullivan, "How Illicit Networks Impact Sovereignty", in Michael Miklaucic and Jacqueline Brewer (eds), *Convergence: Illicit Networks and National Security in the Age of Globalization*, National Defense University Press, Washington, DC, 2013, available at: <https://ndupress.ndu.edu/Portals/68/Documents/Books/convergence.pdf>.
- 13 John de Boer and Louise Bosetti, "The Crime–Conflict 'Nexus': State of the Evidence", *Occasional Paper 5*, United Nations University Centre for Policy Research, New York, July 2015, available at: [https://collections.unu.edu/eserv/UNU:3134/unu\\_cpr\\_crime\\_conflict\\_nexus.pdf](https://collections.unu.edu/eserv/UNU:3134/unu_cpr_crime_conflict_nexus.pdf).

## The challenges of violent competition

The challenges to States when CAGs embrace violence as a means of securing their position in the illicit global economy and its local nodes include endemic insecurity, decreased public confidence in governance by the State and its institutions – especially the police, the judiciary and local government such as mayors and state (provincial) governors. Essentially the States lose legitimacy as the CAGs gain control. The CAGs use violence as a form of “violent lobbying” (including “violent corruption”) to exert their influence and gain power and profit.<sup>14</sup> This violence can be “symbolic” to shape community perceptions of the criminal enterprise or “instrumental” to meet a specific operational or political objective, such as removing an obstacle through assassinating a rival gangster, mayor or journalist, or similar violence targeted at those opposing the group’s activity.<sup>15</sup>

Some of the cartels and gangs (CAGs) operating in Mexico and Brazil have reached a level of violent activity where they utilize sophisticated weapons and tactical operations. In these cases, they are effectively “militarised criminal networks”.<sup>16</sup> The TTPs used by the cartels in Mexico, for example, include drive-by shootings, car bombs and grenades, armed assaults, kidnapping, blockades (*narcobloqueos*), and attacks on police, journalists, political figures (mayors and electoral candidates), judges and prosecutors. They also employ information operations (including the use of social media and *narcomantas* or banners to spread their message) and corpse-messaging or displaying symbols on the bodies of their rivals (along with other forms of dismemberment and beheadings).<sup>17</sup> They also use intelligence, including look-outs or *halcones*, and surveillance – including video surveillance with their own closed-circuit television (CCTV) and radio networks for urban territorial control.<sup>18</sup> Gangs in Brazil often use prisons as a base of operations, conduct high-intensity bank robberies and have conducted

14 Benjamin Lessing, “Logics of Violence in Criminal War”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015.

15 John P. Sullivan, “Criminal Insurgency: Narcocultura, Social Banditry, and Information Operations”, *Small Wars Journal*, 3 December 2012, available at: <https://smallwarsjournal.com/jrnl/art/criminal-insurgency-narcocultura-social-banditry-and-information-operations>.

16 Alexander Elfes, “Militarised Criminal Networks and the Challenges They Present to the Military and Police”, *Small Wars Journal*, 10 July 2020, available at: <https://smallwarsjournal.com/jrnl/art/militarised-criminal-networks-mexico-and-challenges-they-present-military-and-police>.

17 Sylvia M. Longmire and John P. Longmire, “Redefining Terrorism: Why Mexican Drug Trafficking is More than Just Organized Crime”, *Journal of Strategic Security*, Vol. 1, No. 1, 2010, available at: <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1044&context=jss>; Chris Dalby, “How Mexico’s Cartels Have Learned Military Tactics”, *InSight Crime*, 2 September 2022, available at: <https://insightcrime.org/news/how-mexicos-cartel-have-learned-military-tactics/>.

18 John P. Sullivan and Adam Elkus, “Tactics and Operations in the Mexican Drug War”, *Infantry Magazine*, September–October 2011, available at: [www.academia.edu/12571867/Tactics\\_and\\_Operations\\_in\\_the\\_Mexican\\_Drug\\_War](http://www.academia.edu/12571867/Tactics_and_Operations_in_the_Mexican_Drug_War); Robert J. Bunker and John P. Sullivan, “Cartel Car Bombings in Mexico”, *The LeTort Papers*, Strategic Studies Institute and US Army War College Press, Carlisle, PA, 1 August 2013, available at: <https://ssi.armywarcollege.edu/2013/pubs/cartel-car-bombings-in-mexico/>; Robert J. Bunker, “Cártel del Golfo (CDG) CCTV Cameras Seized in Ciudad Valles, San Luis Potosí”, *C/O Futures Cartel Research Note Series*, 7 November 2021, available at: [www.cofutures.net/post/cártel-del-golfo-cdg-cctv-cameras-seized-in-ciudad-valles-san-luis-potos%C3%AD](http://www.cofutures.net/post/cártel-del-golfo-cdg-cctv-cameras-seized-in-ciudad-valles-san-luis-potos%C3%AD).

terrorist or “quasi-terrorist” attacks on civil infrastructure, including buses, police stations and other infrastructure.<sup>19</sup>

## Mexico’s criminal conflicts

This section briefly discusses the origins of Mexico’s criminal conflicts. It provides an overview of the key players: cartels and gangs (that essentially become CAGs). Emphasis is placed on the two major organizations: the *Cártel de Sinaloa* (CDS; Sinaloa Cartel) and the *Cártel de Jalisco Nueva Generación* (CJNG).<sup>20</sup> This section also provides a brief introduction into their operations, including those beyond drug trafficking.

### Background on the conflict

The criminal conflicts in Mexico challenge the Mexican State (at all levels: municipal, state and federal). They involve violent competition between criminal enterprises (gangs and cartels), extreme violence, insecurity, and high degrees of corruption and impunity. These factors are spread unevenly throughout the nation and have transnational dimensions. The situation is often referred to as a drug war due to the conflicts over the lucrative drug trafficking business and competition over control of the *plazas* (transshipment points) and lines of communication by the various drug cartels and their composite or subordinate gangs. Mexico launched a “war” against drug cartels in 2006 under the *sexenio* or six-year term of Felipe Calderón Hinojosa. The drug war has left over 300,000 persons dead and continues despite a series of government crackdowns under three administrations (Calderón, 2006–2012; Enrique Peña Nieto, 2012–2018; and Andrés Manuel López Obrador, 2018–present).<sup>21</sup> In addition, there are at least 357,000 internally displaced persons from criminal battles for territorial control in Mexico as of December 2020.<sup>22</sup>

Mexico’s organized crime problem is considered one of the most significant one in the world, with a high degree of criminality and a low degree of societal

19 John P. Sullivan and Robert J. Bunker (eds), *Competition in Order and Progress: Criminal Insurgencies and Governance in Brazil*, Xlibris, Bloomington, IN, 2022.

20 These are currently the main protagonists in Mexico’s crime wars. See Nathan P. Jones, Irina A. Chindea, Daniel Weisz Argomedo and John P. Sullivan, “Mexico’s 2021 Dark Network Alliance Structure: An Exploratory Social Network Analysis of *Lantia Consultores*’ Illicit Network Alliance and Subgroup Data”, Research Paper, Rice University’s Baker Institute, Houston, TX, 11 April 2022, available at: [www.bakerinstitute.org/research/mexicos-2021-dark-network-alliance-structure-an-exploratory-social-network-analysis-of-lantia-consul](http://www.bakerinstitute.org/research/mexicos-2021-dark-network-alliance-structure-an-exploratory-social-network-analysis-of-lantia-consul).

21 Council on Foreign Relations, “Mexico’s Long War: Drugs, Crime, and the Cartels”, 26 February 2021, available at: [www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels](http://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels).

22 Andrew I. Rudman, “Mexico’s Internally Displaced are an Unrecognized Migration Crisis”, *The Hill*, 5 October 2021, available at: <https://thehill.com/opinion/international/575310-mexicos-internally-displaced-are-an-unrecognized-migration-crisis/>.



resilience to cope with the situation.<sup>23</sup> At least 250 mayors and local politicians have been murdered between 2006 and November 2020, a rate at least four times that of a member of the local population.<sup>24</sup> Police are also targeted, with 525 police killed in 2020, an average of 1.24 murders daily, which is five times more likely than for members of the local population that they serve. Municipal police were at the greatest risk (53.4%), followed by state officers (41.4%), with federal officers representing the smallest percentage (6.2%).<sup>25</sup> Journalists are also at risk, with Mexico being one of the most dangerous places on the globe for reporters and media workers, according to the Committee to Protect Journalists (CPJ):

From 1992 through 2020, CPJ reported that there were 57 confirmed cases of journalists killed, 68 unconfirmed cases, and four cases of media-support workers killed in Mexico. Nearly 80% of confirmed cases involved reporters working the crime beat, 46% involved reporters working on political issues, and approximately 37% involved reporters working on issues related to corruption. In 2020, nine journalists were killed in Mexico, making it the country with the greatest number of cases for that year.<sup>26</sup>

The “Drug War” began in 2006 with a large-scale deployment of federal troops to Michoacán; the deployment known as “Operation Michoacán” brought federal military, police and prosecutors to the region to counter territorial control by cartels.<sup>27</sup> Their initial cartel targeted was La Familia Michoacana. As the protracted struggle continued, additional cartels got involved, including the Knights Templar (Los Caballeros Templarios), Los Viagras, Los Zetas, elements affiliated with the CDS, Cáteles Unidos, and the CJNG. Like other parts of Mexico, the conflict has morphed, yet it persists today as a complex mix of *narcopolítica* (narcopolitics) or the influence of politics in furtherance of the drug trade, criminal violence and (para) military competition for territorial control.<sup>28</sup>

23 Global Initiative Against Transnational Organized Crime, *The Global Organized Crime Index 2021*, Geneva, available at: <https://globalinitiative.net/analysis/ocindex-2021/>.

24 Laura Y. Calderón, Kimberly Heinle, Rita E. Kuckertz, Octavio Rodríguez Ferreira and David A. Shirk (eds), *Organized Crime and Violence in Mexico: 2021 Special Report*, Justice in Mexico, University of San Diego, San Diego, CA, October 2021, pp. 31–2, available at: <https://justiceinmexico.org/wp-content/uploads/2021/10/OCVM-21.pdf>.

25 *Ibid.*, p. 34.

26 *Ibid.*, quote from CPJ, “49 Journalists Killed”, at p. 35.

27 The agencies deployed were the Policía Federal (Federal Police, now Guardia Nacional), the Procuraduría General de la República (PGR, Attorney General’s Office, now the Fiscalía General de la República, FGR), Subprocuraduría Especializada en Investigación de Delincuencia Organizada (SEIDO; Assistant Attorney General’s Office for Special Investigations on Organized Crime), Mexican Army (Ejército, Secretaría de Defensa Nacional; SEDENA) and the Mexican Navy (Marina, Secretaría de la Marina; SEMAR).

28 Vanda Felbab-Brown, “Criminal Violence, Politics, and State Capture in Michoacán”, *Brookings*, 24 September 2021, available at: [www.brookings.edu/opinions/criminal-violence-politics-and-state-capture-in-michoacan/](https://www.brookings.edu/opinions/criminal-violence-politics-and-state-capture-in-michoacan/).

## Current major players and operations

The Mexican Drug War is currently dominated by the CDS and the CJNG. The CDS, also known as the Guzmán-Loera Organization or Federation, rose in the late 1980s from the seeds of the Guadalajara “Cartel”.<sup>29</sup> The CDS, like most other cartels, is a multi-crime organization involved in many enterprises in addition to narcotrafficking. The CDS has been accused of corrupt interactions with elements of the Mexican government and currently operates in at least seventeen Mexican states.<sup>30</sup>

The CDS has transitioned from a cartel to a paramilitary group where its *sicarios* and *gatilleros* (foot soldiers) employ violence to protect and extend the cartel’s interests.<sup>31</sup> While the CDS is traditionally viewed as a “transactional” entity, it has increasingly adopted a “territorial” emphasis.<sup>32</sup> This transition can be best seen in the 17 October 2019 “Battle of Culiacán” where CDS *gatilleros* thwarted Guardia Nacional (National Guard) efforts to capture “El Chapo’s” son Ovidio Guzmán López on a US extradition warrant. Up to 700 cartel gunmen countered the warrant service, surrounding the government forces, instituting blockades that canalized responding forces into indefensible “kill zones”, and attacking civilian, government and military targets throughout the city. The cartel commandos were equipped with armoured vehicles (improvised armoured fighting vehicles (IAFVs)), .50 calibre anti-materiel rifles, grenades, rocket launchers and machine guns. The CDS forces coordinated activities using radios for command and control and cartel-operated video monitors.<sup>33</sup> Mexico’s

- 29 The so-called Guadalajara Cartel was known for establishing the plaza system from which many major cartels in Mexico are descended. It was led by Miguel Ángel Félix Gallardo who is also implicated in the murder of US Drug Enforcement Administration (DEA) agent Enrique “Kiki” Camarena. Félix Gallardo denies responsibility but was convicted for the murder in 2017. See Issa Osorio, “Guadalajara Drug Cartel Founder, in First Interview, Talks About Murdered DEA Agent”, *NBC News*, 19 August 2021, available at: [www.nbcnews.com/news/latino/guadalajara-drug-cartel-founder-first-interview-talks-murdered-dea-age-rcna1715](http://www.nbcnews.com/news/latino/guadalajara-drug-cartel-founder-first-interview-talks-murdered-dea-age-rcna1715); Carlos Pérez Ricart and Jack Pannell, “The Guadalajara Cartel Never Existed”, *Noria Research*, Paris, November 2021, available at: <https://noria-research.com/the-guadalajara-cartel-never-existed/>. Camarena’s assassination is arguably the first political assassination of the drug war. See Laura Ross Blume, “The Old Rules No Longer Apply: Explaining Narco-Assassinations of Mexican Politicians”, *Journal of Politics in Latin America*, Vol. 9, No. 1, 2017, available at: <https://journals.sagepub.com/doi/10.1177/1866802X1700900103>. The CDS was led by “El Chapo” Joaquín Guzmán Loera, who is now incarcerated in the United States, who founded it along with “El Mayo” Ismael Zambada García, its current leader.
- 30 InSight Crime, “Sinaloa Cartel”, 4 May 2021, available at: <https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/>.
- 31 Javier Valdez Cárdenas, *The Taken: True Stories of the Sinaloa Drug War*, University of Oklahoma Press, Norman, OK, 2017; Alejandro Santos Cid, “An Inside Look at Mexico’s Sinaloa Cartel”, *El País*, 16 February 2022, available at: <https://english.elpais.com/international/2022-02-16/an-inside-look-at-mexicos-sinaloa-cartel.html>.
- 32 Nathan P. Jones, *Mexico’s Illicit Drug Networks and the State Reaction*, Georgetown University Press, Washington, DC, 2016.
- 33 Scott Neuman and Carrie Kahn, “Massive Gun Battle Erupts In Mexico Over Son Of Drug Kingpin ‘El Chapo’”, *NPR*, 18 October 2019, available at: [www.npr.org/2019/10/18/771216750/massive-gun-battle-erupts-in-mexico-over-son-of-drug-kingpin-el-chapo](http://www.npr.org/2019/10/18/771216750/massive-gun-battle-erupts-in-mexico-over-son-of-drug-kingpin-el-chapo); Andréa Schmidt, “The Weekly: Episode 20: ‘The Siege of Culiacán’”, *New York Times*, 8 December 2019, available at: [www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html](http://www.nytimes.com/2019/11/15/the-weekly/el-chapo-guzman-son.html); Jorge Monroy, “Y la entidad, con al menos 8,000 soldados,

National Defence Secretariat deployed 230 military personnel to reinforce security in Culiacán, bringing the total municipal, state and federal security deployment to 8000 after over 700 cartel gunmen forced the release of Ovidio Guzmán López.<sup>34</sup>

The CJNG employs stark tactics. In the current phase of the conflict, the CJNG has shot down military helicopters, ambushed high-level politicians in Mexico City and attacked a rival group (Cárteles Unidos, comprised of the remnants of now-defunct cartels and vigilante groups). The CJNG has waged an offensive against the town of Tepalcatepec using infantry tactics rather than traditional criminal assassinations by *sicarios* (hitmen) in a demonstration of its territorial aspirations.<sup>35</sup> The CJNG is currently one of the main criminal protagonists in Mexico's crime wars. Its main rival is the CDS.

The CJNG is arguably the most powerful criminal contender today. The CJNG first appeared as the "Matatzetas" (Zeta Killers) in 2009 and then through a series of dramatic massacres established dominance throughout its operational area (including its base in Jalisco). By 2015, it had largely replaced the Los Zetas as the CDS's primary rival, while embracing the Zetas' violent and often brutal tactical repertoire.<sup>36</sup> In May 2015, the CJNG conducted a siege of Guadalajara with thirty narco-blockades, shooting down a military Cougar EC725 helicopter. In 2017, they began an intense conflict with the *Cártel de Santa Rosa de Lima* (CSRL) in Guanajuato, and, in August 2019, they massacred nineteen members of Los Viagras to exert control over the avocado trade.<sup>37</sup>

The CJNG employs armed commandos, uses *narcotankes* (IAFVs), has used aerial propaganda drops to threaten the CDS and residents that support them, kidnapped and killed police, and embraced higher-capability weapons in its quest for relative superiority over other cartels and freedom of movement from the State.<sup>38</sup> The CJNG is also pioneering the use of drones, landmines and combined-arms capabilities.

Other groups still persist, including remnants of the Zetas, once a dominant innovator of violence, and the *Cártel del Golfo* (Gulf Cartel). The Zetas started as an enforcer group for the Gulf Cartel and split from that group in 2010 (although the process of separation probably began earlier, in 2003).<sup>39</sup> The Zetas were notable for their intense violence, military orientation and barbarization. At their zenith they waged a "war of all against all", seeking control of the *plazas* in Monterrey,

policías y de la GN", *El Economista*, 21 October 2019, available at: [www.eleconomista.com.mx/politica/Y-la-entidad-con-al-menos-8000-soldados-policias-y-de-la-GN-20191020-0059.html](http://www.eleconomista.com.mx/politica/Y-la-entidad-con-al-menos-8000-soldados-policias-y-de-la-GN-20191020-0059.html).

34 J. Monroy, *ibid*.

35 *Ibid*.

36 START, "Tracking Cartels Infographic Series: The Violent Rise of *Cártel de Jalisco Nueva Generación* (CJNG)", START National Consortium for the Study of Terrorism and Responses to Terrorism, available at: [www.start.umd.edu/tracking-cartels-infographic-series-violent-rise-c-rtel-de-jalisco-nueva-generaci-n-cjng](http://www.start.umd.edu/tracking-cartels-infographic-series-violent-rise-c-rtel-de-jalisco-nueva-generaci-n-cjng).

37 *Ibid*.

38 Luis Chaparro, "The Jalisco Cartel is Dropping Death Threats From the Skies", *Vice*, 10 March 2022, available at: [www.vice.com/en/article/bvn3ea/cjng-cartel-planes-death-threat-flyers](http://www.vice.com/en/article/bvn3ea/cjng-cartel-planes-death-threat-flyers).

39 Samuel Logan and John P. Sullivan, "The Gulf-Zeta Split and the Praetorian Revolt", *ISN, ETH Zürich*, 7 April 2010, available at: <https://css.ethz.ch/en/services/digital-library/articles/article.html/114551>.

Matamoros, Reynosa and Nuevo Laredo to dominate the United States–Mexico border zone.

The core of the Zetas' ethos was fear; indeed, their debut as a separate entity on the criminal stage began with the kidnapping of two police in Acapulco accompanied by the *narcomanta* (banner) "*Para que aprendan a respetar*" ("So you learn to respect us").<sup>40</sup> In one major engagement, skirmishes between a caravan of as many as twenty Zeta vehicles in Reynosa, Nuevo Laredo, and Ciudad Mier against rival CDG vehicles (marked with cartel insignia) left dozens dead and reportedly resulted in the kidnapping of ten municipal police officers. The Zetas were engaged in drug trafficking, human trafficking, product piracy, and petroleum theft or *huachicoleo*.<sup>41</sup> The Zetas are essentially military-trained gang members, with their original cadre of thirty-one commandos formed by defectors from the Mexican Army's Airborne Special Forces Group (Grupo Aeromóvil de Fuerzas Especiales (GAFES)). They have fragmented themselves into the Zetas Vieja Escuela (Old School Zetas) and Cártel Noreste (CDN; Northeast Cartel), functioning along the United States–Mexico frontier.<sup>42</sup>

Another rival of the CJNG, the CSRL in Guanajuato, was largely involved in *huachicoleo* or illicit petroleum trade.<sup>43</sup> Its leader "El Marro" José Antonio Yépez Ortiz was a bitter rival of "El Mecho". Both the CSRL and CJNG sought to control the hydrocarbon trade in the Triángulo Rojo (Red Triangle) of Guanajuato comprised of the contested cities of Salamanca, Irapuato and Celaya.<sup>44</sup> The CSRL utilized subterranean (tunnel) operations to conduct its illicit taps on oil pipelines and as a means of evacuating the area to elude pursuit by government forces and rival cartels.<sup>45</sup> The CSRL also filmed their actions with GoPro video cameras for use in propaganda and to conduct tactical debriefings.<sup>46</sup>

40 Steven Dudley, "The Zetas' Model of Organized Crime is Leaving Mexico in Ruins", *InSight Crime*, 30 August 2021, available at: <https://insightcrime.org/news/zetas-model-organized-crime-mexico-ruins/>.

41 *Ibid.*

42 Parker Asmann, "Mexico's Zetas: From Criminal Powerhouse to Fragmented Remnants", *InSight Crime*, 6 April 2018, available at: <https://insightcrime.org/news/analysis/mexico-zetas-criminal-powerhouse-fragmented-remnants/>; Guadalupe Correa-Cabrera, *Los Zetas Inc.: Criminal Corporations, Energy, and Civil War in Mexico*, University of Texas Press, Austin, TX, 2017.

43 Nathan P. Jones and John P. Sullivan, "Huachicoleros: Criminal Cartels, Fuel Theft, and Violence in Mexico", *Journal of Strategic Security*, Vol. 12, No. 4, 2019, available at: <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1742&context=jss>; International Crisis Group, "Keeping Oil from the Fire: Tackling Mexico's Fuel Theft Racket", *Latin America Briefing* No. 46, Mexico City/New York/Brussels, 25 March 2022, available at: <https://d2071andvip0wj.cloudfront.net/b046-mexico-fuel-theft.pdf>.

44 Robert J. Bunker and John P. Sullivan, "Mexican Cartel Tactical Note #41: Cártel Santa Rosa de Lima (CSRL) Logo and Symbols Identification", *Small Wars Journal*, 3 April 2019, available at: <https://smallwarsjournal.com/index.php/jrnl/art/mexican-cartel-tactical-note-41-cartel-santa-rosa-de-lima-csrl-logo-and-symbols>.

45 John P. Sullivan and Robert J. Bunker, "Mexican Cartel Tactical Note #40: Cártel Santa Rosa de Lima (CSRL) Tunnels in Guanajuato Highlights Tactical Considerations in Underground Operations", *Small Wars Journal*, 22 March 2019, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-tactical-note-40-cartel-santa-rosa-de-lima-csrl-tunnels-guanajuato>.

46 Robert J. Bunker, Alma Keshavarz and John P. Sullivan, "Mexican Cartel Tactical Note #39: GoPro Video Social Media Posting of Cártel Santa Rosa de Lima (CSRL) Tactical Action Against Cártel Jalisco Nueva Generación (CJNG) in Guanajuato – Indications & Warning (I&W) Concerns", *Small Wars Journal*, 5 March 2019, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-tactical-note-39-gopro-video-social-media-posting-cartel-santa-rosa-de-lima>.

Both the CSRL and CJNG employed explosive artifacts and simulated car bombs as threat vehicles in their violent competition with each other and the State.<sup>47</sup> The CJNG and CSRL's use of car bombs is rare, yet echoes the car bombing in Ciudad Juárez of 15 June 2010. In addition to that primitive car bomb – which killed four persons and targeted police – twenty-one car bomb incidents have been identified in Mexico in the period of 14 July 2008–31 July 2012.<sup>48</sup> The CJNG also used a car bomb in Colombia and used a remotely detonated car bomb in Apaseo el Alto, Guanajuato, both in 2020.<sup>49</sup> Now we turn to Brazil to examine the situation there.

## Gangs, militias and the State in Brazil

In this section the criminal conflict situation in Brazil is examined. After a brief introduction describing the use of high-intensity crime and violence by the PCC, current operations, including brigandage (as expressed in what is called the new or *Novo Cangaço*), as well as criminal enclaves and criminal governance, as a form of competitive control, are described to illustrate the challenges States face when encountering “territorial gangs”.<sup>50</sup>

### High-intensity crime

Brazil's *facções criminosas* (criminal factions), *gangues* or *quadrilhas* (gangs), and *milícias* (militias) compete with the Brazilian State, creating insecurity in their quest for competitive control. The aforementioned PCC dominates Brazil's prisons and many *favelas*. In an effort to secure its freedom of action, it has repeatedly lashed out against State interference. In a notable early example, it initiated a wave of violence in São Paulo, killing 150 people (a quarter of the toll

47 John P. Sullivan and Robert J. Bunker, “Mexican Cartel Strategic Note No. 27: Confronting the State – Explosive Artifacts, Threats, Huachicoleros, and Cartel Competition in Guanajuato, MX”, *Small Wars Journal*, 14 March 2019, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-strategic-note-no-27-confronting-state-explosive-artifacts-threats>; Robert J. Bunker, John P. Sullivan, David A. Kuhn and Alma Keshavarz, “Use of IEDs and VBIEDs in Mexican Crime Wars”, *Counter-IED Report*, Spring/Summer 2021, available at: [www.academia.edu/49100323/Use\\_of\\_IEDs\\_and\\_VBIEDs\\_in\\_Mexican\\_Crime\\_Wars](http://www.academia.edu/49100323/Use_of_IEDs_and_VBIEDs_in_Mexican_Crime_Wars).

48 John P. Sullivan, “Explosive Escalation? Reflections on the Car Bombing in Ciudad Juárez”, *Small Wars Journal*, 21 July 2010, available at: <https://smallwarsjournal.com/jrnl/art/explosive-escalation>; R. J. Bunker and J. P. Sullivan, above note 18, pp. 18–19, Table 2.

49 Robert J. Bunker and John P. Sullivan, “Mexican Cartel Strategic Note No. 28: Alleged Cártel de Jalisco Nueva Generación (CJNG) Car Bombing (‘Coche Bomba’) in Colombia”, *Small Wars Journal*, 5 December 2019, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-strategic-note-no-28-alleged-cartel-de-jalisco-nueva-generacion-cjng-car>; Robert J. Bunker, David A. Kuhn and John P. Sullivan, “Mexican Cartel Tactical Note #42: Car Bomb in Apaseo el Alto, Guanajuato with Remote Detonation IED (‘Papa Bomba’) Payload”, *Small Wars Journal*, 7 January 2020, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-tactical-note-42-car-bomb-apaseo-el-alto-guanajuato-remote-detonation-ied>.

50 J. P. Sullivan, above note 5.

being police), torching eighty-two buses and attacking seventeen banks.<sup>51</sup> Prison insurrections occurred at seventy-four out of 140 prisons, and schools, shopping centres, transport and commerce were interrupted.<sup>52</sup> In more recent examples of gangs' prowess, Brazil's gangs have recruited former Fuerzas Armadas Revolucionarias de Colombia (FARC; Revolutionary Armed Forces of Colombia) guerrillas,<sup>53</sup> conducted sophisticated, combined-arms, bank robberies known as the new *Cangaço* after historical instances of brigandage, interfered with elections, conducted prison riots, and deployed terrorist (or quasi-terrorist) violence against civil government and critical infrastructure. The PCC is a major player in this regard, as it continues to exert its influence through micro-power in prisons and its "prison–street gang complex". Corruption and impunity empower these episodes of "violent lobbying" as *favelas* become criminal enclaves. Both militias and gangs pursue these violent actions against each other and the State. Human shields have also been utilized as part of the new *Cangaço*-style robberies.

### Current operations and the "Novo Cangaço"

In one early cross-border bank robbery at Ciudad del Este on 24 April 2017, a criminal band assaulted an armoured car warehouse, blasted the vault and escaped with over US\$ 8 million. The heist included a vehicle and boat chase, an attack on a police station, multiple blockades, grenades, explosives and a .50 calibre rifle. The PCC was the main suspect.<sup>54</sup> To counter these extreme criminal operations and endemic insecurity in the *favelas*, Brazilian authorities have enlisted the federal armed forces in a series of stability and support operations (SASOs) in Rio de Janeiro's *favelas*. The first of these contemporary SASOs was implemented in August 2017 when over 3500 soldiers were deployed after 100 police officers were killed in the first eight months of that year. These SASOs are known as *Garantia da Lei e da Ordem* (GLO) or Law and Order assurance operations.<sup>55</sup> In February 2018, the Military returned to Rio to take control of policing under DECRETO N° 9.288 authorizing a GLO mission to 31 December 2018.<sup>56</sup>

51 The Economist, "The Mob Takes on the State", 18 May 2006, p. 39, available at: [www.economist.com/the-Americas/2006/05/18/the-mob-takes-on-the-state](http://www.economist.com/the-Americas/2006/05/18/the-mob-takes-on-the-state).

52 *Ibid.*

53 Rogério Jelmayer, Kejal Vyas and Samantha Pearson, "Brazilian Gang Enlists FARC Rebels for Drug Trade", *Wall Street Journal*, 31 January 2017, available at: [www.wsj.com/articles/brazilian-gang-enlists-farc-rebels-for-drug-trade-1485858609](http://www.wsj.com/articles/brazilian-gang-enlists-farc-rebels-for-drug-trade-1485858609).

54 Jonathan Watts, "'Heist of the Century': Brazilian Gang Hits Security Vault and Police HQ in Paraguay", *The Guardian*, 25 April 2017, available at: [www.theguardian.com/world/2017/apr/25/paraguay-heist-brazil-gangsters-dynamite-speedboat](http://www.theguardian.com/world/2017/apr/25/paraguay-heist-brazil-gangsters-dynamite-speedboat).

55 John P. Sullivan and Robert J. Bunker, "Third Generation Gangs Strategic Note No. 5: Brazilian Military Stability and Support Operations (SASO) in Rio de Janeiro's Favelas", *Small Wars Journal*, 9 November 2017, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-5-brazilian-military-stability-and-support>.

56 John P. Sullivan, José de Arimatéia da Cruz and Robert J. Bunker, "Third Generation Gangs Strategic Note No. 10: Military Takes Control of Policing in Rio de Janeiro", *Small Wars Journal*, 23 February 2018, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-10-military-takes-control-policing-rio-de-janeiro>.



In January 2019, a coalition of gangs – including the PCC, Comando Vermelho (CV; Red Command), and their local counterparts Guardiões do Estado (GDE, Guardians of the State) and Família do Norte (FDN, Northern Family) – waged a reprisal against state forces after the state prison administration enacted enhanced security measures in prisons in the state of Ceará. The city of Fortaleza bore the brunt of these assaults, which included bombings, arson against school buses and other vehicles, police stations, public buildings, bridges, businesses and banks.<sup>57</sup> Later that year in August 2019, a prison riot at Altamira prison, in Pará state in northern Brazil, led by members of the Comando Classe A (CCA; Class A Command), a vassal/allied gang to the PCC, left fifty-eight rival CV gangsters dead, including sixteen decapitated.<sup>58</sup> Another case of gangs’ power projection occurred in Manaus in June 2021. In this case, a CV leader was killed in a confrontation with the Polícia Militar (PM; Military Police) of Amazonas. The resulting gang reprisals included shootings and arson attacks on police, buses, bus stations, schools, banks and public spaces over a three-day period from 5 to 8 June 2021.<sup>59</sup>

## Criminal enclaves and competitive control

The existence of criminal enclaves or parallel powers in the *favelas* presents several difficulties for the State. These include issues of perceived legitimacy and concerns over abuses of power when responding to gang activity and violence. For example, on 6 May 2021, at approximately 06.00 hours (6 a.m.), Rio de Janeiro’s civil police (Polícia Civil do Estado do Rio de Janeiro (PCERJ)) entered the Jacarezinho *favela* to perform a raid.<sup>60</sup> The action, entitled Operação Exceptis (Operation Exception), was directed against known members of the CV. The PCERJ encountered small-arms fire, which killed a PCERJ officer as the team entered the *favela*. A sustained battle followed and continued throughout the day, leaving at least twenty-eight persons dead, including the police officer and twenty-seven residents. The deadly incident provoked widespread global criticism.<sup>61</sup>

57 Jo Griffin, “‘Climate of Panic’: Bombings in Brazil Reveal Growing Power of Gangs”, *The Guardian*, 15 January 2019, available at: [www.theguardian.com/global-development/2019/jan/15/climate-of-panic-bombings-in-brazil-reveal-growing-power-of-gangs?CMP=share\\_btn\\_tw](http://www.theguardian.com/global-development/2019/jan/15/climate-of-panic-bombings-in-brazil-reveal-growing-power-of-gangs?CMP=share_btn_tw).

58 Robert J. Bunker, José de Arimatéia da Cruz and John P. Sullivan, “Third Generation Gangs Strategic Note No. 19: Comando Classe A (CCA) Massacre of Comando Vermelho (CV) Gang Members in Altamira Prison, Brazil – 58 Dead (Including 16 Decapitations)”, *Small Wars Journal*, 6 August 2019, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-19-comando-classe-cca-massacre-comando-vermelho>.

59 John P. Sullivan, José de Arimatéia da Cruz and Robert J. Bunker, “Third Generation Gangs Strategic Note No. 40: Força Nacional de Segurança Pública Deployed to Manaus in Aftermath of Comando Vermelho Violence on the Streets”, *Small Wars Journal*, 28 June 2021, available at: [https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-40-forca-nacional-de-seguranca-publica-deployed?fbclid=IwAR3ATiC8W6T1M7N7woAVSkNzElwQInvEkb5SKdZ1AP2m36PqymViUZ-\\_E4k](https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-40-forca-nacional-de-seguranca-publica-deployed?fbclid=IwAR3ATiC8W6T1M7N7woAVSkNzElwQInvEkb5SKdZ1AP2m36PqymViUZ-_E4k).

60 Terrence McCoy, “Rio Police were Ordered to Limit Favela Raids During the Pandemic. They’re Still Killing Hundreds of People”, *Washington Post*, 20 May 2022, available at: [www.washingtonpost.com/world/2021/05/20/brazil-police-rio-jacarezinho-favela-raid/](http://www.washingtonpost.com/world/2021/05/20/brazil-police-rio-jacarezinho-favela-raid/).

61 Robert Muggah, “Rio’s Bloody Police Campaign”, *Small Wars Journal*, 7 May 2021, available at: <https://smallwarsjournal.com/jrnl/art/rios-bloody-police-campaign>; John P. Sullivan, Robert J. Bunker, and José



In August 2021, an armed group of approximately twenty gangsters conducted a series of urban bank raids in Araçatuba in Metropolitan São Paulo.<sup>62</sup> The new *Cangaço*-style raids used aerial drones, explosives and assault-style rifles. Hostages were taken and tied to the top of escape vehicles for use as human shields. Blockades comprised of burning vehicles and explosives were strategically located to facilitate escape. Between 5 and 16 April 2021, at least ten similar attacks were waged in cities across four states: São Paulo, Paraná, Bahia and Minas Gerais. The aerial drones were not weaponized in this sequence but were used for intelligence, surveillance and reconnaissance (ISR). These *Novo Cangaço*-type operations are essentially complex attack sequences using “urban siege” tactics similar to those developed by terrorists, raising complicated tactical and operational co-ordination issues for both the gangsters and responding police. These heavily armed and highly coordinated operations show that at least some gangsters are evolving sophisticated TTPs that challenge the operational capacity of most municipal or state police.<sup>63</sup> The PCC also threatens judges and prosecutors, as is seen in recent intercepts where gang leaders ordered the assassinations of judicial officials prosecuting the gang in Mato Grosso do Sul.<sup>64</sup>

Militias currently control more territory than gangs in Rio de Janeiro. The militias, originally extrajudicial vigilantes, now occupy a majority stake in the region’s illicit economy. The area controlled by the militias is home to nearly 2.2 million people. The militias are now powerful criminal enterprises and parallel powers exerting criminal governance. They compete with gangs, the police, and at times the military, for control of the *favelas*. The result is diminished State solvency (or the sum of capacity and legitimacy) that fuels a criminal insurgency where CAGs empower transitions of sovereignty and provide opportunities for criminal governance.<sup>65</sup>

de Arimatéia da Cruz, “Third Generation Gangs Strategic Note No. 36: High Casualty Civil Police Raid in Rio de Janeiro’s Jacarezinho Favela Raises Human Rights Concerns”, *Small Wars Journal*, 25 May 2021, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-36-high-casualty-civil-police-raid-rio-de>.

62 John P. Sullivan, José de Arimatéia da Cruz and Robert J. Bunker, “Third Generation Gangs Strategic Note No. 42: Brazilian Gangs Utilize Human Shields, Explosives, and Drones in a New ‘Cangaço’ Style Urban Bank Raid in Araçatuba, São Paulo”, *Small Wars Journal*, 5 September 2021, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-42-brazilian-gangs-utilize-human-shields>.

63 *Ibid.*; and John P. Sullivan, “Policing Urban Conflict: Urban Siege, Terrorism and Insecurity”, *Stratfor*, 10 April 2018, available at: [www.academia.edu/36721271/Policing\\_Urban\\_Conflict\\_Urban\\_Siege\\_Terrorism\\_and\\_Insecurity](http://www.academia.edu/36721271/Policing_Urban_Conflict_Urban_Siege_Terrorism_and_Insecurity); John P. Sullivan and Adam Elkus, “Postcard from Mumbai: Modern Urban Siege”, *Small Wars Journal*, 16 February 2009, available at: <https://smallwarsjournal.com/jrnl/art/postcard-mumbai-modern-urban-siege>.

64 Luís Adorno, “PCC manda matar juízes e promotora de MG por descobrirem ações da facção, diz investigação”, *Notícias R7*, 30 March 2022, available at: <https://noticias.r7.com/cidades/pcc-manda-matar-juizes-e-promotora-de-mg-por-descobrirem-acoes-da-facao-diz-investigacao-30032022>.

65 John P. Sullivan, José de Arimatéia da Cruz and Robert J. Bunker, “Third Generation Gangs Strategic Note No. 32: Militias (*Milícias*) Surpass Gangs (*Gangues*) in Territorial Control in Rio de Janeiro”, *Small Wars Journal*, 26 October 2020, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-32-militias-milicias-surpass-gangs-gangues>; Christian Vianna de Azevedo, “Criminal Insurgency in Brazil – The Case of Rio de Janeiro: Context, Confrontation Issues and Implications for Brazilian Public Security”, *Small Wars Journal*, 22 January 2018, available at: <https://smallwarsjournal.com/jrnl/art/criminal-insurgency-brazil>.

## ***Narcocultura* and social modification**

Drug cartels and gangs challenge State authority in Mexico and Brazil (as well as parts of Central America). This challenge is essentially a “power–counterpower” struggle that erodes State legitimacy and solvency. As part of this struggle, these CAGs act as “primitive rebels” where groups use pre-political agitation to express social discontent or “social bandits” where they frame their activities as rebellion against oppressive State actions and/or corruption (or at least seek that mantle to secure public approval for their actions).<sup>66</sup> This action involves “*narcocultura*” and can usher in a State transition process or “criminal insurgency”. This can be summarized as a feature of what Howard Campbell calls the “Drug War Zone”, a contested space where *narcos* confront the State in a battle for power, legitimacy, and social and cultural supremacy.<sup>67</sup> This process can be summarized:

As part of this contest, the cartels provide utilitarian social goods, form narratives of power and rebellion and act as “post-modern social bandits” to gain support and legitimacy within their own organizations and the geographic areas they control. Their message is delivered through the use of instrumental and symbolic violence and information operations (including influencing the press, forging a social narrative – *narcocultura* – where the gangsters are seen as powerful challengers to the corrupt State). *Narcocorridos* (folk songs), *narcomantas* (banners), *narcobloqueos* (blockades), *narcomensajes* (messages in many forms including “corpse-messages”), and alternative systems of veneration (narco-saints including Jesus Malverde and Santa Muerte) are used to craft these narratives of (counter) power.<sup>68</sup>

Narco-saints (or *Santitos*) are folk symbols of veneration that help forge social bonds among the cartel members and gangs in their social orbit. This folk veneration is both a feature of “primitive rebellion” and illustrative of the bottom-up influence on social belief systems. *Narcocultura* is playing a key role in this development. The narco-saints include Jesús Malverde and Santa Muerte, as well as the quasi-evangelical constructs of La Familia Michoacana and its successor the Caballeros Templarios (Knights Templar), Santo Niño Huachicolera and *huachicolera cultura* among Guanajuato’s fuel thieves and San Nazario.<sup>69</sup> In this case, *narcocultura* augments the development of:

a new social order through “criminal insurgency” [involving] the use of symbolic and instrumental violence, exerting territorial control, the utilitarian

66 Eric Hobsbawm, *Bandits*, The New Press, New York, 2000, 1969; Eric Hobsbawm, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19th and 20th Centuries*. W.W. Norton & Company, New York, 1959.

67 Howard Campbell, *Drug War Zone: Frontline Dispatches from the Streets of El Paso and Juárez*, University of Texas Press, Austin, TX, 2009; J. P. Sullivan, above note 15.

68 J. P. Sullivan, *ibid*.

69 *Ibid.*; Robert J. Bunker and Alma Keshavarz (eds), *Los Caballeros Templarios de Michoacán: Imagery, Symbolism, and Narratives*, Small Wars Foundation, Bethesda, MD, 2019, available at: [www.academia.edu/38806893/Los\\_Caballeros\\_Templarios\\_de\\_Michoacán\\_Imagery\\_Symbolism\\_and\\_Narratives](http://www.academia.edu/38806893/Los_Caballeros_Templarios_de_Michoacán_Imagery_Symbolism_and_Narratives).

provision of social goods, the use of propaganda and information operations, and the use of symbols of authority to confer legitimacy (as seen in the use of uniforms, marked vehicles, and cartel insignia).<sup>70</sup>

San Nazario, *el apóstol del narco* (the narco-apostle), started his career as a *narco* in the Milenio Cartel, then leveraged evangelical beliefs to forge a new belief system to support his rise to power, demonstrating the role that belief systems can play in reinforcing temporal power.<sup>71</sup>

In Brazil, a “battle” for spiritual dominance and temporal power is occurring in Rio’s *favelas*. Evangelical bandits (*bandidos evangélicos*) or gangsters linked to evangelical (and neo-Pentecostal) Christian sects are attacking the *terreiros* or temples of syncretic/traditional traditions Macumba, Umbanda and Candomblé. Gangs such as the Terceiro Comando Puro (Pure Third Command) are waging a holy war and cleansing their neighbourhood of rival traffickers.<sup>72</sup> In another notable case, a *facção* (drug trafficking faction) led by “Peixão” (Big Fish) Álvaro Malaquias Santa Rosa is forging a complex of *favelas* known as “Complexo de Israel” (Israel Complex). Peixão’s domain in the Northern Zone of Rio de Janeiro merges five *favelas* under his control: Cidade Alta, Vigário Geral, Parada de Lucas, Cinco Bocas and Pica-Pau. The area contains 134,000 residents. Peixão’s gang is evangelical in orientation and uses a mix of religious imagery and targeted confessional violence to achieve its aims of territorial control and domination of the licit market.<sup>73</sup> In November 2021, the Peixão Facção built a canal bridge to allow its members access to their territories in the Complexo de Israel without having to encounter police surveillance since the bridge linked two of the *favelas* controlled by the gang.<sup>74</sup>

## Humanitarian considerations

Cartel violence in Mexico drives migration (both internally displaced persons and refugees), and results in the development of “zones of impunity, where at least 37,00 desaparecidos (disappeared persons) augment murders and cartels utilize social cleansing to eliminate threats to their operations”, and where

70 John P. Sullivan, “Postscript: Narcocultura, Insurgencies, and State Change”, in R. J. Bunker and A. Keshavarz, *ibid.*

71 *Ibid.*

72 Robert Muggah, “In Brazil, Religious Gangs Leaders Say They’re Waging a Holy War”, *The Conversation*, 2 November 2017, available at: <https://theconversation.com/in-brazil-religious-gang-leaders-say-theyre-waging-a-holy-war-86097>.

73 John P. Sullivan, Robert J. Bunker and José de Arimatéia da Cruz, “Third Generation Gangs Strategic Note No. 30: Traficante Evangélico (Evangelical Trafficker) Creates ‘Complexo de Israel’ Using Confessional Violence to Consolidate Control in Five Rio Favelas”, *Small Wars Journal*, 4 August 2020, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-30-trafficante-evangelico-evangelical-trafficker>.

74 Marco Antônio Martins and Lília Teles, “Traficantes do Complexo de Israel erguem ponte para circular entre favelas e evitar vigilância policial”, *G1 (Globo)*, 19 October 2021, available at: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2021/10/19/ponte-traffic-complexo-de-israel.ghtml>.

humanitarian, medical and healthcare workers are at risk.<sup>75</sup> At least 338,000 persons have been displaced by violence in Mexico since 2009 to 2019 according to the Internal Displacement Monitoring Centre.<sup>76</sup> Healthcare workers are also targeted by cartels, where *sicarios* interrupt the provision of care, Cruz Roja Mexicana (Mexican Red Cross) workers have been attacked and a patient murdered, an administrator assassinated, and a paramedic killed (and four to six others injured) when an armed group opened fire on aid workers distributing humanitarian assistance.<sup>77</sup> Cartels have also threatened healthcare workers treating rival cartel members and demanding priority treatment for their own cartel members.<sup>78</sup>

In one extreme case a sustained cartel battle left Tijuana, Mexico, hospitals at risk as cartel *sicarios* engaged in simultaneous pre-dawn gun battles. As emergency physicians treated drug traffickers, federal troops secured the Hospital General de Tijuana to ensure the provision of life-saving care.<sup>79</sup>

In addition to the direct battles between cartels and government forces, cartel violence has profound effects on communities, governance and humanitarian response to the violence. According to Diane Davis, the interaction between crime and conflict is articulated as one where irregular “armed forces” seek to usurp some government functions.<sup>80</sup> In “Terrorism, Crime and Private Armies”, this is described as:

Terrorists, criminal actors, and private armies of many stripes have altered the ecology of both crime and armed conflict. In many cases, the two are intertwined. Several factors reinforce these links. Global organized crime, which increasingly links local actors with their transnational counterparts, coupled with chronic warfare and insurgency (which yields economic benefits to some of its participants) can propel local or regional conflicts into genocidal humanitarian disasters. These regions, which are essentially criminal free-States, provide refuge and safe haven to terrorists, warlords, and criminal enterprises.<sup>81</sup>

75 John P. Sullivan, “Humanitarian Diplomacy for Protecting Vulnerable Persons and Humanitarian Aid Workers in Civil Strife and Non-International Armed Conflict in Mexico and Central America’s Northern Triangle”, *Vortex Working Paper No. 52*, 2020, available at: [www.academia.edu/43140694/Humanitarian\\_Diplomacy\\_for\\_Protecting\\_Vulnerable\\_Persons\\_and\\_Humanitarian\\_Aid\\_Workers\\_in\\_Civil\\_Strife\\_and\\_Non\\_International\\_Armed\\_Conflict\\_in\\_Mexico\\_and\\_Central\\_Americas\\_Northern\\_Triangle](http://www.academia.edu/43140694/Humanitarian_Diplomacy_for_Protecting_Vulnerable_Persons_and_Humanitarian_Aid_Workers_in_Civil_Strife_and_Non_International_Armed_Conflict_in_Mexico_and_Central_Americas_Northern_Triangle).

76 Internal Displacement Monitoring Centre, “Mexico, Annual Conflict and Disaster Displacement”, 2019, available at: [www.internal-displacement.org/countries/mexico](http://www.internal-displacement.org/countries/mexico).

77 J. P. Sullivan, above note 75, p. 8. Also, see David Agren, “Violence Rife in Mexico, Affecting Medical Community”, *The Lancet*, Vol. 391, No. 10128, available at: [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)30738-4/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)30738-4/fulltext).

78 Marc Lacey, “Hospitals Now a Theater in Mexico’s Drug War”, *New York Times*, 5 December 2008, available at: [www.nytimes.com/2008/12/05/world/americas/05iht-05mexico.18426237.html](http://www.nytimes.com/2008/12/05/world/americas/05iht-05mexico.18426237.html).

79 Associated Press, “Tijuana Drug Violence Threatens Hospital”, *NBC News*, 29 April 2008, available at: [www.nbcnews.com/id/wbna24372823](http://www.nbcnews.com/id/wbna24372823).

80 Diane E. Davis, quoted by Peter Dizikes, “An Altered State”, *PHYSORG.com*, 19 April 2010 at J. P. Sullivan, above note 2, p. 7.

81 J. P. Sullivan, above note 2, p. 9.

Essentially criminal enterprises, specifically CAGs, are becoming para-political challengers to the State's monopoly on violence to ensure freedom of action. Increasingly, some of these criminal actors employ more sophisticated means in this pursuit.

## Advanced TTPs

Mexican cartels are increasingly seen using the weapons of war including antipersonnel landmines, rocket-propelled grenades (RPGs) and weaponized aerial drones.<sup>82</sup> The use of advanced infantry tactics, weaponized drones, improvised armoured vehicles, and criminal intelligence and surveillance systems, along with marked uniforms and vehicles by criminal belligerents, are factors that demonstrate the sophistication of some of the CAGs active in Mexico. Most of the active cartels wear distinctive clothing or uniforms during many of their combat operations and mark their vehicles with their insignia to enable both distinction and effective co-ordination of their combat action.

The cartels – especially the CJNG and its rivals – are in a stage of tactical evolution that enables them to gain an edge over their rivals in order to accrue power, gain territorial control while enhancing their profits and survivability. At times, the cartels can tactically out-gun and manoeuvre police and military forces. Many cartels, for example the Gulf Cartel, Zetas, CDS and CJNG, have used improvised armoured vehicles, including light armoured trucks, and artisanal *narcotanques* (or *monstruos*) with mounted infantry to confer tactical advantage.<sup>83</sup> Tactical evolution among cartels includes the use of improvised explosive devices (IEDs), grenades, small-calibre mortars, sniper rifles, RPGs with anti-armour munitions, man-portable air-defence systems (MANPADS), ambushes of government forces (police and military), the use of jet skis for tactical amphibious assaults, human shields, Claymore (anti-personnel) mines, anti-vehicle landmines, underground bunkers, and the use of trenches and obstacles to shape the operational (battle) space.<sup>84</sup>

## Antivehicle landmines

The use of cartel antivehicle landmines against a Mexican Army convoy near Apatzingán, Michoacán, an area contested by the CJNG and their rivals the Cárteles Unidos, left at least one and up to four soldiers injured; specific details

82 Marcos González Díaz, “Cómo los carteles en México están usando armas no convencionales como si fueran ejércitos en guerra”, *BBC Mundo*, 24 March 2022, available at: [www.bbc.com/mundo/noticias-america-latina-60486794](http://www.bbc.com/mundo/noticias-america-latina-60486794).

83 C. Dalby, above note 17.

84 Robert J. Bunker and John P. Sullivan (eds), *Illicit Tactical Progress: Mexican Cartel Notes 2013–2020*, Xlibris, Bloomington, IN, 2021.

have not yet been disclosed and it is uncertain which entity placed the mine(s).<sup>85</sup> The day prior to the incident, the Secretaría de Defensa Nacional (SEDENA) detained fifteen CJNG members after four attacks against Government of Mexico forces involving artisanal armoured vehicles and explosives. These deployments included explosive ordnance disposal units.<sup>86</sup> In February 2022, an elderly farmer was killed and his son injured by a CJNG landmine in the Tierra Caliente, near Aguaje, Aguililla.<sup>87</sup> SEDENA technicians deactivated 250 homemade mines in Tepalcatepec, Colacomán and Aguililla, Michoacán after the farmer was killed. In another subsequent incident three cows were killed by mines.<sup>88</sup> Due to the intensity of the confrontations in the regions, the Ejército Mexicano (Mexican Army) is now using rocket launchers (known by the troops as “Blindicide”) to neutralize cartel armoured vehicles (IAFVs) used by the CJNG in Zacatecas.<sup>89</sup>

## Weaponized drones

Weaponized drones present another operational challenge in Mexico’s crime wars.<sup>90</sup> Cartel commandos are attacking their rivals and government forces with armed drones. An early incident involved targeting the residence of the Baja Public Safety Director in Tecate on 10 July 2018. In that incident which appears to have been intended as a threat communication or demonstration of capability, two IEDs were taped to the drone’s frame.<sup>91</sup> Drones are used by Mexican cartels as tools for ISR, that is they are used to scout and gather information to support combined-arms operations, including operations with mounted infantry. Weaponized drones are used to attack rivals and support mounted infantry operations. Finally, drones are used to capture video for propaganda and

85 An earlier Cárteles Unidos mine incident targeted the CJNG in early January 2021. A similar indications and warning incident involving improvised anti-vehicle mines was reported in October 2021. In the aftermath of the January 2021 incident, Government of Mexico forces, including the Guardia Nacional, SEDENA, as well as Policía Michoacán (Michoacán Police) and agents of the Fiscalía General del Estado (Michoacán state prosecutor) saturated the area. La Opinión, “VIDEO: Explota con mina camión blindado del CJNG, sicarios del Mencho así cayeron en trampa [VIDEO: CJNG’s Armoured Truck Explodes with Mine, Mencho’s Hired Killers Fall into Trap]”, 3 January 2021, available at: <https://laopinion.com/2021/01/03/video-explota-con-mina-camion-blindado-del-cjng-sicarios-del-mencho-asi-cayeron-en-trampa/>.

86 DW (Deutsche Welle), “Mexico: Soldiers to Remove Land Mines Planted by Cartels”, 19 February 2022, available at: [www.dw.com/en/mexico-soldiers-to-remove-land-mines-planted-by-cartels/a-60839983](https://www.dw.com/en/mexico-soldiers-to-remove-land-mines-planted-by-cartels/a-60839983).

87 Elena Reina, “In Sign of Escalating Violence, Mexico’s Narcos Plant Land Mines in Tierra Caliente”, *El País*, 17 February 2022, available at: <https://english.elpais.com/international/2022-02-17/in-sign-of-escalating-violence-mexicos-narcos-plant-land-mines-in-tierra-caliente.html>.

88 Ernesto Martínez Elorriaga, “Sedena desactiva 250 minas caseras en Michoacán en tres semanas”, *La Jornada*, 20 February 2022, available at: [www.jornada.com.mx/notas/2022/02/20/estados/sedena-desactiva-250-minas-caseras-en-michoacan-en-tres-semanas/](https://www.jornada.com.mx/notas/2022/02/20/estados/sedena-desactiva-250-minas-caseras-en-michoacan-en-tres-semanas/).

89 Jorge Martínez, “Ejército mexicano usa lanzacohetes para enfrentar al CJNG en Zacatecas”, *Milenio*, 1 March 2022, available at: [www.milenio.com/politica/ejercito-mexicano-lanzacohetes-enfrentar-cjng-zacatecas](https://www.milenio.com/politica/ejercito-mexicano-lanzacohetes-enfrentar-cjng-zacatecas).

90 Robert J. Bunker and John P. Sullivan, *Criminal Drone Evolution: Cartel Weaponization of Aerial IEDs*, Xlibris, Bloomington, IN, 2021.

91 John P. Sullivan, Robert J. Bunker and David A. Kuhn, “Mexican Cartel Tactical Note #38: Armed Drone Targets the Baja California Public Safety Secretary’s Residence in Tecate, Mexico”, *Small Wars Journal*, 6 August 2018, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-tactical-note-38-armed-drone-targets-baja-california-public-safety>.

information operations.<sup>92</sup> The proliferation of aerial drones by non-State actors, including CAGs, offers the criminal arms bearers tactical and operational benefits including aerial manoeuvre for attacks, smuggling and ISR. Police and military forces need to develop countermeasures for operating in environments with weaponized drones. This includes developing technical capacity, doctrine, and training for neutralizing aerial drone threats and legal frameworks enabling these countermeasures.<sup>93</sup>

## COVID-19 and criminal conflicts

The COVID-19 pandemic has created opportunities for organized criminal groups – including CAGs. Extremism, conflict and the consolidation of illicit economic and political power are among the opportunities for non-State actors and challenges for States. Gangs, cartels and mafias can leverage the disruptive forces of the pandemic to exploit the situation and bolster their “statemaking” potentials. Criminal enterprises have imposed and enforced curfews, quarantines and social distancing. They have engaged in the provision of humanitarian aid and in general capitalized on the vacuum in State governance to usurp the provision of public goods and services, control the pricing on food and medicine, and in many cases enhance their status and perceived legitimacy in the communities where they operate. In Brazil’s *favelas*, gangs imposed curfews; in Mexico, cartels provided humanitarian aid.<sup>94</sup> Collectively, these factors suggest potentials for destabilization, stimulating and exacerbating conflicts, and the rise of “hybrid” threats, such as bioterrorism involving future bioweapons and infectious diseases (although these can be expected to be an outlier).<sup>95</sup>

In Mexico, cartels exploited the pandemic to bolster their public image. The Gulf Cartel distributed aid boxes containing food in Tamaulipas,<sup>96</sup> the CJNG distributed aid in impoverished parts of San Luis Potosi and also provided aid in Cuautitlán Jalisco.<sup>97</sup> On the east coast, Los Zetas provided aid in the port city of

92 Robert J. Bunker, *Terrorist and Insurgent Unmanned Aerial Vehicles: Use, Potentials, and Military Implications*, Strategic Studies Institute and US Army War College Press, Carlisle, PA, 2015; R. J. Bunker and J. P. Sullivan, above note 90.

93 Robert J. Bunker and John P. Sullivan, “Mexican Cartels are Embracing Aerial Drones and They’re Spreading”, *War on the Rocks*, 11 November 2021, available at: <https://warontherocks.com/2021/11/mexican-cartels-are-embracing-aerial-drones-and-theyre-spreading/>.

94 John P. Sullivan and Robert J. Bunker (eds), *COVID-19, Gangs, and Conflict*, Xlibris, Bloomington, IN, 2020; Tuesday Reitano and Mark Shaw, *Criminal Contagion: How Mafias, Gangsters and Scammers Profit from a Pandemic*, Hurst & Co., London, 2021.

95 John P. Sullivan, “How COVID-19 is Influencing Organized Crime and Conflict”, *Homeland Security Today*, 25 January 2021, available at: [www.hstoday.us/subject-matter-areas/counterterrorism/how-covid-19-is-influencing-organized-crime-and-conflict/](http://www.hstoday.us/subject-matter-areas/counterterrorism/how-covid-19-is-influencing-organized-crime-and-conflict/).

96 Economía Hoy, “Reportan entrega de despensas del Cártel del Golfo en Ciudad Victoria, Tamaulipas”, 6 April 2020, available at: [www.economiahoy.mx/nacional-eAm-mx/noticias/10466405/04/20/Reportan-entrega-de-despensas-del-Cartel-del-Golfo-en-Ciudad-Victoria-Tamaulipas.html](http://www.economiahoy.mx/nacional-eAm-mx/noticias/10466405/04/20/Reportan-entrega-de-despensas-del-Cartel-del-Golfo-en-Ciudad-Victoria-Tamaulipas.html).

97 La Verdad Noticias, “CJNG reparte despensa por coronavirus ahora en San Luis Potosi”, 14 April 2020, available at: <https://laverdadnoticias.com/crimen/CJNG-reparte-despensa-por-coronavirus-ahora-en-San-Luis-Potosi-20200414-0033.html>.



Coatzacoalcos, Veracruz,<sup>98</sup> while the CDS provided COVID-19 relief, including the distribution of “Chapo Provisions” in Guadalajara, Jalisco.<sup>99</sup> A CDS faction, Los Chapitos, enforced quarantine curfews,<sup>100</sup> while smaller groups, including La Familia Michoacana remnants, provided aid to low-income elderly residents in Guerrero and Los Viagras, and distributed food in Apatzingán and surrounding towns, with the funds for the aid believed to be supported by street taxes levied on local businesses.<sup>101</sup> These assistance packages were all branded with logos and signatures of cartel leaders of the respective cartel benefactors.<sup>102</sup> In sum, according to Robert Muggah and Steven Dudley, the COVID-19 pandemic seems to have presented opportunities to strengthen criminal governance, since “criminal groups appear poised to exert even greater oversight of entire sections of cities and neighborhoods. The effect may last for years to come.”<sup>103</sup>

## Controversies in categorizing conflict

Crime wars and criminal insurgencies present difficult challenges to States as they seek to address these militarized criminal threats. It is important to recognize that not all criminal activity involving CAGs in any given State rises to the level of conflict or to the level of criminal insurgency in its four potential forms: (1) local insurgencies; (2) a battle for the parallel State; (3) combatting the State; and (4) the State implodes.<sup>104</sup> Local insurgencies occur at a neighbourhood level where gangs dominate the local turf and influence political, economic and social life. While these gangs have latent potential to develop a criminal enclave with autonomy, they never fully supplant the State and rather a parallel State or criminal governance results.<sup>105</sup> The battle among criminal enterprises for control

98 Reports on the Zetas’ aid are fragmentary and contained in social media. See, Ignacio Carvajal’s Facebook Page. Reposted by *Código Veracruz Noticias*, 16 April 2020, available at: [www.facebook.com/CodigoVeracruzNoticias/posts/2590548131267420](https://www.facebook.com/CodigoVeracruzNoticias/posts/2590548131267420). The details, along with analysis are recounted in Robert J. Bunker and John P. Sullivan, “Mexican Cartel Strategic Note No. 29: An Overview of Cartel Activities Related to COVID-19 Humanitarian Response”, *Small Wars Journal*, 8 May 2020, available at: <https://smallwarsjournal.com/jrnl/art/mexican-cartel-strategic-note-no-29-overview-cartel-activities-related-covid-19>.

99 Drazen Jorgic, “El Chapo’s Daughter, Mexican Cartels Hand Out Coronavirus Aid”, *Reuters*, 17 April 2020, available at: [www.reuters.com/article/us-health-coronavirus-mexico-cartels/el-chapos-daughter-mexican-cartels-hand-out-coronavirus-aid-idUSKBN21Y3J7?utm\\_source=twitter&utm\\_medium=Social](https://www.reuters.com/article/us-health-coronavirus-mexico-cartels/el-chapos-daughter-mexican-cartels-hand-out-coronavirus-aid-idUSKBN21Y3J7?utm_source=twitter&utm_medium=Social).

100 Frontera Al Rojo Vivo, “VIDEO.— Chapitos Sicarios del Cártel de Sinaloa lo levantan y tablean por no respetar sus ordenes de no salir por COVID-19”, 19 April 2020, available at: [https://lare2s.blogspot.com/2020/04/video-chapitos-sicarios-del-cartel-de.html?utm\\_source=dlvr.it&utm\\_medium=twitter](https://lare2s.blogspot.com/2020/04/video-chapitos-sicarios-del-cartel-de.html?utm_source=dlvr.it&utm_medium=twitter).

101 Infobae, “Los Viagras y el Cártel del Golfo: qué cárteles se están aprovechando del coronavirus para repartir despensas”, 7 April 2020, available at: [www.infobae.com/america/mexico/2020/04/07/los-viagras-y-el-cartel-del-golfo-que-carteles-se-est-an-aprovechando-del-coronavirus-para-repartir-despensas/](https://www.infobae.com/america/mexico/2020/04/07/los-viagras-y-el-cartel-del-golfo-que-carteles-se-est-an-aprovechando-del-coronavirus-para-repartir-despensas/).

102 L. Y. Calderón *et al.*, above note 24, pp. 52–4.

103 Robert Muggah and Steven Dudley, “COVID-19 is Reconfiguring Organized Crime in Latin America and the Caribbean”, *Small Wars Journal*, 2 March 2021, available at: <https://smallwarsjournal.com/jrnl/art/covid-19-reconfiguring-organized-crime-latin-america-and-caribbean>.

104 J. P. Sullivan, above note 2.

105 *Ibid.*

of the “parallel State” occurs when the groups compete for domination of a criminal enterprise or criminal enclave. The resulting violence often spills over into the community and affects the police and military that try to contain it.<sup>106</sup> A situation of direct confrontation occurs when the CAGs directly engage the State to secure freedom of action and become active belligerents against the State.<sup>107</sup> The final condition occurs when the State loses the capacity to respond. It has not occurred in Mexico or Brazil, but could in theory result when a national State transitions into a “narcostate” and loses the capacity to respond.<sup>108</sup>

These four conditions are not mutually exclusive. In addition, several criminal insurgencies can exist simultaneously between different actors (as is also the case with NIACs). Indeed, in Mexico, for example, it can be argued that several interconnected criminal insurgencies co-exist. Beyond this, the violent activity may exist as high-intensity crime, and may be characterized as civil strife. Alternatively, the violence may reach the level of a NIAC if the non-State group has the organizational capacity to adhere to international humanitarian law (IHL) and the armed violence is protracted and reaches a level of intensity (including duration and intensity of individual confrontations, the type of military equipment used, the frequency and spread of fighting, and State reaction). For organizational capacity, a command structure with the ability to plan, coordinate and conduct operations, as well as exercising territorial control, is needed. The criminal nature of the group is irrelevant to characterization of a conflict as a NIAC.<sup>109</sup> Of course, this characterization is controversial.

## Factors and complexities of acknowledging NIACs

Usually, criminal violence is a matter of criminal or penal and human rights law. That is, States govern their internal violence and civil strife via their domestic criminal statutes, and the use of force in these situations of violence is governed

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.* This is the situation in parts of Mexico, such as the reaction by La Familia against Mexican military and intelligence in July 2009 and the PCC attacks against state forces and use of quasi-terrorist attacks to influence policy discussed above.

<sup>108</sup> *Ibid.* Also, see John P. Sullivan and Robert J. Bunker, “Third Generation Gangs Strategic Note No. 41: Criminal Insurgency and ‘Revolution’ in Haiti?” *Small Wars Journal*, 2 July 2021, available at: <https://smallwarsjournal.com/jrnl/art/third-generation-gangs-strategic-note-no-41-criminal-insurgency-and-revolution-haiti>; Ryan Dube and José de Córdoba, “Gangs Threaten to Tip Haiti Into a Failed State”, *Wall Street Journal*, 19 October 2021, available at: [www.wsj.com/articles/gangs-threaten-to-tip-haiti-into-a-failed-state-11634654955](https://www.wsj.com/articles/gangs-threaten-to-tip-haiti-into-a-failed-state-11634654955); Renata Segura, “Haiti’s State of Paralysis: How to Break the Deadly Relationship Between Politics and Crime”, *Foreign Affairs*, 20 April 2022, available at: [www.foreignaffairs.com/articles/haiti/2022-04-20/haitis-state-paralysis](https://www.foreignaffairs.com/articles/haiti/2022-04-20/haitis-state-paralysis).

<sup>109</sup> In International Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, §170, available at: [www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf](https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf): [t]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.

by a law enforcement paradigm and human rights law.<sup>110</sup> Crime wars and criminal insurgency are political processes, not legal definitions. Nevertheless, contemporary conflicts face challenges when it comes to a range of non-State actors. These actors include gangs, militias, criminal cartels and terrorists. Sometimes the definitions blur; as Martin van Creveld observed, “future war will not be waged by armies but by groups whom today we call terrorists, guerillas, bandits, and robber, but who will undoubtedly hit upon more formal titles to describe them themselves”.<sup>111</sup>

The presence of these non-conventional actors in conflict raises both operational and legal issues. The crux of these is what approach and which body of law to apply in order to best resolve the situation. Applying the wrong paradigm can deepen the crisis, enhance instability and insecurity, while eroding State legitimacy. The first question, is which paradigm prevails: is it crime or war (actually the problem is the blurred boundaries between the two);<sup>112</sup> is it organized crime or criminal insurgency (it may be both).<sup>113</sup> These situations are often complicated by inadequate State capacity, diminished public perceptions of State legitimacy, and high levels of insecurity (collectively, State solvency).<sup>114</sup> Human rights concerns include abuses by the police and military (including extrajudicial killings, harsh response and torture), impunity and disappearances. Corruption also complicates matters. CAGs may employ terrorism (or quasi-terrorism) as previously mentioned.<sup>115</sup> In addition, many CAGs are transnational criminal organizations operating across borders (for example, Mexican Cartels in Colombia<sup>116</sup> and Brazilian gangs operating in Paraguay).<sup>117</sup>

Watkin assessed the security, legal and operational challenges of applying different bodies of law to contemporary conflicts and situations of violence in his text *Fighting at the Legal Boundaries*.<sup>118</sup> In essence, he writes that traditional approaches can hinder effective responses to non-State threats. The solution may lie in avoiding exclusive and rigid interpretations of the various bodies of law and

110 International Committee of the Red Cross (ICRC), “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”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, available at: [www.cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/international-committee-of-the-red-cross-icrcs-role-in-situations-of-violence-below-the-threshold-of-armed-conflict/64183418A12D456A04D7BB59529547D5](http://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/international-committee-of-the-red-cross-icrcs-role-in-situations-of-violence-below-the-threshold-of-armed-conflict/64183418A12D456A04D7BB59529547D5).

111 Martin van Creveld, *The Transformation of War*, The Free Press, New York, 1991. See also, Max G. Manwaring, *Street Gangs: The New Urban Insurgency*, Strategic Studies Institute and US Army War College Press, Carlisle, PA, 2005.

112 Kenneth Watkin, *Fighting at the Legal Boundaries*, Oxford University Press, New York, 2016.

113 R. J. Bunker, above note 3.

114 J. P. Sullivan, above note 12.

115 David Teiner, “Cartel-Related Violence in Mexico as Narco-Terrorism or Criminal Insurgency: A Literature Review”, *Perspectives on Terrorism*, Vol. 14, No. 4; David Teiner, “Bibliography: Terrorism and Organized Crime in Latin America”, *Perspectives on Terrorism*, Vol. 14, No. 4.

116 Julietta Pelcastre, “Mexican Narcotraficking Cartels Expand their Control in Colombia”, *Diálogo Americas*, 12 May 2021, available at: <https://dialogo-americas.com/articles/mexican-narcotraficking-cartels-expand-their-control-in-colombia/#.YrzN-y-B2X0>.

117 Juan Diego Cárdenas, “Paraguay: The New Safe Haven for Brazilian Traffickers, Money Launderers”, *InSight Crime*, 25 February 2022, available at: <https://insightcrime.org/news/paraguay-the-new-safe-haven-for-brazilian-traffickers-money-launderers/>.

118 K. Watkin, above note 112. See especially Chapter 1, for an overview of the challenges.

instead applying a holistic approach that integrates the application of the various legal regimes. Selecting the most effective approach depends upon the circumstances of the conflict and the capacity of the groups involved. Indeed, in one State, there may be multiple simultaneous situations, some of which reach the threshold of a NIAC, and others that remain conventional crime or civil strife.

The threshold for reaching the status of a NIAC is two-fold. First, the armed groups must possess a degree of organization necessary to meet the obligations of IHL (or the law of armed conflict) as articulated in Article 3 common to the four Geneva Conventions;<sup>119</sup> these include the existence of effective command and control, with the ability to plan and execute operations. Second, the level of intensity must exceed that of internal disturbances and tensions or periodic terrorist attacks. Indicators of this degree of intensity include the duration and intensity of conflict, the type and number of forces involved, the types of weapons used, and the level of casualties that result. Some, but not all of the cartels in Mexico (as illustrated in the preceding analysis), are engaged in protracted conflict against either the State or other CAGs and appear to possess the organizational structure, capacity, weaponry and ability to exert territorial control to meet these criteria. Others do not.

Nevertheless, in Mexico, it might be argued, and the present author concurs in the opinion, that at least three NIACs currently exist. First, according to the assessment of the Rule of Law in Armed Conflicts (RULAC) initiative, the Government of Mexico is suggested to be involved in two parallel NIACs, including the State's struggles with the CJNG and the CDS. In addition, the violence between the CDS and CJNG also constitutes a NIAC.<sup>120</sup>

Matters of conflict characterization are sensitive and both States and scholars hold various views on the application of the law of NIACs to these situations. Chiara Redaelli, at RULAC, regarding the CJNG states, "Regarding the armed confrontations between the Mexican armed forces and the CJNG, we considered that both criteria are met and that, therefore, the IHL of NIACs applies in addition to international human rights law."<sup>121</sup> Regarding the CDS, Dr Redaelli notes "that both the level of organization of the Sinaloa Cartel and the

119 ICRC, "Commentary of 2016, Article 3: Conflicts not of an International Character", *IHL Database: Treaties, States Parties and Commentaries*, Geneva, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

120 RULAC, "Non-International Armed Conflicts in Mexico", RULAC, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 30 May 2021, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico](http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico); John P. Sullivan, "Non-International Armed Conflict: Mexico and Colombia", *Revista do Ministério Público Militar (Brasil)*, Vol. XLVI, No. 35, 25 November 2021, available at: [www.academia.edu/62379204/Non\\_International\\_Armed\\_Conflict\\_Mexico\\_and\\_Colombia](http://www.academia.edu/62379204/Non_International_Armed_Conflict_Mexico_and_Colombia).

121 RULAC, "International Humanitarian Law Applies to The Armed Confrontations Between Mexico and The Jalisco Cartel New Generation", RULAC, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 12 February 2019, available at: [www.geneva-academy.ch/news/detail/209-international-humanitarian-law-applies-to-the-armed-confrontations-between-mexico-and-the-jalisco-cartel-new-generation](http://www.geneva-academy.ch/news/detail/209-international-humanitarian-law-applies-to-the-armed-confrontations-between-mexico-and-the-jalisco-cartel-new-generation).

level of confrontations with the Mexican armed forces and the CJNG meet the IHL criteria” for a NIAC.<sup>122</sup>

If accepted, the classification of these situations as NIACs would confer IHL obligations on all parties:

All parties to the conflict are bound by Article 3 common to the 1949 Geneva Conventions, which provides for the minimum standards to be respected and requires humane treatment without adverse distinction of all persons not or no longer taking active part in hostilities. It prohibits murder, mutilation, torture, cruel, inhuman and degrading treatment, hostage taking and unfair trials.<sup>123</sup>

Both international human rights law and customary IHL of NIAC would apply.<sup>124</sup> Beyond these obligations, designation of crime wars as NIACs is operationally sensitive and, as such, requires further discussion and detailed analysis and discussion within and among the States and international organizations involved. The Mexican State has not acknowledged these situations as NIACs. The situation in Brazil is also ambiguous,<sup>125</sup> as the status of NIAC has yet to be adopted, although proposals for its consideration have been put forward.<sup>126</sup>

The question of which legal framework best protects the human rights of all persons involved (members of the groups, the States and their officials, the population) is of importance. The effectiveness (or lack thereof) of a law enforcement/human rights approach needs to be harmonized with a NIAC approach if the conditions of an NIAC are present. This must be assessed on a case-by-case basis (for all potential conflict situations) in a given State.

There are benefits and potential drawbacks to rigid application of any single framework, especially given the multi-faceted situation and multiple parties engaged in multiple, simultaneous situations and different levels of conflict. This analysis is exploratory and recognizes that additional discussion and analysis are warranted.

## Conclusion

Criminal violence involving direct competition and confrontation of CAGs with State police and military forces is present in many States. In this paper, the violent competition among these non-State actors and the States of Mexico and

122 RULAC, “Two New Non-International Armed Conflicts in Mexico Involving the Sinaloa Drug Cartel”, RULAC, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 10 March 2020, available at: [www.rulac.org/news/two-new-non-international-armed-conflicts-in-mexico-involving-the-sinaloa-d](http://www.rulac.org/news/two-new-non-international-armed-conflicts-in-mexico-involving-the-sinaloa-d).

123 *Ibid.*

124 *Ibid.*

125 J. P. Sullivan and R. J. Bunker, above note 19.

126 Carlos Frederico De Oliveira Pereira, “Gray Zones and Crime Suppression: Between International Human Rights Law and International Law of Armed Conflicts”, *Small Wars Journal*, 5 February 2020, available at: <https://smallwarsjournal.com/jrnl/art/gray-zones-and-crime-suppression-between-international-human-rights-law-and-international>.

Brazil was examined to identify areas where potential legal approaches can augment and enhance State responses to the violence. Both Mexico and Brazil are faced with high levels of criminal violence. This violence yields high levels of perceived and actual insecurity. In both States criminal cartels, gangs and militias (or CAGs) use violence as part of their quest to seek freedom of action, power and profit. In doing so, the resulting insecurity, coupled with corruption and at times impunity, results in diminishing public perceptions of legitimacy.

This paper provided an analysis of the violence used by these CAGs to illustrate the scope of the challenges faced. As we have seen, these challenges include violent competition, and targeted violence against State officials, judges, politicians, police and the military using armed commando tactics. In addition to advanced TTPs, including the use of weaponized aerial drones, landmines and artisanal armoured vehicles, these groups use hybrid influence techniques such as *narcocultura* and social modification. Through information operations (including violent lobbying), the utilitarian provision of social goods, such as humanitarian relief (essentially embracing the tools of social banditry), and imposing curfews during the COVID-19 pandemic the CAGs seek legitimacy among the communities where they operate. This competition can destabilize communities and empower the CAGs.

Finding the right balance among State responses (including police enforcement and military support to civil authorities) requires defining the most appropriate legal and operational approaches to contain the violence, mitigate insecurity and minimize humanitarian challenges. Integrating a range of legal approaches may be beneficial to addressing these violent challenges to States. Of course, the violence is unevenly distributed within and among the States involved. Both Mexico and Brazil are federal republics with constituent subnational polities or “states” and municipal governments. Each sub-national “state” has police and prosecutorial arms, as well as bodies of penal law. Since the levels of violence fluctuate within States, both in terms of intensity and degree of organization of the CAGs involved, much of the insecurity is classified as civil strife known as “other situations of violence”. At times, the actors and intensity may reach the threshold of NIAC. Of course, the provisions of common Article 3 do not contain a detailed definition of the scope of application or checklist of the criteria for identifying the situations where it applies. That leaves the issue open to interpretation.<sup>127</sup>

This ambiguity makes discussion of the interface between various legal regimes (penal law, human rights law, IHL, international criminal law and

127 On the application of IHL, see Annysa Bellal, “ICRC Commentary of Common Article 3: Some questions relating to organized armed groups and the applicability of IHL”, *EJIL:Talk!*, 5 October 2017, available at: [www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/](http://www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/); also see ICTY, *The Prosecutor v. Dusho Tadić* (a/k/a “Dule”), Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, §70, available at: [www.icty.org/x/cases/tadic/acdec/en/51002.htm](http://www.icty.org/x/cases/tadic/acdec/en/51002.htm); ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, paras 195 ff, available at: [www.icty.org/x/cases/boskoski\\_tarculovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf).

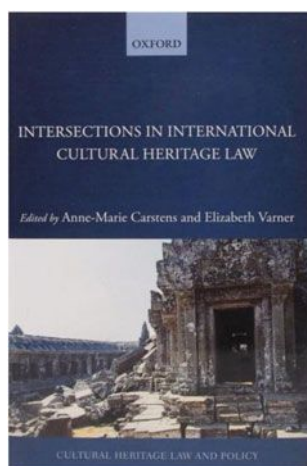
emerging international law related to corruption) essential. These issues and the appropriate way forward must be discussed. The need to synchronize legal approaches, strengthen police and judicial capacity, and ensure effective governance through the rule of law are essential to negotiating these criminal conflicts.

Essentially, these criminal conflicts present situations of convergence where terrorism, quasi-terrorism, domestic, foreign, global and networked intersect.<sup>128</sup> While, of course there is no simple solution and various States may find different solutions, such as relying on penal and human rights law, several questions deserve deliberation. First, are new legal and political frameworks (regimes) needed? If so, what new laws are necessary? Will they be located in IHL, in international criminal law, will they intersect with emerging international anti-corruption instruments, etc.? In addition, what form of global or transnational co-operation is needed, what force structures are best suited to address these threats, and how can they be supported through policy, doctrine, interagency, multilateral co-operation and intelligence support? This paper seeks to provide the operational context for this deliberation. Resolving these issues and the gaps in operational capacity can potentially address the acute insecurity that results when CAGs directly confront the State. These efforts must build national and transnational rule of law organs while limiting the corrosive effects of corruption and impunity. Reducing insecurity and violence can help mitigate the effects of crime wars and their erosion of State solvency by reinforcing both legal and operational capacity.

128 Quasi-terrorist acts utilize terrorist *modus operandi*/TTPs but lack overt political aims. For a discussion of quasi-terrorism, see National Advisory Committee on Criminal Justice Standards and Goals, *Disorders and Terrorism—Report of the Task Force on Disorders and Terrorism*, US Department of Justice, Washington, DC, 1976, especially p. 5, available at: [www.ojp.gov/ncjrs/virtual-library/abstracts/disorders-and-terrorism-report-task-force-disorders-and-terrorism](http://www.ojp.gov/ncjrs/virtual-library/abstracts/disorders-and-terrorism-report-task-force-disorders-and-terrorism).



## LIBRARIAN'S PICK



# Intersections in International Cultural Heritage Law

**Edited by Anne-Marie Carstens and Elizabeth Varner\***

**Book review by Charlotte Mohr**, ICRC Reference Librarian for the collections on the ICRC's history and activities

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Since the United Nations Educational, Scientific and Cultural Organization (UNESCO) Conventions of the early 1970s<sup>1</sup> first recognized the public and collective value of cultural heritage – a value transcending national boundaries and thus deserving of protection at the international level – the protection of cultural heritage has grown into its own distinctive branch of international law. The early twenty-first century has seen the adoption in rapid succession of instruments expanding the notion of cultural heritage and seeking to fill gaps in the legal regime protecting it from destruction and misappropriation.<sup>2</sup> Moving beyond the initial monumentalist vision, they now better encompass the intangible dimensions of cultural heritage and recognize its centrality to human identity and community life. The destruction and pillage of sites of incomparable

\* Published by Oxford University Press, Oxford, 2020. Full text access for ICRC staff is available at: <https://doi.org/10.1093/oso/9780198846291.001.0001>. Previously a Visiting Professor at Georgetown University Law Center, Anne-Marie Carstens is Law School Assistant Professor and Director of Lawyering at the University of Maryland. She has served as an Expert Adviser on cultural property issues at the US Department of State and chaired the Cultural Heritage and the Arts Interest Group of the American Society of International Law. Elizabeth Varner is Adjunct Professor at the Robert H. McKinney School of Law, teaching art, museum, and cultural heritage law and entertainment law. As a Staff Curator, she assists with guiding the management and use of over 202 million cultural and natural history objects. The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

## ICRC Library

The “Librarian’s Pick” is a regular section of the *Review* in which one of the International Committee of the Red Cross’s (ICRC) librarians picks and writes about their favourite new book relating to international humanitarian law, policy or action, which they recommend to the readers of the journal.

The ICRC Library welcomes researchers interested in international humanitarian law (IHL) and the institution’s work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of diplomatic and international conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full texts of the most relevant and reliable sources in the field of IHL and the ICRC, as well as a comprehensive IHL Bibliography, with three issues every year.

The online catalogue is available at: [library.icrc.org](http://library.icrc.org). For more information on the research guides, see: [blogs.icrc.org/cross-files/category/research-guide](http://blogs.icrc.org/cross-files/category/research-guide). To subscribe to the IHL Bibliography, email [library@icrc.org](mailto:library@icrc.org) with “IHL Bibliography subscription” in the subject line.

value in Mali, Syria, Iraq and Yemen, notably, have acted as powerful and tragic reminders of the enduring disconnect between law and reality, raising the issue’s urgency. Growing public concern and political will are further motivated by cultural property trafficking being used to finance armed groups and organized crime. Those developments have attracted considerable critical attention in recent years, leading to a burgeoning – if not yet fully bloomed – body of literature.

However, provisions for the protection of “cultural property” or “cultural heritage” in international legal instruments far predate the birth of a dedicated branch of public international law. *Intersections in International Cultural Heritage Law* is an invitation to look beyond the discipline’s “breaking news”. The book’s opening premise holds that “the content of international legal rules designed to protect and to foster the preservation of cultural heritage has emerged almost exclusively within other fields of international law”.<sup>3</sup> In fifteen contributions, scholars and practitioners look at the diversity of sources, actors and institutions

1 Namely the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage.

2 Most notably, the 2001 Convention on the Protection of the Underwater Cultural Heritage, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

3 Anne-Marie Carstens and Elizabeth Varner, “Intersections in Public International Law for Protecting Cultural Heritage Law: Past, Present, and Future”, in *Intersections in International Cultural Heritage Law*, p. 1.

behind the composite development of the international legal protection of cultural heritage. They zoom in on key intersections between international cultural heritage law and other fields of international law, including international humanitarian law (IHL), international criminal law, international human rights law, and the law of the sea, evaluating recent developments and future trajectories under this interdisciplinary light.

The aim of the volume's cross-cutting approach is twofold. First, it allows for a historical investigation of the interactions between public international law and the protection of cultural heritage. Together, the contributions build a clear picture of how the latter has been shaped by the former, with founding principles of international law such as sovereignty and territoriality constraining the current regime of the protection of cultural heritage. Perhaps more surprisingly, they also illuminate instances where the opposite is true, where principles affirmed in the context of cultural heritage protection were later accepted outside of a cultural heritage-specific context.<sup>4</sup> Second, focusing on intersections between strains of international cultural heritage law and associated areas of public international law proves key to identifying gaps and loopholes in the current protective regime and potential measures to resolve enduring protection challenges.

The volume is divided into five thematic parts, with the editors providing connective tissue through an introduction to each part. The first is quite logically dedicated to IHL, historically the first body of international law to include provisions to safeguard cultural property. What are the consequences of the current protective regime finding its roots in measures meant for wartime? Patty Gerstenblith,<sup>5</sup> for instance, sees in the bifurcation between IHL instruments and rules on the transnational movement of cultural objects in peacetime a disconnect that provides to this day a less robust protection for movable objects than for immovable sites. She argues that although IHL prohibits and criminalizes pillage and misappropriation, it fails to address the subsequent trafficking of cultural objects illegally removed from conflict zones, while the conventions regulating the international movement of cultural objects<sup>6</sup> have limited efficacy in situations of armed conflict. Thus, the lack of intersection between the wartime and peacetime legal regimes leaves a gap in the protection of movable cultural heritage, which fails to prevent cultural objects illegally removed from conflict zones from entering the international art market.

The second section of the volume turns to the criminalization and prosecution of cultural heritage-based offences. Anne-Marie Carstens' contribution recounts how the inclusion of such offences as war crimes was far

4 Such as the acceptance of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict's applicability to situations of non-international armed conflict, which arguably smoothed the path to the adoption of Additional Protocol II to the 1949 Geneva Conventions.

5 Patty Gerstenblith, "The Disposition of Movable Cultural Heritage", in *Intersections in International Cultural Heritage Law*.

6 The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 Convention on Stolen or Illegally Exported Cultural Objects.

from self-evident in the historical development of international criminal law. Karolina Wierczyńska and Andrzej Jakubowski then turn to the landmark 2016 *Al Mahdi* case<sup>7</sup>, the much-discussed first prosecution of a cultural heritage crime before the International Criminal Court. Their analysis centres on the reparation order, highlighted as an important feature in the evolving system of individual criminal responsibility for cultural heritage crimes, and on how the Court grappled with the issues of identifying victims and quantifying the damage. Janet Blake's chapter<sup>8</sup> echoes Patty Gerstenblith's IHL contribution discussed above. Blake addresses a similar question – how to ensure that an illegally removed cultural object remains stained with illegality as it travels and moves through different jurisdictions – this time through the contribution of mechanisms for fighting transnational organized crime. She points out the limits of resting on the prevailing approach to combating trafficking based on the international legal regime protecting cultural property. She considers the alternative international law enforcement approach, stressing the similarities between cultural heritage trafficking and other forms of illegal trade and organized crime activities.

The third part of the volume is dedicated to the action of the different United Nations (UN) bodies. Contributions focus on the spearheading role of UNESCO, the implications of the growing involvement of the UN Security Council and Human Rights Council (HRC), and the jurisprudence of the International Court of Justice. Kristin Hausler's chapter<sup>9</sup> contrasts the framing of cultural heritage-based offences as violations of international human rights law by the HRC and as threats to peace and security by the Security Council. She commends the HRC's human rights-based approach for its inclusion of intangible cultural heritage, such as religious and cultural practices, under special threat in ethnically or religiously motivated armed conflicts. Now that the destruction of both tangible and intangible cultural heritage is recognized as a matter both of peace and security and of respect for human rights, she argues, better coordination between the HRC and the Security Council is necessary to guarantee a holistic approach to the protection of cultural heritage.

The volume's fourth part looks at special legal regimes for World Heritage Sites and underwater cultural heritage. Using the World Heritage Convention as a case study, Lucas Lixinski and Vassilis P. Tzevelekos<sup>10</sup> find the lack of attention given to State responsibility in the development of international cultural heritage

7 Ahmad Al Faqi Al Mahdi, a leader within the Islamist armed group Ansar Eddine, was prosecuted in 2016 by the International Criminal Court for his role in the destruction of Timbuktu's historic mausoleums in 2012. He pleaded guilty, received a nine-years prison sentence and was ordered to pay reparations. Karolina Wierczyńska and Andrzej Jakubowski, "The *Al Mahdi* Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm", in *Intersections in International Cultural Heritage Law*.

8 Janet Blake, "Trafficking in Cultural Property: Where Cultural Heritage Law and the International Fight against Transnational Organized Crime Coincide", in *Intersections in International Cultural Heritage Law*.

9 Kristin Hausler, "The UN Security Council, the Human Rights Council, and the Protection of Cultural Heritage: A Matter of Peace and Security, Human Rights, or Both?", in *Intersections in International Cultural Heritage Law*.

10 Lucas Lixinski and Vassilis P. Tzevelekos, "The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls", in *Intersections in International Cultural Heritage Law*.

law a key barrier to its efficacy. Sarah Dromgoole's chapter<sup>11</sup> on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is a thought-provoking outlier in the book: while most contributors identify gaps in the law, Dromgoole instead points out the problematic side effects of the 2001 Convention's wide material scope of application. She argues that a strict interpretation of its blanket approach to what constitutes underwater cultural heritage is bound to pose real challenges. Should the tons of silver recovered from a shipwreck truly be considered cultural heritage? What about wrecks containing hazardous materials, such as munitions or mustard gas? The chapter is an interesting contribution to the important debates on how cultural heritage is defined in international law. Past instruments have alternatively espoused a comprehensive approach or a selective approach based on a threshold of cultural significance and/or prior identification of sites and objects, and neither option appears to be without pitfalls.

The protection of cultural heritage involves different and sometimes competing interests at the international, national and community levels. The volume's fifth and final part looks at the challenges arising from that competition. Contributors point out the limitations of current instruments in accommodating international and community interests. Vanessa Tümsmeyer makes a strong case for a reinterpretation of a State's duty to protect cultural heritage in light of its human rights obligations.<sup>12</sup> She develops a "functions-based" approach to the appraisal of cultural heritage in order to reframe its protection in human rights terms. Bridging conceptual gaps between international cultural heritage law and international human rights law, she argues, is key to preventing the marginalization or destruction of cultural heritage outside of national cultural identity. Robert Peters' contribution<sup>13</sup> fleshes out the tensions between the increased recognition of the universal value of cultural heritage and legal instruments that remain State-centred. The unidimensional focus of States on national export laws to protect their own heritage makes for an illuminating example. Only the harmonization of national import and export laws, Peters argues, will help curb the illegal movement of cultural objects.

Ultimately, the book's major contribution lies in its ability to identify protection gaps precisely at the intersections between international cultural heritage law and other branches of public international law. Its authors look for ways to close, or at least minimize, such gaps by improving the articulation between the different legal regimes and the communication between implementing institutions. The book shows how the interwoven threads of

11 Sarah Dromgoole, "The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and Its Principles Relating to the Recovery and Disposition of Material from Shipwrecks", in *Intersections in International Cultural Heritage Law*.

12 Vanessa Tümsmeyer, "Bridging the Gap between International Human Rights and International Cultural Heritage Law Instruments: A Functions Approach", in *Intersections in International Cultural Heritage Law*.

13 Robert Peters, "Nationalism versus Internationalism: New Perspectives beyond State Sovereignty and Territoriality in the Protection of Cultural Heritage", in *Intersections in International Cultural Heritage Law*.

treaties, soft-law instruments, and actors involved in the protection of cultural heritage at the international level all form an intricate and evolving net. To tighten the net, the book seems to argue, we should start to tie up the loose threads found at the titular “intersections in international cultural heritage law”.

# The legal limits to the destruction of natural resources in non-international armed conflicts: Applying international humanitarian law

**Saeed Bagheri**

Lecturer in International Law, University of Reading School of Law, UK

Email: [saeed.bagheri@reading.ac.uk](mailto:saeed.bagheri@reading.ac.uk)

## Abstract

*This article analyzes whether and to what extent energy resources fulfil the definition of military objective within the meaning of international humanitarian law (IHL) and customary IHL. In order to bring conceptual clarity to the duty to protect the natural environment in armed conflict, the article explores the legal limits to the destruction of energy resources (that are part of the natural environment) controlled by armed non-State actors during non-international armed conflicts (NIACs). It examines the practice of the United States, which characterizes the destruction of the natural environment during hostilities as being related to targets that contribute to the “war-sustaining capability” of enemies. Conceptual light is shed on the legality of attacks on oil refineries and installations during NIACs as a matter for IHL.*

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**Keywords:** protection of the natural environment, ENMOD Convention, war-sustaining capability of enemies, Geneva Conventions, State property.

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## Introduction

Damaging energy resources that are part of the natural environment (such as oil, coal, natural gas and uranium) during armed conflicts is a matter for international humanitarian law (IHL), which permits it only under specific circumstances.<sup>1</sup> Therefore, depending on the circumstances, when distinguishing between civilian objects and military objectives, as well as conducting an assessment of military necessity and proportionality when targeting military objectives, States must assess the extent of the risk to the environment that may arise from the destruction of energy resources. Prevention of environmental damage during armed conflicts is a rule of customary IHL that continues to apply in both international armed conflicts (IACs) and non-international armed conflicts (NIACs).<sup>2</sup>

One might argue that these specific rules have not become part of customary international law, but practice shows that States are conscious of the high risk of severe incidental losses which can result from attacks on works and installations when they constitute military objectives.<sup>3</sup> Consequently, they recognize that in any type of armed conflict, particular care must be taken during

- 1 The issue will be explored in more detail under the key relevant provisions, including Articles 35(3), 51, 52, 55 and 56 of Additional Protocol I to the Geneva Conventions; Article 15 of Additional Protocol II to the Geneva Conventions; Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court; Article II of the ENMOD Convention; and Rules 43, 44 and 45 of the International Committee of the Red Cross (ICRC) Customary Law Study.
- 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 43–45, pp. 143–158, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in April 2023). For further discussion, see Cymie R. Payne, “Protection of the Natural Environment”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020; Cordula Droegge and Marie-Louise Tougas, “The Protection of the Natural Environment in Armed Conflict: Existing Rules and Need for Further Legal Protection”, *Nordic Journal of International Law*, Vol. 82, No. 1, 2013; Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010.
- 3 The United States, for example, has long opposed Article 56 of AP I and believes that neither Article 15 of AP II nor Article 56 of AP I reflect customary international law. See US Department of Defence (DoD), *Law of War Manual*, Office of General Counsel, Washington, DC, 2016, section 17.7.1, p. 1051; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) 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 1978) (AP II). For a discussion, see Michael N. Schmitt, “Attacking Dams – Part I: Customary International Law”, *Articles of War*, 31 January 2022, available at: <https://lieber.westpoint.edu/attacking-dams-part-i-customary-international-law/>; Michael N. Schmitt, “Attacking Dams – Part II: The 1977 Additional Protocols”, *Articles of War*, 2 February 2022, available at: <https://lieber.westpoint.edu/attacking-dams-part-ii-1977-additional-protocols/>. For State practice, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 814–840.

attacks to avoid the release of dangerous forces and consequent severe losses among the civilian population. This requirement was found to be part of customary international law and is applicable in IACs and NIACs.<sup>4</sup>

What is certain in this regard is that oil rigs, oil storage facilities and oil refineries are not objects containing dangerous forces within the meaning of Article 15 of Additional Protocol II (AP II) and Article 56 of Additional Protocol I (AP I) and that, if these objects are to be given any special protection by the Additional Protocols, it should be done by another article, perhaps by a special article for that purpose.<sup>5</sup> This also underlies the approach of the US authorities, who mention that energy resources may qualify as military objectives that effectively contribute to the enemy's capacity to wage war,<sup>6</sup> the total or partial destruction, capture or neutralization of which, in the circumstances ruling at the time, offers a definite military advantage.<sup>7</sup> This categorization is based on the US Military Commissions Act of 2009, which states that the term "military objective" refers to combatants and those objects which, during hostilities and by their nature, location, purpose or use, effectively contribute to the war-fighting or war-sustaining capability (war effort) of an opposing force and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.<sup>8</sup>

Characterizing Iraqi and Syrian oil refineries occupied by the so-called Islamic State group (IS) as military objectives stems from the United States' interpretation of the law,<sup>9</sup> contained in Article 52 of AP I, which states:

- 4 Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 191.
- 5 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols to the Geneva Conventions*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), p. 668.
- 6 See International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA Study Group), "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", *International Law Studies*, Vol. 93, 2017, p. 330; DoD, above note 3, p. 220.
- 7 DoD, above note 3, p. 210.
- 8 US Military Commissions Act, 28 October 2009, para. 950p(a)(1), available at: [www.intelligence.senate.gov/laws/military-commissions-act-2009-title-xviii-national-defense-authorization-act-fiscal-year-2010](http://www.intelligence.senate.gov/laws/military-commissions-act-2009-title-xviii-national-defense-authorization-act-fiscal-year-2010) ; DoD, above note 3, section 5.6.6, pp. 212–214.
- 9 This is subject to Rule 23 of the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, which qualifies energy-producing facilities and oil storage depots as military objectives by nature in the circumstances ruling at the time (see also Rule 1(y)). This was, however, criticized by the ICRC, which declared that an object is a military objective by nature only if it has an "inherent characteristic or attribute which contributes to military action", and that an "inherent characteristic or attribute" cannot be conceived of on a merely temporary basis and by definition has to be permanent. In essence, the key is that the test for military objectives (those objects which, by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage) must be met before an object may be attacked. See Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Harvard University, 2010, p. 109. For a discussion, see ILA Study Group, above note 6, pp. 330–331.

1. Civilian objects shall not be the object of attack or reprisals. They are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives, and military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes (e.g., a place of worship, a house or dwelling, a school) is a military objective or not, it shall be considered a civilian object.<sup>10</sup>

Article 52 only specifies military objectives in the second paragraph. According to the International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols, a military objective for the purpose of Article 52(2) of AP I must meet two criteria to be a military objective:

1. The object, by its nature, location, purpose or use, has to contribute effectively to the military action of the enemy. The object's "nature" speaks of its intrinsic character and comprises all objects directly used by the armed forces (weapons, equipment, transport, fortifications, depots, buildings occupied by the armed forces, staff headquarters, communications centres, etc).<sup>11</sup> However, there are some objects that only by their "location" make an effective contribution to military action, simply because they are situated in an area that is a legitimate target. In that sense, a specific area of land may be a military objective if its total or partial destruction, capture or neutralization in the circumstances at the time offers a definite military advantage. The object's "purpose" clearly refers to the enemy's intended future use of it, based on reasonable belief, while the object's "use" is about the current function of the object (e.g., weapons factories and even extraction industries providing raw materials for such factories are military objectives, because they serve the military, albeit indirectly).<sup>12</sup>
2. It is unlawful to launch an attack that offers only a potential or indeterminate advantage. In other words, the object's destruction, capture, or neutralization is lawful only if it offers a definite military advantage to the attacker. Hence, those ordering or executing such an attack must have sufficient intelligence available to consider this requirement. In case of doubt as to whether an object which is normally dedicated to civilian purposes is a military objective or not, it shall be considered a civilian object.<sup>13</sup>

As mentioned above, the United States has characterized Iraqi and Syrian oil refineries occupied by IS as military objectives that may be targeted within the

10 For an extensive discussion, see Yoram Dinstein, "Distinction and Loss of Civilian Protection in International Armed Conflicts", *International Law Studies*, Vol. 84, 2008; Yoram Dinstein, "Legitimate Military Objectives Under the Current Jus in Bello", *International Law Studies*, Vol. 87, 2002.

11 ICRC Commentary on the APs, above note 5, p. 636, para. 2020.

12 *Ibid.*

13 *Ibid.*, p. 637. See also ICRC, *The Law of Armed Conflict: Conduct of Operations – Part A*, Geneva, 2002, pp. 4–5.

meaning of Article 52 of AP I. Recall, however, that even when targeting admittedly military objectives within the meaning of IHL, there is a need to avoid excessive long-term damage to the natural environment. Indeed, military objectives should not be targeted if the attack is likely to cause incidental harm to the environment that would be excessive in relation to the direct military advantage which the attack would be expected to confer.<sup>14</sup> This is also evident from Rule 7 of the ICRC's 2020 *Guidelines on the Protection of the Natural Environment in Armed Conflict*, under which "launching an attack against a military objective which may be expected to cause incidental damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited".<sup>15</sup>

Evidently, the 1990–91 Gulf War proved that oil refineries and oil production installations are too much of a risk to the natural environment in many situations and would need special protection because of their significant potentially harmful and long-term environmental impact and risk to human health in case of attack.<sup>16</sup> Targeting oil refineries and installations by air and sea results in air pollution and the risk of the release of hazardous waste. In a sense, the natural environment, which cannot be separated from human life, is the "silent victim"<sup>17</sup> of armed conflicts and must be protected from attacks.

Regarding this issue, which is the primary subject of this article, the US-led coalition forces' attacks<sup>18</sup> on Iraqi and Syrian oil facilities under the control of IS as military objectives have been the subject of controversy. Specifying the scope of the illegality of targeting an installation that is part of the natural environment, but

14 A. P. V. Rogers, "Zero-Casualty Warfare", *International Review of the Red Cross*, Vol. 82, No. 837, 2000, pp. 177–178.

15 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020, Rule 7, p. 8. Similarly, see Principle 14 of the International Law Commission (ILC) Draft Principles on Protection of the Environment in Relation to Armed Conflicts, under which "[IHL], including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection", See ILC, *Draft Principles on Protection of the Environment in Relation to Armed Conflicts*, adopted by the Commission at its 73rd Session, 18 April–3 June and 4 July–5 August 2022, UN Doc. A/CN.4/L.968, 20 May 2022 (ILC Draft Principles).

16 UN Environment Programme (UNEP), *Desk Study on the Environment in Iraq*, Nairobi, 2003, pp. 65–68.

17 Rosemary Rayfuse, "Rethinking International Law and the Protection of the Environment", in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Brill Nijhoff, Leiden and Boston, MA, 2014, p. 1; Desy Churul Aini and Desia Rakhma Banjarani, "Environmental Protection in Armed Conflict According to International Humanitarian Law", *Tadulako Law Review*, Vol. 3, No. 1, 2018, pp. 13–14. For more details, see "On International Day, UN Urges Protection of Environment from Ravages of War: The UN Secretary-General Message for the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict", *UN News*, 6 November 2014, available at: <https://news.un.org/en/story/2014/11/482922>.

18 After IS advanced into Iraq from Syria in June 2014, President Barack Obama authorized targeted air strikes against IS militants in Iraq and Syria in August 2014. The United States then formed an international coalition to counter IS. Over sixty nations and partner organizations agreed to participate, contributing military forces or resources (or both) to the campaign. See "Keynote Address by General John Allen, Special Presidential Envoy for the Global Coalition to Counter ISIL", Brookings Institution, 3 June 2015, available at: [www.brookings.edu/wp-content/uploads/2015/04/060315BROOKINGSDOHA.pdf](http://www.brookings.edu/wp-content/uploads/2015/04/060315BROOKINGSDOHA.pdf).

which contains dangerous forces, can be done through an evaluation in the context of the standards of IHL.

## Natural resources and defending the natural environment from wilful destruction during armed conflicts

### Conceptual framework

As discussed earlier, under Article 52(2) of AP I, oil facilities can be considered legitimate military targets if the mentioned criteria are fulfilled. However, the acceptability of targeting oil facilities of any kind as legitimate military targets during armed conflict is contentious because of their environmental impact and because they might not fulfil the criteria necessary to deem them military objectives since they are not making an “effective contribution to military action”, meaning that they do not satisfy the Article 52(2) definition of military objectives.<sup>19</sup> Therefore, there would be doubt that they could be considered legitimate military objectives open to destruction by any belligerent.<sup>20</sup> Fires at oilfields, oil installations and oil storage facilities can last a long time and can release clouds of pollution over wide areas. The destruction of oil facilities might give rise to toxic air pollution, or oil might seep into the ground and poison water supplies. Also, if the oilfields and installations are located in a coastal State, oil spills can inflict huge environmental damage on coastal marshlands and fishing grounds and may be devastating to marine life,<sup>21</sup> such as what occurred during the 1990–91 Gulf War. In its Resolution 47/37, the United Nations (UN) General Assembly expressed its deep concern regarding environmental damage and the depletion of natural resources, including the destruction of oil-well heads and the release of crude oil into the sea. Further, the resolution stated that the wanton destruction of the natural environment was contrary to international law, and that existing provisions prohibited such acts.<sup>22</sup> It is also worth noting that although the General Assembly’s resolutions are non-binding, they can provide important evidence for establishing the existence of a rule or *opinio juris*, since the formulation and expression of State practice in matters pertaining to international law are manifested through the resolutions.<sup>23</sup>

19 For a much more extended discussion, see Laurent Gisel, “The Relevance of Revenue-Generating Objects in Relation to the Notion of Military Objective”, *Proceedings of the Bruges Colloquium: The Additional Protocols at 40: Achievements and Challenges*, 18th Bruges Colloquium, 19–20 October 2017.

20 See L. C. Green, “Environment and the Law of Conventional Warfare”, *Canadian Yearbook of International Law*, Vol. 29, 1992, pp. 233–234. For an extensive analysis, see Michael N. Schmitt, “Green War: An Assessment of the Environmental Law of International Armed Conflict”, *Yale Journal of International Law*, Vol. 22, No. 1, 1997; Robert E. Linhard, “Protection of the Environment during Armed Conflict and Other Military Operations”, *International Law Studies*, Vol. 69, 1996.

21 Yoram Dinstein, “Protection of Environment in International Armed Conflicts”, *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001, pp. 523–524.

22 UNGA Res. 47/37, 25 November 1992.

23 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (Nuclear Weapons Advisory Opinion), para. 70; Sangwani Patrick Ng’ambi, “Permanent

In its substance, Article 55(1) of AP I prohibits widespread, long-term and severe damage to the environment, which reiterates the regulation contained in Article 22 of the 1899 and 1907 Hague Conventions, providing that the right of belligerents to adopt means of injuring the enemy is not unlimited (prohibited methods of warfare). Article 55(1) of AP I states:

Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Unlike Article 35(3) of AP I, which makes no connection between damage to the natural environment and the health or survival of the population, Article 55(1) draws a connection between damage to the natural environment and its effects on civilians (civilian protection) and includes a reference to the health or survival of the population.<sup>24</sup> In essence, the provisions contained in Article 55(1) do not duplicate each other. However, although both provisions afford protection to the natural environment from damaging weapons and methods of warfare, it is important to note that the thrust of the protection is clear from the four years of negotiations on AP I and is firmly rooted in the protection of the “population”.<sup>25</sup>

What is certain is that the *travaux préparatoires* of AP I do not provide a definition of the term “widespread, long-term and severe” damage, which refers to the key elements of environmental regulations contained in Article 55(1). In comparison, the Annex of the non-binding 1976 Environmental Modification Convention (ENMOD Convention),<sup>26</sup> which was adopted several months before AP I, has interpreted the above-mentioned terms as follows: (a) “widespread”: encompassing an area on a scale of several hundred square kilometres; (b) “long-term”: lasting for a period of months, or approximately a season; and (c) “severe”: involving serious or significant disruption or harm to human life and/or to natural and economic resources or other assets.<sup>27</sup> For the sake of clarity, the very recent interpretations released by the UN Environment Programme (UNEP) and the ICRC recommend that in AP I, “widespread” probably means several

Sovereignty Over Natural Resources and the Sanctity of Contracts, from the Angle of *Lucrum Cessans*”, *Loyola University Chicago International Law Review*, Vol. 12, No. 2, 2015, pp. 157–158. For a comprehensive overview of the relevant standards on this issue, see UNGA Res. ES-11/2, 24 March 2022; UN Environment Assembly Res. 3/1, “Pollution Mitigation and Control in Areas affected by Armed Conflict or Terrorism”, UN Doc. UNEP/EA.3/Res.1, 6 December 2017; UN Environment Assembly Res. 2/15, “Protection of the Environment in Areas Affected by Armed Conflict”, UN Doc. UNEP/EA.2/Res.15, 27 May 2016; ILC Draft Principles, above note 15.

24 See ICRC, above note 15, para. 73.

25 See Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Martinus Nijhoff, Leiden and Boston, MA, 2004, p. 11; ICRC Commentary on the APs, above note 5, p. 410.

26 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted by UNGA Res. 31/72, 10 December 1976 (ENMOD Convention).

27 *Ibid.*, Annex. See also UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, Nairobi, 2009, p. 52.

hundred square kilometres, as it does in the ENMOD Convention.<sup>28</sup> In relation to “long-term”, it has been recommended that a factor to consider in determining the kind of damage that is “long-term” could be the ability of certain substances to persist in particular natural environments. For example, it is well accepted that serious environmental contaminants and hazardous substances can remain in the natural environment for lengthy periods and cause – and continue to cause – harm to species, including humans.<sup>29</sup> “Severe” is defined as a threshold that should be understood to cover disruption or damage to an ecosystem or harm to the health or survival of the population on a large scale.<sup>30</sup> In the interests of clarity, UNEP recommends that the precedent set by the ENMOD Convention – “involving serious or significant disruption or harm to human life, natural and economic resources or other assets” – should serve as the minimum basis for the development of a clearer definition of “severe”.<sup>31</sup> In that sense, as the meaning of “severe” in the context of Articles 35(3) and 55(1) of AP I is understood to cover damage prejudicing the health or survival of the population and ecological concerns, effects involving serious or significant disruption or harm to human life or natural resources should be considered in determining the type of damage that could be covered.<sup>32</sup>

The natural environment has been defined by the ICRC’s Commentary on AP I Article 35 (on methods and means of warfare) as the system of inextricable interrelations between living organisms and their inanimate environment, whereas effects on the human environment are understood as effects on external conditions and influences which affect the life, development and survival of the civilian population and other living organisms.<sup>33</sup> The environment in this sense may be indirectly damaged by the targeting of oil resources as part of the environment in cases where they are considered legitimate military objectives. Rule 43 of the ICRC Customary Law Study is explicit that no part of the natural environment may be attacked unless it is a military objective, and that destruction of any part of the natural environment is prohibited unless required by imperative military necessity.<sup>34</sup> One possible reading of this rule is that the natural environment and its components such as “energy resources”<sup>35</sup> might be used for military purposes, which makes it easier for them to be considered as military objectives. This could only be the case, however, if such resources make an effective contribution to the military actions of the enemy and their destruction, capture or neutralization offers a definite military advantage within the meaning of Article 52(a) of AP I. In other words, immunity from attack can be lost if the object is used in direct support of the enemy’s military operations.

28 See ICRC, above note 15, para. 60.

29 *Ibid.*, paras 64–65.

30 *Ibid.*, para. 72.

31 UNEP, above note 27, p. 5.

32 ICRC, above note 15, para. 72.

33 See ICRC Commentary on the APs, above note 5, para. 1451.

34 This is precisely the argument that will be discussed later under the section on “The Obligation to Protect Natural Resources as State Property”.

35 ICRC, above note 15, para. 179.



Note, however, that even in such a case, the damage could constitute “incidental loss of civilian life, injury to civilians, [or] damage to civilian objects”, which is only permissible to the extent that it is not “excessive” in relation to the concrete and direct military advantage anticipated as a result of the attack;<sup>36</sup> even if an element of the natural environment is lawfully attacked because it constitutes a military objective, depending on the scale of the attack there may be long-term environmental damage beyond the actual destruction.<sup>37</sup> However, the vagueness of the term “widespread, long-term and severe” may be identified as a major gap in the existing international legal framework of IHL regarding the practical issues of proportionality, where environmental damage is seen as collateral damage caused by attacks on military objectives.<sup>38</sup>

Following AP I, Rule 43 of the ICRC Customary Law Study states that “[l]aunching an attack against a military objective which may be expected to cause incidental damage to the environment, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited”.<sup>39</sup> Such an attack is not in conformity with the principle of necessity, which states that the use of military force is only justified to the extent that it is necessary for achieving a defined military objective. In literal terms, military necessity consists of the necessity of those measures which are indispensable for weakening the enemy’s military capabilities, and which are lawful according to the modern law and usages of war. To put it mildly, military actions that do not serve any evident military purpose are forbidden.<sup>40</sup> Nonetheless, unlike the ENMOD Convention, which requires deliberate and intentional damage, the outline of Articles 35 and 55 of AP I refers to a cumulative threshold, which is explained by the fact that the Protocol prohibits damage resulting from those methods and means of warfare which are expected to cause widespread, long-term and severe damage – whether deliberate or unintentional. The most logical reading of this provision is that this threshold is absolute and that any widespread, long-term and severe damage to the natural environment is prohibited regardless of military necessity or proportionality considerations.<sup>41</sup>

It is possible, however, to apply the proportionality standard to the natural environment under Article 51(5)(b) of AP I, according to which an attack that “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”, is to be considered as indiscriminate. This is also evident from Principle 14 of the International Law

36 M. Bothe *et al.*, above note 2, p. 577.

37 *Ibid.*, p. 578.

38 *Ibid.*, pp. 570, 578.

39 ICRC Customary Law Study, above note 2, p. 143. For a discussion, see Nobuo Hayashi, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law”, *Boston University International Law Journal*, Vol. 28, No. 1, 2010.

40 Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863 (Lieber Code), Art. 14; UNEP, above note 27, p. 11; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2016, pp. 89–90.

41 ICRC, above note 15, para. 52.

Commission's (ILC) Draft Principles on Protection of the Environment in Relation to Armed Conflicts (ILC Draft Principles), under which the principles of distinction and precautions and the proportionality rule shall be applied to the natural environment, with a view to its protection.<sup>42</sup> This is also the position of the ICRC, which notes that State practice shows a general acceptance of the principle that incidental damage affecting the natural environment must not be excessive in relation to the military advantage anticipated from an attack on a military objective.<sup>43</sup>

There is also a widespread and uniform practice prohibiting deliberate attacks on the natural environment as a method of warfare. For example, Estonia's Penal Code prohibits affecting the natural environment as a method of warfare.<sup>44</sup> Iraq and Kuwait, in letters to the UN Secretary-General in 1991, have stated that the environment and natural resources must not be used as a weapon.<sup>45</sup> Sweden and Canada have characterized the destruction of the natural environment by Iraqi forces as an unacceptable form of warfare, and have stated that the environment as such should not form the object of direct attack.<sup>46</sup> Relatedly, the declaration adopted in 1991 by the Organisation for Economic Co-operation and Development ministers of the environment condemned Iraq's burning of oilfields and discharging of oil into the Gulf as a violation of international law and urged Iraq to cease resorting to environmental destruction as a weapon.<sup>47</sup>

Ultimately, when it comes to "oil facilities", there is no valid reason to exclude them from consideration as installations whose extensive destruction in times of armed conflict might lead to environmental damage, such as that mentioned in Article 55(1) of AP I, as a conventional rule which embodies a general obligation to protect the natural environment against widespread, long-term and severe environmental damage. Besides this, given that this regulation is also contained in Article 56 of AP I,<sup>48</sup> it might be argued that oil resources and facilities are indirectly protected during both IACs and NIACs.

## General survey of environmental destruction during armed conflicts

Article 55(1) of AP I includes a prohibition on the intentional use of methods, means of warfare or any kind of use of force which may be expected to cause such damage to the natural environment that it will prejudice the health or survival of the local population. AP I does not define the term "widespread, long-term and severe". Unlike Article 35(3) of AP I, however, it seems that Article 55

42 See A. P. V. Rogers, above note 14, pp. 177–178.

43 See ICRC Customary Law Study, above note 2, Rule 43, pp. 143–146.

44 ICRC Customary Law Study, above note 3, p. 885.

45 *Ibid.*, pp. 891, 889.

46 *Ibid.*, pp. 850, 852.

47 *Ibid.*, p. 900.

48 Article 56 of AP I states: "even where these objects are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population".

(1) implies a connection between the environment and humankind.<sup>49</sup> This particular meaning stems from the ICRC Commentary on the Additional Protocols, which makes it clear that the term “natural environment” should be interpreted in general terms, meaning that the natural environment does not only consist of objects that are indispensable to the survival of a civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water supplies and irrigation works – it also includes forests and other vegetation as well as fauna and other biological or climatic elements.<sup>50</sup>

It is reasonably clear that the focus of Article 55(1) is the survival of the civilian population and the environment, which itself is protected against attacks during armed conflict. However, as the ICRC Commentary on the Additional Protocols has rightly noted, the words “care shall be taken in warfare to protect the natural environment”<sup>51</sup> in the first paragraph of Article 55 seem to reduce the effect of the provision by allowing some latitude of judgment, as it excludes a great deal of short-term environmental damage. It can be reasonably assumed that this provision requires conflict parties to refrain from resorting to unconventional means and methods of warfare, such as chemical weapons,<sup>52</sup> which could produce widespread, long-term and severe damage to the natural environment.<sup>53</sup> However, it would be a valid rationale under this provision for conflict parties to resort to using conventional means and methods of warfare such as cluster munitions (especially parties who regard cluster munitions as legitimate weapons) simply because such munitions are not of a nature to affect the natural environment for decades.<sup>54</sup> In all cases, however, it is widely accepted that the impact of such weapons goes beyond civilian casualties, as extensive sub-munition contamination can have far-reaching and widespread environmental consequences, hindering post-conflict reconstruction and development.<sup>55</sup>

49 Adam Roberts, “Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War”, *International Law Studies*, Vol. 69, 1996, p. 233.

50 ICRC Commentary on the APs, above note 5, para. 2126; K. Hulme, above note 25, pp. 12–13.

51 ICRC Commentary on the APs, above note 5, para. 2133.

52 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997). For a discussion on the long-term impacts of chemical weapons, see Dhanasree Jayaram, “Unprecedented Environmental Impacts of Chemical and Biological Warfare: A Critical Appraisal”, *CBW Magazine*, Vol. 14, No. 2, 2021, available at: [www.idsa.in/cbwmagazine/environmental-impacts-of-chemical-and-biological-warfare#footnote5\\_pc656nb](http://www.idsa.in/cbwmagazine/environmental-impacts-of-chemical-and-biological-warfare#footnote5_pc656nb). See also Edward A. Tanzman, “Environmental and Safety Obligations of the Chemical Weapons Convention”, *Proceedings of the Annual Meeting of American Society of International Law*, Vol. 88, 1994.

53 See Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 2013, p. 390.

54 See Convention on Cluster Munitions, 2688 UNTS 39, 30 May 2008 (entered into force 1 August 2010).

55 See Javad Fares and Youssef Fares, “Cluster Munitions: Military Use and Civilian Health Hazards”, *Bulletin of the World Health Organization*, Vol. 96, No. 8, 2018; Kevin Riordan, “Convention on Cluster Munitions”, *UN Audiovisual Library of International Law*, 30 May 2008, available at: <https://legal.un.org/avl/ha/ccm/ccm.html>; Alex Frost, “Mitigating the Environmental Impacts of Explosive Ordnance and Land Release”, *Humanitarian Law and Policy*, 16 December 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/12/16/environmental-impacts-explosive-ordnance/>.

Alongside AP I, there are a variety of international instruments and treaties that cover international norms governing the protection of the environment. These include the UN General Assembly resolutions, the Declaration of the UN Conference on the Human Environment (the non-binding Stockholm Declaration of 1972),<sup>56</sup> the Report of the UN Conference on Environment and Development (the non-binding Rio Declaration of 1992)<sup>57</sup> and the 1949 Geneva Conventions.<sup>58</sup>

Only a couple of relative provisions within AP I and the non-binding 1976 ENMOD Convention mention the protection of the aforementioned objects as parts of the natural environment “in times of armed conflict”. As used in Article II of the ENMOD Convention, the term “environmental modification techniques” in the title “refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”. The Convention protects the natural environment through the prohibition of the use of environmental modification techniques that have severe, widespread or long-lasting impacts in the form of destruction, damage or injury to any other State Party. It does not set out sanctions for any State Party that violates the Convention.<sup>59</sup>

AP I is one of the major instruments of IHL that governs the protection of the natural environment in armed conflicts, but it is pertinent to note that the provisions of AP I are only applicable to IACs; they do not cover environmental destruction during NIACs. Indeed, as treaty law neither the Geneva Conventions, AP I and AP II nor the Hague Regulations regulate environmental damage in NIACs. It appears, therefore, that only the “prohibition of attacks upon works and installations containing dangerous forces” contained in Article 15 of AP II could be (indirectly) relevant to the protection of the natural environment during NIACs.<sup>60</sup> However, it is worth noting here that the conduct of hostilities and other obligations set out in AP I and AP II apply as matters of customary law in NIACs. This is even more evident from Rule 43 of the ICRC Customary Law Study, according to which the natural environment may not be attacked unless it

56 Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1, Stockholm, 5–16 June 1972, available at: [www.un-documents.net/aconf48-14r1.pdf](http://www.un-documents.net/aconf48-14r1.pdf).

57 Rio Declaration on Environment and Development, Annex I of the *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26, Vol. 1, Rio de Janeiro, 3–14 June 1992 (Rio Declaration), available at: [www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf).

58 Consider AP I, Arts 51 (“protection of the civilian population”), 52 (“general protection of civilian objects”), 54 (“protection of objects indispensable to the survival of the civilian Population”), 55 (“protection of the natural environment”), 56 (“protection of works and installations containing dangerous forces”); and AP II, Art. 15 (“protection of works and installations containing dangerous forces”).

59 For more details, see Onita Das, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective*, Edward Elgar, Cheltenham, 2013, pp. 131–132.

60 Wil D. Verwey, “Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective”, *Leiden Journal of International Law*, Vol. 8, No. 1, 1995, pp. 29–30; James E. Bond, William J. Fenrick, Hans-Peter Gasser and Waldemar A. Solf, “Determining Customary International Law Relative to the Conduct of Hostilities in Non-International Armed Conflicts”, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 486.

is a military objective and its destruction is required by imperative military necessity. Furthermore, launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. State practice establishes this as a norm of customary international law. Even though some States have not ratified AP I and AP II, the customary rules of IHL bind all States regardless of whether they are parties to the Geneva Conventions or their Additional Protocols.

It is especially important to note that the ILC Draft Principles, adopted on 20 May 2022, indicate that the international community of States should positively contribute to international efforts in order to protect the natural environment and natural resources during IACs and NIACs, where they recognize the importance and relevance of existing rules and call for them to be implemented and respected in armed conflicts. Eventually, the parties to a NIAC will be encouraged to apply the same rules that protect the environment in IACs.<sup>61</sup> A majority of members of the ILC and the States in the Sixth Committee of the UN General Assembly agreed to apply the ILC Draft Principles to NIACs as well. According to the commentary on Draft Principle 1, no distinction is made between IACs and NIACs in terms of the protection of the natural environment.<sup>62</sup>

## Empirical test: Lessons from the use of force against IS

The US-led coalition's air strikes adversely impacted both civilians and energy resources in the regions under the control of IS in Iraq and Syria. As Terry D. Gill has argued, any civilians or civilian objects affected by an attack on an armed non-State actor (ANSA) would enjoy virtually the same degree of protection from the effects of hostilities under the legal regime applicable to NIACs as they enjoy under the regime on IACs.<sup>63</sup> Destroying oil wells under the control of an ANSA, therefore, might violate the provisions specifically aimed at protecting the environment during armed conflict, including Articles 35(3) and 55(1) of AP I. In a sense, even though AP I applies only to IACs, the parties to a NIAC are required to apply the same rules that protect the natural environment during all armed conflicts, as they are generally considered to reflect customary international law.<sup>64</sup> For the sake of IHL protection, this should also be considered with respect to the IHL principles of distinction and precaution and the

61 For general information, see Tara Smith, "Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity", *Leiden Journal of International Law*, Vol. 32, No. 4, 2019; Hans-Peter Gasser, "For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action", *American Journal of International Law*, Vol. 89, No. 3, 1995.

62 See ILC Draft Principles, above note 15. For a discussion, see UNEP, "Why Legal Principles on War and Environment Matter", 20 August 2019, available at: [www.unenvironment.org/news-and-stories/story/why-legal-principles-war-and-environment-matter](http://www.unenvironment.org/news-and-stories/story/why-legal-principles-war-and-environment-matter).

63 Terry D. Gill, "Classifying the Conflict in Syria", *International Law Studies*, Vol. 92, 2016, p. 369.

64 ICRC Customary Law Study, above note 2, Rules 43–45, pp. 143–158. C. R. Payne, above note 2; C. Droege and M.-L. Tougas, above note 2; ILA Study Group, above note 6, p. 325.

proportionality rule, independently of Articles 35(3) and 55(1). This is simply because the legality of attacks depends on the application of these principles,<sup>65</sup> which prohibit indiscriminate attacks on civilians and civilian objects, and any attack which may be expected to cause excessive incidental damage. More importantly, although attacks are carried out in different situations (deliberate targeting processes in which the expected incidental harm can be carefully assessed, or dynamic targeting in the heat of battle), the proportionality rule and the obligation to take feasible precautions prior to and during an attack to protect civilians where possible<sup>66</sup> apply to all attacks, regardless of the nature of the conflict (IAC or NIAC).<sup>67</sup> Accordingly, States are urged to incorporate such rules into their military manuals and instructions on IHL in a way that does not discriminate based on how a conflict is characterized.<sup>68</sup>

Although the United States is not a State party to AP I and does not accept Article 55(1) of AP I as customary international law,<sup>69</sup> it cannot be said that the explicit obligations contained in Article 55(1) have not achieved the required near-universal adherence because of opposition by the United States. In support of this argument, the ICRC Customary Law Study includes a simplified version of Article 55(1) of AP I in Rule 45 to constitute customary international law, stating:

The use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.<sup>70</sup>

Notwithstanding this rule, there is no doubt that Article 55(1) excludes minor and short-term damage to the natural environment. It is, therefore, perfectly possible to argue that the protection of the natural environment under Article 55(1) of AP I is not sufficient since it does not afford adequate protection during times of armed conflict, and it appears that such protection must therefore be strengthened.<sup>71</sup>

65 See Thilo Marauhn and Stefan Kirchner, “Target Area Bombing”, in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues*, Eleven Publishing, Utrecht, 2006, pp. 102–103.

66 AP I, Arts 57, 58.

67 Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House International Law Programme Research Paper, 2018, para. 3.

68 See ICRC Customary Law Study, above note 3, p. 845; A. Roberts, above note 49, p. 257.

69 In his remarks at the 70th UN General Assembly Sixth Committee on the Report of the ILC on the Work of Its 67th Session, Mark Simonoff, minister counsellor for legal affairs of the US Mission to the UN, argued that the United States is troubled by the presence among the principles of rules extracted from certain treaties that it does not believe reflect customary law – for example, the prohibition in AP I on attacks against the natural environment by way of reprisals. See Mark Simonoff, “U.S. Mission to the United Nations: Remarks at the 70th UN General Assembly Sixth Committee on Agenda Item 83: Report of the International Law Commission on the Work of its 67th Session, 11 November 2015”, in CarrieLyn D. Guymon (ed.), *Digest of United States Practice in International Law*, Office of the Legal Adviser, US Department of State, Washington, DC, 2015, p. 287. For a discussion, see J. E. Bond *et al.*, above note 60, p. 424. See also John R. Crook, “United States Responds to ICRC Study on Customary International Law”, *American Journal of International Law*, Vol. 101, No. 3, 2007.

70 Philippe Sands, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2003, p. 314; ICRC Customary Law Study, above note 2, p. 151; M. Bothe *et al.*, above note 2, p. 574.

71 See Liesbeth Lijnzaad and Gerard J. Tanja, “Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War”, *Netherlands International Law Review*, Vol. 40, No. 2, 1993, p. 182.



With regard to destruction of and attacks on oil refineries and oil storage facilities, it is hardly necessary to stress the grave danger to the natural environment that might follow for the civilian population as a matter of Article 55(1).<sup>72</sup> Indeed, State practice considers the environment to be a *prima facie* civilian object. It is not considered to be a military objective under Rule 10 of the ICRC Customary Law Study, which provides that “[c]ivilian objects are protected against attack, unless and for such time as they are military objectives”. Therefore, indiscriminate attacks on such objects have generally been condemned.<sup>73</sup>

In that regard, although there is an ongoing controversy about whether oil wells constitute installations containing dangerous forces, it has been argued that the examples given in Article 56 of AP I and Article 15 of AP II are not meant to be exhaustive, and a liberal construction could say that the release of the force of the oil fires and spills could be covered.<sup>74</sup>

According to the International Court of Justice (ICJ),

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>75</sup>

This is, in fact, the approach taken by the ICJ in the context of the protective nature of Article 55(1).<sup>76</sup> It is also evident from Article 35(1) of AP I, which is specifically reflective of the interest of States to be bound by this rule. Article 35(1) provides that the right of the warring parties to choose methods or means of warfare is not unlimited, and now there is sufficient State practice to support that this prohibition is considered a rule of customary international law, which is applicable in both IACs and NIACs.<sup>77</sup> In addition, the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia opined that Article 55(1) may reflect current customary international law.<sup>78</sup>

Evaluating the environmental damage that has resulted from the targeting of oilfields and installations under the control of IS in Syria and Iraq, and identifying

72 ICRC Commentary on the APs, above note 5, para. 2150.

73 ICRC Customary Law Study, above note 2, p. 34.

74 William M. Arkin, Damian Durrant and Marianne Cherni, *Modern Warfare and the Environment: The Case Study of the Gulf War*, Greenpeace International, Washington, DC, 1991, p. 140.

75 Nuclear Weapons Advisory Opinion, above note 23, para. 30. For a discussion on the disputable nature of Article 55(1) of AP I, see Karen Hulme, “Natural Environment”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007.

76 For further discussion, see ILC Draft Principles, above note 15, Principle 13 and Commentary.

77 ICRC Customary Law Study, above note 2, p. 151. See also Peter J. Richards and Michael N. Schmitt, “Mars Meets Mother Nature: Protecting the Environment during Armed Conflict”, *Stetson Law Review*, Vol. 28, No. 4, 1999, p. 1075; Waldemar A. Solf, “Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I”, *American University International Law Review*, Vol. 1, No. 1, 1986, p. 134.

78 Y. Dinstein, above note 21, pp. 534–535.



the extent and level of the destruction of the oilfields and the impact on the environment, population and wildlife, requires particular expertise – but there is no doubt that environmental destruction is inevitable when natural resources are targeted. It is partly for this reason that the UN General Assembly, in its Resolution 43/47 adopted in 1992, “[u]rges States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict”.<sup>79</sup>

Most of the Syrian oilfields occupied by IS that were destroyed by US-led coalition forces<sup>80</sup> held underground reserves of crude oil, meaning that the damage to the natural environment as a result of explosions and fires would be widespread and severe. Any justification for the destruction of the natural environment based upon necessity, under Rule 43 of the ICRC Customary Law Study and Article 55(1) of AP I, depends on the “threshold level of the destruction/damage”. The issue, therefore, remains regarding the determination of the threshold of damage to the natural environment in a region of conflict. Based on the information currently available, it cannot be definitively stated that the US-led coalition’s air strikes against the oilfields under the control of IS led to significant environmental damages because of oil spills or fires. What is indisputable is that the present and long-term impacts of the destruction of those refineries are not known at present, and measuring them will be difficult, if not impossible. Determining pollution levels and assessing the risks to the civilian population and their environment in Syria or Iraq depends on detailed studies as well as the monitoring and evaluation of air, water and soil.

Although the US authorities have claimed that the White House had been reluctant to target oil wells held by IS, reports indicate that some US-led coalition forces regularly attacked oil wells and refineries that had been captured by the group, causing localized pollution.<sup>81</sup> This practice, which aimed to stop oil revenues, had little effect on demand and caused the civilian population and armed groups to turn to informal oil-refining methods – a highly polluting process which adversely affected communities and the environment across Syria’s oil-producing areas. As a result, the massive displacement of parts of the Syrian population created environmental stresses in neighbouring countries.<sup>82</sup> Even worse, some US-led coalition forces appeared to be unconcerned about the

79 UNGA Res. 47/37, 25 November 1992, para. 1.

80 It should be noted that many States within the US-led coalition do not accept the United States’ position on targetability of the natural environment during hostilities as related to targets that contribute to the war-sustaining capability of the enemy.

81 Wim Zwijnenburg and Annica Waleij, “Fire and Oil: The Collateral Environmental Damage of Airstrikes on ISIS Oil Facilities”, *New Security Beat*, 13 January 2016, available at: [www.newsecuritybeat.org/2016/01/fire-oil-collateral-damage-airstrikes-isis-oil-facilities/](http://www.newsecuritybeat.org/2016/01/fire-oil-collateral-damage-airstrikes-isis-oil-facilities/); David C. Harary, “Environmental Decisions in the Context of War: Bombing ISIL’s Oil”, *Centre for Development and Strategy*, Vol. 2016, No. 2, 2016, available at: [www.envirosagainstawar.org/2017/07/27/environmental-decisions-in-the-context-of-war-bombing-isils-oil/](http://www.envirosagainstawar.org/2017/07/27/environmental-decisions-in-the-context-of-war-bombing-isils-oil/).

82 See “Country Brief: Syria”, Conflict and Environment Observatory, 26 March 2018, available at: [www.ceobs.org/country-brief-syria/](http://www.ceobs.org/country-brief-syria/); “Report Highlights Health and Environmental Impact of Makeshift Oil Refineries in Syria”, Conflict and Environment Observatory, 5 September 2016, available at: [www.ceobs.org/report-highlights-health-and-environmental-impact-of-makeshift-oil-refineries-in-syria/](http://www.ceobs.org/report-highlights-health-and-environmental-impact-of-makeshift-oil-refineries-in-syria/).

environmental damage their attacks caused. As the Pentagon's press secretary, Rear Admiral John Kirby, pointed out, the direct and indirect impact of environmental destruction resulting from targeting the oilfields under the control of IS was not foremost in the minds of the US-led coalition. In a press briefing on 8 June 2015, Kirby stated:

I'm not an environmental expert. I cannot dispel the fact that in some of these targets there may still be some fires burning as a result of what was hit. ... The crude had to get trucked into these refineries to then get refined and then to be sold on the black market. So, you know, it is possible that at some of them there was not any. I just do not know. We are still working our way through that. But I cannot completely ignore the possibility that there might still be some oil fires burning because of this.<sup>83</sup>

## The obligation to protect natural resources as State property

As a general practice, the natural resources of territorial States are the property of those States, which have "permanent sovereignty over their natural resources" as a principle of customary international law, as recognized by the ICJ.<sup>84</sup> The rights and duties emanating from this principle remain in effect at all times, including during armed conflict and occupation.<sup>85</sup> States involved in armed conflict cannot resort to any particular armed actions that may damage the natural resources that are part of the environment for any reason, because such actions would touch upon the essential interests of other States, particularly the territorial State.<sup>86</sup>

Even though attacks on State property during armed conflicts have been one of the most controversial issues in the context of IHL, the unnecessary destruction of property, even if that property is under the effective control of an Occupying Power (either a State or an ANSA), is a violation of IHL.<sup>87</sup> Contrary to the provision contained in Article 55(1) of AP I, which generally prohibits the destruction of the natural environment during armed conflicts, destruction or seizure of the property of an adversary, including property which is part of the natural environment, is allowed by "imperative necessity". In this regard, Article

83 See "Department of Defence Press Briefing by Rear Admiral Kirby in the Pentagon Briefing Room", DoD, 25 September 2014, available at: [www.defense.gov/News/Transcripts/Transcript-View/Article/606932/departement-of-defense-press-briefing-by-rear-adm-kirby-in-the-pentagon-briefing/](http://www.defense.gov/News/Transcripts/Transcript-View/Article/606932/departement-of-defense-press-briefing-by-rear-adm-kirby-in-the-pentagon-briefing/).

84 See ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras 243–246; UNGA Res. 1803 (XVII), "Permanent Sovereignty over Natural Resources", UN Doc. A/RES/3171, 14 December 1962.

85 UNGA Res. 66/225, "Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources", 13 January 2012; ICJ, *Armed Activities*, above note 84, paras 229, 244. See also S. P. Ng'ambi, above note 23, pp. 158–159; Karol N. Gess, "Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis", *International and Comparative Law Quarterly*, Vol. 13, No. 2, 1964.

86 See Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge University Press, Cambridge 2015, p. 191.

87 See T. D. Gill, above note 63, p. 369.

147 of Geneva Convention IV has advanced this rule by providing that “extensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly” (emphasis added), is a grave breach of the Geneva Conventions, which form the core of IHL. This is highlighted by Rule 43(B) of the ICRC Customary Law Study, which provides that “[d]estruction of any part of the natural environment is prohibited, unless required by imperative military necessity”.<sup>88</sup> The property could be part of the territorial State’s natural resources, including energy resources such as oil that are part of the natural environment. The targeting of a territorial State’s property not justified by military necessity has also been prohibited by Rule 50 of the ICRC Customary Law Study. This rule has identified the prohibition of the “destruction or seizure of the property of an adversary unless required by imperative necessity” as a norm of customary international law which is already recognized in the Lieber Code (Articles 15 and 16) and Hague Convention IV (Article 23(g)).<sup>89</sup> This leads us to the main point at issue, which is that the destruction of property of an adversary, including any part of the natural environment (and notably, natural resources), not required by imperative military necessity, regardless of whether the damage reaches the widespread, long-term and severe threshold, is prohibited.<sup>90</sup>

In a similar vein, the prohibition of the destruction of the natural environment, when it is not justified by necessity and is carried out wantonly, is an accurate reflection of customary international law. Further to this, the extensive destruction and appropriation of an enemy’s private and public property in IACs and NIACs, when unjustified by necessity and carried out unlawfully and wantonly, is considered to be a war crime under Article 8(2) of the Rome Statute of the International Criminal Court. More precisely, the Rome Statute has considered “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” as a war crime in NIACs.<sup>91</sup> State practice explicitly establishes this rule as a norm of customary international law applicable in both IACs and NIACs.<sup>92</sup>

Moreover, the destruction and seizure of property, when not demanded by the necessities of war, has been prohibited by Articles 22 and 23(g) of the Regulations Annexed to Hague Convention IV, which state:

88 ICRC Customary Law Study, above note 2, p. 143.

89 *Ibid.*, pp. 175–177.

90 ICRC, above note 15, Rule 13, p. 74.

91 It has been argued that the prohibition against extensive destruction and appropriation of property which is carried out unlawfully and wantonly also applies to enemy-owned natural resources and wealth. See ICRC Commentary on the APs, above note 5, p. 415. For a much more extended discussion of “unlawful and wanton extensive destruction and appropriation of property”, see Mohamed Elewa Badar, “Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia”, *International Criminal Law Review*, Vol. 6, No. 3, 2006, pp. 343–346. For further discussion, see Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2004, pp. 485–486; Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 289.

92 ICRC Customary Law Study, above note 2, p. 177.

The right of belligerents to adopt a means of injuring the enemy is not unlimited. ... [I]t is especially forbidden ... [t]o destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

The most contentious issue is that energy resources, when used by States or ANSAs to sustain their capacity to wage war and to survive, could be targeted based on military necessity. This poses a particular problem in the assessment of proportionality. For example, it has been argued in the context of the 1990–91 Gulf War that the pollution arising from the burning of the targeted Kuwaiti oilfields and the deliberate spilling of oil into the sea – which killed an unknown number of birds, either by asphyxiation, starvation or drowning in the oil – was excessive in relation to the military advantage that may have been anticipated.<sup>93</sup> As the first Kuwaiti oil wells were ignited by Iraqi forces, there was public speculation that the fires and smoke were intended to impair coalition forces' ability to conduct air and ground operations.<sup>94</sup> The damage to the natural environment as a result of oil fires is believed to have impacted the local wildlife in different ways; it has included severe air pollution throughout Kuwait, acid rain, spikes in the mortality rates of local wildlife, destruction of or changes in the habitats that were used by species through their life cycle, and limitation of the amount of food available for carnivorous species.<sup>95</sup> Viewed from this perspective, therefore, the burning of Kuwaiti oil wells was generally dealt with under the proportionality rule. As Dinstein has argued, although oil wells constitute military objectives, their systematic destruction does not offer a definite military advantage within the meaning of proportionality.<sup>96</sup>

In this regard, the actions of the United States, particularly around the oil facilities under the control of IS, were significant. According to the United States, energy resources that have been occupied by IS and are necessary to its survival as its main revenue source can be legitimately targeted as “war-sustaining objects”.<sup>97</sup> The United States does not accept that the prohibition against attacks on works and installations containing dangerous forces can be sustained absolutely, if, under the circumstances at the time, they are lawful military objectives. Generally, the United States' general practice is based on the legality of attacks on economic targets that indirectly but effectively support the enemy's operations, in order to gain a definite military advantage.<sup>98</sup> The United States is of the view that parts of the natural environment cannot be made the object of

93 International Law and Policy Institute (ILPI), *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Oslo, 2014, p. 17; Y. Dinstein, above note 21, pp. 543–544.

94 Michael N. Schmitt, “War and the Environment: Fault Lines in the Prescriptive Landscape”, *Archiv des Völkerrechts*, Vol. 37, No. 1, 1999, 25, pp. 38–39.

95 ILPI, above note 93, p. 17.

96 Y. Dinstein, above note 21, pp. 543–544.

97 For more details, see Ryan Goodman, “The Obama Administration and Targeting ‘War-Sustaining’ Objects in Non-International Armed Conflict”, *American Journal of International Law*, Vol. 110, No. 4, 2016.

98 See ILA Study Group, above note 6, p. 341. See also DoD, above note 3, section. 5.6.6.2, pp. 313–314.

attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity, but it has repeatedly declared that the prohibition on attacks against the natural environment is overly broad and ambiguous and not part of customary law.<sup>99</sup>

The United States has tried to justify the coalition's air strikes on oil facilities under the control of IS – indeed, it has interpreted the concept of military objectives under Article 52 of AP I in very broad terms and has considered war-supporting economic facilities to be military objectives.<sup>100</sup> However, the United States' basis for targeting those facilities is highly controversial; the legality of attacks on war-sustaining or purely economic targets as legitimate military objectives has not been accepted in practice by other States, by the ICRC or by military doctrine, and it cannot be demonstrated that such objects make an effective contribution to military action and that their destruction confers a definite military advantage to the coalition in the circumstances ruling at the time.<sup>101</sup> The permissibility of targeting energy resources such as oil facilities and refineries is controversial, especially in those situations in which the enemy is not using them for military purposes. The idea is that the targeting of oil facilities and refineries to stop refined oil from being supplied for the enemy's military purposes fits logically within the scope of fighting a war. However, if such attacks are intended to stop the sale of smuggled oil, the proceeds of which would finance the enemy's activities, only part of which includes military action, the determination of such attacks as military objectives is potentially much more controversial.<sup>102</sup>

The United States' approach seems problematic because, first, oil resources were not the only revenue source of IS; the group was able to generate income from many other sources. According to a study by the Centre for the Analysis of Terrorism, IS was generating billions of dollars of income from criminal activities (including extortion, kidnapping and ransom), foreign donations and the trafficking

99 See DoD, above note 3, p. 1192; UN General Assembly, *Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others*, UN Doc. A/CN.4/749, 6 October 2021, pp. 84–86; Theodore Richard, *Unofficial United States Guide to the First Additional Protocol to the Geneva Conventions of 12 August 1949*, Air University Press, Montgomery, AL, 2019, p. 113; W. Hays Parks, "Asymmetries and the Identification of Legitimate Military Objectives", in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen*, Springer, Berlin and Heidelberg, 2007, pp. 65, 89, 101.

100 See DoD, above note 3, pp. 313–314; ILA Study Group, above note 6, pp. 340–341. For the US approach to AP I, see George H. Aldrich, "US Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions", *American Journal of International Law*, Vol. 85, No. 1, 1991.

101 David Turns, "Military Objectives", in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, London, 2016, p. 154.

102 Kenneth Watkin, "Targeting 'Islamic State' Oil Facilities", *International Law Studies*, Vol. 90, 2014, pp. 504–505.

of antiquities, as well as from natural resources.<sup>103</sup> Moreover, the permanent members of the UN Security Council deplored the violation of IHL and expressed their deepening concern over the widening of the conflict through the escalation of attacks on purely civilian targets, and on the oil installations of littoral States such as Iraq.<sup>104</sup>

Furthermore, it is difficult to justify targeting energy resources as State property under “necessity”. As pointed out by the ICJ in its Nuclear Weapons Advisory Opinion, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go into assessing whether an action conforms with military necessity and proportionality.<sup>105</sup>

In the case of IS, the main point is the nature and activities of the oil facilities and installations. In other words, it has to be clear whether or not the oil facilities under the control of IS had a military nature and contributed effectively to its military campaigns. It should also be clear whether IS used the oil facilities for military purposes. If they are used for military purposes, they fall under Article 52(2) of AP I and could be considered as military objectives. If there is a semblance of doubt, they fall under Article 52(3) of AP I, according to which the object should be considered as a civilian object and cannot be directly targeted.

In this respect, a distinction has to be made between refined oil, which is contained in silos, and crude oil, which is still situated in the ground and cannot be moved. Crude oil cannot be used for military purposes and, therefore, cannot make an effective contribution to military action since it is not suitable for transport.<sup>106</sup> Put differently, crude oil in the ground is an immoveable raw material, which is not susceptible to direct military use.<sup>107</sup> To highlight this with an actual example from case law and practice, it is worth looking at the 1956 judgment of the Court of Appeal of Singapore in the *Singapore Oil Stocks* case, in which the Court established that immoveable resources also include subterranean oil reserves.<sup>108</sup> In that sense, crude oil is not a war munition (*munition de guerre*)

103 Laurence Bindner and Gabriel Poirot, *ISIS Financing*, Center for the Analysis of Terrorism, Paris, 2016, available at: <https://cat-int.org/wp-content/uploads/2016/06/ISIS-Financing-2015-Report.pdf>; Hussein Banai, “International and Regional Responses: An Appraisal”, in Feisal al-Istrabadi and Sumit Ganguly (eds), *The Future of ISIS: Regional and International Implications*, Brookings Institution Press, Washington, DC, 2018, p. 154; Abdul Basit, “Foreign Fighters in Iraq and Syria—Why So Many?”, *Counter Terrorist Trends and Analyses*, Vol. 6, No. 9, 2014, p. 7.

104 UN Security Council, “Statement by the President”, UN Doc. S/PV.2730, 22 December 1986, p. 3.

105 Nuclear Weapons Advisory Opinion, above note 23, para. 30.

106 For more details, see K. Hulme, above note 25, pp. 198–200.

107 This is an argument advanced in the sense of Article 53 of the Hague Regulations, which provides that “[a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations”.

108 Court of Appeal of Singapore, *N. V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Judgment, 13 April 1956, in *International and Comparative Law Quarterly*, Vol. 5, No. 1, 1956, p. 93.



and therefore is not subject to destruction. As Elihu Lauterbach has argued, only items which could be used in combat, and items which do not require processing of a costly, elaborate or lengthy character in order to make them suitable for use in combat, can be considered war munitions with an effective contribution to military action.<sup>109</sup> In contrast, refined oil, which is derived from crude oil, can be transported; in other words, refined oil is movable and susceptible to direct military use, and therefore may be subject to loss of protection against direct attack. From this viewpoint, even if it is accepted that the United States' practice of targeting refined oil production installations as dual-use targets<sup>110</sup> is justifiable under necessity, it must be clarified that this practice refers only to the refined oil products under the control of IS as part of its revenue. This type of energy is transportable, and the environmental damage caused by attacks upon it might not be widespread or long-term. This is not the case for crude oil, since it is situated in the ground; targeting such an energy source would cause long-term and widespread damage. This is because crude oil is an immoveable property that has not been extracted and requires processing of an elaborate or lengthy character to be used in combat, and the targeting of such resources might cause unnecessary damage to the natural environment.<sup>111</sup>

According to UNEP, burning crude oil releases a wide range of pollutants, including soot and gases that can cause skin irritation and shortness of breath.

109 Elihu Lauterpacht, "The Hague Regulations and the Seizure of Munitions de Guerre", *British Yearbook of International Law*, Vol. 32, 1956, p. 226. For an extensive and critical discussion, see Evan J. Wallach, "The Use of Crude Oil by an Occupying Belligerent State as a Munition de Guerre", *International and Comparative Law Quarterly*, Vol. 41, No. 2, 1992, pp. 287–310.

110 It is noteworthy that IHL does not recognize any class of dual-use objects and only defines military objectives. Therefore, anything outside this formula is a civilian object and cannot be attacked. It has also been argued that there is no intermediate category of dual-use objects – either something is a military objective, or it is not. Keeping this in mind, the point is that refined oil production installations might be considered military objectives depending on their contribution to the enemy's military action and if the enemy's military effectiveness is reduced by destroying them. See A. P. V. Rogers, *Law on the Battlefield*, 3rd ed., Manchester University Press, Manchester, 2012, p. 111. For further discussion, see Christopher J. Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict", in Peter Rowe, *The Gulf War 1990–91 in International and English Law*, Routledge, New York, 1993; Y. Dinstein, above note 21, pp. 523–524.

111 To make sense of the link between the whereabouts of crude oil and the long-term and widespread harmful effects of its destruction during conflicts, it is worth noting that most oil reservoirs contain 1–5% sulphur. When oil is burned, sulphur reacts with oxygen to create sulphur dioxide, which is classed as a pollutant by the Environmental Protection Agency. Sulphur dioxide is a poisonous gas that can fuse with air and water to create sulphuric acid, the key constituent of acid rain. This is the reason why oil goes through refining processes, as these processes remove the sulphur that is found in crude oil. Burning crude oil therefore creates an inevitable level of risk, as it results in further sulphur-rich precipitation, which accelerates deforestation, acidifies waterways, compromises agricultural crops, contaminates drinking water sources and kills aquatic life. For further details, see "A Complete Guide to Sulphur in Fuel", *Petro Online*, 11 December 2021, available at: [www.petro-online.com/news/analytical-instrumentation/11/breaking-news/a-complete-guide-to-sulphur-in-fuel/56845](http://www.petro-online.com/news/analytical-instrumentation/11/breaking-news/a-complete-guide-to-sulphur-in-fuel/56845); Roy A. Giacomazzi and Max F. Homfeld, "The Effect of Lead, Sulfur, and Phosphorus on the Deterioration of Two Oxidizing Bead-Type Catalysts", *SAE Transactions*, Vol. 82, No. 3, 1973; Savannah Bertrand, "Climate, Environmental, and Health Impacts of Fossil Fuels", Environmental and Energy Study Institute, fact sheet, 17 December 2021, available at: [www.eesi.org/papers/view/fact-sheet-climate-environmental-and-health-impacts-of-fossil-fuels-2021](http://www.eesi.org/papers/view/fact-sheet-climate-environmental-and-health-impacts-of-fossil-fuels-2021).



UNEP reported that during the war with IS in Iraq, fumes from burning stockpiles of sulphur dioxide, and oil wells that were set ablaze, led to further suffering for civilians in Iraqi Kurdistan.<sup>112</sup> Note in this regard that most of the US-led coalition's targets were IS's crude oil collection points.<sup>113</sup> Massive environmental damage resulting from the air strikes is the reason why they are questionable under the customary principle of distinction between civilian objects and military objectives.

As mentioned above, although IS has made millions of dollars from oil revenues, it is not reasonable to assume that its survival was based only on its captured oil resources. In the wake of the US-led coalition's air strikes against oil facilities and installations under the control of IS in Iraq and Syria, the group has maintained a diversified revenue stream.<sup>114</sup> Hence, targeting those installations in order to degrade the group's revenue stream funding its military operations did not serve any obvious military purpose, and has not been successful. Those objects that are only used to generate revenue for a belligerent's war effort do not render a definite "military advantage" and are therefore not military objectives within the meaning of Article 52(2) of AP I.<sup>115</sup> Recall in this context that Article 52 requires an attack to result in a definite military advantage. As we have seen, according to the United States, economic targets that indirectly but effectively support and sustain the enemy's war-fighting capability can be targeted as legitimate military objectives.<sup>116</sup> Unlike the United States, however, the ICRC has taken a restrictive approach to the scope of Article 52, ruling out any advantage which is arguably indeterminate.<sup>117</sup> When it comes to the destruction of oil production facilities, if the coalition's intent was simply to shut IS's revenue streams down, then the relationship between the act and the anticipated advantage would likely be judged to be overly attenuated<sup>118</sup> since the attacks could not halt IS's military activities and its cross-border terrorism.

112 See "ISIL's 'Scorched Earth Policy' Creating Environmental and Health Havoc in Mosul, Warns UN", *UN News*, 27 October 2016, available at: <https://news.un.org/en/story/2016/10/543902-isils-scorched-earth-policy-creating-environmental-and-health-havoc-mosul-warns>.

113 For example, on 5 January 2015, coalition forces conducted fourteen air strikes in Syria, hitting five of IS's crude oil collection points and a crude oil pipeline near Dayr az Zawr. See DoD, "Combined Joint Task Force Continues Airstrikes against ISIL", 5 January 2015, available at: [www.defense.gov/News/Article/Article/603879/](http://www.defense.gov/News/Article/Article/603879/); US Department of State, "Airstrikes Destroy ISIL Infrastructure in Syria, Iraq", 11 August 2015, available at: [www.defense.gov/News/News-Stories/Article/Article/613334/airstrikes-destroy-isil-infrastructure-in-syria-iraq/](http://www.defense.gov/News/News-Stories/Article/Article/613334/airstrikes-destroy-isil-infrastructure-in-syria-iraq/). Coalition forces also launched three strikes and destroyed four oil wellheads and an oil pump jack near Abu Kamal on 25 November 2016. That same day, they launched two strikes and destroyed three pieces of oil-refining equipment and an oil wellhead in the west of Abu Kamal in Dayr Az Zawr. See Christopher Woody, "Watch a US-led Coalition Airstrike Destroy Part of ISIS' Oil Network Near the Iraq-Syria Border", *Insider*, 29 December 2016, available at: [www.businessinsider.com/us-led-coalition-airstrike-isis-oil-syria-2016-12?r=US&IR=T](http://www.businessinsider.com/us-led-coalition-airstrike-isis-oil-syria-2016-12?r=US&IR=T). See also Helene Cooper and Anne Barnard, "Warplanes Blast Militants' Refineries in Syria, Targeting a Source of Cash", *Washington Post*, 24 September 2014, available at: [www.nytimes.com/2014/09/26/world/middleeast/isis-revenue-sources-remain-crucial-target-us-says.html](http://www.nytimes.com/2014/09/26/world/middleeast/isis-revenue-sources-remain-crucial-target-us-says.html); Michael R. Gordon and Eric Schmitt, "U.S. Steps Up Its Attacks on ISIS-Controlled Oil Fields in Syria", *Washington Post*, 12 November 2015, available at: [www.nytimes.com/2015/11/13/us/politics/us-steps-up-its-attacks-on-isis-controlled-oil-fields-in-syria.html](http://www.nytimes.com/2015/11/13/us/politics/us-steps-up-its-attacks-on-isis-controlled-oil-fields-in-syria.html).

114 UNSC Res. 2253, 17 December 2015.

115 See D. Turns, above note 101, p. 154; ILA Study Group, above note 6, p. 341.

116 M. N. Schmitt, above note 94, pp. 27–28.

117 ICRC Commentary on the APs, above note 5, p. 636, para. 2020.

118 M. N. Schmitt, above note 94, p. 53.

Non-military activities, including energy trading, smuggling and collecting taxes from regions under their effective control, are the most important factors ensuring the survival of ANSAs.<sup>119</sup> Importantly, increasing revenue in different ways will ultimately make ANSAs powerful enough to engage in armed conflict. It is important, therefore, to distinguish between their revenue sources. In that sense, the United States' war-sustaining theory is problematic also because targeting only one of the revenue sources of a violent military group – citing it as a war-sustaining capability in terms of the attacking State's unilateral assessment – would appear to be even more difficult to justify under necessity. What is certain is that the military activities, cross-border terrorist actions and growing financial strength of IS were not halted by the coalition's air strikes on their captured oilfields and installations. Even if it is accepted that any revenue source belonging to ANSAs can be targeted as a legitimate military objective – which is certainly not a widely accepted view amongst States – targeting the civilian population working at oil installations under the control of IS, or all of the population paying taxes to IS, may not be justified since these individuals did not directly participate in hostilities.<sup>120</sup> As a basic rule, civilians benefit from protection against direct attack unless and for such time as they take direct part in hostilities.<sup>121</sup> There is a consensus among the international community of States that distinguishing between civilians and combatants during armed conflict is a customary rule of IHL since civilians do not constitute a military advantage for any attacker under any circumstances.

Bearing this in mind, targeting Iraqi and Syrian crude oilfields under the effective control of IS as sources of its revenues based on the "legitimate military objectives" justification would appear problematic. In this regard, the 1990–91 Gulf War was one of the most notorious cases since the war caused long-term and widespread environmental damage. The 752 Kuwaiti oil wells that were set on fire burned for more than nine months – thick smoke blocked out the sun, temperatures

119 See Philippe Le Billon, "The Political Economy of War: Natural Resources and Armed Conflict", *Political Geography*, No. 20, 2001; Michael Ross, "Oil, Drugs, and Diamonds: The Varying Roles of Natural Resources in Civil War", in Karen Ballentine and Jake Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Lynne Rienner, London, 2003; Marina Eleftheriadou, "Elements of 'Armed Non-State Actors' Power: The Case of Al-Qaeda in Yemen", *Small Wars and Insurgencies*, Vol. 25, No. 2, 2014; Tim Eaton et al. (eds), *Conflict Economies in the Middle East and North Africa*, Chatham House, London, 2019, p. 13.

120 For a discussion, see ICRC Customary Law Study, above note 2, Rule 6, pp. 19–24.

121 For the sake of clarity, the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* provides a legal reading of the notion of "direct participation in hostilities", which comprises two elements: "hostilities" and "direct participation" therein. The concept of "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy, and "participation in hostilities" refers to the (individual) involvement of a person in these hostilities. Furthermore, individual participation in hostilities may also be described as "direct" or "indirect", depending on the quality and degree of such involvement. It is worth highlighting here that the notion of "direct participation in hostilities" has evolved from the phrase "taking no active part in the hostilities" used in Article 3 common to the four Geneva Conventions. The ICRC has therefore made it clear that the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities and should be interpreted in the same manner in both IACs and NIACs. By providing this legal reading of the notion of "direct participation in hostilities", the ICRC aimed to strengthen the implementation of the principle of distinction. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 5, 43–44.

dropped locally, and the fallout of oil, soot, sulphur and greasy acid rain fouled the surrounding land. In addition, air quality was severely impaired over the short term by the plumes of smoke, which stretched at one point for over 100 kilometres. Additionally, land, ground and surface water were contaminated and may have caused adverse health effects by the release of oil compounds, to the detriment of vegetation, animals and the local population. Air pollution throughout Kuwait was tantamount to excessive injury to the natural environment and the civilian population in breach of the proportionality rule, and the fires caused black rain and smoke in Turkey and Iran, as well as in Bulgaria, the southern Soviet Union, Afghanistan and Pakistan.<sup>122</sup> As a result of Iraq's burning of Kuwaiti crude oil in underground fields, Security Council Resolution 687 determined that the targeting of Kuwaiti oil resources was an obvious violation of existing international law and that Iraq is "liable under international law for any direct loss [or] damage – including environmental damage and the depletion of natural resources – [resulting from] its unlawful invasion and occupation of Kuwait".<sup>123</sup> Moreover, the Security Council and the United States were convinced that IHL constituted a sufficiently solid basis for the protection of the natural environment in times of armed conflict. Although the United States and Iraq were not contracting parties to AP I, and the Security Council is not clear about the exact principles and rules of IHL, the question of the legality or illegality of the Iraqi military operations vis-à-vis the natural environment can be addressed from two angles: (1) damage resulting from attacks on the environment as such, and (2) damage arising from the use of the environment as a method or instrument of warfare.<sup>124</sup>

## **Holding States responsible for the destruction of energy resources in NIACs**

The attribution of overall responsibility for environmental destruction is still disputed. This is due to the disputed nature of the general prohibition of

122 Meredith DuBarry Huston, "Wartime Environmental Damages: Financing the Cleanup", *University of Pennsylvania Journal of International Law*, Vol. 3, No. 4, 2002, pp. 909–910; Jozef Goldblat, "Legal Protection of the Environment against the Effects of Military Activities", *Bulletin of Peace Proposal*, Vol. 22, No. 4, 1991, p. 402; Y. Dinstein, above note 21, p. 544. See also Christopher C. Joyner and James T. Kirkhope, "The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict", *Case Western Reserve Journal of International Law*, Vol. 24, No. 1, 1992.

123 UNSC Res. 687, 3 April 1991, para. 16. It is worth noting, however, that Iraqi actions against the natural environment in Kuwait generated near-universal condemnation but little tangible normative progress in addressing environmental damage during armed conflicts. As Schmitt has discussed, this was even more apparent in Resolution 687, in which the basis for Iraqi liability was the wrongful occupation of Kuwait and the damage ensuing therefrom, rather than any violation of environmental proscriptions. Not surprisingly, the environmental trauma suffered during the short war led to no new hard law on the subject. See M. N. Schmitt, above note 94, pp. 27–28.

124 See L. Lijnzaad and G. J. Tanja, above note 52, p. 169. For an extensive discussion, see Ali Mohamed Al-Damkhi, "Kuwait's Oil Well Fires, 1991: Environmental Crime and War", *International Journal of Environmental Studies*, Vol. 64, No. 1, 2007; Karen Hulme, "Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How The 1990–91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment", *Journal of Armed Conflict Law*, Vol. 2, No. 1, 1997.

widespread, long-term and severe damage to the natural environment, the controversies surrounding its customary legal nature in AP I and the ENMOD Convention, and the fact that the United States is not a party to AP I. Nonetheless, as was discussed earlier, there is a consensus among the international community of States that destroying or seizing the enemy's property without imperative necessity and disproportionate attacks that impact the environment in IACs and NIACs are direct violations of IHL.<sup>125</sup> As noted above, the Rome Statute considers these acts to also constitute serious violations of the laws and customs applicable in both IACs and NIACs, and they are therefore regarded as war crimes.

Moreover, the duty not to cause significant environmental damage is an accepted customary rule of IHL on the conduct of hostilities in both IACs and NIACs.<sup>126</sup> Military operations that cause damage to the natural environment are in violation of this principle, which is laid down in Article 55(1) of AP I. Although neither Article 3 common to the four Geneva Conventions nor AP II, which are dedicated to NIACs, contain any provisions on war crimes or recognize criminal responsibility for serious breaches, the Rome Statute is apparently following a compromise policy by expanding the scope of what constitutes environmental crimes, and this policy seems to preserve the military policies of the States involved in the conflicts. Article 8(2)(b)(iv) of the Rome Statute states that intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians, damage to civilian objects, or widespread, long-term and severe damage to the natural environment, which would be excessive in relation to the concrete and direct overall military advantage anticipated, will be a serious violation of the laws and customs applicable in IACs.<sup>127</sup> However, the ambiguity of various interpretations has created grounds for controversy on the scope of environmental crimes under the

125 See ILC Draft Principles, above note 15, Principle 14; ICRC Customary Law Study, above note 2, Rule 43 (C), p. 143.

126 See UNEP, above note 28, p. 28; ICRC Customary Law Study, above note 2, p. 143. For a relevant discussion, see Bruce A. Harlow and Michael E. McGregor, "International Environmental Law Considerations during Military Operations Other than War", *International Law Studies*, Vol. 69, 1996.

127 The requirement that a proscribed attack should be "excessive" in relation to the concrete and direct overall military advantage anticipated constitutes a major obstacle to the application of this provision. The intentions and thought behind the widespread, long-term and severe environmental damage must be the "knowledge" that the environmental damage is disproportionate to the "overall military advantage anticipated". Put differently, before an attack is allowed, excessive damage to civilian objects resulting from the attack must be outweighed by the direct military advantage which accrues to the attacker. In that sense, prosecution of the commander of the attack will depend on detailed knowledge of the alleged perpetrator based on his "foreseeable" perceptions at the time, and the knowledge of what "widespread, long-term and severe damage" means – in other words, will the attack cause such a level of damage, and will the damage probably be disproportionate to the anticipated advantage of the military operation? However, it remains unclear whether a commander of a State involved in an armed conflict can be expected to be able to identify potential widespread, long-term and severe damage as a result of his or her attacks. See Ryan Gilman, "Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes", *Colorado Journal of International Environmental Law and Policy*, Vol. 22, No. 3, 2011, p. 455; Steven Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court*, Intersentia, Cambridge, 2015, p. 210; M. N. Schmitt, above note 94, p. 35.

Rome Statute, which is likely to be enough to justify military operations against energy resources that will lead to environmental damage. This is simply because the three modifiers of damage – “widespread, long-term and severe” – and the term “natural environment” are not defined in the Rome Statute.<sup>128</sup>

IHL confers protection to civilians, civilian objects and the natural environment, which is civilian in character. In that regard, one may refer to Article 51(5)(b) of AP I, according to which any attack that is expected to cause excessive loss of civilian life, injury to civilians and/or damage to civilian objects is prohibited. In essence, these kinds of military operations are evidently against the principle of distinction between civilian objects and military objectives. As noted earlier, despite the impossibility of identification of the “long-term, widespread and severe” impact of such operations in the future, the serious damage inflicted on the natural environment and the indirect impact on human health and wildlife are undeniable. Thus, expanding the scope of what constitutes environmental crimes under the Rome Statute would make it even more difficult to hold perpetrators accountable. Rather, enhancing the clarity of the conditions for the identification of environmental war crimes could potentially serve an even more useful purpose in terms of IHL’s protection and its rationality. It is worth noting, as an aside, that there is currently ongoing consideration of how environmental crimes may feature in accountability efforts regarding the conflict in Ukraine.<sup>129</sup>

Concerns about the threats to human health and the natural environment from pollution caused by armed conflict have forced the UN Environment Assembly to adopt a Resolution on Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism,<sup>130</sup> which addresses the loss of environmental governance as well as the coping strategies that communities affected by pollution are often forced into by armed conflicts. In accordance with the Resolution,

the long-term socio-economic consequences of the degradation of the environment and natural resources resulting from pollution caused by armed conflict or terrorism, which include, *inter alia*, the loss of biodiversity, the loss of crops or livestock, and the lack of access to clean water and agricultural land, the negative and sometimes irreversible impacts on ecosystem services and their impact on sustainable recovery, [contribute] to further forced displacement related to environmental factors.

128 See Knut Dörmann, “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Elements of Crimes”, *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, pp. 384–387; Jessica C. Lawrence and Kevin Jon Heller, “The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(B)(IV) of the Rome Statute”, *Georgetown Environmental Law Review*, Vol. 20, No. 1, 2007, pp. 94–95; Mark A. Drumbl, “Waging War against the World: The Need to Move from War Crimes to Environmental Crimes”, *Fordham International Law Journal*, Vol. 22, No. 1, 1998, pp. 127–128.

129 See UNGA Res. ES-11/2, UN Doc. A/ES-11/L.2, 24 March 2022. See also ASEAN Parliamentarians for Human Rights, “Joint Statement on Environmental Crimes in Ukraine”, 30 May 2022, available at: <https://reliefweb.int/report/ukraine/joint-statement-environmental-crimes-ukraine>.

130 See UN Environment Assembly Res. 3/1, “Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism”, UN Doc. UNEP/EA.3/Res.1, 30 January 2018.

In terms of the statements used by the Resolution, including “irreversible impacts on ecosystem services”, the coalition’s air strikes and military operations on refined and crude oil resources in Iraq and Syria, which are considered part of the natural environment, might be characterized as internationally wrongful acts that need to be evaluated within the context of the current legal framework.

Furthermore, pollution resulting from attacks on energy resources has an indirect impact on human health and therefore poses risks for people in vulnerable situations, in violation of the environmental norms of IHL. In that regard, Article 55(1) of AP I is the key instrument of IHL, and it prohibits operations that are intended or may be expected to cause damage to the natural environment and to human health.<sup>131</sup> As has already been evidenced by the aftermath of the 1990–91 Gulf War, the resulting pollution and environmental damage from burning oil wells threatens human health and livelihoods. In other words, air, soil and maritime pollution from oil spillages and fires is the main environmental consequence stemming from the destruction of energy resources that are part of the natural environment.<sup>132</sup>

As reaffirmed in the so-called Rio Declaration on Environment and Development, “human beings are at the centre of concerns for sustainable development [and] they are entitled to a healthy and productive life in harmony with nature”.<sup>133</sup> This is, in fact, a reflection of the principle of protecting of human life and health by limiting the impact of armed conflict as the primary objective of IHL. By contrast, the compatibility of such operations with the principle of precaution requires the perpetrator to consider all options when making targeting decisions, including verifying the target, the timing of the strike (for instance, considering whether to attack at a time when there might be fewer civilians around), the weapons used, and warnings and evacuations for the civilian population in the area. Therefore, there must be a balance between military necessity and proportionality. In other words, any harm to the civilian population has to be balanced against military advantage within the meaning of Article 51(5)(b) of AP I, which prohibits any attacks that are expected to cause excessive loss of civilian life, injury to civilians and/or damage to civilian objects. The term “excessive” in AP I calls for a balance to be struck between military advantage and potential harm to the civilian population.<sup>134</sup>

The only legitimate military aim is to weaken the military capacity of the enemy while taking into consideration that civilians and civilian objects must be protected against attacks, as the primary aim of IHL. In essence, necessity is inadmissible if the purpose for which the measure was taken (for instance, environmental destruction) was itself contrary to IHL. Moreover, belligerents

131 For more details, see Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law*, Cambridge University Press, Cambridge, 2018, pp. 413–417.

132 See ILPI, above note 93, p. 14; UNEP, above note 16, pp. 56–57.

133 Rio Declaration, above note 57, Principle 1.

134 See Christopher J. Greenwood, “Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability”, *Singapore Journal of International and Comparative Law*, Vol. 1, No. 2, 1997, pp. 461–462; ICRC Customary Law Study, above note 2, Rule 1, p. 14.



have the obligation to protect the natural environment from widespread, long-term and severe damage even when the target is a military objective and the incidental harm is proportional. Parties must use only those means and methods of warfare that do not cause such damage to the natural environment, even if the attack is considered lawful and proportionate.

Therefore, it seems that the sole way to untie this inextricable knot in trying to hold perpetrators responsible for environmental crimes during armed conflicts is that protection might be bestowed by other rules of IHL for that purpose. The rules regarding the protection of “State property” contained in Article 23(g) of Hague Convention IV and the relevant rules that reflect customary IHL might be considered as the basis for protecting the natural environment through the identification of States’ natural resources as their property. As was discussed earlier, this is particularly obvious in Rules 43 and 50 of the ICRC Customary Law Study, both of which prohibit the destruction of property of an adversary, including natural resources, not required by imperative military necessity, regardless of whether the damage reaches the “widespread, long-term and severe” threshold.

## Conclusion

This article has examined the legality of the destruction of energy resources during armed conflicts. The main purpose was to determine how, when and to what extent the destruction of energy resources that are part of the natural environment may be acceptable under IHL. To this end, the article has explored the extent to which energy resources fulfil the IHL definition of military objectives under customary IHL and Article 52 of AP I. The article has highlighted that the natural environment may not be attacked unless it is a military objective, and that destruction of any part of the natural environment is prohibited unless required by imperative military necessity. Relatedly, energy resources as components of the natural environment can be targeted if they make an effective contribution to the military actions of the enemy and their destruction, capture or neutralization offers a definite military advantage within the meaning of Article 52(a) of AP I. However, if an element of the environment is lawfully attacked because it constitutes a military objective, depending on the scale of the attack there may be long-term environmental damage beyond the actual destruction. This is precisely subject to Article 55(1) of AP I, which embodies a general obligation to protect the natural environment against widespread, long-term and severe damage, while excluding a great deal of short-term environmental damage. The key point made in this regard is that this threshold is absolute and any widespread, long-term and severe damage to the natural environment is prohibited regardless of necessity or proportionality considerations. Therefore, there is a need to avoid excessive long-term damage to the natural environment even when targeting energy resources as military objectives within the meaning of IHL. In other words, such resources should not be targeted if the attack is likely to cause incidental harm to



the environment which would be excessive in relation to the direct military advantage that the attack would be expected to confer. This is simply because even in the proportionality assessment, civilians and civilian objects are still protected. Therefore, precaution will come into play before and during an attack, even if the target is considered a legitimate military objective and the incidental damage is considered proportional.

The article was, especially, devoted to the United States' actions based on war-sustaining theory as part of US domestic law and its jurisdiction; this theory characterizes the destruction of the natural environment during hostilities as being related to targets that contribute to the "war-sustaining capability" of the enemy. Starting with the US doctrine indicating that the destruction of energy resources controlled by IS has been exercised under governmental authority, I have questioned the lawfulness of this argument within the context of the general principles and rules of IHL, including the distinction principle and the proportionality rule. Looking at the lawfulness of the US-led coalition's air strikes on oilfields controlled by IS in Iraq and northern Syria, and in light of Article 56 of AP I on works and installations containing dangerous forces and based on the provisions on State property, the article has explored the threshold of extensive environmental damage under Article 55(1) of AP I "prohibiting attacks on the natural environment". Having differentiated between the two provisions, I have clarified the extent to which Articles 56 and 55(1) could protect energy resources, mainly oil wells. The major point made is about the disputed nature of the general prohibition of widespread, long-term and severe damage to the natural environment and the ongoing controversies surrounding its customary legal nature under AP I regarding the protection of the natural environment in times of armed conflict. I have argued that the uncertainty of the term "widespread, long-term and severe damage" and the exact threshold for damage contained in Article 55(1) paved the way for the United States to target natural resources during the war with IS.

The destruction of oilfields and installations must comply with all relevant IHL rules and principles that regulate the conduct of hostilities and afford civilians protection, but it must clear whether or not the enemy's oil facilities had a military nature and contributed effectively to its military campaigns. In that regard, a distinction has to be made between refined oil and crude oil in underground fields. This is because crude oil cannot be used for military purposes since it is not suitable for transport, and therefore it cannot make an effective contribution to military action. Crude oil is an immovable raw material that is not susceptible to direct military use. From this viewpoint, even if it is accepted that the United States' practice of targeting refined oil production installations as dual-use targets<sup>135</sup> is justifiable under military necessity, it must be clarified that the United States' practice refers only to refined oil products that provide fuel for IS's armed forces (war-fighting), and not to products that generate revenue for its "war effort" (war-sustaining). The aim of the strikes on those latter products was to stop oil revenues, but it had little effect on demand and caused the civilian population and armed

135 See above note 110.

groups to turn to informal oil-refining methods, which adversely affected the environment across Syria's oil-producing areas. As a result, the massive displacement of parts of the Syrian population created environmental stresses in neighbouring countries. Unlike objects that contribute to a belligerent's war-fighting capability, any other object that merely contributes towards the "war-sustaining capability" of a belligerent does not qualify as a military objective, and the application of the definition of a military objective in this situation would in itself violate the principle of distinction.<sup>136</sup> As was discussed earlier, this is also the position of the ICRC. Ultimately, weakening the military capacity of the enemy is the only legitimate military aim, and civilians and civilian objects must be protected against attacks. The point is simply that belligerents cannot use those means and methods of warfare that may cause widespread, long-term and severe damage to the natural environment, even if the attack is considered lawful and proportionate. Belligerents have the obligation to protect the natural environment from such damages even when the target is a military objective and the incidental harm is proportional.

Finally, we have seen how destroying or seizing the enemy's property – as it relates to natural resources – without imperative necessity in IACs and NIACs is a direct violation of IHL. Despite the disputed nature of the general prohibition of widespread, long-term and severe damage to the natural environment and the controversies on its customary legal nature in AP I and the ENMOD Convention, the 1998 Rome Statute considers these acts to constitute serious violations of the laws and customs applicable in both IACs and NIACs, and they can, therefore, be considered as war crimes. The "prohibition of targeting the natural environment" and indirect protection of the natural environment under Article 55(1) of AP I might be recognized as general principles of IHL within the context of the Geneva Law, the primary object of which is the protection of civilian objects during hostilities. Nonetheless, due to the ambiguity in the threshold requirements, including the "widespread, long-term and severe" criteria, the evaluation of State responsibility for the destruction of natural resources (where an indirect impact on the environment, human health and wildlife is inevitable) based upon these conditions would be difficult under the law of State responsibility.

However, State responsibility for the destruction of energy resources as part of the natural environment is contained under other provisions which protect civilian objects and State property, and their customary legal natures are not a subject of controversy. Concerning the responsibility of the US-led coalition States for the destruction of natural resources during the war with IS, it was discussed in this article that the only way to counteract the lack of a systematic mechanism to prevent States from causing environmental damage or from looting natural resources is for the protection of natural resources to be drawn up under another set of rules of IHL for that purpose. This would be proved by the rules surrounding the protection of State property contained in Article 23(g) of

<sup>136</sup> See ILA Study Group, above note 6, p. 341.

Hague Convention IV and Article 147 of Geneva Convention IV, which prohibit the “destruction or seizure of the property of an adversary unless required by imperative necessity.” Reference to these rules will prohibit such destruction or seizure as a norm of customary international law applicable in both IACs and NIACs.

# The Rif War: A forgotten war?

**Pascal Daudin\***

Pascal Daudin is a former International Committee of the Red Cross delegate and co-founder of ANTHROPOS *Deep Security*.

Email: [pdaudin@bluewin.ch](mailto:pdaudin@bluewin.ch).

## Abstract

*Approximately 100 years ago, a colonial conflict of great breadth began on the south side of the Mediterranean. Initially seen as an “indigenous” rebellion, the conflict evolved into an intense war, the final phase of which involved the intervention of two great colonial powers (France and Spain). Looking at the Rif War (1920–1926) in a region of what is now Morocco, then claimed by Spain, as an example, this article presents a critical analysis of a conflict rich in lessons for current humanitarian challenges and the sometimes-difficult relationship between humanitarian actors and the parties to a conflict. Assessed in the light of its human cost, which is largely forgotten today, the Rif War can feed debates through necessary historical reflection surrounding humanitarian action and the role of the International Committee of the Red Cross. It will also examine the complicated connections between historical truth, collective memory and the political difficulties inherent to reconciliation.*

**Keywords:** Colonial wars, International Committee of the Red Cross, internal armed conflicts, poisonous gas, joint military operations, protection of civilians, humanitarian diplomacy.

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History is a bunch of lies that people have decided to agree upon.<sup>1</sup>

Napoléon Bonaparte

In Julien Duvivier's famous 1935 film, *La Bandera*, a platoon of Spanish legionnaires finds itself isolated on a rocky outcrop, under fire from rebel Moroccan tribes (see [Figures 1](#) and [2](#)). In the final scene, the group's only survivor stands to attention among his fallen comrades and salutes the forces sent to relieve them.<sup>2</sup> The scene depicted in the film is only just over a century old, but how many people know about the war in which it was set? The year 1921 marked the start of a conflict that is now largely forgotten, although it remains one of the most important colonial wars of the twentieth century. Certain specialists regard it as a crucial landmark of Arab nationalism. However, any anniversary of the Rif War<sup>3</sup> is very unlikely to be ever celebrated because it was in no way a "fresh and merry war" (as Kaiser Wilhelm II expected the First World War to be<sup>4</sup>). This article aims at reviewing this long-forgotten conflict from a contemporary point of view, especially in comparison with so-called new phenomenology of conflicts and their humanitarian consequences. This article will first examine the political and military developments of the Rif insurrection in the post-First World War context. It proposes looking at the diplomatic negotiation attempts initiated by the International Committee of the Red Cross (ICRC; in French, CICR) in order to secure an agreement from Spain and France to deploy aid activities in a situation of civil war. It will then describe the consequences of the legal vacuum and some aspects and characteristics of the Rif Conflict. The arguments put forward by the ICRC and the States involved to deny and block humanitarian intervention will later be reviewed. The article will finally explore the lessons that can be drawn today from a 100-year-old conflict and propose some hypotheses on how this conflict has largely escaped humanitarian history.

## Colonial context in Morocco

The Rif, a region in the northern part of what is now Morocco (see [Figure 3](#)), is mountainous, relatively dry and very difficult to access. Located between the Mediterranean Sea and the Ouergha River to the south, the Rif is bordered on the east by the Moulouya River and on the west by the Atlantic Ocean. It is mainly

1 Declaration attributed to Napoléon Bonaparte after the Waterloo defeat (1815).

2 Two mainstream films were made using the Rif crisis as a backdrop: *Il sergente Klems*, filmed in 1971, which recounts the story of an old German soldier from the First World War who became a military leader in the army of Abd el-Krim; and *Légionnaire*, filmed in 1988, where the hero must flee France and heroically fights in the French Foreign Legion against Riffian assailants.

3 The term "war" has been deliberately chosen over international or internal armed conflict because this notion had not yet been codified by international law in the 1920s. In addition, the scale, duration and level of hostilities called for an explicit concept.

4 Serge Bernstein and Pierre Milza, "Chapitre 5 – La Première Guerre Mondiale: remise en question de la réussite allemande", in *L'Allemagne de 1870 à nos jours*, Armand Colin, Paris, 2014.



Figure 1. Abdelkrim rejetant les Espagnols, en 1921, bataille d'Anoual, lors de la guerre du Rif, Archives nationales d'Outre-Mer [Abd el-Krim rejecting the Spanish, in 1921, Battle of Annual, during the Rif War, National Overseas Archives].



Figure 2. Film poster. Source: Le blog du cinéma.

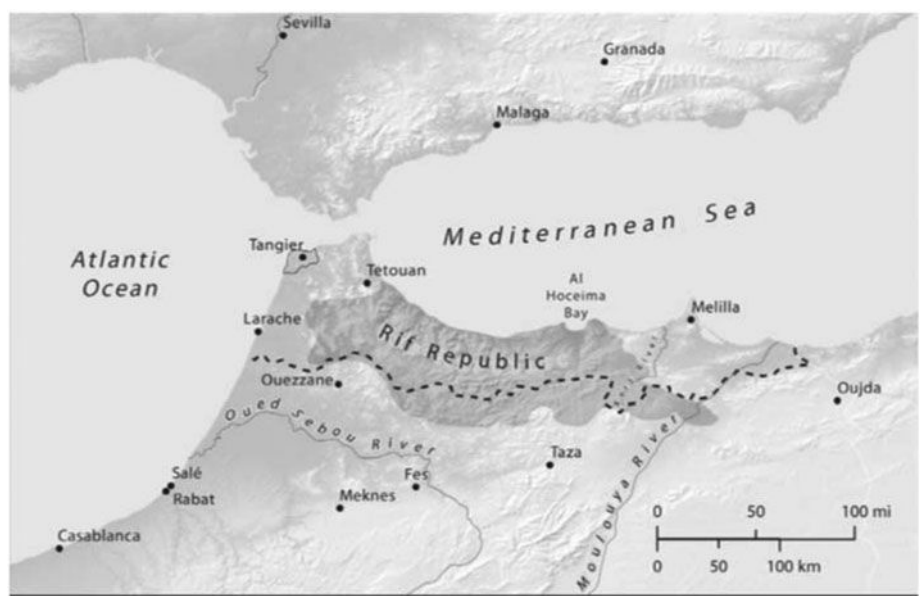


Figure 3. Map of the Rif Republic.

inhabited by Imazighen (or Berber) communities, who are Sunni Muslims. In 1905, France and Spain had the most influence over the sultanate of Morocco, but it was still coveted by Germany, a latecomer with its “*Drang nach Afrika*” (push into Africa), which was claiming the Tangiers region. In 1911, Berlin sent a gunboat to the Bay of Agadir,<sup>5</sup> under the usual pretext of claiming that its nationals were under threat. This show of strength created serious tensions in Europe, and Germany was subsequently offered additional territories in Equatorial Africa and Congo in exchange for giving up its claims on Morocco. In 1912, the Treaty of Fez<sup>6</sup> between France and the Sultan of Morocco formally created the French protectorate in Morocco, but gave Spain some sovereignty in the north, established by a separate treaty between France and Spain. This 1912 treaty established a French zone to the south of the Rif (known as “*Maroc utile*”), a Spanish zone to the north with Tetouan as the capital, the Tangier International Zone and a Saharan territory to the south of the French zone, also attributed to the Spanish. The Treaty of Versailles (1919)<sup>7</sup> confirmed that Morocco would remain under French and Spanish protection, thus definitively ending any German claims to the country.

5 This episode is best known as the “Agadir Crisis”.

6 Treaty Concluded Between France and Morocco on 30 March 1912, for the Organization of the French Protectorate in the Sherifien Empire, Fez, 30 March 1912.

7 Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919 (entered into force on 10 January 1920) (Treaty of Versailles), Arts 141–6.



## From military procession to attrition

In 1912, the Spanish protectorate in Morocco consisted of some small cities along the Atlantic Coast, Asilah, Larache (el-Araich (1911)) and Ksar el-Kebir, as well as a narrow strip on both sides of the Ceuta–Tetouan road.<sup>8</sup> The two enclaves of Ceuta and Melilla had been attached to Spain since the sixteenth century and served in 1912 as bridge heads for the Spanish penetration. Spain, which had lost Cuba and the Philippines in 1898, dreamed of gaining new possessions providing territorial continuity<sup>9</sup> with the Iberian Peninsula and of realizing ambitious colonial plans beyond the narrow coastal strip of land that it already controlled. Morocco was the perfect target for new expansion in North Africa. It was not until 1920 that Spain's expansion effort resulted in military activity, particularly in the Chefchaouen region. The aim was to control territories occupied by Berber tribes resisting mineral exploration and Spanish colonization in general. For that operation, Spain had created the Tercio de Marruecos in 1920, better known as the Spanish Legion,<sup>10</sup> which was later placed under the leadership of Commander Francisco Franco.<sup>11</sup> Although the Spanish army scored a number of fairly easy victories at the start, its progress in the Rif prompted the gradual mobilization of Berber tribes, which submitted to and gradually rallied to the authority of Emir Abd el-Krim al-Khattabi, a well-known Rif native and chief of the Aith Waryaghal tribe (see [Figure 4](#)). Abd el-Krim was an Islamic judge, journalist and teacher. He initially believed that Spain would modernize the protectorate and that he could play a role. He gradually realized that colonization had objectives other than developing the country. He then turned against Madrid and headed the uprising. Abd el-Krim was a local tribal chief, but he identified with the wider anti-colonial struggle, such as that of Emir Abdelkader in Algeria. Indeed, a small number of his troops were Algerian deserters from the French Legion, some of them probably inspired by Abdelkader's revolt. Interpretations differ as to his political objectives, but all historians agree that he wanted broad autonomy for his people, although he remained unclear about the concept of independence and how modern a State he wanted to create.

After a series of initial military successes that created great optimism among the Spanish generals, the Battle of Annual in Tamsamani in July 1921 resulted in a crushing defeat for the Spanish, who lost an estimated 10,000–16,000 men. The military dictatorship installed after the Annual defeat immediately decided to send huge numbers of reinforcements (36,000 troops)

8 Josep Lluís Mateo Dieste and José Luis Villanova, "Les *interventores* du protectorat espagnol au Maroc : Contextes de production d'une connaissance politique des cabilas", *Cahiers d'études africaines*, Vol. 211, No. 3, 2013.

9 Officers who had fought in Cuba formed the "*africanistas*", a hard core wanting to strengthen Spain's colonial positions in Morocco.

10 The Tercio de Marruecos, also known as the Spanish Legion from 1937 in reference to the French legion, was created to conquer Algeria.

11 Francisco Franco was promoted to Commander in 1916 against the opinion of the High Military Council but with the support of Alfonso XIII's privy council. Franco would later receive the rank of Brigadier General in February 1926.

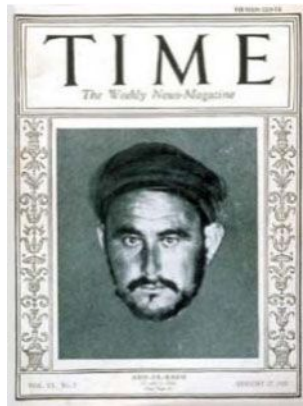


Figure 4. Cover of *Time* magazine, 17 August 1925.

and heavy equipment, but that yielded little success on the ground. Although the Rif tribes had fewer numbers and were disorganized, the terrain gave them a decisive advantage and they were very mobile, successfully repelling the forces engaged by Madrid. In these confrontations, some Spanish battalions suffered up to 75% losses.

Buoyed by his military success, Abd el-Krim announced the creation of the Rif Republic in September 1921 and introduced sharia law in the territories he controlled. However, he remained loyal to the Sultan of Morocco. According to sources available,<sup>12</sup> it is quite established that Abd el-Krim had plans to create an advanced and sovereign State, most probably vaguely inspired by the Kemalist experience,<sup>13</sup> but also influenced by Islamist reformist ideology (Rashīd Riḍā<sup>14</sup>). Some authors strongly dispute the modern nature of the Rif State and prefer to describe Abd el-Krim's project as an *islamo* (Din)–nationalist (Watan) State detached from tribal structures.<sup>15</sup> It is relatively clear that the transformative ambitions of Abd el-Krim had to take into account the limited reform capacities of a very conservative population.

Abd el-Krim was not a mystical prophet waging *jihad* and wanting nothing to do with heretics, in the mould of Muhammed Ahmed ibn-Abdullah (otherwise known as “al-Mahdi”) in Sudan in 1880. Neither was he a pure Berber *rogui*<sup>16</sup>

12 Charles Edmund Richard Pennell, “A Critical Investigation of the Opposition of the Rifi Confederation Led by Muhammad Bin ‘Abd al-Karim al-Khattabi to Spanish Colonial Expansion in Northern Morocco, 1920–1925, and its Political and Social Background”, Vol. II, PhD Thesis, University of Leeds, Leeds, 1979, pp. 514–98.

13 The Kemalist experience refers to the political, economic and social principles advocated by Mustapha Kemal Atatürk in the 20th century and was designed to create a modern republican secular Turkish State.

14 Rashīd Riḍā, 1865–1935, was an Islamic scholar who formulated an intellectual response to the pressures of the modern Western world on traditional Islam.

15 Thomas Martel, “Stratégie et politique pendant la guerre du Rif (1921–1926)”, Thesis, École nationale des chartes, Paris, 2019.

16 This term, which means “pretender to the throne” comes from the name of an insurgent, Djelil al-Rogui, from the Rouga clan of the Seffian tribe, based in the Gharb region of Morocco, who in 1862 led the uprising in the Fez region.

competing for power. Although he was above all regarded as a local hero, he nevertheless sought to strengthen his international position by sending envoys to some European capitals, generally members of his close family, or by sending letters through foreign journalists and collaborators.<sup>17</sup> He was considered as an example in the Muslim world. The Rif Republic was largely a proto-State based on the tribal system and a fairly strict form of Islam called Salafism that stands in opposition to maraboutism and tribalism. Abd el-Krim still sought to develop modern institutions; he centralized his administration and collected taxes vaguely based on the Kemalist model,<sup>18</sup> thus showing that he had not cut all ties with European civilization. His diplomatic efforts were directed towards European civil society and its political elites, and he did not really seek to establish any pan-Arab or pan-Islamic solidarity.<sup>19</sup>

The Rif State project took the form of an embryonic administration only because the rest of the programme met a stiff resistance from its own people very much attached to the tribal structure and opposed to any kind of secularism. The Rif Republic was not recognized by any State despite efforts to attract the sympathy of the League of Nations (LN).<sup>20</sup> France and the Sultan of Morocco, for different reasons, did their utmost to sabotage any form of political or symbolic recognition of the Rif State, amongst them, the attempts to attribute Caliphate to Abd el-Krim.<sup>21</sup> At the same time, Abd el-Krim tried to “internationalize” the conflict by mobilizing Muslim and anti-colonial forces abroad and by asking for humanitarian support, but with limited success. He did not create any relief organization, which might have convinced the ICRC to do more. With hindsight, and with the usual caveats, it would probably have been fairly possible for the ICRC to establish dialogue with Abd el-Krim at least through intermediaries and to take action.

17 For example, the British captain Charles A. P. Gardiner. See Mevliyar Er, “Abd-el-Krim al-Khattabi (1882–1963)”, in *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, Palgrave Macmillan, Cham, 2020.

18 Some authors have expressed serious doubts about the modernist ambitions of Abd el-Krim and his true intentions to borrow the notion of statehood from the Kemalist model. See, for example, C. E. R. Pennell, above note 12.

19 In late 1925, he was invited to the Pan-Arab Congress in Cairo, which addressed the matter of a new caliphate, but ended in total failure.

20 The “Riff Republic” – The Agent-General for the “Government of the Riff” (Morocco) London [Captain C. A. P. Gardiner] – Transmits a copy of the “Declaration of State and Proclamation to all Nations” of the Government of the “Riff Republic”, United Nations Library & Archives Geneva, File R591/11/30635/12861, 31 August 1923, available at: <https://archives.ungeneva.org/the-riff-republic-the-agent-general-for-the-government-of-the-riff-marocco-london-transmits-a-copy-of-the-declaration-of-state-and-proclamation-to-all-nations-of-the-government-of-the-riff-republic> (all internet references were accessed in November 2022).

21 As of 1924–1925, the French authorities in Morocco were extremely concerned about the designation of Abd el-Krim as the new caliph by a Muslim congress due to meet in Cairo (1926). Finally, divisions within the Muslim world and systematic sabotage from various colonial powers led to the failure of the Congress and the designation of a new caliph was abandoned. See Jacques Crémadeills, “La France, Abd-El-Krim et le problème du Khalifat (1924–1926). Remarques à propos de quelques archives inédites”, *Cahiers de la Méditerranée*, Vol. 6, No. 1, 1973.

## From attrition to all-out war

In the following years, the war became a disaster for Madrid. The Spanish retreated on all fronts. Their military positions were taken one by one, although coastal towns like Tetouan, Larache (El-Araich), Ksar el-Kebir, Zeluan and Asilah remained in Spanish hands or were rapidly retaken after a few months of occupation. The French were not unhappy to see the Spanish being defeated. The Spanish retreat in 1924 encouraged Abd el-Krim to open a second front, this time in the south, and he launched raids on French military positions.

In April 1925, the Rif troops started to carry out large-scale military operations in the south against the French-controlled part of Morocco, tipping the country into conflict. Fez was threatened and the French protectorate as a whole was now in a precarious situation. Talks between Abd el-Krim and French envoys were inconclusive. France mobilized and deployed 160,000 men from its regular army that could be supplemented by colonial troops, mostly from North Africa and Senegal, along with sixteen air force squadrons.

The two colonial powers quickly reached a cooperation agreement to carry out joint military action. France's Resident-General in Morocco, Marshal Lyautey, was deemed too cautious, too political and, above all, too close to the Moroccans, and was quickly replaced by a new official transferred from Algeria, Theodore Steeg. However, the real architect of the military campaign was Marshal Philippe Pétain who, in his own words, "did strategy not politics". His aim was no longer to teach Abd el-Krim a lesson, but to crush the revolt once and for all.

On 6 and 7 September 1925, an armada of more than 100 Spanish and French ships unloaded 16,000 men and heavy equipment in Al-Hoceima Bay after unleashing some fearsome early artillery fire (see Figure 5). In all, eighty-eight aircrafts bombed the region to allow the troops to disembark. The operation later served as a template for Operation Torch in North Africa in 1943 and the Allies' Normandy landings in 1944. The operation to take back Morocco had begun. No fewer than 600,000 men (against approximately 15,000 Riffian combatants) took part in offensives intended to take control of the Riffian territory. Spain and France were supported by equipment provided by the United Kingdom and Germany. During this amphibious landing operation Spanish troops could disembark around 18,000 men and the French army up to 20,000.<sup>22</sup> In total, the joint expeditionary corps would reach 120,000 men and 400,000 auxiliary troops (for a picture postcard of General Pétain inspecting the front, see Figure 6).<sup>23</sup>

22 Jan Pascal, "L'Armée française face à Abdelkrim ou la tentation de mener une guerre conventionnelle dans une guerre irrégulière 1924–1927", *Stratégique*, No. 93-94-95-96, 2009, p. 321. See also Shannon Fleming, "Rif War, Expansion and Escalation", *Encyclopaedia Britannica*, 5 December 2019, available at: [www.britannica.com/event/Rif-War](http://www.britannica.com/event/Rif-War); Vincent Courcelle-Labrousse and Nicolas Marmié, "Chapitre XVII – Al-Hoceim", in *La guerre du Rif : Maroc 1921–1926*, Editions Tallendier, Paris, 2008; C. E. R. Pennell, above note 12.

23 Alain Ruscio, "1925, Guerre du Rif. L'alliance entre Pétain et Franco contre les insurgés marocains", *Orient XXI*, 23 December 2020, available at: <https://orientxxi.info/magazine/1925-guerre-du-rif-l-alliance-entre-petain-et-franco-contre-les-insurges,4388>.



Figure 5. La playa de Morro Nuevo en los días del desembarco [Spanish troops landing at Al-Hoceima Bay on 8 September 1925]. Source: Pinterest.



Figure 6. General Philippe Pétain inspecting the front. Postcard, Pascal Daudin's private collection.

After a year of intensive military action, the losses were huge, the tribes disbanded and Abd el-Krim had lost his last supporters, including those in his own tribe. In April 1926, Abd el-Krim's envoys met with French envoys in Oujda, telling them he could accept the offers of peace and autonomy made by the Sultan of Morocco, whose sovereignty he did not dispute. However, the talks



failed. We know that the discussions faltered after three weeks on the matter of prisoner exchanges, and broke down for good on 6 May 1926. Abd el-Krim again ordered the execution of a group of Spanish prisoners, signalling that he no longer intended to negotiate. The Rif troops were defeated a few months later, although pockets of resistance lasted into 1927.

After surrendering to French forces, Abd el-Krim was first exiled to La Réunion, but escaped to Egypt in 1947 en route for France. He never returned to Morocco.

## Legal vacuum

The Rif War took place in a kind of a legal vacuum. In the 1920s, non-sovereign actors were deliberately excluded from international law. At that time the laws of war only applied to conflicts between sovereign States,<sup>24</sup> such as the Hague Convention of 1907. Although the status of the colonies or protectorates was legally uncertain, the French and Spanish authorities took the view that the Rif Conflict was taking place within a sovereign State. As a result, the Conventions did not apply to such a situation. It was not until 1949 and 1977 that the Geneva Conventions included the notions of internal armed conflict and national liberation wars. At the time of the Rif War, thinking of internal conflicts as part of the system of international law was not far beyond the horizon,<sup>25</sup> but totally segregated from the colonial space. According to some historical sources, the ICRC was rather frustrated by the situation and, in particular, to be denied access to detainees.

In addition, after the First World War, the States were more focused on avoiding further military conflagration than developing *jus in bello* instruments.<sup>26</sup> The idea of regulating civil war truly emerged only after the Spanish Civil War (1936–1939), but the main resistance against such a concept (which was later formalized as Article 3 common to the four Geneva Conventions) prevailed until 1949 and was mainly led by colonial powers which ruled millions.<sup>27</sup> Colonial powers like France and the United Kingdom wanted to deal with any sort of rebellion according to their own terms until they had to rally the majority and decided to shape the law. Today, the applicability of the doctrine of belligerency<sup>28</sup> still remains in the hands of States<sup>29</sup> and still orients all negotiations regarding humanitarian access to zones controlled by non-State actors.

24 Anna Chotzen, “Beyond Bounds: Morocco’s Rif War and the Limits of International Law”, *Humanity Journal*, Vol. 5, No. 1, 2014.

25 Giovanni Mantilla, *Law Making under Pressure: International Humanitarian Law and Internal Armed Conflict*, Cornell University Press, Ithaca, NY, 2020.

26 Stefanie Schmahl, “The Development of International Humanitarian Law since the 19th Century”, in Thilo Marauhn and Heinhart Steiger (eds), *Universality and Continuity in International Law*, Eleven International Publishing, The Hague, 2011.

27 Giovanni Mantilla, “Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict”, *International Organization*, Vol. 72, No. 2, 2018.

28 Rob McLaughlin, “Whither Recognition of Belligerency”, *Articles of War*, 17 September 2020, available at: <https://lieber.westpoint.edu/whither-recognition-of-belligerency/>; and G. Mantilla, above note 25, p. 80.

29 Henry Mark Lovat, *Negotiating Civil War*, Cambridge University Press, Cambridge, 2019.

As for the ICRC, in 1920–1921, it did not have an explicit mandate to take action in situations of civil war (what international humanitarian law refers to today as internal armed conflict). However, it is interesting to note that at the 10th International Conference of the Red Cross in 1921, the problem of internal conflicts and the ICRC's role was explicitly addressed by the International Red Cross Movement.<sup>30</sup> At that conference, Resolution XIV<sup>31</sup> stated that:

The Red Cross, which stands apart from all political and social distinctions, and from differences of creed, race, class or nation, affirms its right and duty of affording relief in case of civil war and social and revolutionary disturbances.

However, ICRC action depended on a National Society making a formal request: only then could the ICRC approach the government concerned. If the government refused, the ICRC was nevertheless authorized to voice its concern publicly.<sup>32</sup> In 1925, the Swiss Red Cross asked the ICRC to appoint a representative to collect information on Swiss soldiers in the Spanish Legion captured by the Riffian rebellion. That assignment was refused by the Spanish and French authorities<sup>33</sup> and firmly discouraged by the ICRC.<sup>34</sup>

## Use of poison gas

I have always been reluctant to use asphyxiant gases against indigenous people, but after seeing what they did in the Battle of Annual, I will use them with great delight.<sup>35</sup>

The defeat in the Battle of Annual<sup>36</sup> and the Massacre of Monte Arruit,<sup>37</sup> in which 2000–3000 soldiers of the Spanish Army were killed after surrendering the Monte Arruit garrison near Al Aaroui, were a terrible blow for the Spanish military establishment. Moreover, the discovery of mass graves in Nador and other cities conquered by the Riffian troops stirred up great emotion in Spain and fomented a desire for a modern-day *Reconquista*. One notable aspect of the conflict was the use of poison gas<sup>38</sup> against the Riffian rebels in spring 1924. In that regard, King Alfonso of Spain explained that “vain humanitarian considerations” needed to be

30 The International Red Cross and Red Crescent Movement (the Movement) is a network of components and consists of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and the 191 National Red Cross and Red Crescent Societies.

31 Resolution XIV, 10th International Conference of the Red Cross, Geneva, 1921.

32 See Letter from Paul des Gouttes, Spanish Red Cross, ICRC Archives, CR-138-MD-2, 17 July 1924.

33 The Spanish specified that they considered the situation a civil war, so the ICRC needed to obtain the permission of the Riffian authorities as well as that of the Sultan of Morocco.

34 Lettre du CICR à la Croix-Rouge suisse informant que le CICR ne soutiendra pas la démarche du Lieutenant-Colonel Scherrer [Letter from the ICRC to the Swiss Red Cross informing that the ICRC will not support Lieutenant-Colonel Scherrer's approach], ICRC Archives, B CR-138, 18 April 1925.

35 Telegram sent by General Dámaso Berenguer, Spanish High Commissioner in Tetouan, 12 August 1921.

36 From 21 July 1921 to 9 August 1921.

37 On 9 August 1921, following a twelve-day siege, the Spanish garrison surrendered and was subsequently executed.

38 Phosgene, diphosgene, chloropicrin and mustard gas (also known as yperite).



“set aside” in order to use blockades for starvation and intensive gas attack to help with the “extermination of malicious beasts” who were aiding rebellious Moroccan tribes.<sup>39</sup> Spain used German and French expertise to develop production plants in Spain and in the enclave of Melilla. Some material was also shipped directly from remaining German stockpiles. The French army also ordered and stored mustard gas shells, although it is not clear where and how they were deployed. The Spanish air force dropped numerous “X” bombs on the theatre of operations.<sup>40</sup> Few historians dispute the fact that the Spanish army made heavy use of these weapons, and freely admitted doing so.<sup>41</sup> According to some authors<sup>42</sup> who had access to Spanish and British military archives, the use of gas was part and parcel of the counter-insurgency strategy against the Rif Rebellion and usually directed against large concentration of civilian dwellings. Some former Spanish pilots, a few being still alive in the 1970s, publicly confessed having dropped bombs filled with poison gas in Morocco.<sup>43</sup>

In the beginning of the 1920s, the issue of poisonous gas was already subject to several condemnations, which led to their prohibition.<sup>44</sup> However, it seems that colonies were considered as exceptions<sup>45</sup> or as not being of concern.

Towards the end of 1924, the ICRC had received information from several sources, probably from public sources such as the press,<sup>46</sup> that poison gas had been used in military operations, although it is fair to say that it probably did not have the full details of what was happening in Morocco.<sup>47</sup> Pressured to act, the ICRC chose to ask the Spanish Red Cross about its government’s policy. The Spanish Red Cross responded a few days later that it had received a formal denial from the military authorities concerning such use of poison gas. The ICRC expressed its “relief” in its response to the National Society.<sup>48</sup> It is difficult to admit that this reaction was

39 Sebastian Balfour, *Deadly Embrace: Morocco and the Road to the Spanish Civil War*, Oxford University Press, Oxford, 2002.

40 Olivier Lion, “Des armes maudites pour les sales guerres ? L’emploi des armes chimiques dans les conflits asymétriques”, *Stratégique*, No. 93-94-95, 2009, pp. 491–2.

41 Marouf Hasian, Jr, “ICRC Non-Interventionism and Spanish Gas Attacks in Morocco, 1921–1926”, in M. Hasian, *Communicating during Humanitarian Medical Crises: The Consequences of Silence or “Témoignage”*, Lexington Books, London, 2019.

42 S. Balfour, above note 39.

43 We know of at least two direct witnesses, being the Spanish pilots Pedro Tonda Bueno and Ignacio Hidalgo de Cisneros, who confirmed in their respective autobiographies that they had dropped bombs loaded with poison gas. See Ignacio Hidalgo de Cisneros, *Cambio de rumba*, Ikusager, Vitoria, 2001; Pedro Tonda, *La vida y yo*, México, 1974. See, also, Rachid Raha, Mimoun Charqi and Ahmed El Hamdaoui, *La guerre chimique contre le Rif. Actes du colloque international sur l’utilisation des armes chimiques : Le cas de la guerre du Rif et ses conséquences*, Les Editions Amazigh, Rabat, 2004.

44 Nizar Messari, “L’utilisation des armes chimiques pendant la guerre du Rif (1921–1926) ou de l’ambiguïté des frontières et des séparations en politique”, *Cultures & Conflits*, Vol. 93, 2014.

45 Gases were used in Mesopotamia (Iraq) by the British (1920) and in Libya by Italian troops (1923–1924).

46 The European press, including *La Gazette de Lausanne* in Switzerland, regularly reported the use of mustard gas in several areas in the Rif. *La Gazette de Lausanne*, for example, wrote on 21 December 1924 that the Spanish air force was “carrying out intensive bombardments in the Andjera region and using asphyxiating gases”.

47 It has been shown that Germany provided the technology to produce poison gas, with the support of French arms suppliers. See Rudibert Kunz and Rolf-Dieter Müller, *Giftgas gegen Abd el Krim: Deutschland, Spanien und der Gaskrieg in Spanisch-Marokko 1922–1927*, Einzelschriften zur Militärgeschichte, Vol. 34, Verlag Rombach, Freiburg in Breisgau, 1990.

the result of pure credulity and not subdued complacency. Some authors<sup>49</sup> argue that Abd el-Krim might have sent letters to the ICRC and to the LN on this matter but we could not recover any trace in official archives of either organization.

In 1918, the ICRC had played a major role in a campaign to ban these types of weapons, which resulted in the adoption of the 1925<sup>50</sup> Geneva Protocol.<sup>51</sup> In its further correspondence with the Spanish government, the ICRC referred to this protocol but said that it had very serious doubts about allegations regarding the use of these weapons. It never mentioned these allegations in its public communications but praised instead the Spanish Red Cross for the excellency of its medical response in the field.<sup>52</sup> Surprising as it may seem, military operations in the Rif did not influence the signature of the Geneva Protocol, though Spain did not sign up to the instrument until 1929.<sup>53</sup> Unfortunately, this was not the last use of gas in conflict situations.<sup>54</sup>

## Foreign fighters, mercenaries and deserters

The Rif attracted a few foreign fighters, but they were subject to serious discussions between the belligerents. Among them was the so-called Lafayette Escadrille, an American squadron originally created during the First World War to support the French army on the front. In the summer of 1925, a group of sixteen American aviators joined the French contingent.<sup>55</sup> The squadron was later renamed the Escadrille de la Garde Chérifienne in order to avoid reaction from the US public opinion largely opposed to colonial politics. The squadron's members were nominally attached to the armed forces of the Moroccan Sultan, the formal ruler of Morocco, even bearing the sultanate's emblem of a five-pointed star on their uniforms. The leader of the American outfit was led by a soldier of fortune, Colonel Charles Sweeney, who proposed his services to the French authorities and

48 Letter of E. Boissier to the Spanish Red Cross, ICRC Archives, CR-138, 21 February 1925. Later E. Boissier informed the Spanish Red Cross that all references to the use of asphyxiating gases would be excluded from the report, which would merely discuss the committee's activities since July 1924. See Pablo La Porte, "Humanitarian Assistance during the Rif War (Morocco, 1921–6): The International Committee of the Red Cross and 'an Unfortunate Affair'", *Historical Research*, Vol. 89, No. 243, 2016, p. 126.

49 M. Hasian, above note 41.

50 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 (entered into force February 1928).

51 In a public statement, the ICRC openly referred to "this method of warfare which we cannot call other than criminal". ICRC, "Appel aux belligérants contre l'emploi de gaz vénéneux", Public Declaration, 6 February 1918, available at: [www.icrc.org/fr/doc/resources/documents/misc/5fzgt.htm](http://www.icrc.org/fr/doc/resources/documents/misc/5fzgt.htm).

52 Ben Holmes, "The *International Review of the Red Cross* and the Protection of Civilians, c. 1919–1939", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018.

53 R. Kunz and R.-D. Müller, above note 47.

54 Seven years later, during Italy's campaign in Ethiopia, launched by Mussolini in October 1935 and waged against the armies and people of the Negus, chemical weapons were again used extensively when Italian troops came up against unexpected resistance. This time, the ICRC could directly witness the use of gas but its mild protests to the Italian Red Cross were rejected because Italy considered that the 1925 Protocol did not exclude the possibility of their use in the case of justified reprisals.

55 V. Courcelle-Labrousse and N. Marmié, "Chapitre XVI – Les Ailes américaines du Sultan", in V. Courcelle-Labrousse and N. Marmié, above note 22.

recruited a dozen veteran pilots who had fought in the Lafayette Escadrille during the war. The squadron flew more than 400 missions and bombed symbolic cities such as Chefchaouen,<sup>56</sup> in some sort of premonition of Guernica.<sup>57</sup> The American Legation in Tangier finally warned the American aviators that US law prohibited fighting in a war<sup>58</sup> against people with whom the United States had no quarrel.<sup>59</sup>

In the end, the US government, concerned about violations of neutrality and hostile domestic opinion, brought the chapter of the Escadrille Chérifienne to a close after only six weeks of combat operations.

The Spanish foreign legion counted many Portuguese and a few European citizens in its ranks. However, the harsh discipline enforced by Spanish officers did not attract a large number of foreigners and was conducive to desertions. Abd el-Krim enjoyed the support of a couple of Spanish foreign legion deserters, and some Turkish and European volunteers – mainly Germans<sup>60</sup> – who served as “military advisors” for training Riffian *harkas*.<sup>61</sup>

In 1925, the Spanish Red Cross had created two research bureaus<sup>62</sup> to trace prisoners who had fallen into the hands of Rif rebels. It is difficult to know whether the ICRC was cultivating support by offering its help or was rather using the question of foreign and Spanish combatants as a political back door to obtain a license to operate in the region. In a subsequent meeting between ICRC president Gustave Ador and French ministers Briand and Painlevé in Geneva, the ICRC used the “prisoner argument” to justify and suggest a mission.

## Human toll

Telegram no. 562 O. O. — “When you report losses suffered by dissidents, just state the number of people killed or injured and the number of animals killed, without specifying age or sex.”<sup>63</sup>

There are few reliable sources regarding the human toll of the Rif War. In military terms alone, some sources suggest that 63,000 Spanish, 18,000 French and

56 Lee Ferran, “When Rogue American Flyers Bombed a Moroccan Holy City”, *InsideHook*, 11 May 2018, available at: [www.insidehook.com/article/history/rogue-american-flyers-bombed-moroccan-holy-city-chefchaouen](http://www.insidehook.com/article/history/rogue-american-flyers-bombed-moroccan-holy-city-chefchaouen).

57 Frederic Wehrey, “The Many Repercussions of the Rif Rebellion”, *The New York Review of Books*, 18 December 2021.

58 Regarding the enlistment of American citizens for military service in Morocco, see “The Secretary of State to Representative A. Piatt Andrew of Massachusetts”, *Papers Relating to the Foreign Relations of the United States*, Vol. II, 881.00/1151, Washington, DC, 21 October 1925, available at: <https://history.state.gov/historicaldocuments/frus1925v02/d460>.

59 Gerald Loftus, “Lafayette, We Are Here in Morocco’s Rif”, *Avuncular American Blog*, 3 November 2011, available at: [www.avuncularamerican.net/2011/11/lafayette-we-are-here-in-moroccos-rif.html](http://www.avuncularamerican.net/2011/11/lafayette-we-are-here-in-moroccos-rif.html).

60 Dirk Sasse, *Franzosen, Briten und Deutsche im Rifkrieg 1921–1926: Spekulanten und Sympathisanten, Deserteure und Hasardeure im Dienste Abdelkrims*, Pariser Historische Studien, Oldenbourg Wissenschaftsverlag, Oldenbourg, 2006.

61 In the Maghreb, militia levied by religious or governmental authority.

62 Letter from the Spanish Red Cross, ICRC Archives, 7 April 1925.

63 Captain de Féraud, head of the district office, Ouezzane, 11 November 1921, in Pierre Séraud, *La guerre du Rif*, Librairie de l’humanité, Paris, 1926, p. 25.

30,000 Riffian troops died during the conflict, although these figures should be treated with caution.<sup>64</sup> There is no credible information about civilian deaths and numerous experts believe<sup>65</sup> that the numbers of civilians killed or wounded were systematically underestimated or simply not taken into account. However, we know that it was an all-out war, that the various military operations caused heavy civilian casualties and that the civilian population, assets and infrastructures were clearly targeted. Available figures<sup>66</sup> are merely extrapolations based on military losses. However, it is clearly established that military operations on both sides affected food production infrastructure, such as livestock, markets, agricultural land, dwellings and harvests.<sup>67</sup> In 1923, military planners took the view that the Rif would have to be razed completely in order to crush the rebellion. This left little scope for distinguishing between civilians and combatants. As a result, no quarter was given except for those who surrendered without fighting and agreed to collaborate. It would also be naive to think that the widespread use of poison gas in aerial or land bombing operations only affected the combatants.

In the 2000s, a few Moroccan non-governmental organizations again highlighted the fact that the Riffian people seemed to suffer from abnormally high rates of cancer (of the thyroid) and physical malformations. However, no international and independent scientific studies have been carried out to look into this phenomenon.<sup>68</sup>

The Riffian combatants also left much to be desired in the way that they conducted hostilities. In general, captured Spanish soldiers could not expect any clemency from Riffian fighters (though sometimes prisoners were returned; see Figure 7). On several occasions – such as the Battle of Annual rout, the defence of Mont Aroui and in Nador – Spanish troops were executed and mutilated, with the death toll estimated between 10,000 and 14,000. These summary executions prompted horror and dread among the Western public. Such massacres naturally fed Spanish patriotic fervour and stoked a compulsive desire for revenge within the army.<sup>69</sup> Pictures taken during the 1925 offensive<sup>70</sup> show mutilations of captured Moroccans, with severed heads, noses and ears

64 Max Schiavon, *La guerre du Rif: Un conflit colonial oublié – Maroc (1925–1926)*, Éditions Pierre de Taillac, Paris, 2016.

65 For example, Khouloud Haskouri, “Health Magazine Documents Spain’s War Crimes in Morocco’s Rif Region”, *Morocco World News*, 29 June 2021, available at: [www.moroccoworldnews.com/2021/06/343143/health-magazine-documents-spains-war-crimes-in-moroccos-rif-region](http://www.moroccoworldnews.com/2021/06/343143/health-magazine-documents-spains-war-crimes-in-moroccos-rif-region).

66 Douglas Porch, “Rif War”, *Historynet*, 6 December 2006, available at: [www.historynet.com/rif-war/](http://www.historynet.com/rif-war/).

67 For example, the French Air Force dropped 1434.62 tons of bombs between May 1925 and 1926. See Gilles Krugler, “La puissance aérienne dans la guerre du Rif: Le colonel Paul Armengaud et l’émergence de l’emploi tactique de l’aviation (1925–1928)”, *Revue Historique des Armées*, Vol. 268, 2012. See, also, Frédéric Danigo, “France and the Rif War: Lessons from a Forgotten Counter Insurgency War (Northern Morocco – April 1925–May 1927)”, Thesis, Marine Corps University, Command and Staff College, 2010.

68 In the summer of 2000, a study carried out by the Centre Hospitalier Universitaire (CHU) of Rabat reported that 60% of thyroid cancer in the Nador region was linked to chemical weapons used seventy years earlier. Locally, residents called this disease “*akhenzir*”. See Taïeb Chadi, “Le gaz moutarde agent responsable de la propagation du cancer dans la région de Nador”, *MarocHebdo*, 3 June 2000, available at: [www.maghress.com/fr/marochebdo/42106](http://www.maghress.com/fr/marochebdo/42106).

69 S. Balfour, above note 39.



Figure 7. *Campagne du Maroc. Une remise de décorations aux prisonniers rendus par les Riffains à quelques kilomètres de Targuist* [Morocco campaign. A presentation of medals to prisoners returned by the Riffians a few kilometres from Targuist]. Postcard, Pascal Daudin's private collection.

which were collected by Spanish legionaries, paraded as war trophies and worn as necklaces or spiked on bayonets. Atrocities were perpetrated by both sides without much restraint.

## Very marginal humanitarian aid

Beginning in the second phase of the conflict, in northern Europe and the United States, voices arose to call for charitable action. The fate of civilians was often brought up in the press at the time.<sup>71</sup>

There is little evidence of any large-scale humanitarian action in the Rif region for lack of available means and because of the blockade put in place, first by Spanish troops and later by the French. Civil society and charitable organizations also played a fairly marginal role and committed few resources to the war.

During the hostilities, very few relief actions were attempted, and the rare initiatives that were successful were undertaken by local organizations<sup>72</sup> managed by private individuals or very small associations without great resources. These

70 Pictures uploaded by Mevlyar Er, available at: [www.researchgate.net/figure/Spanish-soldiers-in-the-Rif-with-decapitated-heads\\_fig3\\_280233622](https://www.researchgate.net/figure/Spanish-soldiers-in-the-Rif-with-decapitated-heads_fig3_280233622).

71 For example, "The sufferers are not the fighting men but the poor peasantry who takes no part in the campaigns", *The Times*, 28 February 1925.

72 Francisco Javier Martínez-Antonio, "Resilient Modernisation: Morocco's Agency in Red Cross Projects From Hassan I to the Rif Republic, 1886–1926", *Asclepio*, Vol. 66, No. 1, 2014.

activities were concentrated almost exclusively in the city of Tangier, where several thousands of families had taken refuge. Some volunteers to the Riffian cause offered their services in combat zones, but these gestures are anecdotal from a historical point of view.

The Spanish Red Cross saw a significant increase in its health-care capacity during the conflict, but the hospitals established were entirely dedicated to Spanish troops and to civilian victims of Riffian attacks. In December 1921, after Spain's defeat in the Battle of Annual, a representative of the Spanish Red Cross was asked by Madrid to negotiate a prisoner exchange, which failed because hostilities then resumed. Spanish prisoners were repatriated in 1923 in return for a substantial ransom, but of 550 prisoners only 326 made it home, the rest dying of hunger or being executed.<sup>73</sup> Although it is difficult to attribute all of these events to the orders of Abd el-Krim himself, he did not prevent the numerous abuses perpetrated by the *harkas*, which exacerbated the conflict. On the ground, the Riffian troops were highly independent and carried out *razzia* (raids) without strong coordination.

Generally speaking, the Spanish<sup>74</sup> and French Red Cross societies were in agreement with the positions of their respective governments and sometimes participated in efforts to hinder the ICRC's timid initiatives.<sup>75</sup>

The ICRC was often satisfied to simply communicate questions or demands from National Societies concerned by the situation in Morocco (for example the Turkish Red Crescent) to the relevant Red Cross society without really taking action, even sometimes discouraging action, as was the case with the Swiss Red Cross.

At the international level, several organizations like the Society of Friends (Quakers),<sup>76</sup> the North Africa Mission Hope House Hospital, Save the Children Fund<sup>77</sup> and the Near and Middle-East Association rolled out concrete programmes for affected populations.<sup>78</sup>

A solidarity movement was also created in the Muslim world, at the heart of which the British Red Crescent<sup>79</sup> played a central role and received contributions

73 Francisco Javier Martínez, "Portuguese Soldiers in Morocco's Rif War (1921–27): Participation, Prisoners and the Intervention of the Portuguese Red Cross", in F. J. Martínez (ed.), *Entangled Peripheries: New Contributions to the History of Portugal and Morocco*, Publicações do Cidehus, Évora, 2020. See, also, V. Courcelle-Labrousse and N. Marmié, above note 22, p. 118.

74 Letter from the Spanish Red Cross informing ICRC that Riffian combatants are not belligerents but insurgents (*révoltés* in French) and should not be granted any form of aid. ICRC Archives, B CR-138-9, 27 November 1925.

75 See, for example, the letter from the French Red Cross, firmly criticizing the ICRC for having approached the colonial authorities in Rabat in order to join a French-Spanish evaluation mission in the conflict-affected regions. ICRC Archives, CR-138-167, 17 May 1926.

76 In Gabriel Pretus, "Humanitarian Relief in the Spanish Civil War (1936–39): The Independent and Non-Partisan Agencies", Master's Thesis, Royal Holloway University of London, Department of History, 2011, p. 276. See, also, Letter from Delegate General Raymond Schlemmer to Golden, President of Save the Children Fund, ICRC Archives, B CR-138, 22 November 1924.

77 See Letter from Delegate General Raymond Schlemmer to Golden, *ibid*.

78 See, for example, P. La Porte, above note 48, p. 124.

79 The British Red Crescent, founded in 1912 in the United Kingdom, was created by Indian subjects of the Crown, initially to come to the aid of Muslims in the British Empire in need of humanitarian assistance in



from some National Societies (such as the Egyptian Red Crescent). It nevertheless played only a modest role limited to the transfer of funds for material assistance to refugees in Tangier and for locally recruiting doctors, some of which were sent to zones held by the Riffian insurrection.

In 1922, via its representatives in India and in London, the British Red Crescent officially requested permission from the British authorities to send a contingent of Muslim doctors to Morocco. This initiative was strongly discouraged by the British ambassador in Madrid, Esme Howard, who declared that such an act would gravely undermine the image of the United Kingdom in Spain, so much so that the British government rejected the request to visit Spanish prisoners detained by Abd el-Krim. One might add that even if the great powers still had a contentious relationship after the First World War, inter-imperial solidarity demanded that one did not encourage indigenous rebellions in case the example took.<sup>80</sup>

### The ICRC: Impotent, legalist, pusillanimous or indifferent?

Although the war did not go unnoticed by the ICRC, the latter remained largely on the sidelines. It was not an international armed conflict, and therefore the applicable protection regime was ambiguous – if not absent – and there was no legal or formal basis for the ICRC to take action. This attitude was slightly inconsistent with the resolution and political courage that the ICRC had shown in the past, such as during the Anglo-Boer war (1899–1902), where the ICRC encouraged the Transvaal and the Free State of Orange<sup>81</sup> to establish a Red Cross society and to accede to the Geneva Convention despite the strong objection of the British Crown, which contested the sovereignty of these entities. The ICRC and the Movement components had also taken humanitarian action in the Finland Civil War (1918), in Upper Silesia during the Russian Civil War (1919), the Ukraine War of Independence (1918–1921) and in Hungary during Béla Kun’s communist uprising (1919), which were not inter-State conflicts.<sup>82</sup> In all these situations, the ICRC quietly intervened without much resistance from legitimate or *de facto* authorities.

situations of conflict (“to aid sick and wounded in times of war”). It began its activities by helping Ottoman soldiers wounded in the Balkans. It was never recognized by the Movement of the Red Cross and Red Crescent and seems to have ceased its activities in the beginning of the 1930s. See, for example, Jonathan Benthall and Jérôme Bellion-Jourdan, *The Charitable Crescent: Politics of Aid in the Muslim World*, I.B. Tauris, London, 2003.

80 Giorgio Poti, “Un microcosme de l’entre-deux-guerres : La Guerre du Rif (1921–1926) et la reconfiguration du complexe impérial euro-méditerranéen”, *Cahiers de civilisation espagnole contemporaine*, Vol. 18, 2017.

81 Matthias Schulz, “Dilemmas of ‘Geneva’ Humanitarian Internationalism: The International Committee of the Red Cross and the Red Cross Movement, 1863–1918”, in Johannes Paulmann (ed.), *Dilemmas of Humanitarian Aid in the Twentieth Century*, Oxford University Press, Oxford, 2016.

82 H. M. Lovat, *Negotiating Civil War*, above note 29.



It was not until 1924, three years after the conflict began, that the ICRC started to become a little concerned with the situation in the Rif. This concern was mainly triggered by the mobilization of what would today be called civil society. According to the available sources,<sup>83</sup> it is only after it was approached by charitable organizations and some national Red Cross societies already working in the region, alerting it of the severity of the situation and particularly that of refugees, that the ICRC took some action. In the end, it decided to send a representative to the Marquis of Hoyos, president of the Spanish Red Cross, who immediately retorted that “it was not a conflict, the needs of civilians were amply covered and so there was no justification for the ICRC to take action in the region”.<sup>84</sup> The ICRC was only able to establish direct contact with the Spanish government once, through the Spanish Red Cross, but the reaction was similar. After being approached by the Near and Middle-East Association, a charitable organization concerned about the humanitarian situation in the Rif, ICRC Vice-President Paul des Gouttes confirmed that the ICRC could only take action on the express invitation of a warring party, and that Abd el-Krim did not have that status.

In the course of discussions and exchanges with Spanish authorities and the national Red Cross, further arguments were consistently claimed to obstruct any international intervention.<sup>85</sup> These arguments would strangely resonate today for humanitarian negotiators attempting to gain a licence to operate in some modern conflicts:

- Civilians are marginally impacted by the war and they have already full access to the existing governmental medical structures;
- The ICRC is manipulated by charitable organizations who work to promote foreign interests and undermine legitimate Spanish (and French) protection mandate in Morocco;
- The local population is largely responsible for its own predicament for not evacuating combat places;
- A humanitarian intervention would encourage the rebels to fight and legitimize their cause while Spain and France are trying to bring the light of civilization to a backward and violent population; foreign aid would unnecessarily prolong the conflict;
- There is no relief society in the Rif region that would as such operate as a Red Cross component and the rebels have no trained personnel to treat their own people or to manage medical aid;

83 As of September–October 1925, the ICRC started concrete preparations to send an exploratory mission to Morocco despite negative signals from Spanish and French authorities. See Mission Letter to Dr Fred Blanchod, ICRC Archives, CR-138, 24 October 1925.

84 In this regard, see the Report of Delegate General Raymond Schlemmer’s Mission in Spain, ICRC Archives, BC-138-36, 10 November 1924.

85 See the ICRC’s various exchanges between 1924 and 1925 with the Spanish Red Cross, The British Red Crescent Society, The Near and Middle East Association, the Spanish Ministry of Foreign Affairs, the Turkish Red Crescent, the Swedish Red Cross, the Dutch Red Cross, the German Red Cross, the French Foreign Minister Aristide Briand and the French Red Cross, ICRC Archives, CR-138.

- The Riffians are not only rebelling against the Spanish presence but also against Morocco's legitimate ruler (the Sultan);
- There is no Riffian disciplined military force and tribal outfits are rather unruly warriors without a code of honour;
- There is no Red Cross in the Region because the conditions are not met to establish one;
- The Cheriffian Empire has refused to participate in the Red Cross Movement and we should respect its choice;
- The rebels are condemned by all Muslim religious authorities;
- Abd el-Krim would anyway refuse any help coming from infidels like the ICRC or European Red Cross;<sup>86</sup>
- The shelling of civilian dwellings is inevitable as no distinction is possible between civilians and combatants.<sup>87</sup>

Given the growing concern in the West, in November–December 1925 the ICRC nevertheless sent an envoy to the Tangier International Zone and to Rabat<sup>88</sup> to enquire about the humanitarian situation and in particular about the fate of approximately 5000 Riffian refugees. However, no concrete action was taken at that stage. ICRC's *missus dominicus*, Dr Mentha, was unable to establish any contact with high-ranking officials or with the rebellion representatives or even with the Berber community as such. The whole affair left the impression of a lack of determination and tokenism.

The following year, the ICRC received from the Swedish Red Cross<sup>89</sup> a copy of a letter sent by Abd el-Krim to the King of Sweden,<sup>90</sup> informing him of civilian suffering, and it again sent a delegate to Rabat. On 23 May 1926, Abd el-Krim had already informed the French of his intention to surrender and so the ICRC's relief efforts were deemed to be unnecessary.<sup>91</sup>

It is surprising to see how fainthearted the ICRC was in the Rif affair given that, almost simultaneously, in 1925, it had taken very proactive steps in relation to the Druze revolt in Lebanon, then under French mandate. It showed a much more energetic approach to diplomacy by putting a delegate on the ship carrying France's new high commissioner to Beirut in order to negotiate ICRC action in Lebanon, a French protectorate.

86 Lettre du Vice-Président du CICR Edmond Boissier à Akil Moukhtar, Vice-Président du Croissant-Rouge Turc, ICRC Archives, CR-138, 19 February 1925.

87 Report from Gerald Spencer Pryse transmitted to ICRC by NMEA, ICRC Archives, CR-138, 13 December 1924.

88 Henri Mentha, "Mission à Tanger", *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge*, Vol. 7, No. 84, 1925.

89 Abd el-Krim's request was transmitted by Alexander Langlet, correspondent of the Swedish newspaper *Dagens Nyheter*.

90 Letter from Prince Carl of Sweden and Norway to ICRC, ICRC Archives, CR-138, 30 April 1926.

91 Cancellation of Mission of R. Schlemmer and Dr Reverdin, ICRC Archives, CR-138, 28 April 1926.

## Quest for justification

There is no final explanation as to why the ICRC was so passive regarding the Rif War, but we can imagine that it was not inclined to alienate two European countries for the sake of an “indigenous revolt” that, at the time, did not appear comparable to conflicts between “civilized powers”. We may also suppose that the ICRC was more prone to consolidate and further develop the existing interstate conflict regulation than to spend political assets/resources on a colonial police operation. The French and Spanish Red Cross societies did consider their role as supporting their own troops and helping specific categories of victims but certainly not to offer impartial help to all people affected. Let us note that the issue of impartiality and independence of National Societies is still very prominent in many contexts where they have to operate in internal conflicts.

Before 1924, ICRC archives are mute on the Rif issue. We could not find any reference to the conflict; it is thus hazardous to deduce the level of information the Committee had before this date, or the content of discussions on this issue, if any. It is, however, established that the news from the Rif front had reached newspapers in Europe at least since the Battle of Annual (1921). It is highly improbable that committee members or the small administrative nucleus would have completely overlooked the unfolding events in Morocco<sup>92</sup> before 1924.

However, it is difficult to interpret the ICRC’s strategy and intentions merely based on available institutional archives. There are only assumptions about the ICRC’s apparent unwillingness to act. Some authors<sup>93</sup> argue that the ICRC was kept busy by other contexts where it was running assistance and repatriation programmes and most probably considered the situation in Morocco as being marginal. It is true that for the Committee the rules of war had been established to regulate warfare between “civilized nations”; however, despite the legal vacuum, it had serious concerns concerning the fate of civilians in conflict situations following atrocities committed by various armies during the First World War and its aftermath. In 1921, an ICRC delegate, Maurice Gehri, had, for example, published an account in the *Review* about the atrocities committed by the Greek army against the Muslim population in Anatolia.<sup>94</sup> In that sense, it would be excessive to claim that the ICRC was totally blind to the suffering of non-European populations.

Until the end of 1924, it seems that the institution was very adamant not to upset the Spanish (more or less represented by the Spanish Red Cross), sometimes even responding to queries from other Red Cross societies by endorsing arguments put up by the Spanish authorities to justify their refusal of foreign aid. On the other hand, it would systematically forward to the Spanish Red Cross all letters and communications from National Societies and other charitable organizations

<sup>92</sup> B. Holmes, above note 52.

<sup>93</sup> E.g. P. La Porte, above note 48.

<sup>94</sup> Maurice Gehri, “Mission d’enquête en Anatolie. (12–22 mai 1921)”, *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge*, Vol. 3, No. 31, 1921.

voicing their concern about the situation prevailing in the Rif in a form that could be seen as a protracted and low-key advocacy manoeuvre. By 1925, the tone had changed, and the ICRC started to affirm its resolution to send an official or unofficial (unauthorized) mission to the Rif region.

In November 1925, the ICRC published in the *Bulletin*<sup>95</sup> a rather extensive but clinical summary of decisions taken by it. This article brought clarification to why the organization had decided not to act, identifying itself with the arguments expressed by the Spanish Red Cross.

What must be underlined is that, in 1920, colonialism was not an undisputed policy and its legitimacy was already the subject of heated debates within European States. However, the international climate around the ICRC was still relatively conservative and responding to the plea of unruly natives looked like a potentially dangerous venture. The famous Wilson's fourteen-point programme in which self-determination was exposed was not addressing colonized people but countries like Poland or Czechoslovakia. The United States were largely retaining the idea that the role of colonial powers was to help "less civilized peoples achieve the habit of law and obedience".<sup>96</sup>

In addition, the First World War had shown to the colonized people that "their masters" were not invincible. Colonial rulers were persuaded they had to retain their respective possessions in firm hands in order to avoid a disintegration of their respective empires.

In 1923, the informal embassy of the Rif government based in London sent a "Declaration of State and Proclamation to all Nations" to the LN reaffirming its independence and its desire to fight for its political recognition.<sup>97</sup> In political terms, the LN had from the outset declared that it had no power to intervene, because the Treaty of Versailles had confirmed the major powers' role as protectors of Morocco. The accounts from the period show that ICRC governance shared more or less that vision.<sup>98</sup> The LN and the ICRC also agreed that Riffian fighters did not qualify as a "belligerent". As a result, the LN refused to act as a mediator because it did not regard the Rif Republic as a national entity.<sup>99</sup> It is interesting to note that, almost at the same time, France's military

95 "La Croix-Rouge et le Rif", *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge*, Vol. 7, No. 83, 1925.

96 Joshua Keating, "The Accidental Anti-Imperialist", *Slate*, 30 June 2020, available at: <https://slate.com/news-and-politics/2020/06/woodrow-wilson-racism-self-determination.html>.

97 The "Riff Republic" – The Agent-General for the "Government of the Riff" (Marocco) London, above note 20.

98 See, for example, David P. Forsythe, "The ICRC as Seen Through the Pages of the Review, 1869–1913: Personal Observations", *International Review of the Red Cross*, Vol. 100, No. 907/908/909, 2018. See, also, Paul des Gouttes, "Une thèse de doctorat en droit sur la Croix-Rouge", *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge*, Vol. 4, No. 45, 1922. In this article, the ICRC Vice-President Paul des Gouttes stressed that having invited some Red Cross Societies from "the Dominions" to the Xth International Conference was rather a favour and an exception and should not in any way be considered as a recognition.

99 "In reply to your letter of October 7th I have the honour to inform you that the provisions of the Covenant concerning the settlement of disputes apply solely to disputes between States, the status of which has been

response to the Druze revolt in Lebanon, which spread to much of Syria, did not encounter the same lack of reaction from the LN because Syria was not a colony but a mandated territory. France would have to answer for its actions before the Permanent Mandates Commission and reassure the international community about the use of poison gas. The LN, when considering whether the Geneva Protocol on poison gases applied to Morocco, confirmed that it could only apply to belligerent States,<sup>100</sup> which Spain and France were not, and the Riffians even less so. French perception, for example, was that the use of poison gas in the Rif context was an optional strategic possibility rather than the subject of total ban.

The difference in the ICRC's approach to the Rif War and its humanitarian efforts in the Second Italo–Ethiopian War ten years later is also striking, although it must be said that the latter was an international armed conflict taking place against a completely different political backdrop. It is also worth mentioning that in 1925 the ICRC was still a tiny organization that had almost no operational and financial capabilities. It was not until the Second Italo–Ethiopian War and the Spanish Civil War that the term “delegation” could be used to describe the ICRC's presence.<sup>101</sup>

For the ICRC, any humanitarian action without Madrid's consent would have been regarded as meddling in Spain's domestic affairs. The ICRC's Archives strongly indicate that ICRC management and governance at the time were more inclined to give credit to official State representatives involved than to the version of events that was in line with communications from charitable organizations, which were treated with great wariness. After its disappointing experience with the Spanish Red Cross, the ICRC directly approached the French government through the LN, but faced a similar refusal. A few months later, ICRC Vice-President Boissier<sup>102</sup> added that he doubted in any case that Abd el-Krim would accept aid from an organization belonging to the “infidel” side. At no time did the ICRC make serious efforts to contact the rebel leader or his envoys.

We may conclude that the ICRC's “procrastination”, so to speak, may have had two distinct but intertwined causes. Firstly, there was a willingness to preserve and further develop what had been already achieved with existing States, and, more importantly, to get further legal codification.<sup>103</sup> In 1920–1921, the ICRC was also very busy preserving its lead role within the Movement which was somewhat contested by the newly established League of the Red Cross. It seems that the ICRC wanted to protect its right of initiative (later recognized in 1928) and that Rif

generally recognised. They may be either Members or non-Members of the League.” Letter from Paul Mautoux, LN Director of the Political Section, in Dossier concerning various requests for League intervention in the Rif War, United Nations Library & Archives Geneva, File R591/11/41612/12861, 18 October 1925, available at: <https://archives.ungeneva.org/dossier-concerning-various-requests-for-league-intervention-in-the-rif-war>.

100 Pablo La Porte, “‘Rien à ajouter’: The League of Nations and the Rif War (1921–1926)”, *European History Quarterly*, Vol. 41, No. 1, 2011, pp. 76–82.

101 See, in particular, Rainer Baudendistel, *Between Bombs and Good Intentions: The Red Cross and the Italo–Ethiopian War, 1935–1936*, Berghahn Books, New York, 2006.

102 Lettre du Vice-Président Boissier, ICRC Archives, CR-138-70, 14 February 1925.

103 John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, CO, 1996.

events did not fit in this strategy. Secondly, the lack of resources and operational experience to set up a large-scale humanitarian action in a non-European context was clearly a source of concern that transpired from the correspondence.

## Public opinion divided

The Rif War stirred little reaction in Spain because the public still very strongly believed that every effort should be made to combat and punish “backward” peoples taking up arms against “civilizing forces”. Additionally, the various prisoner massacres and mutilation of dead bodies that took place in the 1920s’ offensive did not make the Riffian rebellion very popular. The mindset was very different from that which led to the Tragic Week in Barcelona in 1909, during which protests about soldiers being sent to Morocco turned into several days of extremely violent rioting in the city.

In France, a left-wing social-democrat coalition came to power in May 1924 and in 1925 it signed an agreement with Spain<sup>104</sup> regarding joint military action in Morocco. What was most worrying to the French was the idea that, after the bloodbath that was the First World War, more young people – whose fathers had died in Verdun – would be sacrificed. The fate of the local people, meanwhile, was of no real concern. For France’s Right and Far Right, the country needed to show that it was capable of defending itself and, above all, maintaining its place in the world. Only the French Communist Party (PCF) – initially accused by the Komintern of being ambiguous about colonial matters and supported by intellectuals including the Surrealist “Clarté” group – organized mass protests against the war, and particularly against the sending of troops to Morocco. At the end of 1924, the PCF also wrote “a pro Rif manifesto” and sent a telegram of support to Abd el-Krim<sup>105</sup> that would be read before the National Assembly.

From 1925 to 1926 the controversy grew in Scandinavia. The publication of a series of articles reported very disturbing testimonies on the conduct of hostilities and the situation of the civilian population. Some authors did not hesitate to qualify military acts as crimes against humanity.<sup>106</sup> Personalities like the explorer Sven Hedin<sup>107</sup> used their prestige to serve the Riffian cause, to the chagrin of French diplomats, who multiplied efforts to discredit the information in these articles to the ICRC. They did their utmost to persuade public opinion that these

104 From 17 to 25 June 1925, French and Spanish delegations met in Madrid to negotiate a series of agreements that committed both sides to, among other agreements, a military pact against the Republic of the Rif. See S. Fleming, above note 22.

105 Nicole Le Guennec, “Le Parti communiste français et la guerre du Rif”, *Le Mouvement social*, No. 78, 1972, p. 41.

106 Article by Waldemar Lanke, *Aftonbladet*, 8 May 1926.

107 Sven Hedin (1865–1962) was a Swedish geographer and explorer as well as a political public figure. He particularly condemned the intervention of foreign mercenaries in Morocco. See, also, Francisco Javier Martínez-Antonio, “An Individual Affair? Sven Hedin, Hans Langlet and the Intervention in Morocco’s Rif War of the International Committee of the Red Cross”, Speech delivered during the “International Health Organizations (IHOs): The History for the Future Network” Conference, University of Strathclyde, 21 April 2016.



Figure 8. Bank note: State Bank of the Rif – Foreign Issues (1923) (Numizon).

personalities were serving foreign powers. Generally speaking, the joint military operation between France and Spain was the object of robust public diplomacy to avoid the emergence of international solidarity between Riffian nationalist forces and communist or anti-colonial movements.

Despite some gains in popular support, Abd el-Krim's efforts to garner foreign political support were largely unsuccessful. The UK government showed very vague sympathy, but offered no diplomatic help. In 1922, debates in the British Parliament showed very clearly that His Majesty's Government was not ready to intervene in any way in the affairs of "friendly Spain".<sup>108</sup>

Abd el-Krim also struggled to convince other countries that the Rif Republic was a fledgling State, despite having very embryonic institutions (for example, a State Bank; see Figure 8). Robert Gordon Canning,<sup>109</sup> chairman of the Rif Committee based in London, tried to intercede with France's Minister of Foreign Affairs Aristide Briand, but in vain. He put that refusal down to France being unable or unwilling to recognize the Rif authorities.

108 "The Rif tribes now engaged in fighting Spanish forces in districts which His Majesty's Government have recognised as forming a Spanish sphere of influence in Morocco must be regarded by His Majesty's Government as rebels against a friendly Power, and consequently His Majesty's Government must refuse to recognise or have any dealings with the emissaries of the Rif tribes now in London. I am not aware whether the Spanish Government are now negotiating with private English manufacturers for the purchase of aeroplanes. For the reasons explained in the first part of my answer, His Majesty's Government do not see their way to intervene, either through the League of Nations or otherwise." *Statement of Neville Chamberlain*, Volume 157: debated on Friday 4 August 1922, UK Parliament, London.

109 Robert Gordon Canning was a dubious character who, in late 1925, visited Tangiers and rapidly became a military advisor, publicist and gunrunner for the Riffian rebellion. He created "the Rif Committee", a rather eclectic organization which tried to convince the British authorities to support Abd el-Krim's project and lobby the French government to conclude a separate peace with the Riffian rebellion. He managed to concoct a peace proposal substituting independence for autonomy but, after weeks of dithering, the French rejected the Proposal. In the 1930s, he joined the British Fascist Union. See Thomas Heyen-Dubé, "Fascism, War and the British Officer Class: The Case of Robert Gordon-Canning", *War & Society*, Vol. 40, No. 4, 2021. See, also, V. Courcelle-Labrousse and N. Marmié, "Chapitre XX – Le Rif Committee et les sauterelles d'Ajdi", in V. Courcelle-Labrousse and N. Marmié, above note 22.



## The strange case of the disappearing war

For decades, the Rif War and its ephemeral Republic were not the object of significant political debate, and it only raised modest interest in academic circles.

However, in December 2018, Spanish Minister of Foreign Affairs Josep Borrel declared that Spain would start a process of healing wounds on both sides, on the occasion of the 100th anniversary of the Rif War.<sup>110</sup> That stance followed a request, made by the Republican Left of Catalonia party, for Morocco to receive compensation for the use of chemical weapons. This was the first time that any reconciliation and reparation process had been openly mentioned. Mr Borrel announced that the process should also take into account the suffering caused by the Battle of Annual and of the 10,000 Spanish soldiers who died in it. The government had – in February 2018 – received a request from the Amazigh World Assembly (AMA),<sup>111</sup> asking Spain to present its apologies for the use of chemical weapons in Morocco and proposing a compensation plan, but things did not advance further. The AMA also mentioned, in its request, the need to put in place a transitional justice mechanism.

Almost at the same time, Netflix broadcasted a series entitled *Morocco: Love in Times of War* (*Tiempos de guerra*),<sup>112</sup> telling the story of Spanish Red Cross nurses in a military hospital in Melilla in 1921.

This slight resurgence of interest only partially masks the relative parsimony of historical studies on the Rif War, which is compounded with the almost total lack of collective memory about this period. This is not even a situation of competing memories in which diverging narratives collide and feed modern political controversies.

Whereas the Rif War was centre-stage politically in the late 1920s and was highly controversial in Europe between pro-colonial and anti-colonial forces, it did not elicit much scientific literature until very recently. However, it is one of the first examples of Western powers forming a coalition to wage a long and ruthless counter-insurgency campaign. It is also an example of the kind of asymmetric wars we are witnessing today. Although a major conflict, it has not been greatly explored by historians and represents a real black hole in terms of remembrance. It should be stressed that it was not just another police expedition aimed at subduing some restive natives using specialist colonial troops, or intended to make a local despot yield using a skillfully deployed gunboat. Rather, it was a

110 In December 2018 *Morocco World News* reported that Spanish Minister of Foreign Affairs Josep Borrell was proposing to use the centenary of the Battle of Annual to mend fences with Morocco in relation to the Rif War. See Safaa Kasraoui, “Rif War: Spain Wants to ‘Heal Wounds’ of Gassing Moroccan Resistance”, *Morocco World News*, 28 December 2018, available at: [www.moroccoworldnews.com/2018/12/261799/rif-war-spain-morocco](http://www.moroccoworldnews.com/2018/12/261799/rif-war-spain-morocco).

111 MEMO Middle-East Monitor, “Spain Urged to Investigate 1920s Toxic Gas Use in Morocco”, 12 February 2018, available at: [www.middleeastmonitor.com/20180212-spain-urged-to-investigate-1920s-toxic-gas-use-in-morocco/](http://www.middleeastmonitor.com/20180212-spain-urged-to-investigate-1920s-toxic-gas-use-in-morocco/).

112 Queen Victoria Eugénie sent a group of nurses from the Spanish Red Cross to Melilla to establish a new hospital. Led by the Duchess of La Victoria, María del Carmen Angoloti y Mesa, the group was composed of young women from Spain’s upper classes.

large-scale conflict pursued using the most modern military resources of its time, and the excessive scale of those resources is still shocking today. It is likely that only the crackdown that followed the Indian Rebellion of 1857 (the Great Mutiny)<sup>113</sup> or, more recently, the massacres of the Herero and Namas populations in Namibia<sup>114</sup> (1904–1907) by the German Empire surpassed the Rif War in terms of civilian casualties.

Not surprisingly, there are very few monuments, commemorative works or gravestones specifically dedicated to the fighters killed during this campaign, not to mention the civilian casualties. A few names are mentioned in some military sections of national cemeteries in France and Spain, but that is about all. The victims of the conflict have faded from history. This situation is paradoxical if one considers the number of monuments to the dead that studded France after the First World War. Closer to us, the French government was until recently very reluctant to create remembrance places for its military personnel fallen in the so-called external operations.<sup>115</sup>

French philosopher Paul Ricœur<sup>116</sup> explored what he called “*les ruses de l’oubli*” (tactical forgetting), which includes the removal of historical records, which may be conscious or unconscious but is in all cases collective. Among the French and Spanish, there has not yet been any political will to revisit an embarrassing colonial episode, which could also result in claims or requests for compensation that would be very complicated to address. France still struggles to approach the Algerian War with equanimity and Spain has not finished managing the heritage of the Franco regime and the Civil War.<sup>117</sup> There are still numerous subjects of disagreement between Spain and Morocco, in particular the fate of the two Ceuta and Melilla enclaves, among others.

In 2007, Moroccan documentarian Tarik el-Adrissi made a film<sup>118</sup> about the use of poison gas, which had relatively little impact in Morocco and Spain. The Rif War has been erased from collective consciousness, and is very rarely alluded to, even for

113 In which estimates suggest that 800,000 people died. See Douglas M. Peers, *India Under Colonial Rule: 1700–1885*, Routledge, Abingdon, 2013, p. 64: “The number of Indians who died during the mutiny and the famines and epidemics that followed in its wake is far more difficult to compute. Attempts to do so based on comparisons between the very sketchy demographic data that we have for the period before 1857 with the census results of 1871 have suggested that the number of deaths might be around 800,000.”

114 Mads Bomholt Nielsen, *Britain, Germany and Colonial Violence in South-West Africa, 1884–1919: The Herero and Nama Genocide*, Cambridge Imperial and Post-Colonial Studies, Palgrave MacMillan, Cham, 2022, pp. 17–34. “Historians estimate that approximately 80,000 indigenous people were killed in the genocide. While these numbers are difficult to confirm, this figure represents about 80 percent of the Herero people and 50 percent of the Nama people.” United States Holocaust Museum, “Herero and Nama Genocide”, available at: [www.ushmm.org/collections/bibliography/herero-and-nama-genocide](http://www.ushmm.org/collections/bibliography/herero-and-nama-genocide).

115 Mali, Niger, Chad, Afghanistan, etc.

116 Paul Ricœur, *La Mémoire, l’histoire, l’oubli*, Points, Paris, 2000.

117 In this vein one might ask the delicate question of the transfer of the remains of General Franco from his mausoleum in Santa Cruz (l’Abadía Benedictina de la Santa Cruz del Valle de los Caídos) by the socialist government of Prime Minister Pedro Sanchez, which continues to cause controversy and political confrontation in the heart of Spanish political culture. See, for example, Olivier Perrin, “L’Espagne veut régler ses comptes avec les horreurs du franquisme”, *Le Temps*, Geneva, 25 June 2018, available at: [www.letemps.ch/opinions/lespagne-veut-regler-comptes-horreurs-franquisme](http://www.letemps.ch/opinions/lespagne-veut-regler-comptes-horreurs-franquisme).

118 Tarik el-Idrissi, *Arrhash (Veneno)*, 2007.

ideological purposes. Objectively speaking, no protagonist, except maybe the fragmented Riffian community, has any interest in exhuming this historical episode. The “rediscovery” of a forgotten conflict necessarily stems from a political decision. In that regard, one could say that the current amnesia is the result of a deliberate political strategy, but there is not even clear evidence for that. Neither is it a case of the traditional conflict between official history and collective memory, as seen in debates about the Algerian War<sup>119</sup> and Vichy France, for example. There are no eyewitnesses left who can tell us about what happened in the Rif. The historical imprint left by a war, which goes beyond the real-life experiences of the protagonists, varies from conflict to conflict but it remains entirely real. It is impossible to understand war in the Balkans during the Second World War without the Jasenovac concentration camp<sup>120</sup> or the Ukraine without the Kuban famine or the Babi Yar massacres. In the case of the Rif, there is no collective remembrance of particular episodes that would strike the imagination, as even the Annual disaster is long forgotten.

## History *versus* collective amnesia

Rebuilding a nation often involves inventing a national narrative or reconstructing its backstory retrospectively to ensure social cohesion. We may wonder if the Rif War and its humanitarian consequences warrant a more thorough scrutiny.

For a quarter of a century, lawyers, politicians, psychologists and historians have debated the role of collective memory in the socio-political sustainable resolution of conflicts (the Rwandan genocide, apartheid, the Bosnian War, the repressive regimes in Chile and Argentina, etc.). Pierre Nora<sup>121</sup> clearly distinguishes the need for remembrance and the historical imperative and is wary of both. Henry Rousso<sup>122</sup> warns against the excesses committed in the name of remembrance and the mental manipulation that can result. Conflicts do not end when the last shot is fired. Certain humanitarian issues, such as people who are missing and unaccounted for, eat away at societies for several decades after hostilities have ended.<sup>123</sup> We know that acknowledging human suffering in conflict is often a preliminary step towards more ambitious phases of the social and political reconciliation and normalization processes. Unfortunately, this collective memory<sup>124</sup> can be revived or manipulated by those who are not solely concerned with giving a voice to victims.

119 Benjamin Stora, *La gangrène et l'oubli : La mémoire de la guerre d'Algérie*, La Découverte/Poche, Paris, 2005.

120 An extermination camp set up by the Ustaše Government (1941–1945) in which several hundred thousand Serbian, Jewish and Roma prisoners died.

121 Hanna Nosova, “Pierre Nora’s Concept of Contrasting Memory and History”, *International Journal of Philosophy*, Vol. 9, No. 4, 2021.

122 Henry Rousso, *La Hantise du passé*, Textuel, Paris, 1998.

123 In places such as the Balkans, Cyprus or Iraq.

124 The historian Pierre Nora defines collective memory as “what remains of the past in the real-life experience of groups, or what those groups do with the past ... It is sweeping and borderless, vague and jumbled. It is based on faith and only assimilates that which supports it.” The quote comes from Jacques Le Goff (ed.), *La Nouvelle histoire*, Retz, Paris, 1978, pp. 398–401.

Some experts believe that forgetting is sometimes a great healer, meaning that reviving forgotten suffering is much riskier than letting injustices go unpunished.<sup>125</sup> Others take the opposite view,<sup>126</sup> claiming that there can be no reconciliation without some sort of recognition of the past, or without justice being served. As Australian aboriginal history and the Rwandan genocide have shown, denying and negating traumatic events seriously damage efforts to promote reconciliation or normalization, develop a peaceful society and establish lasting peace. The Kantian ideal of justice should win out over any other form of moral claim but the Battle of Annual happened four generations ago and its protagonists are long deceased. Nonetheless, it would be too hasty to ignore the symbolic weight<sup>127</sup> of such events.<sup>128</sup> The challenge in the case of the Rif War is that there is no one left to reconcile, which raises the following question: Can justice be served posthumously? A mechanism of restorative justice or compensation could doubtless be put in place but that would probably serve some political purpose being implemented.

The history of humanitarianism is still an emerging discipline, but it has seen significant growth in recent years and can only continue to do so. It is nonetheless difficult to examine conflicts before the 1960s, in particular colonial history, with a few rare exceptions.<sup>129</sup>

125 David Rieff, "... And if There Was Also a Duty to Forget, How Would We Think About History Then?", *International Review of the Red Cross*, Vol. 101, No. 910, 2019.

126 See, for example, the declaration of António Guterres, "La réconciliation ne saurait se substituer à la justice, ni même ouvrir la voie à l'amnistie pour les crimes les plus graves" ("Reconciliation, however, cannot be a substitute for accountability or pave the way for amnesty for serious crimes under international law"), United Nations Security Council, UN Doc. S/PV.8668, Press Release SC/14024, 10 November 2019, p. 3. See, also, Truth and Reconciliation Commission (TRC), *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1998, available at: [www.justice.gov.za/trc/report/finalreport/Volume%201.pdf](http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf). In South Africa's TRC, the slogan "revealing is healing" crystallized ideas about the healing and conciliatory power of verbal memories of violence and abuses that were promoted in that commission. Archbishop Desmond Tutu was Chair of the TRC. See Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions", United States Institute of Peace, Special Report, February 2005, available at: [www.usip.org/sites/default/files/sr130.pdf](http://www.usip.org/sites/default/files/sr130.pdf).

127 To take the Opium War between the British Empire and China as an example, there has not been a symmetrical process of forgetting.

128 For the British, it is largely a forgotten episode belonging to a colonial era that disappeared for good in 1999 in Hong Kong. For the Chinese, it is etched into the collective consciousness, an act that founded modern China and an Asian "never again".

129 For example, the work of Caroline Reeves, Hanna B. Krebs and Miwa Hirono on humanitarianism in China, e.g. Caroline Reeves, "China, 'State-Centric' Humanitarianism, and the International Committee of the Red Cross: A Historical Background", in Elena Fiddian-Qasimiyeh and Patricia Daley (eds), *Routledge Handbook of South-South Relations*, Routledge, Abingdon, 2018; Hanna B. Krebs, "The 'Chinese Way'? The Evolution of Chinese Humanitarianism", Humanitarian Policy Group, 2014, available at: <https://cdn.odi.org/media/documents/9140.pdf>; Miwa Hirono, "Three Legacies of Humanitarianism in China", *Disasters*, Vol. 37, 2013; the work of Rainer Baudendistel on the humanitarian action of the ICRC during the Ethiopian conflict (1935), above note 101; the work of Jennifer Polk on the foreign humanitarian aid of revolutionary Russia, e.g. Jennifer Ann Polk, "Constructive Efforts: The American Red Cross and YMCA in Revolutionary and Civil War Russia, 1917–24", PhD Thesis, University of Toronto, 2012, available at: [https://tspace.library.utoronto.ca/bitstream/1807/65487/3/Polk\\_Jennifer\\_A\\_201206\\_PhD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/65487/3/Polk_Jennifer_A_201206_PhD_thesis.pdf); and the research of Jasmine Moussa on the origins of the concept of humanitarianism in the Middle East, e.g. Jasmine Moussa, *Ancient Origins, Modern Actors: Defining Arabic Meanings of Humanitarianism*, Humanitarian Policy Group,

The rise of nationalist governments and community lobbies contributes to the risk of history being transformed in the name of the sacrosanct collective memory or duty to remember. These ideas can quickly serve to impose a national fiction, in some cases inscribed in law. We know that these “excesses in the duty of remembrance”,<sup>130</sup> “competing victimhood” or the judicialization of historical “truths” are seriously detrimental to critical analysis and the comprehension of both facts and the intent of actors.<sup>131</sup> History does not belong to historians alone<sup>132</sup> and historians are not meant to produce adequate memorial discourse on command. However, humanitarian historians who study these questions must increasingly live with the fact that the discipline is not exclusively neutral and impartial, as the morality of the sector for which it is named. They must speak honestly about the defaults of collective memory with all unpleasant political consequences that this implies.

This article does not aim to determine whether remembrance is socially or politically necessary, nor to assess whether any confessions or reparations are legitimate demands for the Rif War. However, and without overstating the educational value of historical analysis, humanitarian historians should perhaps examine the Rif War more closely, over and above the remembrance efforts that are solely a matter for the people concerned. People make many strategic mistakes when they are unaware of history and when the subjective experience of those affected is rejected or misunderstood. Beyond its academic support, humanitarian history can also help clarify complex reconciliation processes, such as seen through the massacres in Namibia (1904–1907).

## What can we learn from the Rif War?

The Rif War is not yet really part of humanitarian history. The Boissier–Durand history of the ICRC between 1914 and 1945 which gives an account of the actions and initiatives of the Committee to send a mission to Morocco<sup>133</sup> stands as the exception. Otherwise, it is curious to note that François Bugnion, in his magnum opus *The International Committee of the Red Cross and the Protection of War Victims*<sup>134</sup> makes only a very short notice of a conflict which lasted for more than five years and caused tens of thousands of deaths. Michel Veuthey, in

Overseas Development Institute, London, 2014, available at: <http://cdn-odi-production.s3.amazonaws.com/media/documents/9290.pdf>.

130 François Dosse, “L’histoire à l’épreuve de la guerre des mémoires”, *Cités*, Vol. 33, No. 1, 2008, p. 31; Olivier Bertrand, “Compte rendu de *La mémoire, l’histoire, l’oubli* de Paul Ricoeur, Paris, Seuil, 2000”, *Politique et Sociétés*, Vol. 20, No. 1.

131 In 1995, the orientalist Bernard Lewis (1916–2018) was found guilty by the Paris Tribunal de Grande Instance for having expressed reservations about the genocidal character of the massacre of Armenian populations in 1915–1917.

132 See René Rémond, “L’histoire et la Loi”, *Études*, Vol. 404, No. 6, 2006.

133 Pierre Boissier, André Durand, Catherine Rey-Schyr, Françoise Perret and François Bugnion, *Histoire du Comité international de la Croix-Rouge*, 2 vols, Institut Henry-Dunant, Geneva, 1978.

134 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, International Committee of the Red Cross, Geneva, 2003, p. 299.

his seminal thesis on guerrilla warfare and humanitarian law,<sup>135</sup> only mentions it briefly and in relation to the use of poison gas.

What is noteworthy about the Rif War is that, in its second phase, it involved a coalition of forces operating outside of their respective national territories, including regular armies, local back-up troops, tribes, mercenaries and even converted pirates. One can also discover the foundations of a sort of transnational mobilization of civil society.<sup>136</sup> In this respect, it was a thoroughly modern conflict.

The Rif War was a rehearsal, taking place behind closed doors, for future colonial wars, but also to some extent for today's counter-insurgency and insurrection wars. It contained all the ingredients for widespread abuses and excesses. It raised all the issues and complexities relating to the protection of civilians during an internal armed conflict, and showed that States can be reluctant to allow organizations to do their work impartially. So, while the ICRC sent its General Delegate Raymond Schlemmer to Madrid in 1924 to meet Baron de Hoyos (President of the Spanish Red Cross) and the head of the political cabinet of Prime Minister Primo de Rivera, the arguments raised at that time against the ICRC's intervention strangely resound with the reasons put forward by some current governments to deny humanitarian presence or action. As for the "recognition of belligerency" in internal armed conflict, although the legal framework and customary law have considerably evolved since, it is still a recurrent problem when negotiating protection and humanitarian access.

It is striking to see that the powers involved in this conflict already considered that humanitarian action by external actors constituted a risk of political interference and possible politicization of any publicity that could be given to it.<sup>137</sup> On top of this, aid could needlessly prolong the conflict, the presence of a foreign organization on rebel-held territory could in fact give a status to belligerents and the very nature of Riffian combatants, who did not understand the notion of humanity, did not allow the ICRC to act safely.<sup>138</sup> Together, the Spanish government and Red Cross affirmed that the rebels were unwilling to be administered Western medicine and that, in any case, there were no longer civilians in the areas concerned. It is frustrating to see that the arguments used nowadays to deny the ICRC access in certain situations are exactly the same as those advanced 100 years ago.

Is the Rif War a mere historical episode to be filed alongside others such as the Crimean War, the Napoleonic campaigns or the Peloponnesian War? It is not as simple as that.

135 Michel Veuthey, *Guérilla et droit humanitaire*, 2nd ed., International Committee of the Red Cross, Geneva, 1983.

136 G. Poti, above note 80.

137 Even in the 1920s, a period when colonialism did not raise much controversy, the practice of denouncing abuses by competing powers was common. So much so, that in 1917 when an Irish officer, Thomas Leslie O'Reilly, denounced German military acts in Namibia (1904–1907) against the local population ("The Blue Book"), the Germans immediately threatened to do the same regarding British colonial expeditions, which provoked the immediate withdrawal of the report.

138 Francisco Javier Martínez-Antonio, "Weak Nation-States and the Limits of Humanitarian Aid: The Case of Morocco's Rif War, 1921–1927", in J. Paulmann (ed.), above note 81.

The humanitarian approach to history is valid because it relates to ideas and values that are still prompting discussion and controversy today. As such, the Battle of Solferino is of limited historical interest and was nothing like modern conflicts. The only reason it is important today, and has been since 1857, is because it gave rise to a conceptual revolution in the art of war and because it is the foundational moment of modern humanitarianism.

It would be tempting to state that nothing has really changed and that modern wars resemble old ones. However, wars have come a long way since 1920. Although the conflicts in Syria and Yemen might raise doubts about the usefulness and relevance of the law and of the international security system, few contemporary conflicts take place behind closed doors or in a legal vacuum that fosters impunity. The development of rules applicable to internal armed conflicts, although far from being perfect and fully implemented, has established a protection framework that can always be invoked and that has curbed the most serious excesses. States are now accountable for their actions. No regular army can ignore the law and carry out systematic, large-scale violations of the rules without risking international opprobrium. Humanitarian organizations now have a major presence on the ground, although working conditions are increasingly dangerous and access can be often uncertain.

In 1925, no European State disputed the idea that the colonial powers were entitled to settle their differences with native populations as they saw fit, without any sort of international scrutiny or constraints. The Rif was a colonial problem that needed to be settled as one might resolve a domestic dispute, behind closed doors using discretionary powers.

Since 1925, conflict regulations and the protection framework have considerably evolved, but the existing legal construction is repeatedly put into question. The current return to a rigid form of sovereignty, which is opposed to or imposed upon humanitarian organizations, needs to be monitored because it will inevitably make some States feel entitled to use unlimited force to settle political problems. This is in line with the current trend of the rise of “exceptionalist” regimes who also seek to deny certain categories of fighters the protections they are entitled to and therefore the obligations envisaged by international humanitarian law. At 100 years after the first skirmishes of the Rif War and despite the extraordinary accomplishment in terms of normative developments, these questions are at the heart of humanitarian endeavour.

## The reasons behind political procrastination

It is usually very dangerous to assess the past using current political, legal and moral concepts,<sup>139</sup> but it is fair to say that the ICRC could have done better during the Rif

139 Andrew Roberts, “Should we Judge Historical Figures by the Morals of Today?”, *BBC World Histories Magazine*, January 2018, available at: [www.historyextra.com/period/modern/historical-figures-statues-judge-morals-today/](http://www.historyextra.com/period/modern/historical-figures-statues-judge-morals-today/).



episode despite adverse political conditions. It would be presumptuous to say that the ICRC completely failed in its mission, but its lack of political daring doubtless helped to legitimate the dominant discourse of the time, according to which all victims were not equal. It adopted a passive and conservative attitude, probably grounded in its desire to preserve State support to the emerging legal framework on international armed conflicts.

As Yuval Noah Harari once said, “history does not study the past but rather transformations”.<sup>140</sup> Since 1920, the evolution of the ICRC’s operational practices and humanitarian diplomacy is striking. Over the years, it has developed the ability to translate strictly humanitarian concerns into a political language that States can understand and has managed to extend its mandate to the point of being sometimes accused of “mission creep by rejectionist states”. Max Weber<sup>141</sup> has described this dilemma well as two fundamentally differing and irreconcilably opposed maxims. An organization can either be oriented to an ethic of responsibility (*Verantwortungsethik*), meaning that it is accountable for the foreseeable consequences of its actions, or to an ethic of conviction (*Gesinnungsethik*), in which it is accountable only for applying existing policies.

Confronted by new forms of warfare or simply new man-made harmful phenomena, the ICRC has to decide between preserving the existing protection architecture or venturing into uncharted waters. Through its right of initiative, the ICRC’s identity is intrinsically linked to its ability to highlight the plight of victims above all other political or legal considerations when the circumstances require it, beyond positive law. In 1925, during an audience with the Spanish Ambassador Quinonès de León,<sup>142</sup> ICRC representative Raymond Schlemmer declared that humanitarian duty “was clearly contradicting the diplomatic duty”. In this author’s view, the ICRC is never so relevant as when it puts the humanitarian imperative before the norm.

140 Quoted in Sebastian Matthes, “L’IA pourrait engendrer un néocolonialisme, celui des données”, *PME Magazine*, 22 February 2022, available at: [www.pme.ch/strategie/2022/03/08/ia-pourrait-engendrer-un-neocolonialisme-celui-des-donnees](http://www.pme.ch/strategie/2022/03/08/ia-pourrait-engendrer-un-neocolonialisme-celui-des-donnees).

141 Max Weber, *Le savant et le politique*, Presses Électroniques de France, Paris, 2013.

142 Note from Delegate General Raymond Schlemmer following a meeting with the Spanish Ambassador Quinonès de León, ICRC Archives, B CR-138, 18 August 1925.

# Unveiling claims of discrimination based on nationality in the context of occupation under international humanitarian and human rights law

George Dvaladze\*

Regional Legal Adviser for South Asia, ICRC, New Delhi, India.

Email: [gdvaladze@icrc.org](mailto:gdvaladze@icrc.org)

## Abstract

*This article examines international humanitarian law (IHL) and human rights guarantees of equality and non-discrimination applicable to cases of belligerent occupation. Capitalizing on the responsibilities of the Occupying Power with respect to different categories of persons living in the occupied territory distinguished by their nationality, it looks at the contents of obligations stemming from relevant norms of the two regimes and their interplay. It also addresses questions of the adequacy, utility and limits of IHL and human rights in according protection from discrimination and inequality to the inhabitants of the occupied territory.*

**Keywords:** discrimination, occupation, IHL, Geneva Convention IV, human rights.

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## Introduction

International law unequivocally prohibits discrimination and other practices that contradict the principle of equality of persons “in dignity and rights”, such as racism, xenophobia or other forms of intolerance. This rule is firmly established in treaty and customary law, and it is a general principle of international law.<sup>1</sup> It is even claimed to be a *jus cogens* norm.<sup>2</sup> With its inclusion in the Charter of the United Nations (UN Charter)<sup>3</sup> and the Universal Declaration of Human Rights (UDHR),<sup>4</sup> and in view of the fact that discrimination is prohibited at the constitutional level in almost all States across the globe,<sup>5</sup> one can confidently speak of wide, if not universal, acceptance of the principle.

In spite of a clear prohibition, discrimination manifests itself in different forms and degrees in virtually all societies and cultures, and in various settings. Naturally, armed conflicts are no exception. As the International Committee of the Red Cross (ICRC) submits, discrimination on various grounds is among the most stressing issues of many contemporary armed conflicts, as often practices that directly contradict the norms of IHL either directly target or have a significantly more detrimental effect on certain segments of the population defined by characteristics such as gender, disability, religion, ethnicity or political opinion.<sup>6</sup> Discrimination based on nationality in the context of occupation – i.e., settings where a State exercises effective control over the territory of another State without the latter State’s consent<sup>7</sup> – is the subject of this article.

- 1 International Court of Justice (ICJ), *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 of 1970*, Advisory Opinion, 21 June 1971 (South West Africa Advisory Opinion), Separate Opinion of Vice-President Ammoun, p. 76.
- 2 Inter-American Court of Human Rights (IACtHR), *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion No. OC-18/03, 17 September 2003, paras 100–101, 173; IACtHR, *Yatama v. Nicaragua*, Series C, No. 127, 23 June 2005, para. 184. According to the ICJ, certain forms of discrimination, such as racial discrimination, give rise to obligations *erga omnes*: see ICJ, *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 5 February 1970, para. 34.
- 3 Charter of the United Nations, United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 1(3).
- 4 Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948 (UDHR), Art. 1.
- 5 Human Rights Committee, General Comment No. 18, “Non-Discrimination”, 10 November 1989, para. 9; Daniel Moekli, *Human Rights and Non-Discrimination in the “War on Terror”*, Oxford University Press, Oxford, 2008, p. 55.
- 6 See the ICRC Challenges Reports: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003, p. 7; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2007, p. 4; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015, p. 5. In the ICRC’s 2019 Challenges Report, an entire chapter is dedicated to the prohibition of adverse distinction based on disability: see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 41–43. See also ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of IHL*, Geneva, 2022, pp. 22–32.
- 7 Regulations Annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, Art. 42. Notably, a more functional approach that enables the applicability of certain rules of international law of occupation during the so-called “invasion phase” is also recognized: see Marten Zwanenburg, Michael Bothe and Marco Sassòli, “Is the Law of Occupation Applicable to the Invasion Phase?”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

Discrimination is prohibited in armed conflicts and occupation. In fact, virtually all international humanitarian law (IHL) instruments that predate the UN Charter and the UDHR expressly prohibited or at least alluded to the prohibition.<sup>8</sup> Today, the four Geneva Conventions of 1949 and their Additional Protocols of 1977 provide a number of rules expressly prohibiting adverse distinction – an IHL counterpart to the term “discrimination”, to be understood as synonymous with discrimination in human rights law – against persons affected by armed conflict and occupation, and requiring equality of treatment of certain categories of persons.<sup>9</sup> The ICRC Customary Law Study has also identified relevant practice and *opinio juris* that confirm the existence of a customary rule prohibiting discrimination in armed conflict.<sup>10</sup> Besides, nowadays it is widely accepted that international law, which governs a wide range of humanitarian issues that arise in armed conflict and occupation, is not limited to IHL. Most notably, various international bodies have confirmed that human rights law does not cease to apply in such situations<sup>11</sup> and binds States even when they are operating extraterritorially, especially in (but not limited to) instances where they attain the level of control over a territory that is sufficient to qualify them as an Occupying Power.<sup>12</sup> The prohibition against discrimination

- 8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Art. 6; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, Art. 1; Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 4.
- 9 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) (GC I), Art. 12; 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) (GC II), Art. 12; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 16; 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) (GC IV), Arts 13, 27; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Preamble, Arts 9, 10, 70, 75; Article 3 common to the four Geneva Conventions; Protocol Additional (II) 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 1978) (AP II), Arts 2, 4, 7.
- 10 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 88, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1>; Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, pp. 2024–2061, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v2>.
- 11 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (Nuclear Weapons Advisory Opinion), para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (Wall Advisory Opinion), paras 105–106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, para. 216; Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004, para. 11.
- 12 Among others, see ICJ, Wall Advisory Opinion, above note 11, paras 107–113; ICJ, *Armed Activities*, above note 11, para. 216; Human Rights Committee, above note 11, para. 10. For the case law of the European Court of Human Rights (ECtHR) on the matter, see ECtHR, *Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07 (Grand Chamber), 16 September 2014, paras 131–150; ECtHR, *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08 (Grand Chamber), 7 July 2011, para. 86; ECtHR,

and the obligation of equality of treatment of persons contained in virtually all human rights treaties<sup>13</sup> form part of the corpus of such rules.

With the strong stigma attached to it and in view of the universal acceptance of the principle of equality of persons, the notion of discrimination bears with it political and legal significance. Engaging with the Occupying Power to tackle discriminatory practices by insisting on discrimination as a violation in itself, as opposed to treating these as “ordinary violations” of other substantive rules of IHL, can have an added value. On the one hand, it enables tackling the systemic and collective pattern of violations of IHL practised against a given group of persons, and on the other, it “elevates” engagement on the humanitarian issues at stake, thereby increasing the chances of bringing about the end of such practices in humanitarian contexts. This has led to the increasing invocation of discrimination with respect to practices where particular segments of the population in an occupied territory have suffered hardship more than others. Admittedly, over-reliance on discrimination, even with good intentions, in instances where its constitutive elements are not met can risk diluting the notion and ultimately weakening the system of protection against discrimination. In fact,

*Chiragov and Others v. Armenia*, Appl. No. 13216/05 (Grand Chamber), 16 June 2015, para. 186; ECtHR, *Hassan v. the United Kingdom*, Appl. No. 29750/09 (Grand Chamber), 16 September 2014, para. 75; ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08 (Grand Chamber), Merits, 21 January 2021, paras 81–84. For detailed analysis, see Robert Kogod Goldman, “Extraterritorial Application of the Human Rights to Life and Personal Liberty, including Habeas Corpus, during Situations of Armed Conflict”, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013; Gloria Gaggioli and Jens David Ohlin, “Remoteness and Human Rights Law”, in Jens David Ohlin (ed.), *Research Handbook on Remote Warfare*, Edward Elgar, Cheltenham, 2017; Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, *European Journal of International Law*, Vol. 23, No. 1, 2012; Ralph Wilde, “Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties”, *Israel Law Review*, Vol. 40, No. 2, 2007.

- 13 UDHR, above note 4, Arts 2, 7; International Covenant on Civil and Political Rights, 171 UNTS 999, 16 December 1966 (ICCPR), Arts 2, 26; International Covenant on Economic, Social and Cultural Rights, 3 UNTS 993, 16 December 1966 (ICESCR), Art. 2. Universal human rights treaties devoted to the specific categories of persons also outlaw discrimination: International Convention on the Elimination of All Forms of Racial Discrimination, 195 UNTS 660, 21 December 1965 (CERD), Art. 2; Convention on the Elimination of All Forms of Discrimination against Women, 13 UNTS 1249, 18 December 1979 (CEDAW), Art. 2; Convention on the Rights of the Child, 3 UNTS 1577, 20 November 1989, Arts 2, 28; Convention on the Rights of Persons with Disabilities, 3 UNTS 2515, 24 January 2007 (CRPD), Art. 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 3 UNTS 2220, 18 December 1990, Arts 1, 7. All major regional human rights instruments include guarantees of equality and non-discrimination: African Charter on Human and Peoples’ Rights, Organization of African Unity, 27 June 1981 (Banjul Charter), Arts 2, 3, 18(3–4), 28; American Convention on Human Rights, Organization of American States, 22 November 1969 (Pact of San Jose), Arts 1, 24; American Declaration on the Rights and Duties of Man, Ninth International Conference of American States, 2 May 1948, Art. II; Arab Charter on Human Rights, League of Arab States, 15 September 1994, Arts 2, 9, 35; Cairo Declaration of Human Rights in Islam, Organization of the Islamic Conference, 5 August 1990, Art. 1; ASEAN Human Rights Declaration, Association of Southeast Asian Nations, 18 November 2012, Arts 1, 2, 3, 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS 5, 4 November 1950, Art. 14; Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, Council of Europe, ETS 177, 4 November 2000, Art. 1; European Social Charter (Revised), Council of Europe, ETS 163, 3 May 1996, Arts 15, 20, 27, E; Charter of Fundamental Rights of the European Union, European Union, 2012/C 326/02, 26 October 2012, Arts 20, 21, 23.

not so infrequently, claims about discrimination do generate a certain amount of pushback by the States concerned, among others.

Some instances of unfavourable treatment of persons based on an identifiable ground, such as ethnic cleansing practised by an Occupying Power through deportation of the inhabitants of an occupied territory of a given ethnicity and the destruction of their property, will rather uncontroversially be regarded as discrimination under international law. Cases where the alleged discrimination has to do with differentiations based on nationality, such as nationals of the occupied State and nationals of the Occupying Power, whereby the former are subjected to unfavourable treatment compared to the situation of the latter, are not as straightforward. As shall be discussed below, the IHL treaty regime – and the drafting history of those instruments – leaves room for arguing that such differentiations are not to be regarded as discrimination. A question then arises as to whether and to what extent such results under IHL influence the analysis of the same case under human rights law. The present article delves into this debate with the aim of providing an answer to the question of whether such instances are to be regarded as discrimination under international law. From the outset, the analysis is guided by the approach that the answer has to be practicable in a sense that IHL and human rights should not bring different results, whereby the same practice can be deemed as discrimination under human rights law and not IHL, or vice versa.

At first glance, analyzing the issue of discrimination based on nationality in the context of occupation may seem like a theoretical exercise due to the fact that the Occupying Power is not expected to be confronted with its own nationals in the occupied territory, at least not on a significant scale. Such an assumption presupposes that the Occupying Power has respected its other obligations under IHL and other international law, most notably the prohibition against transferring its own population to the occupied territory<sup>14</sup> and the prohibition against annexation.<sup>15</sup> Admittedly, this is not always the case, particularly in instances where the occupation is of a prolonged nature. Given that claims of discrimination based on nationality are more likely to be made in such contexts, this article will consider the factual and legal nuances relevant to those contexts.

In order to set the scene for the debate, this article starts by presenting the normative framework, first by looking at the notion of discrimination and its constitutive elements and then by analyzing the issue of applicability and contents of relevant IHL and human rights rules on non-discrimination, as well as their interplay. It then turns to the debate and provides several hypothetical scenarios to flesh out the matter at stake – namely whether discrimination exists, and what international law has to say about it, when an Occupying Power treats differently its own population and the enemy population present in the occupied

<sup>14</sup> GC IV, Art. 49.

<sup>15</sup> UN Charter, above note 3, Art. 2(4); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970.

territory. Finally, it proposes an answer to the question and provides some concluding remarks.

## Normative framework

### The notion of discrimination and its constitutive elements

Under international law, equality and non-discrimination are considered to be the positive and negative expressions of the same principle – “two sides of the same coin”.<sup>16</sup> However, there is a noticeable difference between the terminology used in IHL and human rights when it comes to the negative framing of the principle, and this divergence in terminology is even reflected in the codification of the relevant rules.<sup>17</sup> The term “adverse distinction” is – or rather, used to be – more commonly used in IHL, and “discrimination” in human rights law. With time, this divide is fading, and admittedly, the latter is dominating the political and legal language, even within the IHL domain.<sup>18</sup> For the purposes of this article, it is important to mention that this difference in terminology does not imply a difference in substance: both terms carry the same meaning and can be used interchangeably. This is also confirmed by the drafting history of the main IHL instruments: the term “discrimination” was actively used at the 1949 Diplomatic Conference, and no distinct meaning was attached to the term “adverse distinction” that was ultimately chosen to be used across the four Geneva Conventions.<sup>19</sup>

Importantly, although the term is mentioned in various provisions, the definition of discrimination is not provided either in IHL or in human rights instruments of general scope. Nevertheless, there is a widely accepted definition proposed by the United Nations (UN) Human Rights Committee:

[T]he term “discrimination” ... should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social

16 Daniel Moeckli, “Equality and Non-Discrimination”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2014, p. 156; Anne Bayefsky, “The Principle of Equality and Non-Discrimination in International Law”, *Human Rights Law Journal*, Vol. 11, No. 1–2, 2015, pp. 72–73; Dagmar Sheik, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, Oxford, 2007, p. 26.

17 See the relevant provisions of the main IHL instruments, as listed in above note 9: namely, GC I, Art. 12; GC II, Art. 12; GC III, Art. 16; GC IV, Art. 13, 27; AP I, Preamble, Arts 9, 10, 70, 75; common Article 3; AP II, Arts 2, 4, 7. Compare to some of the main human rights instruments, such as UDHR, above note 4, Arts 2, 7; ICCPR, above note 13, Arts 2, 26; ICESCR, above note 13, Art. 2.

18 Most notably, see ICRC Customary Law Study, above note 10, Rule 88, which frames the customary rule as “non-discrimination”.

19 *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. 2, Section A, 1949, pp. 821, 852. See also George Dvaladze, “Non-Discrimination under International Humanitarian and Human Rights Law”, in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2022.



origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>20</sup>

The definition covers both direct and indirect discrimination: broadly speaking, the former implies *treatment* that is unfavourable to the person or group of persons concerned, while the latter is concerned with the *effects* of treatment that may not in itself be unfavourable.<sup>21</sup>

Not all differentiation of persons amounts to discrimination, and sometimes the application of a different standard might be not only justified but even required by international law. In order to distinguish prohibited discrimination from other types of differentiation, four cumulative elements outlined in the definition provided above need to be met, namely: (1) the treatment or its effects must be unfavourable to the persons concerned; (2) such disadvantage must be measurable by comparing their situation to those of others in a substantively similar situation (comparator); (3) such treatment must be based on an identifiable characteristic, such as nationality, age, disability, gender, ethnicity, language or any other similar criteria (basis/ground of discrimination); and (4) there must be *no* reasonable and objective justification for such a differentiation, which is to say that (i) it does not serve a purpose that is deemed legitimate under international law, or (ii) it is not necessary and proportionate for attaining such an aim. Whether or not a potential justification was reasonable and objective will be determined on a case-by-case basis, and the standard of scrutiny will vary depending on considerations such as the severity of the treatment applied and the ground of adverse distinction.<sup>22</sup>

## International law rules on non-discrimination applicable in the occupied territory

In an armed conflict or context of occupation, the question of whether a given incident or practice meeting the elements set out above and thereby amounting

20 Human Rights Committee, above note 5, para. 7. The pronouncement of the Human Rights Committee builds upon the definition provided in the universal human rights instruments dealing with specific forms of discrimination, such as the CEDAW, above note 13; CERD, above note 13; and CRPD, above note 13. The same definition is adopted in UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, “Non-Discrimination in Economic, Social and Cultural Rights”, 2 July 2009, para. 7.

21 See Human Rights Committee, above note 5, para. 8; CESCR, above note 20, para. 10; Human Rights Committee, *Althammer v. Austria*, Communication No. 998/2001, 2003, para. 10.2. See also D. Moeckli, above note 16, p. 163; Daniel Moeckli, “Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination”, in Ana María Salinas De Frias, Katja L. H. Samuel and Nigel D. White (eds), *Counter Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 600.

22 For a more comprehensive analysis of the elements of discrimination see, among others, D. Moeckli, above note 16; A. Bayefsky, above note 16; Tufyal Choudhury, “Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights”, *European Human Rights Law Review*, Vol. 8, No. 1, 2003; William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary*, 3rd revised ed., N. P. Engel, Kehl am Rhein, 2019; Janneke Gerards, *Judicial Review in Equal Treatment Cases*, Martinus Nijhoff, Leiden, 2005.

to discrimination is to be governed by one or several rules of international law would depend on the scope and content of the rule at stake. In this respect, the temporal, geographical and material scope of the main rules of IHL and human rights law, as well as their interplay, needs to be considered. This article focuses mainly on the rules applicable to occupation.

### *Rules and principles in IHL instruments*

IHL rules governing occupation are included, among other instruments, in the Regulations attached to Hague Convention IV respecting the Laws and Customs of War on Land (1907 Hague Regulations), Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV), and Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I). All these instruments expressly affirm, or at least allude to, non-discrimination.

The 1907 Hague Regulations do not contain a specific provision on non-discrimination or equality of treatment of persons. Nevertheless, given that the principle of non-discrimination is firmly established as international custom and as a general principle of law,<sup>23</sup> it is safe to suggest that the rule is covered by the Martens Clause contained in the preamble to the Hague Regulations, which provides that

the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Two GC IV provisions of a general nature are particularly important for non-discrimination – namely, Articles 13 and 27.

Article 27 is contained in Part III (“Status and Treatment of Protected Persons”), Section I (“Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”), and therefore, the rule applies within the “closed category” of protected persons as defined in Article 4 of GC IV – excluding, among others, persons of the nationality of the Occupying Power. Article 27 provides that

[w]ithout prejudice to the provisions relating to their state of health, age and sex, all *protected persons* shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion [emphasis added].

The provision includes two important guarantees: treatment with the same consideration, and prohibition of adverse distinction. The two are interconnected

23 ICJ, *South West Africa Cases*, above note 1, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also *South West Africa Advisory Opinion*, above note 1, Separate Opinion of Vice-President Ammoun, p. 76.

but separate obligations; the former is broader, and arguably fully encompasses the latter.

*Treatment with the same consideration*, commonly understood as the obligation of equality of treatment (of protected persons), is comparable to the obligation of “alike” treatment of prisoners of war under Article 16 of Geneva Convention III relative to the Treatment of Prisoners of War (GC III). The drafting history of the Geneva Conventions confirms that both Article 16 of GC III and Article 27 of GC IV set substantively similar standards, and the difference in wording does not bear any significance.<sup>24</sup> As Pejic points out, these articles refer to “mandatory equality of treatment under IHL”, and they seek to ensure consistency of treatment of protected persons.<sup>25</sup> Therefore, any deviation from the standard of treatment required, whether preferential (that is, more favourable) or unfavourable (prejudicial), will contradict this rule, unless there is a justification that can be deemed reasonable and objective, including differentiations that are not based on an identifiable status and characteristic (and therefore do not qualify as discrimination due to the absence of such a ground, as discussed above).

The *prohibition against adverse distinction* covers various practices that may take different forms, such as direct and indirect discrimination, as explained above, as well as the remedial role of the Occupying Power to prevent and protect from discrimination.<sup>26</sup> The prohibition is autonomous in nature – i.e., it prohibits adverse distinction in any area, irrespective of whether the unfavourable treatment in question is expressly prohibited by other substantive rules of GC IV – as opposed to an accessory rule, which has no independent existence and simply requires that a rule expressly provided in a given treaty should be implemented without discrimination.<sup>27</sup>

Article 13 of GC IV is contained in Part II (“General Protection of Populations against Certain Consequences of War”) and is applicable to all members of the civilian population (and therefore not limited to protected persons as defined in Article 4). It provides that

[t]he provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Due to the broader personal scope of Article 13, Rona and McGuire suggest that the rule contained in this provision is a “general prohibition of discrimination without

24 Given the similarity of those provisions, recently updated Commentary to Article 16 of GC III provides important clarifications: see ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021.

25 Jelena Pejic, “Non-Discrimination and Armed Conflict”, *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 186.

26 ICJ, *Armed Activities*, above note 11, para. 209.

27 For the difference between accessory and autonomous rules on non-discrimination, see D. Moeckli, above note 16. See also G. Dvaladze, above note 19.

limitation” and that “all obligations regarding civilians function ‘without adverse distinction’”.<sup>28</sup> Nevertheless, it has to be pointed out that the prohibition is accessory in nature and only prohibits discrimination in areas covered by the provisions contained in Part II of GC IV. However, as far as distinctions in areas covered in Part II of GC IV are concerned, Article 13 prohibits unfavourable treatment of protected persons vis-à-vis any other person, including nationals of the Occupying Power and third-country nationals who are not protected persons.

Last but not least, Article 75 of AP I contains an accessory rule that also applies to all persons and prohibits discrimination in their enjoyment of fundamental guarantees while in the hands of a party to the conflict or the Occupying Power, by providing that

persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

### *Rules on equality and non-discrimination in human rights instruments*

Virtually all human rights treaties – whether universal or regional, general or specific in scope – set out at least one provision on non-discrimination.<sup>29</sup> The International Covenant on Civil and Political Rights (ICCPR) contains five interrelated rules on equality and non-discrimination.<sup>30</sup>

It is widely accepted that human rights instruments, including the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), continue to apply in cases of occupation, since the Occupying Power exercises a degree of control over the territory concerned that is sufficient to bring individuals present there within its jurisdiction.<sup>31</sup> While the provisions on non-discrimination are not listed among the non-derogable rights in Article 4 of the ICCPR, they are considered to be of such a nature. Article 4 requires that measures of derogation must not involve discrimination and must comply with other international obligations of the State concerned<sup>32</sup> – in a context of occupation, this includes IHL rules on equality of treatment and the prohibition

28 Gabor Rona and Robert J. McGuire, “The Principle of Non-Discrimination”, in Andrew Clapham, Paola Gaeta and Marco Sassöli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 199.

29 See above note 13.

30 Bertrand Ramcharan, “Equality and Non-Discrimination”, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, p. 250.

31 See above notes 11 and 12.

32 ICCPR, above note 13, Art. 4(1).

of adverse distinction. The UN Human Rights Committee has also confirmed the non-derogability of guarantees of non-discrimination under the ICCPR in its General Comment 29, in which it observed that

there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.<sup>33</sup>

The most important guarantees of non-discrimination are found in Articles 2 (accessory prohibition of discrimination) and 26 (equality before the law, equal protection of the law and general prohibition of discrimination by an autonomous rule) of the ICCPR.

### *General pronouncements on the interplay between IHL and human rights, and their relevance for the rules on non-discrimination*

There are different theories on the relationship between IHL and human rights, such as separation, convergence, confluence, complementarity and cross-fertilization.<sup>34</sup> According to the International Court of Justice (ICJ),

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 these branches of international law.<sup>35</sup>

With its approach in the Nuclear Weapons Advisory Opinion interpreting “arbitrary deprivation of life” under Article 6 of the ICCPR in light of applicable IHL rules on the conduct of hostilities,<sup>36</sup> the ICJ seems to support the complementarity of the two regimes, at least as far as inherently qualified rights are concerned – that is, non-absolute rights that require a degree of performance which is situation- and context-specific, and that can accommodate the exigencies of the situation and other pertinent factors. A similar stance has been taken by the Human Rights Committee with respect to the right to life and the right to liberty and security, by proposing that IHL rules and principles can provide guidance in determining whether deprivation of life or liberty is to

33 Human Rights Committee, General Comment No. 29, “Article 4: Derogations during a State of Emergency”, 31 August 2001, para. 8. See also D. Moeckli, “Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination”, above note 21, p. 603.

34 For a detailed analysis of those theories, see e.g. Kubo Mačák, “The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention”, *Israel Yearbook on Human Rights*, Vol. 52, 2002; Nancie Prud’homme, “Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?”, *Israel Law Review*, Vol. 40, No. 2, 2007.

35 Wall Advisory Opinion, above note 11, para. 106; ICJ, *Armed Activities*, above note 11, para. 216.

36 Nuclear Weapons Advisory Opinion, above note 11, para. 25.

be deemed “arbitrary”.<sup>37</sup> Some of the regional courts have followed the same path.<sup>38</sup>

International courts and tribunals have not clarified the exact interplay between IHL and human rights rules on non-discrimination, even if in some contexts they have insisted on the complementary nature of those provisions and have found violations in instances where the Occupying Power failed to fulfil its remedial role of tackling discrimination in the occupied territory.<sup>39</sup> Nevertheless, a few important observations can be made by drawing from the pronouncements made in respect of the right to life and right to liberty and security. Firstly, the notion of discrimination and the corresponding IHL and human rights rules are inherently qualified, and therefore, in domains where the two sets of rules overlap, there is room for harmonious interpretation whereby one set of rules can help interpret the other. Secondly, given that some of the most important rules on non-discrimination are accessory in nature, it would be difficult, if not impossible, to determine a single scheme through which IHL and human rights rules on non-discrimination interact. In other words, since such non-discrimination rules attach to other substantive rules that are significantly different (in that some are exclusively regulated by IHL, others are exclusively regulated under human rights law, and the rest are regulated by both), they reflect the nature of those rules with respect to the relationship. Consequently, the task of determining a single and general mode of interplay between IHL and human rights guarantees is difficult, and determination has to be made on a case-by-case basis, taking into consideration the practice area, ground of discrimination, and relevant rules of IHL and human rights on non-discrimination. In the following section, this article will focus on the interplay between relevant IHL and human rights rules that are pertinent to the question at stake.

## **Debate: Can the Occupying Power discriminate against persons living in the occupied territory on the basis of nationality?**

The subject of this article is the question of whether the Occupying Power discriminates based on nationality if it accords different standards of treatment to its own and enemy nationals who reside in the occupied territory, whereby the treatment accorded to the latter is unfavourable or less favourable in comparison to the situation of the former category of persons. A few examples of unfavourable treatment involving such a differentiation are deportation, destruction or confiscation of property or other impediment to the enjoyment of related property rights, failure to protect certain segments of the population from

37 Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, 16 December 2014, para. 66; Human Rights Committee, General Comment No. 36, “Article 6 on the Right to Life”, 3 September 2019, para. 64.

38 See, e.g., ECtHR, *Hassan*, above note 12, para. 107.

39 ICJ, *Armed Activities*, above note 11, para. 209.

private persons and other threats, failure to provide proper administration of the occupied territory and ensure civil life for all, and, as one of the most stressing issues in light of the recent COVID-19 pandemic, failure to manage the spread of disease and to distribute vaccines to the population.

The debate has to do with the non-discrimination rule contained in Article 27 of GC IV, which does not mention nationality among the other listed grounds of discrimination and thereby leaves room to argue that that law applicable to occupation is not concerned with discrimination on the ground of nationality. Importantly, even when discrimination is not established under the black letter of the law, the treatment that underlies alleged discrimination could still be detrimental to the persons affected and, if it falls within the scope of relevant rules, could amount to a violation of IHL. On the other hand, in such instances the treatment will not bring about the legal (and political) consequences attached to the notion of discrimination.

### Article 27 of Geneva Convention IV and its perceived limits in addressing discrimination based on nationality

Article 27 of GC IV is different from all the other provisions of the four Geneva Conventions dealing with non-discrimination – with the only other exception of common Article 3 – in not mentioning “nationality” among the listed grounds of discrimination. Importantly, Article 13 of GC IV *does* include it.

The absence of reference to “nationality” is not due to the drafters simply forgetting to include it. In fact, the ground was initially listed but was deliberately deleted during the negotiations at the 1949 Diplomatic Conference. The reason for the deletion was that the delegations found certain measures envisaged for “enemy aliens” by IHL to be precisely based on nationality.<sup>40</sup> For the same reason, the ICRC Commentary on GC IV suggests that nationality cannot be read under “any other similar criteria” under Article 27.<sup>41</sup>

The clarifications derived from the drafting history of the provision confirm that the *sole* intention of the rule on non-discrimination not mentioning “nationality” is to accommodate the prohibition with the status-based protection provided by the vast majority of rules contained in GC IV. The fear seems to

40 *Final Record*, above note 19, p. 641. See also 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), p. 200 fn. 333.

41 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, p. 206. In this respect the Commentary on Article 27 of GC IV takes a different stance than with respect to the same issue under common Article 3. According to the ICRC’s initial Commentary on GC I, despite the decision of the Diplomatic Conference to omit this criterion in certain provisions of the Geneva Conventions on the prohibition of adverse distinction, nationality should be still read as a subsumed protected ground under the category “any similar criteria”, at least as far as common Article 3 is concerned: see Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 56. This position was reaffirmed in the ICRC’s 2016 Commentary on GC I, above note 40, p. 200, para. 572.



have been that the inclusion of the term would give rise to claims of discrimination or otherwise create confusion that would dilute the protections of the Convention – and this is a relevant consideration. The non-discrimination clause under Article 27 of GC IV operates mainly within a closed category of persons, namely protected persons as defined in Article 4. As such, it does not seek to put an Occupying Power’s own nationals and protected persons on an equal footing. References to nationality in the provision would not in themselves “open up” the closed category of persons.

While the idea of maintaining the structure of GC IV and its status-based protection is sound, the execution is somewhat problematic in terms of legal drafting. Article 4 of GC IV is sufficient to tackle the issue, and the extra effort of the drafters seems to have created a legal problem. If Article 27 of GC IV were not concerned with *any* discrimination on the basis of “nationality”, it would mean that the Occupying Power is not prohibited under IHL from drawing unjustified distinctions between different categories of protected persons, namely between third-country nationals who are entitled to protected person status, stateless persons, and nationals of the occupied State. Such a reading of the law clearly contradicts the object and purpose of the provision. Instead, it is suggested that Article 27 must be understood – as a matter of principle – to prohibit discrimination based on nationality and should not automatically be dismissed on the premise explained above. This would allow a substantive analysis to be made on a case-by-case basis as to whether a differentiation between the inhabitants of the occupied territory who are protected persons based on nationality amounts to discrimination. The inherently qualified nature of the notion of discrimination would, in any event, accommodate the legitimate considerations mentioned above – namely, in the process of determining if for the differentiation at stake the enemy and third-State nationals or stateless residents of the occupied territory were in a substantively similar situation, and whether such differentiation had a reasonable and objective justification.

### The impact of Article 27 of Geneva Convention IV on other international law rules that are concerned with instances of unjust differentiations between own and enemy nationals

In light of its object and purpose of prohibiting discrimination and ensuring treatment with the same consideration of *protected persons*, Article 27 is a specific rule. Differentiations between own nationals and protected persons are not covered by the material scope of this rule, and therefore, it has no direct relevance in assessing claims about practices amounting to discrimination. Nevertheless, the Occupying Power might be inclined to invoke Article 27 of GC IV in order to automatically dismiss claims concerning discrimination based on nationality when it comes to differentiations between own and enemy nationals in the occupied territory. This section seeks to clarify the relationship between the rules affirmed in this provision and other relevant provisions of IHL and human rights instruments.

As far as IHL instruments are concerned, non-discrimination rules contained in Article 13 of GC IV and Article 75 of AP I – both of which mention nationality as a protected ground<sup>42</sup> – are broader in their respective personal and material scopes, and are not limited to distinctions within the “closed category” of protected persons. Admittedly, these are accessory rules, as explained above. Nevertheless, as far as discrimination based on nationality and involving difference in treatment of own and other nationals – including protected persons – is concerned, rules contained in these provisions will apply. And they do cover a wide range of areas, including fundamental guarantees of all persons. For example, Article 13, read in conjunction with Article 17 of GC IV, would prohibit drawing arbitrary differentiations between own and enemy nationals in the evacuation of persons from besieged or encircled areas. Similarly, Article 75 of AP I would require humane treatment and fundamental guarantees to be accorded to all persons irrespective of “national ... origin”, and would prohibit as discrimination all unfavourable treatment – including collective punishment – of persons compared to the treatment of persons with different nationality (including own, enemy or third-country nationals) that has no reasonable and objective justification.

As for the interplay between Article 27 of GC IV and human rights instruments, in particular the virtually all-encompassing autonomous prohibition against discrimination contained in Article 26 of the ICCPR, the relationship is not singular.

Discrimination among the closed category of protected persons in the occupied territory belongs to the category issues that fall within the personal and material scopes of *both* Article 27 of GC IV and Article 26 of the ICCPR, the former being the more specific rule and the latter being the more general one. In this respect, and following the approach of international courts and tribunals, the more special rule can help interpret and give content to the latter, and the inherently qualified nature of the notion of discrimination will allow this. However, as explained above, this issue is not at the heart of the question addressed by this article.

With regard to differentiations between own nationals and protected persons residing in the occupied territory, if Article 27 of GC IV is not applicable, it is not capable of influencing the analysis under the relevant provisions of the ICCPR, including its Article 26. While technically such matters are not *exclusively* governed by human rights law, at least as far as differentiations covered by the accessory rules contained in Article 13 of GC IV and Article 75 of AP I are concerned,<sup>43</sup> Article 27 of GC IV will not suffice to dismiss claims about the applicability and relevance of human rights provisions

42 Article 75 of AP I mentions “national origin”, which is not identical but a related notion: see 2016 Commentary on GC I, above note 40, p. 199 fn. 330; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 259.

43 In any event, save for their accessory nature as explained above, Article 13 of GC IV and Article 75 of AP I do not deal with discrimination in a substantively different manner to human rights instruments, including Article 26 of the ICCPR.

that have no corresponding limitation regarding the personal and material scope of the rule.

### **Why insist on discrimination based on nationality, and how to draw the line between these and other differentiations that are permitted?**

Without pronouncing on the legality of the situation under *jus ad bellum*, IHL regulates the behaviour of the Occupying Power in the occupied territory under the premise that the factual and legal situation of the occupation is temporary. It further provides additional legal safeguards that seek to maintain the *status quo* which existed prior to the commencement of the occupation. Among other things, it recognizes as void, for the purposes of the protections that IHL provides for the inhabitants of the occupied territory, any *de facto* or *de jure* annexation of the territory, and it prohibits demographic changes in the occupied territory.<sup>44</sup> While it is expected that the Occupying Power will be confronted with its own nationals in the occupied territory, IHL does not presuppose that the concentration of nationals of the Occupying Power will be so significant as to give rise to humanitarian concerns in respect of differentiations between own and enemy nationals. Such differentiations will become challenging from the humanitarian and legal standpoint precisely where the Occupying Power has failed to comply with the above-mentioned obligations.

The interrelatedness of discrimination and the Occupying Power's lack of respect for the prohibition against annexation and demographic changes in the occupied territory is significant in that it can have a spiralling effect, ultimately undermining the protection of the inhabitants of the occupied territory. Firstly, the scarcity of resources in the occupied territory – be it in housing, property, employment, health care, or other services or goods – would mean that whatever is given to own nationals would be taken away or diverted from protected persons. Secondly, the discontent tied to such distribution of resources or changing of the demographic of the occupied territory in disregard of international law by the Occupying Power is likely to aggravate the security situation on the ground, giving the factual and legal prerogative to the Occupying Power to use more restrictive measures. It would be difficult to ignore the fact that the use of such prerogatives to the detriment of protected persons ultimately serves the purpose of maintaining the continued breach of the IHL violation of allowing own nationals to reside in the occupied territory.

Lack of resources and the security and safety of others are commonly deemed to be legitimate aims that can render differentiations non-adverse, provided that they are proportionate. In such situations, however, a systematic

<sup>44</sup> GC IV, Arts 47 and 49 respectively.

reading of international law would require that the Occupying Power not be allowed to rely on factors that emanate from or are closely connected to its continued breach of international obligations – namely, to alter the *status quo* or to make permanent demographic changes in the occupied territory. It is suggested that in such instances, not only must nationality *not* be dismissed as a ground of discrimination under IHL and human rights, but it must instead be seen as a suspect classification that necessitates an even higher, if not the highest, standard of scrutiny for determining whether the differentiation between persons has reasonable and objective justification. This would mean that justifications proposed by the Occupying Power to rebut claims about discrimination must be particularly strong and convincing.

## Conclusion

This article has addressed claims about discrimination based on nationality in the Occupying Power's treatment of persons in the occupied territory. It has provided an overview of the applicable international law framework by focusing on IHL and human rights guarantees of non-discrimination and their interplay. Having analyzed the specificity of relevant provisions of key instruments and their interplay, the article has concluded that the merit of such claims cannot be dismissed on the premise that certain rules of IHL do not govern distinctions drawn between own and enemy nationals in the occupied territory. Instead, the determination has to be made on a case-by-case basis, and the reasonable and objective nature of justifications, or lack thereof, must be assessed in light of legal and factual realities pertaining on the ground. At the same time, the determination of whether the differentiation at stake serves a legitimate purpose must take into account, among other aspects, the compatibility of such an aim with general international law. Differentiations between own and enemy nationals, where protected persons are treated unfavourably in connection with the Occupying Power's effort to maintain or facilitate a continued breach of an IHL obligation involving demographic changes in the occupied territory, cannot be deemed legitimate; if coupled with other elements, such practices will amount to discrimination.

Arguments based on a narrow reading of Article 27 of GC IV, which seek to transpose the logic of the provision to more general rules on non-discrimination applicable to occupation, are not grounded in law – and besides, such arguments are not sustainable. Even if the claims regarding discrimination based on nationality were to be readily dismissed, since in such contexts other characteristics, such as ethnicity, religion, culture or political opinion, often appear as the dividing factor between the populations at stake, comparable claims can easily be formulated on those grounds in order to engage the responsibility of the Occupying Power for the same practices, and the analysis would, in any event, need to be made on a case-by-case basis.

Lastly, this article has mainly dealt with the interplay between IHL and human rights guarantees under the relevant instruments, since the discussion on the interplay primarily arises in respect of treaty regimes. Nevertheless, it is suggested that the conclusions drawn from this analysis should be deemed to be fully aligned with the relevant customary rule and general principle of non-discrimination, since these do not establish two distinct (IHL and human rights) standards of performance for the same act occurring in a given context or situation,<sup>45</sup> *in casu* in the treatment of persons in the context of occupation.

45 Marco Sassòli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, Oxford University Press, Oxford, 2011, p. 72.

# Will the centre hold? Countering the erosion of the principle of distinction on the digital battlefield

**Kubo Mačák\***

Legal Adviser, International Committee of the Red Cross,  
Geneva

Email: [kmacak@icrc.org](mailto:kmacak@icrc.org)

## Abstract

*This article argues that the growing involvement of civilians in activities on the digital battlefield during armed conflicts puts individuals at risk of harm and contributes to the erosion of the principle of distinction, a cornerstone of international humanitarian law (IHL). The article begins by outlining the ongoing trend of civilianization of the digital battlefield and puts forward brief scenarios to illustrate it. It then examines the narrow circumstances under which such forms of civilian involvement may qualify as direct participation in hostilities under IHL, and discusses what this means for the individuals concerned, particularly from the*

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*perspective of their loss of protection under the law. The analysis shows that certain types of State conduct which put civilians in harm's way by inducing them to directly participate in hostilities may constitute standalone violations of IHL and human rights law obligations. Beyond these specific prescriptions, the encouragement of civilian involvement undermines the principle of distinction, with dangerous ripple effects on the interpretation of those rules of IHL that flow from it. Accordingly, the article concludes that States should act to reverse the trend of civilianization of the digital battlefield and refrain as much as possible from involving civilians in the conduct of cyber hostilities.*

**Keywords:** armed conflict, civilians, cyber operations, direct participation in hostilities, international humanitarian law.

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## Introduction

The principle of distinction is right at the centre of international humanitarian law (IHL). Woven deep into the fabric of this body of law, it is the material from which many of its rules are made. By prescribing that parties to armed conflicts must at all times distinguish between civilians and combatants and between civilian objects and military objectives, it draws a firm line of protection around those persons and objects that must be spared, as much as possible, from the effects of hostilities.

With the ongoing digitalization of warfare, however, the principle of distinction has come under renewed pressure. It has never been easier to involve civilians in military cyber and digital activities – and it has never been easier to harm them through these means. Most alarmingly, some behaviours of parties to armed conflicts may bring about both of these consequences at the same time. Can the law keep pace with these developments? And can the centre of IHL withstand the pressure that they bring?

This article argues that States and parties to armed conflicts more generally should refrain from involving civilians in the conduct of cyber hostilities, for important reasons of law and policy. Its principal contention is that it is not too late to reverse the damaging trend of the erosion of the principle of distinction in the cyber context, but it is essential that we recognize what is at stake and take action now. In order to build this argument, the article proceeds in five consecutive steps.

First, the article outlines the ongoing trend of civilianization of the digital battlefield and puts forward three brief scenarios to illustrate it. Second, the article examines the narrow circumstances under which such forms of civilian involvement may qualify as direct participation in hostilities under IHL. Third, it explores what this means for the individuals concerned, particularly from the perspective of their loss of protection under the law. Fourth, it analyzes the legal implications for States that engage in such conduct, under both IHL and human rights law. Finally, the article ends with an overall conclusion and recommendations for States.



## Civilianization of the digital battlefield

### From general trends to qualitative and quantitative shifts in the digital space

One of the fundamental premises of IHL is the separation of all persons affected by an armed conflict into two generic categories: on the one hand, there are the combatants, who conduct the hostilities on behalf of the parties to the conflict, and on the other hand, there are the civilians, who are presumed to refrain from doing so and who must therefore be protected against the dangers arising from the conflict.<sup>1</sup>

The line between these two categories has never been fully impermeable, and civilians have been used to perform military functions during armed conflicts and to assist in the war effort since time immemorial.<sup>2</sup> Yet, for most of human history this involvement has typically been fairly minimal or limited to indirect forms of support such as “the production or provision of arms, equipment, food and shelter, [or] economic, administrative and political support”.<sup>3</sup>

This is no longer the case today. Private contractors, civilian intelligence personnel and other civilian government employees are increasingly involved in military operations. The urbanization of warfare has brought conflict literally onto individual civilians’ doorsteps, with many of them taking on active roles in the fighting. In asymmetrical conflicts in particular, the nominally weaker side will often engage and rely on civilians to confuse and outmanoeuvre the asymmetrically stronger enemy.<sup>4</sup>

In addition, the ongoing process of digitalization has enabled certain novel qualitative and quantitative shifts. From the qualitative perspective, digital forms of involvement have a much lower threshold – with some degree of exaggeration, it can be said that anyone with a smartphone is capable of joining in. Digitalization has also erased, or transformed, the concept of remoteness: while individuals may be physically remote from the theatre of hostilities, they are only a few clicks away from the digital battlefield.

1 This article focuses on situations of international armed conflict and the law applicable to that type of armed conflict. While the concept of “combatants” is limited to international armed conflicts, the principle of distinction is applicable to all types of armed conflict. Much of the analysis in this article can thus be applied *mutatis mutandis* to situations qualifying as non-international armed conflict as well, but exploring the specific nuances of that context falls outside of its scope.

2 See David R. Meddings, “Civilians and War: A Review and Historical Overview of the Involvement of Non-Combatant Populations in Conflict Situations”, *Medicine, Conflict and Survival*, Vol. 17, No. 1, 2001.

3 International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2007, p. 15. One historical exception is the *levée en masse* – i.e., the spontaneous uprising of the civilian population against the invading forces of the enemy. As documented in a recent study, this concept originated during the revolutionary wars in America and France, but there have been virtually no instances of *levée en masse* in modern armed conflicts: see Emily Crawford, “Tracing the Historical and Legal Development of the *Levée en Masse* in the Law of Armed Conflict”, *Journal of the History of International Law*, Vol. 19, No. 3, 2017.

4 Andreas Wenger and Simon J. A. Mason, “The Civilianization of Armed Conflict: Trends and Implications”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 848.

On the quantitative side, the characteristics of the digital space have made it much easier to scale up any civilian involvement. A group comprising thousands or even tens of thousands of individuals may be formed and coordinated in a matter of hours. Similarly, the attack surface of societies has vastly increased – there are digital devices, apps and networks everywhere, which means that in time of armed conflict, there are exponentially more vulnerabilities than in the wars of the past.

### Three illustrative scenarios

Several examples – all drawing on incidents and activities reported during recent armed conflicts – may help illustrate these trends. First, States may encourage civilians to engage in offensive cyber operations against targets associated with the enemy (scenario 1). These kinds of involvement may range from the simplest forms, such as joining a distributed denial-of-service (DDoS) attack, to more complex ones, such as contributing to cyber operations aimed at disrupting enemy assets or infrastructure. Individual civilians can be easily mobilized and coordinated through digital means, and existing groups of “hacktivists” can be federated by States.<sup>5</sup> The outsourcing of military cyber operations to civilians may offer certain advantages such as lower costs and operational efficiency, but these must be weighed against the risks posed by the lack of training and discipline at the level expected from military personnel.

Second, States may repurpose existing e-government or other smartphone applications for military use (scenario 2). During an armed conflict, such applications can be “enhanced” by building in new functionalities to encourage users to contribute to the military effort by, for example, reporting the movements of enemy troops, vehicles or aircraft by uploading location-tagged images or videos.<sup>6</sup> Given that the apps are well understood by the population, their use does not require a training period; the new capabilities can be used immediately. For the State in question, an existing community of digital citizens familiar with a given app may present an opportunity to rapidly increase its capabilities in time of war. At the same time, the reliability, accuracy and ultimately operational value of information gathered in this way must be carefully assessed by the receiving State. As will be detailed later, another key disadvantage relates to the risk that the provision of the information poses to the civilians using the app.

5 See e.g. Helmi Noman, “The Emergence of Open and Organized Pro-Government Cyber Attacks in the Middle East: The Case of the Syrian Electronic Army”, OpenNet Initiative, May 2011, available at: <https://opennet.net/emergence-open-and-organized-pro-government-cyber-attacks-middle-east-case-syrian-electronic-army> (all internet references were accessed in April 2023); Stefan Soesanto, *The IT Army of Ukraine: Structure, Tasking, and Ecosystem*, Center for Security Studies, ETH Zürich, June 2022.

6 See e.g. Drew Harwell, “Instead of Consumer Software, Ukraine’s Tech Workers Build Apps of War”, *Washington Post*, 24 March 2022, available at: [www.washingtonpost.com/technology/2022/03/24/ukraine-war-apps-russian-invasion/](https://www.washingtonpost.com/technology/2022/03/24/ukraine-war-apps-russian-invasion/); Dan Sabbagh, “Ukrainians Use Phone App to Spot Deadly Russian Drone Attacks”, *The Observer*, 29 October 2022, available at: [www.theguardian.com/world/2022/oct/29/ukraine-phone-app-russia-drone-attacks-eppo](https://www.theguardian.com/world/2022/oct/29/ukraine-phone-app-russia-drone-attacks-eppo).

Third, either voluntarily or out of a domestic legal obligation, private companies – i.e., civilian entities – that control cyber infrastructure may defend against deliberate cyber attacks originating from abroad or share threat intelligence with government authorities such as national cyber defence entities (scenario 3). A key advantage of such activities for States is that they strengthen the national cyber resilience while offloading the costs for doing so to non-State actors. Even if the frameworks for such involvement are developed with peacetime contexts in mind, the cyber defence actions taken on their basis during armed conflicts may well in effect thwart or at least impede the enemy's military cyber operations. These forms of involvement may, however, invite retaliation by the enemy, which can not only directly endanger the staff and property of the concerned companies but may also negatively affect civilians and civilian services reliant on those companies.<sup>7</sup>

These three examples highlight different forms of civilian involvement as well as their key potential advantages and disadvantages from the military and policy perspectives. Some of them may be taken on the civilian actors' own initiative, while others may be encouraged by States or even mandated by the law. What all of them share, though, is that they draw civilians into a space that is normally occupied by the military, thus potentially blurring the line between civilians and combatants in cyberspace.<sup>8</sup>

This problem is not unknown to States, which have acknowledged its various facets in their official pronouncements. For instance, during recent multilateral discussions at the United Nations (UN), Russia has suggested that it is “very difficult (if not impossible) to draw a distinction in virtual space between ... combatants and non-combatants”.<sup>9</sup> Similarly, Japan has called for further discussions on how IHL rules on “the scope of combatants apply to cyberspace”.<sup>10</sup> And in its 2021 national position on the application of international law in cyberspace, Brazil described the question of “when a civilian acting in the cyberspace might be considered as taking direct part in hostilities” as one of the key unsettled issues in IHL.<sup>11</sup> This is the question to which we will turn in the next section.

7 See, further, Jonathan Horowitz, “One Click from Conflict: Some Legal Considerations Related to Technology Companies Providing Digital Services in Situations of Armed Conflict”, forthcoming.

8 For a legal perspective on the supposedly blurred line between combatants and non-combatants in cyberspace, see Kubo Mačák, “Unblurring the Lines: Military Cyber Operations and International Law”, *Journal of Cyber Policy*, Vol. 6, No. 3, 2021, pp. 419–421, available at: [www.tandfonline.com/doi/full/10.1080/23738871.2021.2014919](https://www.tandfonline.com/doi/full/10.1080/23738871.2021.2014919).

9 Russia, “Statement by Dr. Vladimir Shin, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation, at the Online Consultations of the Open-Ended Working Group on the Developments in the Field of Information and Telecommunications in the Context of International Security”, 30 September 2020, p. 2.

10 Japan, “Basic Position of the Government of Japan on International Law Applicable to Cyber Operations”, 28 May 2021, p. 7.

11 Brazil, “National Contribution on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States”, in *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of*

## Cyber activities and direct participation in hostilities

### General rule

Under IHL, civilians are protected against attack unless and for such time as they directly participate in hostilities. This rule is articulated in Article 51(3) of Additional Protocol I (AP I) and Article 13(3) of Additional Protocol II (AP II). It reflects customary international law applicable in both international and non-international armed conflicts.<sup>12</sup>

Importantly, not every form of civilian involvement in the war effort qualifies as direct participation in hostilities.<sup>13</sup> The cited treaty provisions do not contain more precise criteria and so far, no clear and uniform definition of direct participation in hostilities has been developed in State practice either.<sup>14</sup> However, the International Committee of the Red Cross (ICRC) has published an *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance), according to which an act amounts to direct participation in hostilities if it meets the following three cumulative conditions:

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>15</sup>

The ICRC's criteria have been described in international jurisprudence as "useful guidance".<sup>16</sup> While not all States are fully aligned with the tripartite test,<sup>17</sup>

*International Security Established Pursuant to General Assembly Resolution 73/266*, UN Doc. A/76/136, 13 July 2021, p. 23.

12 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 6, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. See also Supreme Court of Israel, *The Public Committee against Torture in Israel and Others v. Government of Israel and Others*, HCJ 769/02, Judgment, 14 December 2006, para. 38.

13 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), p. 619, para. 1945.

14 ICRC Customary Law Study, above note 12, p. 23.

15 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), p. 46.

16 International Criminal Court (ICC), *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, para. 148.

17 Some are nonetheless very similar in their approaches: see e.g. Norway, *Manual i krigens folkerett*, 2013 (Norwegian Military Manual), paras 3.24–3.27 (relying on the criteria of (1) "damage or injury", (2)

several have expressly endorsed it, either in general terms or specifically in the cyber context, including Colombia (in general),<sup>18</sup> Denmark (in general),<sup>19</sup> France (specifically)<sup>20</sup> and Germany (specifically).<sup>21</sup> In the cyber context, it has also been endorsed by the international group of experts who drafted the *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (Tallinn Manual 2.0).<sup>22</sup>

In the next subsection, we will return to the three scenarios mentioned earlier and assess them against the “analytical tools”<sup>23</sup> set out in the ICRC Interpretive Guidance. In practice, each activity must be carefully evaluated on a case-by-case basis against these criteria before a determination is made.<sup>24</sup> As will be seen, the cumulative criteria set the bar very high, and specific forms of civilian involvement clear it only in exceptional circumstances.

## Application of the general rule to the three scenarios

### *Threshold of harm*

In order for an act to meet the first criterion, it must be likely to adversely affect the military operations or capacity of the adversary, irrespective of the means used or of

“direct cause” and (3) “intent”). Military manuals of other States, several of which were drafted before the ICRC Interpretive Guidance, either do not examine the meaning of direct participation in hostilities or employ differently formulated legal tests: see e.g. Australia, *Law of Armed Conflict*, Australian Defence Force, Canberra, 2006, p. 5-10, para. 5.36; Canada, *The Law of Armed Conflict at the Operational and Tactical Levels: Joint Doctrine Manual*, Department of National Defence, Ottawa, 2001, p. 3-4, para. 28; New Zealand, *Manual of Armed Forces Law*, Vol. 4, New Zealand Defence Force, Wellington, 2019 (New Zealand Military Manual), pp. 6-15–6-17, paras 6.5.13–6.5.17; Spain, *Orientaciones: El derecho de los conflictos armados [Guidelines on the Law of Armed Conflict]*, 2nd ed., Ministerio de Defensa, 2007, para. 5.2.a.(2)(a); Switzerland, *Bases légales du comportement à l'engagement [Regulation on Legal Bases for Conduct during an Engagement]*, Swiss Army, 2005 (Swiss Military Manual), para. 197; United Kingdom, *The Manual of the Law of Armed Conflict*, Joint Service Publication 383, Ministry of Defence, 1 July 2004 (UK Military Manual), para. 5.3.3; United States, *Department of Defense Law of War Manual*, Office of General Counsel, Department of Defense (DoD), Washington, DC, June 2015 (updated December 2016) (DoD Military Manual), section 5.8.

18 Colombia, *Manual de derecho operacional [Operational Law Manual]*, 2nd ed., Ministerio de Defensa Nacional, Comando General de las Fuerzas Militares, Santafé de Bogotá, 2015, p. 41.

19 Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, Danish Ministry of Defence, Defence Command Denmark, 2016 (Danish Military Manual), pp. 168–169.

20 France, *International Law Applied to Operations in Cyberspace*, Ministry of the Armies, 2019 (French Position Paper), p. 13.

21 Germany, *On the Application of International Law in Cyberspace: Position Paper*, March 2021 (German Position Paper), p. 8.

22 Michael N. Schmitt and Liis Vihul (eds), *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), Rule 97, commentary para. 5.

23 Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, *International and Comparative Law Quarterly*, Vol. 59, 2010, p. 192.

24 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement (Appeals Chamber), 17 July 2008, para. 178; ICC, *The Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 83.

whether it would reach the level of an attack on its own.<sup>25</sup> It does not necessarily have to qualify as an “attack” under IHL (the exact threshold of which is unsettled in the cyber context<sup>26</sup>) or involve the use of “weapons”.<sup>27</sup> Accordingly, it is widely accepted that, for example, clearing mines placed by the enemy or wiretapping the enemy’s communications could suffice depending on the situation, even though such activities do not amount to attacks in the IHL sense of the word.<sup>28</sup>

Offensive cyber operations against targets associated with the enemy, as envisaged in scenario 1, do not meet this criterion unless they may “negatively affect the enemy militarily”.<sup>29</sup> In practice, this means that such operations would, if successful, reduce the military capacity of the enemy or at least interfere with the enemy’s military operations. For example, a cyber operation against the computer network of a railway company in time of armed conflict could be designed to block the deployment of trains carrying military equipment belonging to the enemy, thus adversely affecting the enemy’s operations.<sup>30</sup> However, not any manipulation of computer networks would suffice; adverse military effects must be at least likely at the time the operation is planned.<sup>31</sup>

Many forms of information about the enemy’s movements provided to the military through a smartphone application – covered in scenario 2 – would be too general or insignificant to meet the “threshold of harm” criterion. In the traditional physical-world context, there is a “general agreement that civilians merely answering questions asked by passing military personnel could not be considered as directly participating in hostilities”.<sup>32</sup> The same logic applies with regard to digital intelligence sharing. It is only if the information is essential for the execution of a specific military operation, such as transmitting tactical targeting information for an attack, that its provision may be considered

25 Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 5 (“actions that do not qualify as a cyber attack will satisfy this criterion so long as they negatively affect the enemy militarily”); but see United Kingdom, “Application of International Law To States’ Conduct In Cyberspace: UK Statement”, Foreign, Commonwealth and Development Office, 3 June 2021, para. 25, which seems to place the bar higher (i.e., at the level of attack).

26 For a recent overview of the debate, see e.g. Kubo Mačák and Laurent Gisel, “Grammar: Rules in a Cyber Conflict”, in Patrik Pawlak and François Delerue (eds), *A Language of Power? Cyber Defence in the European Union*, Chaillot Paper, EUISS, Paris, 2022, pp. 65–67. For an up-to-date overview of State positions on the matter, see “Attack (International Humanitarian Law)”, *Cyber Law Toolkit*, 30 March 2023, available at: [https://cyberlaw.ccdcoe.org/wiki/Attack\\_\(international\\_humanitarian\\_law\)](https://cyberlaw.ccdcoe.org/wiki/Attack_(international_humanitarian_law)).

27 ICRC Commentary on the APs, above note 13, pp. 618–619; see also Supreme Court of Israel, *Public Committee against Torture*, above note 12, para. 33.

28 ICRC Interpretive Guidance, above note 15, p. 48; see also Nils Melzer, *Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities*, ICRC, Geneva, 23–25 October 2005 (2005 DPH Report), pp. 29 (wiretapping), 31 (clearing mines).

29 Tallinn Manual 2.0, above note 22, Rule 97, para. 5.

30 See e.g. Ryan Gallagher, “‘Cyber Partisans’ Say They Hacked Belarus Rail to Disrupt Russian Troops”, *Bloomberg*, 24 January 2022, available at: [www.bloomberg.com/news/articles/2022-01-24/hackers-say-they-breached-belarusian-rail-to-stop-russian-troops](http://www.bloomberg.com/news/articles/2022-01-24/hackers-say-they-breached-belarusian-rail-to-stop-russian-troops).

31 ICRC Interpretive Guidance, above note 15, p. 50.

32 Nils Melzer, *Summary Report of the Second Expert Meeting on the Notion of Direct Participation in Hostilities*, ICRC, Geneva, 25–26 October 2004 (2004 DPH Report), p. 5.

sufficient to meet the “threshold of harm” criterion.<sup>33</sup> This question is closely related to the issue of direct causation, which will be analyzed in the next section.

Finally, with respect to scenario 3, the majority of activities taken by private companies will fall well below the threshold of harm. This includes activities with some relevance to national cyber defence or to the prosecution of the war effort, such as the development of generic cyber capabilities designed for military use, training military cyber personnel, hardening existing cyber defences, or strengthening societal cyber resilience in anticipation of enemy military operations. All of these are types of “conduct that merely builds up or maintains the capacity of a party to harm its adversary”.<sup>34</sup> As such, they are excluded from the notion of direct participation in hostilities.<sup>35</sup> Conversely, some forms of action taken by private companies to defend the domestic cyber infrastructure against the enemy’s military cyber operations may impede or thwart such operations, and thus potentially cross the required threshold of harm.<sup>36</sup> This would be the case if the company conducted a “hack-back” against the source of the enemy operation – but not if it was merely restoring its system after that operation had ended.

### *Direct causation*

The second criterion, that of direct causation, has been described as “really the key principle in this area”,<sup>37</sup> and this is arguably also the case for our present purposes. The existence of a direct causal link may be established more easily in some of the examples discussed here than in others, however. The ICRC Interpretive Guidance explains that according to the criterion, the harm must be brought about in “one causal step”.<sup>38</sup> Launching an offensive cyber operation (scenario 1) or a hack-

33 ICRC Interpretive Guidance, above note 15, p. 48 fn. 103.

34 *Ibid.*, p. 53.

35 But see Tallinn Manual 2.0, above note 22, Rule 97, para. 5, describing a minority position according to which “maintaining passive cyber defences of military cyber assets” also qualifies as direct participation in hostilities, because by enhancing one State’s own military capacity, it necessarily weakens an adversary’s relative position. In the view of the present author, this is an overbroad reading which is inconsistent with generally accepted interpretations of IHL in this context: for instance, it is generally accepted that civilians working in munitions factories in rear areas are not directly participating in hostilities even though this activity does enhance the military capacity of their State. See e.g. Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 344; ICRC Interpretive Guidance, above note 15, p. 53 fn. 123; DoD Military Manual, above note 17, para. 5.8.2.2 fn. 255.

36 See also Jonathan Horowitz, “Private Companies in Cyber Operations during Armed Conflict”, *Articles of War*, 13 January 2022, available at: <https://lieber.westpoint.edu/private-companies-cyber-operations-armed-conflict/>.

37 D. Akande, above note 23, p. 187.

38 ICRC Interpretive Guidance, above note 15, p. 53; but see e.g. Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010, p. 30 (“[t]he reference to ‘one causal step’ is unfortunate”); David Wallace, Shane Reeves and Trent Powell, “Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines”, *Harvard National Security Journal*, Vol. 12, 2021, p. 194 (arguing that “the ‘case-by-case’ or ‘contextual’ approach taken by the United States and others is arguably more



back (scenario 3) against the enemy is less difficult to classify in this regard: the requisite harm may be reasonably expected to result directly from the act in question.<sup>39</sup> This is irrespective of the geographic or temporal distance between the civilian's action and the relevant harm: what matters is causal proximity, not geographic or temporal proximity.<sup>40</sup>

By contrast, providing intelligence on enemy movements through a smartphone app (scenario 2) is less causally proximate. Whether this provision of information by individual civilians results in the requisite harm depends on the action of the receiving party to the conflict, and for the criterion to be fulfilled, the provision of information must be an integral part of a coordinated operation directly causing the harm.<sup>41</sup> A lot turns on the specific circumstances of each case. As noted earlier, in the kinetic context, there is "general agreement that civilians merely answering questions asked by passing military personnel could not be considered as directly participating in hostilities".<sup>42</sup> Similarly, answering a general question through an app, even if the answer could be of military value to a belligerent, would normally be too remote to qualify as directly causing the requisite harm.<sup>43</sup> As long as the military information being gathered and shared by civilians is of a general nature, the act of gathering and sharing the information does not constitute direct participation in hostilities.<sup>44</sup>

The reverse would only be the case in the exceptional circumstances in which the information in question was provided "with a view to the execution of a specific hostile act".<sup>45</sup> This is a long-standing interpretation, as evidenced by the 1923 Hague Rules of Air Warfare, according to which "[t]he term 'hostilities' includes the transmission ... of military information for the immediate use of a belligerent".<sup>46</sup> An example in our present context would be the provision of exact targeting coordinates for a specific military objective, as an integral part of a concrete and coordinated tactical operation by the belligerent in question to

operationally palatable as it provides the necessary flexibility for determining whether a particular cyber operation would amount to a direct participation in hostilities").

39 See Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 6, describing "conducting DDoS operations against enemy military external systems" as an "unambiguous example" of direct participation in hostilities.

40 ICRC Interpretive Guidance, above note 15, p. 55. See also 2005 DPH Report, above note 28, p. 35; D. Wallace, S. Reeves and T. Powell, above note 38, p. 180.

41 ICRC Interpretive Guidance, above note 15, pp. 54–55.

42 2004 DPH Report, above note 32, p. 5.

43 But see Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 5, describing "gathering information on enemy operations by cyber means and passing it to one's own State's armed forces" as an "unambiguous example" of direct participation in hostilities. For reasons described in the main text, it is submitted that this is an overbroad interpretation of the relevant law.

44 Shane Darcy, *To Serve the Enemy: Informers, Collaborators, and the Laws of Armed Conflict*, Oxford University Press, Oxford, 2019, p. 113.

45 ICRC Interpretive Guidance, above note 15, p. 66.

46 Hague Rules of Air Warfare, 1923, Article 16, emphasis added. More recently, this interpretation has been embraced by the ICTY and the ICC: ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement (Appeals Chamber), 17 July 2008, para. 177; ICC, *The Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 81.

attack that target.<sup>47</sup> The requirement that the intelligence must be gathered and transmitted *for the purposes of a specific attack* is also echoed in the positions of the few States that have expressed their views on these matters in the digital context.<sup>48</sup>

This difference may be subtle, but it is critically important. There is a wide range of situations in which reporting the position of the enemy to the authorities is a normal (i.e., non-hostile) civilian conduct that should not be construed as an act leading to the person's targetability.<sup>49</sup> Otherwise, for instance, internally displaced persons arriving in camps would not be able to tell their stories to the government authorities if those stories contained information on the location of enemy forces – or a civilian air traffic controller could not report the approach of enemy military aircraft in the course of her work – without becoming targetable under IHL.<sup>50</sup> Such interpretations would lead to a manifestly absurd result that would be impossible to reconcile with the protective object and purpose of the relevant rules on the conduct of hostilities.<sup>51</sup>

### *Belligerent nexus*

Determining whether the belligerent nexus criterion is met may again be more straightforward in some of the above examples than in others. The act of launching an offensive cyber operation at the instigation of one's own State against that State's enemy during an armed conflict (scenario 1) is a type of action specifically designed to support the actor's own State and to be detrimental to the other. Ordinarily, such forms of conduct will suffice to meet the criterion.

Things are less clear with regard to the transmission of intelligence on enemy movement (scenario 2). As with the direct causation criterion, a lot will depend on the exact parameters of the app and the type of information provided. Informing one party to the conflict about the military actions of the other may be specifically designed to support one to the detriment of another, thus fulfilling the belligerent nexus criterion. However, doing so may also be designed to enable

47 See ICRC Interpretive Guidance, above note 15, pp. 54–55. See also 2005 DPH Report, above note 28, p. 22 (“only intelligence gathering that had a direct connection to attack or defence should be regarded as part of the hostilities”); 2004 DPH Report, above note 32, p. 5 (“the provision of information with the intent to influence the hostilities should constitute DPH”).

48 French Position Paper, above note 20, p. 15 (“the penetration of a military system by a party to an armed conflict with a view to gathering tactical intelligence for the benefit of an adversary *for the purposes of an attack* constitutes direct participation in hostilities”) (emphasis added); German Position Paper, above note 21, p. 8 (“transmitting tactical targeting information *for an attack* ... could suffice in order to consider a civilian person as directly participating in hostilities”) (emphasis added).

49 See also ICRC Commentary on the APs, above note 13, p. 901, para. 3187, noting that “gathering and transmission of military information” *per se* are examples of “*indirect* acts of participation” in hostilities (emphasis added).

50 I am grateful to Ramin Mahnad for suggesting these examples.

51 For an analysis of the object and purpose of these rules from the perspective of cyber operations during armed conflicts, see Kubo Mačák, “Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law”, *Israel Law Review*, Vol. 48, No. 1, 2015, pp. 77–78 (with references), available at: <https://tinyurl.com/2emrpjj>.

civilian warning and evacuation, to support the work of civil defence organizations, or to achieve other non-belligerent purposes, in which case the criterion would not be met.<sup>52</sup> Furthermore, if the questions and answers transmitted through an app are so general that the civilians involved “are totally unaware of the role they are playing in the conduct of hostilities”, then the action of transmitting the information would not reach the nexus threshold.<sup>53</sup> To say otherwise would mean removing the protection against attack from individuals who are being wholly instrumentalized and who therefore cannot be regarded as performing a legally relevant action.<sup>54</sup>

The belligerent nexus criterion is even harder to meet with respect to the conduct of private companies (scenario 3). It could be argued that when such companies engage in acts of cyber defence, even if mandated by the law, they do so primarily in order to protect their own interests (such as limiting exposure to liability, protecting their share value or simply maintaining their reputation) rather than to support the war effort of one State and/or to harm another.

This raises the question of the relevance of subjective intent in evaluating the belligerent nexus criterion. The ICRC Interpretive Guidance bases its approach strictly on the objective purpose of the act in question, noting that “the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for ‘split second’ targeting decisions”.<sup>55</sup> With some narrow exceptions,<sup>56</sup> whether or not a person becomes targetable under IHL is contingent on the objective nature of their conduct, and not on their inner state of mind.<sup>57</sup>

52 See, similarly, Michael N. Schmitt, “Ukraine Symposium – Using Cellphones to Gather and Transmit Military Information, A Postscript”, *Articles of War*, 4 November 2022, section “Warning the Civilian Population”, available at: <https://lieber.westpoint.edu/civilians-using-cellphones-gather-transmit-military-information-postscript/>.

53 ICRC Interpretive Guidance, above note 15, p. 60. See also e.g. Byron Tau, “App Taps Unwitting Users Abroad to Gather Open-Source Intelligence”, *Wall Street Journal*, 24 June 2021, available at: [www.wsj.com/articles/app-taps-unwitting-users-abroad-to-gather-open-source-intelligence-11624544026](https://www.wsj.com/articles/app-taps-unwitting-users-abroad-to-gather-open-source-intelligence-11624544026) (reporting on how innocuous data collected through apps can be used for military purposes).

54 ICRC Interpretive Guidance, above note 15, p. 60.

55 *Ibid.*, p. 59 fn. 150.

56 Such as when a civilian is “totally unaware” of the fact that they are involved in the conduct of hostilities: see note 53 above and the associated text. See also J. Horowitz, above note 7, discussing the relevance of subjective considerations in the context of technological companies operating in armed conflict environments.

57 See e.g. Germany, Federal Prosecutor General at the Federal Court of Justice (Bundesgeneralanwalt beim Bundesgerichtshof), *Investigation Proceedings against Colonel (Oberst) Klein and Company Sergeant Major (Hauptfeldwebel) Wilhelm Because of Suspected Offences under the International Crimes Code and Other Offences*, Case No. 3 BJs 6/10-4, Decision to Terminate Proceedings Pursuant to Section 170 Para. 2 Sentence 1 of the Penal Procedure Code, 16 April 2010 (so-called *Fuel Tankers* case), p. 60: “Die unmittelbare Teilnahme an Feindseligkeiten im Sinne des Konfliktsvölkerrechts ist von der Willensrichtung des sich Beteiligenden unabhängig, denn der zeitweilige Verlust des Schutzes als Zivilist ist eine Folge davon, dass diese Person objektiv eine militärische Bedrohung darstellt.” (ICRC translation: “The direct participation in hostilities as understood under the international law of armed conflict is independent of the individual will of the person concerned because the temporary loss of protection as a civilian is the consequence of the person objectively constituting a military threat.”) However, some States incorporate the element of intent into their assessment of whether an act

It is submitted that the same approach should apply to the involvement of private companies in national cyber defence. The adversary will normally not be able to determine the subjective motives of the acting entity, and it would be particularly unrealistic to saddle it with this burden in the cyber context, which is characterized by geographical remoteness and uncertain attribution.<sup>58</sup> Therefore, the objective purpose should be determined by reference to the design of the operation in question.<sup>59</sup> If the operation can reasonably be regarded as being designed to support one party to the conflict to the detriment of another, it would thus meet the nexus criterion irrespective of the associated subjective motivations.<sup>60</sup> If not (for example, because a company's operations affect both parties equally), then the criterion would not be met. This may of course be difficult to determine in practice;<sup>61</sup> in case of doubt, the conduct should be presumed not to qualify as direct participation in hostilities.<sup>62</sup>

Additionally, if the operation is objectively taken in defence of the company or its infrastructure, it could potentially fall within the separate exemption of "individual self-defence" against unlawful acts of violence.<sup>63</sup> As noted in the ICRC Interpretive Guidance, "although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another".<sup>64</sup> Similarly, protecting one's own networks against existing or imminent unlawful cyber harm is conduct not designed to support any party to a conflict and as such would lack belligerent nexus.<sup>65</sup>

constitutes direct participation in hostilities: see e.g. Danish Military Manual, above note 19, p. 171; Norwegian Military Manual, above note 17, paras 3.24, 3.27.

58 Cf. Florian J. Egloff and Myriam Dunn Cavelty, "Attribution and Knowledge Creation Assemblages in Cybersecurity Politics", *Journal of Cybersecurity*, Vol. 7, No. 1, 2021, p. 5, explaining that the attacker's intent is an element of attribution that is frequently difficult to substantiate with robust data.

59 ICRC Interpretive Guidance, above note 15, p. 59.

60 See *ibid.*, pp. 63–64, describing the decisive question as "whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party".

61 See J. Horowitz, above note 7.

62 ICRC Interpretive Guidance, above note 15, pp. 75–76; see also e.g. New Zealand Military Manual, above note 17, p. 6-15, para. 6.5.11. But see Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 13, noting that the "International Group of Experts was divided over the issue of whether a presumption against direct participation applies"; and D. Wallace, S. Reeves and T. Powell, above note 38, p. 196, asserting that it is "unclear" how this dilemma will be resolved in the future.

63 The use of force by individuals in defence of themselves or others should be distinguished from the use of force by States in self-defence against an armed attack, which is governed by the *jus ad bellum* and is beyond the scope of this article. See, similarly, ICRC Interpretive Guidance, above note 15, p. 61 fn. 158.

64 *Ibid.*, p. 61. See also ICRC, *Summary Report of the First Expert Seminar on Direct Participation in Hostilities under International Humanitarian Law*, Geneva, September 2003 (2003 DPH Report), p. 6: "All the experts who spoke on the subject stressed that individual civilians using a proportionate amount of force in response to an unlawful and imminent attack against themselves or their property should not be considered as directly participating in hostilities."

65 See, further, J. Horowitz, above note 7, arguing that it is in companies' interest to explain their actions in order to mitigate risks.

## Interim conclusion

Only if a certain form of civilian involvement meets all three of these criteria simultaneously will the conduct in question qualify as direct participation in hostilities. The foregoing analysis demonstrates that this outcome is an exception rather than the rule. While certain offensive cyber operations conducted by civilians (scenario 1) may in some circumstances qualify as direct participation in hostilities, most forms of provision of information by civilians through smartphone apps (scenario 2) and cyber defence activities by private companies (scenario 3) do not.

Nonetheless, the exceptions cannot be ignored, and their legal consequences need to be understood. In addition, the narrow conclusions endorsed here may be challenged by others who interpret the applicable criteria more extensively than the present article, with the result that more types of conduct would be perceived as direct participation. This only underlines the need to understand the legal implications of such qualifications, both for the individuals and for the States concerned. This is what we turn to in the remaining two sections of this article.

## Legal implications for individuals

### Violation of international or domestic law?

To begin with, it might be queried whether the forms of engagement described above are unlawful for the individuals concerned: do civilians violate IHL by directly participating in hostilities? In this regard, it is noteworthy that IHL provides only combatants with an express right to participate directly in hostilities.<sup>66</sup> According to one view (expressed succinctly by the British military lawyer General A. P. V. Rogers), “[t]he inference is that others do not have the right to participate directly in hostilities and, *if they do, they violate the law of war*”.<sup>67</sup> A similar (and similarly rare) position can be found in a 1976 US Air Force pamphlet, according to which there is an “*obligation on the part of civilians not to take a direct part in hostilities*”.<sup>68</sup>

66 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 43(2).

67 Anthony Rogers, “Combatant Status”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 122.

68 United States, “International Law – The Conduct of Armed Conflict and Air Operations”, Air Force Pamphlet 110-31, Department of the Air Force, 19 November 1976, p. 5-8. Air Force Pamphlet 110-31 infers this obligation from the general immunity from attack owed to civilians under IHL. Another historical example can be found in United Kingdom, *The Law of War on Land, Being Part III of the Manual of Military Law*, Her Majesty’s Stationery Office, London, 1958, p. 626 (no longer in force). See also Swiss Military Manual, above note 17, para. 172: “Les personnes civiles ne peuvent pas participer aux hostilités.” (ICRC translation: “Civilians may not participate in hostilities.”)

This interpretation is not generally accepted, however. The dominant position – also shared by the ICRC – is that “IHL neither prohibits nor privileges civilian direct participation in hostilities”.<sup>69</sup> Probably the only treaty prohibition against involving civilians in armed conflict is the prohibition against privateering found in the 1856 Paris Declaration on maritime law,<sup>70</sup> which is of little relevance in the context discussed in this article. Therefore, while it is certainly true that civilians “were never meant to directly participate in hostilities on behalf of a party to the conflict”,<sup>71</sup> there is no express prohibition against them doing so. It logically follows that civilian direct participation in hostilities does not, in and of itself, constitute a war crime.<sup>72</sup> This is confirmed by the fact that none of the statutes of past or existing international criminal tribunals have criminalized such conduct.<sup>73</sup> Returning to the cyber context, the Tallinn Manual 2.0 group of experts also observed that IHL “does not bar any category of person from participating in cyber operations”.<sup>74</sup>

By contrast, acts of direct participation in hostilities are often criminalized under domestic law, together with numerous other forms of harmful behaviour that may fall below the direct participation threshold as far as IHL is concerned. Domestic statutes may do so expressly, or they may provide for offences that cover the same forms of behaviour as those typically committed by individuals engaged in armed conflicts: deliberate killing or injuring of another, damaging or destroying property, or – more relevant in the present context – computer-related offences such as the creation, use or distribution of malicious software.<sup>75</sup> Because civilians are by definition not combatants, they are not shielded from domestic prosecution for such acts by combatant immunity.<sup>76</sup> Similarly, if captured, civilians who have directly participated in hostilities are not entitled to prisoner-of-war status.<sup>77</sup>

69 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 44.

70 Declaration Respecting Maritime Law, Paris, 1856, Art. 1 (“Privateering is, and remains, abolished”).

71 ICRC Interpretive Guidance, above note 15, pp. 38–39.

72 Nils Melzer, “Direct Participation in Hostilities”, in Dražan Djukić and Niccolò Pons (eds), *The Companion to International Humanitarian Law*, Brill, Leiden, 2018, p. 300. See also 2003 DPH Report, above note 64, p. 9 (“No one contested that direct participation in hostilities by a civilian could not be considered a war crime”); Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees”, *Chicago Journal of International Law*, Vol. 5, 2005, pp. 520–521 (arguing that while mere direct participation, without more, is not a war crime, the acts underlying direct participation may be punishable).

73 See ICRC Interpretive Guidance, above note 15, p. 84 fn. 226 (with references). Reportedly, the drafters of the 1998 Rome Statute of the ICC did not even consider any proposal to include direct participation in hostilities as a war crime in the Statute. See A. Rogers, above note 67, p. 122 fn. 100.

74 Tallinn Manual 2.0, above note 22, Rule 86.

75 For a comparative analysis of cyber crime offences criminalized by national laws around the world, see UN Office on Drugs and Crime, *Comprehensive Study on Cybercrime*, February 2013, pp. 77–106, available at: [www.unodc.org/documents/organized-crime/UNODC\\_CCPCJ\\_EG.4\\_2013/CYBERCRIME\\_STUDY\\_210213.pdf](http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf).

76 M. Bothe, K. J. Partsch and W. A. Solf, above note 35, p. 278; ICRC Interpretive Guidance, above note 15, p. 84.

77 See e.g. Knut Ipsen, “Combatants and Non-Combatants”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford, 2021, p. 97.

## Loss of protection from attack and the related safeguards

In addition, a key consequence of direct participation in hostilities is the loss of protection from attack for the individual concerned.<sup>78</sup> In this sense, there is no difference between “kinetic” and “cyber” direct participation in hostilities. In practical terms, the act of direct participation in hostilities by a civilian renders them liable to be attacked by any lawful means, whether cyber or not.<sup>79</sup>

However, the specific characteristics of the cyber environment, together with the remoteness implicit in practically any cyber activity, pose certain additional challenges as well as safeguards relevant to the targeting of individuals who have directly participated in hostilities through cyber or digital means.

First, there may be certain territorial considerations to be taken into account. Until now, a tacit assumption of this article has been that the individuals concerned are located in the territory of one of the parties to the conflict. However, it is certainly conceivable that civilians could engage from outside of those territories in cyber activities that would fall under the definition of direct participation in hostilities if IHL applied. If that is the case, other branches of international law – such as the law on the use of force, the law of neutrality, or human rights law – will contain important limitations that will in most cases preclude the application of lethal force against such individuals.<sup>80</sup>

Second, IHL imposes important temporal considerations. Civilians only lose protection from attack “for such time as” they directly participate in hostilities.<sup>81</sup> This means that if the specific act that constitutes direct participation ends, their protection against attack is restored.<sup>82</sup> The exact beginning and end of specific acts amounting to direct participation in hostilities must therefore be determined with utmost care.<sup>83</sup>

Consider, for example, a civilian using a smartphone app to provide tactical intelligence to attacking forces (scenario 2).<sup>84</sup> As noted earlier, in certain very narrow circumstances, such conduct may amount to direct participation in

78 ICRC Commentary on the APs, above note 13, p. 619, para. 1944; ICRC Interpretive Guidance, above note 15, p. 69; Program on Humanitarian Policy and Conflict Research, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Harvard University, 15 May 2009, *chapeau* to section F; Tallinn Manual 2.0, above note 22, Rule 91, commentary para. 1; UK Military Manual, above note 17, para. 5.3.2; DoD Military Manual, above note 17, para. 16.5.5.

79 Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 3.

80 See, generally, Michael Ramsden, “Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki”, *Journal of Conflict and Security Law*, Vol. 16, No. 2, 2011; Jelena Pejic, “Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, especially pp. 70–75, 100–101. Discussing these areas of law is outside of the scope of the present article.

81 API, Art. 51(3); Protocol Additional (II) 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 1978) (AP II), Art. 13(3); ICRC Customary Law Study, above note 12, Rule 6.

82 ICRC Interpretive Guidance, above note 15, p. 70.

83 *Ibid.*, p. 65.

84 For an analysis of the temporal element in the context of technology companies’ involvement in armed conflicts (scenario 3), see J. Horowitz, above note 7.



hostilities.<sup>85</sup> Importantly, the information thus provided (e.g. the targeting coordinates sent via a chat function in the app or an image of an enemy military objective uploaded through the app) may remain stored in the phone after such engagement. Does the act of direct participation continue while the information is available in the phone concerned?

It is submitted that such a reading would be overbroad, and that the civilian involvement ends at the moment when the information is provided. This is because at that point in time, the relevant conduct (i.e., the “act”<sup>86</sup>) of the civilian comes to an end, and the mere carrying of a phone containing militarily relevant information cannot be considered as direct participation,<sup>87</sup> even if the object as such may continue to have military value.<sup>88</sup> The individual’s conduct does not present any danger for the adversary any more, and as such they may no longer be directly attacked.<sup>89</sup>

Third, there are uncertainty considerations that must be taken into account. In order to avoid the erroneous or arbitrary targeting of civilians, parties to a conflict must take all feasible precautions in verifying whether a person is a civilian and, if that is the case, whether they are directly participating in hostilities.<sup>90</sup> In case of doubt, the person in question must be presumed to be protected against direct attack.<sup>91</sup> As explained by Yoram Dinstein, this interpretation is necessary “to ensure that soldiers tasked with the mission of winnowing out false civilians who are *de facto* combatants will not treat innocent civilians as targetable, ‘shooting first and asking questions later’”.<sup>92</sup>

Fourth, even where a civilian loses protection from attack, any use of force against them remains governed by other rules of IHL. In particular, if attacking the individual may be expected to result in disproportionate incidental civilian harm<sup>93</sup>

85 See the above section on “Application of the General Rule to the Three Scenarios”.

86 See also Tallinn Manual 2.0, above note 22, Rule 97, commentary para. 4: “In the cyber context, it is essential to emphasize that an ‘act’ is required by the individual concerned.”

87 See also Supreme Court of Israel, *Public Committee against Torture*, above note 12, para. 39: “A civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detaches himself from that activity, is entitled to protection from attack.”

88 The device containing this information may continue to qualify as a military objective if fulfils the definition of military objective in the circumstances ruling at the time: see AP I, Art. 52(2). For example, if the information stored in the device was outdated or had otherwise lost its military value, the device would not qualify as a military objective as its destruction, capture or neutralization would no longer offer a “definite military advantage” as required by the law. See, further, ICRC Commentary on the APs, above note 13, p. 636, para. 2024.

89 See ICRC Commentary on the APs, above note 13, p. 1453, para. 4789, noting that protection is denied “for as long as [the individual’s] participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.” See also M. Bothe, K. J. Partsch and W. A. Solf, above note 35, p. 342: “while participating directly in hostilities[, civilians] present an immediate threat to the adverse Party and, accordingly, they are subject to direct attack to the same extent as combatants”.

90 AP I, Art. 57(2)(a)(i); ICRC Customary Law Study, above note 12, Rule 16.

91 See above note 62.

92 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., Cambridge University Press, Cambridge, 2022, p. 206, quoting Frits Kalshoven, *Reflections on the Law of War: Collected Essays*, Cambridge University Press, Cambridge, 2007, pp. 73–74.

93 See AP I, Arts 51(5)(b), 57(2)(a)(iii); ICRC Customary Law Study, above note 12, Rule 14.

or if it was feasible to obtain a similar military advantage while causing less or no incidental civilian harm, then the attack would be prohibited by IHL.<sup>94</sup> Moreover, IHL expressly provides that the presence of civilians directly participating in hostilities among the civilian population does not deprive the population at large of the protection from attack to which it is entitled.<sup>95</sup>

Finally, it is important to distinguish the lawfulness of an attack from its operational feasibility or military value. In practical terms, parties to armed conflicts may prefer to target the objects used by the civilian in question – such as the network, the device or the app – rather than the person. Doing so may be more militarily expedient and thus preferable as a matter of policy. (It would also have to be determined whether the said object qualifies as a military objective, and the operation against it would have to comply with all other applicable rules of IHL.<sup>96</sup>) However, the fact remains that civilians may indeed exceptionally lose their legal protection from attack through these forms of involvement. In the next section, we will analyze what this means from a systemic perspective.

## Legal implications for States

### International humanitarian law

The principle of distinction is one of the oldest principles in IHL and a cornerstone of that body of law. The International Court of Justice (ICJ) has described it as a “cardinal” and “intransgressible” principle that is part of “the fabric of humanitarian law”.<sup>97</sup> It reflects the prevailing post-Westphalian philosophical and political paradigm according to which the monopoly on the legitimate use of force belongs to States.<sup>98</sup> As Jean-Jacques Rousseau wrote in *The Social Contract*, war is a relation “not between man and man, but between State and State”.<sup>99</sup> In other words, civilians are not the enemies of States, and they must thus be spared, as far as possible, from the effects of any hostilities between States.<sup>100</sup>

This paradigm has also been reaffirmed by the international community in the cyber context. In particular, the UN General Assembly has repeatedly given

94 See AP I, Art. 57(3); ICRC Customary Law Study, above note 12, Rule 21.

95 AP I, Art. 50(3).

96 See also J. Horowitz, above note 7, endorsing the same policy preference while warning that cyber operations against military objectives that also provide services to civilians pose significant potential risks, in particular when they are detrimental to critical infrastructure that supports essential civilian services such as health care, electricity and water.

97 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996* (Nuclear Weapons Advisory Opinion), para. 78.

98 Max Weber, *The Vocation Lectures*, Hackett, Indianapolis, IN, 2004, p. 33: “the state is the form of human community that ... lays claim to the monopoly of legitimate violence within a particular territory”.

99 Jean-Jacques Rousseau, *The Social Contract*, trans. G. D. H. Cole, Cosimo Classics, New York, 2008 (first published 1762), pp. 19–20.

100 See e.g. UNGA Res. 2444 (XXIII), 19 December 1968, para. 1(c): “distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible”.

unanimous endorsement to the consensus reports issued by several Groups of Governmental Experts, which have described distinction as an “established international legal principle” applicable to the use of information and communications technologies by States.<sup>101</sup> The principle of distinction and the values it represents are today part of the irreducible core of the normative framework applicable during armed conflicts, including when these involve new means and methods of warfare.<sup>102</sup>

In this respect, encouraging civilian participation in cyber activities that may amount to direct participation in hostilities raises several crucial systemic-level concerns. One has to begin with the humanitarian concern: such acts of encouragement undermine the central humanitarian value that undergirds the principle of distinction, namely the protection of those who must be spared from the effects of armed conflict.

In modern-day armed conflicts, civilians are killed and injured at much higher rates than their combatant counterparts.<sup>103</sup> Any pattern of conduct which makes them more susceptible to harm is thus by definition morally suspect and practically problematic. As Eric Jensen has noted, in the kinetic context, encouraging individuals “to fight as civilians will inevitably lead to more civilian casualties as combatants struggle to distinguish the fighters amongst the civilians”.<sup>104</sup> The same concern arises in the cyber context.

An objection could be made that the kinetic targeting of individuals based on their cyber participation in hostilities is unlikely. For example, in 2019, France’s Ministry of Armies noted in a public position paper that “[g]iven the difficulties of identifying the perpetrators of a cyberattack, the targeting of such individuals remains marginal”.<sup>105</sup> However, technical attribution capabilities have dramatically improved in the recent period,<sup>106</sup> so over time, the risk exists that such targeting may become less marginal.

In addition, there have already been reports of militaries targeting civilians in combat zones for being suspected of using their mobile phones to report the enemy’s location.<sup>107</sup> If parties to armed conflicts encourage civilians to engage in

101 *Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, UN Doc. A/76/135, 14 July 2021; UNGA Res. 76/19, 8 December 2021, para. 2; *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/70/174, 22 July 2015, para. 28(d); UNGA Res. 73/27, 11 December 2018, para. 1.

102 ICRC, “Principles of IHL (Distinction, Proportionality) Have Direct Bearing on Cyber Operations”, Statement to the UN Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, 12 February 2020, available at: [www.icrc.org/en/document/principles-international-humanitarian-law-distinction-proportionality-have-direct-bearing](http://www.icrc.org/en/document/principles-international-humanitarian-law-distinction-proportionality-have-direct-bearing).

103 See e.g. Frederick M. Burkle, “Revisiting the Battle of Solferino: The Worsening Plight of Civilian Casualties in War and Conflict”, *Disaster Medicine and Public Health Preparedness*, Vol. 13, No. 5–6, 2019, p. 838.

104 Eric Talbot Jensen, “Applying a Sovereign Agency Theory of the Law of Armed Conflict”, *Chinese Journal of International Law*, Vol. 12, 2012, p. 701 fn. 74.

105 French Position Paper, above note 20, p. 15.

106 See e.g. Kristen E. Eichensehr, “The Law and Politics of Cyberattack Attribution”, *UCLA Law Review*, Vol. 67, 2020, p. 529.

107 See e.g. Dan Bilefsky, “A Ukrainian Appeals Court Reduces the Life Sentence of a Russian Soldier Tried for War Crimes”, *New York Times*, 29 July 2022.

this type of conduct, such incidents may become much more common, including in situations where the civilian in question was using the phone for another reason – for instance, to warn their families to leave or to seek shelter.

This humanitarian concern translates into legal concerns under IHL. To begin with, there is a strong strand of scholarship arguing that the practice of involving civilians in combat functions is eroding (or undermining) the principle of distinction.<sup>108</sup> As noted, this principle requires that – insofar as persons are concerned – parties to armed conflicts must at all times distinguish between civilians and combatants.<sup>109</sup> The principle is most effective in practice if participation in hostilities is limited to those endowed with combatant privilege.<sup>110</sup> In other words, blurring the distinction between combatants and civilians by definition “endanger[s] the protection afforded to the latter”.<sup>111</sup> This is because if the lines become unclear, then there is a risk that parties to armed conflicts may gradually begin to err on the side of considering all individuals in the enemy population to be involved in hostile acts, thus diminishing restraints on attacks against them.<sup>112</sup>

For some authors, the deliberate contribution to such risks by States does not merely “erode” or “undermine” the principle of distinction, but constitutes a standalone violation of IHL attributable to the State in question. In particular, Lindsey Cameron and Vincent Chetail write:

Respect for the principle of distinction entails that *a state may not use civilians to directly participate in hostilities*. Indeed, if a state were to do so, it would be putting its own civilians in jeopardy since civilians directly participating in hostilities lose protection against attack and may be arrested and tried for such acts. What is more, states are responsible for ensuring that the principle of distinction is upheld. If a state were to permit civilians to undertake combat functions, or to require them by contract to do so, *that state would violate its obligation to uphold the principle of distinction*.<sup>113</sup>

108 See e.g. Gabor Rona, “When Considering CIA Targeted Killings, Don’t Forget International Law!”, *Just Security*, 5 April 2016, available at: [www.justsecurity.org/30426/cia-targeted-killings-dont-forget-international-law/](http://www.justsecurity.org/30426/cia-targeted-killings-dont-forget-international-law/) (“blurring the lines between combatant and civilian – as occurs when the CIA directly participates in hostilities – creates a precedent that undermines the principle of distinction, even if that participation is not unlawful”); Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 25 (“the increasing civilianization of armed forces is ... eroding the principle of distinction because individuals outside of the armed forces are increasingly performing several functions that contribute not only to a State’s military capacity but even directly to battlefield action”); D. Wallace, S. Reeves and T. Powell, above note 38, p. 174 (“civilian involvement in armed conflicts ... undermines the [law of armed conflict’s] core principle of distinction”).

109 AP I, Art. 48; ICRC Customary Law Study, above note 12, Rule 1.

110 K. Mačák, above note 8, p. 421.

111 Giulio Bartolini, “The Participation of Civilians in Hostilities”, in Michael John Matheson and Djamchid Montaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Martinus Nijhoff, Leiden, 2010, p. 325.

112 *Ibid.*, p. 357.

113 Lindsey Cameron and Vincent Chetail, *Privatizing War*, Cambridge University Press, Cambridge, 2013, p. 104 (emphasis added).

This is a powerful argument that goes a long way towards addressing the protective needs identified in this article. However, it may be challenging to identify a precise legal basis for such a generalized obligation to uphold the principle of distinction, or to determine the exact contours of this obligation. Even Article 48 of AP I – sometimes described as “the basic rule of distinction”<sup>114</sup> – is narrower in its remit: it demands that the parties to the conflict should distinguish between the civilian population and combatants at all times, but it does not establish a generalized obligation to uphold the principle that underpins the text of the rule. In this author’s view, it is thus preferable to examine specific IHL obligations that flow from the principle of distinction. Three of them stand out in this context: the obligation of constant care, the obligation to take passive precautions, and the obligations relating to participation in hostilities by children.

First, parties to armed conflicts are bound by the obligation of constant care, which mandates that in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects.<sup>115</sup> Several States – including France<sup>116</sup> and Germany<sup>117</sup> – have explicitly stated that this obligation also applies in the context of cyber operations, and this view is also shared by the ICRC.<sup>118</sup> In the Tallinn Manual process, it was agreed that this duty “requires commanders and all others involved in the operations to be continuously sensitive to the effects of their activities on the civilian population and civilian objects, and to seek to avoid any unnecessary effects thereon”.<sup>119</sup> Exposing civilians to a loss of their protection under IHL is hardly compatible with the duty to spare them from such effects, as required by the constant care obligation.

Second, parties to armed conflicts are obliged to take, “to the maximum extent feasible”, the necessary precautions “to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”.<sup>120</sup> Again, there is little doubt that this rule applies in the cyber context, and this has been expressly recognized by France.<sup>121</sup> In the Tallinn Manual context, it was underlined that this rule was “designed to

114 ICRC Commentary on the APs, above note 13, p. 598, para. 1863: “The basic rule of protection and distinction is confirmed in this article.”

115 AP I, Art. 57(1); ICRC Customary Law Study, above note 12, Rule 15.

116 French Position Paper, above note 20, p. 15.

117 German Position Paper, above note 21, p. 9.

118 ICRC, *International Humanitarian Law and Cyber Operations during Armed Conflicts*, ICRC Position Paper, Geneva, November 2019, p. 6, available at: [www.icrc.org/en/download/file/108983/icrc\\_ihl-and-cyber-operations-during-armed-conflicts.pdf](http://www.icrc.org/en/download/file/108983/icrc_ihl-and-cyber-operations-during-armed-conflicts.pdf).

119 Tallinn Manual 2.0, above note 22, Rule 114, commentary para. 4. Similarly, see Laurent Gisel, Tilman Rodenhäuser and Knut Dörmann, “Twenty Years On: International Humanitarian Law and the Protection of Civilians against the Effects Of Cyber Operations during Armed Conflicts”, *International Review of the Red Cross*, Vol. 102, No. 913, 2020, p. 324: “This obligation requires all those involved in military operations to continuously bear in mind the effects of military operations on the civilian population, civilians and civilian objects, to take steps to reduce such effects as much as possible, and to seek to avoid any unnecessary effects.”

120 AP I, Art. 58(c).

121 French Position Paper, above note 20, p. 16.

protect against death or injury to civilians”.<sup>122</sup> Therefore, encouraging civilians to directly participate in cyber hostilities, and thereby exposing them to the risk of losing their IHL protections, is in direct tension with this rule as well.

It could be objected that the constant care and passive precaution obligations are inapplicable to civilians who are directly participating in hostilities given that these individuals are no longer covered by the protection against attack normally afforded to civilians. However, that would be a misunderstanding of the present argument. This author accepts that for such time as civilians are engaged in an act of direct participation in hostilities, the protective ambit of these rules is removed from them.<sup>123</sup> However, that is not the case *before* they do so. It is submitted that until such time, parties remain bound by the said obligations, and encouraging civilians to cross the line, so to speak, towards unprotected territory is hard to reconcile with those obligations.<sup>124</sup>

Lastly, parties to armed conflicts must do everything feasible to ensure that children under 15 years of age do not directly participate in hostilities.<sup>125</sup> As noted in the ICRC Commentary on the relevant provision in AP I, “[t]he intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict”.<sup>126</sup> The age limit rises to 18 for States party to the African Charter on the Rights and Welfare of the Child,<sup>127</sup> and the ICRC recommends that all States adopt this higher age limit of 18.<sup>128</sup> Given that some of the activities on the digital battlefield may qualify as direct participation, this means that belligerents have an additional duty to prevent children under 15 or 18 from joining in. This is a pressing concern in view of the low threshold for digital forms of involvement discussed earlier<sup>129</sup> – not to mention the possibility that some of the relevant digital tools may be especially appealing to children, who are generally

122 Tallinn Manual 2.0, above note 22, Rule 121, commentary para. 9.

123 See e.g. Inter-American Commission on Human Rights, *Third Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9, Rev. 1, 26 February 1999, para. 54 (“by virtue of their hostile acts, such civilians lose the benefits pertaining to peaceable civilians of precautions in attack and against the effects of indiscriminate or disproportionate attacks”); Supreme Court of Israel, *Public Committee against Torture*, above note 12, para. 46 (holding that the proportionality requirements do not cover the harm “to a civilian taking a direct part in the hostilities at such time as the harm is caused”).

124 See also the text at above notes 103–112, noting that such practices increase the risk for other, protected civilians of being incidentally harmed or erroneously targeted.

125 AP I, Art. 77(2); AP II, Art. 4(3)(c); ICRC Customary Law Study, above note 12, Rule 137; Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990), Art. 38 (2). Under the 1998 Rome Statute of the ICC, using children to “participate actively in hostilities” constitutes a war crime in both international and non-international armed conflicts. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 8(2)(b)(xxvi), 8(2)(e)(vii).

126 ICRC Commentary on the APs, above note 13, p. 901, para. 3187.

127 African Charter on the Rights and Welfare of the Child, July 1990 (entered into force 29 November 1999), Art. 22(2). Article 2 of the Charter states that “[f]or the purposes of this Charter, a child means every human being below the age of 18 years”.

128 Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent in 1995 recommended that parties to conflict “take every feasible step to ensure that children under the age of 18 years do not take part in hostilities”.

129 See the above section entitled “From General Trends to Qualitative and Quantitative Shifts in the Digital Space”.



less able to accurately assess risk and may perceive such tools as just another game on their smart device.<sup>130</sup> Depending on the circumstances, specific examples of feasible measures could include implementing age restrictions and blocks on access to those digital tools the use of which may constitute direct participation in hostilities.<sup>131</sup> By contrast, failure to take any such measures could result in a standalone violation of the relevant IHL rules on the protection of children.

## International human rights law

Encouragement of civilians to directly participate in hostilities during armed conflicts also raises concerns under international human rights law (IHRL). True, it is sometimes said that IHRL was designed for the environment of a normal State in the condition of peace.<sup>132</sup> However, it is now generally accepted that IHRL applies both in time of peace and during armed conflict.<sup>133</sup> This has been confirmed in a consistent line of case law of the ICJ,<sup>134</sup> it is also the view of most States<sup>135</sup> – Israel being one exception<sup>136</sup> – as well as of the International Law Commission<sup>137</sup> and various human rights mechanisms.<sup>138</sup>

There is a separate controversy as to the extent to which IHRL applies to extraterritorial conduct of States. However, that controversy does not arise here – at least not in relation to the practical scenarios considered in this

130 See Pontus Winther, “Military Influence Operations and IHL: Implications of New Technologies”, *Humanitarian Law and Policy Blog*, 27 October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/27/military-influence-operations-ihl-implications-new-technologies/>.

131 Guidance is available regarding the adoption of measures that provide for age-appropriate child safety in digital applications. See e.g. International Telecommunication Union, *Guidelines for Policy-Makers on Child Online Protection*, Geneva, 2020, p. 44 on tools, services and settings.

132 See e.g. Christopher Greenwood, “Human Rights and Humanitarian Law – Conflict or Convergence?”, *Case Western Reserve Journal of International Law*, Vol. 43, No. 1–2, 2010, p. 495.

133 See Kubo Mačák, “The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention”, *Israel Yearbook on Human Rights*, Vol. 52, 2022, p. 223.

134 See e.g. Nuclear Weapons Advisory Opinion, above note 97, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, paras 215–220.

135 See e.g. Helen Duffy, “Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication”, in Ziv Bohrer, Janina Dill and Helen Duffy (eds), *Law Applicable to Armed Conflict*, Cambridge University Press, Cambridge, 2020, p. 39.

136 See e.g. Israel, “Comments from the State of Israel on the International Law Commission’s *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts* as Adopted by the Commission in 2019 on First Reading”, 2020, para. 9.

137 ILC, *Draft Articles on the Effects of Armed Conflicts on Treaties*, 2011, reprinted in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2011, pp. 126–127, paras 49–50.

138 See e.g. Human Rights Committee, General Comment No. 31, “Nature of the General Legal Obligation on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11; Human Rights Committee, General Comment No. 35, “Article 9: Liberty and Security of Person”, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 64; Human Rights Committee, General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/36, 3 September 2019 (General Comment 36), para. 64; Committee on Economic, Social and Cultural Rights, “Concluding Observations: Israel”, UN Doc. E/C.12/1/Add.90, 26 June 2003, para. 31; Committee against Torture, General Comment No. 2, “Implementation of Article 2 by States Parties”, UN Doc. CAT/C/GC/2, 24 January 2008, para. 5; Committee on the Elimination of Discrimination against Women, “General Recommendation No. 28 on the Core Obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women”, UN Doc. CEDAW/C/GC/28, 16 December 2010, para. 11.



article – given that our focus is on a State’s conduct vis-à-vis the civilians who find themselves in that State’s *own territory*, not abroad. On the basis of the foregoing, it can thus be inferred that IHRL is relevant when considering these forms of conduct in spite of the ongoing armed conflict; what remains to be determined is whether the conduct examined here is compatible with States’ IHRL obligations.

It should be recalled that involving civilians in acts of direct participation in hostilities exposes them to the loss of protection against attack under IHL.<sup>139</sup> In other words, in doing so, the acting State exposes these individuals under its jurisdiction to the risk of grave injury or loss of life. At the same time, it is well established that the exposure of an individual to the risk of an effect that is proscribed by law – such as ill-treatment, torture or death – can amount to a violation of the concomitant right. For example, in the 2005 *Mamatkulov and Askarov v. Turkey* case, the European Court of Human Rights (ECtHR) held:

It is the settled case-law of the Court that extradition by a Contracting State may give rise to an issue under Article 3 [of the European Convention on Human Rights, on prohibition of torture and inhuman or degrading treatment or punishment], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. ... Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. *In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.*<sup>140</sup>

The same logic applies here. It is immaterial that the eventual harm would be produced by the actions of another party to the conflict which might attack the directly participating civilians. What matters for the purposes of establishing the international responsibility of the acting State is that its actions have as a direct consequence the exposure of an individual to a real risk of proscribed effects.

What might such proscribed effects be in our present context? The right to life, as explained by the UN Human Rights Committee, “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death”.<sup>141</sup> It is generally accepted that the relevant protections continue to apply during armed conflict, including in the conduct of hostilities.<sup>142</sup> In this regard, it is crucial that the encouragement of

139 See the above section on “Loss of Protection from Attack and the Related Safeguards”.

140 ECtHR, *Mamatkulov and Askarov v. Turkey*, Appl. Nos 46827/99, 46951/99, Judgment (Merits and Just Satisfaction) (Grand Chamber), 4 February 2005, para. 67 (emphasis added).

141 General Comment 36, above note 138, para. 3.

142 *Ibid.*, para. 64. See also ICRC Interpretive Guidance, above note 15, p. 11, noting that the Guidance deals with direct participation in hostilities under an IHL lens only, without prejudice to other bodies of law – such as IHRL – that may concurrently be applicable in a given situation.

civilians to directly participate in hostilities has been shown to be potentially inconsistent with several obligations under IHL.<sup>143</sup> As explained by the Committee, “practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, ... would also violate article 6 of the [International Covenant on Civil and Political Rights]”.<sup>144</sup>

It is useful at this point to distinguish the involvement of civilians in hostilities from the conscription of civilians into the armed forces of States. The latter is an inherent right of States, including where they do so on a compulsory (forced) basis.<sup>145</sup> The legal status under IHL of individuals who are recruited into armed forces changes from “civilian” to “combatant”.<sup>146</sup> This transformation thus brings about key entitlements that are associated with combatant status, including immunity from prosecution for participating in hostilities and entitlement to prisoner-of-war status if captured. Therefore, even though recruitment into armed forces also entails a risk to the lives of the concerned individuals, these no longer qualify as civilians and the acceptance of such risk is an established feature of IHL.<sup>147</sup>

And yet, it would be overbroad to suggest that all forms of encouragement of civilians to engage in cyber activities that constitute direct participation in hostilities amount to a violation of the concerned individuals’ right to life. In the IHRL jurisprudence, relevant criteria include whether the activity at issue is dangerous by its very nature and puts the life of the people concerned at real and imminent risk.<sup>148</sup> While this may be the case with some activities discussed in this article – such as using one’s phone to transmit tactical intelligence directly from the front line (scenario 2) – others may be inherently less dangerous.

In general terms, whenever a State undertakes or organizes dangerous activities, or authorizes them, it must ensure that the risk is reduced to a reasonable minimum.<sup>149</sup> Applied to the present context, this means that States should prioritize those forms of civilian involvement in the war effort that do not place these individuals in harm’s way. This would include cyber activities, which merely build up or maintain the military capacity of a party to the conflict, given that – as noted earlier – these types of conduct do not qualify as direct participation in hostilities.<sup>150</sup>

143 See the above section on “Legal Implications for States: International Humanitarian Law”.

144 General Comment 36, above note 138, para. 64.

145 Diakonia, *Forcible Recruitment of Adults by Non-State Armed Groups in Non-International Armed Conflict*, Legal Brief, May 2019, p. 3.

146 Y. Dinstein, above note 92, pp. 199–200.

147 See e.g. M. Sassòli, above note 108, p. 2; Y. Dinstein, above note 92, pp. 199–200.

148 ECtHR, *Nicolae Virgiliu Tănase v. Romania*, Appl. No. 41720/13, Judgment (Grand Chamber), 25 June 2019, para. 140.

149 ECtHR, *Muĉibabić v. Serbia*, Appl. No. 34661/07, Judgment (Third Section), 12 July 2016, para. 126 (concerning the death of eleven individuals in the context of covert production of rocket fuel under the auspices of a government intelligence service).

150 See text at above note 34.

In addition, the protection of individuals' lives under the IHRL framework must strike a balance with the protection of personal autonomy, which is an inherent part of the right to respect for private life.<sup>151</sup> In order for individuals to exercise this autonomy, States should take adequate measures to provide them with information enabling them to assess the relevant risks to their physical integrity.<sup>152</sup> If the acting State furnishes the concerned individuals with full information about the risks entailed in engaging in a cyber or digital activity that may amount to direct participation in hostilities and they nonetheless decide to do so, it would be more difficult to argue that the State has exposed them to unacceptable risk from the perspective of their right to life.

In the final analysis, it is impossible to draw general conclusions as to the compatibility of the practices considered here with IHRL. The most extreme forms – such as requesting civilians to act in ways that would expose them to the real and imminent danger of being directly attacked, and without informing them of this risk – would most likely violate the concerned individuals' right to life. For instance, asking unwitting civilians who find themselves in the theatre of hostilities to use their phones to supply tactical intelligence needed for immediate attacks would be highly problematic.

However, lesser forms of involvement may more helpfully be analogized to activities such as State-encouraged voluntary participation in dangerous activities like environmental or industrial disaster response. Provided that, for example, volunteer firefighters are given accurate information about the risks they might be facing in helping to extinguish a massive fire, and provided that the State takes reasonable risk mitigation measures, it would be a stretch to argue (on IHRL grounds) that the State was precluded from requesting their assistance, particularly if there was a lack of professional personnel available.

It is submitted that the same approach should apply to the encouragement of civilians to engage in cyber activities that may constitute direct participation in hostilities during armed conflicts. One would be hard-pressed to identify a blanket prohibition of such practices in IHRL, but at least some of them are problematic from the perspective of that body of law, and, generally speaking, if States have other ways of achieving their goals, they should prioritize those in order to avoid potential liability for human rights violations.

151 ECtHR, *Lambert and Others v. France*, Appl. No. 46043/14, Judgment (Grand Chamber), 5 June 2015, para. 142.

152 See e.g. ECtHR, *Öneryıldız v. Turkey*, Appl. No. 48939/99, Judgment (Grand Chamber), 30 November 2004, para. 108 (substantiating a finding of a violation of the right to life – in the context of dangerous industrial activities – in part on the fact that the State had “not shown that any measures were taken in the instant case to provide the [applicants] with information enabling them to assess the risks they might run as a result of the choices they had made”); ECtHR, *L.C.B. v. United Kingdom*, Appl. No. 14/1997/798/1001, Judgment, 9 June 1998, para. 38 (considering that a State may violate its obligation to safeguard the right to life if it does not inform individuals under its jurisdiction about a real risk to their health that is known to that State). See also ECtHR, *Vilnes and Others v. Norway*, Appl. Nos 52806/09, 22703/10, Judgment (First Section), 5 December 2013, paras 233–245 (holding that the State violated the applicants' right to respect for their private life by failing to ensure that they received essential information enabling them to assess the risks to their health and safety entailed in a dangerous activity authorized by the State).

## Conclusion

The ongoing process of digitalization of societies is transforming the way in which wars are fought. States have added cyber capabilities to their military arsenals and continue to search for the most effective ways of projecting their cyber power, including during armed conflicts. One of the concerning trends in this regard relates to the growing involvement of civilians in activities on the digital battlefield.

This article has demonstrated that – even though the circumstances when this occurs are quite narrow – some forms of such involvement may qualify as direct participation in hostilities under IHL. While individuals who engage in these activities do not automatically violate international law, they must be aware that doing so temporarily removes their protection from direct attack. States that decide to encourage such engagement should therefore at the very least be open and transparent about what it means in practical and legal terms.

Moreover, certain acts that put civilians in harm's way by making them directly participate in hostilities may constitute standalone violations of IHL and IHRL obligations by the acting States. From the IHL perspective, the relevant rules include the obligations of constant care and passive precautions, and certain obligations relating to the protection of children. From the perspective of IHRL, some extreme forms of civilian involvement may implicate those individuals' right to life. States must not engage in such conduct in order to comply with their duties under international law.

Beyond these specific prescriptions, the encouragement of civilian involvement in the conduct of hostilities contributes to the erosion of the principle of distinction, an edifice on which the rest of the law applicable in armed conflicts is built. Accordingly, it is strongly recommended for States to reverse the trend of civilianization of the digital battlefield and to refrain as much as possible from involving civilians in the conduct of cyber hostilities. After all, it is a basic truth that “[t]hings fall apart [when] the centre cannot hold”.<sup>153</sup>

153 W. B. Yeats, “The Second Coming”, 1919.

# The *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* and the applicability of Additional Protocol II to intervening foreign forces

**Carrie McDougall\***

Senior Lecturer, Melbourne Law School, University of Melbourne, Australia

Email: [c.mcdougall@unimelb.edu.au](mailto:c.mcdougall@unimelb.edu.au)

## Abstract

*This article critiques the articulation of the legal framework applicable to Australian Defence Force operations in Afghanistan found in the Inspector-General of the Australian Defence Force Afghanistan Inquiry Report (Brereton Report). In particular, using the Australian experience in Afghanistan as a case study, the article argues, on the basis of the rules of treaty interpretation, that where a foreign*

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*State party to Additional Protocol II (AP II) intervenes in a non-international armed conflict (NIAC) to which AP II applies, that foreign State is bound by AP II, in addition to the host State and non-State armed actors that are parties to the NIAC. The article concludes by outlining the reasons why the Brereton Report's silence in relation to AP II matters.*

**Keywords:** Australia, Afghanistan, non-international armed conflict, Additional Protocol II, foreign armed forces.

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The Inspector-General of the Australian Defence Force's (IGADF) *Afghanistan Inquiry Report* (Brereton Report)<sup>1</sup> concludes that there exists credible information<sup>2</sup> to suggest that war crimes – specifically unlawful killings and cruel treatment – were carried out by members of the Australian Defence Force (ADF) Special Operations Task Group (SOTG).<sup>3</sup> In addition to a series of recommendations aimed at addressing the systemic organizational and operational failings identified as having allowed such conduct to have taken place and to have gone unreported for so long, the Report recommends the referral for criminal investigation of nineteen individuals in relation to twenty-three incidents,<sup>4</sup> with a view to prosecution in civilian criminal courts.<sup>5</sup> The commissioning of the Brereton Report and the Chief of the Defence Force's acceptance of its recommendations,<sup>6</sup> together with the establishment by the Australian government of the Afghanistan Inquiry Implementation Oversight Panel to provide oversight and assurance of Defence's broader response in relation to cultural, organizational and leadership change,<sup>7</sup> and

1 IGADF, *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report*, 2020 (Brereton Report), publicly redacted version available at: [www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry](http://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry) (all internet references were accessed in April 2023).

2 In the words of the Report, this “is not a finding, on balance of probability let alone to a higher standard”; rather, it is said to be “analogous to a finding that there are reasonable grounds for a supposition” (*ibid.*, Chap. 1.01, para. 22, Chap. 1.04, para. 37). Noting that the IGADF Inquiry was not confined to evidence that would be admissible in a court of law, and that there may not be admissible evidence to prove a matter beyond reasonable doubt in such a court (Chap. 1.01, para. 23, Chap. 1.04, para. 39), the Report nonetheless states that “findings that there is ‘credible information’ of a war crime have not been lightly reached. Generally, the Inquiry has required eye-witness accounts, corroboration, persuasive circumstantial evidence, and/or strong similar fact evidence, for such a finding” (Chap. 1.01, para. 24). The Report subsequently states that “the Inquiry has generally adopted the approach that unless there is a reasonable prospect of a criminal investigation obtaining sufficient evidence to charge a particular person with a specified crime, it has not made a finding that there is ‘credible information’ that the person has committed the crime” (Chap. 1.04, para. 42).

3 *Ibid.*, Chap. 1.01, para. 15.

4 The Report specifies that an identified twenty-three incidents concerned the killing of thirty-nine individuals and the cruel treatment of two, and involved twenty-five current or former ADF personnel as either principals or accessories, “some on a single occasion and a few on multiple occasions”. *Ibid.*, Chap. 1.01, para. 16.

5 *Ibid.*, Chap. 1.01, paras 21, 74.

6 Chief of the Defence Force, “Statement on IGADF Afghanistan Inquiry”, 19 November 2020, available at: <https://news.defence.gov.au/media/media-releases/chief-defence-force-statement-igadf-afghanistan-inquiry>.

7 Scott Morrison, Linda Reynolds and Peter Dutton, “Joint Statement on IGADF Inquiry”, 12 November 2020, available at: [www.minister.defence.gov.au/minister/lreynolds/statements/joint-statement-statement-igadf-inquiry](http://www.minister.defence.gov.au/minister/lreynolds/statements/joint-statement-statement-igadf-inquiry).

an Office of the Special Investigator (OSI) to conduct criminal investigations,<sup>8</sup> as well as Defence's adoption of its Afghanistan Inquiry Reform Plan,<sup>9</sup> make a strong statement about Australia's commitment to its international law obligations. This is particularly notable when the Australian approach is contrasted with the responses to date of other members of the International Security Assistance Force (ISAF) whose personnel have been accused of committing violations of international law in Afghanistan.<sup>10</sup>

At the same time, the Brereton Report is open to critique on the basis that it provides an incomplete account of the legal framework applicable to the ADF in Afghanistan between 2005 and 2016. This matters for two reasons. The first is specific to the Australia–Afghanistan context. The scant account of applicable international humanitarian law (IHL) found in the Report raises the question of whether all of Australia's legal obligations were taken into account in assessing the lawfulness of the conduct of the ADF's operations in Afghanistan. This is relevant both to the adequacy of the measures taken in response to the alleged violations of IHL that were identified in the Report and the justice deserved by Afghan victims. The second reason is relevant both to other States and to other conflicts. It relates to the Report's specific failure to acknowledge the applicability of Additional Protocol II to the Geneva Conventions (AP II)<sup>11</sup> to Australia's operations. The question of the extraterritorial application of AP II is important because it has a clear operational impact and because it is unsettled: very few authors have addressed the issue, and only a handful go beyond an assertion as to what they claim is the proper interpretation of AP II's Article 1(1), which governs the Protocol's material field of application. The very limited works that are on point are divided, with some authors concluding that AP II does not have

8 See, further, the OSI website, available at: [www.osi.gov.au](http://www.osi.gov.au). Importantly, the OSI's mandate is not limited to investigating the individuals and incidents referred to it as a result of the recommendations of the Brereton Report. In March 2023, a former ADF member was charged with one count of the war crime of murder. This is the first war crime charge of murder to be laid against a serving or former ADF member under Australian law. The individual is expected to be the first of multiple persons to be charged with war crimes as a result of the OSI investigation. See OSI, "Former Australian Soldier Charged with War Crime", media release, 20 March 2023, available at: [www.osi.gov.au/news-resources/former-australian-soldier-charged-war-crime](http://www.osi.gov.au/news-resources/former-australian-soldier-charged-war-crime).

9 See, further, Australian Department of Defence, "Defence Response", available at: [www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response](http://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response).

10 At the International Criminal Court Assembly of States Parties meeting in December 2020, then-president Chile Eboe-Osui made specific comment on the Brereton Report and the Australian government's initial response thereto and said: "So far, these developments promise much as a correct demonstration of the doctrine of complementarity at work. There is, indeed, seldom a war in which a soldier does not commit a war crime, much to the embarrassment of their commanding officers. This is so, however disciplined the armed force in question. It is a show of leadership in the ethos of the rule of law for the national authorities concerned to conduct the appropriate inquiry and take disciplinary and prosecutorial action against the culprits. Australia deserves all the credit for the promise of being an exemplar in this regard." Chile Eboe-Osui, "Valedictory Statement and End of Mandate Overview Including Remarks Delivered at the Opening of the 19th Session of the Assembly of States Parties", 14 December 2020, available at: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/2020-ASP-Valedictory-Statement.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/2020-ASP-Valedictory-Statement.pdf).

11 Protocol Additional (II) 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 1978) (AP II).



extraterritorial effect, some reaching the opposite conclusion, and others simply saying that this as an unresolved question.<sup>12</sup>

The present article argues that where a foreign State party to AP II intervenes in a non-international armed conflict (NIAC) to which AP II applies, that intervening State is bound by AP II, in addition to the host State and armed non-State actors (ANSAs) that are parties to the NIAC. In order to set the scene, the article first canvasses the historic reluctance of States to acknowledge the existence of NIACs and the applicability of IHL, arguing that there are sound reasons to believe that this reluctance has diminished in recent years, especially for third States intervening in a foreign NIAC. Next, the Brereton Report's articulation of the legal framework applicable to the ADF's operations in Afghanistan is examined. It is shown that the Report only briefly and broadly references IHL, rather than methodically establishing that the conflict in Afghanistan was at all relevant times non-international in nature and that Australia was a party to the conflict, and identifying the IHL rules that applied to Australia's operations. In this context, the rules of treaty interpretation are applied to establish that the better view is that the relevant IHL rules included those contained in AP II – a view that Australia has in fact already put on the public record. In this context, the article concludes with an elaboration of the reasons why the Brereton Report's silence on this point matters.

## **Acknowledging the existence of non-international armed conflicts and the rules that apply therein**

Notwithstanding the occurrence of devastating international armed conflicts (IACs) in the twenty-first century, NIACs continue to represent the dominant form of armed violence around the world.<sup>13</sup> Whether a government is seeking to contain armed violence between two or more ANSAs on its territory, is itself engaged in armed violence with an ANSA, or has been asked to intervene in a situation of armed violence to help a host government defeat or contain an ANSA, the State(s) concerned (and other relevant actors) must assess whether or not a specific situation is properly characterized as a NIAC, principally because such an assessment will determine whether IHL applies as a matter of law.

It is well established that identification of a NIAC is not always straightforward: indeed, in a 2009 issue of the *International Review of the Red Cross* dedicated to the subject of conflict classification, Toni Pfanner, then editor-in-chief, described the matter as “the Achilles heel of international humanitarian law”.<sup>14</sup> It can be difficult to confirm relevant facts on the ground, but a greater challenge is posed by the fact that (1) differing and somewhat inconsistent

<sup>12</sup> See below notes 59–69 and accompanying text.

<sup>13</sup> See, for example, the Geneva Academy's Rule of Law in Armed Conflict database, available at: <https://geneva-academy.ch/research/rule-of-law-in-armed-conflicts-rulac>.

<sup>14</sup> Toni Pfanner, “Editorial”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 5.

definitions of a NIAC exist in various treaties<sup>15</sup> and under customary international law<sup>16</sup>; (2) these definitions are of such a high level of generality that they provide little guidance in non-obvious cases; (3) very few judicial decisions have concerned borderline situations, or situations determined not to amount to a NIAC; and (4) factors identified by international criminal tribunals to assist with the assessment task<sup>17</sup> are, unsurprisingly given the context in which they were developed, more suited to *ex post facto* analysis.

The first treaty provision to extend (minimal) rules of IHL to NIACs, Article 3 common to the four Geneva Conventions of 1949 (common Article 3, CA3), does not provide a definition of NIAC, but rather states that its protections apply in “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”. The drafters of CA3 deliberately refrained from including a definition.<sup>18</sup> In part this was because it proved impossible to agree on a set of criteria, but it was also because, at the time, a majority of States were resistant to the notion of IHL applying in NIACs, and did not want the application of the rules to have any degree of automaticity.<sup>19</sup> This was a consequence of the fact that (1) States were opposed to the general idea of international law governing matters wholly within their borders (which was in turn perceived as enabling the interference of external

15 Principally, AP II, Art. 1(1); Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(d), 8(2)(f).

16 It is broadly agreed that the customary definition of a NIAC (which also establishes the applicability of Article 3 common to the four Geneva Conventions (common Article 3, CA3)) is that set out in International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-940101A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1996, para. 70, which defined a NIAC as existing whenever there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.

17 See, for example, ICTY, *The Prosecutor v. Fatmir Limaj, Isah Musliu and Haradin Bala*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 86; ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 49; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras 177, 178, 183; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment (Appeals Chamber), 19 May 2010, paras 22, 177; ICTY, *The Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Judgment with Confidential Annex (Trial Chamber), 23 February 2011, para. 1523.

18 International Committee of the Red Cross (ICRC), *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross*, Geneva, July 26–August 3, 1946, pp. 14–15, available at: [https://library.icrc.org/library/docs/CD/CSN\\_1946\\_CONFPRE\\_ENG\\_01.pdf](https://library.icrc.org/library/docs/CD/CSN_1946_CONFPRE_ENG_01.pdf); ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14–26 April 1947), pp. 8–9; ICRC, *Revised and New Draft Conventions for the Protection of War Victims*, Approved and Amended by the 17th International Red Cross Conference, Geneva, 1948, Art. 2, pp. 9–10, available at: [https://library.icrc.org/library/docs/CI/CI\\_1948\\_PROJET\\_ENG\\_01.pdf](https://library.icrc.org/library/docs/CI/CI_1948_PROJET_ENG_01.pdf); *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, Federal Political Department, Berne, 1949, Special Committee of the Joint Committee, Summary Records of 41 Meetings, Reports to the Joint Committee and Report to the Plenary Assembly, pp. 40–50, 78–79, 82–84, 93–95, 97–102, 107–109, 120–129, available at: [https://library.icrc.org/library/docs/CD/CD\\_1949\\_ACTES\\_ENG\\_25.pdf](https://library.icrc.org/library/docs/CD/CD_1949_ACTES_ENG_25.pdf), and Minutes of the Plenary Meetings, pp. 268–269, 325–339, available at: [https://library.icrc.org/library/docs/CD/CD\\_1949\\_ACTES\\_ENG\\_29.pdf](https://library.icrc.org/library/docs/CD/CD_1949_ACTES_ENG_29.pdf).

19 Boyd Van Dijk, *Preparing for War: The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2020, pp. 116–117, 122, 124, 125, 103, 134, 143.

actors);<sup>20</sup> (2) States were concerned that the applicability of IHL rules in NIACs would confer a degree of recognition on ANSAs (undermining the authority of the government, and providing an opportunity for ANSA conduct to be characterized as “acts of war” in order to escape criminal punishment);<sup>21</sup> and (3) the applicable IHL rules were seen as a constraint on a State’s freedom of action,<sup>22</sup> as reflected in the fact that the prevailing view of humanitarians at the time was that IHL should be applied as widely as possible.<sup>23</sup>

Perhaps inevitably, the omission of a definition allowed many States to deny the applicability of CA3 to situations of armed violence. This resistance in large part explains why, when more elaborate rules applicable in NIACs were adopted under AP II, its scope of application was carefully restricted under Article 1(1), which refers to

all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>24</sup>

20 As expressed by the ICTY Appeals Chamber, “States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This ... was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands”. ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-I-AR72, Decision (Appeals Chamber), 2 October 1995, para. 96; David Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 21–22.

21 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 43–44; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, The Hague, 2013, pp. 693–694; Fionnuala Ní Aoláin, “The Relationship Between Situations of Emergency and Low-Intensity Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 28, 1998, pp. 100–101; B. Van Dijk, above note 19, pp. 114–116, 118, 122, 132. This accounts for the inclusion of paragraph 4 of CA3, which provides that “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

22 Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2015, p. 37; 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, 2013, pp. 268–269; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, p. 57; D. Kretzmer, above note 20, pp. 21–22.

23 J. Pictet (ed.), above note 21, p. 50.

24 Paragraph 2 of Article 1 further specifies that the Protocol does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

As a result of the threshold criteria set out in Article 1(1), it is generally agreed that while CA3 applies in all NIACs, as a matter of treaty law AP II applies to a more limited subset of NIACs—the price paid for reaching agreement on (somewhat) more expansive rules. Specifically, AP II only applies to those NIACs to which governmental armed forces are a party. The application of AP II also requires a greater degree of organization on the part of ANSAs in addition to requiring that ANSAs exercise control over territory, such that they are able to carry out sustained and concerted military operations and implement the Protocol. Finally, it is generally agreed that AP II requires a higher intensity of violence compared to the threshold of hostilities required for a situation of armed violence to be classified as a NIAC generally.<sup>25</sup>

Since CA3 and AP II were concluded, the reach of international law into internal matters has been normalized, at least to a degree, with the growth of international human rights law (IHRL) and international criminal law in particular, such that resistance to the applicability of international law to matters taking place wholly within the borders of a State is not as sharp as it was at the time of the adoption of the Geneva Conventions and their Additional Protocols.<sup>26</sup> With the emergence of ANSAs with sophisticated transnational capacity, such as Al-Qaeda and ISIS, recognition also appears to have become a second-order

25 On the distinction between NIACs governed by CA3 and customary IHL and those to which AP II also applies, see Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), paras 4447, 4453, 4457; Sylvie Junod, “Additional Protocol II: History and Scope”, *American University Law Review*, Vol. 33, No. 1, 1983, pp. 35–38; International Law Association, Use of Force Committee, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague, 2010, pp. 12–13; Dietrich Schindler, *The Different Types of Armed Conflict According to the Geneva Conventions and Protocols*, Hague Academy of International Law, The Hague, 1979, pp. 148–149; Derek Jinks, “September 11 and the Laws of War”, *Yale Journal of International Law*, Vol. 28, 2003, pp. 26–27; Jelena Pejic, “Status of Armed Conflicts”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 87–88; Sylvain Vit  , “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 75–80; A. Cullen, above note 22, pp. 102–107; David Graham, “Defining Non-International Armed Conflict: A Historically Difficult Task”, *International Law Studies*, Vol. 88, 2012, p. 47; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 182–192; D. Akande, above note 22, pp. 51–56; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 38–48; M. Milanovic and V. Hadzi-Vidanovic, above note 22, pp. 24–28; Marco Pedrazzi, “Additional Protocol II and Threshold of Application”, in Fausto Pocar and Gian Luca Beruto (eds), *International Institute of Humanitarian Law: The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives; 40th Round Table on Current Issues of International Humanitarian Law*, Milan, FrancoAngeli, 2018, pp. 48–51; Jann Kleffner, “The Legal Fog of Illusion: Three Reflections on Organisation and Intensity as Criteria for the Scope of the Law of Non-International Armed Conflict”, *International Law Studies*, Vol. 95, 2019, pp. 163–164; Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Northampton, 2019, pp. 180–184; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Pierre Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 618; ICTR, *The Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence (Trial Chamber), 6 December 1999, para. 94.

26 This process arguably reached a high point with the adoption of the 2005 *World Summit Outcome Document*, paras 138–139 of which articulate States’ understanding of the Responsibility to Protect. 2005 *World Summit Outcome Document*, UNGA Res. 60/1, 16 October 2005.

issue.<sup>27</sup> Perhaps more importantly, with the development of IHRL, the perception that a law enforcement characterization of a situation of armed violence provides greater freedom of action has greatly receded, such that it is now widely acknowledged that IHL's rules are more permissive than those of IHRL, particularly in relation to the use of lethal force and detention, and thus carry an operational advantage for States.<sup>28</sup> As Claus Kreß has written, in the context of his argument that the threshold for the application of customary IHL is likely congruous with that of CA3,

[a]t first glance, this expansion of the scope of application of the law of non-international armed conflict may seem surprising because it implies the recognition by States to be bound by quite a wide range of obligations flowing from international humanitarian law. ... Yet, in light of the (perceived) threat posed by violent non-State actors, States seem to be 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 [IHL's] obligations.<sup>29</sup>

At the same time, States are increasingly conscious of the fact that their failure to set out their views consistently on the proper interpretation of IHL's rules (including the test for the legal framework's applicability) has created a vacuum that has been filled by other actors, including courts and tribunals, the International Committee of the Red Cross (ICRC), expert groups, and scholars, in a way that might not always reflect the position of States,<sup>30</sup> leading at least some States to attempt to reclaim this space.<sup>31</sup> In addition, the growth of international criminal

27 See, further, Tom Kaden and Christoph Günther, "Shifting Recognition Orders: The Case of the Islamic State", in Anna Geis, Maéva Clément and Hanna Pfeifer (eds), *Armed Non-State Actors and the Politics of Recognition*, Manchester University Press, Manchester, 2021, p. 88.

28 Eliav Lieblich, *International War and Civil Wars: Intervention and Consent*, Routledge, London, 2013, p. 50; M. Milanovic and V. Hadzi-Vidanovic, above note 22, pp. 306–307; M. Sassòli, above note 25, p. 183; D. Kretzmer, above note 20, pp. 21–25; Rob McLaughlin, "Legal-Policy Considerations and Conflict Characterisation at the Threshold between Law Enforcement and Non-International Armed Conflict", *Melbourne Journal of International Law*, Vol. 13, No. 1, 2012, pp. 104–105; Sasha Radin and Jason Coats, "Autonomous Weapons Systems and the Threshold of Non-International Armed Conflict", *Temple International and Comparative Law Journal*, Vol. 30, No. 1, 2016, pp. 138–139.

29 Claus Kreß, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, p. 260.

30 Michael N. Schmitt and Sean Watts, "The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare", *Texas International Law Journal*, Vol. 50, Symposium Issue 2, 2015; Sandesh Sivakumaran, "Making and Shaping the Law of Armed Conflict", *Current Legal Problems*, Vol. 71, No. 1, 2018; Nora Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals", *Leiden Journal of International Law*, Vol. 31, No. 4, 2018; Carrie McDougall, "The Other Enemy: Transnational Terrorists, Armed Attacks and Armed Conflicts", in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, Cambridge, 2018, pp. 245–251; Knut Dörmann, "The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law", *Journal of Transnational Law*, Vol. 51, No. 3, 2018.

31 For an explanation of this phenomenon, see the position of US and Australian legal advisers: Harold Koh, "The Legal Adviser's Duty to Explain", *Yale Journal of International Law*, Vol. 41, No. 1, 2016; Brian Egan, "International Law, Legal Diplomacy and the Counter-ISIL Campaign: Some Observations",

law means that the consequences of violating IHL are now more real, at least where a relevant court or tribunal has jurisdiction, such that there may be a pressing need to accurately identify the applicable rules of IHL. In situations where one or more foreign States are intervening in a situation of violence at the request of a host State, it is also desirable for military partners to have shared views on the classification of a situation for reasons such as coalition-building and interoperability, as well as public messaging. In other words, while States once deliberately maintained ambiguity, there is reason to believe that at least some States today see an imperative to classify situations of armed violence accurately and to precisely determine the rules of IHL that apply therein.<sup>32</sup>

### **The Brereton Report's description of the legal framework that governed the ADF's operations in Afghanistan**

There is certainly no evidence of any reluctance to identify the situation in Afghanistan as a NIAC in the Brereton Report – although the Report's articulation of the IHL rules applicable to the ADF in Afghanistan leaves much to be desired.

In describing the legal framework applicable to ADF operations in Afghanistan between 2005 and 2016, the Assistant Inspector-General of the Australian Defence Force, Major-General the Hon. Paul Brereton, author of the Report, states:

The Government of Australia rightly considered the conflict in Afghanistan to be an armed conflict not of an international character; that is, a conflict between the sovereign Afghan Government on the one hand and insurgents, foreign fighters and remnants or supporters of the former Taliban regime on the other. Thus, Common Article 3 of the Geneva Conventions applies as a matter of legal obligation. In addition, certain provisions of the Geneva Conventions are applicable as a matter of customary international law. As established customary international law, Common Article 3 applied to all ISAF members, as was recognised by the US Supreme Court in 2005, in *Hamdan v Rumsfeld*.<sup>33</sup>

The Report then states: "It follows that the applicable offences in Division 268 of the Criminal Code are those concerned with war crimes committed in the course of an armed conflict that is not an international armed conflict, and in particular those in

*International Law Studies*, Vol. 92, 2016, pp. 244-245; John Reid, "Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions", *ILA Reporter*, 9 November 2016, available at: <https://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/>.

32 This may not necessarily correspond to a willingness to concede publicly that a NIAC is in existence: as Rob McLaughlin has explained in detail, there are "significant political, social, operational, reputational and economic consequences that flow from a characterisation decision". R. McLaughlin, above note 28, p. 107.

33 Brereton Report, above note 1, Chap. 1.10, para. 11; see also para. 14.



Subdivisions F and G.”<sup>34</sup> As the Report notes, Subdivisions F and G of the Australian Commonwealth Criminal Code respectively mirror Articles 8(2)(c) and 8(2)(e) of the Rome Statute of the International Criminal Court, with Subdivision F containing war crimes that are serious violations of CA3, and Subdivision G covering war crimes that are “other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict”.<sup>35</sup> The Report concludes that the war crime of murder (Subdivision F, Section 268.70) was the offence “most relevant” to the Inquiry,<sup>36</sup> with the war crime of cruel treatment (Subdivision F, Section 268.72) identified as being “also relevant”.<sup>37</sup>

## **A critique of the Brereton Report’s analysis of the applicable international law**

The correct identification of the legal framework applicable to a military operation is crucial because it determines what bodies of international law apply, as well as the specific rules in the event that IHL is engaged, thereby informing the international obligations of the State, including under the law of State responsibility, as well as the obligations of individual personnel as a matter of international and domestic criminal law. For this reason, it is concerning that the Brereton Report’s conclusions in relation to this issue are scant (a single paragraph in the 465-page public redacted version of the Report is devoted to the identification of the applicable rules of IHL),<sup>38</sup> as well as imprecise and incomplete.

It is agreed that at all times relevant to the conduct considered by the Brereton Report, the conflict in Afghanistan was properly classified as a NIAC. This classification of the conflict is widely accepted,<sup>39</sup> but it would have been

34 *Ibid.*, Chap. 1.10, para. 12.

35 *Ibid.*, Chap. 1.10, para. 16.

36 *Ibid.*, Chap. 1.10, para. 19.

37 *Ibid.*, Chap. 1.10, para. 21. It is noted that Sections 268.70 and 268.72 of the Commonwealth Criminal Code were amended by the Criminal Code Amendment (War Crimes) Act 2016 (Cth) at the end of 2016, with the effect of narrowing the scope of the offences such that they now exclude actions taken against members of an organized armed group (in addition to persons not taking an active part in the hostilities). The controversial amendments only had prospective effect and thus do not apply to the conduct that is the subject of the Brereton Report.

38 Brereton Report, above note 1, Chap. 1.10, para. 11. An additional fourteen paragraphs set out the applicable crimes under the Commonwealth Criminal Code, with a following fifteen paragraphs concerning accessory liability, and four paragraphs devoted to defences, before the chapter turns to consider the role of the Attorney-General and the International Criminal Court in war crimes prosecutions, and finally the Defence Force Discipline Act 1982 (Cth). Compare this, for example, to the fifty-nine pages devoted to a historical review of Australia’s approach to allegations of war crimes in Chapter 1.08 of the Report.

39 See, for example, Michael N. Schmitt, “Targeting and International Humanitarian Law in Afghanistan”, *Israel Yearbook on Human Rights*, Vol. 39, 2009, pp. 100–101; Robin Geiß and Michael Siegrist, “Has the Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 13–15; Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, “International Law and Armed Non-State Actors in Afghanistan”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 51–52.



useful for the Report to have included a brief explanation for the conclusion, given that it is not something that is obvious to a non-expert reader. This could have been done succinctly. In 2001, there was a pre-existing NIAC in Afghanistan between the Taliban government and the Northern Alliance. The initial use of force by the United States and United Kingdom against Afghanistan in response to the 9/11 attacks gave rise to an IAC that came into existence in parallel to this NIAC. Following the conclusion of the Bonn Agreement in December 2001 and the UN Security Council's establishment of ISAF under Resolution 1386<sup>40</sup> in June 2002, the Loya Jirga was convened that established the Karzai government, which was recognized as the authority in effective control in Afghanistan. Thus, in late 2001, or mid-2002 at the latest, the IAC ended, and (generally speaking) ISAF members became party to the NIAC between the government of Afghanistan on the one hand and a range of ANSAs (including the Taliban and Al-Qaeda) on the other. This reflects the prevailing view that when one or more foreign States intervene in support of a host government that is a party to a NIAC, that armed conflict retains its non-international character (as distinct from a scenario where a foreign State intervenes in support of an ANSA).<sup>41</sup>

The Brereton Report fails to consider whether Australia's participation in ISAF made it a party to the NIAC in Afghanistan as a matter of law. IHL does not clearly articulate a test for when a State becomes, or for that matter ceases to be, a party to an armed conflict. Assessments generally hinge on the degree and nature of a State's participation in military operations. The ICRC has advanced a support-based approach that focuses on the issue of whether an intervening State's activities "have a direct impact on the opposing Party's ability to carry out military operations", distinguishing this from activities "that enable the Party that benefits from the participation of the multinational forces to build up its military capacity/capabilities",<sup>42</sup> although some have criticized this as setting the bar too low.<sup>43</sup> Nevertheless, in light of the fact that Australia was involved directly in combat operations against the ANSAs in Afghanistan over an extended period of time, it can safely be concluded that from 2005, Australia was a party to the NIAC in Afghanistan as a matter of law.

40 UNSC Res. 1386, 20 December 2001.

41 Lindsey Cameron *et al.*, "Article 3 – Conflicts Not of an International Character", in 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, para. 404.

42 *Ibid.*, para. 446; 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, p. 1231. According to Ferraro, for an intervening State to become a party to a NIAC, the following conditions must be satisfied: "(1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict."

43 Marten Zwanenburg, "Remarks at the 'Peace Forces at War: Implications under International Humanitarian Law' Panel", *Proceedings of the Annual Meeting of the American Society of International Law*, vol. 108, 2014, p. 152.

What is not canvassed in the Brereton Report is the fact that Australia's last combat troops were withdrawn from Afghanistan in December 2013, with 400 personnel remaining in Afghanistan as part of a train, advise and assist mission.<sup>44</sup> Advisers, support staff and force protection elements were assigned to the Afghan National Army Officer Academy and the Special Operations Advisory Group based in Kabul, with additional advisory support provided to the Afghan National Army's 205 Corps Headquarters in Kandahar, and embedded staff in ISAF Headquarters. Until the end of 2014, Australia also assisted with the provision of intelligence, surveillance and reconnaissance through the provision of remotely piloted aircraft.<sup>45</sup> Following the end of the ISAF Mission at the end of 2014, Afghanistan took the lead on its own security. In October 2015, Australian operations were scaled back further to 250 personnel fulfilling advisory and mentoring roles, and embedded roles in the Afghanistan security ministries and at NATO Headquarters.<sup>46</sup> Whether the post-2013 Australian mission involved any activities "beyond the wire" that would enable a conclusion to be reached that Australia continued to be a party to the NIAC in Afghanistan is somewhat unclear. On the basis of publicly available information, it seems not to be the case. If this is correct, it would mean that, contrary to what is stated in the Brereton Report, Australia was not in fact bound by IHL as a matter of international law for the final three years of the scope of the IGADF Inquiry.<sup>47</sup>

It is uncontroversial to conclude that as a party to the NIAC in Afghanistan (from 2005 until at least the end of 2013), the ADF was bound to apply CA3. As quoted above, the Brereton Report states that CA3 "applies as a matter of legal obligation". Confusingly, it then goes on to state that "*as established customary international law*, CA3 applied to all ISAF members". It is thus unclear whether Justice Brereton is of the view that Australia's obligations under CA3 arise as a matter of treaty or customary international law, or both. Moreover, contrary to what is asserted in the Report, the decision of the US Supreme Court in *Hamdan v. Rumsfeld*<sup>48</sup> provides no support for the proposition that CA3 applies to all parties to NIACs as a matter of customary international law.<sup>49</sup>

44 Australian Department of Defence, "Changes to Middle East Operations Now in Place", media release, 30 June 2014, available at: <https://web.archive.org/web/20140826120544/http://news.defence.gov.au/stories/2014/06/operational-restructure-middle-east-region/>.

45 Australian Department of Defence, "Minister for Defence Visit to Afghanistan", media release, 3 September 2014, available at: [www.minister.defence.gov.au/media-releases/2014-09-03/minister-defence-minister-defence-visit-afghanistan](http://www.minister.defence.gov.au/media-releases/2014-09-03/minister-defence-minister-defence-visit-afghanistan).

46 Australian Department of Defence, "Minister for Defence – ADF Completes Training Mission in Afghanistan", media release, 2 October 2015, available at: [www.minister.defence.gov.au/media-releases/2015-10-02/minister-defence-adf-completes-training-mission-afghanistan](http://www.minister.defence.gov.au/media-releases/2015-10-02/minister-defence-adf-completes-training-mission-afghanistan).

47 It is acknowledged that while the temporal scope of the IGADF Inquiry was 2005 to 2016, the chronology of events investigated dates from 2006 to 2013: see Brereton Report, above note 1, Chap. 1.01, Annex B.

48 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557 (2006), 2006.

49 The case concerned a successful constitutional challenge to the legality of the military commissions established to try detainees at Guantanamo Bay on the basis that the Bush administration did not have authority to set up the commissions without congressional authority because they did not comply with the US Uniform Code of Military Justice or the Geneva Conventions. The US government controversially argued that the Geneva Conventions did not apply because the conflict between the United States and Al-Qaeda (in the context of which Hamdan had been captured and detained, and

What *Hamdan* does provide authority for is the proposition that CA3, as a matter of treaty law, has extraterritorial effect. Indeed, it is widely agreed that CA3 must be applied by all States party to one or more of the Geneva Conventions that are a party to a NIAC (i.e., the territorial State, as well as any foreign States and multinational forces operating under national command and control that intervene in support of the territorial State), as well as the ANSAs involved.<sup>50</sup> As such, even though it was operating extraterritorially, the better view is that, as a party to the NIAC in Afghanistan, Australia was bound to apply CA3 as a matter of treaty law. To the extent that there is any room to doubt this conclusion, it is clear that Australia was bound to apply the minimum guarantees contained in CA3 as a matter of customary international law.<sup>51</sup>

In the current context, the more significant point to be made in relation to customary international law concerns the Brereton Report's assertion that "certain

which the US government sought to distinguish from its conflict with the Taliban) was "international in scope" and thus did not qualify as a conflict not of an international character under CA3, and fell outside common Article 2 (which establishes the applicability of the balance of the Conventions) because that provision only applies to conflicts between States party to the Conventions. The Supreme Court did not consider the merits of the government's submissions in relation to common Article 2 because it found that at least CA3 was applicable on the basis that "[t]he term 'conflict not of an international character' is used here in contradistinction to a conflict between nations": *ibid.*, p. 67. While the decision has been widely welcomed for rejecting the US government's argument that a conflict with a transnational terrorist organization is unregulated by IHL because it falls outside the traditional IAC/NIAC dichotomy, it has been criticized for failing to engage in any detail on the complex issues relating to the classification of armed conflicts under common Articles 2 and 3 generally or the US engagement in hostilities in Afghanistan in particular: see, for example, Fionnuala Ní Aoláin, "Hamdan and Common Article 3: Did the Supreme Court Get It Right?", *Minnesota Law Review*, Vol. 91, No. 5, 2007, p. 1523; Eran Shamir-Borer, "Revisiting *Hamdan v. Rumsfeld*'s Analysis of the Laws of Armed Conflict", *Emory International Law Review*, Vol. 21, 2007, p. 601. The decision does not consider the customary status of CA3 as a whole, nor does it consider the application of that article to States other than the United States.

- 50 L. Cameron *et al.*, above note 41, paras 473, 510; 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, pp. 11–17; Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 258–259; M. Milanovic and V. Hadzi-Vidanovic, above note 22, p. 31.
- 51 International Court of Justice, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1987, p. 14, para. 218; ICTY, *Tadić*, above note 16, para. 128; ICTR, *Akayesu*, above note 25, para. 608; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rules 87, 88, 89, 90, 92, 96, 100, 109, 110, available at: <https://ihl-databases.icrc.org/en/customary-ihl>; Françoise Hampson, "Fundamental Guarantees", in E. Wilmshurst and S. Breau (eds), above note 25, pp. 289–292, 299. Indeed, the Rome Statute's *travaux préparatoires* document the fact that a majority of States consider not only that CA3 prohibitions have attained customary status, but also that their violation amounts to a crime under customary international law: see, for example, Hermann von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer International, The Hague, 1999, pp. 89, 104, 123; William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 23; Michael Bothe, "War Crimes", 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. 379; Andreas Zimmermann and Robin Geiß, "Article 8, Para 2(c)–(f) and Para 3: War Crimes Committed in an Armed Conflict not of an International Character", in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Bloomsbury, London, 2016, pp. 542–543; Eva La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, pp. 52–53.

provisions of the Geneva Conventions are applicable as a matter of customary international law”. It is undoubtedly true that customary rules mirroring various provisions of the Geneva Conventions apply in NIACs, but such a conclusion is not particularly helpful given that it provides no guidance as to which rules exactly apply. The statement is also incomplete: the rules of customary international law applicable in NIACs do not exclusively derive from the Geneva Conventions, but also stem from Additional Protocols I<sup>52</sup> and II, and other treaties, such as those prohibiting the use of various weapons and the recruitment and use of child soldiers.

## The Brereton Report’s silence on Additional Protocol II

The Brereton Report’s most significant omission is its failure to refer to the applicability of AP II to the ADF’s operations in Afghanistan.

Debates as to whether AP II applies to a particular NIAC commonly hinge on whether the ANSA party or parties in question are sufficiently organized and in fact exercise control over territory, and whether hostilities have met the requisite intensity threshold. These issues are not particularly controversial in the Afghan context. It was widely accepted that during the relevant period there were continuous hostilities between the government of Afghanistan and a number of ANSAs,<sup>53</sup> including the Taliban, which (1) had a membership in the tens of thousands;<sup>54</sup> (2) employed a hierarchical command structure that was able to replace leaders who were killed, and in some parts of Afghanistan resembled a shadow State;<sup>55</sup> (3) was governed by successively published codes of conduct (the Layeha for Mujahideen), which included organizational and administrative provisions as well as rules relating to the conduct of hostilities and accountability

52 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

53 The extent of hostilities is indicated by the high number of persons killed and wounded year on year: see Neta C. Crawford, “Update on the Human Costs of War for Afghanistan and Pakistan, 2001–mid-2016”, Costs of War Project, Watson Institute of International and Public Affairs, Brown University, August 2016, [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE\\_FINAL\\_corrected%20date.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE_FINAL_corrected%20date.pdf).

54 Estimates for different years vary, but tend to range from 15,000 to 80,000. See, for example, Gilles Dorransoro, “Waiting for the Taliban in Afghanistan”, Carnegie Endowment for International Peace, 20 September 2012, available at: <https://carnegieendowment.org/2012/09/20/waiting-for-taliban-in-afghanistan-pub-49419> (estimating 50,000 members in 2012); Yoshinobu Nagamine, *The Legitimization Strategy of the Taliban’s Code of Conduct: Through the One-Way Mirror*, Palgrave Macmillan, New York, 2015, pp. 22–23 (estimating 15,000–40,000 in 2012).

55 Niaz A. Shah, “The Taliban Layeha for Mujahidin and the Law of Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 3, No. 1, 2012, pp. 207–210; Peter Bergen, “U.S. Intelligence Briefing: Taliban Increasingly Effective”, *Foreign Policy*, 25 January 2010, available at: <http://edition.cnn.com/2010/WORLD/asiapcf/01/25/afghanistan.taliban/index.html>; Theo Farrell and Antonio Giustozzi, “The Taliban at War: Inside the Helmand Insurgency, 2004–2012”, *International Affairs*, Vol. 89, No. 4, 2013, pp. 855–867; Thomas H. Johnson and Matthew C. Dupee, “Analysing the New Taliban Code of Conduct (*Layeha*): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban”, *Central Asian Survey*, Vol. 31, No. 1, 2012, pp. 85–86.

in the event of violation of those rules;<sup>56</sup> and (4) exercised effective control of a significant overall percentage of the country.<sup>57</sup> As such, there is little dispute that AP II applied to at least the conflict between the government of Afghanistan and the Taliban.<sup>58</sup>

The key issue that arises in the context of ADF operations in Afghanistan is not whether the NIAC in Afghanistan met the higher applicability thresholds found in AP II compared to CA3, but whether the Protocol has extraterritorial effect, such that it applied to those AP II States Parties that intervened in the NIAC. As noted above, Article 1(1) states that the Protocol applies to “all armed conflicts” that are not covered by AP I “and which take place *in the territory* of a High Contracting Party between *its* armed forces and dissident armed forces” (emphasis added). This is followed by the requirement that dissident armed forces control “part of *its* territory” (emphasis added). While this clearly requires the territorial State to be a party to AP II, and for the requirements of an AP II NIAC between the territorial State and one or more dissident armed forces to have been met, the formulation raises the question of whether AP II obligations are only owed by States Parties in respect to NIACs on their own territory (and their ANSA adversaries that meet the criteria set out in Article 1(1)), or whether a State party to AP II that intervenes in an AP II NIAC on the territory of another State Party is also bound to apply the Protocol’s rules.

Admittedly, available State practice on this interpretive question is quite limited, the ICRC’s influential Commentary on AP II is silent on the matter, and academic work on the issue is threadbare. The little academic opinion that does exist is divided. Jelena Pejic,<sup>59</sup> Sylvain Vité,<sup>60</sup> and Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen<sup>61</sup> are of the view that a State party to AP II intervening in a qualifying NIAC on the territory of another State Party is bound to apply the Protocol’s rules, although only Bellal and her co-authors put forward any

56 Y. Nagamine, above note 54, pp. 27–43, 92–101, Annex III; Muhammad Munir, “The *Layha* for the *Mujahideen*: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011; N. Shah, above note 55, pp. 192–229; T. H. Johnson and M. C. Dupee, above note 55, pp. 77–91. I am grateful to Azadah Mariam Raz Mohammad for sharing information regarding the Layeha for Mujahideen with me.

57 Percentage estimates vary year-on-year, but appear to be at least 30%. See, for example, Ken Silanian, “Taliban Control of Afghanistan Highest since U.S. Invasion”, *NBC News*, 30 January 2016, [www.nbcnews.com/news/us-news/taliban-control-afghanistan-highest-u-s-invasion-n507031](http://www.nbcnews.com/news/us-news/taliban-control-afghanistan-highest-u-s-invasion-n507031).

58 See, for example, A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, pp. 56–58; M. Munir, above note 56, p. 84; Dapo Akande, “Afghanistan Accedes to the Additional Protocols to Geneva Conventions: Will APII Govern the Conflict in Afghanistan?”, *EJIL: Talk!*, 30 June 2009, available at: [www.ejiltalk.org/afghanistan-accedes-to-additional-protocols/](http://www.ejiltalk.org/afghanistan-accedes-to-additional-protocols/); UN Assistance Mission in Afghanistan and UN Office of the High Commissioner for Human Rights, *Afghanistan: Annual Report 2011: Protection of Civilians in Armed Conflict*, Kabul, February 2012, p. iii, available at: [https://unama.unmissions.org/sites/default/files/unama\\_poc\\_report\\_final\\_feb\\_2012.pdf](https://unama.unmissions.org/sites/default/files/unama_poc_report_final_feb_2012.pdf). The press release issued by the ICRC on the occasion of the Afghan government’s accession to AP II also implies that it expected the Protocol to be immediately implemented: ICRC, “Afghanistan Accedes to Additional Protocols I and II in Historic Step to Limit Wartime Suffering”, media release, 24 June 2009, available at: [www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/afghanistan-news-240609.htm](http://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/afghanistan-news-240609.htm).

59 J. Pejic, above note 25, p. 92.

60 S. Vité, above note 25, p. 80.

61 A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, pp. 60–61.

arguments in support of this contention – namely, that such a conclusion “better fits” with the language of Article 1(1), is more in line with the object and purpose of the Protocol, and allows for a more practical application of the law.<sup>62</sup> Nils Melzer,<sup>63</sup> Dapo Akande,<sup>64</sup> and Robin Geiß and Michael Siegrist<sup>65</sup> claim that foreign States intervening in NIACs are not bound by AP II, although the authors advance no arguments in support of this conclusion beyond an assertion as to what they claim is the proper interpretation of Article 1(1). Martha Bradley concludes that AP II exclusively applies to the armed forces of the territorial State fighting an organized armed group that satisfies the requirements of AP II inside the borders of the territorial State based on her application of the rules of treaty interpretation to the Protocol’s Article 1(1).<sup>66</sup> Yoram Dinstein identifies the question as an outstanding issue, saying that “strictly speaking” the text of Article 1(1) “invites the conclusion that AP II is inapplicable” but that “[a] more lenient deciphering of Article 1(1), based on the spirit rather than the letter of the text”, would see AP II apply.<sup>67</sup> A similar view has been expressed by Andrew Clapham, who states that “[f]rom a humanitarian perspective it makes no sense to deny the applicability of the protective measures in the Protocol to conflicts where the state is a party to the Protocol but the fighting takes place outside its borders”.<sup>68</sup> However, he goes on to note that not all share this view and that this is an issue that could usefully be clarified.<sup>69</sup>

Notwithstanding the limited authority, I am of the view that the applicability of AP II to the ADF’s operations in Afghanistan was clear.

As with any question of the proper interpretation of a treaty, the starting point must be Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).<sup>70</sup> The general rule of treaty interpretation requires a treaty to 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.” In concluding that AP II does not apply to intervening foreign forces, Bradley also starts with Article 31(1) of the VCLT. However, she only considers the meaning of the words “in” and “its” and the compound term “High

62 *Ibid.*

63 N. Melzer, above note 50, p. 257; David Turns, “*Jus ad Pacem in Bello?* Afghanistan, Stability Operations and International Law Relating to Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 230.

64 D. Akande, above note 22, p. 55.

65 R. Geiß and M. Siegrist, above note 39, p. 16.

66 Martha M. Bradley, “Classifying Non-International Armed Conflicts: The ‘Territorial Control’ Requirement under Additional Protocol II in an Era of Complex Conflicts”, *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 2, 2020, pp. 358–363, 383. The focus of Bradley’s article is on “spillover conflicts”, but she also contemplates scenarios where foreign AP II States Parties intervene in an AP II NIAC.

67 Yoram Dinstein, *Non-International Armed Conflict in International Law*, 2nd ed., Cambridge University Press, Cambridge, 2021, p. 117.

68 Andrew Clapham, “Defining Armed Conflicts under the Additional Protocols: Is there a Need for Further Clarification?”, in F. Pocar and G. L. Beruto (eds), above note 25, p. 38.

69 *Ibid.*, p. 39.

70 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980).



Contracting Party” and relies on dictionary definitions of these terms, ignoring both other terms and phrases found in Article 1(1), and their context as that concept is defined in Article 31(2) of the VCLT.<sup>71</sup> Further, while Bradley opines that “[t]he specific purpose of this treaty is to offer protection to the victims of NIACs”, she does not take this object and purpose into account in identifying the ordinary meaning of the terms in Article 1(1). Rather, initially, she seems to conflate object and purpose with the circumstances of AP II’s conclusion when she says (immediately after identifying the object and purpose):

It is possible to maintain that as the treaty was drafted in the context of civil war and at the time did not contemplate complex conflicts including cross-border conflicts it can be taken to mean that the armed conflict must occur in the territory of a single State.<sup>72</sup>

Article 32 of the VCLT of course specifically refers to the circumstances of a treaty’s conclusion, enabling this to be considered as a supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine meaning when the Article 31 exercise leaves the meaning of treaty text ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable – an aspect of the rules of treaty interpretation not canvassed by Bradley. Bradley does revisit the object and purpose of AP II in a later section of her article dedicated to an examination of the territorial scope of AP II in the context of spillover conflicts: here she states that “[a] humanitarian approach or purposive approach from a humanitarian perspective would interpret a provision of a relevant IHL treaty as offering greater protection to the victims of NIACs”.<sup>73</sup> She thus concedes that “the purposive or humanitarian approach to the territorial requirement of Additional Protocol II” supports the reading that the Protocol has extraterritorial effect.<sup>74</sup> She concludes, however, that “the consideration of the object and purpose of a treaty cannot be used to counter a clear substantive provision”, and she asserts that Article 1(1) “clearly determines” a restrictive interpretation<sup>75</sup> – a matter that, as noted above, her article does not in fact convincingly establish. Finally, Bradley asserts that the drafting history of AP II confirms her preferred interpretation, although the only authority she provides in support of this assertion is a footnoted citation referencing a single document in the *travaux*: neither its content nor its relationship to her preferred interpretation is provided.<sup>76</sup> A review of the document cited, a Brazilian proposal to amend Article 1(1), sheds no light on the interpretive issue at hand given that it does not address the question of whether or not AP II was intended to have extraterritorial effect.<sup>77</sup>

71 M. M. Bradley, above note 66, pp. 359–360.

72 *Ibid.*, p. 360.

73 *Ibid.*, p. 368.

74 *Ibid.*

75 *Ibid.*, p. 69.

76 *Ibid.*, p. 360 fn. 56.

77 The Brazilian Proposal (Doc. CDDH/I/79, 21 March 1974, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict*, Vol. 4, Federal Political Department, Berne, 1978, p. 8, available at:



For all of these reasons, I would submit that the interpretive exercise engaged in by Bradley is lacking in a number of respects and, as such, is not compelling.<sup>78</sup>

Indeed, I would suggest that a rigorous application of Article 31(1) of the VCLT to Article 1(1) of AP II in fact leads to the opposite conclusion. Article 1 (1) of AP II requires, *inter alia*, that one of the parties to the armed conflict in question be the armed forces of the State, and that the opposing dissident armed forces or organized armed group(s) meet requirements relating to responsible command, and control of territory. To read the reference to the host State and the dissident armed force/organized armed group as not only threshold requirements but also an exhaustive list of the parties to such a conflict that are bound to apply AP II would require those references to do double duty, and would ignore the conjunctive “and” that follows the reference to AP I. For this reason, the better view is that a good-faith interpretation of Article 1(1), in accordance with the ordinary meaning of its words, provides that the Protocol applies to *all* armed conflicts that meet the threshold requirements set out in Article 1(1). In other words, the requirement that an armed conflict involve the armed forces of the High Contracting Party in whose territory the conflict takes place should be viewed as a threshold requirement, and not as a factor that excludes the application of the Protocol to the armed forces of foreign States participating in the NIAC alongside the armed forces of the host State. Put another way, if AP I does not apply, and if an armed conflict is taking place on the territory of a High Contracting Party between its armed forces and organized armed groups that meet the requisite threshold tests, then AP II applies to “the armed conflict” as a whole. This means that the words “shall apply to all armed conflicts” are determinative, such that a State which is party to AP II and which intervenes in an AP II NIAC on the territory of another State Party is bound to apply the Protocol’s rules.

A reference to the object and purpose of AP II supports this interpretation. The preamble to AP II confirms that one of its key objectives is to “ensure a better protection for the victims of those armed conflicts”. Clearly, adherence to AP II by all High Contracting Parties participating in a NIAC would best enable the Protocol’s object and purpose to be met. A contrary interpretation would lead to a lacuna in the coverage of armed conflicts by AP II and would mean that

[https://library.icrc.org/library/docs/CD/CD\\_1977\\_ACTES\\_ENG\\_04.pdf](https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_04.pdf) reads in full: “Redraft of Article 1 as follows: ‘Article 1, scope of the present Protocol: 1. The present Protocol shall apply to armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, relating to the protection of victims of international armed conflicts, in which, on the territory of a High Contracting Party: (a) Organized armed forces or other organized armed groups under a responsible and identifiable authority and clearly distinguished from the civilian population, perform acts hostile to the established authorities to which the latter respond by using their armed forces; and (b) Forces hostile to the government exert continuous and effective control over a non-negligible part of the territory. 2. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of 12 August 1949.’ In relation to the *travaux préparatoires*, see above notes 80–86 and accompanying text.

78 It is acknowledged that Bradley characterizes her interpretive conclusion as “distressful” and notes that “over time the *lex lege ferenda* could offer greater protection by extending the application of Additional Protocol II”: M. M. Bradley, above note 66, p. 383.

foreign armed forces operating in the territory of another State would be bound to apply a different standard of IHL than if they were operating on their own territory, which would sit in tension with the limitations international law generally places on the conduct of foreign States in a host State's territory. It would also mean that the ANSAs party to the conflict would owe different obligations to host State armed forces compared to those of an intervening foreign State, which would raise serious practical challenges in relation to the ability of such ANSAs to distinguish between different forces.<sup>79</sup> An additional implication would be that host State armed forces and foreign armed forces would more frequently be operating under different rules of IHL, which may pose significant challenges in relation to interoperability and raise sensitivities on the part of a host State. It could even produce the undesirable result of a host State delegating certain functions (such as those relating to detention) to foreign States in order to avoid AP II obligations.

It might be argued that had a broad interpretation of Article 1(1) been intended, it would have been open to the drafters to frame the provision in similar terms to CA3, which merely requires that the conflict take place "in the territory of *one of* the High Contracting Parties". Indeed, if we turn to the *travaux préparatoires* of AP II under Article 32 of the VCLT, it can be seen that the original draft of Article 1, prepared by the ICRC and provided to the Diplomatic Conference, would have given AP II broader application:

Article 1. – Material field of application

1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organised armed groups under responsible command.
2. The present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia*, riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949.<sup>80</sup>

From the outset of negotiations, Article 1 received close attention from States. Thirteen written proposals to amend Article 1 were tabled during the Diplomatic Conference,<sup>81</sup> four of which would arguably have omitted the words that Bradley (and impliedly others) argue prevent AP II's extraterritorial application.<sup>82</sup> The draft article, together with these proposed amendments, was considered by

79 A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, p. 61.

80 Draft Additional Protocols to the Geneva Conventions of 12 August 1949, June 1973, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 1, Part 3, Federal Political Department, Berne, 1978, available at: [https://library.icrc.org/library/docs/CD/CD\\_1977\\_ACTES\\_ENG\\_01.pdf](https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_01.pdf).

81 These are reproduced in *Official Records of the Diplomatic Conference*, Vol. 4, above note 77, pp. 6–10.

82 See proposals by Indonesia (Doc. CDDH/I/32, 12 March 1974, reproduced in *ibid.*, p. 7), the German Democratic Republic (Doc. CDDH/I/88, 11 September 1974, reproduced in *ibid.*, p. 8), Norway (Doc.

Committee I, which, after receiving initial views from States, sent it to Working Group B for consideration. Working Group B “spent the greater part of 15 meetings discussing article 1”, before establishing a Sub-Working Group to carry out informal consultations with a view to agreeing a text for the article.<sup>83</sup> The version that emerged from the Sub-Working Group on 17 March 1975 remained unchanged until its final adoption by the Diplomatic Conference.<sup>84</sup>

Nothing in the negotiating history of what became Article 1(1), including the rejection of the four proposals that would have omitted explicit references to the territory of a High Contracting Party, can be said to exclude AP II’s extraterritorial application. As the ICRC’s commentary to Article 1(1) notes, the provision was “the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it”.<sup>85</sup> The *travaux préparatoires* plainly demonstrate that the purpose of the restrictions added by States to the draft of Article 1(1) prepared by the ICRC, including the insertion of specific references to territory, was to restrict the situations of armed violence that qualified as armed conflict for the purpose of the Protocol to situations that were comparable to IAC, and to achieve this by the use of criteria that could be objectively applied.<sup>86</sup> As noted at the outset, this reflected the majority’s concerns about the sovereignty implications of the application of IHL to NIACs. There is no evidence of any intent to exclude the Protocol’s application to foreign States intervening in NIACs. Indeed, had this been intended, an express exclusion, or clearer confinement of the application of the Protocol, could, and arguably would, have been included – or at the very least would have been explicitly canvassed in the extensive *travaux* generated by AP II’s negotiation.

In requiring the dissident armed force or organized armed group to have the capacity to implement AP II as a precondition for the applicability of AP II, it is clear that the notion of reciprocity is fundamental to the material scope of application (notwithstanding the fact that actual implementation is not required). Thus, in favour of a narrow interpretation of Article 1(1), it could be argued that visiting forces operating on the sovereign territory of another State would be unable to meet some of the obligations set out in the Protocol. It is submitted, however, that this would be an unconvincing objection. The majority of AP II

CDDH/I/218, 17 February 1975, reproduced in *ibid.*, p. 9) and the Philippines (Doc. CDDH/I/231, 26 February 1975, reproduced in *ibid.*, p. 10).

83 Committee I Report, Doc. CDDH/219/Rev.1, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 10, Federal Political Department, Berne, 1978, p. 21, paras 88–90, available at: [https://library.icrc.org/library/docs/CD/CD\\_1977\\_ACTES\\_ENG\\_10.pdf](https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_10.pdf).

84 *Ibid.*, paras 91–92.

85 ICRC Commentary on the APs, above note 25, para. 4446.

86 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Federal Political Department, Berne, 1978, available at: <https://library.icrc.org/library/search/Notice/2374>. See also ICRC Commentary on the APs, above note 25, paras 4453, 4457; Nils Melzer and Etienne Kustner, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2019, pp. 68–69; A. Cullen, above note 22, pp. 88–96; D. Graham, above note 25, p. 47; D. Jinks, above note 25, pp. 26–27.

provisions relate to obligations to protect and respect protected persons and objects. It is, for example, difficult to argue that the fundamental guarantees owed under Article 4, or the obligations to respect and protect medical and religious personnel under Article 9, or the prohibition on the punishment of persons for having carried out medical activities under Article 10, cannot be met because a party to an armed conflict is a visiting force. Positive obligations, such as those owed to persons whose liberty has been restricted, are explicitly caveated by the statement that the parties to the armed conflict need to respect the obligations “within the limits of their capabilities”.<sup>87</sup> Similarly, obligations such as the obligation to take all possible measures to search for and collect the wounded, sick and shipwrecked are limited by the phrase “whenever circumstances permit”.<sup>88</sup> Taking these caveats into account, it is not sustainable to argue that a narrow interpretation of Article 1(1) is militated by the idea that visiting armed forces are unable to apply AP II’s provisions.

For the foregoing reasons, the better view is that AP II applies to a foreign State party to AP II intervening in a qualifying NIAC on the territory of another AP II State Party. As such, the Protocol applied to the ADF in Afghanistan as a matter of treaty law. One complicating factor in the Afghan context is that Afghanistan only acceded to AP II on 10 November 2009, with the treaty entering into force for it on 10 May 2010. It is thus only from this date that Australia was bound to apply the provisions of AP II as a matter of treaty law. As noted above, the scope of the IGADF Inquiry was 2005 to 2016, but it seems likely that Australia ceased to be a party to the armed conflict at the end of 2013, meaning that the ADF was bound by AP II as a matter of treaty law for only part of the Inquiry’s temporal jurisdiction. In this context it should be noted that a chronology of investigated incidents included in the Brereton Report indicates that these incidents fell within the period 2006–13, but that the overwhelming majority date from 2010–13,<sup>89</sup> during which the ADF was bound by AP II.

## **Why the Brereton Report’s silence on the applicability of AP II matters**

The primary reason why it is important to be clear that AP II applied to the ADF’s operations in Afghanistan from May 2010 as a matter of treaty law is because the customary status of the various provisions of AP II is subject to debate. While it is widely agreed that the “core” of AP II now forms part of customary

<sup>87</sup> See AP II, Art. 5(2).

<sup>88</sup> See *ibid.*, Art. 8.

<sup>89</sup> See Brereton Report, above note 1, Chap. 1.01, Annex B. It is difficult to be precise given the redactions in the public version of the Report (which include the day and month of different incidents investigated, meaning that a count of incidents from 2010 could include some occurrences that pre-date the entry into force of AP II for Afghanistan), but of the sixty-two incidents or issues investigated, eleven (or 18%) are dated from 2006–09, and fifty-one (or 82%) from 2010–13.

international law,<sup>90</sup> precisely which rules from AP II have achieved customary law status is less clear. Acknowledging that Australia was bound by all of the Protocol's rules removes room for debate over key IHL obligations.

It is acknowledged that during the period when IHL applied to the ADF's operations in Afghanistan, ADF personnel were subject to Subdivisions F and G of the Commonwealth Criminal Code irrespective of the applicability of AP II as a matter of treaty law. However, the IGADF's mandate was not limited to an investigation of criminal conduct: the IGADF was directed by the Chief of the Defence Force to inquire whether there was any substance to rumours of criminal or unlawful conduct on the part of the ADF SOTG deployments in Afghanistan.<sup>91</sup> Moreover, as the ICRC has noted,

the spectacular rise of international criminal law in recent years constitutes an invaluable contribution to the credibility of IHL and to its effective implementation. It would be wrong and dangerous, however, to see IHL solely from the perspective of criminal law. ...

An exclusive focus on criminal prosecution may ... give the impression that all behaviour in armed conflict is either a war crime or lawful. That impression heightens feelings of frustration and cynicism about the effectiveness of IHL, which in turn facilitate violations. More importantly, that impression is simply wrong.<sup>92</sup>

One would certainly hope that the identification of credible information to suggest that war crimes had been committed would give rise to consideration as to whether any applicable laws of IHL, the violation of which does not attract individual criminal responsibility, were also violated. Consideration of this issue is critical to Australia and Afghanistan's relationship, noting that a serious breach of IHL would likely incur Australia's State responsibility. A review of the ADF's observance of IHL in Afghanistan is also critical to the broader review of the ADF's organizational culture. Adherence to the laws of war is not only a binding obligation, it is central to military honour and the maintenance of morale, and it is critical to mission success: if a State does not obey the laws of war, it risks losing local support for peace-building missions such as those in Afghanistan, and such operations cannot succeed without local support. When a military operation is mandated to help restore the rule of law and members of that operation breach the rules, it threatens the legitimacy of such operations, which

90 See, for example, ICTY, *Tadić*, above note 16, paras 98, 117, 126; ICTR, *Akayesu*, above note 25, paras 609–610; ICTY, *The Prosecutor v. Pavle Strugar, Miodrag Jokić and Others*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal (Appeals Chamber), 22 November 2002, para. 10; ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (Trial Chamber), 2 March 1999, para. 31.

91 Brereton Report, above note 1, Chap. 1.01, Annex A, p. 49, "Chief of Defence Force Direction to Inspector-General of the Australian Defence Force—Concerns Regarding Special Operations Command", 14 December 2016, para. 2.

92 ICRC, "Criminal Repression", *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/law/criminal-repression>.

could have significant geopolitical implications, in addition to posing a critical threat to military effectiveness.

It could be that the IGADF found no credible evidence of ADF violations of the rules of AP II (or customary international law) in Afghanistan – but one would have more confidence in this regard had the Brereton Report squarely addressed the issue.

Separate from the specific context of the inquiry into the ADF's operations in Afghanistan, it is important for States to put their views regarding the applicability of AP II on the public record. There are three reasons for this. First, AP II's application is reciprocal: making it clear when States are bound to apply AP II will benefit those personnel who are deployed overseas to fight in AP II conflicts by ensuring that their rights under the Protocol are promoted, enhancing the prospect of those rights in turn being respected.

Second, the publication of States' views on the proper interpretation of IHL treaties is critical to building a consistent and shared interpretation of those treaties by other States, as well as international courts and tribunals. As I have argued in detail elsewhere,<sup>93</sup> contemporary military operations pose a host of unresolved IHL questions. As noted above,<sup>94</sup> the vacuum created by State silence in relation to such questions is being filled by other actors. To ensure that IHL continues to reflect the views of States and, consequently, is seen as relevant by States, which is critical to maintaining and enhancing compliance with IHL's rules by both States and ANSAs, it is necessary for States to put their views on the law on the record.

Third, the explanation of a State's views on applicable international law is a significant component of any assessment of the legitimacy of that State's actions. This fact has not been lost on Australia. George Brandis, the former Australian Attorney-General, articulated this view in a lecture at the T. C. Beirne School of Law when he said: "It is vital that States (and their international legal advisers) have the courage to explain and defend their legal positions."<sup>95</sup> Picking up the central theme in Harold Koh's seminal article on "The Legal Adviser's Duty to Explain",<sup>96</sup> Brandis observed that explaining legal positions would strengthen our "culture of justification"<sup>97</sup> by making "our legal deliberations more transparent,

93 C. McDougall, above note 30, pp. 235–245.

94 See above notes 30–32 and accompanying text.

95 George Brandis, "The Right of Self-Defence against Imminent Armed Attacks in International Law", lecture delivered at the T. C. Beirne School of Law, University of Queensland, 11 April 2017, p. 12, available at: <https://tinyurl.com/2s43zpvb>.

96 H. Koh, above note 31. As Koh puts it, "[t]o participate in a system of international law, nations owe each other explanations of why they believe their national conduct comports with global norms and follows not from mere expedience but from a sense of legal obligation (*opinio juris*). By laying out her government's legal theory in public, the legal adviser shoulders the nation's responsibility to give its citizens, the media, legal communities, and legislators, as well as the international legal community, a fuller opportunity to assess the legal theory offered to authorize a given action and to test the government's present and future actions in light of that theory" (p. 190).

97 This term was borrowed by Brandis from Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", *South African Journal on Human Rights*, Vol. 10, No. 1, 1994, p. 32.

so that decisions are understood and respected – by Australians as well as by the international community”.<sup>98</sup> As Brandis explained:

International law should not be characterised merely as a set of constraints upon State action. It is more than that. When we hold firmly to an international rules-based order, the law’s “wise restraints” (in the words of Professor John MacArthur Maguire) provide legitimacy to States’ conduct. They do so because when we adhere to them – and we do so explicitly for reasons we are prepared to articulate, explain and defend – we demonstrate that our conduct on the international stage is principled. And it is only when we behave in a principled fashion that we can hope our conduct will be respected and regarded as lawful and legitimate.<sup>99</sup>

While Brandis’ remarks were made in the context of a speech setting forth Australia’s interpretation of the meaning of imminence for the purpose of the exercise of the right of self-defence, they are of no less relevance in relation to a State’s views on IHL. Indeed, consistent with the rationale expressed in Brandis’ lecture, while I was an Australian government legal adviser, I delivered a public presentation on the very issue of the applicability of AP II to foreign States intervening in AP II conflicts.<sup>100</sup> The presentation outlined the reasons why Australian government legal advisers had reached the view that AP II does indeed apply. This makes the silence in the Brereton Report all the more surprising.

## Conclusion

In declaring that credible information exists to suggest that ADF SOTG members committed war crimes in Afghanistan, there is much to commend about the Brereton Report. It is an important example of ownership of a country’s wrongdoing, and it is indicative of a genuine intent to punish those responsible and to take steps to prevent such wrongs from being committed again. In this context, it is important to acknowledge that there existed critics who “aired not only doubts and misgivings but overt hostility to the establishment of the Inquiry”,<sup>101</sup> and that much effort was needed to break the code of silence that traditionally governs SOTG operations<sup>102</sup> – which is to say that the Brereton Report is the outcome of a sensitive and difficult undertaking.

While acknowledging the overall positive contribution of the Brereton Report, it would be remiss of us not to consider its weaknesses. Among these is

<sup>98</sup> G. Brandis, above note 95, p. 12.

<sup>99</sup> *Ibid.*, p. 13.

<sup>100</sup> Carrie McDougall, “The Application of APII to States Intervening in NIAC”, Conference on Non-International Armed Conflict, Asia Pacific Centre for Military Law, Melbourne Law School, University of Melbourne, 19 March 2015.

<sup>101</sup> Brereton Report, above note 1, Chap. 1.02, para. 18.

<sup>102</sup> *Ibid.*, Chap. 1.01, paras 19, 67, Chap. 1.04, paras 22, 45, 50, Chap. 3.01, paras 18, 19, Chap. 3.03, Annex A, “Special Operations Command: Leadership and Ethics Review”, para. 50.



the myopic nature of the Report. In focusing so closely on the alleged war crimes that were committed by SOTG members in Afghanistan, the Report neglected to present a complete account of the international law applicable to the ADF's operations. In this way, the Report failed to convey the impression that the Inquiry had comprehensively considered Australia's observation of its IHL obligations; this could have obscured IHL violations, or at worst, could be interpreted as an exercise in scapegoating.

In failing to set out Australia's views on the important, and unsettled, issue of the applicability of AP II to foreign States intervening in AP II NIACs, the Brereton Report also missed the opportunity to stand as a prominent example of State practice on the issue. This article has argued that the Protocol has extraterritorial effect for an AP II State Party intervening in a foreign NIAC governed by AP II. This conclusion has been based on the application of the VCLT's rules of treaty interpretation to Article 1(1), which governs the Protocol's material scope of application. Clearly, however, the conclusion would be more compelling if it could be complemented by a study of State practice in relation to this interpretive issue. As such, it is hoped that this article might serve as something of a call to arms for States to put their views on this important subject of operational significance on the public record.

## OPINION NOTE

# The Bystander, the Good Samaritan and the Just in the Holocaust and international humanitarian law

**Theodor Meron**<sup>1,2\*</sup>

<sup>1</sup> Honorary Fellow at Trinity College and Visiting Professor of Law, Oxford University, Oxford, UK

<sup>2</sup> Former Judge and President of UN War Crimes Tribunals

Email: [theodor.meron@law.ox.ac.uk](mailto:theodor.meron@law.ox.ac.uk)

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Despite the thousands of pages written and words said about the Holocaust, I still am at a loss in trying to understand it. How a European people with a rich cultural tradition that produced some of the world's greatest composers, philosophers and poets could invent, enforce and docilely follow the first industrial genocide in human history remains, for me, an enigma. This essay focuses on the Jews, both numerically and ideologically the principal, but not the only, victims, the Roma being the other principal victims.

In my reflections, I will not speak of the architects and enforcers of the Holocaust, nor of the victims. Rather, I will speak of three categories of

\* I am grateful to Professors Wolfgang Ernst and Stephen Fisher for their excellent suggestions.

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non-participants: the Bystander, the Good Samaritan and the Just. I define the Bystander as one who is aware of harm but nonetheless looks away or chooses not to act. The Good Samaritan is one who complies with a duty to help others – so long as they take on no major risk themselves. The Just is a person who risked his or her life to save Jews. I realize that these categories are fluid and interchangeable, rather than static – a Bystander who denounced a Jew in hiding would transform, at least temporarily, into a participant or facilitator of the Holocaust. A change in behaviour therefore changes the categorization, at least temporarily.

For example, thousands of French police transformed from Bystanders into participants or enforcers in rounding up Jews in Paris in the infamous Vel d'Hiv deportations of July 1942. Half a century later, in 1995, President Jacques Chirac nobly admitted the responsibility of France for Vichy complicity in the Holocaust.

This paper looks at the Bystander, the Good Samaritan and the Just, drawing from Christian tradition to examine the behaviour of the (largely Christian) populations of Europe during the Holocaust.

## The Bystander

Murders on the scale of the Holocaust are not possible when the body politic stands up for the rule of law, human dignity and equality for all. The murder of 6 million Jews would not have been possible without the acquiescence, if not complicity, of the peoples of Germany and of occupied Europe. In other words, the Holocaust could not have happened without those who had a good idea of the harms being perpetrated but who averted their eyes and did and said nothing.

As a collective, Bystanders bear a heavy moral responsibility. What is more difficult to assess in the abstract, however, is the moral responsibility of each individual Bystander. Bystanders may be involved in various ways – via acquiescence, complicity or participation – and each of these corresponds to a different and increasing degree of moral responsibility. Every person's situational circumstances, such as their knowledge, proximity and ability to help, must be taken into account in order to assess responsibility.

In rare cases, would-be Bystanders banded together to reject complicity with the Holocaust as immoral, and as a result, Jews were saved – as in Denmark, or in the Protestant hamlet of Chambon sur Lignon in France. Why, then, did majorities stand by in most cases?

The fear of German retribution against the rescuer and his or her family was a major factor. It was not only the rescuer who faced the danger of the death penalty, but also the protester who faced the heavy risk of Nazi retribution. And while the French cardinal Pierre-Marie Gerlier and a number of French bishops made statements in support of Jews and were not sanctioned by Nazi occupiers, this did not provide adequate reassurance for lower-profile priests or private individuals.

So what, then, motivated Bystanders to *be* Bystanders?

There was, of course, the anti-Semitism so effectively disseminated by the Goebbels propaganda machine, but this is an incomplete explanation. After all, a

country as anti-Semitic as Poland in those days had the highest number of the Just proportional to the population as a whole – that is, of those who risked their lives to save Jews.

There was the societal stigma attached to Jews, which discouraged others from speaking up on their behalf.

There was the satisfaction of getting rid of perceived competition or persons who were often different from, and resented or even envied by, the majority. For some, there was even sadistic joy in getting rid of Jews.

There was the Catholic Church, with its great influence, which often espoused anti-Semitic sentiment and was mostly conspicuously silent in the face of suffering – but which nevertheless saved a great many Jews, largely through its convents and monasteries.

There was the tradition of respect for and obedience to authority and leadership, even to manifestly unjust and brutal laws. This was a major factor for compliance in Germany and even in a country as historically friendly to Jews as the Netherlands.

There was the prospect of material advantage, as multitudes benefited from assets, businesses and apartments left behind by Jews murdered in death camps or shot by the Einsatzgruppen.

And finally, there was the ubiquitous tendency to turn away from the person in need next door. Nobody expressed this better than Pastor Martin Niemöller, in a poem first delivered in prose in a speech in 1946:<sup>1</sup>

*First they came for the Communists  
And I did not speak out  
Because I was not a Communist*

*Then they came for the Socialists  
And I did not speak out  
Because I was not a Socialist*

*Then they came for the trade unionists  
And I did not speak out  
Because I was not a trade unionist*

*Then they came for the Jews  
And I did not speak out  
Because I was not a Jew*

*Then they came for me  
And there was no one left  
To speak out for me*

1 Matthew D. Hockenos, *Then They Came for Me: Martin Niemöller, the Pastor Who Defied the Nazis*, Basic Books, New York, 2018.

Some might read this poem as an argument for action out of self-interest. I would suggest, rather, that it is an argument for action against injustice out of morality and shared humanity – even if we come to recognize our shared humanity most readily through shared suffering. Whether or not others speak out for me, I should still speak out for the ill-treated.

I end my discussion of the Bystander, or the Bad Samaritan, by paraphrasing the war historian Professor Sir Michael Howard's wish, expressed in his Holocaust memorial lecture at the Oxford University Habad Society in 2008, that we will not be those who simply let this happen – that we will not think the kind of thoughts and tolerate the kind of behaviour that ultimately makes genocides possible.

## The Good Samaritan

The biblical story of the Good Samaritan is inextricably linked with the duty to love one's neighbour and with the identity of that neighbour. Who is the neighbour whom the Good Samaritan has a duty to help? Did the Jews persecuted by the Nazis "count" as such neighbours?

When challenged by a lawyer as to how to inherit eternal life, Jesus answers, first, that he must love God, and second, that he should "love thy neighbour as thyself". The lawyer then asks, "And who is my neighbour?"<sup>2</sup> Jesus answers with the Parable of the Good Samaritan,<sup>3</sup> in which a man on his way from Jerusalem to Jericho is attacked by robbers who strip him, beat him, and leave him "half-dead". Passing by, first a priest and then a Levite<sup>4</sup> see the man but fail to act. But a Samaritan who travels by, moved by compassion, treats him and takes care of him. Jesus concludes that it was the person who showed mercy that acted as a neighbour to the victim.

The parable is thus not neutral as to who has acted justly, but rather clearly favours the Samaritan and compassionate mercy. Saint Paul goes further in his first epistle to the Corinthians, when he prioritizes charity ("love") even over faith.<sup>5</sup> And historically, it is always the Samaritan who has been favoured by readers of the parable, across the centuries.

Helping a person in need is advocated not only by the Gospels, but by philosophers of ethics as well. As Kant explained, "the maxim of common interest, of beneficence toward those in need, is a universal duty of human beings, just because they are to be considered fellow men".<sup>6</sup>

This, too, is reflected in the Parable of the Good Samaritan. The parable describes the Samaritan – himself a member of an unpopular minority – as the

2 Luke 10:25, 29–30.

3 *Ibid.*

4 Levites were members of the Tribe of Levi who acted as assistants in the temple.

5 Corinthians 13:13.

6 Immanuel Kant, *The Metaphysics of Morals*, Cambridge University Press, Cambridge, 2017, p. 217.

good person, who helps a stranger. Meanwhile, the parable says nothing about the victim or his ethnicity or religion.

Already in the Old Testament, Leviticus commands “thou shalt love thy neighbour as thyself”.<sup>7</sup> Saint Augustine advocates the idea of universality of the concept of the neighbour: “Every human being is neighbour to every other human being”,<sup>8</sup> whether Christian or not.

Both when these texts were written and today, “neighbour” usually refers only to someone physically near you, with whom you presumably share some common identity and periodically interact. By making the victim anonymous, the parable makes proximity and identity irrelevant to our duties to universal humanity. And in the Sermon on the Mount, Jesus goes further still, extending the duty to love one’s neighbours to loving one’s enemies as well.<sup>9</sup>

Why did the Parable of the Good Samaritan choose a priest and a Levite to blame, rather than two ordinary Jews? Perhaps it was part of the campaign of Christ against the temple establishment’s emphasis on rituals, rather than on the ethical aspects of Judaism.

Another interpretation is advanced by Pastor Tyler Kleeberger, who argues that Jesus’s contemporaries would have known that Leviticus forbids priests to touch a dead body, as it would render them impure for their priestly duties and unable to consume temple offerings.<sup>10</sup> These contemporaries would have found it natural that a priest would pass on the other side of the road to avoid contact with a person who looks “half-dead”. Thus, the priest and the Levite had to balance the conflicting demands of not touching a dead body versus loving their neighbour, and they chose the former.

Even in this more accommodating understanding of the priest and the Levite’s choices, however, the fact remains that the Parable of the Good Samaritan presents a positive view of the Samaritan. Of course, if we consider Kleeberger’s argument, we should remember that the Samaritan, in aiding the victim, is not compelled to choose between two conflicting laws, as the priest and the Levite were.

So, is the Good Samaritan a model for those who helped Jews to escape death in the Holocaust? The answer is both yes and no.

Yes, as the parable promotes the universal version of the duty to love one’s neighbour and to take appropriate actions to help them. A Christian must love all humans, including Jews.

And also, no. The relevance of the parable is not complete, as the Good Samaritan does not risk his own life for his neighbour, as did those who tried to rescue victims of the Holocaust.

If we think of a Good Samaritan as a person taking on a risk-free or low-risk action, as distinct from taking on risk to their own life, then we must accept that it

7 Leviticus 19: 18.

8 Saint Augustine, Bishop of Hippo, *The Works of St. Augustine: A Translation for the 21st Century*, New City Press, New York, 1990, Sermon 229.D.1.

9 Matthew 5:43–44.

10 Leviticus 21–22.

was extremely rare to be a Good Samaritan during the Holocaust. Those who aided Jews faced harsh punishment; most people were Bystanders unwilling even to protest. The category of Good Samaritans was squeezed out, pushing people into the ranks of the Bystanders.

Perhaps the best-known examples of Good Samaritans were the people of Denmark. They transported all Danish Jews to Sweden in an extraordinary rescue operation during the dark days of the Holocaust.

How can we explain and understand the Danes' willingness to act as Good Samaritans? The massive participation by the Danish people, combined with leadership from the king down, likely reduced the real and perceived risk faced by individual Danes, as they acted within a broader culture of resistance that provided some protection from betrayal and punishment.

The German government, too, recognized that the situation was different in Denmark and its neighbours. The heads of the SS and the involved German ministries met in the Wannsee Conference of 20 January 1942. At that conference, where they agreed on the master plan for carrying out Hitler's "final solution", the undersecretary of State of the Foreign Office warned that deportations of Jews to the east would cause difficulties in the Scandinavian States and requested that "actions" there be deferred. He did not expect great difficulties elsewhere.<sup>11</sup>

The salutary model of the Good Samaritan has survived to modern times and continues to exercise beneficial influence, including on the laws of many countries – mostly civil-law countries which have legislated penal sanctions for Bad Samaritans. The most important of such laws is Article 223-6 of the 1994 French Penal Code, which imposes a prison sentence and a heavy fine for any person who wilfully neglects to aid a person in peril, so long as that aid would pose no risk to themselves or others. Interestingly, the first version of this law was adopted on 25 October 1941, by the Vichy government of German-occupied France. That early version was *not* driven by a desire to motivate citizens to help their fellow citizens in peril – rather, as Professor Edward Tomlinson has pointed out, it was intended to punish French citizens who stood by and did not assist Nazi soldiers attacked by members of the French resistance.<sup>12</sup>

On the moral plane, as a text enforced during the Nazi occupation of France, this law presents some hard questions. Consider a German soldier, lying in the street, bleeding after an attack by the French resistance. A French patriot may well choose to render aid – but suppose the wounded person wears an SS or Gestapo uniform, or is even a senior Gestapo officer. What should the patriot do then? What would *you* do?

Germany, too, had a law punishing those who failed to render assistance to persons in danger – and one that was in force during World War II.<sup>13</sup> Of course,

11 Protocol of the Wannsee Conference, 20 January 1942.

12 Edward A. Tomlinson, "The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement," *NYLS Journal of International and Comparative Law*, Vol. 20, No. 3, 2000, pp. 470–471.

13 German Criminal Code, Section 330 (now 323c).



Jews in danger were not seen as human enough to warrant assistance, despite the law. Not surprisingly, the Reichssicherheitshauptamt imposed a decree on 24 October 1941 which required “custody for education detention”, or in some cases, deportation to concentration camps, for German-blooded persons who maintained friendly relations with Jews. It is hard to think of a stronger deterrence to aiding Jews in distress.

Despite its questionable provenance, the 1941 French law remained in force in the post-war French Republic. The duty to aid a person in distress has become an integral part of the French vocabulary – *non-assistance à une personne en danger* – and thus an important articulation of the moral disapproval of the Bad Samaritan. Of course, the law was never applied to persons failing to assist Jews as they tried to escape the long arm of the Nazis – but then again, the text was designed to apply only when the rescue would not pose a risk to the Good Samaritan, and in helping Jews, the risk was of course enormous.

## The Good Samaritan and international humanitarian law

In the Good Samaritan parable, the anonymity of the victim facilitates the Good Samaritan’s humanitarian role. How does this relate to war and the laws that regulate war?

One of the best-known duties of modern international humanitarian law (IHL) is the requirement of combatants to care for the wounded and sick – regardless of which side they belong to. Yet, until the mid-nineteenth century, international law had no such requirement. The Battle of Solferino, in which wounded and sick enemy soldiers were abandoned and left to die on the battlefield, was a major turning point, serving as the inspiration for modern IHL and for the establishment of the International Committee of the Red Cross (ICRC).

The First Geneva Convention of 1864 was the first multilateral treaty to introduce the duty of combatants to care for the wounded and sick, regardless of the party to the conflict to which they belonged. This resonates with the Parable of the Good Samaritan and Jesus’s admonition in the Sermon on the Mount to go beyond the duty to love one’s neighbours and to include a duty to love one’s enemies.<sup>14</sup>

The notion of neutrality originally involved ambulances and medical corps, and only by implication the wounded themselves.<sup>15</sup> The 1864 Convention then established that the wounded and sick – regardless of the nation to which they belong – must be collected and cared for. The later Geneva Conventions introduced the terms “respect and protect”, which imposed a further obligation on the enemy to come to the aid of fallen and unarmed soldiers and to provide

<sup>14</sup> Matthew 5:43–44.

<sup>15</sup> Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 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. 134.

them with the care they require.<sup>16</sup> In his Commentary on Geneva Convention I (GC I), Jean Pictet rightly observes that the 1864 Convention's obligation to care for the sick and wounded, whatever nation they belong to, reflects the idea that a combatant who is sick or wounded ceases to be an enemy.<sup>17</sup>

In October 1863, the founding conference of the Red Cross met in Geneva. The *compte rendu* of that Conference contains a wealth of material on medical personnel, but none on the duty to care for enemy wounded.<sup>18</sup> The same is true of the *Secours aux blessés communication*, issued in 1864.<sup>19</sup> Soon after the 1864 Convention was adopted, however, that began to change. In his 1870 *Étude sur la Convention de Genève*, Gustave Moynier – himself a Swiss delegate to the Geneva Conference and a major figure in the International Red Cross Movement – briefly addressed the obligation towards enemy wounded.<sup>20</sup> He also addressed in greater detail the protection of local residents who help the wounded and sick, as well as the repatriation of the wounded and sick.

In particular, Moynier elaborates that helping the wounded does not constitute a hostile act.<sup>21</sup> Given the frequency of leaving the enemy wounded and sick on the battlefield at the time, it is strange that he calls the duty to care for those soldiers, whichever nation they belong to, a “banal truth”.<sup>22</sup> He argues that, while care rendered to such combatants depends on the generosity of the victorious party, the interest of reciprocity mitigates against a refusal to render such care. In any event, he explains that the 1864 Geneva Convention transformed what was once only a moral obligation into a legal duty.<sup>23</sup> In practice, the Convention establishes the prohibition against making any distinction between victims on the grounds of nationality, which also implies that the wounded of one's own party should not be given priority in rescue compared with the sick and wounded of the enemy.<sup>24</sup>

Indeed, even in then-recent wars, Moynier acknowledges that the wounded did not have much trust in the mercy of the victors. In the Italian wars of 1859, fearing their enemies, a thousand wounded and hungry Austrian soldiers hid in the caves of Magenta.<sup>25</sup> Likewise, in the Battle of Solferino, the wounded panicked, fearing another offensive by the Austrian military.<sup>26</sup>

Given that whatever obligation had previously existed was only moral in nature, and given the recent history of fear among wounded soldiers, Moynier

16 *Ibid.*

17 *Ibid.*

18 *Conférence Internationale Réunie de Genève: Compte Rendu*, Geneva, 26–28 October 1863, available at: [https://library.icrc.org/library/docs/AF/AF\\_3012.pdf](https://library.icrc.org/library/docs/AF/AF_3012.pdf) (all internet references were accessed in May 2023).

19 ICRC, *Secours aux blessés: Communication du Comité International, faisant suite au compte rendu de la Conférence Internationale de Genève*, Jules-Guillaume Fick, Geneva, 1864.

20 Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Paris, 1870, pp. 189, 198–200.

21 *Ibid.*

22 *Ibid.*, p. 200.

23 *Ibid.*, p. 201.

24 *Ibid.*

25 *Ibid.*, p. 204.

26 *Ibid.*, p. 208.

concludes that there was good reason to codify in law the obligation to care for all sick and wounded soldiers in the 1864 Convention. He praises the extension to the wounded of protections previously reserved for medical personnel.<sup>27</sup>

The duty of protection and care to the wounded and sick has been confirmed and expanded by later Geneva Conventions and Additional Protocols thereto, as well as under customary law. Article 12 of the 1949 Geneva Conventions I and II, for example, concerns the scope of the Conventions' applicability, making clear that they apply to the wounded, sick and shipwrecked without any distinctions based on nationality. Rule 109 of the ICRC Customary Law Study similarly notes that each party has a duty toward the wounded, sick and shipwrecked "without adverse distinction".<sup>28</sup>

Article 10 of Additional Protocol I (AP I) confirms that all wounded, sick and shipwrecked persons, whichever party they belong to, shall be respected and protected. It adds that no distinction may be made among the wounded and the sick on any non-medical grounds.<sup>29</sup> Article 75(1) of AP I prohibits adverse distinctions among persons in the power of a party to the conflict.<sup>30</sup> The ICRC's Commentary on the Additional Protocols clarifies that Article 75, and indeed the entire section of AP I to which Article 75 belongs, applies also to a party's own nationals, except where the article itself indicates otherwise.<sup>31</sup>

Particularly important here is the ICRC's 2016 Commentary on GC I. In that Commentary, the ICRC notes that "limiting protection under common Article 3 to persons affiliated ... with the opposing Party is ... difficult to reconcile with the protective purpose of common Article 3".<sup>32</sup>

The Commentary speaks not only of protection but also of applicability of criminal liability for violations of provisions of IHL vis-à-vis members of the same forces:

Another issue is whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party. Examples would include members of the armed forces who are tried for alleged crimes – such as war crimes or ordinary crimes in the context of the armed conflict – by their own Party and members of armed forces who are sexually or otherwise abused by their own Party. The fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized [in the 1986 *Nicaragua* judgment of the

27 *Ibid.*, pp. 208–209.

28 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 109, available at: <https://ihl-databases.icrc.org/en/customary-ihl>.

29 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Arms Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 10.

30 *Ibid.*, Art. 75(1).

31 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 2915.

32 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, para. 546.

International Court of Justice] as a “minimum yardstick” in all armed conflicts and as a reflection of “elementary considerations of humanity.”<sup>33</sup>

The Commentary quotes for support the International Criminal Court’s (ICC) *Ntaganda* decision on confirmation of charges of 2014,<sup>34</sup> and the ICC’s *Katanga* decision on confirmation of charges of 2008.<sup>35</sup> In the *Ntaganda* judgment on appeal against the second decision on jurisdiction (2017), the ICC Appeals Chamber recognized that common Article 3 grants protection against inhuman treatment “irrespective of a person’s affiliation”.<sup>36</sup>

These texts are clear and categorical and are increasingly regarded as involving persons in relation to their own forces, not only in relation to enemy forces. This concerns both war crimes (intra-force crimes) and protection/care.

While departing from classical international law, this development enhances the humanitarian values of the Geneva Conventions, and it supports the adage that charity begins at home. It remains to be seen, however, whether this humane interpretation is accepted by States.

The prohibition against adverse distinction – or, put another way, this duty to care for the wounded, whichever party they belong to – applies to both international and non-international armed conflicts. Thus, common Article 3 establishes the duty to care for persons taking no active part in the hostilities and those made *hors de combat* by sickness or wounds. Article 2(1) of Additional Protocol II provides for the application of the Protocol, without any adverse distinction, to all persons affected by the armed conflict.<sup>37</sup> Article 4(1) of the same Protocol prohibits any adverse discrimination against persons who do not take or have ceased to take a direct part in the hostilities.<sup>38</sup>

Of course, the Universal Declaration of Human Rights and human rights treaties prohibit discrimination on many grounds, but IHL appears to go further in requiring that even enemy wounded be cared for without adverse distinction. In other words, it prohibits discrimination against non-nationals, even enemies. In this way, it resonates with the noble spirit of the Parable of the Good Samaritan.

33 *Ibid.*, para. 547.

34 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-309, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda (Pre-Trial Chamber), 14 June 2014, paras 76–82.

35 ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/0-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber), 14 October 2008, para. 248.

36 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 OA5, Appeal against the Second Decision of Jurisdiction, 15 June 2017, para. 60.

37 Protocol Additional (II) 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 1978), Art. 2(1).

38 *Ibid.*, Art. 4(1).

## The Just, or the Righteous Gentile

The Just, or the Righteous Gentile, risked their lives to save Jews, and did so not for personal gain or advantage, but out of a sense of morality and shared humanity. The Just seem tiny in number compared to the millions of Bystanders, but after the Holocaust, a full 30,000 were recognized via the Yad Vashem “Righteous Among the Nations” title – in other words, recognized as the Just.

In addition, there were many more who saved Jews with no one to bear witness or report on their deeds. On a personal note, I think of unknown and unsung heroes, including Polish Catholics and even a German policeman who saved my own extended family members.

We should admire the Just – not only for risking their lives and the lives of their families, but also for doing something that was simply not popular within their communities. I admire their altruism, their shared perception of a common humanity, their readiness to swim against the social current, and their heroism. It is the Just and the Good Samaritan, though always vastly outnumbered by the Bystanders, who might restore our faith in humanity.

## Conclusion

I end with the biblical story in which Abraham pleads with God that, in destroying the wicked Sodom, he should not treat alike the righteous and the wicked. God replies, “If I find fifty righteous ones within the city of Sodom, on their account, I will spare the whole place.”<sup>39</sup> After Abraham’s pleading, God reduces the required number of righteous to just ten.<sup>40</sup> But as even ten righteous could not be found, God rained burning sulphur on the town and its inhabitants, saving only the righteous Lot.

So, perhaps the number of the Just during the Holocaust was tiny in comparison to the number of Bystanders – but nevertheless, as the biblical story of Sodom illustrates, even ten righteous people can justify the salvation of many more.

<sup>39</sup> Genesis 18:25.

<sup>40</sup> Genesis 19:24.

# Rethinking direct participation in hostilities and continuous combat function in light of targeting members of terrorist non-State armed groups

**Rebecca Mignot-Mahdavi**

Rebecca Mignot-Mahdavi is Lecturer in International Law at the University of Manchester. She is the Managing Editor of the *Yearbook of International Humanitarian Law*, an Associate Fellow at the T.M.C. Asser Institute, a Research Fellow at the International Centre for Counter-Terrorism and a Member of the Board of Directors of the International Society for Military Law and the Law of War. She holds a PhD in Law from the European University Institute and the French School of Advanced Studies in the Social Sciences.

Email: [rebecca.mignot-mahdavi@manchester.ac.uk](mailto:rebecca.mignot-mahdavi@manchester.ac.uk).

## Abstract

*Endless armed conflicts against terrorist groups put civilian populations at risk. Since France has been involved in the Sahel from 2013 onwards, transnational non-international armed conflicts (NIACs) of extended geographical and temporal scope against groups designated as terrorists are not a US exception anymore. NIACs against terrorist groups, conducted not only by the United States but also by France, persist and have been reconfigured around threat anticipation. How can anticipatory warfare be best constrained? This article argues that it can be best*

*done through more constraining rules regulating target selection in NIACs and, in particular, by redefining the notion of continuous combat function (CCF). Many elements explored in this article indicate that the United States and France select targets that they pre-designate as terrorists, before these targets are engaged in hostilities. Instead of responding to the observed participation of these individuals in hostilities, strikes are based on contextual and behavioural elements ahead or outside of such moments. This paper argues that when war consists of threat anticipation, it becomes very extensive and particularly risky for civilians. Furthermore, recent State practice in the counterterrorism context reveals the pitfalls of the notions of direct participation in hostilities and CCF as defined in the 2009 International Committee of the Red Cross Interpretive Guidance. Outside this context, the interpretations proposed in the Interpretive Guidance might seem sufficient to constrain target selection processes and to protect civilian populations. However, when applied to armed conflicts that are driven by threat anticipation, the pitfalls of these interpretations emerge. I formulate a critique of these interpretations as being partly responsible for anticipatory warfare and propose an alternative theory for the CCF test.*

**Keywords:** direct participation in hostilities, continuous combat function, international humanitarian law, *jus in bello*, counterterrorism, terrorism, targeting, drones.

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## Introduction

In ten years, Europe will still be deployed in the Sahel, and probably more so than it is today.

Général François Lecointre, French Military Forces Chief of Staff<sup>1</sup>

How can endless and anywhere wars in the counterterrorism context be constrained? Non-international armed conflicts (NIACs) against terrorist groups, conducted by the United States,<sup>2</sup> but also by France,<sup>3</sup> persist and have been reconfigured around threat anticipation. The United States and France are the

1 Nicolas Barotte, “Général Lecointre: ‘Nous allons vers une réorganisation de l’ordre du monde’”, *Figaro*, 21 May 2021, available at: [www.lefigaro.fr/international/general-lecointre-nous-allons-vers-une-reorganisation-de-l-ordre-du-monde-20210521](http://www.lefigaro.fr/international/general-lecointre-nous-allons-vers-une-reorganisation-de-l-ordre-du-monde-20210521) (all internet references were accessed in August 2022).

2 For the past twenty years, the United States has used force against members of transnational terrorist groups in, among other places, Afghanistan, Yemen, Pakistan, Somalia, Libya, Iraq and Syria. See, for instance, reports by The Bureau of Investigative Journalism, “US Strikes in Yemen, 2002 to Present”, available at: [www.thebureauinvestigates.com/projects/drone-war/charts?show\\_casualties=1&show\\_injuries=1&show\\_strikes=1&location=yemen&from=2002-1-1&to=now](http://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=yemen&from=2002-1-1&to=now); “CIA and US Military Drone Strikes in Pakistan, 2004 to Present – Chart: Pakistan: CIA Drone Strikes, 2004 to Present”, available at: <https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HIGt09wgLZDSCP-BQaux51w/edit#gid=477128060>; “US Strikes in Somalia, 2007 to Present”, available at: [www.thebureauinvestigates.com/projects/drone-war/charts?show\\_casualties=1&show\\_injuries=1&show\\_strikes=1&location=somalia&from=2007-1-1&to=now](http://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=somalia&from=2007-1-1&to=now); “Afghanistan: US Air and Drone Strikes, 2015 to Present”, available at: [www.thebureauinvestigates.com/projects/drone-war/charts?show\\_casualties=1&show\\_injuries=1&show\\_strikes=1&location=afghanistan&from=2015-1-1&to=now](http://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=afghanistan&from=2015-1-1&to=now).

3 French Ministry of Armed Forces, Opération Barkhane, available at: [www.defense.gouv.fr/operations/operations/operation-barkhane](http://www.defense.gouv.fr/operations/operations/operation-barkhane).



two case studies of this paper as they both happen to select targets that they designate as terrorists outside moments and areas of hostilities. Because these interventions against members of designated terrorist groups<sup>4</sup> aim to anticipate threats, they are extended in time. For this reason, the terms “US forever war”<sup>5</sup> and “French endless war”<sup>6</sup> populate our imaginaries about armed conflicts against non-State armed groups designated as terrorists. Even if underexplored by legal scholars to date, France has, for the past eight years, been leading counterterrorism operations against various non-State armed groups in the Sahel and excludes the prospect of terminating its intervention in the region.<sup>7</sup> While the French intervention in the Sahel is being reconfigured at the moment of finalizing this paper,<sup>8</sup> the government does not intend to put an end to the military intervention but simply to reshape it and increasingly rely on air power.<sup>9</sup> This is in line with the French Law on Military Programming for 2019–2025<sup>10</sup> which provides a military strategy for France’s “war against jihadist groups” – thus entering the international humanitarian law (IHL) paradigm – and suggests that France’s counterterrorism operations abroad will persist for as long as these groups exist, re-emerge and recompose themselves.<sup>11</sup> This law,

4 These interventions amount to NIACs only when the requirement of intensity is met, and the group is sufficiently organized.

5 Harold Hongju Koh, “How to End the Forever War?”, Oxford Union, Oxford, 7 May 2013, Speech published by *Just Security*, available at: [www.justsecurity.org/wp-content/uploads/2013/10/Koh-Oxford-How-to-End-the-Forever-War.pdf](http://www.justsecurity.org/wp-content/uploads/2013/10/Koh-Oxford-How-to-End-the-Forever-War.pdf). Nathan Derejko, “A Forever War? Rethinking the Temporal Scope of Non-International Armed Conflict”, *Journal of Conflict and Security Law*, Vol. 26, No. 2, 2020, available at: <https://doi.org/10.1093/jcsl/kraa018>. Edward Wong, “Americans Demand a Rethinking of the ‘Forever War’”, *New York Times*, 3 February 2020, available at: [www.nytimes.com/2020/02/02/us/politics/trump-forever-war.html](http://www.nytimes.com/2020/02/02/us/politics/trump-forever-war.html).

6 Ruth Maclean and Finbarr O’Reilly, “Crisis in the Sahel Becoming France’s Forever War”, *New York Times*, 29 March 2020, available at: [www.nytimes.com/2020/03/29/world/africa/france-sahel-west-africa.html](http://www.nytimes.com/2020/03/29/world/africa/france-sahel-west-africa.html). “France’s Forever War in the Sahel”, *The Economist*, 17 February 2021, available at: [www.economist.com/middle-east-and-africa/2021/02/17/frances-forever-war-in-the-sahel](http://www.economist.com/middle-east-and-africa/2021/02/17/frances-forever-war-in-the-sahel). Benjamin Haddad, “France’s Forever War”, *Foreign Policy*, 17 November 2015, available at: <https://foreignpolicy.com/2015/11/17/france-syria-isis-hollande-assad/>. “Au Mali, la France piégée dans une guerre sans fin”, *Der Spiegel*, *Courrier International*, 13 June 2021, available at: [www.courrierinternational.com/article/enquete-au-mali-la-france-piegee-dans-une-guerre-sans-fin](http://www.courrierinternational.com/article/enquete-au-mali-la-france-piegee-dans-une-guerre-sans-fin).

7 N. Barotte, above note 1.

8 “Macron: Barkhane Mission Ending, French Presence to Stay in Sahel”, *Al Jazeera*, 10 June 2021, available at: [www.aljazeera.com/news/2021/6/10/sahel-macron-announces-end-operation-barkhane-it-exists](http://www.aljazeera.com/news/2021/6/10/sahel-macron-announces-end-operation-barkhane-it-exists). “Fin de l’opération Barkhane au Mali : la France acte son retrait pour mieux rester au Sahel”, *France24*, 17 February 2022, available at: [www.youtube.com/watch?v=RRO\\_aFMx6ho](http://www.youtube.com/watch?v=RRO_aFMx6ho).

9 “The President of the Republic Emmanuel Macron took part in the G5 Sahel Summit by videoconference. At the end, he held a joint press conference with the President of the Republic of Niger, Mohamed Bazoum.” “Press Conference Following the G5 Sahel Summit”, *Elysée*, 9 July 2021, available at: [www.elysee.fr/emmanuel-macron/2021/07/09/conference-de-presse-a-l-issue-du-sommet-du-g5-sahel](http://www.elysee.fr/emmanuel-macron/2021/07/09/conference-de-presse-a-l-issue-du-sommet-du-g5-sahel).

10 Statute reference is: Loi n° 2018-607 du 13 juillet 2018 relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense (Law on military programming), available at: [www.legifrance.gouv.fr/eli/loi/2018/7/13/ARMX1800503L/jo/texte](http://www.legifrance.gouv.fr/eli/loi/2018/7/13/ARMX1800503L/jo/texte).

11 Rebecca Mignot-Mahdavi, “Le Silence des Agneaux: France’s War Against ‘Jihadist Groups’ and Associated Legal Rationale”, *ICCT Journal*, 15 May 2020, available at: <https://icct.nl/publication/le-silence-des-agneaux-frances-war-against-jihadist-groups-and-associated-legal-rationale/>. Rebecca Mignot-Mahdavi, “Will the War on Terror Ever End?”, *La Revue des droits de l’Homme, Actualités Droits-Libertés*, March 2019. Dustin A. Lewis, Gabriella Blum and Naz K. Modirzadeh, “Indefinite War. Unsettled International Law on The End of Armed Conflict”, Harvard Law School Program on

together with other sources, including the testimony of a French drone operator,<sup>12</sup> indicates that France's military strategy in the counterterrorism context, just as that of the United States, rests on the objective of pre-empting threats: instead of targeting individuals at the very moment when they participate in hostilities, their aim is to pre-emptively identify possible targets before hostile acts are conducted.<sup>13</sup> Given this similarity in the military strategy of the two countries and the extensive temporal scope of their military engagement against designated terrorist groups, France and the United States serve as case studies for this article. This identification of targets is sometimes based on contextual and behavioural elements that do not include the witnessed participation in hostilities and leads, as cases studied in this paper show, to civilian casualties.<sup>14</sup>

I argue in this paper that when armed conflicts consist of threat anticipation, they become not only endless,<sup>15</sup> but also risky for civilian populations. Recent State practice in the counterterrorism context reveals the pitfalls of the interpretations of direct participation in hostilities (DPH) and continuous combat function (CCF) crystallized in the International Committee of

International Law and Armed Conflict, Legal Briefing, February 2017, available at: <https://pilac.law.harvard.edu/indefinite-war/>.

- 12 M. Drevet, L. Mieusset, R. Mignot-Mahdavi, C. Pinel and A. Yehiel, "Testimony of a French Drone Operator: Anticipatory Strikes in the Sahel", *European Forum on Armed Drones (EFAD)*, 16 February 2022, available at: [www.efadrones.org/testimony-of-a-french-drone-operator-anticipatory-strikes-in-the-sahel/](http://www.efadrones.org/testimony-of-a-french-drone-operator-anticipatory-strikes-in-the-sahel/). Rebecca Mignot-Mahdavi, "Frappe de Bounti : la France conduit-elle des « frappes signatures » au Sahel ?", *La Revue des droits de l'homme, Actualités Droits-Libertés*, 19 April 2021, available at: <http://journals.openedition.org/revdh/11718>.
- 13 Law on military programming, above note 10. See also France's latest Strategic Review: *Defence and National Security Strategic Review*, 2017, available at: [www.defense.gouv.fr/dgris/politique-defense/actualisation-strategique-revue-strategique-2017#title-3227](http://www.defense.gouv.fr/dgris/politique-defense/actualisation-strategique-revue-strategique-2017#title-3227). Annexed Report to the Law on Military Programming (NB: it also has legislative value), Rapport annexé (appears at the end of the legislation), available at: [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037192797&dateTexte=20181122](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037192797&dateTexte=20181122).
- 14 For estimates of the civilian harm caused by the United States, see, for instance, the Bureau of Investigative Journalism, "CIA and US Military Drone Strikes in Pakistan, 2004 to Present – Chart: Civilians Killed", available at: <https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HIGt09wgLZDSCP-BQaux51w/edit#gid=1976356146>. Open Society Foundations, "After the Dead Are Counted: U.S. and Pakistani Responsibilities to Victims of Drone Strikes", November 2014, available at: [www.opensocietyfoundations.org/publications/after-dead-are-counted-us-and-pakistani-responsibilities-victims-drone-strikes](http://www.opensocietyfoundations.org/publications/after-dead-are-counted-us-and-pakistani-responsibilities-victims-drone-strikes). Amnesty International, "'Will I be Next?': US Drone Strikes in Pakistan", Amnesty International Publications, London, 2013, available at: [www.amnesty.org/download/Documents/12000/asa330132013en.pdf](http://www.amnesty.org/download/Documents/12000/asa330132013en.pdf). International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, September 2012, available at: [www.cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf](http://www.cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf). And for France, see Roche Fabrice Sossiehi, "Six villageois du nord du Mali ont été tués par une frappe attribuée à la force Barkhane", *NorAfrik.com*, 28 March 2021, available at: [www.norafrik.com/politique/8540.html](http://www.norafrik.com/politique/8540.html). "UN Investigation Concludes French Military Airstrike Killed Mali Civilians", *United Nations News*, 30 March 2021, available at: <https://news.un.org/en/story/2021/03/1088722>.
- 15 Although discussions on Samuel Moyn's *Humane* have mainly focused on the book's argument that drone wars are stabilized through law and are endless because they appear to be more humane, the book also importantly describes the blurring boundary between war and peace. This is explained as an outcome of war's "conver[sion] into policing in the spirit of humane control". See Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2021, p. 323.

the Red Cross (ICRC) Interpretive Guidance of 2009. Outside this context of anticipatory warfare, it was not necessarily possible to foresee that these interpretations would leave unconstrained target selection processes and civilian populations insufficiently protected. I formulate a critique of these interpretations as failing to constrain anticipatory warfare and propose an alternative definition of the CCF test. The point is not to say that the targeting practices were explicitly justified on the basis of CCF as interpreted by the ICRC in its Interpretive Guidance – in fact, as shown elsewhere the US rationale for these practices is an admixture of *ad bellum* and *in bello* justifications,<sup>16</sup> and France mainly presents vague justifications for its military operations in the Sahel.<sup>17</sup> The point of this paper is to argue that not only practically speaking but also on the advocacy front, the mainstream interpretation of CCF provided in the ICRC Interpretive Guidance does not allow for successful and robust pushback against pre-emptive targeting practices that put civilian populations at risk.

The persisting threat of anticipatory (and thus endless) warfare resulting in civilian harm should stimulate renewed interest in scrutinizing States' rules of engagement and related interpretations of the law. It requires asking what open-textured norms of IHL, when left undiscussed, allow for the practice of targeting individuals who have never been witnessed actively participating in hostilities and thus create a high error risk for civilians. The paper identifies the IHL concepts that States use in targeting members of designated terrorist groups who are enemy parties in a NIAC, and discusses how the interpretation of these legal concepts has evolved over the past two decades. All norms present a certain degree of uncertainty and the rules regulating target selection in NIACs – DPH and CCF – are no exception. While these norms have been the object of lively and highly important scholarly debate since the publication of the ICRC's Interpretive Guidance on the notion of DPH, this debate has not much focused on the counterterrorism context. Yet, elements of State practice highlight the pitfalls and strengths of alternative interpretations of these norms. To the question of how to constrain anticipatory warfare, I argue that we need to depart from the current definition of CCF.

This contribution is first descriptive and consists of the study of the notions of DPH and of CCF. In the first section, the article gives a brief account of the evolution of DPH and the notion of CCF, as well as an explanation of the intervention of the ICRC Interpretive Guidance in this evolution. In the second section, the article unpacks what the test of the notion of CCF, as defined by

16 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009 (ICRC Interpretive Guidance), available at: [www.refworld.org/docid/4a670dec2.html](http://www.refworld.org/docid/4a670dec2.html). Rebecca Mignot-Mahdavi, "Drones Programs, the Individualization of War and the *Ad Bellum* Principle of Proportionality", in Claus Kress and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law*, Oxford University Press, Oxford, 2020. Nehal Bhuta and Rebecca Mignot-Mahdavi, "Dangerous Proportions: Means and Ends in Non-Finite War", in Nehal Bhuta, Florian Hoffmann, Sarah Knuckey, Frédéric Mégret and Margaret Satterthwaite (eds), *The Struggle for Human Rights: Essays in Honour of Philip Alston*, Oxford University Press, Oxford, 2021.

17 R. Mignot-Mahdavi, "Le Silence des Agneaux", above note 11.

the Interpretive Guidance and as commented in scholarly debates, involves. In other words, it concentrates on CCF as functional membership derived from evidence not limited to witnessing actual involvement of the target in hostilities. In the third section, the paper shows that the CCF test proposed by the ICRC Interpretive Guidance is very close to how some States target individuals designated as terrorists beyond areas and actual moments of participation in hostilities. It is argued that the CCF test, unless it is revisited, puts civilians at great risk. In this, the paper takes issue with the functional approach to membership as it does not satisfactorily constrain targeting.<sup>18</sup> Finally, in conclusion, I briefly undertake the more normative task of identifying an alternative, more restrictive interpretation of CCF that would change the CCF test, and considerably reduce the targeting opportunities of States, thus lessening the risk posed to civilians.

Methodologically speaking, this paper intends to show that looking at IHL both from an internal and external point of view is necessary to explain in detail how law is conceptually and practically rearranged by States around pre-emptive warfare. I hope to highlight the value of abandoning the divide between studying the norms of IHL in a doctrinal manner, on the one hand, and studying IHL “in action”, on the other hand. This field is one deprived of routine judicial review, so one cannot wait for court decisions to analyse facts and realities of contemporary warfare. Similarly, it concerns military strategies developed by States that do not necessarily have constitutional traditions where the executive branch is vocal about defence policy choices – this is the case of France, for instance. Here again, IHL scholarship cannot wait for official declarations to be made to try and trace rules of engagement and suggest related interpretations of the norms. Therefore, studying the facts of reported cases is sometimes the only way to formulate hypotheses about the legal interpretations chosen by operating States for the norms of IHL. By analysing the practice and rhetoric of certain States active in armed conflicts against parties that they simultaneously label as “terrorist” in nature, I intend by no means to draw conclusions about their interpretation of the law, nor to describe as *de lege lata* their interpretation of these notions. Given the importance of the studied States’ participation in these armed conflicts (time, space and intensity), as well as the laconic information about their legal and operational framework, an active inquiry of State practice that moves beyond the narrow focus on what the States voluntarily share seems timely and needed.

18 Even if they do not argue in favour of the same interpretation of CCF from a normative standpoint, the following authors all consider that the predominant interpretation of CCF is constraining. Some praise this interpretation of CCF: Laura Hofmann, “Strengthening the Principle of Distinction? A Critical Appraisal of the ICRC’s Continuous Combat Function”, *Journal of International Humanitarian Legal Studies*, Vol. 6, No. 2, 2015; others criticize this version of CCF for being too constraining: Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 692; Damien van der Toorn, “‘Direct Participation in Hostilities’: A Legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan”, *Australian International Law Journal*, Vol. 17, 2010, p. 20.

## The concept of direct participation in hostilities in context

The DPH test serves to determine whether a civilian's protection should be temporarily suspended on account of his participation in hostilities.<sup>19</sup> While Article 3 common to the four Geneva Conventions merely refers to "persons taking no active part in the hostilities" without defining the category, Article 51 of Additional Protocol I and Article 13(3) of Additional Protocol II are more specific. Besides, according to Rule 6 of the ICRC Study on Customary International Humanitarian Law, this is also a customary law rule in both international armed conflicts (IACs) and NIACs.<sup>20</sup> These articles provide that in both IACs and NIACs, civilians enjoy protection "unless and for such time as they take a direct part in hostilities". Because treaty rules remain open-textured, case law and doctrinal debates have served to establish that in addition to a limited temporal scope (i.e. suspending protection only for such time as the hostile acts are perpetrated), DPH has a limited material scope (i.e. it only covers acts that are intended to cause and do cause actual harm).<sup>21</sup> The three cumulative constitutive elements of direct participation as consolidated by the ICRC guidelines are that: (i) the person must engage in an act that reaches a certain threshold of harm; (ii) a direct causal link exists between the act and the harm caused; and (iii) the act is precisely designed to directly cause harm, in support of a party to the conflict and to the detriment of another.<sup>22</sup> The notion of DPH so

19 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 51; Protocol Additional (II) 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 1978), Art. 13(3).

20 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

21 Among other relevant sources, see International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber I), 5 December 2003, §§ 45 and 78; ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, § 110; Inter-American Court of Human Rights, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, OEA/Ser.L/V/II.95, Doc. 7, 18 November 1997, § 178; Israeli Supreme Court, *Targeted Killings* case. Bill Boothby, "'And for Such Time as': The Time Dimension to Direct Participation in Hostilities", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2009. Yoram Dinstein, "Distinction and Loss of Civilian Protection in International Armed Conflicts", *International Law Studies*, Vol. 84, No. 1, 2008, available at: <https://digital-commons.usnwc.edu/ils/vol84/iss1/11>. Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2009.

22 ICRC Interpretive Guidance, above note 16, pp. 16–17. Dapo Akande analyses the threshold of harm definition as going beyond the ICRC Commentary on Additional Protocol I which had defined direct participation in his view "overly narrowly" as causing actual harm to the personnel and equipment of the enemy armed forces (he refers to Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 1944). Akande recalls that in the *Targeted Killings* decision, the Israeli Supreme Court criticized the Commentary approach for excluding acts intended to cause damage to civilians and agrees that opening up the scope of the notion to acts that are hostile to civilians just makes sense. See Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", *International and Comparative Law Quarterly*, Vol. 59, No. 1, 2010.

conceived practically restrains targeting in warfare to individuals when they directly commit harmful acts.

The extension of targeting in warfare to individuals recognized as members of the enemy group when hostilities – understood here as acts of combat and military operations – are not ongoing would thus be unlawful under this restrictive interpretation of DPH. However, the notion of CCF as crystallized in the Interpretive Guidance opens up targeting possibilities beyond actual moments of hostilities. In 2009, the ICRC Interpretive Guidance introduced the notion of CCF as follows:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities.

For the sake of clarity, it is useful to note that there are two ways in which CCF can be defined in relation to DPH. CCF can either be considered as a version of DPH, or DPH and CCF can be understood as two separate categories. No matter what option one chooses, CCF is defined as someone's function in the fighting wing of an armed group. To avoid any confusion, it is simply useful to stress that the present paper portrays CCF as one version of DPH as proposed by the ICRC.<sup>23</sup>

Aside from this issue, and in any event, the CCF appears in the Guidance as a criterion for membership in a non-State armed group; but it triggers only a quasi-membership status as it does not come with a privilege of combatant status (that is, with a right to participate in hostilities, combatant immunity or a prisoner-of-war status if the person holding that function is captured). Besides, CCF refers to the person whose continuous function involves the "preparation, execution, or command of acts or operations amounting to direct participation in hostilities".<sup>24</sup> Such a function can be assumed "even before he or she first carries out a hostile act".<sup>25</sup> As such, CCF does not define membership on the basis of an official status as a member of a non-State armed group, nor does it necessarily require

23 This choice is grounded on the fact that common Article 3 reads as follows: "1. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." By including members of armed forces who have laid down their arms in the category of persons taking no active part in the hostilities, it seems reasonable to say that, conversely, members of armed forces who have not laid down their arms or are not *hors de combat* can functionally be considered to be included in the category of persons taking direct part in hostilities under the law of NIACs.

24 ICRC Interpretive Guidance, above note 16, p. 34.

25 *Ibid.*



the witnessing of repeated conduct of participation in hostilities in order to attribute membership (this form of membership is called “continuous direct participation”).<sup>26</sup>

By introducing the CCF, the ICRC intended to give clarity on the terms “civilian”, “armed forces” and “organized armed group” that treaty-based IHL uses without defining them.<sup>27</sup> In doing so, the ICRC wanted to respect the wording and logic of common Article 3 and Article 13 of Additional Protocol II to ensure that civilians, armed forces and organized armed groups remain distinct categories. The goal, beyond terminology, was to concretely distinguish members of the organized fighting forces from civilians who directly participate in hostilities sporadically or support the group with non-combat functions.<sup>28</sup>

## The CCF test: Less is not more

Much scholarly literature on the CCF has focused on discussing the desirability of this concept as defined by the Interpretive Guidance.<sup>29</sup> Although it has been extremely useful in many regards, this discussion has rarely included developments on the CCF test, which is of the specific elements taken into consideration and the analysis undertaken to conclude or not that someone holds a CCF. Yet, having a conversation about the evidence and criteria that practically are, or on a normative level should be, used to determine a potential target’s CCF seems essential to reach a well-informed opinion on the desirability question. The ICRC Guidance, for its part, did provide preliminary elements to start constructing a CCF test: it says that it requires elements demonstrating “lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict”, such as “the preparation, execution, or command of acts or operations”;<sup>30</sup> it adds that “an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act”;<sup>31</sup> and finally, it excludes “individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities”.<sup>32</sup> As CCF is not status-based and not necessarily conduct-based – an individual’s CCF does not need to be derived from repeated participation in hostilities, but can be based on evidentiary elements other than witnessed participation in hostilities. As was just mentioned, apart from this logical

26 See, for example, D. Akande, above note 22.

27 ICRC Interpretive Guidance, above note 16, p. 27.

28 ICRC Interpretive Guidance, above note 16, p. 34.

29 See, for example, D. Akande, above note 22; L. Hofmann, above note 18; Sabrina Henry, “Exploring the ‘Continuous Combat Function’ Concept in Armed Conflicts: Time for an Extended Application?”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018.

30 ICRC Interpretive Guidance, above note 16, p. 34.

31 *Ibid.*

32 *Ibid.*



definition of the CCF test, the ICRC clearly states in its Interpretive Guidance that an individual “can be considered to assume a continuous combat function *even before he or she first carries out a hostile act*”.<sup>33</sup> Therefore, someone can be found to hold a CCF even when their engagement has never been witnessed and even if such engagement has never actually taken place (if someone, for instance, has only been trained but has not yet actively engaged in hostile acts).

However, the purpose of the Guidance is to “facilitate these distinctions [between armed forces of parties to an armed conflict and civilians, and between civilians who never take a direct part in hostilities and those who do so on an individual, sporadic or unorganized basis only] by providing guidance”.<sup>34</sup> As such, it does not pretend to solve every issue and only “summarizes the ICRC’s position on the interpretation of IHL on a particular legal question”.<sup>35</sup> No further details or examples are given in the Interpretive Guidance on what type of elements can be taken into account to demonstrate lasting integration into an organized armed group acting as the armed forces of a non-State party to a NIAC.<sup>36</sup>

Nonetheless, the CCF is found to be a reasonable way of distinguishing members of non-State armed forces that can be targeted from civilians punctually participating in hostilities, while simultaneously extending the targeting possibilities of States against members of non-State armed groups.<sup>37</sup> Indeed, these scholars often share the ICRC’s (most certainly laudable) concern that evolving interpretations of the law should maintain a high level of protection for civilians. While they might have criticized the CCF for other reasons, they supported it for being constraining and for protecting the principle of distinction. Notwithstanding the first impression that CCF strikes the right balance within the above-mentioned typology of membership definitions, an analysis of the notion in light of the actual test it implies, and the type of evidence used to identify a CCF, will invite the reader to nuance and even rebut the presumption that the CCF test as currently defined extends the scope for targeting without putting civilians at greater risk. First, there is the idea that CCF should be applauded for constraining targeting options as it only concerns members of an armed group’s fighting wing and not of the broad organization, e.g. the members of its “political” wing.<sup>38</sup> Yet, approving the functional nature of CCF membership, without trying to build on the foundations provided by the ICRC Guidance and specifying which elements should be expected, neglects the risks it

33 ICRC Interpretive Guidance, above note 16, p. 34 (emphasis added).

34 Jakob Kellenberger, “Foreword”, in ICRC Interpretive Guidance, above note 16. Dr Jakob Kellenberger was President of the ICRC at the time and until 2012.

35 ICRC Interpretive Guidance, above note 16, p. 10.

36 ICRC Interpretive Guidance, above note 16, p. 34.

37 Gloria Gaggioli, “Targeting Individuals Belonging to an Armed Group”, *Vanderbilt Journal of Transnational Law*, Vol. 51, 2018.

38 As a side note, it should be underlined that this limitation only sounds reasonable as CCF is either a version of or an alternative to (depending on one’s point of view as mentioned above) punctual DPH which itself is limited to direct participation in NIACs. The limitation is also only fair when considering that the creation of CCF (and the extension of target options it comes with) was not accompanied by the creation of a fully fledged membership status and combatant privilege.

poses to civilians. Not only is there no clarity to date on the specific elements that permit the identification of someone as holding such function, but also its explicit distinction with a conduct-based membership inherently tells us that CCF is not solely derived from repeated engagement in hostile acts. What are, therefore, the specific elements that lead to identifying someone's "lasting integration into an organized armed group", i.e. as holding a CCF? Also, what is the effect of targeting individuals based on elements other than their repeated engagement in hostile acts? Without answering these questions in detail just yet, it is already possible to say that the error risk inherent to targeting on the basis of evidence other than witnessed engagement in violent acts necessarily puts civilians at greater risk.

Some authors have also applauded the CCF as constraining in comparison to status-based membership.<sup>39</sup> According to this view, membership in an armed group derived from an official status for the purpose of targeting could be too extensive because "as indicated by ex post acknowledgement of attacks by groups such as the Islamic State, for instance, armed groups might have various incentives to exaggerate their membership".<sup>40</sup> Again, basis for appraisal of CCF is vulnerable to a very concrete counterargument related to the test it implies. It may be true that individuals and groups claim membership sometimes in the absence of very close ties between the individual and the group; it would actually be very interesting, as a socio-legal endeavour, to complement this analysis with empirical evidence. This point thus definitely deserves to be made especially if the discussion is placed at the descriptive level. If the discussion is a normative one, though, I am not convinced that this is a good reason to prefer the alternative option of function-based membership, which consists of deducing membership from evidence not limited to engagement in violent acts. There is a need to refine and rethink the current mainstream interpretation of the CCF test in order to powerfully push back against situations that we will explore below.

As mentioned above, the third option is to derive membership from conduct: if States witness individuals engaging in a series of offensive violent acts (in support of a non-State armed group party to the conflict), then they can continuously target them. This option is sometimes considered too similar to punctual attribution of DPH and too restrictive: the idea is that "if membership entirely depends on actual conduct, this notion becomes useless and should simply be abandoned. In other words, if targeting based on 'membership' has to mean something, it has to be more permissive than just direct participation in hostilities".<sup>41</sup> This is not the reason, however, or at least not the apparent or only reason why the ICRC chose to create a membership status based on a function rather than a conduct, at least when looking at the explicit rationale of the Guidance. The ICRC Guidance's goal, by excluding that people showing a continuous combat conduct and not function be targeted, was to preserve "the

39 See, for instance, G. Gaggioli, above note 37.

40 *Ibid.*, pp. 911–12.

41 *Ibid.*, p. 911.

conceptual integrity of the categories of persons underlying the principle of distinction” and protect civilians.<sup>42</sup>

The truth is that both reasons for choosing a conduct-based membership appear to be misguided, for different reasons, and this will clearly emerge from the last section. Indeed, the last section shows that the preferred version of the CCF test is too permissive in the context of States’ targeting members of groups designated as terrorist. Dissatisfaction with the conduct-based definition of membership might stem from underestimating how extensive targeted practices can be when States derive membership solely from elements other than engagement in hostile acts. Yet, a test based on evidence that is not limited to conduct (engagement in hostile acts), and can even exclude conduct (remember the inclusion in CCF of individuals who have been trained but who have not yet engaged in hostile acts) puts civilians at greater risk than a test based on engagement in hostile acts.

Another viewpoint is that CCF is in fact much closer to continuous direct participation (conduct-based membership) than meets the eye.<sup>43</sup> Continuous direct participation describes the situation where an individual engages in a series of hostile acts and is identified, for this reason, as holding a CCF and thus as continuously targetable. Some have considered the ICRC’s rejection of the conduct-based membership to be only “apparent” as “adopting either the ICRC approach or the continuous direct participation approach would probably mean that a person who takes part in a series of hostile acts would lose immunity from targeting, even beyond the specific occasions when he acts”.<sup>44</sup> While it is true that a CCF test can lead to identifying a person who engages in a series of hostile acts as a (continuous) legitimate target, one cannot ignore all the other scenarios where no direct engagement in hostile acts is witnessed and the CCF test is positive. These scenarios will appear legally justifiable (even if debatable from a normative standpoint) for as long as the CCF test can be positive without evidence of direct participation in violent acts. The following section will reveal how problematic this can be for the civilian population.

## Continuous combat function in action: Targeting practices

The arrival of this open-texture CCF in the counterterrorism context has marked the individualization and de-materialization of the way States make targeting decision under IHL. Indeed, State targeting practice in this context shows that CCF allows the targeting of individuals when and where hostilities are not ongoing on the basis of information gathered about the target that do not necessarily include their witnessed direct engagement in hostile acts. Targeting practices thereby are not necessarily based on material circumstances (hostile acts) and are focused on

<sup>42</sup> ICRC Interpretive Guidance, above note 16, p. 28.

<sup>43</sup> D. Akande, above note 22, p. 189.

<sup>44</sup> *Ibid.*

personal features and behavioural patterns of the target. In this context, empirical evidence studied here brings to light what is at stake in the definition of DPH as CCF and makes its impact on targeting choices and scope very tangible: first, targeting based on evidence other than (witnessed) participation in hostile acts presents a higher error risk than when an individual is seen participating in combat; second, the spatio-temporal scope for targeting is considerably extended as CCF opens targeting options beyond moments and areas of active hostilities. While this is exactly what the CCF sought to achieve, by mirroring the risk to which States' armed forces are exposed, there are concrete cases showing the pitfalls of such an extended window for targeting. The point is not to say that these cases reveal what the CCF test necessarily leads to but what it can lead to if CCF is attributed without any witnessed participation in hostilities.

The practices of the United States and increasingly of France, in the context of the armed conflicts they fight against groups they designate as terrorist, show that a CCF rationale practically aligns not only with personality strikes, where the identity of the target is known, but also signature strikes. Signature strikes consist of firing at people whose identities are not known, based on evidence of suspicious behaviour.<sup>45</sup> To understand the role played by the CCF in framing targeting operations, looking at the US Executive Order of July 2016, which remains in force until the date of writing, is helpful. It explains that:

The United States considers all available information about a potential target's current and historical activities to inform an assessment of whether the individual is a lawful target. For example, an individual may be targetable if the individual is formally or functionally a member of an armed group against which we are engaged in an armed conflict. As Administration officials have stated publicly, to determine if an individual is a member of an armed group, we may look to, among other things: the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; or whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

This Executive Order, in other words, allows the targeting of individuals who might not have been personally and formally recognized as being members of a non-State armed group party to a conflict, but rather on the basis of behavioural elements (which might or might not include witnessed participation in hostilities). The point here is not so much to affirm that all strikes analysed below were framed by the United States and France as justified under the CCF. Rather, the point is to show that the CCF test as currently defined does not prohibit such practices, which might be legal in some cases, but pose a high risk to civilians when they

45 Cora Currier and Justin Elliott, "Drone Warfare 'Signature Strikes'", *Global Research*, 27 February 2013, available at: [www.globalresearch.ca/drone-warfare-signature-strikes/5324491](http://www.globalresearch.ca/drone-warfare-signature-strikes/5324491).

rest on contextual or behavioural elements other than their witnessed participation in hostilities.

Bringing to light an actual target selection process, a report by the *New York Times* tells us the story of the Razzo family, whose house was targeted on the evening of 20 September 2015 in Islamic State of Iraq and Syria (ISIS)-occupied Mosul, Iraq.<sup>46</sup> That day, Basim Razzo, his wife, his brother and brother's wife were heading to bed in the family house. Basim had spent his usual night hours of clicking through car reviews on YouTube. A strike hit them. Only Basim and his sister-in-law survived the strike. Later that same day, the American-led coalition uploaded a video to its YouTube channel titled "Coalition Airstrike Destroys Daesh VBIED Facility Near Mosul, Iraq 20 Sept 2015". The target, the video explained, was the leader of a car-bomb factory, a hub in a network of "multiple facilities spread across Mosul used to produce VBIEDs [vehicle-borne improvised explosive devices] for ISIL's terrorist activities" posing "a direct threat to both civilian and Iraqi security forces". The buildings that appeared in the recording were Basim and his brother's houses. That day, the evidence and intelligence gathered on Basim led to his identification as a lawful target. It is likely that his daily YouTube and internet activity, exploring cars, led the US drone authorities to identify him as the leader of a car-bomb factory. It could be argued that this targeting decision is not in flagrant violation of the CCF test as currently framed considering that the type of elements that can be taken to demonstrate "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict" have not been defined, and as the ICRC Interpretive Guidance includes that a person can be targeted without having been witnessed engaging in hostile acts. Although it can be seriously contested that the evidence used demonstrates lasting integration, this event, as numerous others, should urge us to define the test more narrowly.

Another relevant situation is that of a US drone strike conducted on the evening of 16 March 2017, which targeted the Sayidina Omar Ibn Al-Khattab Mosque in Al-Jinah, in the province of Aleppo, Syria. Around forty dead were reported by the Syrian Observatory for Human Rights.<sup>47</sup> The Forensic Architecture team reported that after the strike, the US Central Command claimed responsibility for the airstrike on the building, which it had wrongly identified at first as located in the province of Idlib and as a "partially constructed community meeting hall" rather than a mosque.<sup>48</sup> The US officials further claimed that there were no civilian casualties. They then admitted that the building was in fact a mosque but maintained that they were "confident this was a meeting of al-Qaeda members and leaders; this was not a meeting of

46 Azmat Khan and Anand Gopal, "The Uncounted", *New York Times*, 16 November 2017, available at: [www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html?\\_r=0](http://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html?_r=0).

47 Idrees Ali and Phil Stewart, "Pentagon Denies Striking Mosque in Syria, Says it Killed al Qaeda Militants", *Reuters*, 17 March 2017, available at: [www.reuters.com/article/us-mideast-crisis-syria-usa-idUSKBN16O26S](http://www.reuters.com/article/us-mideast-crisis-syria-usa-idUSKBN16O26S).

48 Forensic Architecture, "Al-Jinah Mosque – Forensic Architecture", *YouTube*, available at: [www.youtube.com/watch?v=mOyihqEOFYA](http://www.youtube.com/watch?v=mOyihqEOFYA).

civilians”.<sup>49</sup> However, on 8 August 2017, a United Nations Syria Commission report concluded that US forces “lacked an understanding of the actual target, including that it was part of a mosque where worshippers gathered to pray every Thursday”, “failed to take all feasible precautions to avoid or minimize incidental loss of civilian life”, and was “in violation of international humanitarian law”.<sup>50</sup> In this case, although it cannot be affirmed with certainty, it is possible (also in light of the 2016 Executive Order) that the regular reunion of a group of people in a building triggered the decision to kill. What matters in this case study is not to conclude with certainty which considerations exactly led to conducting the strike but to emphasize that the CCF test should be better defined to leave no room for doubt that elements such as the regular reunion of a group of people in a building cannot be taken to derive lasting integration into an organized armed group. Of course, it can already be considered far-fetched to deduce lasting integration from such uncertain elements. Such an interpretation also goes against the goal pursued by the ICRC and scholarship when respectively creating and developing the notion. It is also arguably incompatible with other principles of IHL, such as the principle of precaution which requires that, in the conduct of military operations, constant care has to be taken to spare civilians and civilian objects.<sup>51</sup> Still, it is urgent to make some efforts towards discussing and proposing ways to fill the gaps that have been left open.

These two episodes took place in Iraq and Syria, but the United States has also been conducting so-called signature strikes “outside areas of active hostilities”, in other words, where there is no ongoing situation of intense violence in the precise targeting location (justifying this on the basis of a –solid– legal interpretation of the geography of armed conflicts according to which conflicts follow their participants).<sup>52</sup> On 17 March 2011, in the city of Datta Khel in North Waziristan, Pakistan, a US drone strike killed between forty to fifty people seated

49 *Ibid.* See also Thomas Gibbons-Neff, “U.S. Finds that March Airstrike that Struck Building Described as Mosque was Legal”, *The Washington Post*, 7 June 2017, available at: [www.washingtonpost.com/news/checkpoint/wp/2017/06/07/u-s-finds-that-march-airstrike-that-struck-building-described-as-mosque-was-legal-and-resulted-in-one-civilian-casualty/](http://www.washingtonpost.com/news/checkpoint/wp/2017/06/07/u-s-finds-that-march-airstrike-that-struck-building-described-as-mosque-was-legal-and-resulted-in-one-civilian-casualty/).

50 United Nations General Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/36/55, 8 August 2017, p. 13.

51 For NIACs, see Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996) (entered into force 3 December 1998), Art. 3(10); and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (entered into force 9 March 2004), Art. 7. For IACs, see Additional Protocol I, Art. 57(1).

52 The White House, “Executive Order—United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force”, 1 July 2016, available at: [www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures](http://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures). For an analysis, see Ryan Goodman, “Why the Laws of War Apply to Drone Strikes Outside ‘Areas of Active Hostilities’ (A Memo to the Human Rights Community)”, *Just Security*, 4 October 2017, available at: <https://doi.org/10.1093/jicj/mqs096>; “IHL is not in and of itself pre-determined as applying to a limited geographical scope, and its applicability is designed to follow the prevailing hostilities wherever they may spread, rather than vice versa.”

in circles.<sup>53</sup> US officials claimed that the men were all legitimate targets, stating that “these people weren’t gathering for a bake sale. They were terrorists”,<sup>54</sup> and “not the local men’s glee club”.<sup>55</sup> Yet, it was then established by Forensic Architecture,<sup>56</sup> whose work was later used by UN Special Rapporteur Ben Emmerson,<sup>57</sup> that the men were in fact participating in a government-sanctioned meeting, and more specifically a *jirga*, a traditional assembly of leaders that makes decisions by consensus and serves as a dispute-settlement system.<sup>58</sup> Despite the posthumous identity check of the deaths, US government officials reiterated that no civilian casualties resulted from those strikes, which in their view successfully targeted a large group of heavily armed men.<sup>59</sup> The fact that a large group of men were seated in circles and appeared to gather and discuss together for two days and carried weapons led the United States to reach the conclusion that these men were legitimate targets. It is regrettable and dangerous, as it can lead to violations of IHL, including of the principles of distinction and precaution, that cultural and political local specificities are not systematically acknowledged when searching for CCF indicators: in some areas of high insecurity, open carrying of weapons can be quite common including for self-defence purposes.<sup>60</sup> Here again, one should ask if States should be able to strike non-State actors on the basis of elements other than witnessed participation in hostile acts, or if, on the contrary, the risk is too high for civilians.

On 3 January 2021, the Barkhane forces conducted a strike on a group of individuals located in the village of Bounty, in Mali.<sup>61</sup> In the aftermath of the strike, locals and journalists reported that the operation resulted in numerous civilian casualties. France, for its part, declared that its troops had targeted “members of a terrorist armed group” in full compliance with IHL.<sup>62</sup> This event,

53 Airwars, “Pakistan: Reported US Strikes 2011”, available at: <https://airwars.org/wp-content/themes/airwars-new/archives/bij-drone-war/drone-war/data/obama-2011-pakistan-strikes.html>.

54 Salman Masood and Pir Zubair Shah, “C.I.A. Drones Kill Civilians in Pakistan”, *New York Times*, 17 March 2011, available at: [www.nytimes.com/2011/03/18/world/asia/18pakistan.html](http://www.nytimes.com/2011/03/18/world/asia/18pakistan.html).

55 Tom Wright and Rehmat Mehsud, “Pakistan Slams U.S. Drone Strike”, *Wall Street Journal*, 18 March 2011.

56 Forensic Architecture, “Drone Strikes on a Jirga in Datta Khel”, 25 October 2013, available at: <https://forensic-architecture.org/investigation/drone-strikes-on-a-jirga-in-datta-khel>.

57 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 11 March 2014, UN Doc. A/HRC/25/59, available at: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 11 March 2014, UN Doc. A/HRC/25/59, available at: [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_hrc\\_25\\_59.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_25_59.pdf).

58 See also International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), above note 14.

59 Scott Shane, “Contrasting Reports of Drone Strikes”, *New York Times*, 11 August 2011, available at: [www.nytimes.com/2011/08/12/world/asia/12droneside.html?ref=asia&mtref=undefined&gwh=AA5BB874ECB05EFD4B4F0EFBA50C0835&gwt=pay](http://www.nytimes.com/2011/08/12/world/asia/12droneside.html?ref=asia&mtref=undefined&gwh=AA5BB874ECB05EFD4B4F0EFBA50C0835&gwt=pay).

60 Rémi Carayol, “Sahel : les frappes de l’armée française dans le collimateur”, *Médiapart*, 28 June 2021, available at: [www.mediapart.fr/journal/international/280621/sahel-les-frappes-de-l-armee-francaise-dans-le-collimateur](http://www.mediapart.fr/journal/international/280621/sahel-les-frappes-de-l-armee-francaise-dans-le-collimateur).

61 “Mali: le doute subsiste après une intervention de l’armée française”, *TV5Monde*, 6 January 2021, available at: <https://information.tv5monde.com/afrique/mali-le-doute-subsiste-apres-une-intervention-de-l-armee-francaise-390514>.



and the divergent views on how to characterize what happened, led the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) to open an investigation, which resulted in a report published on 30 March 2020.<sup>63</sup> The report concludes that twenty-two casualties resulted from the strike, among which nineteen civilian deaths and three members of the terrorist group Katiba Serma, a semi-autonomous arm of the jihadist group the Macina Liberation Front.

The casualties, including those identified as civilians by the MINUSMA, were the intended targets of the strike: France, both before<sup>64</sup> and after<sup>65</sup> the report, insists that only legitimate targets were hit. On 7 January 2021, the Ministry shared the following detailed information on what triggered the decision to strike (translated from French):

On Sunday January 3, in the afternoon, after several days of intelligence gathering, the Barkhane Force conducted an operation in the Douentza region, an area characterized by the presence and action of terrorist armed groups such as the Katiba Serma. [...]

In this area, more than an hour before the strike, a REAPER drone had identified a motorcycle with two individuals at the north of RN16. The vehicle joined a group of about forty adult men in an isolated zone. All the intelligence gathered, including real time information, allowed us to identify this group as belonging to an armed terrorist group. The observation of the zone for more than an hour and a half also allowed to exclude the presence of women and children. Considering the behavior of the individuals, of the tools identified, and combining all collected intelligence, [the strike was ordered].<sup>66</sup>

The MINUSMA report gets into interesting detail about the local tradition of having men and women spend part of the wedding celebrations in separate groups and concludes that only three of those men were presumably part of a violent non-State armed group.<sup>67</sup>

Although the targets were not engaged in hostilities at the moment of the strike, it seems like their behaviour, age, sex and location were taken to reveal their

62 ASAF, “Press Release—Operation Barkhane: Strike Against a Gathering of Members of an Armed Terrorist Group in the Douentza Region. Press Release of the Armed Forces Staff. Paris, 7 January 2021”, 12 January 2021, available at: [www.asafrance.fr/item/communiqué-de-presse-operation-barkhane-frappe-contre-un-rassemblement-de-membres-d-un-groupe-arme-terroriste-dans-la-region-de-douentza.html](http://www.asafrance.fr/item/communiqué-de-presse-operation-barkhane-frappe-contre-un-rassemblement-de-membres-d-un-groupe-arme-terroriste-dans-la-region-de-douentza.html).

63 MINUSMA, “Rapport sur l’incident de Bounty du 3 janvier 2021 (Report on the Bounty Incident of 3 January 2021)”, March 2021, available at: [https://minusma.unmissions.org/sites/default/files/rapport\\_final\\_bounty\\_bounty9.pdf](https://minusma.unmissions.org/sites/default/files/rapport_final_bounty_bounty9.pdf).

64 ASAF, “Press Release, 7 January 2021”, above note 62.

65 ASAF, “Press Release from the Ministry of the Armed Forces: Reaction to the MINUSMA Report on the January Strikes in Mali”, 30 March 2021, available at: [www.asafrance.fr/item/communiqué-de-presse-du-ministère-des-armées-reaction-au-rapport-de-la-minusma-sur-les-frappes-de-janvier-au-mali.html](http://www.asafrance.fr/item/communiqué-de-presse-du-ministère-des-armées-reaction-au-rapport-de-la-minusma-sur-les-frappes-de-janvier-au-mali.html).

66 ASAF, “Press Release, 7 January 2021”, above note 62.

67 MINUSMA, above note 63.

role as part of the military arm of a terrorist group. Some elements of evidence might not have been released, and press releases from the French Ministry of the Armed Forces and the MINUSMA report might diverge on some elements, but one thing cannot be contested: the Barkhane forces gathered pieces of evidence other than witnessed participation in hostilities which, taken together, allowed them to identify the individuals as legitimate targets.<sup>68</sup> These pieces of evidence seem to have included the facts that all individuals were men, apparently military-aged, unusually gathered, in a region known for the presence of terrorist groups, and that some of them carried weapons.<sup>69</sup>

These cases do not only bring to light the lethal consequences of flawed or outdated intelligence and of misperceptions caused by other factors, but also show that the data and evidence used to identify legitimate targets in armed conflicts against a party designated as a terrorist group include criteria such as, but not limited to: geographic location of individuals or buildings in an area of a city or region identified as concentrating terrorist activities; regular male gatherings; group gatherings; group conversations; mobile phone communications or connections (the target does not need to have expressly communicated with an identified member of a terrorist group to trigger suspicion, as attempts of communication are also intercepted); internet activity (e.g. related to items associated with any terrorist group's activities); possession of weapons. In an era where knowledge data collection capacities are unprecedented and constantly growing, from current drone surveillance to the promise of their algorithmic capacities in the near future, the CCF test that is not conditioned upon witnessing someone engage in hostile acts exacerbates the risks posed by anticipatory warfare to civilian populations.

## Concluding remarks and proposition

Rethinking the CCF notion and test in light of French and US strikes against members of terrorist groups shows that extensive practices cannot be robustly constrained by the CCF test as currently defined. However, this practice puts civilians at great risk and completely deviates from the goals pursued by the drafters of the Interpretive Guidance and those cherished by the IHL scholars whose work has been discussed here. As a result, this paper hopefully showed that the CCF test needs to be collectively reframed and further developed if we want it to perform a constraining function on target selection, including against members of terrorist groups in NIACs. Because the CCF test proposed in 2009 builds on evidence other than witnessed engagement in combat and thus sources of information that could be partial or ambiguous, the CCF architecture creates a

<sup>68</sup> R. Mignot-Mahdavi, above note 12.

<sup>69</sup> It should be noted that the mere carrying of weapons does not suffice to establish DPH as, in order to reach the threshold of harm required to qualify as DPH, the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. See ICRC Interpretive Guidance, above note 16, pp. 47–50.

particularly high risk of error when mobilized against transnational non-State armed groups which are dispersed and whose modes of action make the identification of members of the group more difficult than in traditional non-State actors. It also arguably results in heavier consequences in such conflicts than it would in State-centred non-State armed groups, as it opens the door to geographically unlimited conflict.

A clearer and narrower version of the CCF test should be identified to avoid such extensive targeting practices. The above developments show that the only solution to do so is by including in the CCF test evidence of repeated direct engagement in violent acts that cause harm (in support of a party to the conflict and to the detriment of another). The test could also include, but only in addition to evidence of repeated engagement, behavioural indications of CCF. Such a CCF test would strike a good balance between the willingness to extend the scope for targeting members of terrorist groups beyond moments of active hostilities, while simultaneously not lowering the threshold of civilian protection. To the concern that this version of CCF might put civilians more at risk than the punctual attribution of DPH, two elements should be shared. First, the present paper hopefully shows that there is a less dangerous version of CCF than that which does not require repeated participation. Second, these concerns can be addressed by supplementing the CCF test with additional requirements. One could think of the following formula: according to a reframed CCF test, not only would participation need to be identified, but State forces would have to corroborate this information with additional evidence to support the apparent function of continuous combatant. Such a change would have the added value of consistency by requiring a higher evidentiary threshold when targeting spatio-temporal possibilities are extended (beyond “unless and for such time as” someone is witnessed as engaging in combat), instead of setting a lower threshold when extending the targeting window. In any event, I am certain that other scholars will have sharper ideas to revisit the CCF test. My hope is that this contribution raises awareness about the need to do so in light of existing targeting practices against members of transnational non-State armed groups designed as terrorists.

# “How did they die?”: Bridging humanitarian and criminal-justice objectives in forensic science to advance the rights of families of the missing under international humanitarian law

**Anjli Parrin**

Anjli Parrin is Director of the Global Human Rights Clinic at the University of Chicago Law School. Email: [aps2168@columbia.edu](mailto:aps2168@columbia.edu).

## **Abstract**

*There are thousands of families of missing persons around the world who search for answers as to the fate and whereabouts of their loved ones, hoping to be reunited with them, or in the event that they are deceased, to be able to mourn and grieve their death with dignity. In practice when authorities speak with families to confirm that the missing person is deceased, two initial questions frequently arise. First, families generally want to know, “did you identify the body of my relative?” The second question, once they receive information that their loved one has been positively identified as deceased, is usually, “how did they die?” This article examines whether international humanitarian law requires providing families of the missing, who may know or believe that their relative is deceased, with an answer to this second question of “how did they die?” The article argues that under certain circumstances, it is a requirement of international humanitarian law to provide*

*some information about the cause, manner and circumstances of death to families. It also argues that the International Red Cross and Red Crescent Movement can strengthen the rights of families of the missing by engaging confidentially (directly or indirectly) with judicial bodies that are charged with both identification of the missing and accountability for violations of international humanitarian law. While this is challenging, it is argued that it is often possible to do so while respecting and adhering to the fundamental principles of the Movement, and, in turn, advancing the fundamental principle of humanity.*

**Keywords:** Treatment of the dead, missing persons, forensic science, forensic humanitarian action, rights of families of the missing, international criminal law, transitional justice.

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## Introduction

There are thousands of families of missing persons around the world who search for answers as to the fate and whereabouts of their loved ones, hoping to be reunited with them, or, in the event that they are deceased, to have their loved one's body returned to them to be able to perform dignified last rites, and mourn and grieve their death. Not knowing the fate of their loved ones can be devastating for families and sometimes entire communities, who face an ambiguous loss,<sup>1</sup> and are then "living in limbo, unable to mourn, and in the absence of definite knowledge, constantly tormented by hope – a secret prison, a new life in a foreign land, anything but the finality of death".<sup>2</sup> Families of those who are forcibly disappeared, presumably killed in conflict, or lost in humanitarian emergencies may spend decades searching for their relatives.

Recognizing the profound impact of this type of loss, international humanitarian law (IHL) requires that in times of armed conflict, all parties take steps to prevent persons from going missing, account for those who do go missing, and inform the families of the fates and whereabouts of their missing relatives. Additionally, related international treaties prohibit enforced disappearances. In the last forty years, forensic science tools have significantly advanced the possibility for families to receive scientific, thus reliable, information about the fate of their relatives. Forensic science processes allow trained experts to locate and recover bodies, as well as scientifically identify the

- 1 The concept of ambiguous loss, first articulated by Pauline Boss, refers to the grief that arises when individuals and families experience a loss that remains in some manner unresolved, such as that of families searching for the fate and whereabouts of missing loved ones. This type of loss prevents individuals from obtaining the closure that may otherwise assist in navigating grief. See Pauline Boss, *Ambiguous Loss; Learning to Live with Unresolved Grief*, Harvard University Press, Cambridge, MA, 1999.
- 2 International Committee of the Red Cross (ICRC), *Accompanying the Families of Missing Persons: A Practical Handbook*, Geneva, 2020, p. 16.

remains, which can be extremely painful for families, while also enabling them to finally receive answers about their loved ones. It has been used accordingly across a broad range of contexts from Argentina to the Central African Republic.

In practice when authorities, forensic science experts, or any relevant stakeholder, speak with families to confirm that the missing person is deceased, two initial questions frequently come up. First, families generally want to know, “did you identify the body of my relative?” The second question, once they receive information that their loved one has been positively identified as deceased, is usually, “how did they die?”

This article examines whether IHL requires providing families of the missing, who may know or believe that their relative is deceased, with an answer to their second question, “how did they die?” While of course acknowledging that the responsibility to uphold IHL rests with parties to the conflict, the article explores the extent to which international organizations charged with promoting the advancement of IHL, such as the International Committee of the Red Cross (ICRC), can also support efforts to provide information to families about the manner in which their loved ones died. It argues that under certain circumstances, it is a requirement of IHL to provide some information about the cause, manner and circumstances of death, and that the International Red Cross and Red Crescent Movement (hereinafter the “Movement”) and similar organizations can strengthen the rights of families of the missing by engaging confidentially (directly or indirectly) with judicial bodies that are charged with both identification of the missing and accountability for violations of IHL. Further, I argue that, although challenging, it is often possible to do so while respecting and adhering to the fundamental principles of the Movement, and in turn advancing the fundamental principle of humanity.

In this article, I seek to write from the perspective of both a practitioner and scholar, and to draw upon my own experience of working as part of forensic science teams. In my work, I have undertaken investigations to try to provide families with the possibility to know if their loved ones are dead, and, if so, to identify and return their bodies; as well as to provide them with information about the cause, manner and circumstances of their death. This work is often conducted with multiple objectives – both humanitarian and of criminal justice – and therefore I have had interactions with multiple actors engaged in forensic operations. However, this article is written from the perspective of an outsider to the Movement, not privy to the daily decisions relating to neutrality and impartiality that individuals in the Movement may face. While this article aims to provide overarching suggestions for the reform of existing practices, I am acutely aware that in practice actors are constantly balancing competing objectives, and that each individual case or situation involving forensic science activities will require case-specific analysis and decision-making.

Accordingly, the next section examines the IHL obligations relating to the missing and dead, arguing that the law requires certain actors to provide information about the cause, manner and circumstances of death. Following this is a section which analyses the practical challenges that humanitarian

organizations face in collecting and providing information about the cause, manner and circumstances of death. I then explore the false dichotomy between the humanitarian and criminal-justice objectives of forensic activities in practice; then, before concluding, I discuss three areas of criminal law where greater involvement by humanitarian forensic actors would advance the rights of families.

## **IHL obligations relating to the missing and dead and the work of humanitarian organizations such as the ICRC**

IHL contains strong rules requiring parties to the conflict to take actions relating to the dead and the missing in the context of armed conflict. Article 32 of Additional Protocol I of the Geneva Conventions codifies “the right of families to know the fate of their relatives”.<sup>3</sup> This principle was argued as being crucial among the sponsors of the provisions relating to the missing and the dead during the drafting of Additional Protocol I, who saw “mitigating the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead” as a “fundamental humanitarian principle”.<sup>4</sup> Article 33(1) of Additional Protocol I provides that all parties to a conflict have the obligation, “as soon as circumstances permit”, to “search for persons who have been reported missing by an adverse party”.<sup>5</sup> Additionally, it is a customary IHL rule that “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>6</sup> Furthermore, “practice indicates that this rule is motivated by the right of families to know the fate of their missing relatives”.<sup>7</sup> It should be noted that “the obligation to account for missing persons is an obligation of means”, meaning that “each party to an armed conflict must use its best efforts in this respect”. “The obligation to provide that information which is available is, however, an obligation of result.”<sup>8</sup>

The Geneva Conventions contain other rules that are relevant to the missing. For example, the Fourth Geneva Convention requires parties to a conflict to enable all persons in the territory of a party to the conflict, or in a territory occupied by it, to give news to members of their families and to receive news from them, as well as to facilitate enquiries made by families dispersed by

3 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 32.

4 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1196.

5 AP I, above note 3, Art. 33(1).

6 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 117, available at: <https://ihl-databases.icrc.org/customaryihl/eng/docs/v1> (all internet references were accessed in September 2022).

7 *Ibid.*

8 *Ibid.*



conflict.<sup>9</sup> In that sense, the Geneva Conventions and Additional Protocols indicate the important role of the ICRC’s Central Tracing Agency, to facilitate the transmission of information about persons in the territories of a party to the conflict or in occupied territory and on missing persons, to restore family links, and to collect, centralize and transmit information about protected persons, including civilian internees and prisoners of war, in the hands of the adverse party.<sup>10</sup> The Geneva Conventions also contain rules related to the establishment of National Information Bureaux to collect, centralize and transmit, through the ICRC’s Central Tracing Agency, information about prisoners of war, protected civilians deprived of their liberty and others, including wounded, sick or dead military personnel in the hands of the adverse party.<sup>11</sup>

For persons believed to be or confirmed to be dead, IHL sets out clear rules governing the conduct of all parties to the conflict. It is worth noting that rules are more specific and detailed for international armed conflicts, although relevant obligations found in customary international law apply to non-international armed conflicts as well. First, where circumstances permit, parties to the conflict must, “without delay, take all possible measures to search for, collect, and evacuate the dead without adverse distinction”.<sup>12</sup> Second, parties must take “all possible measures” to prevent dead bodies from being despoiled, mutilation of dead bodies being prohibited.<sup>13</sup> Third, parties to international armed conflicts must “endeavour to facilitate the return of the remains of the deceased”, should next of kin or the party to which they belong request it, and must return their personal effects to them.<sup>14</sup> Furthermore, in the context of international armed conflicts, identification information, last wills or other important documents, money, and personal effects of an intrinsic or sentimental value found on the dead, must be transmitted by each party’s National Information Bureau, through the ICRC’s Central Tracing Agency, to the adverse party.<sup>15</sup> Fourth, the dead

9 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) (GC IV), Arts 25–6.

10 Moreover, the Central Tracing Agency must receive information concerning persons reported missing by an adverse party (AP I, Art. 33(3)). It must also receive cards on children evacuated (AP I, Art. 78(3)). There are multiple other provisions providing a specific mandate and role to the Central Tracing Agency, including Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 123; and GC IV, Arts 25, 130 and 136–7.

11 For an overview of the law relating to the Central Tracing Agency and National Information Bureaux, see ICRC, *Overview of the Legal Framework Governing National Information Bureaux*, Geneva, 8 April 2022, available at: [www.icrc.org/en/publication/4616-overview-legal-framework-governing-national-information-bureaux](http://www.icrc.org/en/publication/4616-overview-legal-framework-governing-national-information-bureaux); Helen Obregón Gieseken and Ximena Londoño, “Looking for Answers: Accountability for the Separated, Missing and Dead in International Armed Conflicts”, *Humanitarian Law & Policy Blog*, 11 April 2022, available at: [https://blogs.icrc.org/law-and-policy/2022/04/11/separated-missing-dead-international-armed-conflicts/#\\_ftn2](https://blogs.icrc.org/law-and-policy/2022/04/11/separated-missing-dead-international-armed-conflicts/#_ftn2).

12 J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 112.

13 *Ibid.*, Rule 113.

14 *Ibid.*, Rule 114. As explained in the summary to this rule, “State practice establishes the customary nature of this rule in international armed conflicts. In the context of non-international armed conflicts, there is a growing trend towards recognition of the obligation of parties to a conflict to facilitate the return of the remains of the dead to their families upon their request.”

15 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), Art. 16; Geneva

must be disposed in a respectful manner, and their graves respected and properly maintained.<sup>16</sup> Finally, with a view to the identification of the dead, each party to the conflict must record all available information prior to their disposal, and mark the location of the graves.<sup>17</sup>

Within State practice, the measures envisaged to comply with the obligation to record all available information about the deceased include carrying out activities such as collecting identification cards or disks, collecting information required for identification purposes, carrying out autopsies, issuing death certificates, burying in individual graves, marking graves properly, recording the disposal of the dead, and prohibiting mass graves. Best practice also suggests that the exhumation and post-mortem examinations, including DNA testing, following forensic standards, is an appropriate method of identifying the dead.<sup>18</sup> There have been a plethora of guides and manuals developed to assist parties to the conflict, governments, and humanitarian organizations taking part in the search, collection, and respectful burial or disposal of remains. Guidelines have been developed to assist in managing and in the identification of the dead in armed conflict, other situations of violence, and mass fatalities including specific guides in: the forensic human identification process;<sup>19</sup> the use of DNA analysis for identification;<sup>20</sup> disaster victim identification;<sup>21</sup> accompanying families and psychosocial support;<sup>22</sup> conducting autopsies;<sup>23</sup> managing dead bodies;<sup>24</sup> and the recovery and analysis of human remains.<sup>25</sup> Additionally, there are guidelines for investigating deaths in custody,<sup>26</sup> the role of religion in forensic sciences and treatment and

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), Art. 19; GC III, Arts 120 and 122; GC IV, Arts 130 and 138–9; AP I, Art. 34(2).

16 J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 115.

17 *Ibid.*, Rule 116.

18 *Ibid.*, Rule 116. ICRC, *Missing People, DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Armed Violence*, Geneva, 2009; ICRC, World Health Organization, Pan American Health Organization and International Federation of Red Cross and Red Crescent Societies, *Management of Dead Bodies After Disasters: A Field Manual for First Responders*, Geneva, 2019.

19 ICRC, *Forensic Human Identification: An Integrated Approach*, Geneva, 18 February 2022.

20 ICRC, *Missing People*, above note 18; National Institute of Justice, *Mass Fatality Incidents: A Guide for Human Forensic Identification*, Washington, DC, 2005, available at: [www.ojp.gov/pdffiles1/nij/199758.pdf](http://www.ojp.gov/pdffiles1/nij/199758.pdf).

21 INTERPOL, “Disaster Victim Identification (DVI)”, available at: [www.interpol.int/en/How-we-work/Forensics/Disaster-Victim-Identification-DVI](http://www.interpol.int/en/How-we-work/Forensics/Disaster-Victim-Identification-DVI).

22 ICRC, above note 2; Susana Navarro, Pau Pérez Sales and Franc Kernjak, *International Consensus on Arbitrary or Extrajudicial Executions Principles and Minimum Standards for Psychological Work in Search Processes and Forensic Investigations*, 2010.

23 United Nations (UN) Office on Drugs and Crime, *Forensic Autopsy: Manual for Forensic Pathologists*, August 2015, available at: [www.theapmla.net/files/PEX02\\_Forensic%20Autopsy%20Manual.opt.pdf](http://www.theapmla.net/files/PEX02_Forensic%20Autopsy%20Manual.opt.pdf).

24 ICRC *et al.*, *Management of Dead Bodies After Disasters*, above note 18.

25 Luis Fondevibrer, *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, Argentine Forensic Anthropology Team, Buenos Aires, 2021, available at: <https://eaaf.org/wp-content/uploads/2020/11/EAAF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>; Melanie Klinkner and Ellie Smith, *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University, Bournemouth, 9 December 2020, available at: [https://issuu.com/bournemouthuniversity/docs/the\\_bournemouth\\_protocol\\_on\\_mass\\_grave\\_protection\\_?fr=sMjc3OTI0MjAyNzM](https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_?fr=sMjc3OTI0MjAyNzM).

26 ICRC, *Guidelines for Investigating Deaths in Custody*, Geneva, 2013.

identification of the dead,<sup>27</sup> country-specific guides and assessments,<sup>28</sup> and recommendations for reform of forensic processes, such as integrating the investigation and identification of missing and unidentified persons.<sup>29</sup>

Organizations such as the ICRC, who seek to assist and protect those affected by armed conflict and promote compliance with IHL, play a crucial role in practice in ensuring respect for the rights of the missing and dead, and their families.<sup>30</sup> They do so both in situations of armed conflict, and more generally outside of conflict situations where a neutral, impartial humanitarian actor may be required. A core way in which this is done is through forensic actions, in which the organization promotes forensic best practices around the world. This is achieved by “ensuring the proper management and identification of the dead and ... prevent[ing] and resolv[ing] the tragedy of people unaccounted for because of armed conflict and other situations of armed violence, disasters and migration”.<sup>31</sup>

The ICRC focuses on the strengthening of medico-legal systems and the provision of forensic science tools for “humanitarian” purposes, and has a large forensic science team.<sup>32</sup> They carry out activities “building local and regional forensic capacity and fostering regional and international cooperation among forensic practitioners and institutions, especially among countries affected by armed conflict and catastrophes to help prevent and resolve the humanitarian consequences of these events”.<sup>33</sup> It can include assisting authorities working in medico-legal systems to develop proper legal frameworks, procedures, and better facilities for the management and investigations of the dead, including improving how they work with families; working with national Red Cross and Red Crescent societies and other organizations to assist them in the collection and dignified burial of bodies following significant violence or disasters; and supporting

27 ICRC, *Management of the Dead Under Islamic Law*, Geneva, 2020.

28 Soren Blau and Luis Fondebrider, *A Practical Guide for Forensic Investigators in Timor-Leste*, Victorian Institute of Forensic Medicine, Melbourne, Australia, 2011; L. Fondebrider, above note 25; International Commission on Missing Persons, *Assessment of the Scope of the Missing Persons Problem in Libya, Including an Overview of Libya’s Institutional, Legal, and Technical Capacities to Find Missing Persons*, The Hague, 2021, available at: [www.icmp.int/wp-content/uploads/2021/04/LibyaReportEnglish-1.pdf](http://www.icmp.int/wp-content/uploads/2021/04/LibyaReportEnglish-1.pdf).

29 Mercedes Salado Puerto *et al.*, “The Search Process: Integrating the Investigation and Identification of Missing and Unidentified Persons”, *Forensic Science International: Synergy*, Vol. 3, 2021. Salado Puerto *et al.* highlight the importance of correcting and broadening the “tendency to understand the search only as a ‘body centred’ forensic response” and articulate a concept of the search process as one that “includes the investigation and identification phases of the missing in any state (dead or alive), in any scenario (with or without bodies), with an integrated, multidisciplinary, and multiagency approach for implementation by all actors involved in the investigation and identification phases of missing persons”.

30 See ICRC, “Restoring Family Links”, available at: [www.icrc.org/en/what-we-do/restoring-family-links](http://www.icrc.org/en/what-we-do/restoring-family-links); ICRC, “Protection of the Dead Through Forensic Action”, available at: [www.icrc.org/en/what-we-do/forensic-action](http://www.icrc.org/en/what-we-do/forensic-action).

31 ICRC, “Protection of the Dead”, *ibid.*

32 *Ibid.* See, also, Peter Maurer, “Forward”, in Roberto C. Parra, Sara C. Zapico and Douglas H. Ubelaker (eds), *Forensic Science and Humanitarian Action*, Vol. 1, Wiley, Hoboken, NJ, 2020, p. lviii, noting that, as of 2020, the ICRC has more than seventy forensic experts.

33 Morris Tidball Binz and Ute Hoffmeister, “Forensic Archaeology in Humanitarian Contexts: ICRC Action and Recommendations”, in W. J. Mike Groen, Nicholas Márquez-Grant and Robert C. Janaway (eds), *Forensic Archaeology: A Global Perspective*, Wiley, Hoboken, NJ, 2015 (emphasis added).

authorities to scientifically identify the remains of the deceased. However, Morris Tidball Binz and Ute Hofmeister, both leading forensic scientists who at the time were working in senior positions within the forensic science unit of the ICRC, stress that actual forensic work (the actual recovery and examination of the deceased) is rarely done by the ICRC, and, if so, is “only carried out in exceptional circumstances or via other service providers”.<sup>34</sup> Both also argue that IHL includes a broad requirement for the parties to the conflict to take all feasible measures to provide families with any information they have on the fate of their loved ones. This could include information about how someone died as part of a humanitarian approach for which forensic sciences are used. They further argue that Additional Protocol I, Article 32 (which applies in international armed conflicts) “means that families have a right to know whether the missing relative is dead or alive; and if the relative is dead, they have a *right to know something about how the death came about* and the whereabouts of the deceased”.<sup>35</sup>

The ICRC does not intervene or provide support to forensic actions that concern criminal prosecutions due to its preferred mode of action, which centres on confidentiality. However, it does provide invaluable assistance to strengthening forensic services and medico-legal systems that carry out work around protection and identification of the dead, and clarification of the fate and whereabouts of missing persons. In line with this, the ICRC may collect information on the circumstances of death, and is mindful of the importance of this for the search for individuals, and for identification processes. However, the ICRC usually does not provide information about the cause, manner and circumstance of death to families in the cases in which it does get involved. Instead, this is seen as the domain of international criminal law (ICL), transitional justice, or national accountability processes, and can be de-emphasized in humanitarian practice.

## **Challenges faced by humanitarian organizations collecting and providing information on cause, manner and circumstances of death**

The ICRC and other organizations conducting forensic operations for humanitarian purposes frequently cite certain tensions when deciding not to collect and/or provide information on cause, manner and circumstances of death to families.<sup>36</sup>

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> “The ICRC is the only organization internationally that has forensic science **solely** for humanitarian purposes.” See Denise Abboud, “How Does ICRC use Forensic Science for Humanitarian Purposes?”, ICRC, 19 May 2022, available at: [www.icrc.org/en/document/how-does-icrc-use-forensic-science-humanitarian-purposes](http://www.icrc.org/en/document/how-does-icrc-use-forensic-science-humanitarian-purposes). However, national government bodies tasked with disaster management may at times be involved in forensic science for humanitarian purposes, and on occasion international non-governmental organizations specializing in the scientific search, recovery and examination of human remains may undertake forensic activities for humanitarian purposes. For example, the Argentine

In many instances, in order to get warring parties to the table to agree on a missing-persons mechanism, discussions must be moderated by a neutral and impartial party.<sup>37</sup> As a result, providing information about cause, manner and circumstances of death may be seen to risk certain fundamental humanitarian principles, especially that of neutrality and impartiality.<sup>38</sup> Second, the provision of this information can be in tension with an important method of work of the ICRC and the Movement more broadly: confidentiality. Finally, from an operational and practical perspective for the ICRC specifically, there may be a fear that by supporting efforts that are aimed at providing families with information about the cause, manner and circumstance of death, the ICRC may eventually be asked to testify (in violation of immunities), thus risking harming the credibility of the ICRC as an impartial institution.<sup>39</sup> As a result due to the

Forensic Anthropology Team, which advances the search for missing persons for both criminal-justice or truth-seeking purposes and humanitarian purposes, intervenes in support of forensic action for humanitarian purposes. This can include in the search for missing migrants, following natural disasters, or as part of humanitarian efforts in conflict. See, generally, Argentine Forensic Anthropology Team, available at: <https://eaaf.org/>.

37 See, generally, Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell, “Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach”, Vol. 99, No. 2, 2017.

38 For example, the Coordination Mechanism on Persons Unaccounted for in Connection with the Events of the 1992–93 Armed Conflict and After in Abkhazia “does not attempt to attribute responsibility for the deaths of any missing person, nor make any findings as to the cause of such deaths”. M. Crettol *et al.*, *ibid.*, p. 603. The authors note that: “A coordination mechanism bringing Georgian and Abkhaz participants to the table was established at the end of 2010 to clarify the fate of missing persons in relation to the conflict. The ICRC agreed to chair this mechanism.” M. Crettol *et al.*, *ibid.*, p. 603. More generally, the ICRC notes the risk to loss of impartiality that may arise with the provision of confidential information to criminal-justice institutions. See ICRC, “Confidentiality Q&A”, 15 January 2018, available at: [www.icrc.org/en/document/confidentiality-q](http://www.icrc.org/en/document/confidentiality-q). See, also, ICRC, “The International Committee of the Red Cross’s (ICRC’s) Confidential Approach: Specific Means Employed by the ICRC to Ensure Respect for the Law by State and Non-State Authorities Policy Document. December 2012”, *International Review of the Red Cross*, Vol. 94, No. 887, 2012, available at: <https://international-review.icrc.org/sites/default/files/irrc-887-confidentiality.pdf>.

39 The question of the obligation not to testify has arisen before international courts. In the case of *Prosecutor v. Simić and others*, the court ruled that “the ICRC has a right under customary international law to non-disclosure of the Information” that the prosecution was seeking. International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Case No. IT-95-9, Decision (Trial Chamber), 27 July 1999. While in recent times there have not been legal challenges seeking to compel the ICRC to disclose information collected during humanitarian forensic operations to courts, in a case concerning detainees held at Guantanamo Bay by the United States government, a military court initially ordered the defence in United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: *United States of America v. Khalid Shaikh Mohammad et al.*, to allow a one-time inspection of ICRC records from visits to Guantanamo Bay. The ICRC in turn asserted an “absolute right to non-disclosure of the ICRC’s confidential information, including the right not to be compelled to testify in judicial proceedings”. Ultimately the court ruled to uphold the ICRC privilege of non-disclosure. However, one of the judges, issuing a separate opinion in the case, noted that he was not “persuaded that the ICRC’s protection against disclosure was the absolute one which it asserted”, but that concluding on that issue was not necessary to resolve based on the facts of the case. United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba, *United States of America v. Khalid Shaikh Mohammad et al.*, Order on the Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, AE 013BBB/108T, 6 November 2013, available at: <https://web.archive.org/web/20170518131534/http://media.miamiherald.com/smedia/2013/11/06/16/25/16cpHS.S0.56.pdf>.

concern of causing harm to affected populations by being perceived as partial or not neutral, organizations such as the ICRC, who ordinarily may be supporting States in their forensic actions in the context of armed conflicts, can be reluctant to intervene and support efforts to ensure the identification of the missing and dead when it may be linked in any way to, or pertain to, accountability efforts. Below, the article explores each tension that prevents greater collaboration between humanitarian and criminal-justice forensic stakeholders in more detail.

## Threats to neutrality and impartiality

The Movement – which encompasses the ICRC, National Red Cross and Red Crescent Societies, and the International Federation for the Red Cross and Red Crescent societies – all abide by seven fundamental principles, which form the ethical framework and core approach to their work. These principles ensure that assistance and protection are in keeping with this framework, irrespective of who the beneficiaries are and what they believe in, and maintain the independence of the Movement.

The principle of neutrality requires that the Movement does “not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.<sup>40</sup> It can be argued that to the extent to which facilitating the collection of information that can later be used by a tribunal or court proceeding against one side in the hostilities may be perceived as collecting information about crimes committed by one side, and therefore as biased, can be a form of “taking sides”. The ICRC has noted that: “The use of ICRC confidential information in accountability processes regardless of their integrity and legitimacy, could be seen as being involved in controversies of a political, religious or ideological nature, which could erode the perception and trust in the ICRC as a neutral and independent humanitarian actor. This in turn would negatively impact our activities and thus people in need of protection and assistance.”<sup>41</sup>

Collecting information about the cause, manner and circumstances of death can at times require understanding how someone was killed, who killed them, and in what conditions. While collecting that information, important linkage information – connecting individual perpetrators to senior commanders – may be obtained. However, the collection of information about the missing and the dead, including how they are killed, need not result in taking sides in hostilities, nor in resulting in a perception of being involved in political, religious or ideological controversies. This is because some of the most important information for prosecutors to take action – such as information about possible perpetrators, which may be the information most likely to result in such

40 ICRC, *The Fundamental Principles of the International Red Cross and Red Crescent Movement: In Brief*, Geneva, August 2015, available at: [www.icrc.org/sites/default/files/topic/file\\_plus\\_list/4046-the\\_fundamental\\_principles\\_of\\_the\\_international\\_red\\_cross\\_and\\_red\\_crescent\\_movement.pdf](http://www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf).

41 Ximena Londoño and Helen Obregón Gieseken, “Sustaining the Momentum: Working to Prevent and Address Enforced Disappearances”, *Humanitarian Law & Policy Blog*, 26 August 2022, available at: <https://blogs.icrc.org/law-and-policy/2021/08/26/sustaining-momentum-enforced-disappearances/>.



perception – need not be collected, analysed or assessed by humanitarian organizations. Therefore, this type of information would not be confidentially shared with families for humanitarian purposes. Taking a broader understanding of the meaning of providing information about the fate of missing loved ones to include the provision of very basic information about cause, manner and circumstances of death (rather than simply information about identity) can ensure that these forensic activities remain under the umbrella of humanitarian action, and that humanitarian organizations assisting in providing families with basic answers about the fate and whereabouts of their loved ones do not participate in prosecutorial activities. As such, they can remain neutral and seek only to serve the interests and rights of families to know the fate of their loved ones.

Second, the principle of impartiality requires the movement to assist all without discrimination of any particular group or identity, “guided solely by their needs” and, therefore, to provide assistance proportionally to where it is most necessary, without individual favouritism.<sup>42</sup> Similarly, here it can be argued that by collecting evidence of crimes conducted by one side, or assisting one side to the conflict in collecting more information about the crimes committed by their adversaries, the Movement may be in violation of the principle of impartiality. Additionally, this can be argued to be compounded by the uncertainty of knowing in advance who might be buried in a particular location. However, finding ways to maintain impartiality and provide assistance to those who need it most (and to all parties of the conflict) is not a unique concern for forensic actions. Such decisions must be taken by the Movement for all activities that they carry out – protection, the provision of humanitarian aid, and building respect for IHL. With careful planning and significant preliminary preparation prior to any exhumations, it is possible to navigate concerns about impartiality and provide support without discrimination to any particular group or identity.

## Confidentiality

A second core tension inhibiting greater support by the Movement to criminal or quasi-criminal-justice processes – for which the use of forensic sciences is essential – is a concern of confidentiality. While not itself a fundamental principle, as a working modality, it is derived from the fundamental principles of neutrality and independence.<sup>43</sup> Therefore, for the ICRC, confidentiality is a core tool by which it is able to carry out its work: “to gain access to affected communities, we build trust by holding confidential dialogues with all the parties to an armed conflict or those involved in other situations of violence”.<sup>44</sup> It is also a key tool in ensuring the safety and security of humanitarian staff and vulnerable persons whom the organization aims to assist.<sup>45</sup> In general, the ICRC

<sup>42</sup> ICRC, above note 40.

<sup>43</sup> ICRC, “Confidentiality Q&A”, above note 38. See, also, ICRC, “The International Committee of the Red Cross’s (ICRC’s) Confidential Approach”, above note 38.

<sup>44</sup> ICRC, “Confidentiality Q&A”, *ibid.*



takes a very serious approach to confidentiality and extremely rarely speaks out or denounces violations. Using this approach enables the ICRC and the Movement more generally to gain vital access to areas that most other actors may not, and provide lifesaving support to civilians, detainees and vulnerable persons around the world. For example, the ICRC was one of the only organizations in the years following the terrorist attacks of 11 September 2001 permitted to visit the Guantanamo Bay facility where the United States was holding internees suspected to be linked to terrorism.<sup>46</sup> Key to being able to do so was the policy that “the ICRC does not comment publicly on the situation at Guantanamo Bay”.<sup>47</sup>

One theory may be that the ICRC and other humanitarian organizations fear that supporting forensic activities within mechanisms that concern the provision of information about the cause, manner and circumstances of death (such as judicial or fact-finding mechanisms) to families may violate the confidentiality that the ICRC generally ensures to all parties with which it engages. It would place the ICRC in a position of reporting findings to families that may implicate another actor or party to a conflict, with which the ICRC was engaging. However, in my view, the ICRC could continue to maintain confidentiality (and, as a result, a perception of neutrality and independence) of information provided to it by other parties, and still assist with forensic operations and activities in a limited manner, in which new information would be collected that is independent of what has been provided as part of confidential conversations. In parallel, the ICRC could, where possible, confidentially provide families with information about what happened (cause, manner and circumstance of death) to their loved ones. The ICRC can consider, in the narrow instances where it may choose to engage with judicial organs to advance efforts to identify individuals, requesting judicial organizations to keep their advice or assistance confidential, to minimize possible harm or retaliation by any individuals or organizations. Finally, it should be noted that confidentiality is not absolute, and there may be times when the ICRC would decide to denounce or publicly speak out against violations.<sup>48</sup>

45 Elem Khairullin, “5 Things That Make ICRC Confidential Information Unsuitable for Legal Proceedings”, *Humanitarian Law & Policy Blog*, 31 January 2019, available at: <https://blogs.icrc.org/law-and-policy/2019/01/31/5-things-make-icrc-confidential-information-unsuitable-legal-proceedings/>, noting that the “operational consequences of disclosure of ICRC confidential information – which includes safety and security of ICRC staff and beneficiaries – outweigh the immediate interest in disclosing such information”.

46 ICRC, “Guantanamo Bay: The Work Continues”, 18 July 2003, available at: [www.icrc.org/en/doc/resources/documents/update/5g2gt7.htm](http://www.icrc.org/en/doc/resources/documents/update/5g2gt7.htm).

47 *Ibid.*

48 For example, in August 1992 the ICRC denounced the detention and inhumane treatment of innocent civilians in Bosnia-Herzegovina, and in September 1998 issued a public statement related to the Kosovo crisis, drawing attention to the plight of the civilian population. See Jakob Kellenberger, “Speaking Out or Remaining Silent in Humanitarian Work”, *International Review of the Red Cross*, Vol. 86, No. 855, 2004, pp. 599–600.

## Privilege to not testify

Finally, a third tension is the ICRC’s privileged exemption from providing evidence and testifying (although this privilege does not apply to other organs of the Movement, such as national Red Cross and Red Crescent societies).<sup>49</sup> As an international body recognized in treaty law with a mandate to promote respect for IHL, the ICRC can be seen as similar to the United Nations (UN), or other international organizations that have explicit privileges and immunities.<sup>50</sup> The International Criminal Tribunal for the former Yugoslavia has recognized as customary international law the ICRC’s right to decline to provide evidence.<sup>51</sup> The International Criminal Court Rules of Procedure and Evidence also expressly exempt the ICRC from testifying before it.<sup>52</sup> Finally, the ICRC has bilateral agreements in many of the countries in which it works, which enable the organization to carry out its mandate and also ensure upholding of the privilege of non-disclosure of confidential information.<sup>53</sup>

Collecting and providing information about the cause, manner and circumstances of death could open up the possibility of States subpoenaing and suing the ICRC to obtain this information. Additionally, and more importantly, if the ICRC were the only possessor of this information (in the event that this information was collected but not shared), it would mean that families of victims of human rights violations may not be able to ever obtain information about the cause and manner of death, unless the ICRC were to waive its right not to divulge this information or to provide the information through another mechanism.

Although the privilege to not testify and its implications may complicate the decision to provide support to the collection of forensic evidence relating to cause, manner and circumstances of death and involvement in forensic investigations that include prosecutorial objectives, this concern may not be insurmountable. First, the ICRC is not the only organization exempt from testifying to engage in forensic activities. Multiple UN agencies contract third parties or develop forensic teams, especially as they relate to fact-finding missions and commissions of inquiry. In some instances, as with the ICRC, where information from a commission of inquiry is requested by national authorities and UN staff are requested to testify before national or other judicial bodies, they have the ability to decide whether to do so, or to exert their privileges and immunities.<sup>54</sup>

49 ICRC, “Memorandum: The ICRC’s Privilege of Non-Disclosure of Confidential Information”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: [https://international-review.icrc.org/sites/default/files/irc\\_97\\_1-2-18.pdf](https://international-review.icrc.org/sites/default/files/irc_97_1-2-18.pdf).

50 The UN derives its privileges and immunities from the Convention on Privileges and Immunities of the United Nations of 1946, and bilateral agreements with States. See note 54.

51 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Blagoje Simić et al.*, above note 39.

52 International Criminal Court (ICC), Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), Part II.A, Rule 73(4)–(6).

53 ICRC, above note 49, p. 439.

54 Convention on Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946 (entered into force 17 September 1946), specifying the forms of privileges and immunities that apply to representatives of members to the principal and subsidiary

Second, rather than directly conducting forensic activities, it may be possible for the ICRC – and indeed the ICRC already does, in certain contexts – to work alongside intermediary organizations, and to support international, hybrid and national judicial bodies with strengthening their medico-legal systems, forensic institutions or in conducting forensic activities, with a view to advancing humanitarian objectives. The ICRC and similar organizations could thus support these institutions developing methods to provide families with information about the fate and whereabouts of their loved ones, leaving questions such as who was responsible for the death of their loved one and any linkage evidence for the Courts to independently investigate. In practice, it is not often possible to simply distinguish between judicial and humanitarian objectives, which require a more flexible, holistic approach that addresses the totality and complexity of the needs of families of victims. Below, the article outlines certain case studies, and the mixed nature of criminal-justice and humanitarian objectives.

## **Blurring criminal-justice objectives and humanitarian forensic objectives in practice**

For families, and in reality, it can often be very difficult to cleanly demarcate humanitarian from criminal-justice objectives, just as it is often not possible to categorize the wishes of families of victims, which are not static or homogeneous. Instead, it is imperative to try to address both humanitarian and criminal-justice needs in a complementary manner, and to develop processes that advance the dignity of families of the missing and the deceased. Conflict resolution and justice efforts, for instance in the Central African Republic, highlight the difficulty of trying to bifurcate objectives of the operations/investigations.

Conflict in the Central African Republic broke out in 2013. During the peak of violence in December 2013, thousands of persons were killed, with bodies strewn across the capital city Bangui and its surroundings, dumped in wells, buried in shallow pits, and left on the side of the road.<sup>55</sup> The national Central African Red

organs to the United Nations (Art. IV); UN Officials (Art. V); and experts on mission for the UN (Art. VI). The UN has created a mechanism for cooperation with judicial organs such as the ICC, whereby requests for UN staff to testify are considered by the Office of Legal Affairs, and “the Secretary-General is under an obligation to waive the immunity of United Nations personnel when the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization”. See UN, *Best Practices Manual for United Nations – International Criminal Court Cooperation Pursuant to The Relationship Agreement Between the United Nations and the International Criminal Court*, 26 September 2016, p. 22, available at: [https://legal.un.org/ola/media/UN-ICC\\_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf](https://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf).

- 55 See, for example, Preliminary Report of the Independent Expert on the Situation of Human Rights in the Central African Republic, Marie-Thérèse Keita Bocoum, UN Doc. A/HRC/26/53, 30 May 2014; Amnesty International, “Central African Republic: Time for Accountability”, 10 July 2014, available at: [www.amnesty.org/en/documents/afr19/006/2014/en/](http://www.amnesty.org/en/documents/afr19/006/2014/en/); UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), *Violations and Abuses of International Human Rights and Humanitarian Law Committed in Bangui, Central African Republic, Between 26 September and 20 October 2015*, Bangui, 2016, available at: [https://minusca.unmissions.org/sites/default/files/bangui\\_report\\_final\\_english.pdf](https://minusca.unmissions.org/sites/default/files/bangui_report_final_english.pdf).

Cross began organizing an emergency effort to collect bodies from across Bangui, taking them to one of the main morgues in the city and ensuring that they were placed in labelled body bags.<sup>56</sup> However, the morgues became quickly overwhelmed, with bodies piling up outside the mortuary door. In other parts of the country, there were reports of large-scale killings and creation of mass graves.<sup>57</sup>

In response to this, a transitional government was created, and the International Criminal Court announced the opening of a preliminary investigation to look into the violence, following a referral by the State. Additionally, a hybrid Special Criminal Court was set up, as well a Truth, Justice and Reconciliation Commission. Third, although during the periods of intense hostilities the court houses were all closed, the national judicial system opened within a few years a criminal session, to try suspects linked to the violence. Finally, in 2017, forensic experts were requested by the national judge to investigate and exhume a mass grave alleged to contain the remains of individuals believed to have been killed by international peacekeepers.<sup>58</sup> The investigation that followed and in which I took part, is an example of the blurring and integration of both humanitarian and criminal-justice objectives. It aimed: (1) to provide families with the opportunity to scientifically identify their loved ones and to know how their loved ones were killed; (2) to provide evidence to tribunals about what happened, in a bid to supplement and provide clarity to statements and information provided by both the victims and alleged perpetrators; and (3) to ensure that the investigation team, which was made up of international organizations, took initial steps to train and transfer expertise to national forensic experts. Each of these aims has elements of both humanitarian and criminal-justice objectives.

In this case, because families of the victims and the judicial system had a dual desire to advance both identification-related and criminal-justice objectives of the case, it was possible to advance both, without privileging either goal. The forensic investigators were able to complete the criminal investigation while also including the perspectives and wishes of the families to a wide extent, providing

56 ICRC, “Central African Republic: ‘We’re Passionately Humanitarian’”, 22 April 2014, available at: [www.icrc.org/en/doc/resources/documents/interview/2014/04-22-central-african-republic-red-cross-volunteers.htm](http://www.icrc.org/en/doc/resources/documents/interview/2014/04-22-central-african-republic-red-cross-volunteers.htm); Kim Lewis, “Red Cross: Death Toll Mounts in Central African Republic’s North”, VOA Africa, 20 January 2014, available at: [www.voanews.com/a/car-violence-bangui-icrc-flee-dead-injuries-hospital-machete-people/1833898.html](http://www.voanews.com/a/car-violence-bangui-icrc-flee-dead-injuries-hospital-machete-people/1833898.html); ICRC, “Health Care One of the First Casualties of the Conflict”, 26 August 2014, available at: [www.icrc.org/en/doc/resources/documents/article/health-care-in-danger/2014-08/hcid-field-focus.htm](http://www.icrc.org/en/doc/resources/documents/article/health-care-in-danger/2014-08/hcid-field-focus.htm), noting that: “The 250 Red Cross volunteers are often among the last health-care workers to come back in off the streets, where they evacuate and care for the wounded, recover dead bodies and take them to the morgue for burial.”

57 UN Office of the High Commissioner for Human Rights, *Report of the Mapping Project Documenting Serious Violations of International Human Rights Law and International Humanitarian Law Committed Within the Territory of Central African Republic Between January 2003 and December 2015*, Bangui/Geneva, 30 May 2017, available at: [www.ohchr.org/sites/default/files/Documents/Countries/CF/Mapping2003-2015/2017CAR\\_Mapping\\_Report\\_EN.pdf](http://www.ohchr.org/sites/default/files/Documents/Countries/CF/Mapping2003-2015/2017CAR_Mapping_Report_EN.pdf).

58 Columbia Law School Human Rights Clinic, “Major Step Forward for Justice as Experts Exhume and Investigate Mass Grave in the Central African Republic”, New York, 12 December 2017, available at: <https://web.law.columbia.edu/human-rights-institute/news/Central-African-Republic-Boali-Investigation>.

them, for instance, with an opportunity to pray prior to the commencement of the exhumation and further updates on its work. Additionally, the judge in charge of the case decided to request for scientific identification of the remains, and not simply an analysis of the cause, manner and circumstance of the death – despite the fact that for purely the purpose of evidence collection for prosecution of the individuals charged with war crimes in this case, identification processes were not necessary to prove the commission of the crime. It should be noted that it is always the obligation of an autopsy (including the forensic analysis of skeletal remains) to try to seek information as to the identity of the individual, and therefore there should not be a bifurcation of “humanitarian” and “criminal-justice” objectives. However, in practice, judicial bodies investigating international crimes do not always prioritize identifications. While bridging multiple mandates may not be possible in all situations, at times there can be room for creative avenues of collaboration.

In other instances where there may not be the possibility for criminal prosecutions following forensic investigations – for example because the requesting authority is a truth commission or commission of inquiry that is not mandated to prosecute, or because a particular government may be totally unwilling to carry out prosecutions – it is still important to collect basic information about the cause, manner and circumstances of death. First, best efforts should be taken to provide this information – if available – to families of victims, even if in a very basic manner, as part of the right, under Customary IHL Rule 117, for families to know the fate of their loved ones. In my view, knowing the fate should require, in addition to knowing that they are dead, understanding (where it is possible to do so) how they may have died. Second, in situations where for political reasons it may not be possible during conflict or immediately following conflict to proceed with judicial investigations, collecting and preserving the information about both identification and cause, manner and circumstance of death (rather than simply information pertaining to identification) can prevent re-exhuming bodies once more, should the political situation suddenly change and become amenable to judicial processes even after decades. This would maintain the sanctity and dignity of the bodies, and prevent families from having to undergo multiple, emotionally challenging exhumations.

Finally, organizations providing forensic support for humanitarian purposes such as the ICRC should endeavour, where feasible and in line with their principles of neutrality and impartiality, to confidentially engage more often with governmental and intergovernmental organizations and mechanisms involved in the search and recovery of the missing, even if they are part of criminal purposes, on matters of identification of victims. This would strengthen respect for IHL related to the missing and the deceased, and enable the families of the missing and the dead to regain some dignity. In particular, confidentially engaging with institutions working on ICL, transitional justice, and national judicial efforts, and supporting identification efforts (even if indirectly) will aid families to know the fate of their loved ones. The following section argues why it is crucial to engage with each of these areas.

## Moving forward: (Properly) incorporating forensics and humanitarian action into criminal and transitional justice investigations

In advancing greater integration of the humanitarian and criminal-justice objectives of forensic science, there are three primary areas in which organizations that currently focus primarily on forensic humanitarian action could have greater involvement: (1) in ICL; (2) in transitional justice efforts; and (3) in support of national judicial efforts. Engaging more closely with each of these fields is likely to better advance the rights of families of the missing, and ensure that identification and return of unidentified human remains to families occurs more frequently.

### International criminal law and investigations of the missing and dead

ICL, which seeks to hold those responsible for the most heinous crimes, serves a crucial role in advancing the rights of families of those unlawfully killed or disappeared in conflict, and ensuring that justice for serious violations of IHL and international human rights law is served. Under ICL, States have the obligation to investigate and hold accountable those responsible for crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian and human rights law. With respect to the Rome Statute of the International Criminal Court, which came into force in 2002, the Court has jurisdiction over multiple international crimes, including importantly for the missing and the dead, crimes of genocide, crimes against humanity, including that of murder, and war crimes of wilful killing and outrages upon personal dignity.<sup>59</sup> The Explanatory Note of the International Criminal Court further specifies that outrages to personal dignity need not apply only to living persons, but can include humiliating, degrading or violating the dignity of dead persons as well.<sup>60</sup> The International Criminal Court is a court of last resort, and works according to principles of complementarity with States.<sup>61</sup> Today,<sup>62</sup> the International Criminal Court has seventeen open investigations, and a further three situations under preliminary investigation.<sup>63</sup> Additionally, many countries have set up hybrid tribunals, incorporated international law

59 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 6, 7(1)(a), 8(2)(a)(i), 8(2)(b)(xxi) and 8(2)(c)(ii).

60 ICC, *Elements of Crimes*, The Hague, 2008, p. 33, footnote 57, available at: [www.icc-cpi.int/sites/default/files/iccdocs/PIDS/docs/ElementsOfCrimesEng.pdf](http://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/docs/ElementsOfCrimesEng.pdf).

61 Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, International Center for Transitional Justice, New York, 2016, available at: [www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](http://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf). For an overview of relevant documents on complementarity, see ICC, “Complementarity”, available at: <https://asp.icc-cpi.int/complementarity>.

62 As at September 2022.

63 ICC, “Preliminary Investigations”, available at: [www.icc-cpi.int/situations-preliminary-examinations](http://www.icc-cpi.int/situations-preliminary-examinations).

criminal codes into their national statutes, and have obligations to criminalize certain acts that amount to international crimes.<sup>64</sup>

Organizations and institutions with a humanitarian mandate argue that ICL (as well as international human rights law) partly aims to prevent violations of IHL by prosecuting and punishing parties to the conflict that violate international humanitarian and human rights law. Humanitarian organizations engage with parties to the conflict and seek to prevent harm to civilians by using tactics of “confidential dialogue and persuasion” of State authorities and other parties to the conflict.<sup>65</sup> As a result, in practice, information about the cause, manner and circumstances of death, as well as perpetrator information, in situations where an international crime may have been committed is seen to be the domain of ICL. By contrast, humanitarian organizations conducting forensic science operations focus mainly on the search and identification of human remains in situations where there are no ongoing international criminal investigations. However, there is a real risk in relying entirely upon ICL to provide information to families about cause of death, as there are tensions between the identification of many victims and the objectives of ICL.<sup>66</sup>

First, the tension between identification of victims and ICL lies to a certain extent in the formulation of the elements of the crimes. A significant number of the crimes under ICL do not require identification of specific individuals who may be missing and killed, and therefore international criminal investigators are not incentivized to take steps to scientifically identify victims. For example, proving the crime of genocide requires understanding the group identity of individuals – and whether they belong to a specific national, ethnical, racial or religious group which is being destroyed.<sup>67</sup> Evidence of one’s religious group might be

64 See, generally, Howard Varney and Katarzyna Zduńczyk, *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes*, International Center for Transitional Justice, New York, December 2020, available at: [www.ictj.org/sites/default/files/ICTJ\\_Report\\_Universal\\_Jurisdiction.pdf](http://www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf).

65 See, for example, Anne Marie La-Rosa, “ICRC and ICC: Two Separate but Complementary Approaches to Ensuring Respect for International Humanitarian Law”, *ICRC*, 3 March 2009, available at: [www.icrc.org/en/doc/resources/documents/interview/international-criminal-court-interview-101008.htm](http://www.icrc.org/en/doc/resources/documents/interview/international-criminal-court-interview-101008.htm), noting that: “The work of the ICC and that of the ICRC constitute alternative approaches to preventing IHL violations, approaches we see as complementary. While the ultimate objectives are similar, the tools are quite different. The ICC prosecutes and sanctions, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion.”

66 This challenge was highlighted by Eric Stover and Rachel Shigekane twenty years ago, and the tensions remain relevant. See Eric Stover and Rachel Shigekane, “The Missing in the Aftermath of War: When do the Needs of Victims’ Families and International War Crimes Tribunals Clash?”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002. Additionally, a recent article explores the possibilities of finding “a middle ground” between international humanitarian aid organizations and international justice goals. See Sarah Craggs, Tiffany Deguzman, Ivey Dyson, Helena von Nagy, Bryce Rosenbower and Eric Stover, “Finding a Middle Ground? International Humanitarian Aid Organizations, Information Sharing, and the Pursuit of International Justice”, *Human Rights Quarterly*, Vol. 44, No. 3, 2022, noting that international humanitarian organizations often collect personal and sensitive information that may be of interest and serve international criminal-justice institutions, and exploring “four issues that affect information sharing between humanitarian organizations and international justice institutions: (1) the right to privacy and justice; (2) mandate requirements; (3) policy requirements; and (4) organizational culture”.

67 Rome Statute, above note 59, Art. 6.



determined by an examination of the artefacts found together with multiple bodies, and not require individual identification. Additionally, proving murder as a crime against humanity requires that the act be performed as part of a “widespread or systematic attack” that is “directed against any civilian population”.<sup>68</sup> In some instances, proving murder as a crime against humanity may require showing that those killed were civilians, rather than necessarily demonstrating the individual identity of a victim.

Second, ICL is primarily concerned with individual culpability and responsibility for those most responsible for serious crimes. While most of international human rights law and IHL focuses on creating obligations binding upon States (and all parties to the conflict, in the case of IHL), ICL centres on trying to hold individuals accountable. As a result, the latter necessarily focuses on specific individuals who are suspected of the commission of serious violations of IHL and human rights law. The International Criminal Court’s jurisdiction is even narrower, as it is both a court of last resort, and only focused on those most responsible for the commission of these crimes – not junior or lower-level actors who may have committed the crimes.<sup>69</sup> As a consequence, it is unlikely that ICL can actually provide the tools to identify all those killed in contexts of conflict. Some of those may not be victims of a serious ICL violation. Others who may be victims of crimes that are properly classified under ICL may nonetheless not be victims at the hands of a suspect who is senior enough to be brought to trial under the existing jurisdictions.<sup>70</sup> This then limits the number of victims for whom ICL tools can provide scientific identification or information about the cause, manner and circumstances of death.

Third, in practice, ICL is hampered by significant challenges in resource allocation. Running a complex investigation to prove particular crimes against a senior leader is not only extremely expensive, but also very challenging. It may require interdisciplinary expertise, including assistance from criminalistics

<sup>68</sup> *Ibid.*, Art. 7(1).

<sup>69</sup> States have an obligation to uphold international humanitarian and human rights law and investigate, prosecute and punish individuals at all levels who have committed violations that rise to the level of a crime. However, in practice following a major conflict or mass crime it is often extremely difficult, if not impossible, to provide carceral punishment to all those involved, and there may be other goals of reconciliation or social cohesion that may lead States to consider alternative approaches. The field of transitional justice has evolved to address such situations of mass conflict, and in situations of a non-international armed conflict, Article 6(5) of the Second Additional Protocol provides that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in armed conflict, of those deprived of their liberty for reasons related to the armed conflict”. Note, this amnesty excludes persons suspected or accused of war crimes; see J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 159. It is beyond the scope of this article to have a full discussion of the relationship between amnesties and ICL, but it remains a vibrant and dynamic area of study.

<sup>70</sup> In addition to the ICC (whose jurisdiction is binding upon parties that have ratified the Rome Statute), following specific conflicts, some States create hybrid courts, many of which also only have jurisdiction to try those more responsible. National criminal courts generally have the authority to investigate and prosecute those involved in the commission of international crimes – and the role of national prosecuting bodies is discussed below. See, also, H. Varney and K. Zduńczyk, above note 64, for a summary of universal jurisdiction.

experts, cybercrime experts, open-source investigators, gender-based violence and sexual violence experts, psychiatrists, witness protection experts and many others. Creating large forensic teams to conduct the search, recovery, examination, identification and analysis of human remains is unlikely to be conducted in all ICL cases. This is especially true if obtaining identification information is not strictly required to prove all of the elements of a specific crime beyond reasonable doubt.

Fourth, while there have been efforts to move away from this, in ICL and especially among prosecutors and investigators, success is typically measured by the outcome and not necessarily by the process. Securing a conviction and bringing a strong case against a suspected perpetrator is seen as a successful outcome. Many prosecutors are much more concerned with the cause and manner of death – which can be obtained by physically examining a body or obtaining an autopsy report – than with supporting the extremely complex process of scientifically identifying an unidentified person.<sup>71</sup> The process – the possibility for families of victims to identify, have a body returned to them, and bury their loved ones with dignity – while extremely important, may not be the central consideration when it comes to ICL.

These tensions result in a concern that in practice, international criminal investigations often deprioritize the important goal of providing scientific identification of victims of crimes in order to provide families with the possibility to know the fate of their loved ones. It is not to suggest that these tensions should exist, or that investigators do not have an obligation to find creative ways around them. Additionally, it is not to abscond those working in ICL of their obligations to scientifically identify and aim to return corpses to families in certain circumstances.<sup>72</sup> There is tremendous possibility for creative partnerships that bridge the criminal-justice and humanitarian divide, which sometimes exists, that may lead to families having both the possibility to know the identity and the cause of death of their loved ones. It can also be a way for the ICRC and other humanitarian organizations working on such issues to advance their mandate of the promotion and respect for IHL.

Humanitarian organizations such as the ICRC already undertake activities to sensitize ICL organizations on their obligations to uphold and advance IHL as

71 Additionally, there are complications in practice in advancing the search for missing persons, persons presumed dead, and persons who are deceased but for whom the identity of their body is not known. Creating a holistic strategy formed around the search for the missing individual (whether presumed dead or alive) is extremely important, but beyond the scope of this article. See M. Salado Puerto *et al.*, above note 29.

72 See, generally, Office of the UN High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), New York/Geneva, 2017, available at: [www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf](http://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf). The obligation to search for and return the remains of missing and forcibly disappeared persons to their families in international human rights law “has been incrementally recognized and developed by different courts”. Grażyna Baranowska, “Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017.

part of their criminal investigations.<sup>73</sup> As Anne-Marie La Rosa, legal advisor and focal point for the ICRC on issues related to international criminal justice, notes: “The ICRC’s usual approach to possible violations of IHL is to engage in *critical, confidential dialogue* with those who have the power to improve the situation. Our mission is exclusively humanitarian: to protect the lives and dignity of victims of armed conflicts and other situations of violence and to provide them with assistance.”<sup>74</sup> It is my argument that as part of these efforts, engaging innovatively and confidentially – and only in situations where the ICRC’s mandate would not be compromised – with judicial actors advancing forensic investigations that can lead to identification of individuals can further improve the ways in which international criminal investigations are conducted. The judicial actors often have the power to provide information that advances the dignity of armed conflicts, and can be sensitized to ensure that they advance humanitarian rights-respecting investigations.

## Transitional justice and investigations of the missing and dead

A second vital avenue to ensure that families of the missing and known dead have the possibility to confirm the identity, and learn the whereabouts, and cause of death of their loved ones is through transitional justice mechanisms, which are frequently employed following the end of conflict. Transitional justice processes seek to deal with past injustice, conflict, and widespread human rights and IHL violations. While the origins of transitional justice can be traced back to the Geneva Conventions, as well as the Nuremberg and Tokyo trials, the field first began self-identifying as such in the 1980s following a wave of political changes in both Latin America and Eastern Europe, with the aim to support countries transitioning from conflict toward peace, and support societies moving from autocracy to democracy.<sup>75</sup> Through instruments such as truth seeking and truth telling, criminal justice, amnesties, reparations, memorialization, institutional reform, and vetting, transitional justice processes aim to contribute to the reform and transformation at the individual, community and societal levels following armed conflicts and other situations of violence. While transitional justice tools and approaches are not used solely in conflict situations, in many instances its mechanisms are used to grapple with, and provide families with, ways to deal with conflicts and with the past.

Institutions providing humanitarian forensic support frequently engage with transitional justice mechanisms. In Colombia, the peace agreement led to

73 A.-M. La Rosa, above note 65, noting that: “The work of the ICC and that of the ICRC constitute alternative approaches to preventing IHL violations, approaches we see as complementary. While the ultimate objectives are similar, the tools are quite different. The ICC prosecutes and sanctions, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion.”

74 *Ibid.*

75 See, generally, Ruti G. Teitel, *Transitional Justice*, Oxford University Press, New York, 2000; Ruti G. Teitel, “Transitional Justice Genealogies”, *Harvard Human Rights Law Review*, Vol. 16, No. 1, 2003; Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice”, *Human Rights Quarterly*, Vol. 31, No. 2, 2009.

the creation of multiple transitional justice mechanisms, including a Truth, Coexistence and Non-Repetition Commission, a Special Jurisdiction for Peace, as well as a Unit for the Search for Missing Persons.<sup>76</sup> While these mechanisms have had challenges,<sup>77</sup> in some ways the Special Jurisdiction for Peace has achieved the greatest success, providing an example of the creative possibility of mixed humanitarian–judicial initiatives.<sup>78</sup> Forensic experts provided information as part of the Truth and Reconciliation Commission in South Africa, and later a Missing Persons Task Team was created, to investigate and search for persons missing during apartheid. The ICRC and the Argentine Forensic Anthropology Team have provided forensic advice to national experts in Cyprus, to assist them in the recovery of missing persons believed to have been killed during inter-communal fighting. Each of these can be considered to be transitional justice mechanisms, assisting individuals, communities and societies deal with the past.

However, forensic experts working on advancing “humanitarian” goals should pay greater attention to the field of transitional justice. Too few times are the concerns of the families of the missing and deceased accounted for in transitional justice processes, especially in the processes that deal with accountability.<sup>79</sup> As a result, the concerns of families of the missing are regularly marginalized at the expense of other needs, whereas creative mechanisms and approaches aiming to innovate within the transitional justice field by bringing in interdisciplinary scientific expertise to advance the rights of families are not capitalized upon.

## National prosecutions and investigations of the missing and dead

Finally, organizations conducting humanitarian forensic assistance should confidentially engage, directly or indirectly, with organizations and bodies

76 See Truth, Coexistence and Non-Repetition Commission, the Special Jurisdiction for Peace (JEP) and the Unit for the Search for Persons Presumed Disappeared in the context and by reason of the armed conflict (UBPD), *Comprehensive System of Truth, Justice, Reparation, and Non-Repetition* (SIVJRNR), 2019, available at: [www.jep.gov.co/DocumentosJEPWP/4SIVJRNR\\_EN.pdf](http://www.jep.gov.co/DocumentosJEPWP/4SIVJRNR_EN.pdf); Institute for Integrated Transitions, *The Colombian Peace Talks: Practical Lessons for Negotiators Worldwide*, September 2018, available at: <https://ifit-transitions.org/wp-content/uploads/2021/03/The-Colombian-Peace-Talks-Practical-Lessons-for-Negotiators-Worldwide.pdf>.

77 Andrés Morales, “The Rocky Road to Peace II: Additional Challenges at the Special Jurisdiction for Peace in Colombia”, *EJIL:Talk!*, 12 May 2022, available at: [www.ejiltalk.org/the-rocky-road-to-peace-ii-additional-challenges-at-the-special-jurisdiction-for-peace-in-colombia/](http://www.ejiltalk.org/the-rocky-road-to-peace-ii-additional-challenges-at-the-special-jurisdiction-for-peace-in-colombia/); VerdadAbierta.com, “Search Unit Still Does Not Fill the Disappearance Gap”, 16 November 2021, available at: <https://tortuoso-camino-implementation.verdadabierta.com/en/search-unit-still-does-not-fill-disappearance-gap/>.

78 For example, in April 2022 eleven persons, including a military general, nine other military officials, and a civilian admitted before the Special Jurisdiction for Peace to committing war crimes and crimes against humanity as part of the killings of at least 120 civilians. See Julie Turkewitz and Sofia Villamil, “Colombian General and 10 Others Admit to Crimes Against Humanity,” *New York Times*, 27 April 2022, available at: [www.nytimes.com/2022/04/27/world/americas/colombia-war-crimes.html](http://www.nytimes.com/2022/04/27/world/americas/colombia-war-crimes.html).

79 Robert Mardini, “Transitional Justice: States Should Include Issue of Missing Persons and their Families in the Process. Statement to the UN Security Council Open Debate on Peacebuilding and Sustaining Peace: Transitional Justice in Conflict and Post-Conflict Situations”, ICRC, 13 February 2020, available at: [www.icrc.org/en/document/transitional-justice-states-should-include-issue-missing-persons-and-their-families-process\\_](http://www.icrc.org/en/document/transitional-justice-states-should-include-issue-missing-persons-and-their-families-process_).

involved in conducting investigations of the missing and dead around efforts to ascertain the fate and whereabouts of missing persons, even if those organizations may have a purpose of eventual prosecutions (such as national courts). This should be prioritized especially in contexts where the complementary pursuit of both humanitarian and justice-related objectives is conducive to responding effectively and comprehensively to the various needs of the families of the missing. While it is the primary duty of States to ensure adequate medico-legal services, frequently countries that have experienced recent armed conflict or significant violence may have medico-legal systems and forensic services that are severely overwhelmed, with a lack of proper regulations, very limited facilities and few trained experts. Many countries may not have the equipment, resources or expertise to carry out advanced scientific approaches, such as integrated identification processes, or extraction and processing of DNA. Additionally, many States may not have incorporated ICL within their domestic statutes, or may choose not to focus on the rights of the missing and deceased.

While humanitarian organizations such as the ICRC already provide vital support to medico-legal systems and national forensic services (and sometimes are the only organizations to do so), it is crucial that this continues to be strengthened. Where possible under existing mandates, these organizations can consider directly or indirectly supporting these services with advice and technical support – to respond comprehensively to the various needs of the missing and their families, including those that are justice-related. Although it is tricky to implement in practice, this can provide families with the closure they need, through information and truth concerning what happened to their loved ones, as well as the possibility to have a body returned to them to carry out last rites. It can also prevent families from being retraumatized and being exposed to the additional pain and grief of inadequate or poorly implemented forensic processes. Merging criminal-justice objectives and humanitarian objectives can lead to the incorporation of a victim-centric approach, which views advancing the rights of families in the process of carrying out criminal investigations as equally important as the outcome, and which centres the dignity of families of victims.

## Conclusion

The advancement of forensic science and its application into missing persons investigations has contributed to uphold the dignity of the deceased and enabled families of the missing to obtain crucial information about the fate and whereabouts of their loved ones, facilitating closure even after decades of waiting and searching. Additionally, forensic science processes have supported transparency, stronger, fairer investigations with reliable results, in which the families of those dead or missing may have the opportunity to advance justice and seek redress and reparations. The failure, at times, to simply advance humanitarian and criminal-justice objectives in forensic science, however, hinders efforts to assist families searching for their loved ones. It reduces the possibility

for families to obtain the full truth regarding what happened to their relatives. Additionally, a lack of humanitarian focus and engagement with criminal and judicial mechanisms weakens these instruments, allowing judicial mechanisms to deprioritize identification of victims. By having greater collaboration and blurring the distinction between humanitarian and criminal-justice objectives, the needs of families of the missing and deceased can be significantly advanced.

# IHL in the era of climate change: The application of the UN climate change regime to belligerent occupations

**Romina Edith Pezzot\***

PhD Researcher in international law and Teaching Assistant,  
Geneva Graduate Institute, Geneva, Switzerland

Email: [romina.pezzot@graduateinstitute.ch](mailto:romina.pezzot@graduateinstitute.ch)

## Abstract

*This article invites the reader on a journey through the legal arguments that would confirm the application of the United Nations (UN) climate change regime to belligerent occupations. Although the regime is silent on this issue, its application should not be limited to peacetime due to the seriousness of global climate change and its adverse effects on the environment and living entities. A harmonious interpretation and application of the UN climate change regime and the law of occupation would allow Occupying Powers to ensure the safety and well-being of the civilian population and contribute to the protection of the Earth's climate system.*

\* Romina Edith Pezzot holds a law degree from the University of Buenos Aires and a master's degree in international law from the Geneva Graduate Institute. Her current research focuses on the interaction between international environmental law, climate change law and international humanitarian law. For several years, she has also lectured in public international law, international humanitarian law and international criminal law at the University of Buenos Aires.

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**Keywords:** climate change, Paris Agreement, international humanitarian law, law of occupation, armed conflict, belligerent occupation.

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Once, a knight was riding back to his castle when he saw a little sparrow lying on its back in the middle of the road, with its small legs up in the air.

Reining in his mount, the knight looked down and asked: “Why are you lying upside-down like that?”

“I heard that the heavens are going to fall today,” replied the bird.

The horseman laughed and asked: “And do you think that your spindly legs can hold up the heavens?”

“Well,” replied the sparrow, “one does what one can.”

Antonio Cassese<sup>1</sup>

## Introduction

The emission of greenhouse gases (GHGs) into the atmosphere by human activities has decisively caused a rise in the Earth’s temperature, a phenomenon known as anthropogenic climate change.<sup>2</sup> Due to the serious threat that climate change represents for the planet and the survival of living entities, States have decided to coordinate their action to stabilize and reduce the emission of GHGs by adopting the 1992 United Nations Framework Convention on Climate Change (UNFCCC),<sup>3</sup> the 1997 Kyoto Protocol<sup>4</sup> and the 2015 Paris Agreement,<sup>5</sup> collectively referred to herein as the UN climate change regime. Despite climate change having an unusual macro scope and requiring a highly intense, permanent and long-term international cooperation, the treaties regulating this subject matter have a common feature: they are silent about their application during armed conflicts. This legal gap may give rise to uncertainties as to whether States Parties must respect the UN climate change regime during armed conflicts and, if so, how the rules and principles of international humanitarian law (IHL)

- 1 Quoted in “Antonio Cassese: The Stubborn Sparrow”, Episode 0: “The Knight and the Sparrow”, Geneva Graduate Institute, 8 December 2021, available at: [www.graduateinstitute.ch/communications/news/new-podcast-series-antonio-cassese](http://www.graduateinstitute.ch/communications/news/new-podcast-series-antonio-cassese) (all internet references were accessed in April 2023).
- 2 The Intergovernmental Panel on Climate Change (IPCC), created by the United Nations Environment Programme (UNEP) and the World Meteorological Organization, confirmed that the global average temperature has been increasing since the mid-twentieth century and that anthropogenic GHG emissions have been the dominant cause – in other words, that the human influence on Earth’s climate system is clear. IPCC, *AR4 Climate Change 2007: Synthesis Report – Summary for Policymakers*, 2007, pp. 2–5; IPCC, *AR5 Climate Change 2014: Synthesis Report – Summary for Policymakers*, 2015, pp. 2–7.
- 3 United Nations Framework Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1994) (UNFCCC).
- 4 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 162, 11 December 1997 (entered into force 16 February 2005) (Kyoto Protocol).
- 5 Paris Agreement, 3156 UNTS 107, 12 December 2015 (entered into force 4 November 2016).

should be interpreted and applied in an era in which climate change has become an international priority at all times.

This legal context is particularly relevant in the case of belligerent occupations, which are regulated by IHL. As is well known, these are – at least *a priori* – temporary situations, and the Occupying Power does not acquire sovereign rights over the occupied territory.<sup>6</sup> Due to this temporality, occupations are governed by the general principle of preservation of the *status quo ante bellum*, according to which the Occupying Power can only adopt those measures that are necessary to restore and ensure public order and safety.<sup>7</sup> As explained by Orkin and Ferraro, an Occupying Power must not adopt policies or measures that would introduce or result in permanent changes<sup>8</sup> because one of the aims of the occupation regime is to facilitate transition and restoration of power to the legitimate authorities. It is worth recalling that occupations are ruled by conventional rules, including the 1907 Hague Convention IV with Respect to the Laws and Customs of War on Land and Its Annex (Hague Convention IV),<sup>9</sup> the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV),<sup>10</sup> and the 1977 Additional Protocol I to the Geneva Conventions.<sup>11</sup> IHL also contains customary norms applicable to such situations.<sup>12</sup>

This set of regulations is what has been called the “law of occupation”, and it was adopted and developed at a time when climate change did not exist, or at least was not yet publicly acknowledged as a global problem. Hence, the law of occupation has no specific rules related to how to deal with climate change in that concrete context. This raises questions regarding, first, the current scope of application of the law of occupation and the UN climate change regime, and second, how both legal regimes interact.<sup>13</sup> The issue here is the tension that exists

6 Benvenisti defines a belligerent occupation as a situation where the forces of one or more States exercise control over the territory of another State without the latter’s permission, a situation regulated by international law because occupation does not transfer sovereignty over the territory to the Occupying Power: Eyal Benvenisti, “Occupation, Belligerent”, *Max Planck Encyclopedia of Public International Law*, May 2009, para. 1. Belligerent occupations are characterized, therefore, by their non-consensual nature: see Yoram Dinstein, *The International Law of Belligerent Occupations*, 2nd ed., Cambridge University Press, Cambridge, 2019, p. 39.

7 Eyal Benvenisti, *The International Law of Occupation*, Oxford University Press, Oxford, 2012, pp. 83–102.

8 Mikhail Orkin and Tristan Ferraro, “IHL and Occupied Territory”, *Humanitarian Law and Policy Blog*, 26 July 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/07/26/armed-conflict-ukraine-ihl-occupied-territory/>.

9 Hague Convention (IV) with Respect to the Laws and Customs of War on Land and Its Annex, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV).

10 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) (GC IV).

11 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, 2 vols, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/en/customary-ihl>.

13 As explained by Liebhlich and Benvenisti, the law of occupation interacts nowadays with many “neighbouring” international legal frameworks and institutions because when it emerged in the nineteenth century, it was the only body of law that regulated military control over hostile territory.

between the temporary nature of belligerent occupations and the permanent and global nature of climate change. In this context, due to the seriousness of global climate change and the humanitarian situation faced by the civilian population during a belligerent occupation, it is necessary to reflect on the compatibility between these two international legal regimes. With that in mind, the purpose of this essay is to address the scope of application of the UN climate change regime and to determine whether it is applicable during armed conflicts and in concrete, belligerent occupations.

The thesis presented in this essay is that the UN climate change regime applies permanently regardless of the context (peacetime or wartime). Firstly, this is because the suspension of its application due to armed conflicts (or, in this case, a belligerent occupation) would diminish the efficacy of this legal regime and could be catastrophic for the Earth's climate system and living entities. The seriousness and permanent characteristic of the climate change problem requires that all parties to the regime constantly take action to limit temperature increases to 1.5°C above pre-industrial levels, and the temporality of a belligerent occupation cannot be an excuse for not respecting and implementing the regime in the occupied territory. Secondly, from a humanitarian perspective, the safety of the civilian population of the occupied territory is simultaneously threatened by two sources: climate change and the occupation. Hence, the population must be protected from the negative consequences of both threats and should therefore benefit from the protection of both legal regimes.

In light of the above, four main legal arguments are developed to justify the application of the UN climate change regime to belligerent occupations. The first argument concerns respect for the UN climate change regime by Occupying Powers when that regime is part of the laws in force in the occupied territory. The second relates to the extraterritorial application of the regime in the occupied territory as a consequence of the "GHG production-based system boundary" adopted by the regime and the harm prevention principle recognized in international environmental law (IEL). The third argument is based on the principle of legal stability and continuity of treaties developed by the International Law Commission (ILC) in its Draft Articles on the Effects of Armed Conflicts on Treaties (ILC Draft Articles),<sup>14</sup> and the application of the principle to the UN climate change regime. And finally, the application of the UN climate change regime during belligerent occupations is legally possible due to the connection between this regime and international human rights law (IHRL), and the obligation of the Occupying Power to respect and guarantee the recognized human rights of the civilian population under its effective control, in particular those rights affected by the adverse effects of climate change.

Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law*, Oxford University Press, Oxford, 2022, p. 3.

14 ILC, *Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries*, in *Yearbook of the International Law Commission*, Vol. 2, Part II, 2011 (ILC Draft Articles).

## The importance of clarifying the scope of application of the UN climate change regime

The UN General Assembly has recognized that climate change is a common concern of humanity, since climate is an essential condition which sustains life on Earth.<sup>15</sup> The serious threat that climate change represents for the planet and living entities has mobilized international public opinion and has brought the issue to the attention of the whole world. In this regard, it has been said that climate change is a “civilizational wake-up call ... telling us we need to evolve”,<sup>16</sup> and that we are “the last generation that can do something about it”.<sup>17</sup> It has also been considered to be “the defining issue of our times”, and one that “presents a golden opportunity to promote prosperity, security and a brighter future for all”.<sup>18</sup> Hulme believes that climate change is not just another international problem waiting for a solution; instead, he believes that it is “an environmental, cultural and political phenomenon which is reshaping the way we think about ourselves, about our societies and about humanity’s place on Earth”.<sup>19</sup>

Due to the global character, complexity and scientific uncertainties of climate change, from a legal perspective it was necessary to adopt a flexible international regime that would be easily adapted to the fluctuations of the phenomenon and the advances of science. The UN climate change regime follows the framework convention–protocol approach,<sup>20</sup> in which the UNFCCC establishes the legal structure for addressing climate change – objectives, principles and institutional architecture – and the protocols specify the concrete action that should be taken to achieve the objectives. For that reason, the UNFCCC is considered a living instrument as it is capable of evolving and responding to the scientific realities of climate change,<sup>21</sup> through the conclusion of complementary treaties.

In this sense, the complementarity between the UNFCCC and the Paris Agreement can also be observed in their objectives. The UNFCCC’s Article 1 states that the ultimate objective of the Convention and future protocols – the long-term global goal – is to achieve the stabilization of GHG concentrations in

15 UNGA Res. 43/53, 6 December 1988.

16 Naomi Klein, “How Will Everything Change under Climate Change?”, *The Guardian*, 8 March 2015, available at: [www.theguardian.com/environment/2015/mar/08/how-will-everything-change-under-climate-change](http://www.theguardian.com/environment/2015/mar/08/how-will-everything-change-under-climate-change).

17 Barack Obama, “Remarks by the U.S. President at U.N. Climate Change Summit”, UN Headquarters, New York, 23 September 2014, available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit>.

18 Ban Ki-Moon, “UN Secretary-General’s Remarks at Climate Leaders’ Summit”, Washington, DC, 11 April 2014, available at: [www.un.org/sg/en/content/sg/statement/2014-04-11/secretary-generals-remarks-climate-leaders-summit](http://www.un.org/sg/en/content/sg/statement/2014-04-11/secretary-generals-remarks-climate-leaders-summit).

19 Mike Hulme, “Why We Disagree about Climate Change”, May 2009, available at: [www.mikehulme.org/wp-content/uploads/2009/10/Hulme-Carbon-Yearbook.pdf](http://www.mikehulme.org/wp-content/uploads/2009/10/Hulme-Carbon-Yearbook.pdf).

20 Lavanya Rajamani, “The United Nations Framework Convention on Climate Change: A Framework Approach to Climate Change”, in Daniel Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, Cheltenham, 2016, p. 206.

21 *Ibid.*, p. 214.

the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. That level is specified in Article 2 of the Paris Agreement: the increase in the global average temperature must be held to well below 2°C above pre-industrial levels, and parties must make efforts towards limiting the temperature increase to 1.5°C above pre-industrial levels.

As mentioned before, the final provisions of both legal instruments are silent about their application during armed conflicts.<sup>22</sup> In the case of the Paris Agreement, Voigt explains that the Durban Mandate (established at the 17th Conference of the Parties, in 2011) outlined several topics which were to become part of the work of the working group for drafting the new agreement, but the institutional provisions and final clauses were not explicitly mentioned in that mandate, and negotiations about them started later.<sup>23</sup>

The ILC's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (ILC Draft Principles)<sup>24</sup> are a necessary starting point for elucidating the scope of application of the UN climate change regime. The Draft Principles are applicable before, during and after an armed conflict, including in situations of occupation (Draft Principle 1). Furthermore, Draft Principle 13 establishes the general rule that the environment shall be respected and protected in accordance with applicable international law, in particular the law of armed conflicts. This proposed rule is coherent with the content of Draft Principle 19 on the "General Environmental Obligations of an Occupying Power", which also specifies that an Occupying Power shall take environmental considerations into account in the administration of a territory.<sup>25</sup> In the Commentaries, the ILC clarifies that the phrase "applicable international law" in Draft Principles 13 and 19 refers to the law of armed conflict, but also to IEL<sup>26</sup> and IHRL.<sup>27</sup> As for the application of IEL in situations of armed conflict, the ILC

22 Bakker also highlights that in the Paris Agreement, the term "armed conflict" is not even mentioned and there is no explicit reference to what States commit to do to prevent the effects of climate change from contributing to or intensifying armed conflicts. Christine Bakker, "The Relationship between Climate Change and Armed Conflict in International Law: Does the Paris Climate Agreement Add Anything New?", *Peace Processes Online Review*, Vol. 2, No. 1, 2016, p. 7.

23 Christina Voigt, "Institutional Arrangements and Final Clauses", in Daniel R. Klein, María Pía Carazo Ortiz, Meinhard Doelle, Jane Bulmer and Andrew Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford University Press, New York, 2017, p. 354.

24 ILC, *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, in *Yearbook of the International Law Commission*, Vol. 2, Part II, 2022 (ILC Draft Principles).

25 As the law of occupation is part of IHL, the ILC clarified that Draft Principle 19 shall be read in the context of Draft Principle 13. *Ibid.*, p. 159.

26 For instance, some scholars consider that international climate change law is not a self-contained regime because it sits squarely within the fields of IEL and public international law more broadly. See Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani (eds), *International Climate Change Law*, 1st ed., Oxford University Press, Oxford, 2017, p. 11. Others believe that although international climate change law can be considered as a sub-area of IEL, due to its contemporary significance and the active negotiations and cooperation taking place between States, it is considered a unique area of international law. See Cinnamon Piñon Carlarne, Kevin Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law*, 1st ed., Oxford University Press, Oxford, 2016, pp. 6–7. Despite the academic divergences on whether the UN climate change regime is or is not a new branch different from IEL, here it is considered that the regime is part of IEL.

27 ILC Draft Principles, above note 24, p. 159.

considers that the claim that customary and conventional IEL continue to apply during such situations can be supported by the interpretation provided by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion), and by the ILC Draft Articles on the Effects of Armed Conflicts on Treaties.

Regarding the Nuclear Weapons Advisory Opinion, on that occasion the ICJ made an important authoritative statement on international environmental obligations and the interests of future generations.<sup>28</sup> Nevertheless, it also observed that it could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.<sup>29</sup> The Advisory Opinion thus illustrates how in that moment, the protection of the environment was marginalized to favour sovereign security interests despite the evident and proven environmental destructiveness of nuclear weapons.<sup>30</sup> Therefore, this historic and international legal precedent raises the question of whether the seriousness of the global climate change problem is itself enough to presume or take for granted the application of the UN climate change regime during armed conflicts. The answer is negative. Thus, due to the interests at stake, and with the aim of avoiding States party to the regime excusing themselves from complying with it during armed conflicts due to national security reasons and of avoiding possible similar legal results before domestic or international courts, more legal arguments should be developed to support ILC Draft Principles 13 and 19 regarding the application of the UN climate change regime to belligerent occupations, so that States’ security interests are not privileged over the protection of the environment and the civilian population. While they are an authoritative legal instrument, the ILC Draft Principles are *per se* a soft-law instrument and are therefore not in force.

In this regard, one should be mindful of the fact that in general any armed conflict threatens the security of belligerent parties and that the “carbon footprint”<sup>31</sup> of the concerned States, or their GHG emissions, usually skyrockets during armed conflicts.<sup>32</sup> It thus follows that to protect current and future

28 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996* (Nuclear Weapons Advisory Opinion), paras 27–33. See also Edith Brown Weiss, “Opening the Door to the Environment and to Future Generations”, in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice, and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, pp. 338–353.

29 Nuclear Weapons Advisory Opinion, above note 28, para. 97.

30 During the International Environmental Law Conference organized by the International Union for the Conservation of Nature (Oslo, 3–6 October 2022), Professor Cymie Payne mentioned in her presentation that “the environment is marginalized as soon as a commercial or security reason appears”.

31 The expression “carbon footprint” has been being used by NGOs advocating for increasing awareness and understanding of the environmental and derived humanitarian consequences of conflicts and military activities, and transparency from the military sector when reporting its GHG emissions. See, for example, the websites of the Conflict and Environment Observatory, available at: <https://ceobs.org/about/>; Scientists for Global Responsibility, available at: [www.sgr.org.uk](http://www.sgr.org.uk); and The Military Emissions Gap, available at: <https://militaryemissions.org/>.

32 On the relationship between armed conflicts and GHG emissions, see Eoghan Darbyshire and Doug Weir, “How Does War Contribute to Climate Change?”, Conflict and Environment Observatory, 14 June 2021, available at: <https://ceobs.org/how-does-war-contribute-to-climate-change/>; Linsey Cottrell and Eoghan

generations from the negative impacts of climate change, it is crucial to determine whether the UN climate change regime is applicable regardless of the factual context (peace or war), with the aim of avoiding States invoking national security interests to argue that the regime is only applicable during peacetime.<sup>33</sup> This legal determination is particularly important in the case of belligerent occupations because, as clearly pointed out by Spoerri, occupation law's prescriptions are frequently interpreted by the Occupying Power in a self-serving manner in order to reduce constraints on their discretionary powers.<sup>34</sup> Finally, it is worth mentioning that even if nowadays belligerent occupations are few in number compared with the number of international and non-international armed conflicts taking place,<sup>35</sup> GHG emissions from occupied territories have an impact on Earth's climate system, and climate change could also negatively affect those territories and their civilian populations. Thus, the scarcity of occupied territories in the world should not be used as an excuse for failing to apply the UN climate change regime in such territories. Just as the sparrow says to the knight in Cassese's tale, "one does what one can", so too do all States Parties share a common responsibility to address global climate change in all circumstances, including situations of occupation.

## On why the UN climate change regime is applicable to belligerent occupations

Having clarified the importance of determining the scope of application of the UN climate change regime, the next step is to examine the legal arguments that would help us to make that determination. With the aim of presenting and explaining the arguments in a didactic manner, this article proposes to assess the issue through the lens of a theoretical "legal maps app" (similar to Google Maps) that guides legal experts and practitioners to arrive at their legal destination, which is the permanent application of the UN climate change regime, particularly during belligerent occupations.

Like any digital map application, this "legal maps app" has a departure point for our journey. That departure point is Principles 23 and 24 of the 1992 Rio Declaration on Environment and Development,<sup>36</sup> because these principles

Darbyshire, "The Military's Contribution to Climate Change", Conflict and Environment Observatory, 16 June 2021, available at: <https://ceobs.org/the-militarys-contribution-to-climate-change/>.

33 As they did before the ICJ when they argued that the principal purpose of environmental treaties and norms was the protection of the environment in times of peace. Nuclear Weapons Advisory Opinion, above note 28, para. 28.

34 Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2015, p. 192.

35 See the Geneva Academy's Rule of Law in Armed Conflicts website, available at: [www.rulac.org](http://www.rulac.org).

36 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992. Principle 23 establishes: "The environment and natural resources of people under oppression, domination and occupation shall be protected." Principle 24 states: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."



operate as a “legal umbrella” that guides the conduct of States on the protection of the environment during armed conflicts. Based on the general principle of *pacta sunt servanda* (Article 26 of the Vienna Convention on the Law of Treaties (VCLT)),<sup>37</sup> the unanimously adopted Principle 24 asserts the application of all those relevant international rules – conventional, customary and general principles of law – that provide protection to the environment during armed conflicts<sup>38</sup> (without differentiating between international and non-international armed conflicts).<sup>39</sup> Principle 23, meanwhile, reaffirms the protection against environmental risks faced by people under oppression, domination and occupation.<sup>40</sup>

Our “legal maps app” envisages four alternative routes towards the chosen destination (i.e., the permanent application of the UN climate change regime), all determined according to their time frame, and these will be analyzed in the following subsections. The short-term road examines whether or not the phrase “laws in force” in Article 43 of Hague Convention IV comprehends the UN climate change regime when the Occupied State is party to it. The first mid-term road concerns the possible extraterritorial application of the UN climate change regime in the occupied territory, while the second mid-term road is based on the application of the principle of legal stability and continuity of treaties during armed conflicts to the UN climate change regime. Finally, the long-term road relates to the interaction between IHL, the UN climate change regime and IHRL during belligerent occupations.

### The short-term road: The UN climate change regime and the laws in force in the occupied territory

As a branch of IHL, the law of occupation tries to find a balance between the interests of the Occupying Power, the interests of the legitimate authorities of the occupied territory, and the well-being of the local population.<sup>41</sup> It establishes two core obligations of conduct for Occupying Powers that are interconnected. On the one hand, they must restore and maintain public order and civil life in the occupied territory (including the welfare of the population); on the other hand,

37 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT).

38 Marie-Louise Tougas, “Principle 24”, in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary*, Oxford University Press, Oxford, 2015, p. 573.

39 As clearly highlighted by Pavoni and Piselli, this principle does not contain specific normative prescriptions, but it has over the years become a significant and vibrant international law standard. Riccardo Pavoni and Dario Piselli, *Armed Conflicts and the Environment: An Assessment of Principle 24 of the Rio Declaration Thirty Years On*, University of Siena, February 2022, available at: <https://ssrn.com/abstract=4071106>. This can be observed in the ICJ’s Nuclear Weapons Advisory Opinion, when this principle was cited to support the Opinion’s interpretation and conclusion that environmental considerations must be taken into account when assessing whether an action is in conformity with the principles of necessity and proportionality. Nuclear Weapons Advisory Opinion, above note 28, para. 30.

40 Mara Tignino, “Principle 23”, in J. E. Viñuales (ed.), above note 38, p. 559.

41 E. Lieblich and E. Benvenisti, above note 13, p. 1; Hanne Cuyckens, *Revisiting the Law of Occupation*, Brill Nijhoff, Boston, MA, 2018, p. 103.

they must respect (unless absolutely prevented from doing so) the laws in force in the occupied territory (Article 43 of Hague Convention IV and Article 64 of GC IV).

Article 43 of Hague Convention IV can be thought of as a door left ajar, through which the UN climate change regime can enter and start interacting with the law of occupation, providing that the phrase “laws in force” from Article 43 is broadly interpreted.<sup>42</sup> In this regard, Sassòli proposes a broad conception of the phrase and considers that it refers to the entire legal system of the occupied territory.<sup>43</sup> This means that it includes constitutions, decrees and ordinances, executive orders, national and municipal laws, and substantive and procedural law.<sup>44</sup> However, it is worth remembering that a State’s legal system consists of its domestic laws as well as those international customary and conventional rules in force and binding upon it (whose internal incorporation will depend on the monist or dualist system of law adopted by a State). Consequently, it can be affirmed that international legal rules in force for the Occupied State are included in the phrase “laws in force” found in Article 43, and that these rules are a source of obligations for the Occupying Power<sup>45</sup> because, as the *de facto* authority effectively controlling the territory (even a part of it), it is responsible for complying with them,<sup>46</sup> particularly those that would help to ensure the maintenance of public order and safety in the occupied territory.

The UN climate change regime is a good example of international binding rules that can help to ensure the maintenance of public order and safety in the occupied territory because the implementation of that regime, through the adoption of mitigation and adaptation measures by the Occupying Power, would tend to reduce the civil population’s vulnerability to climate change<sup>47</sup> and thereby help to maintain a healthy – local and global – environment for the enjoyment of human rights. Moreover, it would also contribute to keeping safe the Occupying

42 Gross considers that this provision became the cornerstone in the determination of the nature and scope of the Occupying Power’s responsibility: the occupation is temporary, and the Occupying Power is to manage the territory in a manner that protects civil life, exercising its authority as a trustee of the sovereign. Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambridge University Press, Cambridge, 2017, p. 18.

43 Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 669.

44 *Ibid.*; Yoram Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, Occasional Paper Series, No. 1, Program on Humanitarian Policy and Conflict Research, Harvard University, Autumn 2004, p. 4; Yutuka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden, 2009, p. 97.

45 See Theodor Meron, “Applicability of Multilateral Conventions to Occupied Territories”, *American Journal of International Law*, Vol. 72, No. 3, 1978; Marco Longobardo, *The Use of Armed Force in Occupied Territory*, Oxford University Press, Oxford, 2022, p. 45.

46 E. Benvenisti, above note 7, pp. 83–86; Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge University Press, New York, 2015, p. 157.

47 As an example, Hulme mentions that in drought-prone regions, those acting as occupiers must ensure the right to survival of the affected population, and one way to achieve this might be by actively rebuilding facilities or reconnecting damaged services. Karen Hulme, “Climate Change and International Humanitarian Law”, in Rosemary Rayfuse and Shirley V. Scott (eds), *International Law in the Era of Climate Change*, Edward Elgar, Cheltenham, 2012, pp. 209–210.

Power's armed forces deployed in the occupied territory. Therefore, respect for the UN climate change regime and the application of that regime to belligerent occupations are beneficial for all the parties affected by an armed conflict as well as for the Earth's climate system. In other words, from a humanitarian and environmental perspective, a broad interpretation of Article 43 of Hague Convention IV is needed because today's reality demands that Occupying Powers take action against climate change, as their inaction (or lack of adoption of adequate measures) could have a negative impact on the Earth's climate system, the local natural environment, and human beings – temporal and permanent – living in the occupied territory.

### The first mid-term road: The extraterritorial application of the UN climate change regime to belligerent occupations

According to the information available at the UN Treaty Collection, the UNFCCC has been ratified by 198 States,<sup>48</sup> and the Paris Agreement by 195 States.<sup>49</sup> In the hypothetical case that only the Occupying Power is party to the UN climate change regime – because the occupied State never expressed its consent or because it decided to withdraw from it<sup>50</sup> – the Occupying Power will have to respect the regime in the occupied territory based on the “GHG production-based system boundary” implemented by the UN climate change regime. This system boundary has a territorial approach according to which GHG emissions are allocated to the State Party in whose territory they are generated,<sup>51</sup> so that it can stabilize and reduce them by exercising its sovereign powers. A concrete example of this criterion is the obligation of States party to the Paris Agreement to submit every five years their domestic plans for climate action, known as “nationally determined contributions” (Article 3).<sup>52</sup>

The said obligation could be interpreted in a restrictive manner as covering only those emissions produced in the metropolitan territories of the parties (in this case, Occupying Powers). However, the implementation of this obligation should be done through the spirit of the harm prevention principle, as the UN climate change

48 See the UN Treaty Collection website, available at: [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en).

49 See the UN Treaty Collection website, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en). Due to the number of States Parties to both legal instruments, it can also be argued that the UN climate change regime has become general customary law. Whether or not this has happened, Baxter explains that in the case of treaties with a high number of States Parties, it is difficult to demonstrate the existence of the customary rule outside the treaty because of the low number of non-party States whose practices or behaviours can be surveyed or analyzed for that purpose. Richard Baxter, “Treaties and Customs”, *Collected Courses of the Hague Academy of International Law*, Vol. 129, Hague Academy of International Law, Leiden, 1970, p. 64.

50 UNFCCC, above note 3, Art. 25; Paris Agreement, above note 5, Art. 28.

51 Scott explains that according to this territorial system boundary, emissions are allocated to the country in which goods and services are produced rather than the country in which they are consumed. Joanne Scott, “Unilateralism, Extraterritoriality and Climate Change”, in Daniel Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, Cheltenham, 2016, pp. 168–169.

52 *Ibid.*

regime is part of IEL.<sup>53</sup> The harm prevention principle is considered the cornerstone<sup>54</sup> or the *raison d'être* of IEL;<sup>55</sup> it reflects a rule of customary nature;<sup>56</sup> it is included in paragraph 8 of the preamble to the UNFCCC; and its application during belligerent occupations is also proposed in ILC Draft Principles 19.2 and 21.<sup>57</sup> According to the harm prevention principle, a State has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction.<sup>58</sup> The ICJ has interpreted that the harm prevention principle has a due-diligence nature, meaning that States are obliged to use all means at their disposal to avoid environmental harm.<sup>59</sup>

The notion of “jurisdiction or control” over a space is a key component of the harm prevention principle because it connects the concerned State with the environment of that space and its protection. Coincidentally, the notion of “control” is also important in the law of occupation<sup>60</sup> because according to Article 42 of Hague Convention IV, a territory is considered occupied when “it is actually placed under the authority of the hostile army”.<sup>61</sup> As explained

53 Duvic-Paoli and Viñuales mention that the prevention principle performs important interpretive functions of treaty provisions relating to other matters, such as to clarify or update their content or to conciliate different considerations. Leslie-Anne Duvic-Paoli and Jorge Viñuales, “Principle 2”, in J. E. Viñuales (ed.), above note 38, p. 120.

54 Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law*, Cambridge University Press, Cambridge, 2018, p. 2; Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law*, 3rd ed., Cambridge University Press, Cambridge, 2012, p. 191.

55 L.-A. Duvic-Paoli and J. Viñuales, above note 53, p. 107.

56 Nuclear Weapons Advisory Opinion, above note 28, para. 29; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports 2010*, para. 101.

57 An example of the application of the harm prevention principle to other international law regimes is the case of the law of the sea. Article 194(2) of the UN Convention on the Law of the Sea provides that States “shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [the] Convention”. United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).

58 See Principle 21 of the 1972 Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration. Brunnée explains that the harm prevention rule finds its conceptual origins not in the protection of the environment but in the mutual limitation of sovereign rights to the use and enjoyment of territory. She further clarifies that the harm prevention rule should be understood as an obligation of conduct that requires States to exercise due diligence in the face of risks of significant transboundary environmental harm. Jutta Brunnée, “Harm Prevention”, in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, 2nd ed., Oxford University Press, Oxford, 2021, pp. 269, 283.

59 ICJ, *Pulp Mills*, above note 56, para. 101.

60 Kalandarishvili-Mueller points out that the notion of control is not only important for classifying situations of military occupation, but also plays a significant role in wider international law as each branch uses and positions control in different tests and with different thresholds: Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law*, Routledge, Abingdon, 2020, p. 3.

61 Benvenisti considers that the occupation’s authority derives not from a right to control but from the fact of control that depends on a factual determination of the occupant’s effective control over certain territory: E. Benvenisti, above note 7, p. 43.

by Vité, two conditions must be fulfilled for occupation to exist: (1) the Occupying Power is able to exercise effective control over a territory that does not belong to it, assuming this status when its troops are deployed in the concerned territory and it is in a position to exercise its own power; and (2) its intervention has not been approved by the legitimate sovereign (even if there is no armed resistance).<sup>62</sup> Consequently, there is a connection between the harm prevention principle and the law of occupation through the notion of “control”.

A harmonic interpretation and application of the Paris Agreement and the harm prevention principle in a context of belligerent occupation would therefore allow us to conclude that the Paris Agreement should be applied in an extraterritorial manner to those areas under the jurisdiction or control of States Parties, such as in the case of occupied territories. Accordingly, the Occupying Power would be responsible for controlling GHG emissions from the occupied territory under its effective control (in order to avoid worsening the climate change situation), should take concrete actions to mitigate those GHG emissions and to protect the civil population from climate change during the occupation, and should include in its nationally determined contributions those GHGs produced in the occupied territory when that space is under its effective control.<sup>63</sup>

62 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. 74. See also Hortensia Gutierrez Posse, *Elementos de derecho internacional humanitario*, Editorial Eudeba, Buenos Aires, 2014, pp. 94–95; Tristan Ferraro (ed.), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ICRC, Geneva, 2011, pp. 16–26; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 173.

63 As an example of the extraterritorial application of the UN climate change regime, some States party to the Paris Agreement with territorial disputes made interpretative declarations when expressing their consent to be bound (as reservations are prohibited). For instance, in the case where the United Kingdom ratified the Agreement and its application was extended to the territory of Gibraltar, the king of Spain declared that Gibraltar is a non-autonomous territory subject to a decolonization process, whose international relations come under the responsibility of the United Kingdom. The declaration can be read at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en). Moreover, the war between the Russian Federation and the Republic of Ukraine has motivated these two States to rely on the Paris Agreement as a source of legal argument to assert their sovereign rights over the disputed territories by including the Crimean GHG emissions as part of their respective territories. See Michael Birnbaum, “At War, Russia Aims to Claim Ukraine’s Land—and Its Carbon Emissions”, *Washington Post*, 18 October 2022, available at: [www.washingtonpost.com/climate-environment/2022/10/18/russia-ukraine-crimea-emissions/](http://www.washingtonpost.com/climate-environment/2022/10/18/russia-ukraine-crimea-emissions/). Regardless of the legality or illegality of the exercise of sovereign powers in a given territory, and the diplomatic strategies that countries can implement to support their legal claims, the measuring and reducing of GHG emissions from an occupied territory should be depoliticized in the interests of the protection of Earth’s climate system. A practical approach should be implemented to shed light on this issue for all States party to the UN climate change regime. This could take the form, for instance, of a resolution by the Conference of the Parties which clarifies that the inclusion of GHG emissions from territories under occupation in reporting by the Occupying Power shall not constitute a basis for asserting, supporting or denying a claim to territorial sovereignty or create any rights of sovereignty over an occupied territory, as was successfully agreed in Article 4 of the 1959 Antarctic Treaty for disputed territories in that area. This would help to ensure that territorial disputes and belligerent occupations do not affect the continuous application of

## The second mid-term road: The principle of legal stability and continuity of treaties and the UN climate change regime

Another route that the “legal maps app” offers to arrive at our destination point is related to the principle of legal stability and continuity of treaties. According to this principle, it is presumed that the existence of an armed conflict does not *ipso facto* terminate and suspend the operation of a treaty, as proposed by ILC Draft Article 3.<sup>64</sup> When the concerned treaty does not contain provisions on its operation in situations of armed conflict, in Draft Article 6, the ILC has proposed a non-exhaustive list of factors that could serve to determine the susceptibility to termination, suspension or withdrawal of a treaty, which may or may not be relevant for it depending on the circumstances.<sup>65</sup> Subparagraph (a) focuses on those factors in relation to the treaty itself, while subparagraph (b) deals with those related to the characteristics of the armed conflict.

According to Draft Article 6, the treaty-related factors that could be considered for the determination are the nature of the treaty (in particular, its subject matter), its object and purpose, its content, and the number of parties to the treaty.<sup>66</sup> Subparagraph (a) is linked to Draft Article 7, which proposes an indicative list (found in the Annex) of categories of treaties whose subject matter involves an implication that they continue in operation during armed conflicts.<sup>67</sup> The ILC recognizes that in certain cases, the proposed categories are overlapping.<sup>68</sup> The categories included in the list that are relevant for the purposes of this paper are the ones related to “treaties declaring, creating or regulating a permanent regime or status or related permanent rights” (Annex, subparagraph (b)) and “treaties relating to the international protection of the environment” (Annex, subparagraph (g)).

Based on the treaty-related factors included in Draft Article 6(a), from the content of the UNFCCC and the Paris Agreement, as well as considering the number of States Parties they have, it can be inferred that both legal instruments

the UN climate change regime and, consequently, the effective measurement and reduction of GHG emissions.

64 ILC Draft Articles, above note 14, Art. 3. The Draft Articles follow the criteria developed previously by the Institute of International Law in its 1985 resolution on the effects of armed conflicts on treaties. In Article 2 of that resolution, the Institute proposed that “[t]he mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict”. And in Article 3 of the resolution, it is proposed that “[t]he outbreak of an armed conflict renders operative between the parties the treaties which expressly provide that they are to be operative during an armed conflict or which by reason of their nature or purpose are to be regarded as operative during an armed conflict”. See Institute of International Law, *Yearbook*, Vol. 61, Part I, Session of Helsinki 1985, Preparatory Work, pp. 25–27. The principle of legal stability and continuity of treaties is also one of the arguments that the ILC invoked to support the conclusion that treaties relating to the international protection of the environment may continue in operation during armed conflict. ILC Draft Principles, above note 24, p. 160.

65 ILC Draft Articles, above note 14, p. 119.

66 Some of these factors are related to the general rule of interpretation of treaties established in Article 31 of the VCLT.

67 ILC Draft Articles, above note 14, p. 120

68 *Ibid.*



are multilateral treaties related to the protection of the environment, open to consent by any State or regional economic integration organizations, and they have achieved almost universal ratification. Besides this, the general subject matter (the protection of the environment) and the objective (the stabilization of GHG concentrations in the atmosphere) of this legal regime are connected to the magnitude, duration, seriousness and uncertainties of climate change. It is precisely due to these characteristics of the climate change problem that those treaties have established a permanent regime with the aim of enabling States Parties to take constant collective action in order to tackle the problem effectively, because this issue will affect humanity for several generations. As highlighted by Thorgeirsson, the UNFCCC is in essence a planetary risk-management treaty,<sup>69</sup> and this feature can be extended to the entire regime. Furthermore, this special feature of the UN climate change regime – as an environmental permanent regime (following Draft Article 7's criteria) – can also be inferred from the preamble of the UNFCCC, in which the States Parties acknowledge that climate change is a problem surrounded by uncertainties with regard to timing, magnitude and regional patterns (paragraph 5), and that they are determined to protect the climate system for present and future generations (paragraph 23) because the global nature of the climate change problem and its adverse effects are a common concern of humankind (paragraph 1).

The permanent application of the UN climate change regime can also be inferred from the fact that the regime has been established to deal with a global environmental problem. Besides this, with the aim of stabilizing GHG concentrations in the atmosphere and achieving “net zero”, the regime intends to modify collective and individual behaviour connected to patterns of production and consumption, and this transition will take decades. Moreover, it can be considered that the regime seeks to serve the interests of the international community as a whole by having as its primary objective the protection of a common environmental good<sup>70</sup> (the climate system), as well as the protection of human health, safety and life on Earth for present and future generations. Consequently, considering that Earth's climate system is a common concern of humankind, the permanent application of the regime can be confirmed as it plays a critical legal role in addressing the problem. Finally, the regime's permanent application is necessary as a way of maximizing the effectiveness of the regime and the efforts made so far to cope with the climate problem.

As for the armed conflict-related factors listed in ILC Draft Article 6(b), these include the territorial extent of the armed conflict, its scale and intensity, its duration and, in the case of non-international armed conflicts, the degree of outside involvement. The duration factor is key in the determination of the continuous application of the UN climate change regime because of an intrinsic

69 Halldór Thorgeirsson, “Objective (Article 2.1)”, in D. R. Klein *et al.* (eds), above note 23, p. 124.

70 Silja Voney, “Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War”, in Jay Austin and Carl Bruch (eds), *The Environmental Consequences of War*, Cambridge University Press, Cambridge, August 2010, pp. 211–212; UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, November 2009, p. 44.



characteristic of belligerent occupations: they are supposed to be temporary situations because it is expected that the legitimate authorities will return to power soon.<sup>71</sup> However, this temporality should not be an excuse for precluding the application of the UN climate change regime during this type of armed conflict. This is because the essence of the law of occupation is to find a balance between, on the one hand, the protection of the life and property of inhabitants (included the local environment) as well as respect for the sovereign rights of the ousted government;<sup>72</sup> and, on the other hand, the fulfilment of the security and military needs of the Occupying Power.<sup>73</sup> It is precisely the protection of life and the environment of the occupied territory that triggers the necessity of applying the UN climate change regime during belligerent occupations in order to reduce the adverse effects of climate change in the occupied territory. In other words, the UN climate change regime has to be applied during belligerent occupations for humanitarian and environmental reasons, and even more so in case of prolonged occupations.<sup>74</sup> Therefore, the negative impact of climate change on the civilian population<sup>75</sup> and the environment, and the lack of action by the Occupying Power in reducing GHG emissions in the occupied territory, as well as in adopting mitigation and adaptation measures to reduce and prevent those climate consequences, would be contrary to the object and purpose of the UN climate change regime – including the harm prevention principle – and the humanitarian spirit of the law of occupation.

The foregoing analysis, based on ILC Draft Article 6 and subparagraphs (b) and (g) of the Annex related to ILC Draft Article 7, allows us to conclude that the intrinsic characteristics of the UN climate change regime explained above, as well as

71 Vaïos Koutroulis, “The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 167. Cuyckens highlights that since occupation disrupts the normal order of things, creating a distinction between effective control and sovereign title, it has been construed to be of a short-term duration and the law advocates for a quick return to normality by any form of bringing the conflict to an end. H. Cuyckens, above note 41, p. 108.

72 Eyal Benvenisti, “The Origin of the Concept of Belligerent Occupation”, *Law and History Review*, Vol. 26, No. 3, 2008, p. 622.

73 This explains why the regime is both “permissive (accepting that an occupier exercises certain powers) and prohibitive (putting limits on the occupier’s actions)”. P. Spoerri, above note 34, pp. 185–186.

74 Koutroulis clarifies that neither conventional nor customary IHL distinguishes between “short-term” occupations and “prolonged” ones; hence, no distinct legal category of prolonged occupation exists in IHL, and the adjective “prolonged” is descriptive. However, this author points out that the duration of an occupation does not leave the interpretation and application of IHL and IHRL completely unaffected, the central question being how much leeway the Occupying Power should be accorded when administering the occupied territory. V. Koutroulis, above note 71, pp. 168, 170, 176.

75 Bakker explains that the vulnerability of the environment and the civilian population caused by the hostilities themselves is often exacerbated by the effects of climate change (severe drought and water shortages, rising sea levels, extreme weather events): C. Bakker, above note 22, p. 7. In this regard, the ICRC has pointed out that countries in conflict are the most vulnerable to the climate crisis because their capacity to adapt to a changing climate is drastically limited by the disruptive impact that wars have on them, and because they are among those most neglected when it comes to climate action and finance. See ICRC, “Seven Things You Need to Know about Climate Change and Conflict”, 9 July 2020, available at: [www.icrc.org/en/document/climate-change-and-conflict](http://www.icrc.org/en/document/climate-change-and-conflict); ICRC, “COP27 – The ICRC’s Call to Strengthen Climate Action in Conflict Settings”, 24 October 2022, available at: [www.icrc.org/en/document/cop27-icrc-calls-ahead-of-cop27-climate-change-and-conflict](http://www.icrc.org/en/document/cop27-icrc-calls-ahead-of-cop27-climate-change-and-conflict).

the well-known negative consequences that climate change is having on the environment itself and on humanity, are enough to justify the permanent application of the regime regardless of the context (peacetime or wartime), because the regime's interrupted application or suspension due to armed conflict can be catastrophic in general for Earth's climate system and in particular for the civilian population affected by the armed conflict. As mentioned by the ILC, in the case of environmental treaties that are widely ratified and that have a global scope, it may be difficult to conceive of the suspension of those treaties exclusively between the parties to the armed conflict, because "obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation".<sup>76</sup>

### The long-term road: The holistic application of IHL, IHRL and the UN climate change regime during belligerent occupations

Finally, the fourth route offered by the "legal maps app" concerns the relationship between and application of IHL, IHRL and the UN climate change regime during belligerent occupations. It is introduced as the "long-term road" because the question of how these three branches of public international law interact does not have a definitive answer yet. For instance, the ILC, in its study on *Fragmentation of International Law*,<sup>77</sup> considers that the principle of systemic integration (Article 31(3)(c) of the VCLT) is the key tool to be used for interpreting and determining the relationship between general international norms and norms of self-contained regimes, in order to maintain the coherence of public international law. However, the ILC concludes that the VCLT alone is not enough to give an answer to the emergence of conflicting rules and overlapping legal regimes, because it does not give sufficient recognition to special types of treaties and the special rules that may be useful for their application and interpretation. Finally, the ILC concludes that the whole complex of inter-regime relations is a legal black hole, and wonders what principles of conflict solution might be used for dealing with conflicts between two regimes or between instruments across regimes. In this regard, the ILC Draft Principles provide an answer to the applicability of other international legal regimes that protect the environment during armed conflicts, besides IHL. Yet, in the Draft Principles, the ILC does not propose how that interaction and application should take place or the criteria for resolving possible normative contradictions between IHL, IHRL and IEL, this being left to the consideration of States and stakeholders.

76 ILC Draft Articles, above note 14, p. 66. An example of a similar international legal regime that confirms the ILC's approach is the treaties adopted in the late 1980s to deal with the depletion of the ozone layer, which are also silent about their application during armed conflict.

77 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, as corrected by UN Doc. A/CN.4/L.682/Corr.1, 11 August 2006 (finalized by Marti Koskeniemi).

As for the application of IHRL during armed conflicts,<sup>78</sup> the ICJ has confirmed that “the protection offered by human rights conventions does not cease in case of armed conflict”, and has also affirmed that the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights are applicable in respect of acts carried out by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories, confirming the extraterritorial application of the Covenants.<sup>79</sup> This interpretation is emblematic because it has opened the door for other international legal regimes, like IHRL, to contribute to and strengthen the humanitarian and legal protections provided during armed conflicts, in particular in situations of belligerent occupation.<sup>80</sup>

This opened door is an interesting one to be crossed by IHRL hand in hand with the UN climate change regime (as part of IEL), with the aim of providing humanitarian protection to civilian populations simultaneously affected by armed conflict (in this case, belligerent occupation) and the adverse effects of climate change. For instance, the Paris Agreement’s preamble expressly connects the UN climate change regime and IHRL by acknowledging that States Parties should – when taking action to address climate change – respect, promote and consider their respective obligations on human rights (paragraph 11). Carazo highlights that this acknowledgement is important because the Paris Agreement is the first multilateral environmental agreement to incorporate express reference to human rights, this being considered as revolutionary.<sup>81</sup>

The express connection between the two regimes is a legal advantage that must be seized, and its implementation during belligerent occupations can take place in two ways. Firstly, it can take place through the intimate interlink between the climate change crisis and the enjoyment of recognized human rights. There are several fundamental human rights that are already being affected across the planet – like the rights to life, to health, and to food and water – as a

78 See Cordula Droege, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, *Israel Law Review*, Vol. 40, No. 2, 2007; Nehal Bhuta (ed.), *The Frontiers of Human Rights*, Oxford University Press, Oxford, 2016; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge University Press, Cambridge, 2015; Daniel Ivo Odon, *Armed Conflict and Human Rights Law Protecting Civilians and International Humanitarian Law*, Routledge, London, 2021; Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge University Press, Cambridge, 2016.

79 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, paras 106–113. This interpretation was later confirmed by the Court in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 216–217. See also Nuclear Weapons Advisory Opinion, above note 28, para. 25.

80 The UN Human Rights Committee has the same approach concerning the application of the 1966 International Covenant on Civil and Political Rights, as expressed in its General Comment No. 31, in which it interpreted 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”. 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, 26 May 2004, paras 10–12.

81 María Pía Carazo, “Contextual Provisions (Preamble and Article 1)”, in D. R. Klein *et al.* (eds), above note 23, p. 114.

consequence of climate change and the lack or inadequacy of policy action from governments.<sup>82</sup> Secondly, it could take place through the international (and domestic) recognition of the human right to a safe, clean, healthy and sustainable environment. This recognition is important because it enhances “the enjoyment of rights holders, and the accountability of duty bearers to respect, protect and fulfil this right”.<sup>83</sup> Legal action on this issue has been taken by States,<sup>84</sup> international organizations and international tribunals. For instance, the UN Human Rights Council<sup>85</sup> and UN General Assembly<sup>86</sup> have expressly recognized the right to a healthy environment as a human right that is important for the enjoyment of other human rights, that is related to other rights and existing international law, and whose promotion requires the full implementation of multilateral environmental agreements under the principles of IEL. Besides this, Article 24 of the African Charter on Human and Peoples’ Rights recognizes the right to a general satisfactory environment.<sup>87</sup> Furthermore, when the Inter-American Court of Human Rights had the first opportunity to analyze States’ obligations arising from the need to protect the environment under the American Convention on Human Rights, it considered that

the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region, as well as in some provisions of the international *corpus iuris* .... The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.<sup>88</sup>

82 UNEP and Sabin Center for Climate Change, *Climate Change and Human Rights*, Nairobi, 2015, pp. 2–10; Office of the High Commissioner for Human Rights (UN Human Rights), *Understanding Human Rights and Climate Change*, Report Submitted during the 21st Conference of the Parties to the UNFCCC, 2015; Male’ Declaration on the Human Dimension of Global Climate Change, 14 November 2007.

83 UN Human Rights, UNEP and United Nations Development Programme, *What Is the Right to a Healthy Environment?*, Information Note, 2022, available at: [www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf](http://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf).

84 Many States have already recognized the human right to a healthy environment in their constitutions or domestic law. See David Boyd, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/73/188, 19 July 2018; David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (Law and Society)*, UBC Press, Vancouver, 2011.

85 HRC Res. 48/13, 18 October 2021. This resolution was historic because it was the first time that this right had been recognized at the global level.

86 UNGA Res. 76/300, 28 July 2022.

87 Article 24 provides: “All peoples shall have the right to a general satisfactory environment favorable to their development.”

88 Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras 58–59.

Consequently, either because of the intimate connection between climate change and adverse effects on basic human rights or because of the consecration of the human right to a healthy environment as a right in itself, Occupying Powers will have to apply IHRL and the UN climate change regime in the occupied territory under their effective control because they are obliged to respect and adopt appropriate measures to protect those basic and recognized human rights of the civilian population<sup>89</sup> whose enjoyment can be affected or worsened due to the effects of climate change in the occupied territory.<sup>90</sup> Occupying Powers will have to adapt to governance challenges,<sup>91</sup> as the exercise of jurisdiction or control over a territory does not come without responsibilities. Lastly, an immediate legal consequence of the connection between the UN climate change regime and IHRL would be the constant respect and application of the UN climate change regime regardless of the context.<sup>92</sup>

## Conclusions

Current belligerent occupations are taking place in a context of global climate change, a problem that represents a challenge for the civilian populations of occupied territories simultaneously affected by the adverse consequences of it and by the armed conflict. IHL is silent about belligerent parties' duties regarding climate change, and the UN climate change regime is silent about its application in situations of armed conflict. Nevertheless, as clearly highlighted by Slade, silence from the UN climate change regime on the links between armed conflict and climate does not mean silence from IHL, in particular, because both legal regimes share the same humanitarian concern towards the well-being of people.<sup>93</sup> Global climate change does not distinguish between peacetime and times of armed conflict, as the application of public international law does; it is simply happening, and it is happening constantly. Therefore, both legal regimes – together with IHRL – can be applied in a complementary manner so that Occupying Powers can take action against the adverse effects of climate change in order to maintain the

89 It is worth recalling that the European Court of Human Rights (ECtHR) has confirmed the application of the European Convention on Human Rights in situations of occupation: see ECtHR, *Loizidou v. Turkey*, Judgment, 18 December 1996; ECtHR, *Cyprus v. Turkey*, Judgment, 10 May 2001.

90 Although not in situations of armed conflict, climate change applications have been submitted before the ECtHR, and future decisions taken by the Court can be an important precedent for all States (including Occupying Powers) concerning human rights and climate change. See ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. No. 53600/20, 17 March 2021; ECtHR, *Carême v. France*, Appl. No. 7189/21, 28 January 2021.

91 H. Cuyckens, above note 41, p. 104.

92 As clearly pointed out by Sassòli, today it is no longer possible to divide international law (and its branches) into the law of war and the law of peace because IHL is not the only branch of public international law that provides answers to humanitarian problems arising in armed conflicts. Marco Sassòli, *International Humanitarian Law*, Edward Elgar, Cheltenham, 2019, p. 422.

93 Tuiroma Neroni Slade, "International Humanitarian Law and Climate Change", in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2009, p. 655.

safety and well-being of the civilian populations of occupied territories and to contribute to the protection of Earth's climate system. The application of the UN climate change regime should not be limited to peacetime and should remain in force during armed conflicts, including belligerent occupations, due to humanitarian and environmental reasons. Regrettably, IHL is "sometimes charged with being a war behind".<sup>94</sup> Hence, in order to keep IHL updated and able to tackle climate change during belligerent occupations, it is necessary to take into account environmental considerations when interpreting the law of occupation, with a view to establishing the permanent application of the UN climate change regime regardless of the context. This is the global and legal momentum for interpreting the law of occupation in light of environmental considerations so that it can be well suited to contemporary challenges.

94 Marco Sassòli, Antoine Bouvier and Anne Quintin (eds), *How Does Law Protect in War?*, Vol. 1, ICRC, Geneva, 2011, p. 149.

# Humanitarianism and affect-based education: Emotional experiences at the Jean-Pictet Competition

**Rebecca Sutton and Emiliano J. Buis\***

Rebecca Sutton is Senior Lecturer in International Law at the University of Glasgow School of Law and was a jury member at the March 2020 Jean-Pictet Competition in Indonesia.

Emiliano J. Buis is Professor of Public International Law at the University of Buenos Aires (UBA) and at the Central University of the Province of Buenos Aires. He is Director of the UBA Observatory of IHL and a Researcher at the National Research Council for Science and Technology, Argentina. He has been a member of the Committee for the Jean-Pictet Competition since 2012.

## Abstract

*For international lawyers seeking to promote compliance with international humanitarian law (IHL), some level of affective awareness is essential – but just where one might cultivate an understanding of emotions, and at which juncture of one's career, remains a mystery. This article proposes that what the IHL lawyers*

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*and advocates of the future need is an affect-based education. More than a simple mastery of a technical set of emotional intelligence skills, what we are interested in here is the refinement of a disposition or sensibility – a way of engaging with the world, with IHL, and with humanitarianism. In this article, we consider the potential for the Jean-Pictet Competition to provide this education. Drawing on our observations of the competition and a survey with 231 former participants, the discussion examines the legal and affective dimensions of the competition, identifies the precise moments of the competition in which emotional processes take place, and probes the role of emotions in role-plays and simulations. Presenting the Jean-Pictet Competition as a form of interaction ritual, we propose that high “emotional energy” promotes a humanitarian sensibility; indeed, participant interactions have the potential to re-constitute the very concept of humanitarianism. We ultimately argue that a more conscious engagement with emotions at competitions like Pictet has the potential to strengthen IHL training, to further IHL compliance and the development of IHL rules, and to enhance legal education more generally.*

**Keywords:** international humanitarian law, mootings, pedagogy, Jean-Pictet Competition, emotions, affect-based education, simulations, interaction ritual.

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As teachers of international law, in particular, we have in our care each year hundreds of students. For some of them, our course will be the only exposure to sustained reflection about global politics. There is a responsibility and power in this.

Gerry Simpson<sup>1</sup>

## Introduction: To learn, to compete, to meet... to feel?

How will future generations prevent and alleviate the suffering caused by armed conflicts through law? International humanitarian law (IHL) – not unlike the phenomenon of war which it seeks to regulate – is deeply emotional both in its normative content and in action. Perceptions, feelings, culture, in-group belonging and a myriad of other extra-legal considerations shape the ways in which individuals and groups engage with IHL rules. Consequently, IHL in action rarely resembles IHL in the books. For international lawyers seeking to promote compliance with this body of law, some level of affective awareness is thus essential – but just where one might refine these emotional skills, and at which precise juncture of one’s career, remains a mystery. In the law school setting, theoretical and applied training on emotions is the exception rather than the norm: law’s affective dimension remains obscured to all but a very few students

1 Gerry Simpson, *The Sentimental Life of International Law*, Oxford University Press, Oxford, 2021, p. 4.

upon graduation.<sup>2</sup> This article proposes that what the IHL lawyers and advocates of the future need is an “affect-based education”. More than a simple mastery of a technical set of “emotional intelligence” skills, what we are interested in here is the refinement of a disposition or sensibility – a way of being in and engaging with the world in general, and with IHL and humanitarianism in particular.

This article considers the potential for the Jean-Pictet Competition to provide this education. The Jean-Pictet Competition is a training course in IHL that engages participants in role-playing and simulations. Since 1989, universities from more than 100 countries have participated. In the past fifteen years, a central aim of the competition has been to “take law out of the books”. This makes the competition an excellent site of study to better understand the practice of IHL, and the interplay of emotions and law. The authors of this article have both participated in the Jean-Pictet Competition in various forms, and the discussion draws on this first-hand experience. The discussion is also informed by findings from a survey administered to 231 former competition participants in 2020, which will be the basis for our analysis.

Through a close study of emotions at the Jean-Pictet Competition, we will show that emotions play an important role in the global dissemination of IHL. Emotions matter not only for IHL training, but also for IHL compliance and the future development of this body of law. Tomorrow’s IHL experts need to have a real grasp of fundamental principles (distinction, proportionality, precaution, etc.), and they must understand how IHL rules are implemented in the heated context of armed conflicts. For example, in moments of high stress, how does a commander decide whether to order or halt an attack? How are on-the-spot decisions made about deploying various means and methods of warfare? What does an *ex ante* assessment of a complex targeting decision look like without the benefit of hindsight? Each of these scenarios is inflected with strong emotions relating to fear, hunger, stress, resentment, grief, and so on. Teaching an “emotionless” IHL – however alluring this might be for its certainty – may do a disservice here, as it leads to misinterpretations, misunderstanding and a failure to grasp IHL’s practical application. The practice-related aspects of the Jean-Pictet Competition, and especially its role-plays and simulation exercises, are thus ripe for investigation from an emotional perspective. As we will argue, the high emotional energy generated through the various interaction rituals at the competition achieves an unstated goal. This is the promotion of a humanitarian sensibility that will become an asset to participants in their personal lives and

- 2 The US legal education movement for contemplative lawyering offers great potential here: see Leonard L. Riskin, “The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and Their Clients”, *Harvard Negotiation Law Review*, Vol. 7, No. 1, 2002. See also Gillian Calder, “Whose Body Is This? On the Role of Emotion in Teaching and Learning Law”, in Susan Bandes *et al.* (eds), *Research Handbook on Law and Emotion*, Edward Elgar, Cheltenham, 2021; Senthurun Raj, “Teaching Feeling: Bringing Emotion into the Law School”, *The Law Teacher*, Vol. 55, No. 2, 2020. On the importance of emotions in legal education, see also Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law*, Ashgate, Farnham, 2011; Lesley Townsley, “Thinking and Feeling Like a Lawyer: Introducing Knowledge about Emotion into Legal Ethics Education”, LLM thesis, University of Sydney, 2014.

their professional futures – either within the realm of IHL or outside of it. We ultimately propose that a more conscious commitment and a stronger focus on the didactic importance of this affect-based education can increase the positive outcomes of the Pictet experience, enhancing its role as an IHL dissemination ground. We thus advocate for the competition to acknowledge and consciously deepen its affective dimension and, at the same time, for IHL university courses to integrate the competition’s role-playing model as an antidote to traditionally emotionless legal teaching. Our conclusions also have implications that go far beyond Pictet, as we seek to make a more general point about emotions in legal education.

The discussion is structured as follows. The first part provides an overview of the Jean-Pictet Competition and presents it as a training space with both legal and affective aspects. The second part explores two key themes that emerged from participant experiences at Pictet: emotions before, during and after the competition, and role-plays and simulations as a site where law meets emotion. The third part advocates for a “law and emotions” approach to the Pictet experience, and to IHL pedagogy more generally. This section delves deeper into individual and collective emotions at the competition, and also examines the impact of the Pictet experience on participants’ career aspirations. We present the competition as a site at which students “become humanitarian”, joining a global humanitarian community which can be understood as a type of “affective community”. This transformation occurs by means of numerous implicit sociological phenomena – including interaction ritual, emotional energy and circulation of affect – which we argue need to be dealt with explicitly and amplified for a stronger impact. The concluding section suggests further creative ways forward in the project of delivering an affect-based education to those who would seek to disseminate, promote and ensure respect for IHL.

## The Jean-Pictet Competition as a site of law and emotions

Academic legal education might seem far removed from the active conflict zones that studies of IHL typically engage with, especially when compared with other pedagogical efforts like military trainings, which tend to focus on field simulations. Yet these academic spaces, too, are worthy of study as settings in which IHL rules are implemented in practice.<sup>3</sup> The Jean-Pictet Competition experience is saturated with individual, interpersonal and group emotions that shape the way in which individuals – in this case, the potential IHL lawyers of the future – understand and engage with law. Probing the emotional experiences of participants in the competition has the potential to achieve the following aims: improving and enhancing the Jean-Pictet Competition as it evolves over time;

3 See description of the “pedagogical realm” in Rebecca Sutton, *The Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law*, Oxford University Press, Oxford, 2021, Chap. 1.

informing the IHL dissemination efforts of States and organizations such as the International Committee of the Red Cross (ICRC); and enhancing compliance with IHL rules globally. Beyond these tangible gains in the field of IHL, student experiences at the competition offer insights for legal education, specifically regarding the way in which law students are trained to become lawyers in the university setting across different cultures and countries.<sup>4</sup>

## The “Pictet experience”

The Jean-Pictet Competition is widely perceived as one of the best examples of efficient practice in disseminating IHL knowledge amongst students at universities.<sup>5</sup> But what is the “Pictet experience”, exactly? The Jean-Pictet Competition is a training event for law students from all around the world,<sup>6</sup> which aims to disseminate the principles and values of IHL through a dynamic and immersive role-play simulation.<sup>7</sup> Every year, the Committee for the Jean-Pictet Competition (Comité pour le Concours Jean-Pictet, CCJP), a not-for-profit association with twenty-seven members globally, organizes the competition in a different location. A call for registration is launched, and interested teams that apply are carefully selected after the submission of short essays (answering three questions) which undergo several rounds of evaluation. There are typically forty-eight teams in each edition of the competition, usually from five continents.

Distinguishing it from other competitions on international law, the Jean-Pictet Competition has some unique features.<sup>8</sup> It was created in order to promote

4 For a critical perspective on mootings, see Christine Schwobel-Patel, “Mooting: Advocacy, Litigation, Strategy”, in Ilan R. Wall *et al.* (eds), *Critical Legal Pocketbook*, Counterpress, Oxford, 2021.

5 See Etienne Kuster, “Promoting the Teaching of IHL in Universities”, in Drazen Djukić and Niccolo Pons (eds), *The Companion to International Humanitarian Law*, Brill, Leiden, 2018, p. 25; Andreas R. Ziegler and Stefan Wehrenberg, “Domestic Implementation”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 654, para. 22; Elzbieta Mikos-Skuza, “Dissemination of the Conventions, Including in Time of Armed Conflict”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above; David Turns, “Implementation of IHL”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 371.

6 In theory, the competition regulations allow teams of students coming from a variety of different fields (such as law, political sciences and the military) to participate, though in reality an overwhelming majority pursue legal studies at an undergraduate or graduate level. This paper will focus on the importance of the “Pictet experience” as a way of complementing and enriching the traditional teaching of IHL to law students.

7 See the Jean-Pictet Competition website, available at: [www.concourspictet.org](http://www.concourspictet.org) (all internet references were accessed in December 2022). Originally organized in French, the competition now includes both English- and French-speaking editions every year. Between 2008 and 2010 it also included a Spanish-speaking edition, which allowed several teams from Latin America and Spain to participate.

8 See Christophe Lanord and Michel Deyra, “Dissemination in Academic Circles: The Jean Pictet Competition”, *International Review of the Red Cross*, Vol. 35, No. 306, 1995; Mathias-Charles Krafft, “Le Concours Jean-Pictet 1999 – ou les pièges d’une ‘Conference internationale pour la protection des victimes des conflits armés’”, *International Review of the Red Cross*, Vol. 82, No. 838, 2000. Michel Deyra and Christophe Lanord are the co-founders of the competition, and they designed its special format back in 1989. As an acknowledgment for this achievement they were awarded the 2021 Henry Dunant Field Prize by the Fondation Prix Henry Dunant (see: <https://prix-henry-dunant.org/en/recipients-field/2021-michel-deyra/>).

a more dynamic way to teach IHL, showing the practical importance of that body of law and the real-life challenges involved in implementing it in times of armed conflict. The selected teams meet for a one-week competition from a Saturday evening to the next Friday evening, in which they must assume the roles of various actors engaged in a fictitious armed conflict. In addition to the diverse backgrounds and qualification levels of the teams, there is an intergenerational aspect: the competition is presided over by an evaluation panel or “jury” formed of eminent experts in international law and in humanitarian affairs (who may be former Pictetists themselves), convened every year by the CCJP. The jury’s presence inculcates a professional and competitive atmosphere throughout the proceedings, adding a sort of “upscale” flavour and exposing participants to encounters with more seasoned lawyers and humanitarians.<sup>9</sup> This presents an important opportunity for cross-generational engagement on IHL.

The method and pedagogical approach of the Jean-Pictet Competition focus more on oral interactions than most other law moots, where written memorials or pleadings are required.<sup>10</sup> At the Jean-Pictet Competition, students play the roles of diverse actors (such as States, military personnel, humanitarian workers, political officers, armed group members and lawyers) in the context of a fictional case scenario that progresses throughout the days of the competition. The development of the case scenario involves an important surprise element. In the weeks prior to the competition, only some very general and abstract hints are provided to the teams. This generally acquaints them with the fictitious region where the armed conflict will take place and allows them to start elaborating hypotheses on the relevant topics. The details of each edition’s case study, however, remain unknown until the first day of the test, once participants have arrived at the venue. The scenario is then progressively developed day by day, and no team can foresee the direction it will ultimately take. Despite its fictional nature, the scenario is always closely associated with real-life precedents and routinely engages with global events that are unfolding at the time of the competition. The March 2020 edition in Indonesia, for example, dealt with COVID-19. This dynamic approach aims to foster a contextualized and practical understanding of the application of IHL in armed conflict.<sup>11</sup>

While the emphasis is on practical implementation, participants are still required to engage extensively with IHL doctrine and theory as part of their

9 An interesting aspect of these encounters is the more casual and “backstage” aspect, where IHL aspirants see not only the “IHL expert” but also the off-duty human behind that professional identity – for example, by the pool after the day’s events have ended. On backstage practices and mooting, see Wouter Werner, “Moot Courts, Theatre and Rehearsal Practices”, in Lianne Boer and Sofia Stolk (eds), *Backstage Practices of Transnational Law*, Routledge, Abingdon, 2021.

10 The only written activity which is required by teams takes place during the selection process: teams must submit an application comprising a cover letter and answer three questions, two of which deal with substantial aspects related to contemporary challenges in IHL.

11 Françoise Hampson, “Teaching the Law of Armed Conflict”, *Essex Human Rights Review*, Vol. 5, No. 1, 2008, p. 7. The time-sensitive nature of the assignment (where participants might roughly have between 10–15 minutes and two hours of preparation time, depending on the test) reflects the reality of field-driven IHL practice.

preparation. The late reveal of the case study also requires them to familiarize themselves with the different areas of public international law (PIL) that are relevant in armed conflicts, such as international criminal law, international human rights law and international refugee law. Although the overall focus of the Jean-Pictet Competition remains on IHL, some tests may elevate these other branches of PIL over IHL in terms of importance.

As noted, no detailed information on the case study is given to the teams before the week of the competition. However, ahead of the competition the CCJP administrator sends participating teams basic training documents on relevant topics to help them get abreast of legal matters. In addition to legal substance, the training documents highlight the importance of teamwork and practical skills related to negotiation and role-play. These materials convey to participants that they must keep the legal aspects of the assigned topic at the forefront of their minds when preparing, yet they also need to be creative in the broader strategies they deploy once the competition is under way. Participants are thus invited to strike a balance between strengthening their theoretical legal knowledge and honing their ability to communicate and negotiate in challenging circumstances. A grasp of the “extra-legal” will be especially important when participants prepare to accurately embody their assigned simulation roles. The emphasis on interaction with others across the competition also provides an opportunity for the contestants to engage with persons from diverse backgrounds, the Jean-Pictet Competition being a place that produces strong interpersonal links and long-lasting friendships. These connections might eventually shape the professional careers of those who participate, but they also have intrinsic value in terms of relationship- and community-building.

## Objectives of the Jean-Pictet Competition

The Jean-Pictet Competition has three stated objectives: to learn, to compete and to meet. The “learn” criterion includes not only IHL and related areas of international law, but also skills that are not always addressed in university teaching such as public speaking, teamwork, interaction with different types of interlocutors, and stress management. Pictet participants are evaluated by jury members on the following assessment criteria: *legal aspects*, *strategic skills* and *interaction with others*.<sup>12</sup> According to the regulations of the competition, the strategic skills component includes the following four features. First, *demonstrated understanding of the simulations*: “the capacity to position oneself within the given scenarios ... [and] the ability to understand the complexities of the events and the assigned roles during the various simulations”. Second, *ability to argue*: “persuasiveness in presenting arguments, use of the law in creative and innovative ways, appropriate combination of rational analysis with emotion and passion”. Third, *commitment*: towards the competition, the simulation and, when appropriate in a simulation,

<sup>12</sup> These criteria are mentioned in Article 12 of the regulations of the competition. The 2021 version of the regulations is available at: [www.concourspictet.org/files/reg2021EN.pdf](http://www.concourspictet.org/files/reg2021EN.pdf).

the spirit of IHL. Fourth, *oral communication skills*: including the ability to be convincing, articulate and logical; the ability to convey feelings when appropriate in simulations; the capacity to communicate across cultures; and the ability to translate complex issues and ideas into understandable concepts.

These components need to be broken down in order to examine the relevance of feelings and emotions. In the feature related to *demonstrated understanding of the simulations* cited above, there is a hint that empathy and emotional intelligence might be important, as the participants must position themselves in the scenario and understand the assigned role. There is an explicit reference to “emotion” in the *ability to argue* feature, and to “feelings” in the *oral communication skills* feature. It may be argued that a role for emotions is also implicit in the reference to the “spirit of IHL” in the *commitment* feature. The competition envisions that participants will bring emotion and passion into the case scenarios along with legal/rational arguments, that they will possess the appropriate judgement regarding when and how to convey feelings in the simulation exercises, and that they will embody the spirit of IHL through their behaviour, comportment and expression. Presumably, this last aspect requires participants to demonstrate a proclivity and affinity for humanitarian values such as compassion. This point will be revisited later in the article.

The *interaction with others* component cited above refers to the importance of teamwork and cooperation, as well as respect for the neutral humanitarian space in which the competition is organized, and the ability to listen to others within and outside of the team. The issue of (active) listening could have an important emotional component, especially if one links it to paying attention to those in an out-group or outside of the team. We could scrutinize a further affective dimension here, which relates to cross-cultural engagement: in a scenario in which two competing Pictet teams come from States that are involved in an armed conflict with each other in real life, attending to the cultural aspect could help to enhance the responses and the determination of the teams. At the same time, emphasizing a cultural component could serve to heighten tensions – perhaps even when a team does not come from either of the actual conflict States but its members have strong feelings about the conflict. Accordingly, it is important to think of cultural sensitivity in a broader sense here, as a concept that entails the promotion of open-mindedness, empathy and impartiality. As a more subtle goal, then, the Jean-Pictet Competition can encourage contestants to empathize with others who in real life are often pictured as the “enemy”. The engagement of seasoned professionals, for example as members of the jury, is important here for modelling diplomatic behaviour. These professionals can share concrete experiences, offer advice and convey the importance of cross-cultural empathy and understanding, showing participants that this is an essential disposition in the arena of international law and politics. The concepts of “humanitarian space” and neutrality are also important for the present discussion, and they will be examined further below.

While the Jean-Pictet Competition clearly has an affective dimension, the extent to which student participants actively prepare to succeed in this aspect has



not been explored. Additionally, the relevance of intra- and inter-group dynamics to engagement with law at the competition has not been well understood. As we will now show, attending to these extra-legal elements is fundamental to fully understanding the competition and its longer-term impact.

## **Feeling IHL: Participant experiences at the Jean-Pictet Competition**

In 2020, we administered a survey to 231 former Pictet participants. The survey was open to all individuals who had participated as student team members in the Jean-Pictet Competition since its inception in 1989. This group includes some 2,700 individuals worldwide, out of more than 4,000 alumni. The survey was administered in English, French and Spanish using Qualtrics.<sup>13</sup>

The aim of the survey was to uncover the way in which IHL and emotions interconnect, by inviting participants to reflect on the emotional dimensions of their Pictet experience. While we knew it would be difficult to accurately identify specific individual emotions,<sup>14</sup> we hoped to broadly map the competition's emotional terrain and to get a sense of what participants, individually and collectively, were feeling at various junctures. To develop the specific questions for the survey, we drew on our direct experience with the competition: Rebecca has been on the jury, and Emiliano has a long-standing involvement that includes being in the scenario “kitchen” and serving on the CCJP since 2012. Additionally, the survey is informed by our observations and conversations that took place over a week-long period during the 2020 Jean-Pictet Competition in Indonesia. This engagement led to the discovery that students seemed to “become humanitarian” at the competition, generating a new set of survey questions about career aspirations.

In what follows, we will draw on some of the survey responses to demonstrate that emotions influence IHL and play a crucial role in competitions such as the Jean-Pictet. The next two subsections respectively explore (1) emotions at different stages of the competition and (2) role-plays as a site where law meets emotion.

While feelings and emotions are clearly engaged throughout the Pictet experience, the intensity and the specific feelings which are aroused at various moments will depend on several factors—in particular the stage of the competition and the role one is assigned to play. To understand the connection between IHL and emotions at the Jean-Pictet Competition, it is essential to identify the precise moments of the competition in which specific emotional processes take place. This is the goal of the first section of the discussion. Here we attempt to capture a snapshot of emotions, an endeavour complicated by the

13 Qualtrics is a web-based software package that allows users to generate surveys and reports in multiple languages.

14 As Rossner notes, “a decay in delicate feelings and memories” may have set in once time has passed. Meredith Rossner, *Just Emotions: Rituals of Restorative Justice*, Oxford University Press, Oxford, 2013, p. 107.

fact that emotions are not in a static state. What we find is that (experiences of) emotions are dynamic and in flux, influenced by the different stages of the competition. Emotions like excitement or fear thus predominate according to the circumstances in which participants find themselves, how they perceive those circumstances, and what they expect is going to happen next. For example, preparation for the competition may entail high levels of anticipation; interpersonal engagement with other teams during the competition may give rise to strong feelings, both positive and negative; and individual expectations and fears might further intensify as participants approach the competition's final stages. There are relational and collective elements to consider as well, as participants' own emotional experiences are shaped in part by (their assessments of) the emotional states of others – within their team, from other teams, from the jury, and so on – and how these others view or respond to them.

Another important factor shaping emotions at Pictet relates to the role-plays and simulations. The second section of the discussion considers how participants engage in their assigned roles and how the different scenarios they confront can produce varying emotions. We contend that the ability of individuals and teams to grasp their assigned roles, and to develop appropriate strategies that reflect these roles, is decisive in shaping the emotions that arise.

The outcomes of the survey and these reflections allow us, at the end of the section, to advance various proposals on the need to embrace affect-based education in order to promote humanitarian awareness and train future professionals in the field.

## Emotions before, during and after the competition

While emotions evidently flow through every single person who participates in the Jean-Pictet Competition, understanding the role of emotions in a more in-depth way requires us to examine the personal experiences and backgrounds of each participant. In this section, we consider the development of emotional intelligence skills (i.e., skills that can help students to be persuasive orators) and holistic affect-based strategies relating to the teaching, dissemination and promotion of a more refined disposition or sensibility towards others. This latter sensibility aspect is grounded in IHL's humanitarian aims, and it links to the notion that participants are joining a global humanitarian community.<sup>15</sup>

What interests us presently are the feelings that are most likely to be experienced at specific moments of the Jean-Pictet Competition. Our aim in exploring emotions in this way is to reflect on how they might be better harnessed at each stage in order to enhance the overall educational value of

15 On the affect-based nature of such a community, see Emma Hutchison, *Affective Communities in World Politics: Collective Emotions after Trauma*, Cambridge University Press, Cambridge, 2016. Through a more historical use of the same concept and in spite of some differences in scope, Rosenwein claims that an "affective community" has its own particular norms of emotional valuation and expression: see Barbara H. Rosenwein, *Emotional Communities in the Early Middle Ages*, Cornell University Press, Ithaca, NY, 2006, p. 23.

Pictet. It should be acknowledged that some emotions discussed here would arise in any international law competition. Indeed, this fact enhances the relevance of our argument beyond Pictet and the IHL field; we expect that a similar temporal approach could help illuminate emotions at other types of competitions.

Starting with the advance preparation that participants engage in before they travel to the competition, a participant from the United States described the environment in which she prepared at her home institution as stressful. This underscores the fact that the competition as such does not simply start at the inaugural ceremony which officially opens the week – well before they arrive, participants will already have experienced and navigated anticipatory emotions while preparing in their respective local environments. Before the competition officially begins, then, feelings like stress, insecurity, panic and nervousness, but also optimism, excitement and joy, will have a critical influence on each of the participants' minds and bodies. There are material aspects to participation that also merit consideration here: while some universities pay for the competition (allowing their students to focus more on studying), other participants need to raise money to pay for team travel. We anticipate that the latter students have less time to devote purely to preparation and are likely to experience higher levels of stress in advance of the competition. A further point here is that for many participants, the Jean-Pictet Competition is a poignant emotional experience because it represents their first time travelling internationally.

Our findings show that there are different kinds of emotions, expressed in a variety of ways, arising before and after the opening night ceremony. In this matter, the survey found that almost 56% of those who answered the question “Which feelings were strongest for you in the weeks prior to the competition?” said they felt highly positive emotions such as pride, excitement, pleasure and/or joy (see [Chart 1](#)). But it is interesting to note that a high rate (almost 37%) of respondents to this question also described less positive emotional experiences related to stress: they felt fear, nervousness, anxiety and/or fatigue.

Once the opening ceremony begins, however, we find that those negative emotions subside. On the question “Which feelings were strongest for you on the opening night of the competition?”, almost 72% of participants indicated that they felt excitement, pride, pleasure and/or joy (see [Chart 2](#)). This disparity can be explained with the feeling of “overjoy” and expectation that the ceremony produces in the participants. Where nervousness and fear previously prevailed, a slight feeling of excitement and anticipation soon arises – perhaps combined with some relief that things are going well.

A further example of these different “opening night” emotions can be found in the experience shared by one of the participants from Argentina, who said that she felt excitement walking with the other team members to the competition venue. Another strong emotion during these moments prior to the opening ceremony of the competition is a sense of responsibility, as shared by a participant from Belarus.

These mixed feelings are perfectly compatible with the expectation of participating in a prestigious and enjoyable, yet challenging, international law

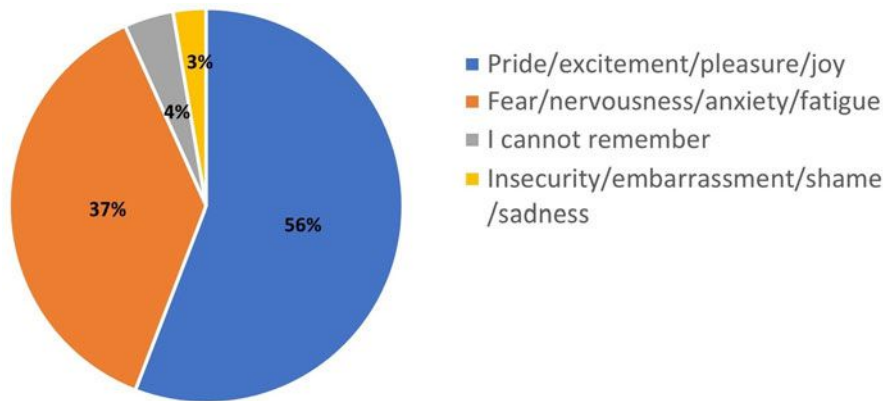


Chart 1. Responses to the question: Which feelings were strongest for you in the weeks prior to the competition?

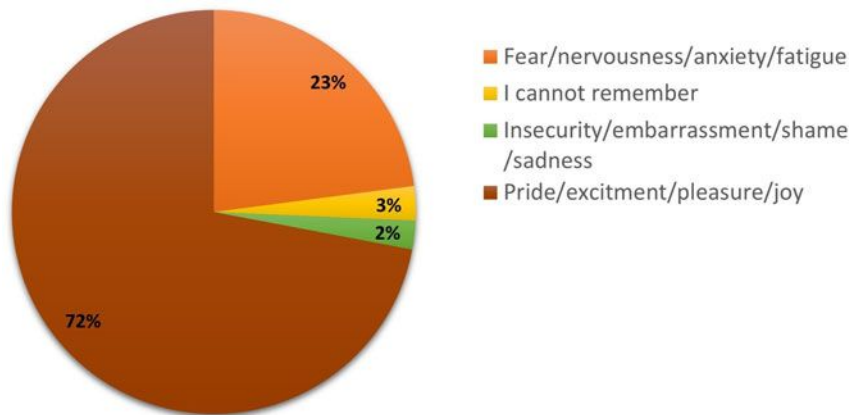


Chart 2. Responses to the question: Which feelings were strongest for you on the opening night of the competition?

competition where participants’ knowledge will be tested and where they are representing their home institution and even their country – which, in their own perception, they could “make proud” or, equally, disappoint or “let down”. Quite often, the pressure from a specific university to perform well, or the self-imposed pressure to be a good representative of one’s own country, needs to be considered as a cultural demand that students must deal with. This is an important aspect of cross-cultural engagement at the competition, reminding us that each team (and the members within it) might bring a very different perspective on what is at stake.

As soon as the competition kicks off with the first role-play exercise, the teams assume their respective roles and begin to interact amongst their members and with other teams. The performance aspect now also begins, as the jury starts

observing, asking questions and evaluating the teams. Frequently, the hypothetical situations that are played out are complex. Although the analysis of role-playing and simulations will be deferred to the next section, it is worth noting the predominant emotions shared in the survey regarding this stage of the competition. Out of the 218 responses given to this question, 117 (54%) said that the strongest feelings during the first role-play were once again excitement, pride, pleasure and/or joy, while eighty-seven (40%) stated that fear, nervousness, anxiety and/or fatigue were stronger for them (see [Chart 3](#)).<sup>16</sup>

These emotions are connected to how participants felt during the advance training that took place before the competition began. More positive emotions were present among those students who had been exposed to specific information on how the simulations work – for example, through interactions with alumni of previous editions. Prior experiences thus play a key role in the way the contestants feel and express emotions during the competition: those teams that were able to rehearse based on the experiences shared by friends or peers who had been former Pictists felt more confident and experienced more pleasurable (and less stressful) moments at the beginning of the competition. To address this gap, the CCJP has decided to include general ice-breaker workshops on Sunday morning, which are delivered by some of the invited jury members or CCJP members. A first “mock test” now also takes place on Sunday afternoon before the “real” competition starts on Monday morning. This familiarizes participants with the different formats they will experience, and it provides those who had less advance coaching with the chance to express doubts and ask questions. As part of these general workshops, the CCJP also introduces the practical aspects of the competition, explaining its purposes and offering a network of support. An important part of the latter is the appointment of tutors – along with volunteers, most of whom are former participants – who accompany the teams during the week and provide them with tailored feedback on their performance. Notably, tutors are not allowed to discuss legal issues with their assigned team; their assistance is limited to non-legal matters such as role-playing techniques or communication. As the survey reveals, the tutors’ role is essential in assisting participants to navigate their emotions throughout the week.<sup>17</sup>

In addition to the points regarding advance preparation and support noted above, each participant’s lived experience of the competition will be shaped by the way that they prepare to answer questions from the jury, the level of cohesion between team members, and the self-confidence they feel and display.

Another important element that influences emotions during the competition (which is reflected in the fact that members of different teams often

16 In general, our impression of the competition indicates that participants who are well- or over-prepared seem to feel more pressure, anxiety and stress, whereas those who are under-prepared or are not looking for achievement feel much less stress. This has to do with emotions related to (perceptions of) external pressure.

17 In recent editions, additional mechanisms were put in place in order to help participants cope with external pressures and with mental health issues that arise throughout the competition. This included the appointment of focal points and the presence of professional officers with expertise in mental health.

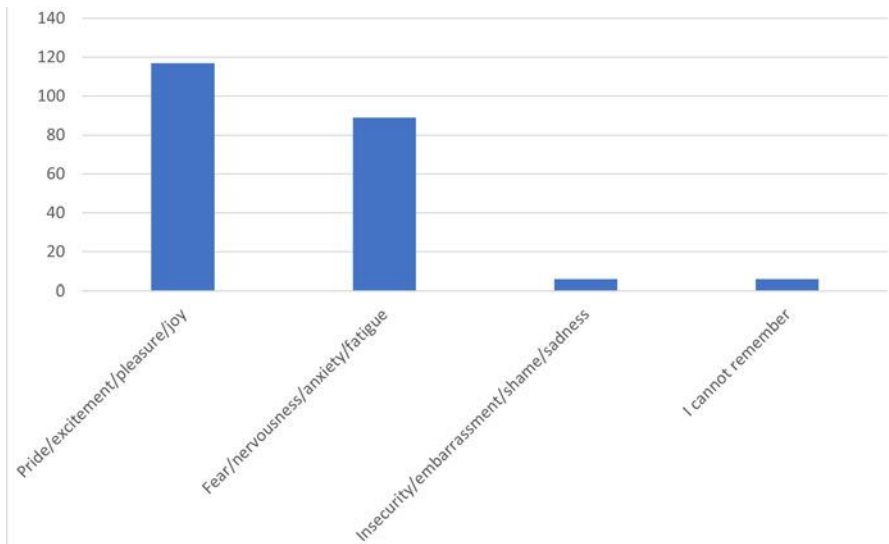


Chart 3. Responses to the question: Which feelings were strongest for you while you were competing?

report having different emotions) has to do with evaluation of performance: that is, participants’ reaction to the jury’s decision about whether their own team will progress successfully to the next round. Technically, the Jean-Pictet Competition is a place to share and enjoy, with no formal ranking of participating teams provided at the end. Nonetheless, it is impossible to deny that there are ultimately winners. Emotions like anxiety, a rush of adrenaline, disappointment and joy run high during the week because of this. These emotions spike when the jury announces which teams will advance into the semi-finals and finals.

As the competition concludes, one might expect that there would be two different kinds of emotions among participants: sadness and joy. The team winning the edition would be overwhelmed by a strong set of (positive) emotions, ranging from excitement to pride, whereas all those teams who did not manage to win would feel somewhat disappointed. Notably, however, our survey reveals pride and satisfaction as the predominant kind of emotion felt by all participants when the competition is over. In answer to the question “Which two options best describe how you felt upon returning home from the competition?”, almost 72% felt excited, proud, content and/or relieved, while only 18% felt sadness, loneliness, shame and/or embarrassment (see [Chart 4](#)).

These numbers do not track with the proportion of participants who “win” the competition, meaning that positive emotions were not ultimately contingent on outward success.<sup>18</sup> The fact that satisfaction and pride are the main feelings of

18 The only individual award of the competition (the Gilbert-Apolis Award) is granted to the “best orator” of the competition. It is intended to acknowledge the student who best “embodies the IHL spirit”. Winning it has emotional repercussions, generating feelings of self-pride and personal development.

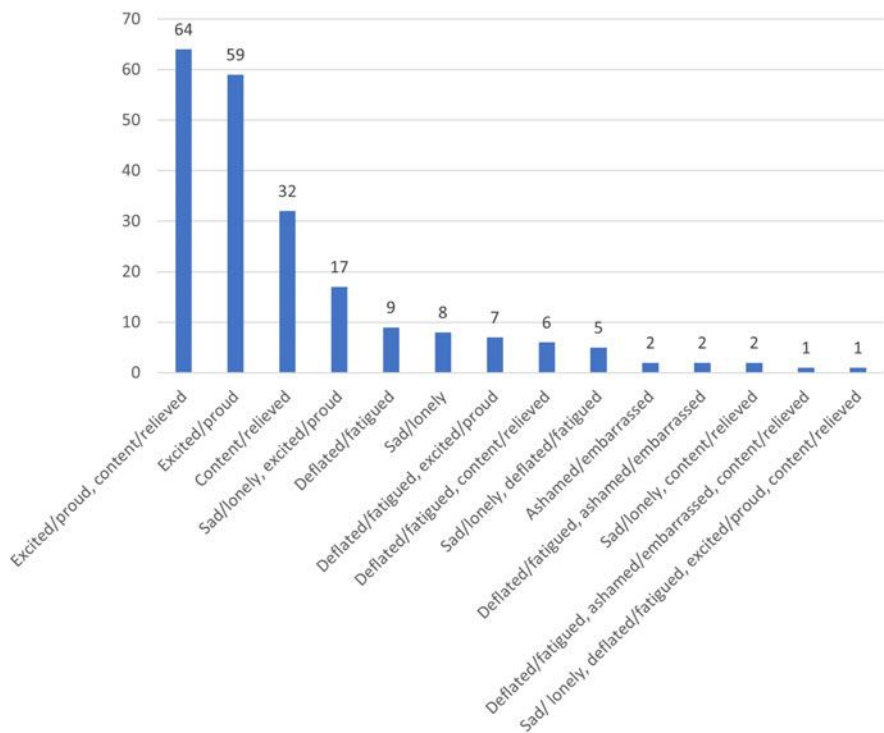


Chart 4. Responses to the question: Which two options best describe how you felt upon returning home from the competition?

participants when the Pictet experience is over – regardless of the result – suggests that the experience of participating in the Jean-Pictet Competition is intrinsically rewarding. Students know, as they also report in the survey, that simply being part of Pictet can influence the careers of everyone who participated. They ultimately feel part of a privileged group of law students who have been able to take part in a competition where they have learned to take the law out of the books. As a participant from Venezuela shared, “the Pictet has been the most beautiful international academic experience of my life”. It is not every day in a law school setting that one hears these kinds of exuberant statements from students, and this points us towards the possibility that there is something special about the Pictet experience that would be desirable to amplify and replicate elsewhere.

These participant statements attest to positive outcomes related to the Jean-Pictet Competition as a whole, an experience interspersed with “meaningful rituals”. These rituals are an essential part of the competition, and they include the welcome ceremony, document distribution, tests, tutors’ meetings, jury debriefing, semi-finalist announcements, party night, semi-final and final rounds, and closing ceremony. Separately and collectively, these rituals generate significant moments



that combine to create a positive community based on shared values, collaboration and in-group understanding. These formal rituals are complemented by the simulation aspect of the competition, which gives rise to specific emotions that are unique to Pictet.

## Role-plays and simulations as a site where law meets emotion

The Pictet method, as established above, is premised on the idea of immersion through simulations based on real-life scenarios. Those in charge of developing each edition's fictional case study – the “kitchen” that “cooks” the evolving story for the week and assigns specific tasks for each test – take the emotional background of the role-play very seriously. The roles assigned to teams are not random or arbitrary; they are carefully designed to reflect the reality of armed conflicts, and to expose students to the motivations, behavioural constraints, resources and interactions of institutional actors in armed conflicts.<sup>19</sup> The underlying thought here is that to truly understand the dynamics of IHL practice, one must have an opportunity to adopt the persona of an actor in an armed conflict – even if only for a fictional activity.

As students step into their assigned roles, their ability to manage felt and expressed emotions during the simulations constitutes an important element of their Pictet participation. To be effective, participants must be able to properly embody the role and feel like they are “stepping into the actor's shoes”. In this sense, an Argentinian participant said that the key to their success when playing the part of someone who was “abducted” (i.e., taken out of the room by a jury member performing the role of a terrorist) was that they were able to channel feelings of anguish and fear that they imagined one might feel in this situation.<sup>20</sup> Some participants likewise reported that playing the role of a humanitarian actor made them more empathic to the different challenges that humanitarians face in real-life armed conflicts. Closely relating to (the individuals playing) victims in the course of the tests also helped them to understand how conflicts affect individuals and communities.

As the simulations require participants to assume the role of several different actors, some discomfort is inevitable. Our survey shows that there are certain roles which participants believed would be difficult for them, and these tended to be the more operational and less straightforwardly “legal” roles (see [Chart 5](#)).

Acting as a member of an armed group, for example, is a role which most law students are not familiar with and are not trained to do; some would be unsympathetic to it as well (see below). This point held for operational military actors more generally. While that is perhaps unsurprising, some also found it

19 Elizabeth T. Smith and Mark A. Boyer, “Designing In-Class Simulations”, *PS: Political Science and Politics*, Vol. 29, No. 4, 1996, p. 690.

20 This kind of activity raises important questions about trauma-sensitive approaches and the avoidance of secondary trauma. On trauma and its emotional impact, see note 21 below.

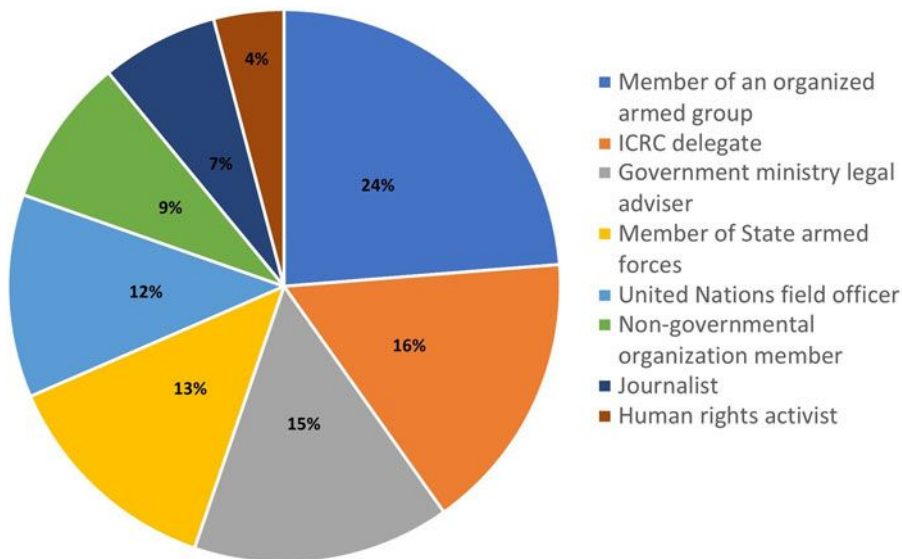


Chart 5. Responses to the question: What kind of character, from the list below, would you find it most difficult to play?

difficult to perform as legal advisers (i.e., to political decision-makers), NGO representatives or ICRC delegates – roles one might expect to be closer to the hearts of Pictet competitors. Participants explained that this was because legal academia has never given them tools to “use” or “apply” law in practice, and they thus felt unequipped to apply law concretely in the field.

When asked about which of the roles they found the easiest to play, most of the participants identified government ministry legal adviser, ICRC delegate and human rights activist as their best options (see [Chart 6](#)). They felt that these roles required them to channel their legal knowledge more directly – though one could argue that there is a slight contradiction here with beliefs about some field-oriented advisory roles being too intimidating.

These findings show that assuming unfamiliar roles presents a clear pedagogical opportunity, as it forces students to jump out of their comfort zone, adopt different perspectives and put law into action. Claims about being unprepared to apply law practically in the field – whether in relation to humanitarian practice or technical applications of international law – also point to a gap in global legal education more generally.

A point of relevance for emotions is that in certain cases students may wish to reject or distance themselves from their assigned role because they disagree with the stance or interests that they are obliged to embody and defend. Highlighting this dynamic, a participant from Serbia recalled feelings of embarrassment and guilt when playing the role of someone who was responsible for committing illegal actions. In the same vein, a participant from India described having to balance

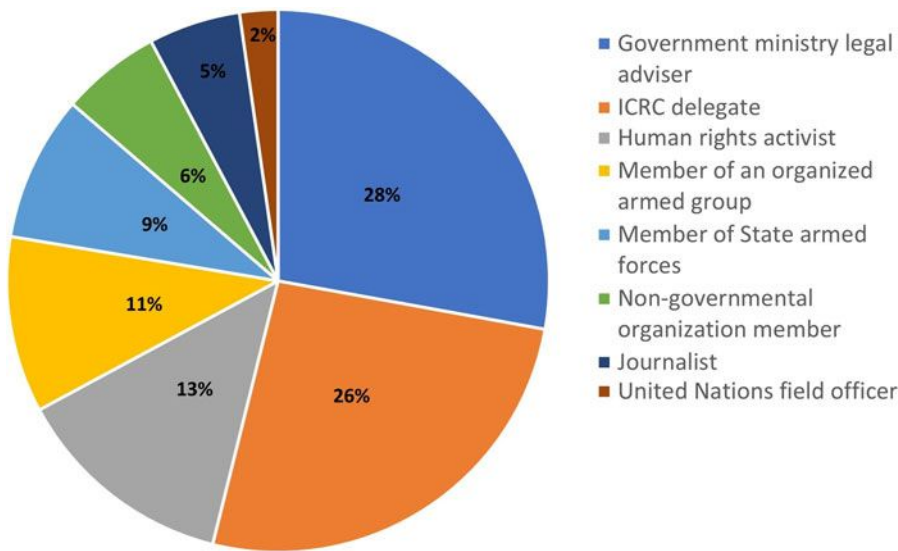


Chart 6. Responses to the question: What kind of character, from the list below, would you find it easiest to play?

difficult emotions in a simulation where she was required to prosecute a child soldier for committing war crimes.

It is not only the assigned role that is relevant to the way the participants feel and express their emotions, but also the context(s) in which they must operate. Sometimes, the challenge that is presented comes from confronting an unexpected situation or dynamic as the scenario unfolds. These surprise moments can trigger emotions and impact the way that participants perform. A participant from India thus described feeling “tough emotions” during a preliminary situation in which jury members played the part of terrorists. A participant from Nepal also reported feeling “sick and a major adrenaline rush” when she entered a room of actors playing the part of victims who had been harmed, injured or killed.<sup>21</sup> This exposure led her to reflect on real-world armed conflicts and their impact on human life: she explained that the simulation triggered “empathy for the situation in current armed conflicts around the world”. Finally, a participant

21 A few role-playing activities in the past included role-playing by jury members suggesting the horrors of kidnapping or other threats. These specific experiences are remembered by participants as moments in which they were exposed to the effects of wartime suffering, something that would foster the development of trauma sensibility. It should be noted that, since perceptions of what is appropriate in a training session are evolving globally, the CCJP in general, and the “kitchen” of each edition in particular, discuss the appropriateness of including such tests. In other cases, in “field tests”, participants playing the role of humanitarian actors would be confronted with stories about (sexual) violence, harassment or massacres told by jury members performing the role of victims. This is intended to generate an emotional awareness about the need to behave humanely when speaking to those who have lived through traumatic experiences. We anticipate that these aspects of the competition will continue to change and evolve as best practices on trauma sensitivity are developed globally.

from Singapore said her emotions were triggered when she encountered an individual (performed by a jury member) who was crying, upset and seemingly terrified during a simulation. This experience, according to the participant, “reminded us to go back to the basic instincts we have as humans and to show empathy and sensitivity, before thinking with any other legal hats on”. This last point is noteworthy because it suggests that participants sometimes make conscious decisions to try to separate law from emotions; they lead with their feelings and de-prioritize the legal element.

The above examples demonstrate that engaging in role-play shapes the (mixed) emotions that participants experience throughout the competition. Our survey also attests that there is a further emotional aspect that unfolds around the simulations, one we might expect to find at any moot court competition. As teams strategize, develop their arguments, get ready to take the floor, and organize the speaking responsibilities of each team member for oral presentations, they keep the assigned scenario in mind. But the survey also shows that participants experience feelings one would expect in any kind of (semi-) public performance of this nature: nervousness and anxiety are present in almost every collected testimony. As the pressure of performance mounts, team spirit and the ability to help and rely on each other also become essential assets, both for the team’s performance as a whole and for what goes on at the individual, personal level.

The various types of tests which are deployed during the week of the competition call on participants to engage specific strategies and skill sets. Relevant activities include negotiation, mediation, advising, fact-finding, decision-making and pleading, all of which could be relevant within and beyond IHL practice. During these formal interactions, emotions are generated within a global and multigenerational community made up of students and jury members. The more informal interactions that accompany the tests also create a deep sense of solidarity in terms of emotions, based on a shared understanding of the importance of humanitarian values such as compassion, empathy and affection. Acknowledging this common ground helps to overcome possible negative emotions that arise in armed conflicts, which participants with direct exposure to armed conflicts might also have experienced first-hand. The neutral space of the Pictet – based on the “learn, compete, meet” motto – plays a crucial role here, helping to neutralize the affective impact of war and potentially enabling participants to overcome traumatic feelings by providing them with a safe space to perform, interact and reflect.

Further to the issue of performance, evaluation is always at the forefront of participants’ minds. This is the case regardless of whether they will be formally ranked at the competition’s conclusion. As teams are aware, the way that they approach their assigned role and the context in which they are immersed is decisive to their evaluation. While there are always several plausible legal arguments that can be deployed in the universe of fictional Pictet scenarios, the arguments deployed must be appropriate to, and contextualized for, the assigned role. It is not unusual for confusion about the scenario and/or unwillingness to

take on a role to produce a misstep in a team's performance; awareness of this possibility introduces a trepidation or fear element for participants. Such errors can happen at any stage of the competition, and when they do, they tend to destabilize team cohesion. A US participant thus said that she felt "embarrassed" after her team prepared for the wrong part due to an incorrect interpretation of the assigned task. The risk here is that individual members may lose trust in, turn on or blame each other in these moments of embarrassment – dynamics that can reverberate across subsequent competition events. If thoughtfully discussed within the group, however, tackling these negative moments of resentment and disappointment at the Jean-Pictet Competition may increase mutual support amongst team members, as explained by a former participant who is now an expert in the field.<sup>22</sup> Trust and inter-reliance will equally be important for participants outside of the competition, should they embark on professional lives as IHL lawyers, humanitarian practitioners or other related roles. A small team of humanitarian negotiators, for example, must support one another if they are to work coherently as a team to advance their agenda – including, and perhaps especially, where one of them makes a mistake.

To sum up the above, the emotions experienced by the participants during role-play exercises at the Jean-Pictet Competition matter. While this appears to be a simple and somewhat obvious claim on the surface, stating it emphatically is an appropriate starting point for the arguments that will be advanced in the rest of the discussion. These emotions are the expression of the participants' values and beliefs, which interplay with their theoretical knowledge of IHL and PIL in general. There are certainly some roles which will be easier to represent because they align with the values commonly shared by IHL students, while other roles may be more challenging due to the threat they pose to the ethos of participants (or because they are deemed too "operational"). Playing new roles in each test within the competition requires participants to adapt their own mindsets and perspectives to reflect the thinking, assessments and interests of various stakeholders in an armed conflict. Participants cannot avoid challenging themselves, questioning their own values and the limitations of their point of view. By displaying and expressing the emotions that they project onto the assigned role, participants potentially get closer to experiencing what others feel and think. This offers an empathetic way of understanding the plurality of possible positions that different people might adopt on the same topic or problem. It also helps students to grasp that IHL cannot be confined to some kind of abstract legal realm, and that on many occasions the real-life use of legal arguments should be complemented by other (rational, emotional) strategies in order to achieve a concrete goal under specific circumstances. As we will address below, this could even imply going as far as using law in ways that challenge or contradict one's fledgling humanitarian values.

22 James Cockayne, "Humanizing Lawyers: The Legal Pedagogy of the *Concours Pictet*", in Julia Grignon (dir.) and Jérôme Massé (coord.), *Hommage to/Tribute to/Homenaje a Jean Pictet par le Concours de Droit International Humanitaire*, Schulthess/Éditions Yvon Blais, Cowansville/Montreal, 2016, p. 20.

This discussion has shared the findings from our Pictet observations and survey, which establish that emotions and feelings play a key role at the Jean-Pictet Competition. This is the case not only with respect to the development of strategies employed by the participants in each test, but also when teams are determining the circumstances in which a non-legal approach could better help them to realize an objective. These findings establish that an affect-based education serves as a didactic tool that can present students with concrete dilemmas and experiences, offering a better understanding of the realities of armed conflict and the interactions between stakeholders in times of war.

This engagement with the survey will now be complemented by a more theoretical examination of the extent to which making use of the emotional dimension can improve the Jean-Pictet Competition's role as an IHL dissemination ground. As we will discuss in the next section, paying careful attention to the role of emotions can help us to harness the potential for role-playing activities to shape the world views of future humanitarians.

## **Becoming humanitarian: The impact of the Jean-Pictet Competition on law student futures**

This section considers the Jean-Pictet Competition as a formative initiation of membership into a broader global humanitarian community. It examines how the experience shapes participants as future IHL lawyers, influencing their engagement with law at the competition itself and in their (projections of) future careers. The three subsections respectively explore the reported impact on student career trajectories; how a humanitarian sensibility is acquired or developed through the competition; and Pictet as a site of interaction ritual.

To set the stage, parallels can be drawn between the emotions aroused during the Jean-Pictet Competition and those related to humanitarian work itself. Of course, the tests provide students with a safe simulation which, at the end of the day, cannot be compared to real-life missions where their lives might be at risk – but similarities in affective dispositions may nonetheless be triggered here, if not in intensity then at least in kind. For example, anxiety related to preparing for the competition is not so different from some feelings which are experienced before embarking on a mission; the fear of failing during the tests can be mirrored by the fear of having access to detainees thwarted; and unease about letting down one's university or country has echoes with anxieties about disappointing victims of an armed conflict. While, as noted, the stakes are clearly higher in actual humanitarian field work than in a simulated role-play, we find that role-play participants also experience these heightened emotions at a personal level. Indeed, we would argue that the artificiality and low stakes of the Jean-Pictet Competition potentially contribute to feelings of shame and embarrassment: when a participant performs poorly, she might have the sense that she should have done better because this is a carefully controlled and simulated scenario. These parallels with professional practice suggest that a more

intentional approach to affect-based education can provide tools for professional training within and beyond the humanitarian sector as well.

## Impact of the Jean-Pictet Competition on career choices

From the survey results, we have identified that an overwhelming 81% of respondents believed that having participated in the Jean-Pictet Competition impacted their plans for their legal careers (see [Chart 7](#)). For a substantial number of participants the experience crystallized their interest in pursuing humanitarian work, for example with an organization such as the ICRC; several participants agreed that the competition helped them to decide that they wanted to specialize in the field of IHL and the regulation of armed conflicts. The Pictet experience motivated these participants to structure their academic and professional choices towards graduate projects and areas of work or research that relate to IHL.

These findings attest that the competition boosts interest in IHL as a field of specialization, one that some participants did not even know existed prior to attending the competition. This applies not only to students who had not yet fleshed out their career aspirations, but also to those who had been quite set in their plans: some participants had been inclined to pursue a legal career in other specific areas before participating, and the competition gave them a new perspective. One participant from the UK, for instance, modified her career path after participating, and reported that she is now currently working for the ICRC. Similarly, a participant from Sri Lanka said that Pictet motivated her to change her professional focus and pursue work as a humanitarian officer at the United Nations (UN) or ICRC. She was considering this now instead of academia, because she “wanted to do something to stop war or even to protect the people who are suffering”.

The effect of the Pictet experience on career choices is also evident when analyzing the current fields of work (and past professional experience) of those who answered the survey.<sup>23</sup> Out of the 228 respondents who replied to the question “What describes best your current field of activity?”, the vast majority are now working in NGOs, international organizations and academia, even if not always directly focused on IHL topics;<sup>24</sup> sixteen of them are currently working within the International Red Cross and Red Crescent Movement (see [Chart 8](#)). As indicated by one participant, “it was mainly due to the Jean-Pictet [C]ompetition that my interest in IHL was awakened, and from then on, the vocational confirmation of my desire to deepen my studies in Public International Law in general and in IHL in particular”. While this idea of an “awakening” suggests that even a student who had no previous IHL affinity could

23 These numbers can be confirmed through an unpublished 2015 ICRC study on the Jean-Pictet Competition, which examines the profile of participants.

24 Some of these positions might be identified more broadly as public interest, rather than IHL- or humanitarian-specific.



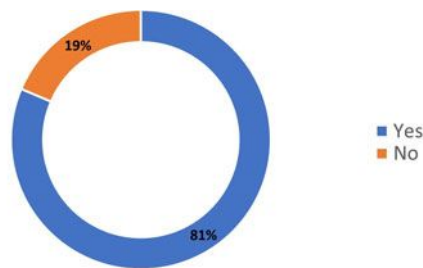


Chart 7. Responses to the question: Did your experience at the competition impact your plans for your (law) career?

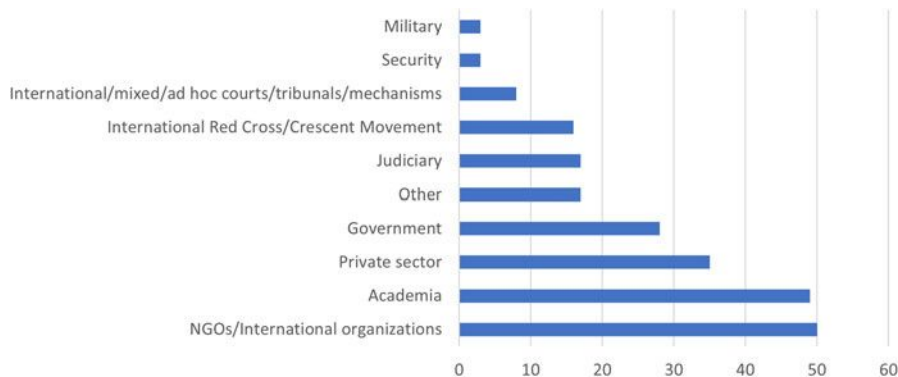


Chart 8. Responses to the question: What describes best your current field of activity?

have their plans shaped by Pictet, we must also note that there could be some pre-determination in these careers – that is, those predisposed to humanitarian work might be more likely to self-select to participate in the competition in the first place.

Participating in the Jean-Pictet Competition does not always lead to a humanitarian career, of course. Some 65% of survey respondents are not currently working specifically on humanitarian affairs,<sup>25</sup> while 35% (seventy-five of the respondents) said that they had since acquired some sort of professional experience in this field (see [Chart 9](#)).

Our survey findings suggest that one cannot trace a clear arc between Pictet participation and a future humanitarian career, yet the Jean-Pictet Competition clearly serves a role as an impactful advocate for humanitarian values, principles and ways of being in the world. The competition also promotes an engaged perspective on the function of law, encouraging participants to adopt a more human-centred approach to their own professional development. The latter could be applicable within or beyond the specific fields of IHL and humanitarianism, as

25 An interesting further question to ask, which the survey did not probe, is whether a deliberate decision was made not to work in the field due to negative emotions experienced at the Jean-Pictet Competition.

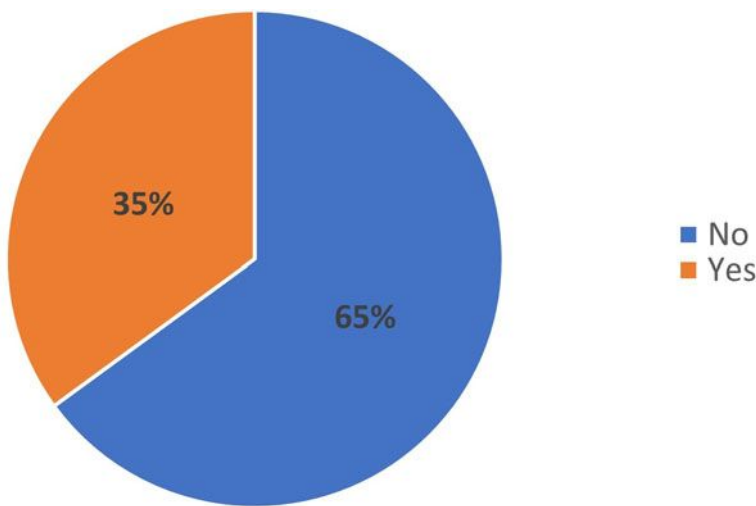


Chart 9. Responses to the question: Have you worked as a professional in the humanitarian field?

participants might bring a certain kind of sensibility into future non-humanitarian roles as well.

Acquiring a humanitarian sensibility at the Jean-Pictet Competition

As we contemplate different ways of engaging with law, we are invited to consider what the Jean-Pictet Competition offers to participants more holistically – regardless of whether they pursue humanitarian careers or not. Practically speaking, survey respondents said the competition was highly influential in allowing them to develop professional skills that have contributed to success in their respective fields. In every type of legal practice (or scholarship), professionals will need to engage effectively in teamwork, cooperation and strategic thinking, and they will need to display emotional intelligence and cultural sensitivity when interacting with others.<sup>26</sup> Our survey and our own observations of the competition suggest that this dynamic is even stronger when participants do opt for a career in IHL or humanitarianism. While there are of course many capable humanitarians in the field who have never engaged with the Jean-Pictet Competition, the formative training offered by the competition allows students to refine and develop skills that could prove useful – or indeed indispensable – when working as a humanitarian professional. Developing a humanitarian sensibility makes for better professionals in the field and, in the

26 Rebecca Sutton, “Reflections on Teaching ‘Emotion Bites’ in an LLM Course on Human Rights and Conflict Resolution”, in Barrie Sander and Jean-Pierre Gauci (eds), *Teaching International Law*, British Institute for International and Comparative Law, 2023 (forthcoming).

case of those who join armed forces or organized armed groups, might promote stricter compliance with relevant rules.<sup>27</sup>

Those attending the competition might also have the sense that student participants are “becoming humanitarian”, so to speak – that is, law students are being initiated into the wider global community of humanitarians. This does not necessarily mean being shaped in the mould of the Red Cross actor, although many Pictetists would be. It is about being ready more generally to resort to a teleological interpretation of IHL, taking into account its humanitarian objective and applying it in real life with actual people who experience suffering and distress as a consequence of armed violence.<sup>28</sup>

Having highlighted the issue of professional skills and competencies, we now wish to push further and think about what it means to adopt a certain kind of *sensibility about* IHL and humanitarianism. Here it is important to stress that the Pictet experience does (and, indeed, needs to) go beyond a mere technical exercise. Part of what is potentially being disseminated is a way of being in or engaging with the world, a posture of approaching global problems that hopefully avoids a merely technocratic or techno-legal/managerial response. Here we are inspired by Simpson’s reflections on teaching international law. Simpson notes that the teaching of PIL has increasingly come to be understood as a technical and differentiated endeavour, with separate courses on arbitration and humanitarian intervention, for example.<sup>29</sup> The trend towards an overly technical or managerial type of training for students of international law displaces non-vocational approaches in which one seeks to understand the world for its own sake. The problem, in short, is that today’s PIL classroom emphasizes “usefulness”.<sup>30</sup> In Simpson’s alternative vision, PIL would offer a final refuge for the humanities, a place where students might engage in “flights of imaginative fancy or rebellious thinking or, even, humanist pedagogy and liberal education”.<sup>31</sup> As an aside, Simpson’s observation that an international criminal law course might be encouraged to service the war on terror warns against the simplistic notion that we simply need more emotional approaches to law teaching. The potential for courses on law and war to rally emotions like caution, fear, anxiety and desire for revenge in problematic ways underscores the complexity of engaging with emotions in legal education.

27 See, recently, Ezequiel Heffes, “Let’s Talk about Compliance with International Humanitarian Law”, *Just Security*, 24 August 2022, available at: [www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/](http://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/).

28 “Teleological” here encompasses interpreting/applying IHL treaties according to their humanitarian/protective aims, which are to protect persons not or no longer participating in hostilities and limiting means and methods of warfare accordingly (see e.g. various preambles). For further insights, see Anne Quintin, “Permissions, Prohibitions and Prescriptions: The Nature of International Humanitarian Law”, PhD thesis, D. 970-2019/05/03, University of Geneva, 2019, available at: <https://archive-ouverte.unige.ch/unige:123851>.

29 G. Simpson, above note 1, pp. 195–196.

30 See Sara Ahmed, *What’s the Use? On the Uses of Use*, Duke University Press, Durham, NC, 2019.

31 See G. Simpson, above note 1, pp. 195–196.

One opening here is to think about the place of creativity in IHL and humanitarian work. Experienced humanitarian professionals often mention the importance of creativity in their daily engagement with IHL in the field (or in policy contexts), and it is interesting to consider how creativity might be inculcated in Pictet participants. Creativity might be engaged, for example, where they are encouraged to find novel ways of using IHL in the competition. Turning to fiction offers one way of moving beyond the merely technical, recalling Nussbaum's argument that literary experience can shape the individual reader's emotional engagement with the world.<sup>32</sup>

The above observations on processes of "becoming humanitarian" at the Jean-Pictet Competition invite us to reflect more deeply on what it means to join a community of humanitarians or humanitarian professionals. Staying close to the focus on emotions in this piece, we can think of the humanitarian community as a particular "affective community", since those who are engaged in it share a set of common values that allow them to evaluate what surrounds them from similar perspectives. We might also consider here the concept of "circulation of affect", related to the idea of contagion and creativity of affect. According to Ross, through the deployment of conscious and unconscious exchanges of emotions, social interactions "intensify, harmonize, and blend the emotional responses of those who participate in them".<sup>33</sup> The next section expands on these points, presenting the Jean-Pictet Competition as a form of interaction ritual.

## Emotions and interaction ritual at the Jean-Pictet Competition

Our research findings show that Pictet participants understand that they must master legal rules and techniques in order to succeed. But also, and this is crucial, participants come away with the sense – if they did not have it prior to the competition – that their ability to grapple with their own emotions and those of others is decisive in the outcome. In light of this, we elucidate here an approach to the phenomena of interaction ritual, emotional energy, affective communities and circulation of affect, which could provide a theoretical framework to help us think of the Jean-Pictet Competition in emotional terms. Developing specific cases in which individuals "feel" the realities of armed conflict through their own experience allows for a bottom-up understanding of IHL. This perspective requires a consideration of how attention to emotional identities could complement traditional law-focused rational/abstract approaches.<sup>34</sup>

32 See Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*, Beacon Press, Boston, MA, 1995.

33 Andrew A. G. Ross, *Mixed Emotions: Beyond Fear and Hatred in International Conflict*, University of Chicago Press, Chicago, IL, 2014, p. 1.

34 See Emiliano J. Buis, "Beyond Law, Beyond Reason: The Role of Emotions in Generating Compliance with International Humanitarian Law", *Armed Groups and International Law*, October 2020, available at: [www.armedgroups-internationalallaw.org/2020/10/19/beyond-law-beyond-reason-the-role-of-emotions-in-generating-compliance-with-international-humanitarian-law/](http://www.armedgroups-internationalallaw.org/2020/10/19/beyond-law-beyond-reason-the-role-of-emotions-in-generating-compliance-with-international-humanitarian-law/).

When considering the encounters of student teams adopting different identities in role-plays and simulation exercises at the Jean-Pictet Competition, it is instructive to think about the proceedings as a form of interaction ritual.<sup>35</sup> Interaction ritual, a concept introduced by Durkheim and developed by Collins and Goffman, refers to the dynamics of all types of interaction that take place between two or more persons.<sup>36</sup> The interaction could be as casual as a shared lunch, or as formal as a Sunday morning service in a US megachurch.<sup>37</sup> Engaging with the theory of interaction ritual means adopting an approach that focuses on whether a successful ritual has occurred between participants in a given instance. The attention to ritual also responds to the emphasis on relationship-building that we see in various aspects of humanitarian practice (such as efforts to promote “community acceptance”), recognizing that the outcome of a discrete encounter may be less important than the process of building trust and good relations with one’s interlocutors over time.

In order to have a successful ritual, Collins argues, four ingredients must be in place: the assembly of a group; barriers to exclude outsiders, whether physical (e.g. a locked building) or symbolic (e.g. legal knowledge); mutual focus of attention; and a shared emotional mood amongst participants.<sup>38</sup> The format of the Jean-Pictet Competition amply supplies all of these ingredients, and when one observes the proceedings one has the impression that participants are indeed “caught up in the rhythm and mood of the talk”.<sup>39</sup>

What is particularly compelling about interaction ritual theory for thinking about the Jean-Pictet Competition is that it equates strong and meaningful rituals with high levels of emotion. Rather than attempting to contain or suppress emotions, a successful ritual is one that achieves high “emotional energy” – a state of well-being that follows from an interaction in which there is strong solidarity.<sup>40</sup> An extreme variant of this is captured in Durkheim’s concept of “collective effervescence”: “a sort of electricity [that] is generated from their [participants’] closeness and quickly launches them to an extraordinary height of exaltation. Every emotion expressed resonates without interference in consciousnesses that are wide open to external impressions; each one echoing the others.”<sup>41</sup> It may be too much to expect that the Jean-Pictet Competition would offer participants an “effervescent” experience – though having personally

35 This proposal is inspired by Rossner’s articulation of interaction ritual in the criminology context, for which she considers a different sort of highly emotive encounter: restorative justice conferences that bring together victims and perpetrators of crime. M. Rossner, above note 14.

36 Emile Durkheim, *The Elementary Forms of the Religious Life*, Oxford University Press, Oxford, 1912; Randall Collins, *Interaction Ritual Chains*, Princeton University Press, Princeton, NJ, 2004; Erving Goffman, *Interaction Ritual: Essays on Face-to-Face Behavior*, Pantheon, New York, 1982.

37 James K. Wellman Jr. et al., “‘God Is Like a Drug...’: Explaining Interaction Ritual Chains in American Megachurches, *Sociological Forum*, Vol. 29, No. 3, 2014.

38 R. Collins, above note 36, p. 48.

39 As discussed in M. Rossner, above note 14, p. 30.

40 *Ibid.*, p. 71.

41 E. Durkheim, above note 36, pp. 217–218, quoted in Christian von Scheve and Mikko Salmela, “Introduction”, in C. von Scheve and M. Salmela (eds), *Collective Emotions: An Introduction*, Oxford University Press, Oxford, 2014 (note that the brackets are from von Scheve and Salmela’s original quote).

experienced or observed the competition ourselves, we would say this is clearly within the realm of possibility – but what is instructive is Durkheim’s more general insight that emotions have positive social functions that become especially apparent in rituals.<sup>42</sup> Adept hosts and facilitators can also work to increase this emotional intensity, both in their preparation before proceedings and in the way that they navigate an event’s early moments – the opening ceremony of the Jean-Pictet Competition being an obvious example.

Also crucially, Durkheim is drawing attention to collective emotions shared at the level of a community or social group which “imbue a community’s socially shared beliefs and values with affective meanings, thus making these values salient in everyday, mundane interaction, well beyond the immediate ritual context”.<sup>43</sup> Successful interaction rituals engender amongst participants a sense of solidarity, which Collins defines as “a feeling of group membership and closeness”.<sup>44</sup> More than this, as Rossner notes in the restorative justice context, a successful interaction ritual can create “moral beings”.<sup>45</sup> The different rituals involved in the Jean-Pictet Competition have proven to be useful in endorsing among participants the sense of belonging to a humanitarian community, one that is composed of engaged students and more seasoned professionals. When it comes to Pictetists (i.e., those who have participated in the competition), the affective experience created during the week seems to play a key role in generating awareness and shaping common attitudes toward the importance of regulating war and alleviating the suffering it causes.

If we consider the different roles that Pictet participants are asked to play at the competition, it also becomes clear that there are layers of (collective) emotions to uncover.<sup>46</sup> Each party to a humanitarian negotiation with an armed group, for example, will belong to a group or organization, which has its own motives and values.<sup>47</sup> Humanitarian negotiators and armed actors will share (some) emotions with their own social group – their in-group – and that social group will have its own rituals which embed their shared beliefs with affective meaning. The negotiation encounter is cast in a new light here: we now have an individual (or several) belonging to one in-group interacting with an individual

42 Discussed in C. von Scheve and M. Salmela (eds), above note 41, p. xiv.

43 *Ibid.*

44 R. Collins, above note 36.

45 M. Rossner, above note 14, p. 29.

46 Several monographs have dealt with the importance of collective emotions in the broader field of peace and conflict and reconciliation: see C. von Scheve and M. Salmela (eds), above note 41, p. xv. On hatred and resentment in particular, see Thomas J. Scheff and Suzanne Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts*, Lexington Books, Lanham, MD, 1991; Roger D. Petersen, *Understanding Ethnic Violence*, Cambridge University Press, Cambridge, 2002; Max Scheler, *Das Ressentiment im Aufbau der Moralen*, Klostermann, Frankfurt am Main, 2004. Concerning shame and guilt in those contexts, see Margaret Gilbert, “Collective Guilt and Collective Guilt Feelings”, *Journal of Ethics*, Vol. 6, No. 2, 2002; Nyla R. Branscombe and Bertjan Doosje (eds), *Collective Guilt: International Perspectives*, Cambridge University Press, Cambridge, 2004.

47 On the importance of identifying organizational motives and values, see Centre of Competence on Humanitarian Negotiation, *CCHN Field Manual on Frontline Humanitarian Negotiation*, Geneva, 2019, p. 223. According to the Manual, trust-building takes place at both the individual and the organizational levels (p. 194).

(or several) belonging to another. Whether or not fellow members of one's in-group are physically present, the existence of the group and its shared system of beliefs and emotions is significant.<sup>48</sup>

This invites us to think of the negotiation encounter – as it unfolds on the front line, or in simulations at the Jean-Pictet Competition – not as a meeting of the individuals involved, so much as the collision of different “affective communities”. As conceptualized by Hutchinson, affective communities are “constituted through, and distinguished by, social, collective forms of feeling”.<sup>49</sup> A key insight of the “affective community” concept is that emotions which appear to be individual are in fact collective as well as political.<sup>50</sup> In this regard, “emotions are embedded in and structured by particular social systems and, as such, are interwoven with the dominant interests, values and aspirations of those systems”.<sup>51</sup>

Related phenomena which we could consider that emphasize collectivity and the affective domain include emotional climates, emotional atmospheres, inter-group emotions and circulating affects.<sup>52</sup> These concepts offer a thorough explanation of the social dimension of group-shared experiences, which promotes, encourages and facilitates the interaction of sentimental processes.<sup>53</sup> Since emotions extend well beyond and between persons, affective moods and feelings are easily transferred in community settings.<sup>54</sup> Reciprocal permeation of emotional states characterizes the staging of common activities in which people are exposed to similar stimuli, and this becomes obvious in the organization of a role-playing exercise such as the Jean-Pictet Competition.

While we might productively consider individual experiences of any kind of humanitarian encounter, this discussion has conveyed that there is an undeniable collective or communal element that shapes the interaction rituals which occur at Pictet. The role of emotions needs to be acknowledged in the creation of a group identity at the competition: the Pictetists become a “family”, and their belonging to the group shapes their identity as such. This collective identity is based upon a

48 The importance of the manipulation of this affective interaction has been studied in diplomatic negotiations: see Todd H. Hall, *Emotional Diplomacy: Official Emotion on the International Stage*, Cornell University Press, Ithaca, NY, 2015.

49 See E. Hutchison, above note 15, p. xi, focusing on communities recovering from shared trauma after conflict. On emotional communities, see also the chapter by Helm in C. von Scheve and M. Salmela (eds), above note 41.

50 E. Hutchison, above note 15, p. xii.

51 See above note 15. The political importance of emotions cannot be underestimated. As expressed by Mihai, “engaging emotions constructively is an important normative and prudential concern for all democratic communities, at all times, and across persons”: see Mihaela Mihai, *Negative Emotions and Transitional Justice*, Columbia University Press, New York, 2016, p. 169. For a wider approach, see George E. Marcus, *The Sentimental Citizen: Emotion in Democratic Politics*, Penn State University Press, University Park, PA, 2002; Manuel Arias Maldonado, *La democracia sentimental: Política y emociones en el siglo XXI*, Página Indómita, Barcelona, 2016.

52 C. von Scheve and M. Salmela (eds), above note 41, p. xv.

53 A. A. G. Ross, above note 33, pp. 21–23.

54 This is what is called “emotional contagion”: see Elaine Hatfield, John T. Cacioppo and Richard L. Rapson, *Emotional Contagion*, Cambridge University Press, Cambridge, 1994; Roland Neumann and Fritz Strack, “‘Mood Contagion’: The Automatic Transfer of Mood between Persons”, *Journal of Personality and Social Psychology*, Vol. 79, No. 2, 2000.



shared knowledge of IHL and, at the same time and perhaps more importantly, upon the same appraisal of the emotional involvement required for working in humanitarian environments and engaging with the world as a self-identified humanitarian.

## **Conclusion: What the Jean-Pictet Competition can provide in emotional terms**

This article has demonstrated that in IHL learning, as in armed conflicts, emotions play an important part. A more explicit engagement with emotions has the potential to strengthen IHL training, to further IHL compliance and the development of IHL rules, and to enhance legal education more generally. As it sets up a neutral space in which participants come together to contemplate the legal regulation of armed conflicts, the Jean-Pictet Competition can not only teach participants about the negative emotions of war, but also help to translate those emotions into positive ones.

Taking into account the significant 81% IHL-career change or confirmation revealed by the survey (see [Chart 7](#)), the influence of the Jean-Pictet Competition on the academic and professional futures of student participants is beyond dispute.<sup>55</sup> While this outcome is no accident, it is also true that the engagement with emotions at the competition to date has not been as conscious and intentional as it could be. By identifying a set of inflection points in the build-up to the competition and in the week's proceedings, the present discussion has demonstrated that there are moments in which individual and collective emotions are felt more strongly at Pictet. Those running the competition could play an important role in harnessing these moments as opportunities to intensify the emotional energy and more consciously direct it towards the formation of a humanitarian "affective community". If participants feel pride in representing their institutions, for example, then the opening ceremony presents a chance to channel this pride into a broader conception of solidarity – initially with other Pictetists, but eventually, one hopes, with populations caught up in war. Engaging carefully with "bad" emotions like stress, fear, anxiety, regret and embarrassment will also be important. Given that one of the central goals of the competition is naturally "to compete", these difficult emotions cannot be avoided; encouraging thoughtful reflection amongst participants on how such emotions shape their experience and their engagement with IHL could be instrumental for their professional futures. Related to this, we have sought to underscore a ritualistic sociological aspect to the competition: that of cementing the Pictet group and helping them to adopt a humanitarian outlook in their respective professional paths, whatever those paths may be. The payoff of looking at the competition as a form of interaction ritual is that it draws attention to emotions and opens

<sup>55</sup> Christophe Lanord and Michel Deyra, "Quelques aspects de l'impact du concours Jean Pictet", in J. Grignon (dir.) and J. Massé (coord.), above note 22, pp. 3–15.

further opportunities to inculcate qualities such as empathy, open-mindedness and impartiality. The role-plays are particularly important here, and approaching them with an emphasis on process, rather than outcome, is essential.

In closing, we offer several recommendations for incorporating a more intentional “law and emotions” approach that can engage some of the unique features of the Jean-Pictet Competition to promote extra-legal teaching outcomes.

The theoretical framework developed in this discussion may be useful for future iterations of the competition, in which building in a more explicit emotional component to the exercises could be considered. In this sense, the Pictet works (and should continue to do so, in more explicit terms) as a laboratory in which experimenting with emotions serves to attain positive goals in controlled scenarios.<sup>56</sup> In the field test, for example, a practical simulation exercise is drafted for students to interact with victims or other people affected by violence. Here the “kitchen” could design a scenario that tests IHL’s emotional dynamics and explicitly promotes participants’ sentimental development and affective awareness. One might envision here a scenario in which the roles of “victim” and “war criminal”, or perhaps “terrorist” and “revolutionary hero”, are not clearly distinguishable. Since navigating moral ambiguity and grey areas is already an implicit part of the competition, the move here would be to foreground such challenges and to explicitly frame them as opportunities for testing the boundaries of a humanitarian sensibility.

Thinking also of Simpson’s entreaty to imagine PIL as a refuge of the humanities and a non-technical endeavour, we might revisit the readings and preparation materials that students engage with in advance of the competition. In the documents prepared by the CCJP, which include useful information on IHL and also address teamwork and role-playing, space could be devoted, as Nussbaum advises,<sup>57</sup> to engaging with fiction and literature that elucidates conundrums relevant to the humanitarian endeavour.<sup>58</sup> This could provoke a more expansive understanding of what a relevant IHL text might be in the context of Pictet – perhaps something ultimately very different from the Geneva Conventions.

As we propose additional ways to challenge and engage Pictet participants, we should not forget that influence is travelling in multiple directions. In addition to the cross-cultural and cross-community learning that occurs, cross-generational IHL is also on offer at the Jean-Pictet Competition. When one considers the encounters that Pictet participants have with one another and with more

56 On the importance of developing well-thought-out strategies for experimenting with emotions related to war, see Rose McDermott, “Experimenting with Emotions”, in Linda Åhäll and Thomas Gregory (eds), *Emotions, Politics and War*, Routledge, Abingdon, 2015, pp. 100–111.

57 See M. Nussbaum, above note 32. As far as armed conflicts are concerned, emotions are not only relevant for humanitarian work. Scholarship in the field could also learn a lot from a more passionate engagement, as suggested in Naz K. Modirzadeh, “Cut These Words: Passion and International Law of War Scholarship”, *Harvard International Law Journal*, Vol. 61, No. 1, 2020.

58 For an example of an initiative that links reading fiction to humanitarian action, see the Read for Action website, available at: [www.readforaction.org](http://www.readforaction.org).

seasoned practitioners, such as the members of the jury,<sup>59</sup> it becomes clear that it is not only students whose lives are being shaped. In fact, the Pictet proceedings promote several layers of emotional circulation: participants can themselves influence what humanitarianism is and what it looks like as a practice, even for those who are already involved in the field. This contribution is crucial, because IHL practice sorely needs fresh thinking and creative approaches in order to keep the field relevant.

Indeed, there may be persistent modes of thought amongst humanitarians that require challenging and contestation in order to be invigorated. Consider, for example, the concepts of “humanitarian space” and the neutrality of the competition, which constitute features upon which Pictet participants are judged. Engaging with neutrality through hands-on exercises could expose a conflict that practitioners routinely grapple with, and one that students could help to inform thinking on. The clash here is potentially between the notion of a neutral humanitarian space, on the one hand, and an entreaty to embody the “spirit of IHL”, on the other. The latter might imply feeling strongly about helping humans in need or suggest being passionate about the protection of war-affected populations. As students import their own views and understandings of neutrality into the competition, their engagement might offer us new ways of conceptualizing how neutrality does, or should, implicate the commitment to IHL and its affective dimension. Limiting influence to a one-way transit from the jury to the participants would be a shame here, as it presents more a form of indoctrination rather than an invitation to reshape and reimagine the possibilities of IHL. This points to the power of thinking of Pictet as a form of interaction ritual – that is, it directs attention to how the interactions amongst student participants, and between all students and the seasoned practitioners, potentially (re-)constitute the very idea of what it means to be humanitarian. Humanitarianism is ultimately a construction in which good practices circulate, together with shared values and affective perceptions, and the Jean-Pictet Competition is an ideal environment in which to reinforce this positive “emotional contagion” and implement a true affect-based education.

There is a further contribution that law students could make within and beyond the competition, which is bringing law and humanitarianism into closer and more informed contact. Given that the average humanitarian practitioner working for the Red Cross, UN agencies and other NGOs is not typically a lawyer and is not likely to be formally trained in legal skills and argument, law students and legal practitioners are well positioned to make valuable contributions to the humanitarian community. While the present discussion focuses on shaping participants holistically as future practitioners, we are not advocating here for the law to fade away or drop off from the competition. On the contrary, identifying legal problems, advancing legal strategies and putting forward good-faith legal arguments must remain a core part of the exercise, as enshrined in the motto of the competition: “taking the law out of the books”.

59 In addition to this, there are the “mentors” and the members of the “kitchen” who design the scenarios.

Playing several roles, a landmark feature of the Jean-Pictet Competition, can also teach participants about different ways of “thinking like others” well beyond the scope of the competition. In fact, a lesson could be drawn from the Pictet simulations for the training of professional humanitarians as well as soldiers – two very different affective communities. By putting themselves in the shoes of another as part of their training, individuals can acquire some distance from their own perspective and grasp how different communities implement IHL. Swapping roles in their respective trainings might create ethical dilemmas that can produce insightful reflections on their mandates, competing expectations, and the value of dialogue.

The Pictet approach is a beacon for future teaching strategies, suggesting that academic IHL teaching – as well as training in military schools, the judiciary and NGOs – should be reformed to integrate training on dealing with emotions. First, this could be achieved by injecting fictional scenarios and role-plays in order to test the learning of specific aspects of IHL, drawing inspiration from the “Pictet experience” or borrowing directly from past versions of the competition. Such exercises would allow a wider swathe of students to use their legal knowledge in a practical situation which requires them to engage physically with, and embody, different roles. Second, the emphasis on teamwork and thoughtful engagement with interpersonal dynamics at the Jean-Pictet Competition should be replicated in PIL and IHL classrooms. In addition to evaluating law students on the strength of their legal arguments, law teachers should inculcate and reward team-oriented behaviour that is geared towards a strong overall performance reflecting a humanitarian ethic. Third, a broad conceptualization of cultural sensitivity is needed in the law classroom, one that encompasses open-mindedness, empathy and generosity when it comes to engaging with different ethnicities, cultures, professional identities and world views. The “affect-based” education instilled at the Jean-Pictet Competition by means of these activities, which we have sought to draw out and make more explicit in this article, can equip future graduates with practical experiences and tools grounded in a humanitarian sensibility. This can contribute to more engaged future professional action in the legal field, and even beyond this in the context of armed forces or organized armed groups.

The more general point we have sought to make is that when it comes to IHL education, the legal element is insufficient on its own.<sup>60</sup> The field of practice that participants are potentially joining will require so much more of them than legal finesse, and this “something more” needs to be deliberately and delicately inculcated by means of affect-based strategies.

60 We support here the conclusion of the 2018 ICRC study on *The Roots of Restraint in War*, wherein the limits of a “legalistic” approach when dealing with IHL are revealed. Overruling the conclusions of the previous work on the matter (ICRC, *The Roots of Behaviour in War*, 2004), the study promotes the need for interdisciplinary tools and strategies (including emotional considerations) to understand the reasons behind respect for the rules regulating armed conflicts. As shown by Stephens, the role of identity, emotions and collective values in IHL can no longer be ignored: see Dale Stephens, “Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

# Detonating the air: The legality of the use of thermobaric weapons under international humanitarian law

**Arthur van Collier\***

Associate Professor, Faculty of Law, University of Fort Hare,  
South Africa

Email: [vancollerarthur@gmail.com](mailto:vancollerarthur@gmail.com)

## Abstract

*Thermobaric weapons cause damage and harm through overpressure and thermal effects, but secondary harm may also occur due to fragmentation, the consumption and depletion of ambient oxygen, and the release of toxic gases and smoke. Several international instruments prohibit or regulate weapons that generate asphyxiating or toxic gases, poison or poisoned weapons, chemical weapons, and weapons primarily designed to be incendiary. Thermobaric weapons are, however, primarily designed for blast and are not specifically covered by, or excluded from, the application of these instruments. The general customary law principles of international humanitarian law that determine the legality of the use of all weapons, including thermobaric weapons, prohibit causing superfluous injury and unnecessary*

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*suffering, and the use of indiscriminate weapons. Thermobaric weapons cause severe suffering but will not be rendered unlawful merely because of this effect. These weapons are also not automatically and inherently indiscriminate when used in their normal or designed circumstances. The use of thermobaric weapons, when directed at a military objective, while considering all feasible precautions to protect civilians and civilian objects and the principle of proportionality, will, as a result, be lawful in most circumstances. However, the use of thermobaric weapons should, in a similar manner to heavy explosive weapons, be avoided in urban or populated areas.*

**Keywords:** international humanitarian law, thermobaric weapons, weapons law, unnecessary suffering, superfluous injury.

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## Introduction

In order to secure a strategic and tactical advantage over their actual or potential adversaries, States have progressively developed more formidable and efficient weapons for use during armed conflict.<sup>1</sup> This reality has produced, among many other examples, thermobaric weapons that create wide area pressure, thermal heat and blast.<sup>2</sup> Thermobaric weapons are particularly suitable, from a military perspective, for use against military objectives located in buildings and hard or deeply buried subterranean structures or those in populated areas and urban environments.<sup>3</sup> The enhanced pressure and thermal effects produced by a thermobaric explosion, especially within confined spaces, are devastating and cause severe injuries that are difficult to treat.<sup>4</sup> However, these weapons also create significant challenges for belligerents as their use in populated areas exposes civilians to terrible harm. Nonetheless, States maintain that thermobaric weapons offer a unique military advantage which cannot be produced by available alternative weapons.

The legality of the use of thermobaric weapons has, in the past, been the subject of some general debate within the media. This speculation has increased during the armed conflict between Russia and Ukraine.<sup>5</sup> It is, however,

- 1 See William Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009, p. 1.
- 2 Noah Shachtman, "When a Gun Is More than a Gun", *Wired*, 20 March 2003, available at: [www.wired.com/2003/03/when-a-gun-is-more-than-a-gun/](http://www.wired.com/2003/03/when-a-gun-is-more-than-a-gun/) (all internet references were accessed in March 2023).
- 3 Robert Weinheimer and Kristian Vuorio, *The Use of Thermobaric Weapons*, Orac International, January 2022, pp. 22–30; David Andrew, "Munitions—Thermobaric Munitions and Their Medical Effects", *Journal of Military and Veterans' Health*, Vol. 12, No 1, 2003.
- 4 Dave Majumdar, "The American Military's Deadly Thermobaric Arsenal", *The National Interest*, 3 December 2015, available at: <https://nationalinterest.org/blog/the-buzz/the-american-militarys-deadly-thermobaric-arsenal-14505>; Denise Chow, "What Are Vacuum Bombs? Concerns Grow about Russia's Thermobaric Weapons", *NBC News Science*, 2 March 2022; R. Weinheimer and K. Vuorio, above note 3; Matt Montazzoli, *Are Thermobaric Weapons Lawful?*, Lieber Institute, West Point, NY, 23 March 2022.
- 5 Patricia Zengerle, "Ukraine, Rights Groups Say Russia Used Cluster and Vacuum Bombs", *Reuters*, 1 March 2022, available at: [www.reuters.com/world/europe/ukraines-ambassador-us-says-russia-used-vacuum-bomb-monday-2022-02-28/](http://www.reuters.com/world/europe/ukraines-ambassador-us-says-russia-used-vacuum-bomb-monday-2022-02-28/); Marianne Hanson, "What Are Thermobaric Weapons? And Why

surprisingly difficult to find a comprehensive review of the legality of thermobaric weapons despite the possibility that the use of these weapons will increase in future conflicts.<sup>6</sup> The lack of significant engagement on this issue may be due to the complexity of dealing with the numerous forms of thermobaric weapons. Therefore, this article will attempt to accommodate all the forms of thermobaric weapons by focusing on the primary design element that all thermobaric weapons have in common – namely, a thermobaric explosion that produces blast. The basic goals of weapons law will first be assessed, together with the inherent design, nature, use and effects of thermobaric weapons. From this exercise, an additional evaluation will be conducted of any treaty-based provisions and customary international humanitarian law (IHL) rules that potentially apply to, or that may affect, the use of thermobaric weapons. It is submitted that the isolation and assessment of the technical aspects of a specific weapons technology such as thermobaric weapons, along with an examination of that technology's use and effects, will provide valuable insight and produce broader conclusions on the legality of the use of all means of warfare.

## Weapons law

Weapons law, principally by way of treaty law but also through customary IHL, prohibits particular weapons<sup>7</sup> and related technologies or restricts the conditions in which such weapons may lawfully be employed.<sup>8</sup> The basic principle of weapons law prohibits harm that is not essential to achieving a legitimate objective of armed conflict. The right of belligerents to adopt means or methods of injuring the enemy is, therefore, not unlimited.<sup>9</sup> Weapons law incorporates several treaties with specific rules that apply to particular weapons, such as the

Should They Be Banned?", *The Conversation*, 2 March 2022, available at: <https://theconversation.com/what-are-thermobaric-weapons-and-why-should-they-be-banned-178289>; Colm Ó Mongáin, "The Weapons Used, Feared and Threatened in Ukraine War", *RTE*, 6 April 2022, available at: [www.rte.ie/news/world/2022/0406/1290608-weapons-explainer/](http://www.rte.ie/news/world/2022/0406/1290608-weapons-explainer/).

6 R. Weinheimer and K. Vuorio, above note 3.

7 The term "weapon" refers to an offensive capability (device, weapon, implement, substance, object or piece of equipment), with a destructive, damaging or injurious effect, that is capable of causing, or that is intended or designed, by way of attack, to cause injury or damage when applied to an adversary in an armed conflict or to threaten or intimidate any person. See Samuel Paunila and N. R. Jenzen-Jones, *Explosive Weapon Effects: Final Report*, GICHD, 2017, p. 128; W. Boothby, above note 1, p. 4; Justin McClelland, "The Review of Weapons in Accordance with Article 36 of Additional Protocol I", *International Review of the Red Cross*, Vol. 85, No. 850, 2003, p. 397; Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2009, Rule 1(ff), para. 1.

8 William Boothby, "Space Weapons and the Law", *International Law Studies*, Vol. 93, 2017, p. 192; Eitan Barak, *Deadly Metal Rain: The Legality of Flechette Weapons in International Law: A Reappraisal Following Israel's Use of Flechettes in the Gaza Strip, 2001-2009*, International Humanitarian Law Series Vol. 32, Martinus Nijhoff, Leiden, 2011, p. 53; Sean Watts, "Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War", *International Law Studies*, Vol. 91, 2015, pp. 542-543; US Department of Defense (DoD), *Law of War Manual*, Office of General Counsel, 12 June 2015 (DoD Manual), paras 1.3.3.1, 6.2.1.

9 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35(1); Convention (IV) Respecting the Laws and Customs of War on Land and Its



banning or regulation of the use of projectiles<sup>10</sup> of a weight below 400 grams that are explosive or charged with fulminating or inflammable substances,<sup>11</sup> expanding bullets,<sup>12</sup> asphyxiating, poisonous or other gases,<sup>13</sup> biological weapons,<sup>14</sup> weapons designed to injure by undetectable fragments,<sup>15</sup> chemical weapons,<sup>16</sup> blinding laser weapons,<sup>17</sup> anti-personnel mines,<sup>18</sup> cluster munitions<sup>19</sup> and nuclear weapons.<sup>20</sup> These instruments are typically produced retrospectively, generally after some technological advance in weapons technology has been developed and/or where these weapons have had unacceptable effects during armed conflict.<sup>21</sup> Numerous States, in consultation with the United Nations, the International Committee of the Red Cross (ICRC) and civil society organizations, have recently acknowledged the devastating humanitarian consequences on civilians that result from the blast and fragmentation effects of explosive weapons. This collaboration resulted in the adoption of a non-binding political declaration whereby States committed to avoid and restrict the use of explosive weapons that may cause indiscriminate effects and civilian harm in populated areas.<sup>22</sup> In reality, however, the motivations behind the regulation or prohibition of different weapons are influenced by both humanitarian concerns and the continued

Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations), Art. 23(g).

10 A “projectile” refers to a munition propelled under power from a weapon system.

11 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 138 CTS 297–299, 29 November/11 December 1868 (St Petersburg Declaration); Frits Kalshoven, “Arms, Armaments and International Law”, *Recueil des Cours*, Vol. 191, 1985, pp. 207–208.

12 Hague Declaration (III) Concerning Expanding Bullets, 187 Consol. T. S. 459, 26 Martens Nouveau Recueil (Ser. 2) 1002, 29 July 1899.

13 Hague Declaration (II) on the Use of Projectiles the Object of which Is the Diffusion of Asphyxiating or Deleterious Gases, 187 CTS 453, 29 July 1899 (Hague Declaration II); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65, 8 February 1928 (Gas Protocol); S. Watts, above note 8, p. 562.

14 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 26 UST 583, 1015 UNTS 163, 10 April 1972.

15 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (and Protocols), 1341 UNTS 137, 10 October 1980 (amended 21 December 2001) (CCW), Protocol (I) on Non-Detectable Fragments, Geneva, 10 October 1980 (CCW Protocol I).

16 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997) (CWC).

17 CCW, above note 15, Protocol (IV) on Blinding Laser Weapons, 13 October 1995 (entered into force 30 July 1998) (CCW Protocol IV).

18 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 3 December 1997 (entered into force 1 March 1999) (Ottawa Convention).

19 Convention on Cluster Munitions, 48 ILM 357, 30 May 2008 (entered into force 1 August 2010).

20 Convention on the Prohibition of the Use of Nuclear Weapons, UN Doc. A/RES/60/88, 11 January 2006 (entered into force 22 January 2021).

21 See, in general, S. Watts, above note 8.

22 See the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas, 2022, available at: [www.dfa.ie/our-role/policies/international-priorities/peace-and-security/ewipa-consultations/](http://www.dfa.ie/our-role/policies/international-priorities/peace-and-security/ewipa-consultations/).

military utility, or lack thereof, of the weapon in question under specific tactical conditions based on a cost-benefit analysis.<sup>23</sup>

IHL requires States to assess the legality of new weapons under international law. This requirement was first codified in Article 36 of Additional Protocol I to the Geneva Conventions of 1949 (AP I) and has since been incorporated into customary international law, thus binding all States.<sup>24</sup> States are required to conduct a preventative legal review of weapons in order to determine whether the acquisition, development, modification or employment of a new weapon would be consistent with, or partially or totally prohibited by, IHL or any other rule of international law.<sup>25</sup> Articles 36 and 82 of AP I, read together, require that legal advisers be available during armed conflict to advise military commanders on IHL and “on the appropriate instruction to be given to the armed forces on this subject”.<sup>26</sup> It is unclear how many States have systems for the legal review of new weapons, but it is evident that most States currently do not have existing weapons review mechanisms or that these systems are generally inadequate to ensure suitable outcomes.<sup>27</sup> Some States Parties<sup>28</sup> and non-States Parties<sup>29</sup> to AP I conduct weapons reviews; some States claim to comply with the review obligation,<sup>30</sup> while some rely on the reviews conducted by other States. Nonetheless, many States while others are pessimistic about the usefulness of these reviews.<sup>31</sup>

23 Margarita Petrova, *Banning Obsolete Weapons or Reshaping Perceptions of Military Utility: Discursive Dynamics in Weapons Prohibitions*, IBEI Working Paper No. 2010/31, 2010, p. 6.

24 See 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 71–86, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. See also Kathleen Lawand, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, Geneva, 2006, p. 933 (ICRC Legal Review of New Weapons); Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013 (HPCR Manual); Michael N. Schmitt and Liis Vihul (eds), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), Rule 9.

25 See AP I; ICRC Legal Review of New Weapons, above note 24, pp. 931–936, 946–948.

26 ICRC Legal Review of New Weapons, above note 24, p. 933.

27 Natalia Jevglevskaja, *International Law and Weapons Review: Emerging Weapons Technology under the Law of Armed Conflict*, Cambridge University Press, Cambridge, 2021, p. 48; ICRC Legal Review of New Weapons, above note 24, pp. 931–956; Brian Rappert, Richard Moyes, Anna Crowe and Thomas Nash, “The Roles of Civil Society in the Development of Standards around New Weapons and Other Technologies of Warfare”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 782–784; Netta Goussac, “Safety Net or Tangled Web: Legal Reviews of AI in Weapons or War-Fighting”, *Humanitarian Law and Policy Blog*, 18 April 2019, available at: <https://blogs.icrc.org/law-and-policy/2019/04/18/safety-net-tangled-web-legal-reviews-ai-weapons-war-fighting/>.

28 Australia, Belgium, Germany, France, the Netherlands, Norway, Sweden, the United Kingdom, Argentina, Denmark, Mexico, Austria, Canada, New Zealand and Switzerland.

29 The United States of America and Israel. See Maya Yaron, “Statement on Lethal Autonomous Weapons Systems (LAWS) Weapon Legal Review”, Group of Experts Meeting on Lethal Autonomous Weapons Systems, 13 April 2016, available at: [https://docs-library.unoda.org/Convention\\_on\\_Certain\\_Conventional\\_Weapons\\_-\\_Informal\\_Meeting\\_of\\_Experts\\_\(2016\)/2016\\_LAWS\\_%2BMX\\_ChallengesToIHL\\_Statements\\_Israel.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Informal_Meeting_of_Experts_(2016)/2016_LAWS_%2BMX_ChallengesToIHL_Statements_Israel.pdf).

30 Russia, Italy and Finland.

31 N. Jevglevskaja, above note 27, p. 28.

Article 36 does not establish new rules on the legality of weapons but rather addresses the implementation of existing substantive IHL obligations on States. The review process is not subject to specific rules, and individual States may, therefore, decide on the nature of and process for the review.<sup>32</sup> However, the review obligation imposes a duty to conduct a realistic, systematic and multidisciplinary review, wherein States must at least assess the potential of the weapon to cause superfluous injury or unnecessary suffering (SI/US) and widespread, long-term and severe damage to the natural environment, the possible indiscriminate nature of the weapon, and any specific treaty rules or customary law that prohibit or restrict the use of the weapon. As weapons are usually acquired to meet a capability requirement over a substantial period, such a review is also prudent in order to establish, as far as possible, whether any future developments of IHL could affect a weapon's legality.<sup>33</sup> Ultimately, weapons and related technologies that fall outside these prohibitions or restrictions may lawfully be used in armed conflict, provided that the rules applicable to targeting are respected.<sup>34</sup> Targeting decisions and associated issues are excluded from the application of weapons law as States cannot practically be expected to predict all the potential uses or abuses of a weapon that may increase the amount of injury and suffering.<sup>35</sup>

## Thermobaric weapons

The assessment of any weapon must consider the weapon's technical characteristics, design and intended use.<sup>36</sup> Thermobaric weapons, in general, are classified as enhanced blast weapons.<sup>37</sup> More specifically, these weapons are a subcomponent of volumetric weapons – that is, weapons which use oxygen from the air to create a high-temperature explosion.<sup>38</sup> Thermobaric weapons may take a variety of forms,<sup>39</sup> including devices designed to explode (bombs<sup>40</sup> and hand grenades<sup>41</sup>), projectiles (mortar or artillery shells), and warheads<sup>42</sup> that are integrated with

32 *Ibid.*, p. 28.

33 28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, Final Goal 2.5.

34 Permanent Court of International Justice, *S. S. Lotus (France v. Turkey)*, Judgment, 1927 PCIJ (Series A) No. 10, 7 September 1927, p. 18.

35 William Hays Parks, "Means and Methods of Warfare", *George Washington International Law Review*, Vol. 38, No. 3, 2006.

36 ICRC Legal Review of New Weapons, above note 24, p. 944.

37 D. Andrew above note 3, p. 9; Lemi Türker, "Thermobaric and Enhanced Blast Explosives (TBX and EBX)", *Defence Technology*, Vol. 12, No. 6, 2016, p. 1.

38 Volumetric weapons include thermobaric and fuel-air explosives; see M. Montazzoli, above note 4.

39 L. Türker, above note 37, p. 423.

40 The KAB-1500LG-OD-E with thermobaric warhead: see "KAB-1500LG-OD-E", *Rosoboronexport*, available at: <http://roe.ru/eng/catalog/aerospace-systems/air-bombs/kab-1500lg-od-e/>.

41 The Russian-produced RG-60TB thermobaric hand grenade.

42 A warhead refers to the portion of the munition that contains detonating explosives, is designed to be fitted to or integrated with an existing delivery system and is intended to cause the damage or destruction of the target. See United Nations, *International Ammunition Technical Guidelines*, 3rd ed.,

existing delivery systems such as shoulder-launched<sup>43</sup> or multiple-barrel mobile rocket launchers,<sup>44</sup> air-delivered laser-guided bombs,<sup>45</sup> or ground- or air-launched guided<sup>46</sup> or unguided missiles.<sup>47</sup>

Thermobaric explosives are normally made up of a high-power explosive core and a secondary fuel-rich composition, typically a plastic-bonded explosive composition comprised of a metallic fuel and an oxidizer or nitramine, axially spaced from the core.<sup>48</sup> The addition of aluminized or other metal particles to the composition creates the so-called “thermobaric effect”.<sup>49</sup> The thermobaric explosion is initiated by an anaerobic detonation of the explosive core, which distributes a plasma cloud of the fuel-rich composition across the target, whereafter, a secondary aerobic post-combustion ignites and detonates the cloud of fuel, which is now combined with the ambient atmospheric oxygen. Thermobaric weapons create large, powerful combustion zones that burn at extremely high temperatures.<sup>50</sup> These weapons are optimized to produce a destructive force by generating dynamic negative overpressure<sup>51</sup> and sustained

2021, note 3.176, available at: [https://unoda-safeguard.s3.amazonaws.com/iatg/en/V3\\_IATG\\_compiled-compressed.pdf](https://unoda-safeguard.s3.amazonaws.com/iatg/en/V3_IATG_compiled-compressed.pdf).

43 The TBG-29V shoulder-launched rocket thermobaric weapon: see “TBG-29V”, *Rosoboronexport*, available at: <http://roe.ru/eng/catalog/land-forces/strelkovoe-oruzhie/grenade-launchers/tbg-29v/>.

44 The TOS-1A multiple rocket launcher: see “TOS-1A”, *Rosoboronexport*, available at: <https://roe.ru/eng/catalog/land-forces/missile-systems-multiple-rocket-launchers-mrl-atgm-systems-and-field-artillery-guns/TOS1A/>.

45 A “bomb” is generally accepted to be a guided or unguided munition with no method of propulsion. Michel Chossudovsky, “‘Tactical Nuclear Weapons’ against Afghanistan?”, Centre for Research on Globalisation, 5 December 2001, available at: [www.nadir.org/nadir/initiativ/aggp/free/9-11/globalresearch/cho112c.htm](http://www.nadir.org/nadir/initiativ/aggp/free/9-11/globalresearch/cho112c.htm).

46 The AGM-114N thermobaric blast fragmentation laser-guided missile for use by rotary and fixed-wing aircraft: see “AGM-114 Hellfire Missile”, *Aeroweb*, available at: [www.fi-aeroweb.com/Defense/AGM-114-Hellfire-Missile-System.html](http://www.fi-aeroweb.com/Defense/AGM-114-Hellfire-Missile-System.html).

47 The Russian-made Metis-M1 anti-tank missile system, which launches the thermobaric 9M131FM missile: see “Metis-M1”, *Rosoboronexport*, available at: <http://roe.ru/eng/catalog/land-forces/missile-systems-multiple-rocket-launchers-mrl-atgm-systems-and-field-artillery-guns/metis-m1/>.

48 Nitramines are a class of organic nitrate explosives. See “Explosives – Nitramines”, *Global Security*, available at: [www.globalsecurity.org/military/systems/munitions/explosives-nitramines.htm](http://www.globalsecurity.org/military/systems/munitions/explosives-nitramines.htm); Stefan Kolev and Tsvetomir Tsonev, “Aluminized Enhanced Blast Explosive Based on Polysiloxane Binder”, *Propellants, Explosives, Pyrotechnics*, Vol. 47, No. 2, 2022, p. 1; United States, “Thermobaric Explosives and Compositions, and Articles of Manufacture and Methods Regarding the Same”, Patent No. US 7,754,036 B1, 13 July 2010, available at: <https://patents.google.com/patent/US7754036B1/en>; Stanisław Cudziło, Waldemar Trzciński, Józef Paszula, Mateusz Szala and Zbigniew Chylek, “Performance of Magnesium, Mg-Al Alloy and Silicon in Thermobaric Explosives – A Comparison to Aluminium Propellants”, *Propellants, Explosives, Pyrotechnics*, Vol. 45, No. 11, 2020, p. 1.

49 Kai Zhong, Liangliang Niu and Chaoyang Zhang, “Atomic Insight into the Thermobaric Effect of Aluminized Explosives”, *FirePhysChem*, Vol. 2, No. 2, 2022, p. 191.

50 The European Court of Human Rights (ECtHR), in its judgment in the *Tagayeva* case, commented that the RPO-A Shmel with a thermobaric charge “creates a powerful combustion zone (a sphere of fire 5 to 7 metres in diameter) burning at temperature of about 1800°C; accompanied by an extremely powerful shock wave caused by a complete burning of oxygen in the detonation zone”. ECtHR, *Tagayeva and Others v. Russia*, Appl. Nos 26562/07 *et al.*, 13 April 2017, para. 220.

51 Negative overpressure results from the extraordinary blast concussion of the explosion, which creates pressure that is less than atmospheric pressure. Overpressure may also be “positive” when it exceeds atmospheric pressure: see S. Paunila and N. R. Jenzen-Jones, above note 7, p. 122.

mechanical and thermal impulse blast<sup>52</sup> waves that propagate in all directions.<sup>53</sup> The slower explosive thermal heat overpressure exposes the target to longer periods of pressure and thermal heat; as a result, thermobaric explosions produce a higher total energy output over an extended period than conventional explosives and therefore generate more destruction than conventional explosives.<sup>54</sup> The harmful effects of thermobaric weapons are amplified in confined spaces as the thermobaric explosion may, depending on the structure, expose the target to multiple blast waves.<sup>55</sup> Thermobaric explosions also cause tertiary and quaternary damage due to the pressure effects generated by the structures around the explosion and from suffocation due to the consumption and depletion of the ambient oxygen, as well as from toxic gases and smoke. These combined attributes make thermobaric weapons extremely effective against buildings, bunkers, trenches and hard or deeply buried subterranean structures.<sup>56</sup>

Most conventional weapons use explosives to propel metal fragments or a shaped-charge jet to destroy targets.<sup>57</sup> By contrast, thermobaric weapons are typically designed with light casings that may, as an additional effect, cause harm when secondary fragments are formed by shearing or spalling of nearby solid objects affected by the blast.<sup>58</sup> These weapons are thus highly destructive to human bodies, and their use increases the quantity and severity of injuries to which humans are normally exposed with conventional explosive weapons. The lethal effects of thermobaric explosions are often related to the bronchial trauma caused by the negative pressure; however, soft targets close to the ignition point of the thermobaric explosion are likely to be crushed or obliterated, while those further away will potentially suffer internal injuries as the thermobaric explosion compresses, stretches or disintegrates by overload any tissue interface of varying densities, elasticity and strength.<sup>59</sup> These explosions may also cause concussions, fractures, lung collapse, air embolisms within blood vessels, ruptured eardrums, displacement of the eyes from their sockets and neurological, biochemical and blood chemistry changes. Treating these “terrible”, appallingly painful and

52 The blast refers to a destructive wave of gases or air produced in the surrounding atmosphere by a detonation.

53 D. Andrew, above note 3, p. 10; Ovidiu-George Iorga *et al.*, “Experimental Techniques for Measuring Overpressure Generated by Thermobaric Devices”, 19th International Seminar on “New Trends in Research of Energetic Materials”, Pardubice, 20–22 April 2016.

54 R. Weinheimer and K. Vuorio, above note 3.

55 D. Andrew, above note 3, p. 9.

56 *Ibid.*, p. 9; O.-G. Iorga *et al.*, above note 53.

57 Richard Moyes, “Spiked”, *Landmine Action Campaign*, No. 13, 2007, p. 10, available at: <https://tinyurl.com/9byw4vhc>.

58 S. Paunila and N. R. Jenzen-Jones, above note 7, p. 118.

59 Such as the lungs, bowel and inner ear. See D. Andrew, above note 3, p. 11; Malcolm Mellor, “Ballistic and Other Implications of Blast”, in James M. Ryan, Norman M. Rich, Richard F. Dale, Graham J. Cooper and Brian T. Morgans (eds), *Ballistic Trauma: Clinical Relevance in Peace and War*, Springer, London, 1997, pp. 47–59.

agonizing<sup>60</sup> injuries frequently requires computer-assisted tomography that may not always be readily available within the combat zone.<sup>61</sup>

## The legality of thermobaric weapons

The weaponization and use of thermobaric explosives continue to pose unique challenges when assessing the legality of these weapons. The following section discusses the restrictions that potentially apply to, or that may affect the use of, thermobaric weapons. Such an assessment necessitates a review of the general legal principles with which all weapons must comply, the treaty-based rules concerning the effects of weapons on the natural environment, and the customary and treaty provisions that deal with all weapons and specifically with thermobaric weapons.

### Specific regulations and prohibitions

No international instrument specifically addresses the legality of the possession or use of thermobaric weapons. Even so, the debate on the legality of the use of thermobaric weapons may indirectly implicate specific provisions of the Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention of 1907 (Hague Regulations),<sup>62</sup> the 1925 Geneva Gas Protocol,<sup>63</sup> the 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (CCW Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Conventional Weapons, CCW),<sup>64</sup> and the 1993 Chemical Weapons Convention (CWC).<sup>65</sup> It may be prudent here to refer briefly to the prohibition of weapons “the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”, which are covered by Protocol I of the CCW.<sup>66</sup> Many munitions, including the fuses of some

60 ECtHR, *Tagayeva*, above note 50, para. 220; M. Montazzoli, above note 3; D. Andrew, above note 3, p. 9; Ove Bring, “Regulating Conventional Weapons in the Future: Humanitarian Law or Arms Control?”, *Journal of Peace Research*, Vol. 24, No. 3, 1987, p. 279.

61 Anna Wildegger-Gaissmaier, “Aspects of Thermobaric Weaponry”, *ADF Health*, Vol. 4, No. 1, 2003; Lisanne van Gennip, Frederike Haverkamp, Mans Muhrbeck, Andreas Wladis and Edward Tan, “Using the Red Cross Wound Classification to Predict Treatment Needs in Children With Conflict-Related Limb Injuries: A Retrospective Database Study”, *World Journal of Emergency Surgery*, Vol. 15, No. 52, 2020.

62 Hague Regulations, above note 9, Art. 23(a).

63 Gas Protocol, above note 13.

64 CCW, above note 15; *Review Conference of the State Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Final Document*, UN Doc. CCW/CONF.I/16 (Part I), Geneva, 1996; David Keye and Steven A. Solomon, “The Second Review Conference of the 1980 Convention on Certain Conventional Weapons”, *American Journal of International Law*, Vol. 96, No. 4, 2002.

65 CWC, above note 16.

66 *Ibid.*

thermobaric weapons, are constructed of non-metallic parts that produce fragments which may not be detectable by X-rays. The incorporation of these parts in thermobaric weapons will not in itself result in their prohibition under Protocol I, however, since the injuries caused by these fragments are incidental to the primary effect of the weapon.

### *Poisonous and asphyxiating gases and toxic chemicals*

The 1899 Hague Peace Conference, in its efforts to prohibit destruction not absolutely demanded by the necessities of war, adopted a declaration whereby States are required to “abstain from the use of projectiles the sole objective of which is the diffusion of asphyxiating or deleterious gases”, since these weapons were regarded as equal to “barbarity, treachery and cruelty”.<sup>67</sup> The 1907 Hague Regulations, in turn, specify that “it is especially forbidden [t]o employ poison or poisoned weapons”.<sup>68</sup> The Geneva Gas Protocol prohibits “the use in war of all asphyxiating, poisonous, and other gases” as well as “bacteriological methods of warfare”.<sup>69</sup> The determination of whether a specific weapon has been designed to cause asphyxiation, and is therefore subject to the Gas Protocol, is a question of fact.<sup>70</sup> During the *Nuclear Weapons* case, the United Kingdom and United States submitted to the International Court of Justice (ICJ) that the prohibition against gas warfare applies to weapons designed to injure or cause death by the effect of such poison, which would exclude those weapons that incidentally poison. The subsequent ICJ *Nuclear Weapons* Advisory Opinion states that the terms “poison” or “poisoned” must be interpreted in their ordinary sense to include weapons whose primary or exclusive effect is to poison or asphyxiate.<sup>71</sup> Poison must, therefore, be the “intended” injury mechanism.<sup>72</sup>

A thermobaric explosion produces pressure and thermal effects but also consumes and depletes the ambient oxygen and, further, generates toxic gases and smoke.<sup>73</sup> Thermobaric explosions, therefore, have the potential to cause choking, suffocation and poisoning from processes that cause burns, chemical reactions on or in the human body, and infections due to contamination.<sup>74</sup> The removal of oxygen from the surrounding area will be

67 Hague Declaration (IV,2) concerning Asphyxiating Gases, The Hague, 29 July 1899.

68 Hague Regulations, above note 9, Art. 23(a).

69 Gas Protocol, above note 13.

70 James Malony Spaight, *Air Power and War Rights*, Longmans, Green, London and New York, 1947, pp. 191–192.

71 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (Nuclear Weapons Advisory Opinion), para. 55; written statements in the *Nuclear Weapons* case by the United Kingdom, para. 97, and the United States, para. 100, cited in ICRC Customary Law Study, above note 24, p. 253; DoD Manual, above note 8, para. 6.8.1.1.32.

72 ICRC Customary Law Study, above note 24, p. 253.

73 R. Weinheimer and K. Vuorio, above note 3.

74 James Fry, “Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law”, *Columbia Journal of Transnational Law*, Vol. 44, No. 2, 2006, p. 458; O.-G. Iorga *et al.*, above note 53.



enhanced where thermobaric weapons are employed in confined spaces, such as caves.<sup>75</sup> However, thermobaric weapons are not primarily designed to asphyxiate or poison. When present, these effects are regarded as secondary or additional effects. This conclusion excludes the use of thermobaric weapons from the application of the above declarations and treaties.

### *The Chemical Weapons Convention*

The CWC defines chemical weapons to include “[m]unitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices”. Toxic chemicals are further defined as “[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”.<sup>76</sup> However, these chemicals are not prohibited by the CWC if they are not intended for purposes that are proscribed by the Convention.<sup>77</sup> The Rome Statute of the International Criminal Court (ICC) describes the employment of “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” as “serious violations” of IHL applicable to international armed conflict, and such violations are regarded as war crimes subject to the jurisdiction of the ICC.<sup>78</sup>

The composition of the fuel mixtures in thermobaric weapons includes toxic chemical substances and chemical agents, which are selected based on exothermicity (the release of heat during a chemical reaction).<sup>79</sup> The presence of these substances may create a toxic environment as harmful as most other chemical agents if a secondary aerobic post-combustion ignition failure of the aerosolized explosive cloud occurs.<sup>80</sup> However, the mere fact that a thermobaric weapon contains chemicals does not, in itself, render it a prohibited chemical weapon in terms of the CWC,<sup>81</sup> as thermobaric weapons are not primarily designed to produce harm by poisoning. There are also no reports that highlight any failures during the secondary combustion processes or other reliability concerns of thermobaric weapons that may render their use illegal.

75 D. Andrew, above note 3.

76 CWC, above note 16, Arts II(1)(b), II(2).

77 Matthew Aiesi, “The Jus in Bello of White Phosphorus: Getting the Law Correct”, *LawFare*, 26 November 2019, available at: [www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct](http://www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct).

78 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (Rome Statute), Art. 8(2)(b)(xviii).

79 Edward Sheridan, George Hugus, Filippo Bellomo, Daniela Martorana and Ryan McCoy, “Thermal Enhanced Blast Warhead”, Patent No. US 8,250,986 B1, 28 August 2009.

80 Defense Intelligence Agency, “Fuel-Air and Enhanced-Blast Explosive Technology – Foreign”, April 1993 (document obtained by Human Rights Watch under the US Freedom of Information Act).

81 Ian J. MacLeod and A. P. V. Rogers, “The Use of White Phosphorus and the Law of War”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007.

## *The Convention on Conventional Weapons*

The CCW creates an enabling framework, by way of individually ratified additional protocols, for the progressive banning of certain conventional weapons that are excessively injurious or that have indiscriminate effects.<sup>82</sup> The CCW now includes comprehensive bans or restrictions on the use of particular weapons, including CCW Protocol III, which restricts the use of incendiaries. The ICRC Customary Law Study includes two rules on incendiary weapons that may, by analogy, be applied to the use of thermobaric weapons.<sup>83</sup> The implications of these two rules will be discussed hereunder with reference to the prohibition against causing SI/US and as it relates to indiscriminate weapons.

Incendiary weapons typically contain a solid, liquid or gel incendiary substance.<sup>84</sup> They are defined in CCW Protocol III as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target”.<sup>85</sup> The high temperatures produced by incendiary weapons cause thermal and respiratory burns and secondary fires. The definition in Protocol III of incendiaries incorporates examples of qualifying weapons,<sup>86</sup> but it excludes, as incendiary weapons, those weapons “which may have incidental incendiary effects”<sup>87</sup> and those “designed to combine penetration, blast or fragmentation effects with an additional incendiary effect”.<sup>88</sup>

A prohibition on the anti-personnel use of incendiaries was considered but not adopted by delegates to the CCW negotiations that produced Protocol III,<sup>89</sup> as the burn injuries caused by incendiary weapons were, in principle, not considered worse than injuries inflicted by other weapons.<sup>90</sup> The position on the anti-personnel use of incendiaries is unlikely to change, and it is thus improbable that a protocol prohibiting the use of these weapons will be adopted in the future.<sup>91</sup> CCW Protocol III, accordingly, prohibits attacks using incendiary weapons directed at civilians or civilian objects “in all circumstances” but allows for the

82 CCW Protocol IV, above note 17.

83 ICRC Customary Law Study, above note 24, Rules 84–85.

84 Examples are white and red phosphorus, thermite and a jellied fuel mixture: S. Paunila and N. R. Jenzen-Jones, above note 7, p. 119.

85 CCW, above note 15, Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980 (CCW Protocol III), Art. 1.

86 Flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

87 Such as illuminants, tracers, smoke or signalling systems.

88 CCW Protocol III, above note 85, Art. 1(b)(ii): “armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities”.

89 W. Boothby, above note 1, p. 201.

90 *Ibid.*, p. 201.

91 *Ibid.*, above note 1, p. 201 fn. 57.

direct and deliberate use of incendiary weapons against an adversary, with some limits on the manner of delivery to a military objective.<sup>92</sup>

It is reasonable to conclude, on initial scrutiny, that thermobaric weapons may violate CCW Protocol III. However, further investigation creates some doubt, specifically as the definition of incendiary weapons in Protocol III is excessively narrow (the definition also does not adequately deal with multi-purpose incendiary weapons). The focus in the definition is on the purpose for which a weapon is designed, as opposed to the impact of the weapon.<sup>93</sup> The definitional boundaries, therefore, limit the regulation of specific weapons based on how the developer, manufacturer and/or user describes the design purpose of the weapon. The phrase “primarily designed” indicates that the weapon’s primary design purpose must be directed at setting fire or causing burn injury. However, thermobaric weapons have no increased fire-starting capability compared to other high-explosive munitions.<sup>94</sup>

The European Court of Human Rights (ECtHR) commented in the *Tagayeva* case that experiments to establish the effects of an RPO-A Shmel thermobaric rocket demolished buildings but produced no fires.<sup>95</sup> The applicants in *Tagayeva* argued that “thermobaric weapons were governed by the more restrictive legal regime of incendiary weapons”.<sup>96</sup> The Chamber, in its reasoning and based on expert evidence, highlighted the differences between conventional high-explosive, incendiary, fuel-air explosive and thermobaric munitions.<sup>97</sup> The Chamber found that “incendiary weapons, devices or bombs are designed to start fires or destroy sensitive equipment, using materials such as napalm, thermite, chlorine trifluoride, or white phosphorus”. Incendiary weapons “deflagrate”, while thermobaric weapons “detonate”. The Chamber therefore concluded that incendiary weapons are “primarily intended to provide sufficient heat and fuel to ignite, and possibly sustain, a fire at the target”. In contrast, thermobaric weapons are designed to “create a gross overpressure, combined with very high temperatures, such that the target suffers severe physical damage almost instantaneously”.<sup>98</sup>

Thermobaric weapons are accordingly not primarily designed to cause fire or burns, even though they will likely or frequently produce “incendiary effects” that are substantial but “incidental” or secondary.<sup>99</sup> Some thermobaric munitions, such as the BLU-118/B penetrating warhead and its successor, the BLU-121/B hardened

92 CCW Protocol III, above note 85, Art. 2; Human Rights Watch, “Strengthening the Humanitarian Protections of Protocol III on Incendiary Weapons: Memorandum to Convention on Conventional Weapons, Delegates”, 22 August 2011, available at: [www.hrw.org/news/2011/08/22/strengthening-humanitarian-protections-protocol-iii-incendiary-weapons](http://www.hrw.org/news/2011/08/22/strengthening-humanitarian-protections-protocol-iii-incendiary-weapons).

93 Human Rights Watch and International Human Rights Clinic, *From Condemnation to Concrete Action: A Five-Year Review of Incendiary Weapons*, 6 November 2015, p. 5, available at: [www.hrw.org/news/2015/11/05/condemnation-concrete-action-five-year-review-incendiary-weapons](http://www.hrw.org/news/2015/11/05/condemnation-concrete-action-five-year-review-incendiary-weapons).

94 HPCR Manual, above note 24, p. 75.

95 ECtHR, *Tagayeva*, above note 50, para. 220.

96 *Ibid.*, para. 596.

97 *Ibid.*, para. 220.

98 *Ibid.*, para. 472.

99 W. Boothby, above note 1, p. 245; M. Montazzoli, above note 3.

steel warhead with a thermobaric explosive fill, are designed to achieve substantial penetration and significant blast effects for use against hard or deeply buried military objectives, such as tunnels and blast doors.<sup>100</sup> These weapons, as a result, have “additional incendiary” and “combined penetration, blast and fragmentation effects” and, as a result, escape regulation under CCW Protocol III on both counts.<sup>101</sup>

The definitional limitations of incendiary weapons in CCW Protocol III may, in part, be addressed by an amendment with less emphasis on the purpose for which the weapons are primarily designed. This articulation would then focus on how such weapons cause injuries through heat, and the indiscriminate effect thereof on humans. Such an effects-based modification to the definition will not be remarkable as a definition with a similar focus has already been included in Protocol I of the CCW,<sup>102</sup> which focuses on the effect that the weapon has on humans (injury by fragments which cannot be detected by X-rays) rather than its design or purpose.<sup>103</sup> An effects-based definition in Protocol III would potentially implicate thermobaric weapons due to the suffering caused by the fire and heat, but no such amendment to the definition is foreseen. Ultimately, thermobaric weapons may incidentally start fires, and the use of these weapons should either be avoided or undertaken with extreme caution in civilian populated areas.

## Environmental effects

Another IHL limitation that is generally applicable to the means of warfare relates to the effects of weapons on the environment, which is, in principle, considered to be a civilian object. A distinct part of the natural environment may qualify as a military objective where it, by its nature, location, purpose or use, makes an effective contribution to military action, and its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage.<sup>104</sup> The ICJ confirmed that “[t]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.<sup>105</sup> The 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual) defines “damage to or the destruction of the natural environment” as “collateral

100 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge University Press, Cambridge, 2011, p. 163; Adam Hebert, “Initial Shipment of 10 BLU-118B Warheads Expected Soon: DoD Readies ‘Thermobaric’, Cave-Clearing Bomb for Enduring Freedom”, *Inside the Air Force*, Vol. 13, No. 1, 2002, pp. 10–11.

101 CCW Protocol III, above note 85, Art. 1(b)(ii).

102 CCW Protocol I, above note 15.

103 Human Rights Watch and International Human Rights Clinic, above note 93.

104 AP I, Art. 52(2); ICRC Customary Law Study, above note 24, Rule 8. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment Under International Humanitarian Law, with Commentary*, Geneva, 2020 (ICRC Environmental Guidelines), p. 49.

105 Nuclear Weapons Advisory Opinion, above note 71, para. 29.

casualties” or “collateral damage”, which is prohibited where such damage cannot be justified by military necessity.<sup>106</sup>

CCW Protocol III states that “[i]t is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives”.<sup>107</sup> However, as stated above, thermobaric weapons do not qualify as incendiary weapons and are, as a result, excluded from the application of Protocol III. The 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) prohibits “military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party”.<sup>108</sup> The ENMOD Convention prohibits the conversion of the environment itself into a weapon to cause harm to an adversary, but it applies only to situations where the destruction, damage or injury is caused to another State Party.

AP I provides that “[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.<sup>109</sup> AP I also requires that the natural environment should be protected during armed conflict “against widespread, long-term and severe damage”, and that this protection includes a prohibition against methods or means of warfare which may “prejudice the health or survival of the population” due to damage to the natural environment.<sup>110</sup> AP I applies to weapons that have extreme effects on the environment, and the thresholds of “widespread”, “long-term” and “severe” are cumulative as all these requirements must exist for the rule to be breached. The language of the Rome Statute also uses similar terminology where it prohibits intentional attacks that may cause damage to the natural environment, which would be “excessive in relation to the concrete and direct overall military advantage anticipated”.<sup>111</sup> These prohibitions are considered to be customary international law.<sup>112</sup> At the Diplomatic Conference that adopted AP I, some States considered the phrase “long-term” to refer to damage that extends over decades. The Commentary to AP I also states that the threshold would probably be breached only where the damage would likely threaten the “continued survival of the civilian population or would risk causing it major health problems”.<sup>113</sup> It is thus reasonable to conclude that the use of thermobaric weapons, in accordance

106 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), paras 13(c), 44.

107 CCW Protocol III, above note 85, Art. 2(4).

108 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 31 UST 333, 1108 UNTS 151, 10 December 1976, Art. 1.

109 AP I, Art. 35(3).

110 *Ibid.*, Art. 55(1).

111 Rome Statute, above note 78, Art. 8(2)(b)(iv).

112 ICRC Customary Law Study, above note 24, Rule 45; HPCR Manual, above note 24, Rule 89.

113 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 1454.

with their primary design purpose, will not achieve the cumulative threshold requirements set in AP I.<sup>114</sup> The provisions of the ENMOD Convention and AP I, with regard to the effects of these weapons on the environment, are thus likely to be of peripheral or no relevance to thermobaric weapons.

## General principles of international humanitarian law: The right to choose methods or means of warfare

There is, at present, no specific treaty that prohibits blast weapons, and none that are specifically focused on thermobaric weapons. States are, therefore, allowed to develop and use thermobaric weapons, provided they comply with other applicable rules of IHL. It is thus also necessary to consider the customary rules of IHL,<sup>115</sup> with specific reference to the prohibition against causing SI/US and the further prohibition against the use of indiscriminate weapons.<sup>116</sup> The application of these “primary” principles is associated with and influenced by “further” principles such as military necessity, humanity,<sup>117</sup> distinction<sup>118</sup> and proportionality.<sup>119</sup>

### *The prohibition against superfluous injury or unnecessary suffering*

Military necessity dictates that a belligerent is allowed to employ only the measures necessary and lawful to expeditiously and effectively achieve the complete submission of the adversary with the minimum possible loss of resources.<sup>120</sup> The 1863 Lieber Code, accordingly, states that “[m]ilitary necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering”;<sup>121</sup> there are, therefore, limits to military necessity, as the infliction of suffering for the sake of suffering or revenge is regarded as an “intolerable encroachment of humanity”.<sup>122</sup> The preamble to the St Petersburg Declaration<sup>123</sup> thereafter provided the initial articulation of military necessity and the prohibition against SI/US by confirming the existence of a threshold beyond which further suffering would be unnecessary and useless.<sup>124</sup> The preamble specifically states that “the progress of civilisation

114 See ICRC Environmental Guidelines, above note 104.

115 ICRC Customary Law Study, above note 24. see also HPCR Manual, above note 24; Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013; Tallinn Manual 2.0, above note 24.

116 Christopher Greenwood, “Historical Development and Legal Basis”, in Dieter Fleck and Michael Bothe (eds), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, p. 11.

117 See ICJ, *Corfu Channel Case (United Kingdom v Albania)*, [1949] ICJ 4, 1949, p. 22.

118 ICRC Customary Law Study, above note 24, Rules 70, 71.

119 Nuclear Weapons Advisory Opinion, above note 71; Tallinn Manual 2.0, above note 24, Rule 20, para. 75.

120 William Fenrick, “New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict”, *Canadian Yearbook of International Law*, Vol. 19, 1981, p. 230.

121 *Instructions for the Government of Armies of the United States in the Field*, US Army General Order No. 100, 24 April 1863 (Lieber Code), Art. 16.

122 *Ibid.*, Arts 5, 6; F. Kalshoven and L. Zegveld, above note 100, p. 203.

123 St Petersburg Declaration, above note 11.

124 Frits Kalshoven, *Reflections on the Law of War*, International Humanitarian Law Series, Martinus Nijhoff, Leiden, 2007, Preamble; Robert Kolb and Momchil Milanov, “The 1868 St Petersburg Declaration on

should have the effect of alleviating as much as possible the calamities of war”, and, in addition, that the only legitimate object which States should pursue during armed conflict is to weaken the military forces of the adversary by disabling “the greatest possible number of men”. The only legitimate objective during armed conflict is, as a result, limited to rendering a belligerent *hors de combat* in order to “weaken the military forces of the enemy” and eventually subdue the adversary’s will to continue with the hostilities.<sup>125</sup> It would therefore be “contrary to the laws of humanity” to employ weapons that unnecessarily aggravate suffering or that would render the death of belligerents “inevitable”.<sup>126</sup> Thermobaric explosions, especially in confined spaces, distribute and fill the entire lethal area with a fuel mixture, potentially resulting in the “inevitable death” of everyone within the blast zone.<sup>127</sup> However, the notion of “inevitable death” may no longer be relevant in contemporary IHL as the principle was not incorporated into the language of AP I.<sup>128</sup>

Numerous subsequent IHL instruments and treaties have refined and confirmed the prohibition against causing SI/US.<sup>129</sup> The 1874 non-binding Brussels Declaration,<sup>130</sup> and later, in treaty form, the Hague Regulations of 1899 and 1907,<sup>131</sup> and AP I, confirm that the parties to an armed conflict do not possess unlimited power to adopt any means of warfare.<sup>132</sup> The Hague Regulations and AP I specifically prohibit, as a cardinal principle of IHL,<sup>133</sup> the employment of means and methods of warfare that are calculated to cause SI/US beyond that which is required to accomplish the destruction of material or rendering combatants *hors de combat*.<sup>134</sup> The phrase “calculated to cause” implies an element of deliberate design and, therefore, weapons that incidentally, unintentionally or accidentally inflict superfluous injury would probably not

Explosive Projectiles: A Reappraisal”, *Journal of the History of International Law*, Vol. 20, No. 4, 2019, p. 520; Hans-Peter Gasser, “A Look at the Declaration of St Petersburg of 1868”, *International Review of the Red Cross*, Vol. 33, No. 297, 1993, p. 513.

125 R. Kolb and M. Milanov, above note 124, p. 518.

126 St. Petersburg Declaration, above note 11.

127 *Ibid.*, Preamble; R. Kolb and M. Milanov, above note 124, p. 155.

128 R. Kolb and M. Milanov, above note 124, p. 528. See, in general, Emily Crawford, “The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL”, *Journal of the History of International Law*, Vol. 20, No. 4, 2019.

129 Nuclear Weapons Advisory Opinion, above note 71; ICRC Customary Law Study, above note 24, p. 237; Henri Meyrowitz, “The Principle of Superfluous Injury of Unnecessary Suffering”, *International Review of the Red Cross*, Vol. 34, No. 299, 1994, p. 103.

130 Project of an International Declaration Concerning the Laws and Customs of War, Conference of Brussels, 27 August 1874 (Brussels Declaration), Art. 12.

131 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, The Hague, 29 July 1899, Art. 22; Hague Regulations, above note 9, Art. 22.

132 St. Petersburg Declaration, above note 11, preambular paras 3–6; Brussels Declaration, above note 138, Art. 13(e); Hague Regulations, above note 9, Art. 22; ICRC Customary Law Study, above note 24, Rule 17; AP I, Art. 35(1); Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2011, pp. 269–272.

133 Nuclear Weapons Advisory Opinion, above note 71, paras 74–87.

134 Hague Regulations, above note 9, Art. 23(e): “It is especially prohibited ... [t]o employ arms, projectiles, or material of a nature to cause superfluous injury”; AP I, Art. 35(2): “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”



violate this principle. AP I, however, uses different terms where it states that it is “prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.<sup>135</sup> The 1913 Manual of the Laws of Naval War,<sup>136</sup> the CCW,<sup>137</sup> the CWC<sup>138</sup> and the 1997 Ottawa Convention on Anti-Personnel Mines<sup>139</sup> also confirm the principle prohibiting SI/US.

The San Remo Manual states that it “is forbidden to employ methods or means of warfare which are of a nature to cause superfluous injury or unnecessary suffering”.<sup>140</sup> The 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>141</sup> provides that the Tribunal possesses the jurisdiction to prosecute persons violating, among other things, the prohibitions against poisonous weapons or other weapons calculated to cause unnecessary suffering. The ICJ, in its Nuclear Weapons Advisory Opinion, commented that the Martens Clause “has proved to be an effective means of addressing the rapid evolution of military technology”, with specific reference to weapons that cause unnecessary suffering and “harm greater than that unavoidable to achieve legitimate military objectives”.<sup>142</sup> Article 8(2)(b)(xx) of the Rome Statute specifically states that the use of means and methods of warfare that cause SI/US or which are inherently indiscriminate qualifies as a war crime in international armed conflicts.<sup>143</sup> However, the purpose of this provision has effectively been defeated as States Parties have failed to adopt the required annex listing those means and methods of warfare that would cause the harm described in Article 8(2)(b)(xx). Rule 70 of the ICRC Customary Law Study expresses the customary rule that the “use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited”.<sup>144</sup>

The prohibition against SI/US has arguably become increasingly irrelevant as the application of the principle in practice and the determination of any violations thereof are vague and complicated.<sup>145</sup> It is not possible to measure by medical means what the threshold of SI/US is, and there is, as a result, no agreed-upon objective standard to determine or define SI/US.<sup>146</sup> These limitations have resulted in disagreements regarding the exact scope, significance and operational limits

135 *Ibid.*, Art. 35(2) (emphasis added).

136 Manual of the Laws of Naval War, Oxford, 9 August 1913, Art. 16(2).

137 CCW, above note 15, Preamble; CCW, above note 15, Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 3 May 1996, Art. 3(3).

138 By implication as the CWC, in its preamble, “reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925”.

139 Ottawa Convention, above note 18, Preamble.

140 San Remo Manual, above note 106, para. 42(a).

141 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, 25 May 1993, Art. 3(a).

142 Nuclear Weapons Advisory Opinion, above note 71, para. 238.

143 Rome Statute, above note 78, Art. 8(2)(b)(xx).

144 ICRC Customary Law Study, above note 24, pp. 237–244; Nuclear Weapons Advisory Opinion, above note 71, para. 78.

145 Elvira Rosert, “The Prohibition of Unnecessary Suffering in International Humanitarian Law: Norm Erosion, Contestation, and Permissive Effects”, paper presented at the 12th Pan-European Conference on International Relations, Prague, 12–15 September 2018.

146 G. Solis, above note 132, p. 272.

imposed by the prohibition against SI/US.<sup>147</sup> States have nonetheless included specific weapons in their military manuals that are considered to violate the prohibition against SI/US. These manuals list chemical, biological and bacteriological weapons, weapons that injure by non-detectable fragments, dum-dum bullets, hollow-point weapons or other projectiles with expanding heads, poison, anti-personnel mines, blinding laser weapons, and explosive traps when used in the form of an apparently harmless portable object.<sup>148</sup> The existence of such a list may seem counter-intuitive as the purpose, or use, of all weapons may, by design or chance, cause severe injury, suffering and death.<sup>149</sup> However, IHL prohibits only those weapons that cause superfluous injury or suffering that is unnecessary. The terms “superfluous” and “unnecessary” indicate that the use of a less harmful alternative weapon should be employed where such a weapon is available. Rule 85 of the ICRC Customary Law Study refers to incendiary weapons, but this rule may be applied to the use of thermobaric weapons by analogy. Rule 85 prohibits the “anti-personnel” use of incendiary weapons “unless it is not feasible to use a less harmful weapon to render a person *hors de combat*”.<sup>150</sup> This rule may be interpreted as “a specific application” of the prohibition against SI/US,<sup>151</sup> as the use of incendiary weapons and, by analogy, thermobaric weapons amounts to the infliction of additional and unnecessary suffering where a less harmful weapon is available that could render the adversary *hors de combat*.<sup>152</sup> The phrase “less harmful” has been interpreted to mean “less painful” or “less long-lasting”.<sup>153</sup> This interpretation, however, adds little to the debate on the legality of the use of thermobaric weapons as IHL, in general, requires that a less harmful available weapon to achieve the military purpose must be used, failing which the use of the weapon would amount to the infliction of SI/US.<sup>154</sup>

The accepted test to determine whether a weapon violates the prohibition against SI/US aims to establish whether a weapon, when used for its intended purpose and with reasonable foresight, will result in increased suffering that

147 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 113, p. 403.

148 Australia, *The Law of Armed Conflict: Commanders' Guide*, Australian Defence Force Publication, Operations Series, ADFP 37 Supplement 1 – Interim Edition, 7 March 1994, paras 306, 308, 309; Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 04.6, Australian Defence Headquarters, 11 May 2006, para. 4.20; France, *Fiche didactique relative au droit des conflits armes*, annexed to Directive No. 147 of the Ministry of Defence, 4 January 2000, p. 6; France, *Manuel de droit des conflits armes*, Ministry of Defence, Office of the Law of Armed Conflict, 2001, p. 54; Germany, ZDv 15/1: *Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze*, DSK VV230120023, Federal Ministry of Defence, June 1996, para. 305.

149 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 62.

150 ICRC Customary Law Study, above note 24, Rule 85.

151 Jean-Marie Henckaerts, “Customary International Humanitarian Law: A Rejoinder to Judge Aldrich”, *British Yearbook of International Law*, Vol. 76, No. 1, 2005, p. 531.

152 W. Boothby, above note 1, p. 201.

153 George Aldrich, “Customary International Humanitarian Law: An Interpretation on Behalf of the International Committee of the Red Cross”, *British Yearbook of International Law*, Vol. 76, No. 1, 2005, p. 521.

154 ICRC Customary Law Study, above note 24, Rule 85.

serves no military purpose and is also substantially disproportional or excessive compared to that caused by available lawful alternative weapons which are sufficiently effective in achieving the intended military advantage.<sup>155</sup> The ICRC interprets this test to focus on the design-dependent nature of the foreseeable injury caused by the weapon and whether such injury is more than what is necessary to render a combatant *hors de combat*.<sup>156</sup> It would thus, by necessary implication, be unlawful to use a weapon if it is of a nature to occasion additional injury or suffering for which there is no corresponding military purpose. The emphasis is therefore not on the subjective bodily sensation of the victim but on the presence or lack of military advantage from the use of the weapon. The practical application of the prohibition against SI/US with regard to thermobaric weapons thus requires some deliberation on alternative methods for securing a military advantage or achieving a military purpose for which thermobaric weapons would ordinarily be used.<sup>157</sup>

Each weapon should be assessed based on its individual effects and its expected average injury and suffering.<sup>158</sup> Thermobaric weapons, when used as intended, may indeed cause severe injuries and extreme suffering, but when evaluated in isolation, the increased lethal effects will not render these weapons unlawful.<sup>159</sup> The purpose for which thermobaric weapons were developed was, and still is, to achieve a specific military advantage, especially when these weapons are employed to defeat hard targets and subterranean objectives – States have concluded that the heat and pressure effects of thermobaric explosions cannot be obtained using an available alternative current inventory weapon without substantial collateral damage and suffering.<sup>160</sup> As a result, a ban on the use of thermobaric weapons would contradict prevailing military judgement on the military advantages that these weapons offer. Some States may also, in the absence of an express treaty law prohibition concerning a particular weapon, challenge the illegality of a particular weapon based on the prohibition against SI/US alone.<sup>161</sup> It is, accordingly, inappropriate to assume that the use of thermobaric weapons would inevitably breach the prohibition against SI/US.

155 Isabelle Daoust, Robin Coupland and Rikke Ishoe, “New Wars, New Weapons? The Obligation Of States to Assess the Legality of Means and Methods of Warfare”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 354; W. Boothby, above note 1, p. 51; David Turns, “Weapons in the ICRC Study on Customary International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006; W. Fenrick, above note 120, p. 500; W. Hays Parks, above note 35, p. 536; William Boothby and Wolff Heintschel von Heinegg, *Nuclear Weapons Law: Where Are We Now?*, Cambridge University Press, Cambridge, 2022, p. 155.

156 HPCR Manual, above note 24, fn. 116.

157 See W. Boothby and W. von Heinegg, above note 156, p. 155.

158 W. Boothby, above note 1, p. 225.

159 Y. Dinstein, above note 149, p. 65; W. Boothby, above note 1, p. 234.

160 National Research Council of the National Academies, *Advanced Energetic Materials*, National Academies Press, Washington, DC, 2004, p. vii; Eddie Lopez, “Will Thermobaric weapons Overwhelm the Military Health System?”, US Army College, 2018, available at: <https://warroom.armywarcollege.edu/articles/will-thermobaric-weapons-overwhelm-the-military-health-system/>; Richard Wallwork, “Artillery in Urban Operations: Reflections on Experiences in Chechnya”, master’s thesis, Faculty of the US Army Command and General Staff College, Fort Leavenworth, KS, 2004, p. 86.

161 HPCR Manual, above note 24, p. 59; Y. Dinstein, above note 149, p. 61.

## *The prohibition against indiscriminate and disproportionate attacks and indiscriminate weapons*

The question of whether one method of harming humans with the use of a particular weapon, such as a thermobaric weapon, is inherently more inhumane and thus unacceptable, as opposed to the harm caused by another weapon such as a conventional explosive weapon, is subject to interpretation and may not, therefore, produce a definitive answer. The more proximate question is whether a weapon with a wide blast radius and effects is inherently indiscriminate. It is important to acknowledge the basic distinction between an indiscriminate weapon and an indiscriminate attack, even though the attack and the weapon used to prosecute the attack cannot be practically separated. Indiscriminate attacks do not refer to weapons that are, *per se*, unlawful, as the focus is on the unlawful use of the weapon.<sup>162</sup> Indiscriminate attacks may conceivably be realized with the use of most weapons where the rules of targeting are not respected.<sup>163</sup> It must also be noted, however, that the determination of the legality of any weapon may include a presumption that the weapon operator will comply with the law of targeting.<sup>164</sup> The potential indiscriminate nature of thermobaric weapons, as opposed to the assessment of indiscriminate attacks, thus offers a more appropriate opportunity to logically assess the legality of these weapons.

Article 51(4) of AP I, which deals with indiscriminate attacks, includes reference to weapons that are unlawful by nature because they are incapable of compliance with the principle of distinction or the prohibition against SI/US.<sup>165</sup> There is no accepted definition of what constitutes a weapon that is “by nature indiscriminate”,<sup>166</sup> but AP I records that indiscriminate weapons are those which cannot, due to their nature, be directed at a specific military objective, or the effects of which cannot be limited as required by AP I, and which, under these circumstances, are of a nature to strike civilians, civilian objects and military objectives without distinction.<sup>167</sup> This rule is mainly concerned with the lawfulness of the weapon since its focus is on the inherent characteristics of the weapon as opposed to the indiscriminate nature of the particular attack, which is

162 AP I, Art. 51(5).

163 R. Weinheimer and K. Vuorio, above note 3.

164 Lauren Sanders and Damian Copeland, “Developing an Approach to the Legal review of Autonomous Weapons”, *ILA Reporter*, 27 November 2020, available at: <https://ilareporter.org.au/2020/11/developing-an-approach-to-the-legal-review-of-autonomous-weapon-systems-lauren-sanders-and-damian-copeland/>.

165 AP I, Art. 51(4): “Indiscriminate attacks are prohibited. Indiscriminate attacks are: ... b) those which employ a method or means of combat which cannot be directed at a specific military objective; or c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.”

166 ICRC Customary Law Study, above note 24, Rule 71.

167 AP I, Art. 51(4)(b)–(c); William Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors*, TMC Asser Press, The Hague, 2014, pp. 159–160; Meron Rappaport, “IDF Commander: We Fired More than a Million Cluster Bombs in Lebanon”, *Haaretz*, 12 September 2006, available at: [www.haaretz.com/2006-09-12/ty-article/idf-commander-we-fired-more-than-a-million-cluster-bombs-in-lebanon/0000017f-e033-df7c-a5ff-e27b47270000](http://www.haaretz.com/2006-09-12/ty-article/idf-commander-we-fired-more-than-a-million-cluster-bombs-in-lebanon/0000017f-e033-df7c-a5ff-e27b47270000); Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1986, paras 1957, 1962–1966.

related to the actual activities of the user of the weapon. The rule prohibiting indiscriminate weapons has acquired customary international law status,<sup>168</sup> with corresponding prohibitions in the Rome Statute<sup>169</sup> and the military manuals of many States.

The potential classification of a thermobaric weapon as indiscriminate must, accordingly, consider the weapon's ability to engage a specific military objective and the likelihood of limiting its effects to the intended military objective. The technical performance of the specific type of thermobaric weapon under consideration is thus, by necessary implication, significant in determining whether the weapon's normal and intended use may cause it to be indiscriminate. The ICRC lists specific factors to be considered during this assessment, including the accuracy and reliability of the weapon's targeting mechanism, the effective area covered by the weapon (the extent and degree of damage and injury likely to be caused by its blast effect), whether the foreseeable effects of the use of the weapon can be limited or directed to the intended target, and whether the weapon or its effects can be controlled in time or space (the period and area over which the damaging/injurious effects will persist after the use of the weapon).<sup>170</sup> It has been argued that cluster munitions, depleted uranium munitions and anti-personnel mines cause excessive collateral damage compared to the anticipated military advantage. Thermobaric weapons have not been the subject of similar criticism.<sup>171</sup>

The AP I<sup>172</sup> requirement that a weapon must be capable of being directed against a specific military objective does not require "terminal"<sup>173</sup> or precision guidance.<sup>174</sup> In fact, there is no explicit obligation in treaty or customary IHL that requires the use of precision-guided weapons even when such weapons are available.<sup>175</sup> However, this may change with technological advances relating to increased precision and shifting public opinion on precision attack capabilities. Variants of thermobaric weapons have been designed to be attached to unguided delivery systems,<sup>176</sup> while others are designed for precision targeting purposes. The Russian TOS-1A, for example, is a dedicated carrier of thermobaric weapons designed to deliver multiple munitions over a long distance to a wide area with

168 ICRC Customary Law Study, above note 24, Rule 71. See also Rome Statute, above note 78, Art. 8(2)(b)(xx).

169 Rome Statute, above note 78, Art. 8(2)(b)(xx).

170 ICRC Legal Review of New Weapons, above note 24, p. 946.

171 HPCR Manual, above note 24, p. 59.

172 AP I, Art. 51(4)(b).

173 The guidance applied to a guided missile between mid-course guidance and arrival in the vicinity of the target: see DoD Manual, above note 8, p. 194, read with p. 258, section 5.1.1.6.

174 HPCR Manual, above note 24, p. 61; Michael N. Schmitt, "Precision Attack and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 859, 2005, p. 451; Robert Mandel, "The Wartime Utility of Precision Versus Brute Force in Weaponry", *Armed Forces and Society*, Vol. 30, No. 2, 2004, p. 171; Mark Gunzinger and Bryan Clark, *Sustaining America's Precision Strike Advantage*, Center for Strategic and Budgetary Assessments, Washington, DC, 2015, p. 7.

175 HPCR Manual, above note 24, p. 83.

176 The Russian-made Metis-M1 anti-tank missile, which launches the thermobaric 9M131FM missile, and the TOS-1A multiple rocket launcher.

dispersed effects. In contrast, the AGM-114N Metal Augmented Charge Hellfire missile, fitted with a thermobaric warhead, is designed for extreme precision.<sup>177</sup> State practice also confirms that the use of unguided bombs is in itself not indiscriminate by nature as these weapons can, depending on the area of application (uninhabited areas) or their methods of delivery in general, be successfully directed at a military objective without harming civilians or civilian objects.<sup>178</sup> In addition, the ICRC database of customary international law reveals no evidence that any State has expressly declared thermobaric weapons to be inherently indiscriminate.<sup>179</sup> As a result, all forms of thermobaric weapons are not automatically or inherently indiscriminate.

The ICTY, in the *Martić* judgment, made a weapon-specific determination regarding the self-propelled M-87 Orkan, which the Trial Chamber considered to be “an indiscriminate weapon”.<sup>180</sup> The Orkan is comparable to the TOS-1A, as both of these weapon systems are multiple rocket launcher systems designed to deliver various warheads. They are both designed as area weapons with a large fragmentation or blast radius, and they also allow for the delivery of multiple warheads and firings. Their munitions may impact or detonate anywhere within a wide area, especially where they are employed from a long firing range, as environmental conditions and their propulsion during flight may also result in an additional element of variation. However, the Orkan in the *Martić* case was deployed from its maximum range with warheads containing a payload of numerous fragmentation bomblets (cluster munitions) to produce a large dispersion pattern, as opposed to the TOS-01, which delivers a thermobaric warhead.<sup>181</sup> The Trial Chamber heard expert evidence that it was not appropriate to employ the Orkan system as an indirect-fire weapon with a warhead containing cluster munitions in an urban environment. The conclusion was that it would have been more appropriate, under the circumstances, to employ an alternative weapon with “appropriate precision, and appropriate destructive force”, such as a precision-guided munition.<sup>182</sup> The Trial Chamber, and later the Appeals Chamber,<sup>183</sup> therefore found that the Orkan is a “non-guided high dispersion weapon” that was predictably (“beyond doubt”) incapable of hitting specific targets.<sup>184</sup> The TOS-01, in turn, is described by its manufacturer as being

177 US Army, *2012 US Army Weapons Systems Handbook*, 2012, pp. 132–133, available at: <https://man.fas.org/dod-101/sys/land/wsh2012/132.pdf>.

178 HPCR Manual, above note 24, p. 61.

179 M. Montazzoli, above note 3.

180 ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgment, 12 June 2007; Maya Brehm, *Unacceptable Risk Use of Explosive Weapons in Populated Areas through the Lens of Three Cases Before the ICTY*, Pax, Utrecht, 2014, pp. 50–57.

181 ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Testimony of Tetsuo Itani, Public Transcript of R61 Hearing, 27 February 1996, pp. 10, 98, 103.

182 ICTY, *Martić*, above note 181, p. 112: “I would not have used an Orkan system to attack a military target in Zagreb. It is a built up area. I would have used some other system that would have provided me with appropriate precision, and appropriate destructive force.”

183 ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment (Appeals Chamber), 8 October 2008, para. 256.

184 ICTY, *Martić*, above note 180, paras 463, 472.



capable of high accuracy for an unguided rocket system, but the manufacturer also states that the impact point of the rockets will cover a target densely from a long range.<sup>185</sup> The TOS-01, despite the differences between it and the Orkan, will thus, in a similar manner, be considered indiscriminate when directed toward an urban environment.

The next inquiry that applies to all forms of thermobaric weapons relates to the ability of the user to control the enhanced blast effects produced by the thermobaric explosion. Rule 84 of the ICRC Customary Law Study, concerning incendiary weapons, states that “*particular care* must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects” when these weapons are deployed.<sup>186</sup> It is also submitted that this rule may be applied, by analogy, to the use of thermobaric weapons. Rule 84 is similar to Article 57(2)(a)(ii) of AP I, which states that belligerents must, when attacks are considered, take “all *feasible* precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”.<sup>187</sup> The United Kingdom, when ratifying AP I, interpreted the term “feasible” to mean “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.<sup>188</sup> Boothby suggests that the term “particular care” means that attackers must consider the particular dangers or enhanced risk associated with the use of incendiary weapons, such as the potential for firestorms or uncontrollable consequences, that would necessitate increased caution prior to the use of such weapons.<sup>189</sup>

Belligerents must therefore consider the reasonably foreseeable, direct or reverberating civilian harm that may be expected to result from an attack with a specific weapon. Some forms of thermobaric weapons, as seen above with the TOS-01, have an extremely large blast and secondary fragmentation radius,<sup>190</sup> which creates a considerable destructive area surrounding the detonation point and produces victims with injuries that are difficult to treat.<sup>191</sup> As with explosive

185 “TOS-1A BM-1 Soltsepek”, *Army Recognition*, 2 June 2022, available at: [www.armyrecognition.com/russia\\_russian\\_army\\_vehicles\\_system\\_artillery\\_uk/tos-1a\\_bm-1\\_soltsepek\\_heavy\\_flamethrower\\_armoured\\_vehicle\\_technical\\_data\\_sheet\\_specifications.html](http://www.armyrecognition.com/russia_russian_army_vehicles_system_artillery_uk/tos-1a_bm-1_soltsepek_heavy_flamethrower_armoured_vehicle_technical_data_sheet_specifications.html).

186 ICRC Customary Law Study, above note 24, Rule 84 (emphasis added).

187 AP I, Art. 57(2)(a)(ii) (emphasis added); UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, JSP 383, Oxford University Press, Oxford, 2004, paras 5.32.1, 5.33.4; Laurent Gisel, Palar Gimeno Sarciada, Ken Hume and Abby Zeith, “Urban Warfare: An Age-Old Problem in Need of New Solutions”, *Humanitarian Law and Policy Blog*, 27 April 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/04/27/urban-warfare/>; Eirini Giorgou, “Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas”, *Humanitarian Law and Policy Blog*, 25 January 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/01/25/explosive-weapons-populated-areas/>.

188 DoD, *Law of War Manual*, Office of General Counsel, 2012, p. 191.

189 W. Boothby, above note 1, p. 199.

190 Juliee Sharma, “Use of Explosive Weapons in Populated Area [sic] and International Humanitarian Law”, *ISIL Yearbook of International Humanitarian and Refugee Law*, Vol. 16, 2016–17, p. 179.

191 Ove Dullum, “Collateral Damage from the Use of Indirect Fire in Populated Areas – Can It Be Avoided?”, *Humanitarian Law and Policy Blog*, 5 May 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/05/05/collateral-damage-indirect-fire-populated-areas/>.



weapons, these effects produced by blast weapons may further be influenced by numerous factors, such as the specific weapon's parameters<sup>192</sup> and battlefield parameters.<sup>193</sup> It is, as a result, extremely difficult to accurately simulate these effects, even by way of the systematic testing of the weapon under consideration. Any estimation of the effects of the weapon would therefore probably be unreliable. Nonetheless, it is ultimately accepted that all thermobaric explosions will generally impact everything within their blast radius. Special care must accordingly be taken when there are any civilians, critical civilian infrastructure, means of livelihood or cultural sites near the intended detonation point of the weapon. As a direct consequence, these challenges will create doubt about the reliability of the mitigation measures taken to appreciably reduce the weapon's area effects and harm to civilians.<sup>194</sup> The use of thermobaric weapons, especially those with inaccurate delivery systems, should therefore be avoided in urban or populated areas.

## Humanity and public opinion

Public opinion, or “the dictates of public conscience”, that regards the continued possession or use of thermobaric weapons as unacceptable may also become relevant in determining the legality of thermobaric weapons.<sup>195</sup> The Martens Clause, as codified in AP I, states that

[i]n cases not covered by this Protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the *principles of humanity* and from the *dictates of public conscience*.<sup>196</sup>

The Ottawa Anti-Personnel Mine Ban Convention pertinently refers to “the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines”.<sup>197</sup> There are, however, numerous and even contradictory interpretations of the meaning of the Martens Clause.<sup>198</sup> The phrases “principles of humanity” and “dictates of public conscience” have been interpreted as independent legal standards for considering moral and ethical implications of

192 Including characteristics of the warhead body material, thermobaric explosive composition, mass, and initial velocity.

193 Including current conditions, terrain configuration, detonation height, impact angle, projectile impact velocity, and the final angular velocity of the projectile.

194 See E. Giorgou, above note 187; HRC Res. 28/20, 27 March 2015; R. Weinheimer and K. Vuorio, above note 3.

195 AP I, Art. 1(2).

196 *Ibid.*, Art. 1(2) (emphasis added). See also Hague Declaration II, above note 13; Protocol Additional (II) 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 1978); CWC, above note 16; Nuclear Weapons Advisory Opinion, above note 71, para. 55.

197 Ottawa Convention, above note 18, Preamble.

198 Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, p. 188.

weapons compliance, particularly where no regulations on the matter exist<sup>199</sup> and where a particular weapon receives strong public disapproval.<sup>200</sup> However, the Clause has also been regarded as merely an interpretative guide through which IHL is applied during armed conflict.<sup>201</sup> Meron, as a result, argues that the significance of the two phrases has diminished over time. Consequently, the principles of humanity and the dictates of public conscience will, except in remarkable instances and where general agreement exists, not cause a particular weapon to be unlawful.<sup>202</sup>

Public opinion may, however, influence the conduct of hostilities during armed conflict – an intense dislike of a particular weapon by the public, in general, may become a significant consideration in the development of weapons law. That said, public opinion on thermobaric weapons, unlike the previous campaigns to prohibit landmines and cluster munitions, cannot be regarded as an extreme or uncontested instance where the dictates of public conscience alone have created enough impetus to delegitimize the use of such weapons.<sup>203</sup> Public sentiment may nonetheless change depending on the content, quantity, quality and tone of mass media coverage, relevant internet content and awareness campaigns on the nature and effects of the use of thermobaric weapons. This outcome seems improbable, however, as the public mainly receives a sanitized version of armed conflict. The reality of the violence and harm inflicted in armed conflict is also generally presented with jargon, euphemisms, acronyms and fabrications. The specific manner in which language is employed by those reporting on an armed conflict may, as a result, diminish the perception of the degree of actual violence and suffering or may even suggest a conflict of sterile precision with the use of terms such as “surgical strikes” and “precision bombings”.<sup>204</sup>

## Conclusion

Thermobaric weapons generate blast that is primarily designed to cause damage and harm through negative overpressure and secondary harm due to fragmentation,

199 Bonnie Docherty, “Statement to Convention on Conventional Weapons Group of Governmental Experts on Lethal Autonomous Weapons Systems”, Human Rights Watch, 26 March 2019, available at: [https://docs-library.unoda.org/Convention\\_on\\_Certain\\_Conventional\\_Weapons\\_-\\_Group\\_of\\_Governmental\\_Experts\\_\(2019\)/IHL%20BGGE%2Bstatement-3%2B26%2B19-FINAL.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2019)/IHL%20BGGE%2Bstatement-3%2B26%2B19-FINAL.pdf).

200 ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons: Report*, Geneva, 1975, p. 12, para. 36, available at: [https://library.icrc.org/library/docs/DOC/DOC\\_00169.pdf](https://library.icrc.org/library/docs/DOC/DOC_00169.pdf).

201 See, in general, Jochen von Bernstorff, “Martens Clause”, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2009.

202 Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *American Journal of International Law*, Vol. 94, No. 1, 2000.

203 See, in general, *ibid.*, p. 78; Ann M. Florini (ed.), *The Third Force: The Rise of Transnational Civil Society*, Carnegie Endowment for International Peace, Washington, DC, 2000, p. 2.

204 Conor Friedersdorf, “What’s with the U.S. Media’s Aversion to Graphic Images?”, *The Atlantic*, July/August 2013, available at: <https://www.theatlantic.com/magazine/archive/2013/07/the-gutless-press/309405/>. See, in general, Stephen Thorne, *The Language of War*, Taylor and Francis, London, 2006.

thermal effects, the consumption and depletion of ambient oxygen, and the release of toxic gases and smoke. Thermobaric weapons are, therefore, extremely destructive and cause trauma that requires specialized medical equipment to treat those affected. Various international instruments prohibit or limit the use of weapons that generate asphyxiating or toxic gases, weapons that poison, chemical weapons and weapons primarily designed to be incendiary. Thermobaric weapons incorporate some toxic chemical agents and toxic substances that generate incendiary effects, but they are primarily designed as enhanced blast weapons. Thermobaric weapons are thus not prohibited by any specific treaty.

The general customary law principles and rules of IHL should also be evaluated to determine the legality of using thermobaric weapons. The relevant IHL principles include the prohibition against causing SI/US, as well as the prohibition against indiscriminate weapons. Thermobaric weapons create effects that result in severe suffering, but the pattern of injury and suffering associated with the normal intended or designed use of thermobaric weapons cannot be regarded as disproportionate to the nature and scale of the military advantage anticipated. All weapons are capable of being used indiscriminately and may, as a result, be subject to potentially unlawful methods of deployment. The prohibition and limitations against the deployment of indiscriminate weapons would therefore affect thermobaric weapons in the same manner as most other means of warfare. The use of thermobaric weapons, when directed at military objectives and accompanied by feasible precautions while limiting the weapon's effects and respecting the principle of proportionality, would accordingly be lawful.

Thermobaric weapons can also not be considered to be automatically and inherently indiscriminate, as their primary design typically incorporates the capability to engage in a precision attack against the selected military objective. The capacity to direct a thermobaric weapon at a precise aimpoint effectively achieves humanitarian benefits while also reducing the number of munitions required to effectively target the selected military objectives. Humanitarian considerations alone have therefore not resulted in the total prohibition of thermobaric weapons. Nevertheless, the application of the IHL rules governing the conduct of hostilities has progressively increased the protection of the civilian population, notwithstanding the military utility of particular weapons. There would, accordingly, be an obligation on belligerents, where thermobaric weapons are used, to minimize or avoid injury to, or incidental loss of, civilian life and damage to civilian objects, which would include damage to the natural environment. Thermobaric weapons, as with any other heavy explosive weapon, should thus, wherever possible, be avoided in urban or populated areas, as the multiple mechanisms which they employ to inflict harm, and their dispersed wide-area effects, make it extremely difficult to adequately mitigate or appreciably reduce their harmful effects on civilians.

## BEYOND THE LITERATURE

# The Rights to Privacy and Data Protection in Times of Armed Conflict

Edited by Russell Buchan and Asaf Lubin\*

In this new series called “Beyond the Literature”, the Editorial Team of the *International Review of the Red Cross* selects a recently published volume in the field of humanitarian law, policy and action and convenes a discussion on the book among experts, in an effort to foster constructive engagement on some of the most promising recent literature in the field.

*Every so often, a book comes along that engages in a uniquely thoughtful and in-depth way on an issue of pivotal contemporary importance. Russell Buchan and Asaf Lubin’s recently published edited volume, The Rights to Privacy and Data Protection in Times of Armed Conflict, is one such book.*

*The book, published in June 2022, aims to address the unique threats posed by contemporary armed conflict to the rights to privacy and data protection. The editors and the chapter authors they have convened address the many – and ever-changing – technological advances in surveillance, data analytics, artificial intelligence and more, and how these advances fundamentally alter the landscape and nature of military operations in the modern world. Even more to the point, the book delves into the gaps in existing law and policy that, as they stand,*

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*fail to adequately address the implications of these advances for privacy and data protection rights.*

*In this inaugural voyage for the Review's "Beyond the Literature" series, we have invited Russell and Asaf to introduce their volume, before then posing a series of questions to Jelena Pejic, Marko Milanovic and Eduardo Ustaran, who have graciously agreed to act as discussants of the book, given their expertise in the international humanitarian law (IHL), international human rights law (IHRL) and data protection fields. Jelena worked for many years as Senior Legal Adviser to the International Committee of the Red Cross (ICRC) and has published widely on IHL. Marko is Professor of International Law at the University of Reading and is co-editor of the Tallinn Manual 3.0 project, which examines the application of international law to cyber operations. Marko is an expert in IHRL and has published extensively in that field. Eduardo is a data protection expert and, being a partner at Hogan Lovells International LLP, he brings an important practitioner's perspective to the debate.*

.....

**Bruno Demeyere:** *Russell and Asaf, what motivated you to write this book? What message does the book convey?*

**Russell Buchan and Asaf Lubin:** In *A Memory of Solferino*, the Swiss humanitarian Henry Dunant laid the foundations for the worldwide Red Cross and Red Crescent movement. The book ends with a series of questions that Dunant leaves for his readers. These questions have survived the test of time. One of them reads: "[I]n an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least alleviate, the horrors of war?"<sup>1</sup>

The charge that Dunant led remains as relevant today as it was at the end of the Battle of Solferino of 1859. While the theatre of war and its instrumentalities have morphed and evolved, superfluous injury and unnecessary suffering are still commonplace. These wartime harms now manifest in both physical and digital form. Cyberspace is now a new frontier for violence wherein data is considered a strategic military asset and technologies of surveillance, censorship, hyper-connectivity, automation and disinformation are the state of the art. Against this backdrop there is again urgency in rethinking the regulatory tools at our disposal to constrain this contemporary arms race and hold accountable national armed forces, paramilitary groups and their contractors when abuses of power ultimately take place.

The main bodies of IHL – the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols of 1977 – were all

<sup>1</sup> Henry Dunant, *A Memory of Solferino*, 1862 (reprinted in English by the ICRC, 2010), p. 127.

produced in a pre-internet age. These treatises thus lack any reference to the function that informational privacy, online freedom of expression, data protection and cyber security could play as important shields to protect civilians from the effects of modern wars. This legal vacuum has not stopped militaries and the tech giants that support them from developing and deploying big-data collection and analysis tools, machine learning algorithms, facial recognition software, and surveillance drones and satellites, to name a few examples. *The Rights to Privacy and Data Protection in Times of Armed Conflict* offers an assessment of existing and future IHL and the concurrent application of IHRL as legal frameworks that could respond to these developments.

The book was commissioned and published by the NATO Cooperative Cyber Defence Centre of Excellence [CCDCOE]. We were invited to act as its general editors and we benefited immeasurably from the support and guidance of Ann Väljataga, a legal researcher at the CCDCOE. The focus of the book is on the protection of the rights to privacy and data protection in times of armed conflict, which is an important yet under-researched topic in the literature. The book brings together a talented group of scholars drawn from a range of different backgrounds, and we believe it will be of broad appeal to researchers, practitioners, policy-makers and other stakeholders working across the disciplines of technology, human rights, international law and international relations.

As we write in the book's introduction: "In light of the technological advances in the fields of electronic surveillance, social engineering, predictive algorithms, big data analytics, artificial intelligence, automated processing, biometric analysis, and targeted hacking, we presented our contributing authors with a Herculean task. We asked each author to doctrinally and theoretically explore the ways that these technologies, and others, are already interacting or could possibly interact in the future with wartime digital rights. In so doing, we invited the authors to grapple with the concurrent and extraterritorial application of these rights, with the limitations and possible derogations from these rights during war, and with their scope of application to actual case studies and scenarios taken from the field."<sup>2</sup>

The book is split into four parts which cut across different themes. Part 1 explores the extent to which various regimes of IHL protect the rights to digital privacy and data protection. In Chapter 1, Mary Ellen O'Connell advances the argument that the protection afforded by international law to personal data is the same during times of armed conflict as it is during times of peace. In Chapter 2, Tal Mimran and Yuval Shany zero in on the weapons review obligation contained in Article 36 of Additional Protocol I [AP I], arguing that it requires State parties to integrate privacy concerns into their evaluation of new military technologies. In Chapter 3, Laurie Blank and Eric Talbot Jensen examine the extent to which international humanitarian law governs the seizure, destruction and requisition of data during times of armed conflict. In Chapter 4, Jacqueline Van De Velde assesses the extent to which the law of neutrality requires neutral

<sup>2</sup> *The Rights to Privacy and Data Protection in Times of Armed Conflict*, p. 4.

States to monitor and prevent companies located within their jurisdictions from transferring data to parties to armed conflicts in breach of the rights to privacy and data protection. In Chapter 5, Omar Shehabi explores how the law of occupation, and in particular the obligations it imposes upon Occupying Powers, can be progressively reinterpreted to protect digital privacy. In Chapter 6, Emily Crawford examines the privacy-related rights of prisoners of war [PoWs] in the digital age and, in particular, identifies the types of data that Detaining Powers can collect from PoWs.

Part 2 of the book considers the impact of surveillance technologies on the enjoyment of digital rights. In Chapter 7, Leah West explores the legal obligations arising during armed conflict that limit the use of facial recognition technology by belligerent parties. In Chapter 8, Eliza Watt examines the impact of sustained drone surveillance on non-combatants in war zones and analyzes the legal constraints placed by IHL and IHRL on this practice. In Chapter 9, Tara Davenport analyzes the international legal rules that apply when parties to armed conflicts collect data stored on or passing through underwater sea cables.

Part 3 of the book examines the obligations of militaries and humanitarian organizations when it comes to the protection of digital rights. In Chapter 10, Tim Cochrane explores the potential of individuals to obtain personal data from military agencies under the legal regimes of several States, namely Australia, Canada, New Zealand and the United Kingdom. In Chapter 11, Deborah Housen-Couriel focuses on data sharing within multilateral military operations. In Chapter 12, Asaf Lubin examines the obligations of international organizations to protect data in the context of their humanitarian action; this chapter uses the ICRC as a case study and may be of particular interest to the participants today.

Part 4 analyzes the protection of digital rights in the *jus post bellum*. In Chapter 13, Kristina Hellwig examines the role of the right to privacy in the investigation and prosecution of international crimes. In Chapter 14, Yaël Ronen considers the “right to be forgotten” – that is, the right of individuals to have digitalized personal information removed from the public sphere. Finally, in Chapter 15 Amir Cahane proposes a “right not to be forgotten”, which, in order to protect digital identities, would place a moratorium on private tech companies and prevent them from denying individuals caught up in humanitarian crises access to their online accounts.

The book was launched at CyCon, a cyber security conference convened by NATO’s CCDCOE, in early June 2022. Jelena, Marko, and Eduardo first discussed the book at CyCon, and we thank all three for their thoughtful engagement with the book, both at CyCon and here.

**Bruno Demeyere:** *Marko, Eduardo and Jelena, do you share the book’s primary premise that digital rights, such as privacy and data protection, are more vulnerable to abuse in times of armed conflict and that there is a need to examine the practice of militaries and the law that constrains them in this area?*



**Jelena Pejic:** To be honest, my sense is that we are losing – or have already lost – the battle for privacy and data protection in all spheres of life, whether in peacetime or armed conflict. The fast-paced development of technology and the opaqueness of governments and other relevant actors about their capabilities simply outstrips our ability as individuals to know what information about us is being collected, stored, and shared – i.e., processed. Having said that, persons affected by armed conflict, civilians and detainees in particular, are inherently vulnerable to abuse and have even less control over the exploitation of data related to their real or digital lives in the disrupted circumstances of war. In addition, the problem of protecting digital rights in armed conflict is likely to become more significant over time. *Sauf erreur* on my part, militaries have not engaged with this consequence of their operations in a meaningful way. I thus agree with the statement in the question above.

**Marko Milanovic:** I do. If only a few years ago somebody wrote a book (or a book chapter) about privacy in armed conflict, most international lawyers would have thought the author(s) to be slightly mad. Privacy is not something we normally associate with war. Soldiers in trenches seem as far removed from privacy as anything can be. And even the literature on human rights in armed conflict and the relationship between IHRL and IHL has focused on more “tangible” or physical rights, such as the right to life or liberty of person. A great success of this book is how all of its chapters expose such views as misplaced. Privacy in armed conflict is not science fiction. Take any modern conflict – including the ongoing war in Ukraine – and just consider how the advent of the digital age has made severe impacts on the right to privacy inevitable, and how such impacts need to be regulated. From cyber attacks affecting civilians, for example involving the exfiltration or destruction of their data, to surveillance measures implemented by occupying authorities against the civilian population, to the collection of biometrics and other data of PoWs – all of these are examples of privacy being adversely affected in armed conflict, with or without justification. In all of these cases harm is being inflicted not just on a party to a conflict, whether a State or an armed group, but on numerous individuals *qua* individuals. It is only right and proper for human rights law to take such harms into account. States that care about their reputation as law-abiding members of the international community need to take their obligations in this regard seriously. And their officials need to read this book!

**Eduardo Ustaran:** Absolutely. The ongoing war in Ukraine has certainly shown the crucial importance of privacy and data protection in times of armed conflict. For example, the privacy implications presented by activities such as the use of facial recognition technology to help identify the bodies of soldiers killed in combat and track down their families in order to inform them of their deaths are substantial. Equally, the procurement by the military of location data surreptitiously obtained from mobile devices and apps raises similar issues. These are use cases that under other circumstances would certainly require undertaking

a “data protection impact assessment”, and the fact that they are occurring during a war does not take away that need.

Disinformation and cyber attacks are an essential part of modern warfare and are directly affected by key data protection principles like data accuracy and integrity. Cyber security in particular is a key defensive pillar well beyond the theatre of war. The need to adopt cyber security best practices – from strengthening firewall protection and keeping software and backups updated to (re-)training employees and reviewing incident response plans and contractual arrangements – has never been more real. So, if there is an area of data protection law that is likely to be tested during a war, data security will be a top candidate.

All of this shows that the role of privacy and data protection rights does not stop when the shelling starts. If anything, it becomes more life-critical, but as with anything affected by war, it needs to adapt to its specific reality. Data protection impact assessments may need to be more agile, data security more robust and data sharing more focused, but ultimately, wars do not change our dignity or our fundamental rights. Data protection on the battlefield may look different, but it is very much a pressing need.

**Bruno Demeyere:** *Which of the book’s chapters or themes did you find most illuminating, and why?*

**Jelena Pejic:** All the book’s chapters address different angles of the topic and are worth reading, so it would be unfair to single out one in particular. Personally, I was most absorbed by the contributions dealing with the effects of certain surveillance technologies and weapons/platforms on respect for privacy and data protection. As explained in the book, there is a tension in armed conflict between the legal and operational requirements of the parties to an armed conflict to gather information and intelligence – in order to, for example, properly identify military objectives and apply other IHL targeting rules – and the privacy rights of the affected local population and individuals. Ensuring respect for digital rights to a greater degree than is currently the case would appear to be possible provided there is an awareness of the potentially nefarious consequences of indiscriminate information gathering over time and, of course, a will to do so. My sense, however, is that there is a significant practical difference in this regard between measures that could be taken in the conduct of hostilities and those that could be taken in relation to persons detained by a party to a conflict. The book could not make this sufficiently clear, due to the fact that it is an edited volume of separate chapters and not a monograph – but the practical distinctions would be worth exploring going forward.

**Marko Milanovic:** The chapters in the book are uniformly excellent, accessible and readable, and that is a very rare thing in an edited collection. But I was particularly struck by some of the chapters, which I thought were especially novel and thought-provoking – for example, the chapter by Mimran and Shany, whose thesis is that the

human right to privacy needs to be integrated into weapons reviews pursuant to Article 36 of AP I. Or there is the illuminating chapter by Shehabi on digital privacy in the occupied Palestinian territories and the multitude of ways in which Israel as the Occupying Power subjects the Palestinian population to systemic and pervasive surveillance. The chapter by Crawford on PoWs is incredibly relevant – again, just consider the collection, processing and dissemination of data about PoWs in the ongoing conflict in Ukraine. The chapter by West on facial recognition and its role in applying the principles of precaution and distinction in the targeting process is very cautionary. Finally, there is the chapter by Hellwig on the *jus post bellum* and the numerous privacy and data protection issues that arise in the context of gathering evidence for international criminal prosecutions.

**Eduardo Ustaran:** As a data protection lawyer, for me those chapters that analyze the question of whether existing legal frameworks are suited to address the specific data uses that take place in an armed conflict scenario are particularly thought-provoking. The opening chapter masterfully deals with the existing protections for personal data, looking at the role of IHL and IHRL. These protections, of course, also apply to personal data during armed conflicts. It is also very interesting to see the debate that emerges between the school of thought which argues that laws such as the General Data Protection Regulation [GDPR] are precluded from applying to data activities in situations of armed conflict, and the idea that national security exemptions are in fact limited and do not necessarily prevent the full application of data protection law.

Taking this multi-pronged approach to the protection of privacy and personal data even further, several other chapters are also able to introduce creative ways of thinking about how the combination of legal approaches can be effective in this context. From the applicability of Article 36 of AP I – which requires determining whether the employment of a new weapon would be prohibited under international law – to the potential applicability of the “right to be forgotten” as a mechanism of privacy preservation in cyberspace, there is no shortage of points of view that bring together legal authorities to show a kaleidoscopic approach to the issues at stake.

But while the legal theories put forward by the various authors provide a truly illuminating perspective, they are greatly balanced by the many practical overviews of real-life scenarios, including in particular the challenges raised on the ground by the emergence of sophisticated surveillance technologies. These are technologies that are currently being applied across many different parts of the world and that affect non-combatants in armed conflicts, and they highlight the need for the application of minimum safeguards.

**Bruno Demeyere:** *The book highlights two legal approaches for the future regulation of privacy and data protection in war: one that extends the existing rules of IHL to cover new types of data-intrusive activities by both militaries and non-State groups involved in armed conflict, and another that relies on the*

***concurrent application of human rights law to achieve similar effects. Which of these two approaches do you find more persuasive? Should they be tied together or should a third approach be considered for thinking about regulation in this space?***

**Jelena Pejic:** This is a tough one, and I am afraid there is no satisfactory answer. It is a fact that IHL contains only a few articles pertaining, mainly by implication, to the right to privacy and data protection, and several more that could be interpreted as relevant to it. (In this context I was struck by Eliza Watt's chapter in the book, in which she argues that the duty of constant care in military operations could serve to fill the normative gap in the IHL framework by placing privacy and data protection obligations on States' intelligence operations. Needless to say, it would be useful to know what States may think.) Given that the Geneva Conventions and AP I were developed well before the ongoing technological revolution, this is not surprising. A separate legal challenge would be how to deal with the privacy or data protection "obligations" of non-State armed groups given the dearth of binding IHL rules in non-international armed conflict and the fact that non-State armed groups are not the addressees of human rights law.

As regards human rights law, many legal issues arise, of which two of a basic nature come to mind. First, what exactly is the difference between privacy and data protection, and are both equally relevant in armed conflict? I have not been able to find a satisfying, comprehensive description of the difference for the purposes of a possible response. Second, what exactly is meant by human rights "law"? Is it binding law of global import, of which there is little, or regional hard law, whose geographic reach is obviously limited? It should be noted that even the European Union's 2016 General Data Protection Regulation, looked to by non-EU actors as a model in this domain, excludes from its ambit data protection linked to national security.<sup>3</sup> Or is human rights "soft law" meant? While there is plenty of it, these norms are non-binding and are very rarely tailored to the specificity of armed conflict, due to which their application would likely remain aspirational.

Thus, a third way could be explored, one which would carefully examine the relevant IHL norms and even more carefully parse out the relevant norms of human rights law on privacy and data protection that would be feasible in armed conflict. Such an effort was, for example, undertaken in the humanitarian sector, resulting in the *Handbook on Data Protection in Humanitarian Action* published by the Brussels Privacy Hub and the ICRC.<sup>4</sup> The ICRC and other

3 Regulation (EU) No. 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 OJ (L 119), 2016 (GDPR). According to Article 2, as elaborated in the preamble of the Regulation, the GDPR does not apply to "issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. The Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union." Preamble, para. 16.

4 Brussels Privacy Hub and ICRC, *Handbook on Data Protection in Humanitarian Action*, 2nd ed., 2020.

organizations working in this field have also developed their own documents and guidance on the matter.

**Marko Milanovic:** I don't think it's an either-or kind of choice. A legal system can adapt to new developments through a combination of new law and the evolution of old law, and in our case the recognition that some parts of the old law which were thought to be irrelevant are actually quite relevant. There is no barrier to applying existing rules of IHL and IHRL to novel questions of the digital age, including the right to privacy of civilians and combatants. What I would say in this context, however, is that IHRL is inevitably going to be more important in this evolutionary process than IHL, for two basic reasons. First, politically it seems highly unlikely that States will agree to new bespoke rules of IHL that address privacy issues in armed conflict. Second, current IHL, even in the abstract, says little or nothing on these issues. There is very little material here that can evolve. This is nothing like questions of deprivation of life and liberty during armed conflict, where IHL has detailed rules on the matter that can in some sense take priority over more general rules of IHRL by applying some variant of the *lex specialis* principle. That really can't be done with privacy or many other human rights, from freedom of expression to most socio-economic rights, on which IHL is simply silent. So, the only option really is to apply human rights law in a more flexible, realistic manner so as to take into account the extraordinary circumstances of armed conflict.

**Bruno Demeyere:** *Given the oversized role that private-sector companies play in the development and deployment of the relevant infrastructures and applications under examination in this book, is there room to reconsider the role of non-State actors in the development of relevant rules of IHL and IHRL in this space? What categories of rule developers should play a role in the prescriptive process that could lead to the future regulation of wartime digital rights?*

**Jelena Pejic:** I am not sure one should immediately embark on a prescriptive process, as there are many issues related to the law, technology, and military policy and practice – and their interface – that should first be identified and discussed. Given that armed conflict is the context, such an exchange should involve all relevant actors: this would mean governmental and relevant intergovernmental representatives, as well as military lawyers and practitioners, private-sector/tech company experts, the ICRC and other relevant humanitarian organizations, non-governmental organizations working in the field, and academics dealing with the matter. Each could bring their perspective to the table, allowing for an overview of what may be feasible given the novelty of the issue. To give an example, the requirement of consent is a cornerstone of human rights-compliant data protection regimes in peacetime. In those circumstances, consent as a legal basis for processing personal data “must be freely given,

informed, specific, and an unambiguous indication of wishes by a clear affirmative act signifying agreement to processing”.<sup>5</sup> Can this principle be applied to information gathering, data processing etc. in armed conflict? If so, how? In the conduct of hostilities? To detained persons? Would adaptations in its implementation need to be made? How?

**Bruno:** *Are there any issues – legal, technological, political, social or economic – that the book fails to capture? What should future research in this area focus on?*

**Jelena Pejic:** My sense is that drilling down into some of the thorny issues would be more useful than pursuing a broad, academic approach to the subject matter. Some chapters of the book would lend themselves to such an in-depth “rubber meets the road” examination. Another option would be to try and identify those privacy and data protection principles and rules that could – and should – be applicable in armed conflict, such as lawfulness, purpose limitation, minimization, storage limitation, data security and accountability, to name a few. Whatever path may be chosen, there is much work ahead.

**Marko Milanovic:** The book does its task admirably, but there will always be questions open for further research: first, the regulation of intelligence gathering – including intelligence sharing – from the standpoint of IHRL but during armed conflict; second, the issue of privacy of PoWs that the book already examines, which will inevitably get litigated in the near-to-medium term; third, cyber attacks that destroy or exfiltrate private data or otherwise impact private life, for example the leaking of the health-related information of enemy officials online. Note how in terms of IHL this issue has so far been analyzed from the perspective of whether data can constitute a (civilian) object, but from an IHRL perspective this is irrelevant – even if data is not an object, and destroying it does not constitute an attack within the meaning of IHL, destroying it could nonetheless violate the human right to privacy. Finally, there is the issue of extraterritorial application of IHRL in situations of armed conflict to violations of privacy, where again the Ukraine conflict is an instructive case study.

**Eduardo Ustaran:** The book demonstrates that the data activities which take place during armed conflict require a multi-pronged approach to regulation that combines various existing frameworks and regulatory approaches. In my view, the complexities of such data activities are best addressed through the interlinked combination of IHL, human rights law and existing data protection law. Flowing from the issues discussed above, perhaps the area that may merit a more in-depth analysis in future books is the role of data protection law in regulating the use of personal information in armed conflict. Data protection law, understood as the

5 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, 2018 ed., pp. 101, 111.

body of law tasked with regulating the use and protection of personal information, is likely to play an increasingly relevant role in this particular context.

In this regard, it would be extremely interesting to explore how the principles, rights and accountability obligations that are present in the GDPR and similar frameworks can and should be adapted to deal with the use of data in times of armed conflict. Specific and well-established principles such as fairness, purpose limitation and data minimization are likely to play a truly vital role in this environment. The scope of data protection rights – in particular, newer rights such as the right to object to automated decision-making – should be explored, as well as the most appropriate governance processes that State and private-sector actors would need to deploy to ensure observance of universal principles. There is much that can be learnt from the responsible use of data in peacetime and that could be successfully deployed during armed conflicts. Ultimately, through the combination of legal approaches and the deployment of tried and tested data protection practices, it may be possible to limit some of the horrors of war in the data realm.



## REPORTS AND DOCUMENTS

# Some key documents on the ICRC's response to armed violence and more

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The purpose of this section is to share, in a consolidated format, relevant and public documentation pertaining to the theme of armed violence and the ICRC's operational response to the phenomenon.

### Literature on armed violence

1. Review issue on “Urban Violence”, Vol. 92, No. 878, 2010, available at: <https://international-review.icrc.org/reviews/irrc-no-878-urban-violence>.
2. ISS and ICRC joint report, *Urban Violence and Humanitarian Challenges*, 2012, available at: [www.iss.europa.eu/sites/default/files/EUISSFiles/Urban\\_violence\\_and\\_humanitarian\\_\\_challenges.pdf](http://www.iss.europa.eu/sites/default/files/EUISSFiles/Urban_violence_and_humanitarian__challenges.pdf).
3. ICRC policy document, *The International Committee of the Red Cross's (ICRC's) Role in Situations of Violence below the Threshold of Armed Conflict*, 2014, available at: <https://international-review.icrc.org/sites/default/files/irrc-893-policy.pdf>.
4. ICRC briefing paper, *Urban Violence and the ICRC's Humanitarian Response*, 2016, available at: [www.icrc.org/en/publication/urban-violence-and-icrcs-humanitarian-response](http://www.icrc.org/en/publication/urban-violence-and-icrcs-humanitarian-response).
5. ICRC policy paper, *Armed Violence and the New Urban Agenda: The ICRC's Recommendations for Habitat III*, 2016, available at: [www.icrc.org/fr/node/20409](http://www.icrc.org/fr/node/20409).

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## Literature on the ICRC's operational response to armed violence

1. ICRC article, "Rio Project: Programmes Helped Reduce Humanitarian Impact of Violence in Rio de Janeiro", 2016, available at: [www.icrc.org/en/document/rio-project-programs-helped-reduce-humanitarian-impact-violence-rio-de-janeiro](http://www.icrc.org/en/document/rio-project-programs-helped-reduce-humanitarian-impact-violence-rio-de-janeiro).
2. ICRC report, *Safer Access for Public Essential Services*, 2018, available at: [www.icrc.org/en/publication/safer-access-public-essential-services-report](http://www.icrc.org/en/publication/safer-access-public-essential-services-report).
3. ICRC video, "Urban Violence in Latin America: What Is It? What Is the ICRC Doing about This Problem?", 2019, available at: [www.icrc.org/en/document/urban-violence-latin-america-what-it-and-what-icrc-doing-about-problem](http://www.icrc.org/en/document/urban-violence-latin-america-what-it-and-what-icrc-doing-about-problem).
4. Article by ICRC head of mission in Honduras, "Honduras: Seeking Durable Solutions for People Displaced by Violence", 2021, available at: [www.icrc.org/en/document/honduras-seeking-durable-solutions-people-displaced-violence](http://www.icrc.org/en/document/honduras-seeking-durable-solutions-people-displaced-violence).
5. ICRC report, *Mexico: Humanitarian Report 2022*, 2022, available at: [www.icrc.org/en/document/armed-violence-mexico-and-central-america-continues-cause-large-scale-suffering](http://www.icrc.org/en/document/armed-violence-mexico-and-central-america-continues-cause-large-scale-suffering).
6. ICRC infographic, "AMS in Figures: The Safer Access Program for Essential Public Services, Overview 2016–2022", 2022, available at: [www.icrc.org/en/document/brazil-ams-in-figures](http://www.icrc.org/en/document/brazil-ams-in-figures).
7. ICRC, "The Safer Access to Essential Public Services Programme: Executive Summary", 2023, available at: [www.icrc.org/en/publication/safer-access-essential-public-services-programme-executive-summary](http://www.icrc.org/en/publication/safer-access-essential-public-services-programme-executive-summary).
8. ICRC paper, *Present and Engaged: How the ICRC Responds to Armed Conflict and Violence in Cities*, 2023, available at: [www.icrc.org/en/publication/4666-present-and-engaged-how-icrc-responds-armed-conflict-and-violence-cities](http://www.icrc.org/en/publication/4666-present-and-engaged-how-icrc-responds-armed-conflict-and-violence-cities).
9. ICRC video (in Portuguese), "Trajetória: Os impactos invisíveis da violência armada", 2023, available at: [www.youtube.com/watch?v=i8HTsK2WlR8](https://www.youtube.com/watch?v=i8HTsK2WlR8).

## REPORTS AND DOCUMENTS

# ICRC report on *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and Examples of How to Implement Them*

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Detention – by States and non-State armed groups (NSAGs) – is a reality in armed conflict. In 2021, the International Committee of the Red Cross (ICRC) estimated that around 100 armed groups were holding detainees. Detention puts people in a vulnerable situation: their lives and dignity depend on the detaining authority. Experience shows that detention by NSAGs often presents legal and practical challenges, ranging from a lack of knowledge of international rules and standards on detainee protection, in particular those found in international humanitarian law (IHL), to practical challenges such as how to ensure humane conditions of detention in the dire realities of armed conflict, or how to provide essential judicial guarantees for persons facing criminal charges.

The ICRC's new report on *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and Examples of How to Implement Them* presents research conducted by the ICRC on the law and

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

practice relating to detention by NSAGs.<sup>1</sup> It restates the legal framework for the protection of detainees in non-international armed conflict based on international humanitarian treaties and customary law. At the heart of this publication are a set of examples of measures that NSAGs have taken – or aim to take – to implement their IHL obligations, based on NSAG practices, reported practices and doctrine. These examples were identified from practices witnessed by the ICRC when visiting detainees held by NSAGs; interviews conducted by the ICRC with representatives of sixteen NSAGs; laws, codes of conduct, policies or other documents developed by NSAGs; and practices cited in public reports and academic research. In the study, the emphasis is put on the actual practices, reported practices and doctrine of NSAGs that display an effort to comply with the IHL obligations in question; the research does not focus on practices or doctrine that are contrary to IHL, except where the presentation of IHL violations is deemed helpful to explain misunderstandings of the law.

It is hoped that this study will provide evidence-based examples of how NSAGs can respect and protect detainees. It may also be of interest for States that are considering helping non-State parties to armed conflicts to protect detainees, humanitarian organizations working for the protection of detainees, and researchers working on related issues.

1 The report is available at: [www.icrc.org/en/document/detention-non-state-armed-groups](http://www.icrc.org/en/document/detention-non-state-armed-groups).

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