# International Humanitarian Law Rules, Controversies,and Solutions to Problems Arising in Warfare

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**How to cite**

SASSÒLI, Marco. International Humanitarian Law Rules, Controversies,and Solutions to Problems Arising in Warfare. Cheltenham : E. Elgar, 2019. (Principles of International Law) doi: 10.4337/9781786438553

This publication URL: https://archive-ouverte.unige.ch/unige:120551
Publication DOI: 10.4337/9781786438553

# INTERNATIONAL HUMANITARIAN LAW

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International Humanitarian Law
Rules, Solutions to Problems Arising in Warfare and Controversies
*Marco Sassòli*

# INTERNATIONAL HUMANITARIAN LAW

## Rules, Controversies, and Solutions to Problems Arising in Warfare

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PRINCIPLES OF INTERNATIONAL LAW

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2018967382

This book is available electronically in the **Elgar**online
Law subject collection
DOI 10.4337/9781786438553

ISBN 978 1 78643 854 6 (cased)
ISBN 978 1 78643 855 3 (eBook)

Typeset by Sparks – www.sparkspublishing.com

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# EXTENDED CONTENTS

# LIST OF ABBREVIATIONS

| | |
|---|---|
| **Academy Commentary** | Andrew Clapham *et al*. (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) |
| **Academy Handbook** | Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) |
| **ACHR** | American Convention on Human Rights (22 November 1969) 1144 UNTS 123 |
| **ACHPR** | African Charter on Human and Peoples' Rights (27 June 1981) (1982) 21 ILM 58 |
| **Additional Protocols** | Protocol I and Protocol II to the 1949 Geneva Conventions |
| **AJIL** | American Journal of International Law |
| **Art** | Article |
| **ATT** | Arms Trade Treaty (2 April 2013) (2013) 52 ILM 988 |
| **AU** | African Union |
| **Bothe/Partsch/Solf Commentary** | Michael Bothe *et al*., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, reprint revised by Michael Bothe, Martinus Nijhoff 2013) |
| **BYBIL** | British Yearbook of International Law |
| **CCW** | Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (10 October 1980) 1342 UNTS 137 as amended by Amendment 1 of the CCW (21 December 2001) 2260 UNTS 82 |
| **CCW Protocol II on Non-Detectable Fragments** | Protocol on Non-Detectable Fragments (Protocol I) (10 October 1980) 1342 UNTS 168 |
| **CCW Protocol I on the Use of Mines, Booby-Traps and Other Devices** | Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II) (3 May 1996) 2048 UNTS 93 |

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|---|---|
| **CCW Protocol III on Incendiary Weapons** | Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (10 October 1980) 1342 UNTS 171 |
| **CCW Protocol IV on Blinding Laser Weapons** | Protocol on Blinding Laser Weapons (Protocol IV) (13 October 1995) 1380 UNTS 370 |
| **CCW Protocol V on Explosive Remnants of War** | Protocol on Explosive Remnants of War (Protocol V) (28 November 2003) 2399 UNTS 100 |
| **CoE** | Council of Europe |
| **Convention I** | Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 |
| **Convention II** | Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 August 1949) 75 UNTS 85 |
| **Convention III** | Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 |
| **Convention IV** | Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949 (12 August 1949) 75 UNTS 287 |
| **CUP** | Cambridge University Press |
| **Doc** | Document |
| **ECHR** | European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 |
| **ECtHR** | European Court of Human Rights |
| **EHRR** | European Human Rights Reports |
| **EJIL** | European Journal of International Law |
| **EU** | European Union |
| **fn** | footnote |
| **HC** | Hague Convention |
| **HC IV** | Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) |
| **Hague Convention IV** | See HC IV |
| **Hague Convention on Cultural Property** | Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 UNTS 240 |
| **Hague Regulations** | Hague Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention IV (18 October 1907) |

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|---|---|
| **Henckaerts and Doswald-Beck** | Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume 1: Rules* (CUP 2005). Text also available in ICRC CIHL Database listed below. |
| **HPCR Manual** | The Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013) |
| **HR** | See Hague Regulations |
| **HRCtee** | UN Human Rights Committee |
| **HRC** | UN Human Rights Council |
| **GC I** | See Convention I |
| **GC II** | See Convention II |
| **GC III** | See Convention III |
| **GC IV** | See Convention IV |
| **GCs** | Geneva Conventions I to IV of 12 August 1949 |
| **Geneva Conventions** | See GCs |
| **IAC** | International armed conflict |
| **IACommHR** | Inter-American Commission on Human Rights |
| **IACtHR** | Inter-American Court of Human Rights |
| **ICC** | International Criminal Court |
| **ICCPR** | International Covenant on Civil and Political Rights (16 December 1996) 999 UNTS 171 |
| **ICC Statute** | Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 |
| **ICJ** | International Court of Justice |
| **ICJ Statute** | Statute of the International Court of Justice (24 October 1945), annexed to the UN Charter |
| **ICL** | International criminal law |
| **ICLQ** | International & Comparative Law Quarterly |
| **ICRC** | International Committee of the Red Cross |
| **ICRC CIHL Database** | ICRC, 'IHL Database: Customary IHL' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> accessed 11 August 2018 |
| **ICRC Commentary APs** | Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff 1987) |

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| **ICRC DPH Guidance** | Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC 2009) |
| **ICTR** | International Criminal Tribunal for Rwanda |
| **ICTY** | International Criminal Tribunal for the former Yugoslavia |
| **IHFFC** | International Humanitarian Fact-Finding Commission |
| **IHL** | international humanitarian law |
| **IHRL** | international human rights law |
| **ILC Articles on State Responsibility** | 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' in ILC, 'Report of the International Law Commission on the Work of its 53rd Session (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, 26-143 |
| **ILM** | International Legal Materials |
| **ILS** | International Law Studies |
| **IMT** | International Military Tribunal |
| **Intl** | International |
| **IRRC** | International Review of the Red Cross |
| **IYBHR** | Israel Yearbook on Human Rights |
| **J** | Journal |
| **JICJ** | Journal of International Criminal Justice |
| **L** | Law |
| **MN** | Margin Number |
| **MONUSCO** | UN Organization Stabilisation Mission in the Democratic Republic of the Congo |
| **MPEPIL** | Max Planck Encyclopedia of Public International Law |
| **National Societies** | National Red Cross and Red Crescent Societies |
| **NATO** | North Atlantic Treaty Organization |
| **NGO** | Non-governmental organization |
| **NIAC** | Non-international armed conflict |
| **No** | Number |
| **OAS** | Organization of American States |
| **Online Casebook** | Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* (ICRC), regularly updated at <https://casebook.icrc.org> |

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|---|---|
| **Oslo Convention on Cluster Munitions** | Convention on Cluster Munitions (30 May 2008) 2688 UNTS 39 |
| **OSCE** | Organization for Security and Co-operation in Europe |
| **Ottawa Convention on Landmines** | Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997) 2056 UNTS 211 |
| **OUP** | Oxford University Press |
| **para** | Paragraph |
| **Pictet Commentary GC I** | Jean S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952) vol I |
| **Pictet Commentary GC II** | Jean S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1960) vol II |
| **Pictet Commentary GC III** | Jean S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1960) vol III |
| **Pictet Commentary GC IV** | Jean S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952) vol IV |
| **PMSC** | Private military and security company |
| **P I** | See Protocol I |
| **P II** | See Protocol II |
| **P III** | See Protocol III |
| **Protocol I** | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 |
| **Protocol II** | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 |
| **Protocol III** | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (8 December 2005) 2404 UNTS 261 |
| **Protocol I to the Hague Convention on Cultural Property** | Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Protocol I) (14 May 1954) 249 UNTS 358 |
| **Protocol II to the Hague Convention on Cultural Property** | Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999) 2253 UNTS 172 |
| **PUF** | Presses universitaires de France |

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|---|---|
| **POW** | Prisoner of war |
| **Recueil des Cours** | Recueil des Cours de l'Académie de droit international de la Haye; Collected Courses of the Hague Academy of International Law |
| **Rep(s)** | Report(s) |
| **Res** | Resolution |
| **Rev** | Review |
| **San Remo Manual** | Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) |
| **SCSL** | The Special Court for Sierra Leone |
| **The Conventions** | See GCs |
| **UK** | United Kingdom |
| **UN** | United Nations |
| **UN Charter** | Charter of the United Nations (26 June 1945) 1 UNTS XVI |
| **UNESCO** | UN Educational, Scientific and Cultural Organization |
| **UNGA** | UN General Assembly |
| **UNSC** | UN Security Council |
| **Updated ICRC Commentary GC I** | 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* (CUP 2016) |
| **Updated ICRC Commentary GC II** | ICRC, *Commentary on the First Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (CUP 2017) |
| **Updated ICRC Commentary GC III** | ICRC, *Commentary on the First Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (forthcoming, CUP) |
| **US** | United States of America |
| **US Law of War Manual** | US Office of the General Counsel, Department of Defense, 'Department of Defense Law of War Manual' (2015, updated December 2016) |
| **UK Military Manual** | UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) |
| **VCLT** | Vienna Convention on the Law of Treaties (23 May 1969) 1115 UNTS 331 |
| **YIHL** | Yearbook of International Humanitarian Law |
| **YIIHL** | Yearbook of the International Institute of Humanitarian Law |

# ACKNOWLEDGMENTS

The ideas, opinions, understanding of IHL and mistakes contained in this book are exclusively mine (except where a footnote indicates another source). Nevertheless, this book could not have been written without the assistance, contribution and influence of many others, all of whom I would like to thank wholeheartedly.

First and foremost, my research assistant (and doctoral candidate) at the University of Geneva, Patrick S. Nagler, LLM, provided invaluable help by revising my English as well as the references, conducting some research and making countless remarks and suggestions on how the text could be made more easily understandable for the reader and more legally accurate. I did not take all of them into account and therefore any errors or ambiguities are attributable to me. We often intensely debated every single sentence in our common aspiration to make sure that readers understand and do not misinterpret what I wanted to explain. Mr. Nagler's sense of precision, desire for total accuracy and absolute mastery of IHL impressed me every single day while I was writing this book, and I appreciated his constant good humour, flexibility and complete commitment to the project. Interacting with him has been a privilege, and I learned something for life thanks to him beyond just English grammar and style.

The research for a few parts of this book and drafts for a few sub-sections have also been made quietly but highly efficiently by Alessandra Spadaro, who is a doctoral candidate at the Graduate Institute of International and Development Studies. Some of the secretarial work was made patiently, rapidly and always with a smile by my secretary at the University of Geneva, Edith Muerrlé.

In the conception of this book and in its production, I also had the privilege of being encouraged and unfailingly supported by the pragmatic and flexible yet principled team of Edward Elgar Publishers, in particular Laura Mann, Stephanie Tytherleigh and Luke Adams. I also thank Tom Fryer and Richard Walshe from Sparks Publishing Services Ltd for having ensured rapid, consistent and non-invasive copy editing.

As often mentioned in this book's footnotes, my thinking on several issues has been profoundly influenced, and sometimes even completely modified, by the results of the research made by my former and current doctoral students in view of their PhD theses, many of whom have also been or still are my teaching assistants at the University of Geneva: Lindsey Cameron, PhD; Djemila Carron, PhD; Julia Grignon, PhD; Christiane Johannot-Gradis, PhD; Zakaria Daboné, PhD; Sharon Weill, PhD; Anne Quintin, LLM; Elvina Pothelet, LLM; Yvette Issar, LLM; Sophie Rondeau, LLM; Anaïs Maroonian, Master in Law; Carlos Sibille Rivera, LLM; and Eugénie Duss, Master in Law. My thanks go also to Théo Boutruche, PhD, Professor Andreas Ziegler and Ms Nele Achten who have graciously reviewed certain sections.

Questions, which were sometimes critical but more often simply expressed the desire to understand, asked by my LLM students at the Geneva Academy of International Humanitarian Law and Human Rights as well as by my Master and Bachelor students at the University of Geneva and the Université du Québec à Montréal were also invaluable. In particular, their questions helped me understand the issues of IHL that learners do not comprehend, what must be explained and the concepts that are especially confusing as well as issues that I myself do not really understand because I am unable to explain them in an intelligible way.

Before joining academia, I was first exposed to IHL through my work with the International Committee of the Red Cross (ICRC), where I had the privilege to serve for 13 years at both its headquarters and in conflict areas. My supervisors, colleagues and subordinates in the ICRC, my interlocutors from States (in particular their militaries), armed non-State actors and, above all, those who were hopefully the beneficiaries of my work made indelible marks on the mixture between pragmatism and a principled approach that transpires everywhere in this book. It is only with hesitation, a feeling of humility and gratitude that I emancipate myself from what is now the ICRC opinion on certain IHL issues.

Finally, I want to thank the University of Geneva for allowing me to accumulate through my teaching and research the knowledge I try to transmit in this book, granting me a sabbatical that allowed me to write this book and paying Patrick Nagler, without whom, once again, this book would never have been published.

Marco Sassòli
Geneva, 31 August 2018

# READER'S GUIDE

This book has been primarily written for law students willing to familiarize themselves with IHL. However, it may also be used for the same purpose by military, civilian and humanitarian practitioners. It also allows those who already master IHL to obtain a summary of the debates surrounding certain issues through its detailed table of contents, index and numerous cross-references.

For learning purposes, most chapters, sub-chapters and sub-sections are preceded by a bolded overview of key concepts. Each chapter as well as the sub-chapters of Chapters 8 to 10 are meant to be self-contained, that is, they may be understood without studying the other chapters. Teachers may therefore assign only certain chapters for their students to study, preferably combined with the bold introductions of the other chapters.

This book is meant to be used in conjunction with the ICRC's Online Casebook entitled *How Does Law Protect in War?* (Online Casebook), which is accessible for free at the ICRC's website (https://casebook.icrc.org), that I co-authored. Therefore:

1. This book does not contain bibliographies on every subject dealt with. Such bibliographical references can be found in the Online Casebook in a systematic way under 'The Law' and in the index 'A-Z'. A general bibliography on IHL may also be found there (https://casebook.icrc.org/glossary/general-sources-ihl). The bibliographical references of the Online Casebook are currently in the process of being updated. This book provides references to scholarly works and articles only where this is either necessary to avoid plagiarism or, in cases of controversies, to provide references to those who adopt and explain different positions.
2. As for the practice of States, courts, armed groups and NGOs, this book most often refers to the more than 500 cases contained in the Online Casebook, all of which have been carefully edited and may be discussed through the relevant questions that appear at the end of each case. References to such cases are provided with the title under which they can easily be found

in the Online Casebook (for instance, 'Online Casebook, ICJ, Nuclear Weapons Advisory Opinion') instead of the primary source citation (in this example, 'ICJ, Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 66').

It is my hope that the user will not only enjoy reading this book, but, most importantly, that they understand that IHL provides realistic solutions to humanitarian problems arising in armed conflicts. Although armed conflicts are inherently inhumane, the fate of most of those affected by current armed conflicts would be incomparably better if those rules were systematically respected in good faith. I sincerely wish that this book contributes to improving the respect of IHL through enhancing the understanding of IHL by those who apply it as well as by the public at large. To that end, this book equally seeks to explain the values underlying IHL, its inherent limitations, other limitations that are dictated by the current state of the international community and its many complexities.

# TABLE OF INSTRUMENTS

# 1

# INTRODUCTION

IHL protects the life and dignity of persons affected by armed conflicts, but only to the extent States consider their respect to be compatible with the legitimate aim of an armed conflict to weaken the military potential of the enemy. The precise protection offered by IHL depends on the classification of the conflict as international or non-international, the classification of the affected person as a civilian or combatant and many other legal categorizations.

**1.01** IHL is marked by four main features. First, IHL applies only during situations of *armed conflict*, or, in other words, violent situations resulting from a failure of the law that threaten the very survival of the individual, communities or States. Second, IHL mainly protects the life and dignity of persons who are perceived as the *enemies* of one of the parties to the armed conflict. Third, international armed conflicts (IACs) would not exist today if States respected the prohibition of the use of force in international relations, which is one of international law's most important rules. Fourth, IHL is *part of public international law*, which is characterized as a mainly self-administered horizontal legal system that lacks a centralized system of adjudication and enforcement for most of its rules. Consequently, IHL too suffers from the absence of a centralized adjudication and enforcement system. These four features of IHL not only weaken it, but also would make it surprising if the parties to a conflict always respected IHL or if its rules were uncontroversial.

**1.02** Hersch Lauterpacht once wrote that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.'[1] Nevertheless, one may also consider that IHL necessarily exists as long as armed conflicts exist. In contrast to laws that merely prohibit criminal conduct, international law not only prohibits armed conflicts but also prescribes how armed conflicts should be conducted. Indeed, IHL is one of the oldest branches of public international law.

1 Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BYBIL 360, 381–2.

**1.03** IHL is less humanitarian than peacetime law by necessity because it must be sufficiently adapted to the dire reality of armed conflicts. It may therefore be better to refer to IHL as the laws of war or laws of armed conflict as the military, one of the main societal groups that use and apply IHL, prefers to call it. Its substantive rules try to limit the use of violence in armed conflicts by:

1. prohibiting the use of violence against persons who do not or who no longer directly participate in hostilities (therefore all persons in the power of the enemy must be treated humanely at all times); and
2. restricting the level of violence to the amount necessary to achieve the only legitimate aim of the conflict, which is to weaken the military potential of the enemy.

**1.04** These two objectives generate not only specific principles of IHL but also highlight some of its limitations:

1. the separation between the rules on the legitimacy of resorting to an armed conflict (*jus ad bellum*) and the rules on how armed conflicts must be conducted (*jus in bello*) to which IHL belongs;
2. the distinction between civilians and combatants;
3. the prohibition against attacking persons who are *hors de combat*;
4. the prohibition against inflicting superfluous injury or unnecessary suffering; and
5. the principles of necessity and proportionality.

**1.05** As a result of the separation between *jus ad bellum* and *jus ad bello*, IHL applies independently of the legitimacy of the cause for which a party or an individual is fighting. This separation implies a key limitation of IHL (at least from the viewpoint of those who are fighting): it imposes the same legal obligations on all parties to a conflict while concurrently providing equal protection to all persons affected by the conflict, irrespective of whether the parties or individuals are fighting for a just or unjust cause.

**1.06** The distinction between combatants and civilians, in turn, highlights another important limitation of IHL: as combatants are part of the military potential of the enemy whereas civilians are not, IHL cannot protect both civilians and combatants in the same manner. The criterion for distinguishing between the two main categories of individuals is, at least in modern IHL, not based on innocence or guilt but rather on status in IACs and a controversial mixture of affiliation as well as conduct in non-international armed conflicts (NIACs).

**1.07** Finally, the prohibition against inflicting superfluous injury or unnecessary suffering implies a further limitation from a humanitarian point of view: IHL does not prohibit violence or even deliberate infliction of suffering as long as such actions are indispensable for achieving the legitimate aim of weakening the enemy's military potential.

**1.08** The foregoing principles and resulting limitations demonstrate not only the inevitable constraints of IHL but also its underlying rationale – a rationale that ultimately fails if the parties to the conflict have aims that are either irrational or inherently incompatible with IHL.

**1.09** A great IHL expert, Eric David, once noted that IHL is characterized both by its simplicity and its complexity.[2] Fortunately, one does not have to study this book to understand many of IHL's most important rules for those affected by armed conflicts as most of those rules are relatively simple and straightforward. Indeed, one does not have to be a lawyer to understand that it is prohibited to torture, rape or summarily execute detainees as well as to deliberately attack or starve civilians, although the limitation of the last two prohibitions to civilians already requires complex distinctions that will be discussed in this book. If such simple rules are violated, it is not because the rules are unknown or misunderstood, but because they are not respected. This book will therefore extensively discuss compliance with IHL and the legal means to improve such compliance before even addressing IHL's substantive rules. I would like to take this opportunity from the outset to apologize to the reader that this book will focus on IHL's complexities and nuances. Indeed, determining the exact IHL rules that apply as well as the extent and sometimes even the very existence of protection offered by IHL depends upon making sophisticated distinctions that require answering several questions, in particular:

1. whether an international or non-international armed conflict exists;
2. whether the individual affected by the conflict is a civilian or a combatant;
3. whether that person is in the power of the party affecting him or her;
4. whether a civilian is found in a State's own territory or in an occupied territory;
5. whether such a civilian is interned for imperative security reasons, to await trial or to serve a sentence;
6. whether a civilian affected by hostilities was directly targeted or only an incidental victim of an attack and, in the latter case, what was actually targeted and how important that target was for the attacker's military aims.

2 Eric David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 975.

**1.10** It is therefore easily understandable why more than 600 pages are needed to explain IHL's complexities and nuances, the interplay of IHL with other branches of international law and all of its legitimate as well as unfounded legal controversies. This book emphasizes:

1. problems relating to IHL's respect, implementation and enforcement;
2. whether rules of IHL of IACs may also be applied in NIACs;
3. the interplay between IHL and rules of other branches of international law;
4. the perspective of non-State armed groups;
5. controversial as well as new issues; and
6. issues that learners typically have difficulties with when simply reading the treaty texts and customary rules identified by the ICRC Customary IHL Study.

**1.11** By opposition, this book only dedicates limited space to summarizing rules that learners may easily understand reading the treaty texts (which are anyway explained in detailed ICRC commentaries), although such rules are crucial to guarantee that persons affected by armed conflicts are afforded a minimum level of respect. Thus, for example, the prohibition of rape, the detailed rules on the treatment of POWs and civilian internees during internment or the prohibition of medical experiments are only mentioned in passing.

# 2

# HISTORY

The idea that wars are subject to rules and limitations has existed for millennia, as it is inherent in the very concept of war. Throughout history, all civilizations and religions have established some rules that today would be qualified as IHL. Even before modern IHL was codified in multilateral treaties, belligerents frequently concluded bilateral agreements or issued unilateral instructions in this field. Following the initiative of Henry Dunant and later the ICRC in the nineteenth century, the first multilateral treaties were adopted in this field. Subsequently, such treaties were periodically extended and adapted to new problems arising in armed conflicts. Today, this branch of public international law is largely codified in the four Geneva Conventions of 1949 as well as in the related Additional Protocols of 1977. While all States are parties to the Conventions, a number of important States have yet to accept the Protocols. Nevertheless, most of the rules contained therein are accepted as customary law. Since the adoption of these treaties, States have been unable to agree on a general revision of IHL to better adapt it to the modern realities of warfare. Even so, more recently, international criminal law (ICL) and the jurisprudence of international criminal tribunals established to implement it, as well as treaties on specific issues such as weapons, children and cultural heritage, have contributed to the progressive development of IHL's rules and mechanisms. States and scholars also consider that customary law has developed over the last 30 years and that such rules are largely the same for IACs and NIACs.

**2.01** Warfare since times immemorial has been subject to rules and limitations contained in religious precepts, customary practices (which were not yet distinct from customary law), codes of honour and local or temporary agreements between adversaries. As far back as the seventeenth century BCE, the famous code of the Babylonian king Hammurabi set forth rules protecting the weak from the strong in warfare. All civilizations and religions have established some rules protecting enemies during times of war. Many ancient texts, such as the Mahabharata, the Bible and the Koran, contain rules advocating mutual respect between adversaries. The great Chinese military thinker Sun Tzu mentions that respecting prisoners and the wounded is part of the 'Art of War'. In medieval Europe, knights followed rules of chivalry, including the requirement to respect and protect those who could not defend themselves.

**2.02** The ICRC, as the main guardian of IHL, has made great efforts to highlight the existence of precursors to a number of IHL rules across many civilizations to convince parties to contemporary conflicts and individuals involved therein to comply with IHL principles. When the ICRC studies local and regional traditions, including poetry and proverbs, to anchor its dissemination work in the culture of the people it wants to convince on the merits of respecting IHL, it always finds principles and detailed rules of behaviour that run parallel to those of IHL.[1] Admittedly, however, all civilizations committed acts throughout history that today must be considered to be incredibly cruel and horrific. Historical works, including religious texts, may describe such acts without any condemnation or even condone them. In addition, it is generally unclear whether historical customary practices and religious precepts, which are indeed humanitarian even from a contemporary perspective, only protected persons belonging to the same civilization or whether such protection extended to neighbouring civilizations or even to all possible enemies. Bilateral agreements, which were often temporarily concluded between parties to conflicts by their respective military leaders in the field of battle, were more precise and better respected. However, such agreements, the respect of which was subject to reciprocity, first had to be concluded – and even then they did not protect everyone from the effects of war.

**2.03** What is clear is that individuals who claim today that persons affected by war, or at least civilians, were better respected in previous times ignore history. Others who consider that, as Cicero plead unsuccessfully for his client Titus Annius Milo against the accusation of murders committed in a NIAC, 'the laws [were] silent among [those who use] weapons' also ignore history.[2]

**2.04** A decisive change occurred in the second half of the nineteenth century with the initiative of Henry Dunant (Dunant), a Geneva businessman, that resulted in the 1864 Geneva Convention. As always in history, this pivotal change was not only a logical development given the historical context but was also revolutionary for two reasons: it acknowledged for the first time the idea that even wounded members of an enemy's armed forces should be respected and cared for, and it resulted in the adoption of a new kind of instrument – a multilateral

1 See, e.g., ICRC, 'Under the Protection of the Palm: Wars of Dignity in the Pacific' (ICRC 2009); ICRC, 'Somalia: Sparing People from the Spears – How a Radio Show Can Save Lives' (ICRC 2008) (noting that '[t]he ICRC, the Somali Red Crescent Society and local radio stations have together initiated a series of radio spots aimed at spreading public awareness of the Somali customary code of war, known as "Biri-ma-Geydo" (literally, spared from the spear), and the basics of international humanitarian law').

2 Marcus T. Cicero, *Pro Milone*, 4.10.

treaty. Although the 1864 Convention initially covered only the wounded and sick soldiers in the field and only applied during IACs, it laid the necessary foundation for the gradual development of modern IHL.

**2.05** In 1859, Dunant, who merely wanted to meet then French emperor Napoleon III, witnessed by chance a battle that occurred in a village in northern Italy, Solferino, between French, Italian and Austrian forces. He was shocked by the horrific violence of the fighting as well as by the miserable fate of the wounded abandoned on the battlefield without any care. Together with 'the women of Castiglione' from the surrounding villages, who cried the famous slogan 'tutti fratelli' ('they are all brothers'), he tried to alleviate their suffering.

**2.06** Back in Geneva, Dunant published a short book in 1862 entitled *A Memory of Solferino*[3] in which he not only impressively described the horrors of the battle but also successfully suggested ways to remedy to the abject suffering he had witnessed. He suggested the creation of the Red Cross, but he also appealed to States 'to formulate some international principle, sanctioned by a Convention inviolate in character' giving legal protection to wounded soldiers in the field.[4] A few months after publication, a small committee, which was the precursor to the ICRC, was founded in Geneva, Switzerland, with the main objective of examining the feasibility of Dunant's proposals and identifying ways to formalize them. After having consulted military and medical experts in 1863, the committee persuaded the Swiss Government to convene a diplomatic conference, which was held in Geneva in August 1864 and which resulted in the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864.

**2.07** With the adoption of the 1864 Geneva Convention, States agreed to limit – for the first time in history – their own power in favour of the individual in wartime in an international treaty open to universal ratification. War had finally become subject to written law of general applicability. And so modern IHL was born. While modern IHL was largely codified at first in treaties, the adoption of these treaties over time decisively influenced the development of customary law applicable to the conduct of war by States not parties as well as to situations not covered by a particular treaty's material field of application.

3 Henry Dunant, *A Memory of Solferino* (Reprint edn, ICRC 1986).
4 Ibid., 126.

**2.08** Since 1864, the treaty law – and the resulting customary law – governing armed conflicts developed spectacularly in four key ways. First, the categories of war victims protected by IHL steadily expanded with the adoption of several multilateral instruments. The first multilateral IHL treaty adopted in 1864 protected wounded and sick members of the armed forces on land, while the same protection extended to wounded, sick and shipwrecked members of the armed forces at sea in 1899. Wounded, sick and shipwrecked civilians, however, only benefitted from the protection of some IHL rules beginning in 1949 with the adoption of Convention IV and had to wait until the adoption of the Protocols in 1977 to benefit from the same protection previously provided to members of the armed forces. IHL first governed the protection of prisoners of war with the adoption of the Hague Regulations in 1899 and later in 1929 with the adoption of an entire Geneva Convention dedicated to the issue. Some rules contained in the Hague Regulations adopted in 1899 and revised in 1907 protected civilians located in occupied territories, while only Convention IV adopted in 1949 established a more comprehensive regime protecting such civilians and established for the first time a regime protecting civilians in the enemy's own territory. Civilians threatened by attacks or bombardments, however, were covered only very summarily in 1899 and 1907 and had to wait until the adoption of Protocol I in 1977 to benefit from a comprehensive protection regime.

**2.09** Second, the protection of war victims under both conventional and customary IHL, which traditionally only protected victims during IACs, gradually extended to victims of all NIACs. Already in 1863, the US adopted an important unilateral instrument – the 1863 Lieber Code – based upon customary law applicable in IACs to mitigate the effects of the US Civil War. The Lieber Code contained many rules that would later be incorporated into IHL treaties. Apart from this unilateral instrument, IHL only applied to NIACs if the government fighting against insurgents issued a declaration recognizing the latter's belligerency. It was only in 1949 with the adoption of Article 3 common to the Conventions, however, that the automatic applicability of some IHL rules to all NIACs without any declaration of belligerency was accepted. Although NIACs have become much more frequent than IACs since World War II, it was not until 1977 that States adopted an entire treaty – Protocol II – dedicated to NIACs. Even so, Protocol II is still rudimentary when compared to Protocol I, which was adopted in the very same year to cover IACs.

**2.10** Third, IHL treaties have been regularly updated and modernized to account for the realities of recent conflicts. Rules protecting the wounded initially adopted in 1864 were revised in 1906, 1929, 1949 and 1977. The rules protecting

prisoners of war, which were first formulated in the Hague Regulations of 1899 and 1907, were updated based upon the experiences of World War I in the Geneva Convention of 1929, revised in 1949 due to the experiences of World War II and then adapted in some respects to the realities of guerrilla warfare in 1977. As for civilians, the Hague Regulations of 1907 mainly protected civilians located in an occupied territory. It is tragic that the outbreak of World War II prevented the submission of a draft convention protecting all civilians, which was adopted in 1934 during an International Red Cross Conference held in Tokyo, to a diplomatic conference that was supposed to convene in 1940. It was not until the adoption of Convention IV in 1949 that a comprehensive regime protecting civilians in the power of an enemy in either the enemy's own territory or in territory occupied by that enemy came into effect. Civilians, however, had to wait even longer – until 1977 – to benefit from a coherent protection regime against the effects of hostilities.

**2.11** Reflecting upon the aforementioned developments, some critics charge that IHL is always one war behind reality. Indeed, only after a major conflict or group of conflicts did former parties to armed conflicts agree to be bound by treaties that, if respected, would have avoided much of the suffering resulting from past conflicts. For example, if the Geneva Convention of 1929 had been adopted prior to World War I, it would have prevented or a least mitigated the abuses prisoners of war experienced during that conflict. Likewise, adoption of Convention IV prior to World War II would have avoided, if respected, the suffering of civilians at the hands of Nazi Germany, Imperial Japan and Fascist Italy. Similarly, the Protocols would have offered protection to the numerous victims of the post-World War II wars of decolonization that had largely concluded by 1977.

**2.12** On the other hand, the fact that diplomats and military officers used the practical experience they obtained during prior conflicts to develop new IHL treaties ensured the development of treaties with realistic rules. In addition, since 1859, protective measures based on practical battlefield experience suggested at first by Dunant and then by the ICRC were often implemented first in practice before being codified in treaties. This way of proceeding also ensured the development of realistic rules that States would actually adhere to and that corresponded to the actual protection needs of those affected by prior conflicts.

**2.13** The benefits of adopting treaty rules after a conflict to address the humanitarian problems that appeared in the previous war is, however, subject to an important limitation: the victors, while willing to tackle the humanitarian problems

highlighted by the wartime conduct of the vanquished, often resisted the adoption of rules that they believe would have morally condemned their own conduct. Thus, Convention IV's title, indicating that it contains rules 'relative to the protection of civilian persons in time of war', promises more protection than its provisions have actually delivered. While it adequately protects civilians against abuses by an occupying power, it could not deal with the protection of civilians against aerial bombardments because both the Axis Powers and the Allies committed indiscriminate aerial bombardments during World War II against Warsaw, Amsterdam and Coventry as well as Hamburg, Dresden and Tokyo, respectively. Rules protecting civilians from such attacks could therefore only be adopted in Protocol I. Notably, however, the use of nuclear weapons has even never been explicitly covered by an IHL treaty.

**2.14** Fourth, prior to the adoption of Protocol I in 1977, IHL existed as two separate sub-branches of law:

1. Geneva Law, which was codified and developed in successive waves of Geneva Conventions, mainly concerned the protection of the victims of armed conflicts (that is, non-combatants and those who no longer take part in the hostilities) once they were in the power of a party; and
2. Hague Law, originating in the Hague Regulations of 1899 and 1907, regulated the conduct of hostilities by mainly protecting persons who are not yet in the hands of a party but rather targeted and affected by its warfare as well as establishing limitations or prohibitions of specific means (in other words, weapons) and methods (that is, tactics) of warfare.

**2.15** This distinction between rules on the protection of persons in the power of a party and rules on the conduct of hostilities is still important today[5] because, among other things, it is much easier to assess violations of the former than of the latter. Today, however, the Geneva Law and the Hague Law have been merged with the adoption of Protocols I and II in 1977.

**2.16** As a result of this merger, modern IHL treaty law now consists of:

1. certain provisions of the Hague Regulations of 1907 that are still important, particularly the rules concerning the administration of occupied territories;
2. the Geneva Conventions of 1949:

5 See MNs 3.32–3.33.

a. Convention I protecting the wounded and sick on land;
b. Convention II protecting the wounded, sick and shipwrecked at sea;
c. Convention III protecting prisoners of war; and
d. Convention IV protecting civilians, though most of its rules apply only if they are in the hands of the enemy;

3. the Additional Protocols of 1977:

   a. Protocol I protects victims of IACs (including national liberation wars) by:

      i. Developing certain rules established by the 1949 Conventions;
      ii. Adapting IHL to the realities of guerrilla warfare;
      iii. Prescribing for the first time a comprehensive regime protecting the civilian population against the effects of hostilities; and
      iv. Updating and establishing more detailed rules relating to the conduct of hostilities initially contained in the Hague Regulations of 1907; and

   b. Protocol II protects of victims of NIACs by:

      i. Extending and formulating more precisely the fundamental guarantees contained in Article 3 common to the Conventions that protect all persons who do not or who no longer actively participate in hostilities; and
      ii. Containing some basic rules protecting the civilian population against the effects of hostilities; and

4. Protocol III of 2005, which merely introduced an additional emblem to mark medical personnel, units and transports.

**2.17** It is undeniable that most States from the Global South were still under colonial domination when most modern IHL treaties were adopted and when many rules of customary IHL developed, and thus had no say on the content of modern IHL rules. In my view, this is not a sufficient reason to criticize modern IHL as being Eurocentric. First, most States from the Global South also had no input in the development of most rules of the other traditional branches of public international law (for example, the law of treaties, the law of the sea, diplomatic and consular immunities, refugee law and jurisdiction). Second, as mentioned above, many of modern IHL rules reflect common values shared

by all civilizations. Third, all States, including those previously under colonial rule, are now parties to the Conventions, and have therefore consented to the rules contained therein. Fourth, and most importantly, the diplomatic conference held between 1974 and 1977 in Geneva to elaborate the Protocols offered all newly independent States at that time the occasion to have their say and it allowed them to prevail on many issues important to them, such as the extension of IHL rules applicable in IACs to national liberation wars,[6] the relaxation of the obligation of guerilla fighters to distinguish themselves from the civilian population[7] and the denial of combatant as well as POW status to mercenaries.[8] For other rules, the diplomatic conference offered the Global South an occasion to manifest their ownership of older rules previously adopted without their input. Fifth, an ICRC study demonstrates that the official practice of countries from the Global South supports rather than challenges the overwhelming majority of IHL rules.[9] Therefore, while the treaty and customary rules of modern IHL developed in Europe (and to a certain extent in the Americas), their content is not Eurocentric.

**2.18** Since 1977, and for the first time since 1859, the general IHL treaty regime has not been updated for more than 40 years even though warfare has dramatically developed since then. This may be explained in part by the fact that one of the key issues today it is not a lack of adequate substantive rules protecting victims of armed conflicts but rather the failure to respect such rules. In addition, States are no longer ready to agree by consensus to updated rules that restrain their ability to wage war, particularly in the NIAC context. Experts widely agree that today States would not have adopted either Common Article 3, which is binding on all States and explicitly addressed to all parties to NIACs (which include not only States but also non-State armed groups, including, insurgents, terrorists and revolutionary movements), or the rules of Protocol I. We are therefore sentenced to live with those treaty rules. Attempts to create new implementation and compliance mechanisms in IHL have equally failed.[10]

**2.19** Today, while some claim that IHL is ill-adapted to contemporary conflicts, they fail to proffer specific suggestions as to either the rules that should be replaced or modified or the content of any new rules. Some of the proponents who argue

6 See P I, Art 1(4).
7 P I, Art 44(3).
8 P I, Art 47.
9 Henckaerts and Doswald-Beck, which is regularly updated at the ICRC CIHL Database.
10 See ICRC, 'No Agreement by States on Mechanism to Strengthen Compliance with Rules of War' (2015); Helen Durham, 'Strengthening Compliance with IHL: Disappointment and Hope' (*ICRC, Humanitarian Law & Policy Blog* 2018).

that IHL has failed to keep pace with modern conflicts implicitly request that exceptions should be made to the detriment of some categories of persons (for example, terrorists) and that some existing obligations should be weakened when fighting enemies who systematically violate IHL. Others, however, hold that IHL is not protective enough, arguing instead that IHL rules on the use of force and detention should be aligned with parallel rules in IHRL and that additional categories of weapons should be prohibited. Finally, some people wonder whether it is realistic to expect armed groups to implement the existing IHL rules applicable in NIACs, all the more so as such groups have no say in the development of those rules governing their conduct.

**2.20** Nevertheless, the development of IHL has not come to a halt since 1977. First, several treaties since 1977 limit the use of certain weapons or, more recently and more importantly, outlaw the production, use and stockpiling of certain weapons. In particular, various Protocols to the 1980 Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons (CCW, which was revised in 2001 to extend to NIACs):

1. Outlaw laser weapons (1995)[11] and weapons employing non-detectable fragments (1980);[12]
2. Limit the use of anti-personal landmines (1980, revised in 1996);[13]
3. Limit the use of incendiary weapons (1980);[14] and
4. Address explosive remnants of war (2003).[15]

**2.21** More recently, the 1997 Ottawa Convention bans the use of anti-personnel landmines,[16] while the 2008 Oslo Convention prohibits the use of cluster munitions.[17]

**2.22** Second, recently established international criminal tribunals, in particular for the Former Yugoslavia (1993) and Rwanda (1994) as well as the International Criminal Court (ICC, 2002), have not only made an important contribution to the enforcement of IHL by holding individuals criminally responsible for IHL violations that constitute war crimes, but have also clarified many legal issues in IHL through their respective jurisprudence. Third, the ICRC, after

11 CCW Protocol IV on Blinding Laser Weapons.
12 CCW Protocol I on Non-Detectable Fragments.
13 CCW Protocol II on the Use of Mines, Booby-Traps and Other Devices.
14 CCW Protocol III on Incendiary Weapons.
15 CCW Protocol V on Explosive Remnants of War.
16 Ottawa Convention on Landmines.
17 Oslo Convention on Cluster Munitions.

studying official State practice for 10 years, published a study on customary IHL in 2005 that identified 161 rules of customary IHL, out of which at least 136 (if not 141) are also considered applicable to NIACs, despite the fact that many of the customary rules identified by the study resemble the treaty rules of Protocol I applicable only to IACs.[18] Fourth, the 1999 Protocol II to the 1954 Hague Convention on Cultural Property[19] updated and modernized the rules protecting cultural heritage in armed conflicts previously established by the Hague Convention and its Protocol I. Finally, in 2000, the Optional Protocol (OPAC) to the Convention on the Rights of the Child (CRC)[20] updated and strengthened the rules against recruitment and participation of children in armed conflicts.

18 See generally ICRC CIHL Database.

19 Protocol II to the HC on Cultural Property.

20 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) 2173 UNTS 222.

# 3

# A GENERAL OVERVIEW OF IHL BASED UPON ITS MAJOR DELIMITATIONS

**3.01** The purpose of this chapter is to provide an overview of IHL by highlighting the major delimitations specific to this branch of public international law. The rules mentioned in this overview will be discussed in more detail in Chapter 8 on IHL's protective regimes, while specific delimitations, their impact and related controversies will be discussed further in Chapter 6 on IHL's scope of application as well as in Chapter 7 addressing the differences and similarities between IHL of IACs and IHL of NIACs.

## 3.1 IHL APPLIES ONLY TO ARMED CONFLICTS

> Most IHL rules, in particular those protecting persons and objects from abuse, apply only in armed conflicts and only if the conduct in question is linked to the conflict. Armed conflicts can be of an international or non-international character.

**3.02** IHL largely applies only during armed conflicts. Most IHL rules regulating conduct can only be invoked if an armed conflict exists and the conduct to be regulated has the requisite link, or nexus, to that conflict. Otherwise, only peacetime law, in particular IHRL, applies. Although IHRL is more restrictive and provides better protection to individuals from abuse, its application is less realistic in situations of armed violence, and it is traditionally considered to apply only to States and not to armed non-State actors.[1]

**3.03** Some IHL rules, however, apply even outside of armed conflict; except for the rules on the use of the emblems in peacetime, this is the case because an armed conflict existed, exists elsewhere or may occur in the future.[2] Apart from these exceptions, the existence of an armed conflict is a necessary precondition for the application of most IHL rules. There exists, however, no single definition of

1 See MNs 9.023–9.025.
2 See MN 6.45.

armed conflicts. Rather, there are two categories of armed conflicts: IACs and NIACs.

## 3.2 THE THRESHOLD OF APPLICATION IN IACS VERSUS NIACS

IHL of IACs applies to any use of force between States, whether directly or through armed groups over which they have control, as well as to belligerent occupation even if it does not meet with armed resistance. In contrast, for IHL of NIACs to apply, the violence must not only be much more intense than what is necessary to trigger an IAC, but it must also occur between one or more States, on the one hand, and a sufficiently organized armed group, on the other hand, or between such groups. IHL treaties are much more developed and detailed for IACs than for NIACs, while customary IHL is increasingly considered to be similar for both types of armed conflict except with regard to rules relating to combatant and POW status as well as to belligerent occupation.

**3.04** IACs are fortunately rare in the contemporary world. Such conflicts are fought between opposing States, either directly or indirectly in cases in which one State has the requisite control over an armed group fighting against the government of another State.[3] IACs include traditional 'wars' as well as belligerent occupation, which is equally subject to the IHL of IACs even when it does not meet with armed resistance. Protocol I extends the application of the IHL of IACs to national liberation wars.

**3.05** Today, most armed conflicts are NIACs. Referring to NIACs as 'internal' armed conflicts leads to confusion as such conflicts may involve several States fighting on the same side and may take place across the territories of several States. Indeed, the concept of NIACs includes not only internal civil wars (including between non-State armed groups without government involvement) but also extraterritorial armed conflicts conducted by one or more States against a non-State armed group, such as the conflict in Afghanistan between NATO member States and the Afghan government, on the one hand, and the Taliban, on the other hand. Contrary to IHL of IACs, which applies according to the prevailing opinion as soon as one State commits any act of violence against another State, IHL of NIACs only applies once a certain level of violence is used by, against or between non-State armed groups that are sufficiently organized.

3 See MNs 6.13–6.21.

**3.06** The vast majority of conventional IHL rules are codified in treaties that apply only in IACs. Out of all the rules in the 1949 Conventions, only Article 3 common to the Conventions (Common Article 3) applies to NIACs as a matter of conventional treaty law. Moreover, Protocol II, which is the only IHL treaty specific to NIACs, applies but only when additional conditions are fulfilled in addition to the two requirements mentioned above. This paucity of conventional rules applicable during NIACs is not an oversight by States. Rather, it is the result of a deliberate decision by States who, in their Westphalian obsession for sovereignty, refused to accept the same or even similar rules for both types of armed conflict.[4] Conversely, most scholars today argue either explicitly or implicitly that the distinction between IACs and NIACs should disappear.[5] Many of them, however, fail to clarify whether the claim inherent in the concept of the modern State that States have a monopoly over the lawful use of violence in their respective territories should be abandoned, even though it has very beneficial effects for those living in a State if properly enforced. Removing the long-standing distinction between IACs and NIACs could result in either granting – contrary to the monopoly mentioned above – combatant immunity from prosecution to insurgents in NIACs for their mere participation in the conflict or the abolishment in IACs of combatant immunity (and therefore POW status).

**3.07** In reality, developments over the last few decades have resulted in the slow but steady merger of the IHL of NIACs and the IHL of IACs. The jurisprudence of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) has been instrumental in initiating this merger. In its first decision in the *Tadić* case, the ICTY held that the majority of IHL rules apply equally in both IACs and NIACs and that, under customary international law, the concept of war crimes is also applicable in NIACs.[6] States accepted this revolutionary finding rather favourably, resulting in the eventual inclusion of a similar list of war crimes capable of being committed in both IACs and NIACs in the 1998 Rome Statute of the International Criminal Court (ICC Statute).[7] States, however, maintained the distinction between the two types of conflict by

4 For the difficulties the ICRC faced in getting Protocol II adopted, see ICRC Commentary APs, paras 4360–418.

5 See, e.g., James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313, 313–50; Lindsay Moir, 'Towards the Unification of International Humanitarian Law?' in Richard Burchill *et al.* (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP 2005) 108–18; Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP 2010) 6–7, 31, 37–46, 171–3.

6 See Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, paras 96–136.

7 Compare ICC Statute, Art 8(2)(a) and (b) with ibid., Art 8(2)(c) and (e).

listing such crimes separately and by omitting for NIACs the crimes of clearly disproportionate attacks and attacks targeting civilian objects. This makes the prosecution of violations of the rules on the conduct of hostilities much more difficult in NIACs than in IACs. Outside the field of ICL, recent IHL treaties relating to the use of certain weapons and on the protection of cultural property establish the same rules for both categories of conflict.[8]

**3.08** In a separate development, the ICRC Customary Law Study concluded that 136 (if not 141) IHL rules out of 161 rules apply with equal force to both types of conflict, although many of those rules resemble the treaty rules Protocol I foresees for IACs.[9] In addition, the increasing influence of IHRL also contributed significantly to this convergence because the classification of a conflict as an IAC or NIAC is technically irrelevant for the application of IHRL.

**3.09** As a result of this merger, the distinction between IACs and NIACs arguably remains only relevant for three issues in IHL. First, combatant and prisoner of war status only exist in IACs and, in contrast to insurgents in a NIAC, combatants may not be punished for the mere fact of having committed acts of hostility in IACs. Second, the concept of occupied territory for which IHL rules protecting civilians are much more detailed is difficult to extend to NIACs. Third, in my view, IHL of NIACs must take into account that it is, unlike IHL of IACs, not only addressed to States but also to non-State armed groups that have a more limited capacity than States to comply with sophisticated rules.[10]

## 3.3 THE INDEPENDENCE OF IHL FROM *JUS AD BELLUM*

IHL applies equally to all parties to an armed conflict, irrespective of any justification for resorting to the use of force and even if the use of force by one side violates the UN Charter or domestic law.

**3.10** Perhaps the most important principle for IHL is the absolute separation between *jus ad bellum* ('the right to wage war') and *jus in bello* ('the law applicable in war'). *Jus ad bellum*, which regulates the legitimacy of the resort to force, should now be referred to as *jus contra bellum* ('the law against war') because international law prohibits the use of force between States as a general rule

8 See CCW, Art 1 (in particular paras 2 and 3), as amended on 21 December 2001 to extend it to NIACs; HC on Cultural Property, Art 19; Protocol II to the HC on Cultural Property, Art 22.

9 See ICRC CIHL Database.

10 See MNs 10.219–10.220.

subject to a few exceptions. In contrast, *jus in bello*, which includes IHL as its most important part, regulates the manner in which warfare is conducted. Any past, present and future theory of the so-called 'just war' relates only to *jus ad bellum* and cannot justify the contention that a party fighting a just war has more rights or fewer obligations under IHL than a party perceived as waging an unjust war. The just war theory is nonetheless frequently used to impliedly support such a contention.

**3.11** The absolute separation of *jus ad bellum* and *jus in bello* has several consequences that will be discussed later in more detail.[11] First, the separation results in the equality of belligerents under IHL. In other words, IHL rules apply in the same way to all parties to a conflict independently of whether or not their respective causes are just under *jus ad bellum*. This highlights the key difference between armed conflicts among equals to which IHL applies and situations of violence exclusively governed by domestic criminal law as well as IHRL rules on law enforcement. Indeed, criminals and the police are not subject to the same rules during law enforcement operations. In contrast, while aggression itself is unlawful, both the first shot fired in an armed conflict and subsequent shots fired as between and against combatants of the parties to a conflict are lawful and governed by identical limitations under *jus in bello*.

**3.12** Second, determining when IHL, including some of its specific legal regimes such as the law of military occupation, applies requires an assessment of the factual situation on the ground, such as, for instance, whether there is armed violence between the armed forces of two or more States or whether the degree of violence by armed groups within a State has reached a sufficient level to be classified as a NIAC. Justifications underlying the resort to violence are wholly irrelevant. Third, arguments concerning *jus ad bellum* cannot be used to interpret IHL. Thus, for example, the proportionality analysis required before launching an attack is the same for a military commander attempting to occupy a town on the territory of the adverse party or a commander trying to liberate an occupied town on his or her own territory. Fourth, as long as it is lawful under *jus ad bellum* to use force for certain purposes (for example, individual or collective self-defence), IHL cannot be developed or interpreted in a way that makes it impossible to achieve those purposes.

**3.13** IHL's independence from *jus ad bellum* obviously cannot be applied literally to NIACs given that international law does not regulate when it is lawful to

11 See MNs 9.097–9.106.

trigger a NIAC. Nevertheless, domestic law provides, by analogy, something similar to *jus ad bellum* in NIACs. As a State's monopoly on the use of force is inherent in the very concept of the Westphalian State, it can be assumed that the national legislation of all States prohibits anyone under their jurisdiction from waging an armed conflict against governmental forces or, except for State organs acting in an official State capacity, against anyone else. While IHL of NIACs is equally binding on all parties to the conflict, including non-State insurgents, it does not require an affected State to treat insurgents and government forces equally under its domestic law. Specifically, while domestic law authorizes government forces to use force, the use of force by insurgents is criminalized even if it complies with IHL. In other words, States may punish members of rebel forces for the mere fact of having directly participated in hostilities. This problem and its consequences will be addressed later when we discuss the status, rights and obligations of armed groups under IHL.[12]

## 3.4 THE FUNDAMENTAL DIFFERENCE BETWEEN CIVILIANS AND COMBATANTS AND THE RESULTING IHL PROTECTION REGIMES

In IACs, civilians and combatants benefit from profoundly different protection regimes during the conduct of hostilities as well as when in the power of the enemy. The distinction between the two categories, however, is increasingly difficult to apply. While the legal concept of combatant does not exist in NIACs, it is increasingly considered that 'fighters' are subject to a different legal regime than civilians.

### 3.4.1 The starting point: the difference between civilians and combatants in IACs

**3.14** At least in IACs, the protection afforded to an individual under IHL largely depends on whether they are a civilian or combatant. Like in common parlance, civilians are defined by opposition to combatants. Combatants are members of armed forces belonging to a party to an IAC. Only combatants have the 'right'[13] to directly participate in hostilities, a 'right' which is often referred to as 'combatant privilege'. Combatants may therefore not be punished for merely participating in hostilities, even if such participation constitutes a crime under the enemy's domestic legislation. This legal consequence of combatant privilege

12 See MN 10.221.

13 As explained in MN 10.009, this is not actually a right within the traditional understanding of the term, which would imply that those attacked must tolerate the exercise of this right.

is called 'combatant immunity'. Civilians, conversely, have no right to directly participate in hostilities and may consequently be punished under the enemy's applicable domestic law for doing so.

**3.15** In contrast to combatants, however, Protocol I and the corresponding rules of customary law protect civilians against attacks except if and for such time as they directly participate in hostilities as well as, to a certain extent, against the incidental effects of attacks. Unlike civilians, combatants – even if they do not pose an actual threat to the enemy at the time of the attack – may be directly targeted at any time until they surrender or are otherwise *hors de combat*. Nevertheless, combatants are protected by a few rules limiting the means (for example, the prohibition against the use of chemical weapons) and methods (for instance, the prohibition of perfidy) of warfare at all times, including even while they fight.

**3.16** Combatants receive full protection from attack only when they become wounded, sick or shipwrecked under the respective provisions of Conventions I and II or, more importantly, as POWs under Convention III upon falling into enemy hands. Indeed, Convention III provides combatants who have become POWs with detailed protection during their internment and also requires their release as well as repatriation at the end of active hostilities. Although Convention III provides extensive protection to POWs, it also explicitly provides parties to a conflict with the right to automatically intern combatants as POWs without any individual procedure for the mere fact that they contribute to (and are an integral part of) the enemy's military potential.

**3.17** While Convention IV provides some measure of protection to all civilians (in particular wounded and sick civilians) located in the warring countries, most of its protective rules only apply to 'protected civilians' or, in other words, civilians who find themselves in the power of the enemy.[14] It should also be noted that most of Convention IV's rules governing protected civilians differ depending on whether the protected civilian is in a belligerent State's own territory or in occupied territory.

**3.18** In contrast to POWs, protected civilians in both own and occupied territory may not be deprived of their liberty except to await trial, to serve a sentence following a criminal conviction or for imperative security reasons. Unlike POWs,

14 For nuances relating to the status of civilians who are nationals of neutral or co-belligerent countries, see MNs 8.154–8.155.

the decision to detain protected civilians under the latter justification must be made using an appropriate procedure on an individual case-by-case basis. These differences between the regime governing detention of combatants and civilians rest on the basic presumption that civilians, in contrast to combatants, do not contribute to the enemy's military potential.

### 3.4.2 The legal regime protecting civilians and fighters in NIACs

**3.19** Combatant status (and therefore POW status) does not technically exist in NIACs. No State accepts that its own citizens waging an armed conflict against its government or each other in its territory have either the right to commit acts of hostility or the immunity from punishment flowing from that right, both of which are inherent to combatant status. Therefore, the rules of IHL applicable in NIACs simply guarantee humane treatment to all persons who do not or no longer actively participate in hostilities, 'including members of armed forces who have laid down their arms.'[15]

**3.20** During the conduct of hostilities in NIACs, direct attacks against civilians are prohibited, and the civilian population enjoys general protection from the dangers arising from military operations. While IHL applicable in NIACs fails to define 'civilians', it is impossible to imagine how 'civilians' could be or even should be defined other than by opposition to individuals who engage in acts of hostility. With regard to the question of who qualifies as a legitimate target of attack, the difficulty in defining who is a combatant in IACs traditionally shifted to the equally difficult task of defining in NIACs the acts that constitute direct participation in hostilities. Today, however, it is increasingly accepted that a kind of status-based approach prevails in NIACs too, albeit in a significantly modified form that is based initially upon certain conduct. According to this approach, members of armed forces as well as members of armed groups are targetable at all times until they surrender or are otherwise *hors de combat*. Members of armed groups are often referred to as 'fighters' (a term which does not appear in any IHL treaty), but the dividing line between such fighters and civilians is subject to controversy.[16] The ICRC suggests that individuals become members of an armed group and are therefore subject to direct attack only if they have a continuous combat function. In addition, civilians in NIACs who are not fighters lose, as in IACs, their protection from direct attack and may be targeted if and for such time as they directly participate in hostilities. The exact

15 GCs, Common Art 3(1).
16 See MNs 10.261–10.267.

conditions amounting to a direct participation in hostilities resulting in such loss of protection, however, remain controversial.

**3.21** The key question that arises once members of non-State armed groups fall into the power of government forces is whether States have the right, as in IACs with respect to combatants, to detain such fighters until the end of active hostilities without using an individualized procedure.[17] Regardless of the answer to that question, it is uncontroversial that such fighters do not benefit from combatant privilege or the protection offered by Convention III.

**3.22** Some States, the US in particular, answer this question affirmatively, using modified IAC terminology to refer to such persons as 'unlawful combatants' or 'unprivileged belligerents'. Others, however, reject such contentions on the basis that applicable IHL treaties, none of which identify a legal basis or procedure for detention, do not provide States with the right to detain fighters in NIACs. Opponents to the controversial unlawful combatant concept therefore argue that, as IHL applicable to NIACs is silent on the issue of detention, IHRL guarantees concerning arbitrary detention apply and must be adhered to. The ICRC, in contrast, follows a mixed approach. According to the ICRC, while IHL provides an inherent legal basis for detaining fighters, that detention is permissible pursuant to the principle of legality only if: (1) an admissible reason allowing detention (the ICRC suggests imperative security reasons by analogy to the IHL rules regulating the detention of civilians in IACs) is provided for by law prior to the detention and (2) the law also establishes an adequate safeguard procedure to ensure that the detention is actually justified by an admissible reason. Regardless of the position one adopts, the right to detain – at least according to the principle of equality of belligerents in IHL – must be the same for both the government and non-State armed groups in NIACs. Many States nevertheless reject this latter argument.[18]

17 For a more thorough discussion on these controversial issues, see MNs 10.285, 10.287–10.301, 10.303–10.308.

18 See International Conference of the Red Cross and the Red Crescent (32nd Session), Resolution 1: 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' (8–10 December) Res 32IC/15/R1, preamble, para 1.

### 3.4.3 Factors limiting the relevance of the principle of distinction between combatants and civilians

**3.23** Even beyond the controversies and lacunas inherent in IHL as it applies to NIACs, the principle of distinction, which the ICJ qualifies as 'cardinal' and 'intransgressible',[19] has lost some of its importance for several reasons.

**3.24** First, everyone in the power of a party benefits from fundamental guarantees of humane treatment (for example, they may not be tortured, raped or summarily executed).

**3.25** Second, although the text of IHL treaties suggests that (at least in IACs) everyone is either a combatant or a civilian both during hostilities and when in the power of the enemy, it is increasingly suggested that 'unlawful combatants' or 'unprivileged belligerents' are neither combatants nor civilians.[20] As such persons directly participate in hostilities, States adopting this concept claim that they are not civilians and are therefore not protected by Convention IV. At the same time, it is also asserted that such persons are not combatants because they do not fulfil the necessary conditions for combatant status (in particular, the requirement to distinguish themselves from the civilian population or the requirement that they belong to a party to an IAC). States espousing this position consider that such 'unlawful combatants' bear all of the disadvantages of combatant status without benefiting from any of the protections IHL affords to POWs. Specifically, while they may be attacked at any time and are subject to internment when in enemy hands without any further procedure until the end of active hostilities, they do not benefit from either the prosecutorial immunity inherent to combatant privilege or Convention III's protective regime.

**3.26** Third, the principle of distinction is only effective in practice if combatants distinguish themselves from the civilian population (as they are obliged to do in IACs).[21] The central importance of the obligation to distinguish in IHL is reflected by the fact that it is one of the necessary preconditions for combatant and POW status. While Protocol I relaxed the requirements relating to when and how combatants must distinguish themselves, it has nevertheless maintained the principle. Even Protocol I's more lenient requirements, however, are often not respected in an increasing number of asymmetric IACs, let alone in NIACs. Some authors even contend that the principle of distinction (and thus the attendant

19 See Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, paras 78–9.
20 See MNs 8.112–8.119.
21 See MNs 8.058–8.059, 8.063, 8.069, 8.121.

obligation to distinguish) cannot be realistically applied in NIACs because in such conflicts non-State armed groups in particular rely on ordinary civilians for certain tasks.[22] In other words, one must question whether fighters on the technologically inferior side in such conflicts can realistically be expected to distinguish themselves from civilians if doing so would mean almost certain defeat.

**3.27** Fourth, several features of certain contemporary conflicts undermine the entire rationale underpinning the principle of distinction, namely that it is legitimate in war to kill, injure or capture only combatants to achieve victory because only they are part of the enemy's military potential. If an armed conflict is conducted for the main purpose of genocide, ethnic cleansing, rape or looting, focusing on combatants or 'fighters' no longer remains 'rational'. Similarly, if structures of authority have disintegrated due to the conflict, combatants or fighters no longer belong to a party to the conflict as required, and civilians will often carry weapons to defend themselves in such situations, making it difficult to determine if they are indeed directly participating in hostilities and thus subject to direct attack. Furthermore, conflicts with the central aim to overthrow the government of an enemy country or even one's own country will rely on the local civilian population to effectuate the regime change rather than combatants who are often more loyal to and better controlled by the government in power. Finally, the increasing civilianization of armed forces[23] is also 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, such as the provision of security, intelligence gathering and the operation of drones.[24]

## 3.5 THE DISTINCTION BETWEEN THE PROTECTION OF PERSONS IN THE POWER OF A PARTY AND THE PROTECTION OF PERSONS DURING THE CONDUCT OF HOSTILITIES

The conditions for protection, the protective regimes and the applicable sources of law differ depending on whether a person is affected by a party in whose power he or she is or whether he or she is affected by hostilities.

According to the protective regime governing the conduct of hostilities, the first requirement is that only means (that is, weapons) and methods (in other

22 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 357–8.

23 Giulio Bartolini, 'The "Civilianization" of Contemporary Armed Conflicts' in Hélène Ruiz Fabri *et al.* (eds), *Select Proceedings of the European Society of International Law* (Hart 2010) vol II, 569–70.

24 See MNs 10.133–10.135.

words, tactics) of warfare that are not prohibited by IHL may be used. Second, only combatants, fighters, civilians directly participating in hostilities and military objectives may be directly targeted. Third, even if an attack is directed against a lawful target, its incidental impact on civilians and civilian objects may not be excessive in relation to the anticipated military advantage gained from eliminating or neutralizing the target. Finally, all feasible precautionary measures must be taken to spare the civilian population and civilian objects from the effects of war. This protective regime is – for the most part – very similar in both IACs and NIACs.

In contrast, the legal regime protecting persons who are in the power of a party differs substantially depending on whether the armed conflict is an IAC or a NIAC. In the former, protection is mostly afforded to 'protected persons'. Thus, the first question that must be addressed is whether the person who is in the hands of a party to the conflict qualifies as a 'protected person'. If so and depending on the individual's specific situation and status, an individual is protected by one or more of the protection regimes established by the Conventions for the wounded and sick military on land (Convention I), the wounded, sick and shipwrecked at sea (Convention II), prisoners of war (Convention III) and civilians (Convention IV). The protective rules of Convention IV are further subdivided into rules protecting (mainly enemy) foreigners in a belligerent State's own territory and rules applicable to occupied territories that not only protect the population of such territories but also govern the occupying power's administration of the territory. Individuals who do not qualify as a 'protected person', however, only benefit from a more limited set of fundamental guarantees. In NIACs, civilians and fighters in the power of the enemy traditionally benefit from the same protection, but it is increasingly argued that IHL provides an inherent legal basis to intern the latter.

**3.28** IHL protects the life and dignity of individuals during an armed conflict. On the one hand, it protects persons who are in the power of a party to the conflict, including the wounded, sick and shipwrecked as well as POWs and civilians, from conduct by the party in whose hands they are that undermines their life and dignity.[25] Rules protecting persons in the power of a party are traditionally referred to as 'Geneva Law' because they are mainly codified in the Geneva Conventions.

**3.29** On the other hand, IHL protects civilians and, to a much more limited extent, combatants against attacks and effects of hostilities by an adverse party to the conflict. These rules are traditionally referred to as 'Hague Law' because they

25 Most of the rules, however, only protect such persons if they belong to an adverse party to the conflict.

were initially codified in the Hague Regulations. Currently, however, those rules are mainly found in Protocol I.[26] Those rules of Protocol I have largely influenced the pertinent rules of customary IHL applicable to both IACs and NIACs.

**3.30** Similarly, as to the protection of objects, it is important to distinguish between the rules of Geneva Law that protect objects against destruction by the party controlling them and the rules of Hague Law that protect objects against attacks by the adversary of the party controlling the objects.

**3.31** The demarcation between rules protecting persons in the power of an adverse party and those rules protecting persons against the effects of hostilities is obviously not absolute. Indeed, the rules on humanitarian assistance not only benefit civilians, POWs, military wounded and sick in the power of a party but are also equally addressed to any adversary of that party to the extent all parties to a conflict must permit the free passage of relief convoys and humanitarian organizations.[27] Additionally, on the battlefield or the frontlines, it may prove difficult to determine whether persons are in the power of the party affecting them and thus which regime should apply. Similarly, it is also sometimes controversial whether certain prohibitions in IHL, such as the prohibition of murder in Common Article 3, applies only to summary executions of persons in the power of a party or whether it also extends to the conduct of hostilities.[28]

**3.32** Despite these nuances, the distinction between the rules falling under Geneva Law and those rules contained within Hague Law is important as it has a practical impact in several respects. First, the complicated question of who qualifies as a protected civilian either on the basis of nationality or arguably allegiance[29] is relevant only to the application of Geneva Law. Second, the difficult debates regarding what constitutes direct participation in hostilities in both IACs and NIACs as well as about who is a civilian in a NIAC are irrelevant for Geneva Law as such questions only concern the application of Hague Law. Third, the distinction between IACs and NIACs is much more important for Geneva Law than for Hague Law because protection in IACs largely depends on status. Fourth, a party may conduct hostilities only against persons and objects that are not in its power. In contrast, the use of force against persons in the power of a party is governed by the relevant human rights rules relating to

26 To make things more complicated, Conventions I, II and IV also contain few rules relating to the conduct of hostilities (which therefore belong to Hague Law).

27 See MNs 10.198–10.215.

28 See MN 7.27.

29 See MNs 8.150, 8.156–8.158.

law enforcement operations.[30] Fifth, it is much easier to establish violations of Geneva Law (for example, whether a prisoner has been tortured, a person has been raped or a house in an occupied territory has been destroyed) than it is to determine violations of Hague Law (for instance, whether a person killed or a school destroyed by an aerial bombardment resulted from a violation of IHL). In particular, whether an attack is lawful under Hague Law does not depend on the results of the attack but rather an ex ante evaluation by the attacking party. Additionally, establishing whether an attack violated Hague Law requires a complex analysis of several legal factors, including the status of the targeted person or object, whether such person or object was the actual target of the attack, the actual or intended use of the targeted object, the military value to the attacker in eliminating the targeted person or object in relation to the extent (if any) of incidental effects upon civilians and whether the attacker took all feasible precautionary measures in attack to avoid or minimize incidental effects upon civilians. Assessing these legal factors necessarily requires knowledge of the military plans of both parties.

**3.33** Application of Geneva Law rules or enquiries into questions relevant only under Geneva Law when an issue of conduct of hostilities arises and vice versa is one of the most frequent mistakes committed by students, practitioners and courts when determining the legal rules applicable and any violation(s) in relation thereto. For example, the ICC assessed whether cultural property destroyed after it had fallen under the control of the accused's party constituted a valid military objective,[31] despite the fact that objects in the power of a party cannot possibly fall within the definition of a military objective because such objects cannot 'by their nature, location, purpose or use make an effective contribution to military action' of the adversary of that party.[32]

### 3.5.1 The protection of persons who are in the power of a party

**3.34** To determine which Convention applies, persons in the power of the enemy in an IAC must be classified into: (1) POWs (that is, combatants who have fallen into the power of the enemy); (2) military medical personnel; (3) wounded, sick and shipwrecked combatants; and (4) civilians. Additionally, it should be noted here that Protocol I abolished the limitation of Conventions I and II to military

30 See MNs 9.011, 9.048, 10.266, 10.269–10.270, 10.276, 10.278, 10.281–10.282.

31 ICC, *Prosecutor v Al Mahdi* (Decision on the confirmation of charges) ICC-01/12-01/15 (24 March 2016) paras 36–41, 56; ICC, *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) para 39.

32 See P I, Art 52(2); see also MNs 8.301, 8.303.

wounded, sick and shipwrecked and military medical personnel by extending similar protection to wounded, sick and shipwrecked civilians as well as civilian medical personnel.

**3.35** To make things even more complicated, when it comes to civilians in the power of a party to the conflict, the necessary enquiry is far from over. As mentioned above, to find the applicable rules, it must first be determined whether those civilians are 'protected civilians', and if so, second, whether they are in an occupied territory or in a party's own territory. Third, in every case one must also determine whether that civilian is a member of one of the special categories of civilians (for example, women, children, journalists and refugees) who receive heightened protection under IHL through special rules.

**3.36** All the aforementioned distinctions, however, technically only apply in IACs. The IHL rules applicable in NIACs found in Common Article 3 and Protocol II, which provide guarantees that are more rudimentary when compared to the legal regime benefiting protected persons in IACs, protect all '[p]ersons 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'.[33] In a NIAC, therefore, a captured fighter is protected by exactly the same rules that protect a civilian who has never directly participated in hostilities or is no longer doing so.

### 3.5.2 The rules on the conduct of hostilities

**3.37** The rules on the conduct of hostilities apply to attacks against persons and objects that are not in the attacking party's power. While such rules are formulated mainly as prohibitions in Protocol I and in the ICRC's customary IHL rules, they are, however, easier to understand not as prohibitions but rather as instructions on how attacks must be conducted. For an attack to be lawful in IHL, it must fulfil four cumulative conditions. First, prohibited means (that is, weapons) and methods (in other words, tactics) of warfare may not be used, and restrictions on the use of certain means of warfare must be respected. Second, only legitimate targets may be directly targeted. Third, even if an attack is directed against a legitimate target, the proportionality rule must also be respected. Fourth, the attacking party must take all feasible precautions in attack to spare the civilian population from the effects of hostilities. Even if an attack

33 GCs, Common Art 3(1); see also P II, Art 4(1).

incidentally kills or injures civilians or destroys civilian objects, it nevertheless remains lawful if it complies with the four cumulative conditions outlined above.

**3.38** With regard to the first condition, even legitimate targets may not be attacked using all means or methods of warfare available to the attacking party. A party's right to choose the means and methods of warfare is not unlimited. Thus, IHL prohibits the use of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering. Additionally, IHL prohibits the use of certain weapons (such as chemical weapons) even if used exclusively against combatants. Similarly, IHL restricts the use of other weapons to certain targets or circumstances or requires special precautions to be taken for the benefit of the civilian population when certain weapons are used. Finally, IHL prohibits certain methods of war, such as perfidy, even when employed against combatants.

**3.39** Under the second condition, an attack may only be directed at legitimate targets. Legitimate targets include combatants, civilians directly participating in hostilities until their direct participation ceases, military objectives and, arguably, members of a non-State armed group in NIACs who have a continuous combat function even while they do not directly participate in hostilities. The concept of direct participation in hostilities, which establishes the dividing line between a lawful attack and the war crime of deliberately targeting a civilian, is subject to numerous legal issues and controversies that will be discussed later at length.[34] IHL defines military objectives as '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'.[35]

**3.40** Turning to the third requisite condition for a lawful attack, an attack that uses lawful means and methods of warfare directed against a legitimate target nonetheless is unlawful if it 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' by the attacking party.[36] It is, however, controversial whether the proportionality rule extends beyond civilians and civilian objects to cover other

34 See MNs 8.311–8.318.
35 P I, Art 52(2).
36 P I, Art 51(5)(b).

protected persons and objects, such as military medical personnel, wounded as well as sick members of the armed forces and POWs.

**3.41** Fourth, even if an attack employs lawful means and methods of warfare against a legitimate target and complies with the proportionality rule, the attacking party must also take all feasible precautionary measures to avoid and in any event minimize incidental effects on the civilian population and civilian objects. This overarching rule imposes several sub-obligations on the attacking party. First, an attack must be suspended or cancelled if it becomes apparent that it is prohibited under IHL. Second, if circumstances permit, an 'effective advance warning' must be given for those attacks which may affect the civilian population. Third, in determining the objective of an attack and if a choice between military objectives having a similar military advantage is possible, the objective that 'may be expected to cause least danger' to the civilian population must be selected. Furthermore, IHL requires those planning and deciding on an attack to take additional precautionary measures, including taking all feasible measures to verify that the target of attack is a legitimate target, taking all feasible precautions in the choice of means and methods of warfare to avoid or minimize incidental civilian damage and refraining from initiating the attack if it is expected that incidental loss of civilian life or destruction of civilian objects will outweigh the military advantage anticipated from the attack. The meaning of these aforementioned obligations in practice, however, remains controversial in many cases, especially with regard to which precautions are 'feasible' given the respective technological capacities of the parties to a conflict or with regard to what constitutes a 'concrete and direct military advantage' in the proportionality assessment.

**3.42** The aforementioned rules apply to attacks directed against ordinary targets. Some categories of persons (for instance, medical personnel) and objects (for example, medical units and transports, cultural property, objects and installations indispensable for the survival of the civilian population, works and installations containing dangerous forces such as dams and nuclear power stations and the natural environment) benefit from special protection. In other words, they benefit from special IHL rules that further limit the instances when such specially protected persons and objects may be attacked, foresee additional criteria that must be taken into account in the proportionality evaluation and require the attacking party to undertake additional precautionary measures.

**3.43** Finally, nearly all of the rules mentioned above on the conduct of hostilities arguably apply with equal force in IACs and NIACs, except that fighters in

non-State armed groups are not technically combatants in NIACs. It is uncontroversial, even if it is not self-evident, that government soldiers may be targeted at all times until they surrender or are otherwise *hors de combat*. The controversy concerning targeting in NIACs therefore centres on fighters who, according to some, may be the subject of a lawful attack at any time, even if they are not directly participating in hostilities at the moment of the attack. In addition, it is controversial whether all members of a non-State armed group or only those with a continuous combat function may be directly attacked at any time.[37]

37 See MNs 8.314–8.318, 10.261–10.262, 10.264–10.267, 10.267–10.283.

# 4

# THE SOURCES OF IHL

The sources of IHL are the same as those of other branches of international law, although some phenomena are more important in IHL. Those phenomena can be forced into the traditional categories or into a new category of hybrid soft law.

**4.01** IHL is largely codified in general multilateral treaties, but it has become virtually impossible to adopt new treaty rules. Although it is even more difficult to identify than for the rest of international law, customary law, which has been translated into rules by a rather authoritative and regularly updated ICRC Customary Law Study, fills gaps created by, in particular, insufficient participation in treaties. More astonishingly, customary rules applicable in NIACs allegedly go much further than what States were ready to accept as treaty rules. The role of general principles depends on how they are defined, but even positivists must admit that humanitarian considerations play an important role. However, they have difficulties in conceptualizing and classifying this role into the traditional categories of sources.

**4.02** Soft law relevant to IHL consists not so much of non-binding resolutions and agreements typical in other fields of international law but rather of hybrid soft law documents adopted by expert meetings or produced by the ICRC that are in reality nearly as important for IHL as the traditional sources of international law. We will also discuss what positivists and the ICJ Statute relegate to subsidiary means for the determination of rules: jurisprudence, in particular of international criminal tribunals, and scholarly writings. Finally, and although this does not constitute a source but an element of several sources, we will examine State positions on IHL, including the value of and the difficulties in determining such positions for the purpose of assessing both customary IHL as well as the subsequent practice that must be taken into account when interpreting IHL treaties.

## 4.1 TREATIES

The rules of IHL can be largely found in universal multilateral treaties that are well coordinated with each other. The Geneva Conventions, which are universally accepted, form the core of multilateral IHL treaties. The Hague Regulations now correspond to customary law. Other treaties, in particular the Additional Protocols, only bind their States parties (Protocol I only applies to armed conflicts that occur between States parties), but they correspond to a varying extent to customary international law.

Specific treaty regimes prohibit or limit the use of certain weapons and protect cultural heritage. ICL treaties defining war crimes are also sources of substantive rules of IHL.

**4.03** The systematic 'codification' (which consisted mainly of the adoption of new rules) of IHL in general multilateral treaties started relatively early – in the mid-nineteenth century – compared to other branches of international law. Most often a new set of treaties supplemented or replaced less detailed, earlier conventions in the wake of major wars, taking into account new technological or military developments.[1]

**4.04** Today, IHL is one of the most codified branches of international law, and its relatively few international instruments are well coordinated with each other. Generally, the more recent treaty expressly states that it either supplements or replaces the earlier treaty as between the States parties to the new treaty. In addition, there are no IHL treaties at the regional level.

**4.05** The great advantage of IHL treaties is that their rules are relatively beyond doubt and controversy and are therefore ready to be applied in armed conflicts without first obliging belligerents to conduct extensive research on State practice that would theoretically be necessary to identify customary law. Formal acceptance of treaties also gives States of the 'Global South' an occasion to accept law developed before they became independent. Thus, the drafting process of the Protocols provided them the opportunity to discuss customary rules that developed in earlier times.[2] In addition, such States – often following a voluntarist approach – agree more readily to be bound by treaties than by other sources of international law.

1 See MNs 2.10–2.11.
2 See MN 2.17.

**4.06** The disadvantage of all treaties, including IHL treaties, is that they are technically unable to have a general effect because treaties bind only States parties. We will see, however, that treaties have a major effect on customary law. Fortunately, most IHL treaties are today among the most universally accepted treaties.[3] This process of acceptance nevertheless generally takes decades, preceded by years of '*travaux préparatoires*'. In addition, in IACs, although compliance is not subject to reciprocity, the main IHL treaties bind States parties only when they fight against other States parties. However, the Conventions also apply in an IAC between a State party and a State not party if the latter accepts and applies them.[4]

**4.07** The traditional process of drafting new international treaties in the field of IHL is dominated by an obsessive desire to reach consensus between nearly 200 States. This process confers a 'triple victory' on those who have been described as 'digging the grave of IHL' or, in other words, those who do not want better protection to exist in a given domain. 'They slow the process down; they water down the text, and then do not even ratify the treaty once adopted.'[5] They thus leave the States parties that wanted to increase protection with a text that falls short of their original wishes. To avoid this unsatisfactory state of affairs, some States that genuinely wanted improvement resorted to what is referred to as the 'Ottawa procedure' because it was applied for the first time during the deliberations on the Ottawa Convention banning anti-personnel landmines. Under this procedure, only those States that wished to achieve a ban were involved in negotiating standards that opponents were then free to agree to. This procedure was successfully repeated for the Oslo Convention banning cluster munitions.

### 4.1.1 The Hague Conventions of 1907

Rules of the Hague Regulations, which are annexed to Hague Convention IV, correspond to customary law unless the rule in question has either fallen into desuetude or has been replaced by more recent treaty rules. They have an ongoing relevance for the regulation of the means and methods of warfare and the law of occupation. Some other Hague Conventions are still relevant for the law of neutrality and the law of naval warfare.

3 For an up-to-date list of participation in IHL treaties, see ICRC, 'Treaties, States Parties and Commentaries' <https://ihl-databases.icrc.org/ihl> accessed 29 July 2018 [ICRC Treaty Database].

4 GCs, Common Art 2(3).

5 Yves Sandoz, 'Le demi-siècle des Conventions de Genève' (1999) 81 IRRC 241 (author's translation).

**4.08** In conformity with the codification mood of those times, States convened in 1899 to adopt general multilateral treaties codifying and developing public international law and in 1907 to revise those treaties. Most of the treaties concerned the 'laws of war' (a term which, at that time, also covered some *jus ad bellum* issues). Out of the 14 instruments adopted in 1907, 10 concerned what is known today as IHL. Many of Hague Conventions are outdated, while some of them specifically concern the law of naval warfare and neutrality and will therefore be discussed in later chapters.[6] The Regulations concerning the Laws and Customs of War on Land (Hague Regulations), which are annexed to Hague Convention IV, are still relevant today for general IHL. More recent IHL treaties have revised parts of the Hague Regulations (for example, Articles 1 to 20 on combatants and the treatment of prisoners of war). However, Section II 'on hostilities' still contains some important rules on the means and methods of warfare and on spies, which in part have been since revised by Protocol I. More importantly, it contains the only existing rules on 'parlementaires' (that is, negotiators bearing a white flag sent by one belligerent to negotiate with another belligerent), capitulations and armistices.

**4.09** Section III of the Hague Regulations that addresses 'military authority over the territory of the hostile state' is the part most relevant for IHL today. While Geneva Convention IV now regulates the protection of protected civilians located in occupied territories, Section III still governs how an occupying power may and must administer an occupied territory as well as the protection of private and public property rights.

**4.10** While the Hague Regulations constitute treaty rules, there is no need to ascertain whether a certain State is bound by them because all of their rules that have neither been abrogated or modified by later treaty rules nor fallen into desuetude are considered to be binding on all States as customary law.[7] When interpreting the Hague Regulations, it must be taken into account that French is their only authentic language.

### 4.1.2 The Geneva Conventions of 1949

The Geneva Conventions are universally accepted. Each of the Conventions prescribes a protection regime for a particular category of persons in IACs, that

6 See MNs 8.420 and 9.140, 9.142, 9.144–9.145, 9.148.

7 See the IMT, 'Trial of the Major War Criminals Before the International Military Tribunal' (1945–1946) vol I, 253–4; ICJ, Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 89.

is, the wounded and sick on land, the wounded, sick and shipwrecked at sea, prisoners of war and civilians in the power of a party. Article 3 common to the Conventions covers NIACs. Other articles common to the Conventions deal with IHL's field of application, implementation and enforcement (including through individual criminal responsibility for grave breaches) as well as with final clauses.

**4.11** The four 1949 Geneva Conventions still constitute the cornerstone of contemporary IHL and in particular of Geneva law for several reasons. First, the Conventions establish detailed protection regimes for all categories of protected persons. Second, their Common Article 3 contains a 'mini-convention' applicable to NIACs. Finally, all States capable of becoming parties to those Conventions have done so.

**4.12** We have seen that each Convention is dedicated to the protection of a particular category of persons (Conventions I and II on the wounded, sick and shipwrecked; Convention III on POWs; Convention IV on civilians in the power of a party), sometimes in a particular domain (Convention I on land; Convention II at sea). Those regimes will be presented in detail in Chapter 8.

**4.13** However, a specificity of the Conventions is that they have common articles that appear in each Convention, although not always with the same number and not always with the exact same wording. Common provisions with the same number and same (or largely) the same content will be referred to as 'Common Article 3',[8] while such provisions having different numbers but the same (or largely the same) content will be referred to as 'Common Articles 49/50/129/146'. The provisions defining grave breaches of each Convention are a special case because they obviously define different crimes, but their object is the same. They are therefore usually nevertheless referred to as 'Common Articles 50/51/130/147'.

**4.14** Some common articles cover the typical final clauses of treaties (for example, Common Articles 58/59/138/155 on the entry into force). Common Article 2 defines the field of application of the Conventions (that is, IACs except for Common Article 3 applicable to NIACs). Other common articles most importantly concern crucial issues of implementation, such as Common Article 1 (on the obligation to ensure respect), Common Articles 9/9/9/10 (on the right of

8 Careful readers will notice that the text of Common Article 3 is not exactly the same in all the Conventions as Article 3 of Convention II adds the shipwrecked to the wounded and sick who must be collected and cared for.

initiative of the ICRC), the aforementioned articles on the criminal repression of grave breaches and Common Articles 47/48/127/144 (on the 'dissemination' of the Conventions).

### 4.1.3 The Additional Protocols

> Protocol I covers IACs, while Protocol II addresses NIACs. Protocol III introduces an additional protective emblem. Protocol I expands on certain aspects of the Conventions and introduces rules on the conduct of hostilities, in particular to protect the civilian population from the effects of hostilities. Protocol II enlarges the protection offered by Common Article 3 in NIACs, but it does not apply to all NIACs. Most, but not all, rules of Protocols I and II correspond to customary international law.

**4.15** Protocols Additional I and II of 1977 (Protocols I and II) and III of 2005 (Protocol III) to the Geneva Conventions are international treaties that are distinct and separate from the Conventions. Nevertheless, only States parties to the Conventions can become parties to them. For those who do so, the Protocols supplement or amend the Conventions. Protocol III merely adds a new, additional protective emblem to the red cross and the red crescent. Protocols I and II do not apply (as the Geneva Conventions) to distinct categories of persons but rather to distinct categories of situations. Protocol I adds many rules applicable in IACs, while Protocol II establishes additional (albeit fewer) rules applicable in NIACs. In fact, while some provisions of Protocols I and II modify the rules of the Conventions, most of them deal with problems not covered by the Conventions, in particular in the field of the conduct of hostilities.

**4.16** Contrary to the Conventions given their universal acceptance, one must verify whether a given State is a party to the Protocols. Indeed, Protocol I applies as a treaty only between States parties. The fact that Protocol III only has 73 States parties does not raise major humanitarian problems.[9] Although Protocols I and II are very widely ratified (174 States for Protocol I and 168 for Protocol II), important States have not accepted them: the US, Israel, Turkey, India, Pakistan, Sri Lanka, Thailand and Myanmar are missing for both Protocols, while Syria and Iraq have not ratified Protocol II. Consequently, Protocol II does not apply to the NIACs in Turkey, Syria, Iraq, Pakistan and Myanmar, and the US and Israel are not bound by Protocol I in IACs even against States parties to Protocol I. Although formally speaking a State party does not have to comply with Protocol I when fighting an IAC against a State not party, States parties

9 See MNs 8.038–8.039.

generally train and instruct their armed forces to comply with Protocol I in all IACs. In addition, most, but not all, rules of Protocol I correspond to customary law and therefore bind all States.

### 4.1.4 Weapons treaties

**4.17** Under its traditional approach, IHL does not seek to prohibit or regulate certain weapons, but rather it regulates the use of all weapons, in particular (but not exclusively) to protect the civilian population. Nevertheless, there is an old but increasing tendency to outlaw the use of certain weapons altogether (in which case the relevant treaties are situated on a sliding scale between IHL and disarmament law) or at least subject their use to certain specific limitations that go beyond the general rules of IHL, most often in order to avoid incidental effects on civilians.[10] Many of those rules correspond to customary law[11] but some do not. In the latter case, one must determine the treaties to which the State using the weapon is a party, and it may even be the case that four distinctive regimes apply to the same weapon for different States (for instance, in the case of anti-personnel landmines). The Protocols to the 1980 Convention on Certain Conventional Weapons (CCW) contain many of the rules on weapons. The CCW itself is a mere framework convention that does not foresee specific prohibitions or limitations but rather simply offers a legal framework for its Protocols that do so. Article 1 of the CCW was amended in 2001 to extend the prohibitions of its Protocols to NIACs. The specific treaties[12] on weapons may be classified as follows:

1. Treaties regulating the use of certain weapons beyond the general rules of IHL:

    a. CCW Protocol II on the Use of Mines, Booby-Traps and Other Devices, 1980, which limits the use of landmines and prohibits certain booby-traps. An amended version was adopted in 1996, but some States, such as Burundi, Côte d'Ivoire, Cuba, Laos and Uzbekistan, are still only bound by the original version
    b. CCW Protocol III on Incendiary Weapons, 1980
    c. CCW Protocol V on Explosive Remnants of War, 2003

10 For a discussion of these rules, see MNs 8.378–8.403.

11 See ICRC CIHL Database, Rules 72–86.

12 The full title and text of all those treaties can be found in the ICRC Treaty Database, above note 3.

2. Treaties prohibiting the use of certain weapons:

    a. Hague Declaration (IV,3) concerning Expanding Bullets, 1899
    b. Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods of Warfare, 1925
    c. CCW Protocol I on Non-Detectable Fragments, 1980
    d. CCW Protocol IV on Blinding Laser Weapons, 1995

3. Treaties prohibiting the production, possession, transfer and use of certain weapons:

    a. Convention on the Prohibition of Biological Weapons, 1972
    b. Convention on the Prohibition of Chemical Weapons, 1993
    c. Ottawa Convention on Anti-Personnel Landmines, 1997
    d. Oslo Convention on Cluster Munitions, 2008
    e. Treaty on the Prohibition of Nuclear Weapons, 2017 (to which no State possessing nuclear weapons is a party).[13]

**4.18** In addition, the Arms Trade Treaty (ATT) obliges States parties to take the risk of IHL violations into account before transferring arms.[14]

### 4.1.5 Treaties protecting cultural heritage

**4.19** A distinct and very ancient part of IHL protects cultural heritage.[15] Several general IHL treaties concluded since the Hague Regulations contain rules providing 'special protection' to cultural property.[16] There are, however, also specific instruments on the issue: the Roerich Pact in the Americas[17] and several instruments concluded since 1954 in The Hague (but which in substance comprise both 'Hague Law' and 'Geneva Law'). These instruments are the 1954 Hague Convention on Cultural Property,[18] 1954 Protocol I to the Hague Convention on Cultural Property[19] (which in particular deals with cultural property in cases of occupation and cultural property deposited in cases of armed conflict with another State) and the 1999 Protocol II to the Hague

13 Treaty on the Prohibition of Nuclear Weapons (7 July 2017, not yet in force).
14 See ATT, Arts 6(3) and 7(1)(b)(i); see also MNs 10.098, 10.102–10.106.
15 See MNs 10.172, 10.174.
16 See in particular HR, Arts 27 and 56; P I, Art 53; P II, Art 16.
17 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (15 April 1935) 167 LNTS 289.
18 HC on Cultural Property.
19 Protocol I to the HC on Cultural Property.

Conventions on Cultural Property[20] (which foresees enhanced rules of protection in the conduct of hostilities and individual criminal responsibility for violations). General treaties protecting cultural heritage also in peacetime[21] must also be taken into account when determining how cultural heritage is protected in an armed conflict.[22]

### 4.1.6 ICL treaties

**4.20** We will discuss later the contributions made by ICL and international criminal justice not only to the enforcement of IHL but also to the clarification and arguably to the development of IHL.[23] The ICC Statute's provisions on war crimes may be considered as a treaty-based source of IHL because war crimes necessarily presuppose that the criminalized conduct also constitutes a violation of IHL.[24]

### 4.1.7 Special agreements between belligerents

> States and armed groups are encouraged to conclude special agreements containing additional humanitarian rules, but such agreements may not adversely affect the protection IHL offers to persons protected under the Conventions.

**4.21** In addition to accepting the general multilateral treaties mentioned above, States may conclude special agreements on certain humanitarian issues pursuant to Common Articles 6/6/6/7. Such agreements were often concluded before the codification of IHL in general treaties began. Some specific treaty provisions even encourage or urge States or, in most cases, States parties to a conflict to conclude such agreements.[25] However, under Common Article 6/6/6/7, '[n]o special agreement shall adversely affect the situation of the [protected persons, as defined in each] Convention, nor restrict the rights which [the Convention] confers upon them.' This provision clarifies that the Conventions confer rights upon individuals. In my view, it does not simply prohibit

20 Protocol II to the HC on Cultural Property.

21 See the instruments accessible through the UNESCO Website <http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html> accessed 29 July 2018.

22 See MNs 9.149, 10.179, 10.183.

23 See MNs 9.063–9.064, 9.069–9.072.

24 For a detailed discussion and some possible objections on this point, see MNs 9.059, 9.061–9.062.

25 See the provisions of each GC referred to in GCs, Common Arts 6/6/6/7, and in P I, Arts 6(4), 26(1), 27(1), 28(4), 31(1), 31(3)–(4), 34(2), 56(6), 59(5), 60 and 66(5).

such unfavourable agreements; it prescribes that the relevant provisions of the Conventions remain fully applicable despite the adverse agreement.[26]

**4.22** Common Article 3(3) strongly encourages parties to NIACs (that is, the State and armed group(s) or several armed groups fighting each other) to conclude special agreements, which are often called 'ad hoc agreements' to distinguish them from agreements between States, in order 'to bring into force…all or part of the other provisions of [each] Convention.' In an extreme case, this may lead to the application of IHL of IACs to a NIAC.[27] These agreements, beyond making certain provisions of the Conventions applicable to NIACs, may also regulate other humanitarian matters that are not specifically addressed by the Conventions. In Colombia, even a peace agreement was concluded with specific reference to that provision.[28] In practice, however, ad hoc agreements are not very frequent[29] because sovereignty-obsessed States fear that they could confer legal status upon non-State armed groups even though Common Article 3(4) explicitly stipulates that the conclusion of such an agreement 'shall not affect the legal status of the Parties to the conflict'. We will discuss the legal status of non-State armed groups under IHL later on.[30] It is sufficient to mention here that it is controversial whether such agreements are governed by international law.[31] In my view, the alternative, under which such agreements would be subject to the domestic law of the concluding or territorial State, would deprive Common Article 3(3) of any *effet utile* ('useful effect'). Indeed, such agreements would be void under that domestic law for several reasons: armed groups with a criminal purpose generally do not acquire legal personality under domestic law, the contents of such agreements often violate domestic law and the concluding State could abrogate or modify them unilaterally by changing its domestic law.

26 For a contrary view, see Stuart Maslen-Casey, 'Special Agreements in International Armed Conflicts' in Academy Commentary, 143.

27 See MNs 7.39, 7.41–7.43.

28 See Online Casebook, Colombia Peace Agreement: A. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, para 50.

29 For examples, see Online Casebook, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts.

30 See MNs 6.67–6.71.

31 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 109. For the view in favour, see Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369, 389–92; Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques* (Schulthess 2012) 146–8. For a more sceptical view, see Raphaël van Steenberghe, 'Théorie des sujets' in Raphaël van Steenberghe (ed), *Droit international humanitaire: un régime spécial de droit international* (Bruylant 2013) 62–4. For the opposite view, at least with respect to peace agreements, see SCSL, *Prosecutor v Brima et al.* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-16-AR72(E) (13 March 2004) paras 41–8.

### 4.1.8 IHL treaties under the law of treaties

IHL treaties are governed by the normal rules of the law of treaties, although some exceptions are foreseen in IHL treaties and States cannot terminate or suspend an IHL treaty in response to a breach by another State.

**4.23** The law of treaties, as codified in the VCLT (which is not applicable as a treaty to most IHL treaties, including in particular the Conventions as well as Protocols I and II)[32] and often repeated by the final provisions in IHL treaties, governs the conclusion, entry into force, application, interpretation, amendment and modification of IHL treaties as well as reservations to them. There are, however, some specificities.

**4.24** First, under Protocol I and the CCW, a national liberation movement[33] may make a declaration to be bound by those treaties and the Conventions. This does not make the movement a party to the treaties, but it makes the latter applicable to the armed conflict between the movement and the State party as if the movement was a State party.[34]

**4.25** Second, Switzerland, as the depositary of the Conventions and Protocols,[35] is responsible for the normal functions as a kind of notary under the VCLT.[36] However, for historical reasons and sometimes invoking its role as a depositary, it has had a special role in developing IHL and in ensuring its respect.[37] In particular, it has convened all diplomatic conferences that adopted the subsequent series of Geneva Conventions and the Protocols. The UN General Assembly recognized Switzerland's special role by asking it, as a depositary, to convene conferences of States parties to Convention IV.[38] The International Conference of the Red Cross and the Red Crescent mentioned Switzerland as the facilitator of a process aimed at enhancing respect of IHL, a process that eventually failed.[39] In addition, Switzerland has been especially active in trying to ensure

32 See VCLT, Arts 4 and 84(1).

33 For the conditions for P I, Art 1(4) to apply, see MNs 6.26–6.30.

34 P I, Art 96(3); CCW, Art 7(4).

35 GCs, Common Arts 57/56/137/154; P I, Art 93; P II, Art 21; P III, Art 9.

36 VCLT, Arts 76 and 77.

37 See Marco Sassòli, 'La Suisse et le droit international humanitaire – une relation privilégiée?' (1989) 45 Annuaire suisse de droit international 47.

38 See Online Casebook, UN, Resolutions and Conference on Respect for the Fourth Convention: E. UN General Assembly Resolution ES-10/4, K. UN General Assembly Resolution ES-10/15 and L. UN General Assembly Resolution 64/10.

39 See International Conference of the Red Cross and Red Crescent (32nd Session), Resolution 2: 'Strengthening Compliance with International Humanitarian Law' (8–10 December 2015) Res 32IC/15/R2.

respect of IHL, sometimes on the basis of its role as depositary even though such action is legally based upon Common Article 1.[40]

**4.26** Third, IHL treaties may be denounced, but denunciation only takes effect after the end of the armed conflict in which the denunciating State is involved.[41] By opposition, a ratification or accession to the Conventions takes immediate effect for a State involved in an armed conflict.[42]

**4.27** Fourth, some IHL treaties foresee special amendment procedures[43] that may be triggered by any State party. Annex I of Protocol I (Regulations concerning identification) may even be amended by a two-thirds majority of a conference convened by the depositary unless one-third of the States parties object within one year and the revised Annex then binds all States parties that have not objected.[44]

**4.28** Finally, but most importantly, once an IHL treaty binds a State, not even a substantial breach of its provisions by another State – including by its enemy in an IAC – permits the termination or suspension of the treaty's application as a consequence of that breach.[45]

### 4.1.9 The future of IHL treaty law

In recent decades, it has become nearly impossible to adopt new IHL treaties, except in the field of weapons.

**4.29** If new IHL rules are needed, the obvious starting point should be treaty law. This is even more the case for urgently needed enforcement mechanisms because they cannot be created by customary law. This is also what Henry Dunant suggested and achieved in 1864. However, the composition and functioning of the international community are very different today, and the current international reality poses great difficulties to the adoption and universal acceptance of new multilateral treaties for several reasons.

40 See MNs 5.145–5.157.

41 See GCs, Common Arts 63/62/142/158; P I, Art 99; P II, Art 25. In practice, there has never been such a denunciation. The cited provisions explicitly refer to the Martens clause (see MNs 4.51–4.53 below) to clarify the legal situation after such a denunciation has become effective.

42 GCs, Common Arts 62/61/141/157.

43 P I, Art 97; P II, Art 24; P III, Art 13; CCW, Art 8; HC on Cultural Property, Art 39.

44 P I, Art 98.

45 VCLT, Art 60(5). See also MN 5.037.

**4.30** First, the number of States in existence has increased dramatically, a fact that necessarily affects the length and difficulty of negotiation processes. Second, as there is already a largely adequate normative framework in place, the few remaining areas that would benefit from clarification often involve controversial points of law that States do not wish to clarify, preferring to keep instead a certain latitude of action in armed conflicts. Codification to elucidate controversial issues, such as the temporal and geographical scope of IHL, the contours of the proportionality rule, the notion of direct participation in hostilities or the relationship between IHL and IHRL, is totally unrealistic.

**4.31** Finally, there are concerns that agreements on new rules might jeopardize the already existing normative framework. States might take advantage of a new general revision of the IHL treaties 70 years after the Conventions to weaken rather than to improve protection of war victims, especially with regard to those they classify as 'terrorists'. This concern was one of the main reasons why in 1977 no new generation of Geneva Conventions was drafted, but only 'additional' Protocols that could not open up the existing law to negotiations. I think that Common Article 3 would today no longer be included into generally revised treaties on IHL.

**4.32** This does not mean, however, that IHL treaties will never be concluded again. Indeed, recently, we witnessed the adoption of the Convention on Cluster Munitions and the ATT, both of which have important IHL aspects. It would also be erroneous to consider that only treaties with universal acceptance are effective instruments. The Ottawa Convention on Landmines, the Convention on Cluster Munitions and Protocol I bind their parties and provide evidence of State practice that is useful in determining the emergence of customary rules on specific issues. The Ottawa Convention also shows that a widely ratified treaty may nevertheless impact the conduct of States not party.

**4.33** Finally, future attempts to address substantive challenges to IHL through treaty law should be carried out in a way that addresses or, at least, avoids widening the ownership gap between armed groups and the law. Modalities to engage armed groups in the development and recognition of new norms must be found and used to ensure new rules are realistic and complied with.[46]

46 For a concrete proposal, see Sivakumaran, The Law, above note 31, 564–7, and MNs 10.238–10.239.

## 4.2 CUSTOMARY LAW

Customary law is indispensable as it covers issues that are not regulated by treaties and binds States not party as well as States parties in their relations with States not party. It is also sometimes useful for international and domestic tribunals that are unable or reluctant to apply treaties. Customary IHL experienced an astonishing revival in recent years, although it is particularly difficult to assess actual State practice and *opinio juris* in the field of IHL. In my view, participation in treaties and (for IHL of NIACs) the practice of armed groups must equally be taken into account to assess the state of customary IHL. The ICRC Customary Law Study greatly facilitates the identification of official State practice and the resulting customary rules.

### 4.2.1 The revival of customary IHL

**4.34** IHL began as customary law but has since been largely codified. In the last 25 years, there has been an astonishing revival of customary law[47] to fill, according to the ICRC and international criminal tribunals, gaps in the IHL of NIACs that States did not want to address when they adopted the Protocols in 1977. This revival started with the judgments of the ICTY, which applied customary law (because the UN Security Council could not retroactively establish substantive criminal law) and tried to avoid determining which conflicts in the former Yugoslavia were IACs or NIACs by claiming that the customary IHL of NIACs is largely the same as that of IACs. Nearly simultaneously, the International Conference of the Red Cross asked the ICRC to prepare a study of customary IHL. The ICRC Customary Law Study, which was published in 2005[48] based upon a wide survey of practice and expert consultations and which is now constantly updated as a database,[49] identified 161 rules of customary IHL, out of which 136 (if not 141) were considered to apply both in IACs and in NIACs, although many of them (in particular in the field of the conduct of hostilities) resemble the treaty rules of Protocol I that were drafted for IACs. Most recently, however, the ILC has advanced a traditional theory of customary law in its attempt to help States identify customary law that would, if applied to IHL, certainly put many of the alleged advances into question.[50]

47 For a scholar and judge who has contributed to this phenomenon, see Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 AJIL 817 and many other books and articles he has written on the subject.

48 See Henckaerts and Doswald-Beck.

49 See ICRC CIHL Database.

50 For the ILC's Draft Conclusions on the topic entitled *Identification of Customary International Law*, see ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2016) UN Doc A/71/10, 76–9.

### 4.2.2 Difficulties to determine customary IHL rules

**4.35** The 'revival' of customary IHL is particularly remarkable if one considers that customary law stems from the actual conduct of States in conformity with an alleged norm. Indeed, the identification of customary rules faces several obstacles in IHL. First, for most IHL rules, practice is limited to that of belligerents or, in other words, a few subjects whose practice is difficult to qualify as 'general' and even less so as 'accepted as law'.[51] Second, the actual practice of belligerents is difficult to identify especially because it often consists of omissions. In addition, war propaganda manipulates the truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate.[52] Finally, States are responsible for the conduct of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such conduct is also State practice constitutive of customary law. It is therefore particularly difficult to determine which acts of soldiers count as State practice. At least one difficulty related to determining the applicable customary law, however, does not exist for most rules of IHL. Specifically, even persistent objectors cannot escape from their *jus cogens* obligations,[53] which include most obligations under IHL.

### 4.2.3 Practice to be considered

#### a. Forms of practice

**4.36** Due to the difficulties mentioned above, factors other than the actual conduct of States must also be considered when assessing whether a rule is part of customary IHL. Specifically, whether qualified as practice[54] or as evidence for *opinio juris*, statements of belligerents, including accusations against the enemy of violations of IHL and justifications for their own conduct, should also be taken into account. It is therefore not astonishing that the ICRC Study[55] as well as the ICJ and the ICTY[56] focus on 'official practice' as reflected by State declarations regardless of their actual practice. I admit that the law always has an element of hypocrisy, but I agree with the ILC that 'operational conduct "on

51 This is, however, the definition of custom in Art 38(1)(b) of the ICJ Statute.

52 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 99.

53 Henckaerts and Doswald-Beck, xlv (Introduction); Olufemi Elias, 'Persistent Objector' (2006) in MPEPIL, paras 14, 18; Holning Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chinese J of Intl L 495.

54 ILC Report, above note 50, 77, Conclusion 6(2).

55 Henckaerts and Doswald-Beck, xxxiii.

56 Online Casebook, ICJ, Nicaragua v. United States, para 186; Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 99.

the ground'" must equally be considered'.[57] However, in my view, this is the case only if such conduct is officially condoned. If declarations and actual conduct of the same State differ, that State can simply not contribute to the alleged rule of customary law.[58]

### b. Practice of non-belligerents

**4.37** Many States are not involved in armed conflicts and thus cannot have any 'operational conduct' in the field of IHL. To identify 'general' practice, however, statements of non-belligerent States on the conduct of belligerents and their abstract statements on an alleged norm in diplomatic fora must also be considered.

### c. Military manuals

**4.38** Military manuals are an important source of official practice because they contain instructions by States restraining their soldiers' actions, which in essence represent 'statements against interest'. However, too few States – and generally only Western States – have sophisticated manuals that are open to public consultation. They therefore cannot suffice as evidence for 'general practice' in the contemporary international society of States. Moreover, some of those manuals are said to reflect policy rather than law.[59] Finally, the US Law of War Manual contains the disclaimer that it does 'not necessarily reflect the views of…the U.S. Government as a whole.'[60] In my view, while this shows how States try to avoid to demonstrating their official practice (or how difficult it is to agree on a position within a government), it cannot prevent the manual's instructions to US armed forces from counting as US practice.

### d. Participation in treaties

**4.39** Given the difficulties described up to now, special consideration must be given in the field of IHL to treaties as a source of customary international law, including, in particular, to the general multilateral conventions codifying the law and the process leading to their adoption. For example, taking an overall view of all practice, it may be found that a rule set out in the Protocols corresponds today to customary law binding on all States either because it: (1) codified previously existing general international law; (2) translated previously existing practice into a rule; (3) combined, interpreted or specified existing principles or rules;

57 ILC Report, above note 50, 77, Conclusion 6(2).

58 The ILC's Conclusion 7(2) points in the same direction. Ibid.

59 See John B. Bellinger, III and William J. Haynes II, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89 IRRC 443, 447.

60 US Law of War Manual, preface, vi.

(4) concluded the development of a rule of customary international law; or (5) catalysed the creation of a rule of customary IHL through subsequent practice, including, in my view, through the consent of multiple States to be bound by the Protocols.[61] It is therefore generally agreed today that most, but clearly not all, of the rules set out in the Protocols correspond to parallel rules of customary international law. Whether such customary rules necessarily also apply in NIACs is in my view another issue that must be decided on the basis of the practice and *opinio juris* of States (and, I would dare to add, armed groups) in NIACs.

**4.40** The very wide ratification or accession of IHL treaties raises a particular problem relating to the influence of IHL treaties upon customary law. Paradoxically, it could be claimed that compliance by States parties with their treaty obligations cannot count as either practice or as an expression of their *opinio juris* for customary law. This is called the 'Baxter paradox'.[62] It would mean that the more widespread State participation in a treaty norm is, the less a parallel customary rule could develop because neither State participation in the treaty nor State compliance with treaty obligations[63] could count as practice contributing to customary law and the practice of the few remaining States not party would not be sufficiently 'general' even if it was in conformity with the treaty rule. I suggest, however, that participation in a treaty with a fundamentally norm-creating character (such as an IHL treaty) counts as practice capable of supporting the development of parallel rules of customary law.[64]

### e. Practice of non-State armed groups?

**4.41** As IHL of NIACs is equally addressed to non-State armed groups, the question arises whether their practice and *opinio juris* also contribute to customary IHL of NIACs. The ILC clearly gives a negative answer.[65] The ICRC Customary Law Study considers that the legal significance of such practice is unclear.[66] Although one of its authors writes that, '[u]nder current international law, only

61 For the different possibilities regarding how a general multilateral treaty may relate to or influence customary law, see ICJ, *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, paras 60–77, and Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht* (Helbing & Lichtenhahn 1990) 205–22.

62 Richard Baxter, 'Treaties and Custom' (1970) 129 Recueil des Cours 31, 64.

63 The ICJ explicitly stated this view in the North Sea Continental Shelf Case, above note 61, para 76.

64 In ibid., para 73, the ICJ considers that this is at least possible. Clear support for this view can be found in Online Casebook, Eritrea/Ethiopia, Partial Award on POWs: A. Prisoners of War, Ethiopia's Claim 4, para 31. However, the ILC is very cautious in this respect in its commentary to Conclusion 11(c). See ILC Report, above note 50, 106, para 8.

65 ILC Report, above note 50, 87–9, Conclusion 4(3) and para 9 commentary to Conclusion 4. However, the ILC admits that it may provoke State practice, which is obviously a different issue.

66 Henckaerts and Doswald-Beck, xxxvi.

State practice can create customary international law', he nevertheless advocates taking into account the practice of armed groups at least *de lege ferenda* ('with a view to future law').[67] The underlying doctrinal question is whether customary law rules are based upon the consent of States. I submit rather that customary law rules develop from the conduct and *opinio juris* of the rule's addressees in the form of acts, omissions, declarations, accusations or justifications for their conduct.[68] From a purely practical point of view, it is useless to consider a rule to be 'customary law' if half of the addressees (non-State armed groups) do not respect it out of a sense of conviction. In order to ensure that customary rules are realistic for all belligerents and to give non-State armed groups a sense of ownership over customary IHL of NIACs, it is important that the practice and statements of armed groups are taken into account when determining customary rules applicable in NIACs.

**4.42** Admittedly, there are several conceptual difficulties in considering the practice of non-State armed groups in the norm-creating process. First, an armed group, contrary to a State, is not meant to be and does not even want to be permanent, but must inevitably disappear by either victory (becoming the government of a State) or by defeat.[69] A certain stability and continuity of States as well as the possibility for them to repeat practice and to become in the future both the beneficiary and addressee of a rule are all ingredients of the mysterious customary process that turns what is – practice – into what ought to be – the law. Some of these factors may not apply in the case of non-State armed groups. Second, in most cases, a non-State armed group has an IHL practice only towards one State or one adverse armed group, and it considers itself less than States as part of an international society made up of other States (and, in this case, armed groups).

**4.43** Third, international law presupposes that States have uniform characteristics, and they are indeed much less diverse than armed groups. Should one deduce IHL of NIACs from the practice and *opinio juris* of all armed groups that are parties to NIACs or should one create categories of groups (for example, according to whether they control territory or want to become the government of a State) and deduce different rules applicable to each category from the practice and *opinio juris* of groups of belonging to specific categories? In the first case,

67 Jean-Marie Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law' in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th–26th October 2002* (2003) 27 Collegium 123, 128.

68 For further details, see Sassòli, above note 61, 32–48.

69 Daboné, above note 31, 87–8.

only very rudimentary rules will result, while the second alternative would lead to a further fragmentation of IHL. The second alternative would also raise the question whether States should also be bound by different rules depending on the category of non-State armed group they are fighting.

**4.44** Fourth, the question arises whether the law deduced from the practice and *opinio juris* of armed groups binds only them or whether customary IHL of NIACs for States and armed groups should be based upon the practice and *opinio juris* of both. The first alternative would mean the end of the equality of belligerents before IHL, which may anyway be a fiction.[70] The second alternative would lead to very rudimentary rules even for States that are capable of complying with additional and more complex rules. This risk, however, is mitigated by the fact that States also remain bound by IHRL. Finally, one must avoid the risk that taking the practice of armed groups into account may result in rules that are no longer humanitarian. Despite all these open questions, some scholars suggest that it is possible for armed groups to play a role in the development of new rules without 'downgrading' current international protections by considering the result of their practice and *opinio juris* as 'quasi-custom'.[71] In my opinion, this theory merits further reflection.

### 4.2.4 Continuing importance of customary IHL

**4.45** Although IHL is widely codified, customary rules remain important to protect victims in several respects. First, customary law fills gaps on issues not covered by the treaties. Second, it binds non-parties to a treaty (or even entities which cannot become parties because they are not universally recognized) that are involved in a conflict. Third, it obviates reservations made by States to the treaty rules. Fourth, international criminal tribunals prefer to apply customary rules, and, in some legal systems, only customary rules are directly applicable in domestic law. Given the above-mentioned difficulties to adopt new treaty rules as well as the rapidly evolving needs of war victims for protection against new technological and other inhumane phenomena, the importance of custom – redefined or not – may even increase.

70 See Marco Sassòli, 'Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?' (2011) 93 IRRC 426.

71 Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011) 37 Yale J of Intl L 107, 141–52.

### 4.2.5 Limits of customary IHL

**4.46** Custom, however, also has very serious disadvantages as a source of IHL. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, difficult to formulate and always subject to controversy. The codification of IHL began 150 years ago precisely because Henry Dunant's appeal to the international community convinced it that the actual practice of belligerents was unacceptable, and custom is – despite all modern theories – also based on the actual practice of belligerents. Finally, customary law by definition cannot create the much-needed mechanisms and institutions to enhance the respect of IHL.[72]

## 4.3 GENERAL PRINCIPLES

General principles comprise principles that are common to all domestic legal systems, intrinsic to the idea of law or derived from logic as well as general principles of international law that are deduced from treaty and customary law rules. Among the latter, elementary considerations of humanity play an important role for IHL.

Principles of IHL, such as distinction or military necessity, can be derived from IHL treaty or customary rules. The Martens Clause plays an important role by providing that the principles of humanity and the dictates of public conscience shall protect people in the absence of specific rules of treaties and customary law, but those principles and dictates are controversial and difficult to define.

### 4.3.1 The various meanings of 'general principles'

**4.47** There are various understandings of the concept of 'general principles' in international law. First, 'general principles of law recognized by civilized nations' mentioned as a source of international law in Article 38(1)(c) of the ICJ Statute were initially understood as those principles of domestic law common to all legal orders that may be applied at the international level. Given the large number of States and the great variety of their legal systems, only very few such principles can be formulated precisely enough to be operational. Such principles (for example, good faith and proportionality) are in most cases now customary law

72 See ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 200; Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) 9 Chinese J of Intl L 81, 92.

and have even been codified. They also apply in armed conflicts and can be useful in supplementing and implementing IHL.

**4.48** Second, other principles often seen as 'general principles' within the meaning of Article 38(1)(c) are intrinsic to the idea of law and based on logic rather than a legal rule. Thus, if it is prohibited to attack civilians, logic dictates that an attack directed at a military objective must be stopped when it becomes apparent that the target is (exclusively) civilian.[73]

**4.49** Third, there are general principles of international law that result from an abstraction from treaties or custom,[74] such as the sovereign equality of States, the concept of the common heritage of mankind, the freedom of navigation on the high seas and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States. As IHL is part of international law, general principles of international law also apply in IHL, although the strict separation between *jus ad bellum* and *jus in bello* must be taken into account. 'Elementary considerations of humanity' is a general principle that is particularly relevant for IHL. According to the ICJ, it applies even more in times of peace.[75]

### 4.3.2 The principles of IHL

**4.50** A fourth meaning of the concept of general principles that is more important for IHL than the foregoing are *its* general principles. Jean Pictet wrote that behind the rules in IHL treaties are 'a number of principles which inspire the entire substance of the documents' that are 'expressly stated in the Conventions,…clearly implied [or]…derive from customary law.'[76] Examples include the principle of distinction (between civilians and combatants, civilian objects and military objectives), the principle of necessity (as a limitation to military action) and the prohibition against causing unnecessary suffering. These principles, however, are not based on a separate source of international law but rather on treaties, custom and general principles of law. On the one hand, they can and must often be derived from the existing rules, thereby expressing the rules' substance and meaning. On the other hand, they inspire as well as support existing

73 This has now been codified in P I, Art 57(2)(b).

74 Christian Tomuschat, 'General Principles of Law' (1993) 241 Recueil des Cours 311, 320.

75 ICJ, *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22. These considerations were first recognized in the Nuremberg Judgment over the major Nazi war criminals. IMT, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (1950) HMSO, Part 22, 450.

76 Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 59–60.

rules and make them understandable. Such principles must be taken into account when interpreting existing rules.

### 4.3.3 The Martens Clause

**4.51** The so-called 'Martens Clause' expressly recognizes IHL principles, the meaning of which, however, is very difficult to determine. It prescribes that in cases not covered by treaties, '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.'[77] This clause was first introduced at the 1899 Hague Peace Conference based on a compromise proposal by the Russian delegate, Frederic de Martens, into the preamble of Hague Convention II of 1899 to cover the treatment of 'franc-tireurs' (or unlawful combatants as they would today be called), an issue on which States then (and now) could not find an agreement. Despite its historical purpose, this clause today also covers all other IHL issues.

**4.52** Although the clause itself is recognized as a part of customary international law, it is controversial whether it has an autonomous meaning as well as whether it even constitutes a distinct source of obligations and, if so, what these obligations are.[78] Due to this clause, it is argued that everything that is not prohibited is not necessarily lawful in war,[79] but reality shows that IHL rules are mainly formulated as prohibitions while only some are claimed to also imply authorizations.[80] Indeed, in practice, States do not look to IHL for authorization before deciding upon certain conduct; at best, they only determine whether their envisaged conduct is prohibited. In my view, despite the clause, conduct that is not prohibited by a treaty, a customary rule or a principle (including elementary principles of humanity) is lawful under IHL, but not necessarily 'authorized by IHL'.

**4.53** The clause, however, may constitute an opening to natural law, which inspired the very first codifications of IHL. Yet since its introduction, the world has become more diverse. In a world with extremely varied cultural and religious traditions in which people have diverging interests and different historical

77 See P I, Art 1(2). See also the preambles of HC IV, the CCW, and (with a different wording) P II as well as GCs, Common Arts 63/62/142/158 (concerning the consequences of a denunciation).

78 For the existing range of opinions, see Updated ICRC Commentary GC I, paras 3290–98.

79 On the relationship between the Martens Clause and the 'Lotus principle', see Rhea Schircks, *Die Martens'sche Klausel, Rezeption und Rechtsqualität* (Nomos 2002) 15.

80 See MNs 10.002–10.003, 10.007, 10.014–10.019.

perspectives, the clause cannot provide a solution for a problem encountered in warfare; it can simply indicate which direction to look for a solution. The term 'the dictates of the public conscience' may nevertheless include authoritative expressions of the international community's will, such as those found in UN General Assembly resolutions.[81] In any case, a particular relationship exists in IHL between what is morally good, fair or just and what is legal.

## 4.4 UNILATERAL ACTS

Unilateral acts of States may bind them based upon the principle of good faith. Unilateral commitments by armed groups play an important role in ensuring their ownership of IHL, but they are difficult to classify in international law.

**4.54** States may be bound by unilateral acts in the field of IHL as in any other field if certain conditions are fulfilled.[82] Such acts are binding based upon the principle of good faith.[83] What is theoretically more challenging and more important in practice is whether non-State armed groups are bound by their unilateral acts. Indeed, as such groups can neither participate in treaties nor, according to the prevailing opinion, contribute to customary IHL of NIACs, they often make unilateral commitments, in particular through deeds of commitment promoted by Geneva Call (an NGO specialized in engaging non-State armed groups). We will discuss such commitments later on.[84]

## 4.5 HYBRID SOFT LAW INSTRUMENTS

Although they do not easily fit into the traditional categories of sources, non-binding documents elaborated by States, 'manuals' elaborated by 'experts', and 'guidances' as well as 'commentaries' published by the ICRC play an important role in IHL even though they are not binding. They generally stress that they do not create new rules, but only restate existing law or interpret it. Such documents are nevertheless very useful for scholars, courts and practitioners in that

81 Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 IRRC 125, 130–31.

82 See ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' as contained in ILC, 'Report of the International Law Commission on the Work of its 58th Session' (2006) UN Doc A/61/10, 161–6. See also ICJ, *Nuclear Tests* (*Australia v. France*) (Judgment) [1974] ICJ Rep 253, 267–8, paras 43, 46; ICJ, *Nuclear Tests* (*New Zealand v. France*) (Judgment) [1974] ICJ Rep 457, 472–3, paras 46, 49.

83 ILC Guiding Principles, ibid., 370; Robert Kolb, *La bonne foi en droit international public* (PUF 2000) 328–32.

84 See MNs 10.242–10.250.

they spare them from undertaking research into what constitutes customary law or how to interpret a treaty rule. Some of these documents, however, are criticized because of their non-transparent adoption process in which experts representing the views of some States have a greater say even though they technically participate in their private capacity.

**4.55** This book cannot aim to reconcile different theories about the sources of international law or apply just one theory of sources, including even the one expressed in Article 38(1) of the ICJ Statute. Positivists and States consider that international law (and therefore equally IHL) is exclusively made by States. In recent years, even the ICRC has paid lip service to this dogma,[85] although its own history shows how much impact non-State actors can have on the development of a branch of international law. While I have doubts that international law is only made by States, I do not agree with those scholars who do not care about States because international law loses its realism and its normative force without State involvement. Nonetheless, I sympathize with the analysis that IHL is made by the community of IHL lawyers from States, international organizations, international tribunals, the ICRC, expert groups and individual scholars whose contributions have some, albeit not the same, impact on IHL.[86]

**4.56** Whatever theoretical framework one prefers, the legal discourse on IHL, including by States, is not exclusively based on what those making an argument openly declare and genuinely believe to be treaty obligations, customary law or general principles of law. Jurisprudence and scholarly writings are not only used to identify obligations derived from those three sources. Reality is more varied. Even if other 'sources' are generally admitted not to be 'legally binding', they still have a genuine value and impact in legal discourse, in particular in a field like IHL where adjudication has a limited role. Invoking a clear treaty rule is not the end of every discussion in IHL, just as relying on an ICRC document or 'manual' elaborated by experts is not at all irrelevant. Relative normativity exists in IHL as in other branches of international law. This does not facilitate the work of lawyers nor does it contribute to the normative force of IHL, but it is a mere observation of reality. The source of such rules, which are not fully binding but are nevertheless relevant, is often called 'soft law' in scholarly writings about international law.

85 See, e.g., Peter Maurer (President of the ICRC), 'International Conference: Opening Address by ICRC President' (8 December 2015).

86 Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2017) 7–18 <https://ssrn.com/abstract=3084238> accessed 9 March 2018.

### 4.5.1 The evolving concept and controversial relevance of 'soft law'

**4.57** In branches of international law other than IHL, 'soft law' is traditionally based upon non-binding resolutions adopted by States in the framework of international organizations as well as upon concerted non-conventional acts and joint declarations of States. UN General Assembly Resolutions[87] and, more importantly, resolutions of International Conferences of the Red Cross and the Crescent play a certain role in IHL. Resolutions by those Conferences in particular constituted important steps in the process of developing new rules and mechanisms or triggered them. The production by 'experts' of 'best practices', 'interpretive guidances', 'principles', 'standards', 'manuals' or 'declarations', while not limited to this branch, is more important for contemporary IHL as such documents have an increasing importance in international reality. The ICRC's normative output is another source that is specific to IHL. However, its consistent lip service to the traditional theory of the sources of international law and its tendency to downplay the importance of its role make it even more difficult to classify that output.

**4.58** These phenomena may be seen as a kind of sources of IHL (at least as 'soft law') or they may be classified into the traditional categories as evidence for customary law, interpretations of treaties or scholarly writings. Regardless of how they are classified according to everyone's doctrinal choices, they must be taken into account when studying and applying IHL. Indeed, these sources are actually taken into account, including by States, even if their State-centred rhetoric and their resulting theory of sources cannot justify this.

### 4.5.2 New forms of 'soft law' in the field of IHL

**4.59** The relevant documents, some of which are mentioned hereafter, may be categorized according to who created them (such as States, experts or the ICRC), whether they claim to restate the law or to interpret it and according to the process that led to their creation. These categorizations obviously overlap.

#### a. Non-binding documents adopted in informal processes by States

**4.60** Some documents result mainly from discussions between States but are not treaties. One example is the 2008 Montreux Document[88] on rules applicable

87 See UNGA Res 2444 (XXIII) (1968) and UNGA Res 2675 (XXV) (1970), both of which reaffirmed the principles of IHL on the conduct of hostilities and certainly consolidated their customary character.

88 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' as annexed to the 'Letter

to the activities of PMSCs operating in an armed conflict zone.[89] It first recalls the existing legal framework and then contains non-binding 'good practices…to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict.'[90] States also spearheaded the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations,[91] which were elaborated in a five-year process involving the participation of 24 States as well as five international and regional organizations. This process, however, was criticized because of its closed nature.[92]

**4.61** There were two failed recent attempts to have States develop some IHL mechanisms and rules: the initiative led by Switzerland and the ICRC to strengthen the respect of IHL and another project led by the ICRC to strengthen legal protection for persons deprived of their liberty in relation to NIACs. While the preparatory processes involved only State representatives, the reports on the discussions held are publicly available but do not attribute any opinions to individual States.[93] This makes it impossible for civil society, even in democracies, to advocate for more humanitarian positions by their governments. However, States made it clear that they would not engage in those processes if they were more open and involved civil society. The very disappointing outcome of those initiatives at and after the 2015 International Conference of the Red Cross and the Red Crescent raises serious doubts whether the ICRC justifiably conceded to State demands. In any case, even if those initiatives had been successful, they would have – according to the nearly unanimous opinion of States involved – led only to non-binding documents.

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Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to Secretary-General' (2008) UN Doc A/63/467.

89 See generally MNs 10.133–10.157.

90 Montreux Document, above note 88, 12.

91 The Copenhagen Process on the Handling of Detainees in International Military Operations, 'The Copenhagen Process: Principles and Guidelines' (October 2012).

92 Jacques Hartmann, 'The Copenhagen Process: Principles and Guidelines' in Terry D. Gill *et al.* (eds), YIHL (TMC Asser Press 2013).

93 See two concluding reports from the 32nd International Conference of the Red Cross and Red Crescent held Geneva, Switzerland from 8–10 December 2015: ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report' (2015) Doc No 32IC/15/19, and ICRC and the Swiss Department of Foreign Affairs, 'Strengthening Compliance with International Humanitarian Law: Concluding Report' (2015) Doc No 32IC/15/19.2. For the failure of the first initiative, see Helen Durham, 'Strengthening Compliance with IHL: Disappointment and Hope' (*ICRC, Humanitarian Law & Policy Blog* 2018).

### b. Manuals resulting from expert processes

**4.62** Most non-binding documents result from expert processes and claim to be 'restatements', rather than developments of existing international law. Examples include the 1994 San Remo Manual on the International Law Applicable to Armed Conflicts at Sea and the 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare.[94] Inevitably, these documents are not pure restatements. Rather, they represent developments of the law concerning certain issues.[95]

**4.63** The Tallinn Manual on cyber warfare is a special case. Representatives of States and of NATO were heavily involved in the drafting of its two editions but only 'in their private capacity'. While it 'is intended as an objective restatement of the *lex lata*',[96] the subject it covers is so new that it is difficult to claim that it restates existing specific customary law. Rather, it applies the existing rules to this new domain, but this is not a purely technical operation. The second edition clearly covers issues beyond IHL and armed conflicts. Experts are currently drafting a similar 'Manual on International Law Applicable to Military Uses of Outer Space',[97] but some of them have split away to start an alternative process[98] mainly driven by military interests, which will weaken the credibility of the outcomes of both processes.

**4.64** The 2005 ICRC Customary Law Study,[99] which by its very nature cannot develop the law, has at least demonstrated that customary IHL of IACs is much more similar to customary IHL of NIACs than previously thought by even the greatest experts.[100] Officially, this study is exclusively based upon expert con-

94 See San Remo Manual and HPCR Manual, respectively.

95 For the HPCR Manual's developments, see Ian Henderson, 'Manual on International Law Applicable to Air and Missile Warfare: A Review' (2010) 49 The Military L and L of War Rev 169. The introduction of the San Remo Manual itself admits that it 'includes a few provisions which might be considered progressive developments in the law'. See Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) 5.

96 Michael Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017) 3.

97 McGill University, 'Manual on International Law Applicable to Military Uses of Outer Space' <https://www.mcgill.ca/milamos/> accessed 29 July 2018.

98 See 'The Woomera Manual on the International Law of Military Space Operations' <https://law.adelaide.edu.au/woomera/the-woomera-manual> accessed 24 June 2018.

99 See Henckaerts and Doswald-Beck, and the resulting ICRC CIHL Database.

100 Such as, e.g., the experts who wrote the 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', para 52, as annexed to 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' (1994) UN Doc S/1994/674. For a criticism of the ICRC Study that goes too far in my view, see Bellinger and Haynes, above note 59, 444.

sultations, and the ICRC considers it 'primarily as a work of scholarship' and 'respected the academic freedom of the report's authors and of the experts'.[101]

### c. Documents interpreting IHL

**4.65** Other non-binding documents are intended to serve as guides to interpreting the law. In my view, and even more so than in other areas of law, there exists in IHL a sliding scale between new legislation and the interpretation of existing rules.

#### *i. The ICRC Commentaries*

**4.66** The most interesting cases are the Commentaries to the Conventions and the Protocols, which are presently being updated. The Pictet Commentaries to the Conventions[102] (published between 1952 and 1960) and the Commentary to the Additional Protocols[103] (published in 1987) state that they only represent the opinion of the authors and not that of the ICRC.[104] Nevertheless, they are viewed, and in my opinion rightly so, as the ICRC's Commentaries.[105] The Pictet Commentaries are very influential,[106] although they are sometimes based less upon a rigorous positivist analysis than upon humanitarian considerations and even wishes.[107] Even so, they met little resistance and the ICTY qualified them as authoritative.[108]

**4.67** In my view, the Updated Commentaries,[109] two of which have already been published starting in 2016, offer a much more serious and critical academic analysis than the Pictet Commentaries. They clearly state that they 'reflect the

101 See Henckaerts and Doswald-Beck, xi (Foreword by the ICRC President).

102 Pictet Commentary GC I; Pictet Commentary GC II; Pictet Commentary GC III; Pictet Commentary GC IV.

103 ICRC Commentary APs.

104 Pictet Commentary GC I, 7; ICRC Commentary APs, xiii.

105 The US Supreme Court referred to them both as 'the official commentaries'. See Online Casebook, United States, Hamdan v Rumsfeld: I. United States Supreme Court Decision – Part 1, Section VI(D)(ii).

106 For sources with many references to State practice and jurisprudence, see Julia Grignon, 'Les Commentaires des Conventions de Genève rédigés sous la direction de Jean Pictet' in Julia Grignon (ed), *Tribute to Jean Pictet* (Yvon Blais edn, Schulthess 2016) 140–49; Sivakumaran, Making and Shaping, above note 86, 6. See also W Hays Parks, 'Pictet's Commentaries' in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law in Honour of Jean Pictet* (Martinus Nijhoff 1984) 496–7.

107 For an extreme case on the lower threshold of application of Article 3 common to the GCs, see Pictet Commentary GC I, 50, stating: 'What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?' See also Julia Grignon, *L'applicabilité temporelle du droit international humanitaire* (Schulthess 2014) 129, 131, 133, 140, 148.

108 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 93. See also ibid., C. Appeals Chamber, Merits, paras 562, 579.

109 See generally Updated ICRC Commentary GC I; Updated ICRC Commentary GC II.

ICRC current interpretations of the law',[110] although they benefitted from, in contrast to the previous edition, an incomparably wider input from external practitioners and academics from all around the world.[111] It is a sign of our times that Anglo-Saxon military lawyers have criticized them more heavily than the Pictet Commentaries.[112]

**4.68** In any case, no one uses IHL treaties without consulting these aforementioned Commentaries, and practitioners follow their interpretation, except if they have very strong national interest reasons not to do so. Their classification in most scholarly writings as 'teachings of the most qualified publicists' in the sense of Article 38(1)(d) of the ICJ Statute[113] is artificial in my opinion.[114] No State or court will treat those Commentaries in the same way as the Academy Commentary[115] or the Bothe/Partsch/Solf Commentary.[116] The reason is not that the authors of the last two are less qualified publicists, but that the ICRC, which has a mandate 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof,'[117] stands behind the former.

### *ii. The Interpretive Guidance on Direct Participation in Hostilities*

**4.69** Another example is the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities that was based upon a long process of expert consultations but was unable to achieve consensus. While it has an author (Nils Melzer), it is declared to be 'an expression solely of the ICRC's views.'[118]

110 Updated ICRC Commentary GC I, para 5; Updated ICRC Commentary GC II, para 5.

111 Updated ICRC Commentary GC I, Acknowledgements and paras 11–13; Updated ICRC Commentary GC II, Acknowledgements and paras 11–13.

112 See Sean Watts, 'The Updated First Geneva Convention Commentary, DOD's Law of War Manual, and a More Perfect Law of War' (*Just Security*, 5 July 2016); Ken Watkin, 'The ICRC Updated Commentaries: Reconciling Form and Substance', Parts I and II (*Just Security*, 24 and 30 August 2016).

113 Sivakumaran, Making and Shaping, above note 86, 6; Grignon, above note 107, 144–5.

114 For a detailed discussion on the divergence between the authority of the Commentaries in legal theory and in social reality, see Linus Mührel, 'Die Kommentare des Internationalen Komitees vom Roten Kreuz, ihre Autorität und ihr Einfluss auf die Entwicklung des Humanitären Völkerrechts im Wandel der Zeit' to be published in Felix Boor *et al*. (eds), *Zeit und Internationales Recht* (forthcoming, Mohr Siebeck 2019).

115 Academy Commentary.

116 Bothe/Partsch/Solf Commentary.

117 Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva, Switzerland in 1986, and amended in 1996 and 2005) Art 5(2)(g).

118 Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC 2009) 6 [ICRC DPH Guidance].

### 4.5.3 Some concerns about new processes leading to new forms of 'soft law'

**4.70** With some new non-binding documents, there is concern that the non-transparent and non-inclusive process leading to their adoption may affect the legitimacy of the outcome. Often, such documents are developed by experts whose representativeness and legitimacy are doubtful. Even where States are involved, these soft law rules are no longer created, as they were traditionally, publicly in the UN General Assembly or the Human Rights Council with civil society present. In addition, non-State armed groups were and are not involved in any of those processes, although most of them concern such groups.

**4.71** As mentioned above, similar criticism may be voiced against the preparatory phases of Switzerland's and the ICRC's recent attempts to have States develop some IHL mechanisms and rules, which failed for all practical purposes. In any case, had those initiatives been successful, they would have led to non-binding documents. The fact that States are so reluctant to adopt such documents and that they insist that outcomes must be based upon consensus and adopted in purely State-driven processes shows that States believe such documents have an impact even if they are not binding. Whether such impact is classified as legal or non-legal is largely irrelevant and depends on one's concept of 'law'.

## 4.6 SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES

**4.72** Returning to a more orthodox theory of sources, Article 38(1)(d) of the ICJ Statute lists jurisprudence and scholarly writings only as 'subsidiary means for the determination of rules of law'.

### 4.6.1 International jurisprudence

> International jurisprudence, although not binding (except, in some cases on States involved in the dispute), in particular that of international criminal tribunals, has not only had a major impact on the clarification and interpretation of IHL but has also created new rules, often under the guise of ascertaining customary law.

**4.73** Under Article 38(1)(d) of the ICJ Statute, judicial decisions are only subsidiary means to determine legal rules. In reality, jurisprudence is treated as if it constituted precedents in an Anglo-Saxon domestic legal system, especially, but not only, by scholars. Every publication on IHL, including this book, is full of

references to ICTY jurisprudence on substantive IHL issues and even the US Law of War Manual contains 20 such references. The courts themselves often try to legislate 'under the guise of the ascertainment of customary law,'[119] a phenomenon which is particularly evident in the jurisprudence of ICTY.

**4.74** As judgments of the ICJ and arbitral decisions on IHL are rare, and in the absence of an IHL mechanism that can be triggered by the individual victim, the burden falls on existing human right bodies and international criminal tribunals to produce most of the jurisprudence relevant to IHL.

**4.75** While this reliance on human rights bodies fills the gap created by the absence of an IHL specific mechanism in some ways, it also creates certain substantial challenges for all human rights bodies engaging with such questions.[120]

**4.76** International criminal tribunals face other challenges. As they operate at the level of individual responsibility (and not the responsibility of parties to armed conflicts), they only deal with IHL violations that amount to war crimes and therefore do not address other IHL violations. More importantly, the practice of international criminal tribunals does not take the difficulties of applying IHL during armed conflicts into account.[121] In some cases, their interpretations are easier to apply years after the events occurred than on the battlefield.[122] The jurisprudence of these criminal tribunals has nevertheless played an enormous role in developing and clarifying the laws applicable to armed conflict, including, for example, the material, temporal and geographical scope of IACs and NIACs; the existence of a similar body of IHL rules for IACs and NIACs; and the prohibition against sexual violence. Human rights bodies have clarified the relationship between IHRL and IHL, although their approach is contested by the military in particular.

### 4.6.2 National jurisprudence

Domestic jurisprudence may also offer legal reasoning useful for interpreting IHL, and it is often referred to as if it was a source of legal rules. Its impact,

119 Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 368.

120 See MN 5.115.

121 Marco Sassòli and Julia Grignon, 'Les limites du droit international pénal et de la justice pénale dans la mise en oeuvre du droit international humanitaire' in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du XXIe siècle* (Bruylant 2012) 144–52. See more generally MNs 9.065–9.068.

122 For a further discussion on one example in which the ICTY found that allegiance determines whether someone benefits from protected civilian status under GC IV, see MNs 8.156–8.158.

however, is weaker when it either tries to justify conduct of the forum State or adopts very far-reaching positions towards other States or their agents.

**4.77** Domestic jurisprudence could and should have an important role in enforcing the legal obligations of States.[123] It constitutes State practice and expresses the *opinio juris* of a State, and it may also help in interpreting IHL through the quality of the legal reasoning adopted by judgments applying IHL.[124] Nevertheless, domestic jurisprudence often adopts the legal interpretation that is needed to justify the conduct of the forum State or to criticize conduct of another State.[125] In addition, scholars and military manuals mainly refer to the jurisprudence of a few Anglo-Saxon countries not only because of cultural bias but also because judgments of courts in the Global South are either not available or they sometimes lack a basic understanding of IHL.[126]

### 4.6.3 Scholarly writings

Although scholarly writings were important sources in the past and are still frequently used to understand IHL, their impact has weakened because of the diversity of opinions expressed, the diverse understandings of what is international law and the blurring between *lex lata* ('the law as it exists') and *lex ferenda* ('what the law should be').

**4.78** Even if the ICRC Commentaries do not, as suggested here, fall into the ICJ Statute category of scholarly teachings, it must 'be recalled that the law of armed conflict has a history of rules later being accepted which first emerged "from the pens of scholarly advocates."'[127] Historically, works by Hugo Grotius[128] and the Spanish school with Bartolomé de la Cases, Francisco de Vitoria and Francisco Suarez[129] formed (Western) IHL because their reasoning was considered to express natural law. Even more recently, Lassa Oppenheim[130]

123 See MNs 5.116–5.119.

124 See the examples referred to in the Online Casebook, 'Implementation Mechanisms' at Section III. Respect by the conflict, sub-section 3. Role of domestic courts.

125 See MN 5.119.

126 See, e.g., Robert Frau, 'Drone Strikes as "War Crime" – The Peshawar High Court Embarrasses Itself' (2013) BOFAX Nr. 427E <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264237> accessed 18 July 2018.

127 Sivakumaran, The Law, above note 31, 52 (citing to James E. Bond, 'Application of the Law of War to Internal Conflicts' (1973) 3 Georgia J of Intl and Comparative L 345).

128 See Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (PUF 1983).

129 See Sergio Moratiel Villa, 'The Spanish School of the New Law of Nations' (1992) 32 IRRC 416; Peter Haggenmacher, 'Just War and Regular War in Sixteenth Century Spanish Doctrine' (1992) 32 IRRC 434; Luciano Pereña Vicente, 'Charter of Rights of the Indians According to the School of Salamanca' (1992) 32 IRRC 467, 475–85.

130 Lassa Oppenheim, *International Law: Vol II, War and Neutrality* (Longmans 1906).

decisively influenced several military manuals and generations of practitioners.[131] Still today, when a problem of IHL interpretation arises, students, scholars and practitioners regularly consult scholarly writings.

**4.79** Today, however, the importance of scholarly writings has diminished for several reasons. First, some scholars simply consider the practice of States (or of their State) is the law. Such positions are often camouflaged through sophisticated and novel policy-oriented theories. Others simply consider that the outcome they desire from a humanitarian point of view is the law. Despite their noble aims, such scholars also weaken the law's impact. When it comes to IHL in particular, scholars must remain realists because it is a profoundly pragmatic branch of international law. In a utopian world, there would be no need for IHL as there would be no armed conflicts.

**4.80** Second, many scholars work (or have worked) for States or humanitarian organizations and are therefore brainwashed by the preconceived notions of their respective communities. Third, an academic career cannot be pursued by honestly describing the existing law, but only by suggesting 'new interpretations', 'thinking outside the box' or 'deconstructing' everything written previously. This leads to the impression that a reference may be found in favour of any position. The increasing number of publications on every imaginable IHL problem, the race in the academic world towards a quantitative evaluation of research output useful for a career and the need to raise funds for research by imagining innovative projects that claim a 'paradigm shift' is needed all reinforce this tendency. Fourth, scholars following some contemporary schools of international law often proudly refuse to state whether their positions reflect *lex lata* or *lex ferenda* as they consider this distinction to be outdated and irrelevant.

## 4.7 STATE POSITIONS ON THE INTERPRETATION OF IHL

It is impossible to know the positions of most States on IHL questions. It is often only (former) officials, expressing themselves 'in their private capacity', who express themselves on how IHL rules should be interpreted. Their positions should not be given too much weight, including because States have no monopoly or privilege in the interpretation of IHL, except when States parties agree upon the interpretation of a treaty rule.

131 See, e.g., US Law of War Manual, preface, iii.

**4.81** As mentioned above, I do not believe that only States make international law. Even if this was true, States cannot be the exclusive interpreters of the rules. Indeed, one does not go back to parliament when a rule of domestic law requires interpretation. The interpretation of a rule must be made by courts (rare in IHL) as well as by all addressees and beneficiaries of IHL, namely, States, non-State armed groups, humanitarian organizations and war victims invoking their rights. Except for an interpretation adopted by a judgment that binds the parties to a dispute, one interpretation of a rule does not prevail by principle over other interpretations. States obviously are free to change the rule, but for that they need universal (treaties) or general (customary law) acceptance by those who will be bound by the new rule. Otherwise, subsequent State practice is a means for interpreting the law only if it establishes the agreement of States regarding the interpretation of a rule.[132] An interpretation by a few States, even if they are powerful, is not an agreement.

**4.82** The focus of judicial decisions, scholarly writings (including this book) and (Western) military manuals only on the interpretation given by a few Western States is an additional problem. This is not necessarily due to imperialist neocolonialist wishes to impose certain views; it is also due to the fact that the interpretation of IHL by most States is not publicly available. No one knows how Russia interprets direct participation in hostilities, how Sri Lanka interprets the term 'military objective' or how Pakistan calculates proportionality.

**4.83** Finally, the question of who may interpret the law for a given State arises. In this book, I often refer to positions of the US or UK military lawyers (positions that are frequently shared by their Canadian and Australian colleagues). Technically, these are not official government positions but are instead expressed in scholarly articles, blogs and expert meetings by military lawyers 'in their private capacity' (although everyone knows that, just as ICRC lawyers, they need approval from their superiors for any public statement) and by former military lawyers. Such statements can nevertheless be seen as reasonably reflecting the positions of their armed forces (which are generally reluctant to officially take a position because this could tie their hands), and this is precisely the reason why such persons are invited 'in their private capacity' to expert meetings. Military lawyers may even be more reluctant to adopt more progressive interpretations of IHL influenced by humanitarian considerations or human rights than might be espoused by commanders who actually fight, because they were trained, as

132 Thus, for treaties, see VCLT, Art 31(3)(b).

all lawyers, to foresee possible future situations for which they have to safeguard the interests of their clients.

**4.84** Despite the frequent references to positions of the US or UK (or Anglo-Saxon) military lawyers in this book, readers should *not* get the erroneous impression that they are the main conservative force opposed to more 'humanitarian' interpretations of IHL. It is true that French Ministry of Defence lawyers have recently become more outspoken, adopting rather open and humanitarian positions.[133] However, it is impossible to know the positions of Russian, Chinese, Indian or Pakistani military lawyers. I suspect that if they were honest (and not simply adopting anti-Western propaganda positions) and ready (and allowed) to express their positions on IHL questions, they would often adopt positions that are less humanitarian than their Anglo-Saxon colleagues.

**4.85** In any case, such statements are useful because they allow us to understand the aspirations, problems and difficulties practitioners have in relation to a certain rule or interpretation. Such statements, however, cannot be decisive, just as the aspirations and problems of non-State armed groups must, in my view, be taken into account but cannot be decisive when interpreting IHL. Indeed, those lawyers only unofficially 'represent' very few States. Moreover, a State is not comprised solely of its military, even when it comes to the interpretation of IHL.[134] Open declarations by States on how they interpret IHL would be very welcome, but they do not do so. We must therefore rely on others to interpret the law.[135]

133 Nathalie Durhin, 'Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law' (2017) 98 IRRC 177; Léa Bass and Claire Landais, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2016) 97 IRRC 1295.

134 For example, the US Law of War Manual contains the disclaimer that 'the views in this manual do not necessarily reflect the views of those Departments or the U.S. Government as a whole.' See US Law of War Manual, preface, vi.

135 Michael Schmitt and Sean Watts, 'State Opinio Juris and International Humanitarian Law Pluralism' (2015) 91 ILS 171.

# 5

# RESPECT OF THE LAW

**5.01** Before even discussing in detail the substantive rules of IHL, it is necessary to address the elephant in the room faced by everyone who studies IHL, namely the doubts of students as to whether those engaged in armed conflicts actually respect the substantive rules of IHL. If actors involved in armed conflicts do not in reality care for IHL, this field of law would consequently amount to nothing more than a purely intellectual exercise that, while nevertheless perhaps useful to train the legal capacities of young minds, would not warrant a book on the subject. In my opinion, however, IHL is indeed frequently respected, thus playing an important role in mitigating the negative effects caused by armed conflict.

**5.02** Even in a law book, the enquiry into whether actors respect IHL requires an analysis that goes beyond the law itself to help explain why IHL is respected or violated. While the realism of IHL rules is obviously relevant to this discussion, this enquiry also requires an interdisciplinary analysis into various fields of study, including international relations, psychology, political science and anthropology. Even though I am not an expert in these other fields, I can offer nearly 30 years of practical experience gained working to implement IHL in various armed conflicts around the world by engaging with all actors such as victims, perpetrators (who can overlap with the latter category!), governments as well as their armed forces, non-State armed groups and fellow academics. In addition to providing some insight into those practical experiences and what they show regarding the respect of IHL, this chapter will also cover fields more familiar to lawyers: the legal mechanisms designed to ensure IHL's respect. In this regard, the present chapter will first outline the role general public international law mechanisms play in enforcing IHL because, once again, IHL is first and foremost a branch of public international law. This chapter will then highlight and analyse the specific mechanisms established by IHL to ensure its respect.

## 5.1 THE RESPECT OF IHL

Even though the media all too often places IHL violations at the front and centre of the public's eye, IHL is in reality more often respected than violated. Taking the context to which it applies – armed conflicts – into account, it is rather astonishing how often it is respected. Beyond the legal mechanisms ensuring the respect of IHL, many non-legal factors also contribute to its respect, including following routine, military interest in discipline as well as efficiency, public opinion, ethical as well as religious factors, positive reciprocity and the desire to re-establish a durable peace. The public perception, which is all too often driven by the media, that IHL is systematically violated is not only erroneous but also dangerous in that such perceptions can negatively impact the respect of IHL. To increase the respect for IHL, it is important to overcome this credibility gap, including, in particular, by ensuring that the law does not promise what cannot be fulfilled in reality. To this end, and while perhaps not meeting with the lofty ideals of some, it is therefore important that the substantive rules of IHL are realistic.

**5.03** People who watch or read the news as well as those who read NGO reports and decisions of the international criminal tribunals are likely left with the mistaken impression that IHL is systematically violated in contemporary armed conflicts. Indeed, it cannot be denied that current conflicts in Syria, the Central African Republic, Yemen or South Sudan are rife with IHL violations such that some academics in this field despair, often leading them to withdraw into cynicism, deconstructionist theories or even the desire to specialize instead in investment protection law. Historians know that the often-heard claim that wars in the past were fought principally between soldiers while contemporary conflicts are now waged against civilians is simply wrong. One only has to recall the high toll imposed on civilians during the Thirty Years War in Central Europe, the Napoleonian occupation of Spain, the warlords in China, the Livonian war between Russia and Sweden, the Spanish Civil War and the colonial wars conducted by British, French, German, Belgian, Italian, Spanish and Portuguese colonizers against the local population. The dichotomy of perceptions between past and current conflicts results instead from the fact that modern technology allows for the immediate dissemination of violations against the civilian population to almost all people in the world. Moreover, and more importantly, the law regulating armed conflict is now (fortunately) much more developed and its applicability to all armed conflicts, including to NIACs, is uncontroversial. Consequently, in contrast to past wars, the gap between what the law says ought to be and what actually occurs in contemporary conflicts is now much greater, and the perceived gap is even greater than the actual gap.

**5.04** Even though IHL is more often respected than violated, the fact that it is violated is not astonishing. This section will outline the numerous factors inherent to armed conflict and human psychology that lead to IHL violations. It will demonstrate, however, that multiple, convergent non-legal factors nevertheless contribute to the respect of IHL and that the perception that IHL is violated is in fact worse than reality. Indeed, as explained below, this mistaken perception combined with IHL's increasing promises of protection results in a self-fulfilling prophecy by creating a credibility gap that can and does lead to further IHL violations. Finally, this section will argue further that this vicious circle must and can be interrupted.

### 5.1.1 Why is IHL violated?

**5.05** In opposition to the laws of physics, a distinctive feature of social rules is that such rules can be and are actually violated. There are several reasons why IHL is violated. First, violations of IHL, which is one of the many subsets of society's social rules, mostly consist of violent acts committed in armed conflicts or, in other words, situations anyway marked by violence, most of which is not prohibited by IHL. As, according to the well-known maxim, violence begets violence, both legal and illegal violence inherent in armed conflict can create a contagious, vicious cycle of violence that not only perpetuates further violence, including by those who have not resorted to violence, but also establishes a fertile breeding ground for potential IHL violations. This book, however, is not the place to explain the reasons for violence. It is simply sufficient to note that violence appears to be an inherent aspect of the human condition and that it results from the interplay of various objective (for example, historical, cultural, educational and economic) and subjective factors. Violence, however, is never an inevitability, even when all factors leading to violence exist.

**5.06** Second, no one can guarantee that he or she would not respond in turn by committing war crimes if confronted with IHL violations during an armed conflict, the torture of one's brother, the death of one's husband or the rape of one's mother, real (or even fabricated) reports of indiscriminate bombing 'by the others', the perception that one's own survival or the survival of one's group is at stake, group pressure or impunity for violations of IHL. The regrettable fact remains that IHL will be violated as long as there are cultures, ideologies and ideas that exclude or characterize others as less human simply because of their nationality, race, ethnic group, religion, culture or economic condition or as long as some believe that 'the others' do not care for the rules of IHL.

**5.07** Third, structural inequalities that pre-exist and often lead to armed conflict offer additional reasons as to why IHL is violated. Many who fight in contemporary armed conflicts lived in a pre-conflict environment of injustice rife with systemic and serious violations of the most fundamental civil, political, social, economic and cultural rights. This environment not only often contributes to the outbreak of conflict, but it is also exacerbated itself by conflict. Is it surprising that individuals raised without proper education in an atmosphere of street violence, organized crime, misery, racism, abject poverty and endemic human rights violations fail to respect IHL the very moment they are given weapons and told to fight an 'enemy'? Is it any wonder that such persons violate IHL when, in addition to the above, they are continuously exposed during a conflict to death, injury, fear, hate, cries, cadavers, dirt, cold, heat, hunger, thirst, exhaustion, weariness, physical tension, uncertainty, arbitrariness and an absence of love? In other words, when people are deprived of nearly everything that makes human life 'civilized', how can others expect them to behave in a civilized way? While these questions highlight some of the societal factors that can and have contributed to IHL violations, no one, however, is ever put in a situation where he or she is forced to violate IHL. The decision to violate IHL remains a personal choice, and there are numerous accounts of people who, even in the worst socio-economic environments, make the conscious decision to uphold the law themselves and to prevent others violating IHL, even when doing so places them and their families at great risk.

**5.08** Fourth, from a legal perspective, armed conflicts constitute situations where the primary international legal and social regime – peace – is overruled because *jus ad bellum*, which should now more aptly be referred to as *jus contra bellum* prohibiting the use of force, has been violated by at least one of the parties to the conflict. It is therefore not astonishing that people, after experiencing the failure of the primary legal regime designed to prohibit armed conflicts, will not necessarily respect IHL, the subsidiary legal regime, that applies when *jus contra bellum* fails to maintain the peace.

**5.09** Fifth, armed conflict is an exceptional experience for even the best-trained soldiers, let alone all other people it impacts. Certain acts typically prohibited during peacetime become not only lawful under IHL but also commonplace. On a near daily basis during a conflict, soldiers as well as civilians directly participating in hostilities are 'legally' killed and property that satisfies the definition of a valid military objective is 'lawfully' destroyed, all with societal approval. The lawful violence permitted by IHL during conflict can make it easier for those involved in a conflict to violate other fundamental rules of human behaviour

and commit acts (for instance, torture or rape) that remain prohibited even in armed conflicts by IHL.

**5.10** Sixth, modern battlefield technology makes it both easier to violate IHL and to respect it. Modern weapons, on the one hand, allow some belligerents to kill people from afar without recognizing such people as individuals or even without seeing them altogether, thus making easier to kill them without much remorse. Moreover, modern weapons are often launched according to a 'division of labour' that waters down and perhaps even eliminates sentiments of individual responsibility. The combination of the two aforementioned factors ends up limiting certain ethical instincts. To take but one example, it is unlikely that the pilots who carpet-bombed Coventry, Dresden or Hiroshima would have slit the throats of or poured petrol over tens of thousands of women and children. On the other hand, recent genocidal conflicts have shown that unchecked hatred and fanaticism can turn even previously good fathers into war criminals who rape girls from the same village or slit the throats of their neighbours while looking them straight in the eye, and make loving mothers cry for revenge at all costs.

**5.11** Seventh, IHL violations can also result from the fact that both the public at large and the likely protagonists in armed conflicts are often not instructed and trained in IHL. While the basic moral principles of IHL are self-evident, its more detailed and complex rules are not always self-explanatory. Furthermore, people often fail to realize that IHL does not accept most of the justifications often given for IHL violations as an excuse, for example for acts of torture. Such justifications include a 'state of necessity', 'self-defence', the sense of having suffered an injustice, 'strategic interests' and the desire to spare friendly forces from death or even injury. It should be noted here, however, that even proper training and instruction in the rules of IHL is not a sufficient condition to ensure that those rules are respected. Rather, people engaging in conflict must accept and implement IHL rules for those rules to be effective.

**5.12** Eighth, while respect for IHL is impossible without a minimum level of discipline and organization, a climate of blind obedience that is so commonplace in regular armies and in armed groups who identify their cause with a leader is conducive to IHL violations. In addition, indoctrination may create the feeling that 'the cause' is more important than any other human value.

**5.13** Ninth, some belligerents involved in today's increasingly asymmetric conflicts are convinced that they cannot win without violating or at least 'reinterpreting'

IHL. How can the necessary intelligence information about terrorist networks be obtained while humanely treating those who are supposed to have such information? Is not demoralization of the civilian population through terrorist acts the only chance for many groups to overcome an enemy that has far superior equipment, technology and often manpower? While frequently used by belligerents to justify IHL violations, both of these convictions are wrong. Inhumane treatment of suspected 'terrorists' will only help recruit others and put democratic States on the same moral level as the terrorists. Terrorist attacks only strengthen the determination of the public in democracies to stand behind their governments and to favour military solutions over other solutions that eradicate the root causes of terrorism (but this may be precisely the terrorists' aim because such a state of affairs would guarantee them continued support from their constituencies).

**5.14** Tenth, in asymmetric conflicts, most rules of IHL in fact concern only one side of the conflict because, for example, only one side has prisoners, only one side has an air force and only one side could possibly use the civilian population as shields. Beyond that, the very philosophy of IHL – that the only legitimate aim is to weaken the military forces of the enemy – is challenged by such conflicts. That aim is often irrelevant in asymmetric wars because one side often has no military forces while most of the military forces of the other side are outside its reach. The weaker side in an asymmetric conflict often lacks the necessary structures of authority, hierarchy, communication between superiors and subordinates and accountability mechanisms that are all essential to the enforcement of IHL.[1] Legally, one may obviously consider that such groups do not possess the minimum structure of organization required to be a party to an armed conflict[2] and that IHL therefore does not apply to such conflicts. Such a result would, however, mean in practice that IHL is inapplicable to asymmetric conflicts, even with regard to the more organized government side to which it should surely apply. In addition, factors contributing to restraint can be identified even in decentralized or community embedded armed groups that lack a strong hierarchy.[3]

### 5.1.2 IHL is often respected

**5.15** Taking into account the aforementioned reasons why IHL may be violated, one may be rather astonished that IHL is in fact often respected in armed conflicts.

1 ICRC, 'The Roots of Restraints in War' (ICRC 2018).
2 See MNs 6.34, 6.36.
3 Restraints in War, above note 1, 45–62.

However, only people who experience armed conflicts through their television sets can think that war inevitably entails violations of the laws of war, while people who actually live through wars know that such conflicts are fought by human beings who have the inherent choice to be humane.

**5.16** While it is impossible to quantify in percentages the respect of most IHL rules, anecdotal evidence shows that IHL is more often respected than not. Nearly one million prisoners are visited every year by the ICRC. They are evidence that countless fighters respect their surrendering enemies even after their comrades, wives and children have been killed by those belonging to the same side as those who surrendered. Equally surprising, numerous fighters, police officials and investigators do not resort to torture even if they assume that those in their hands must know when an attack will happen. Likewise, in the vast majority of instances, oppressed citizens do not plant indiscriminate bombs even though their rulers deny them the most fundamental civil, political, social and economic rights. Similarly, most leaders do not authorize unrestrained fighting even though they either fear that they may lose the war or their power or are convinced that they are fighting for a just cause. Finally, the regime of Saddam Hussein in Iraq in the 1980s – a profoundly inhumane regime that massacred its own population with poisonous gas as well as in places of detention that more aptly qualified as torture camps – respected Iranian prisoners of war largely in conformity with the rules prescribed by Convention III. Convention III made all the difference.

### 5.1.3 Non-legal factors that contribute to the respect of IHL

**5.17** Although it has been found that legal arguments are more durable than moral arguments when seeking to convince combatants to respect humanitarian norms during warfare,[4] non-legal factors – as opposed to the specific legal mechanisms established to ensure the respect of IHL – are the main reasons why IHL, like any other branch of the law, is respected.[5] In that regard, routine is the first important non-legal factor contributing to respect. Indeed, once soldiers or civil servants are aware of a regulation that their superiors expect to be followed, they will apply and respect it without further discussion, especially if they have understood that it is possible to do so.

4 See Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (ICRC 2004), in particular 15. For a view that is now more nuanced, see Restraints in War, above note 1, 65.

5 I follow here to a large extent Michel Veuthey, *Guérilla et droit humanitaire* (2nd edn, ICRC 1983) 338–47.

**5.18** Second, in all human societies, there is a positive predisposition to respect the law. In most cases, if individuals understand that the rules of IHL are the law applicable in armed conflicts accepted by States and the international community, and not simply the philanthropic wishes of professional do-gooders, they will respect them.

**5.19** Third, respecting IHL is also largely in the military's interest. One of the strongest arguments used to convince belligerents to respect IHL is that they cannot only achieve victory while respecting IHL but also that IHL will even make victory easier because it ensures that the military concentrates its resources only on the enemy's military potential. In other words, respecting IHL is a question of military efficiency. For example, many IHL rules governing the conduct of hostilities simply implement the tactical principles of economy and proportionality of means. Attacks directed against civilians – in addition to constituting war crimes – waste ammunition that is needed for neutralizing military objectives. Likewise, troops who respect IHL form a disciplined unit that is more effective in battle, whereas looting and raping not only lack military value but also undermine the equally important battle for the 'hearts and minds' of the civilian population.

**5.20** Fourth, in a global information society, international and national public opinion increasingly contribute to the respect for IHL, although sometimes public opinion can also unfortunately contribute to IHL violations. The sympathy of international and national public opinion is as essential to waging an effective war as ammunition supplies. In NIACs, the battle for the hearts and minds of the people is one of the central issues at stake. There is no more effective way to lose public support than television images of atrocities that may, unfortunately, also have been manipulated. Obviously, free access to the truth by the media may be hindered or manipulated by belligerents. Enemy atrocities may be sheer fabrications. Manipulated or not, some media incite hatred and atrocities by dehumanizing members of specific ethnic groups, depriving them of humanitarian protection. In a worldwide information society, however, it becomes increasingly difficult to protect such false news and manipulated opinions against the truth and elementary considerations of humanity.

**5.21** Fifth, the cultural, ethical and religious imperatives of most societies often support if not mandate the respect of IHL. Restraint is more durable if it is internalized as part of a soldier's or fighter's identity than if it is merely obliged by

the law.[6] All religions contain rules on respect for either the earth's or God's creatures as the case may be. A number of holy books contain specific prohibitions equally or exclusively applicable in wartime. An in-depth knowledge of the Conventions and the Protocols is not necessary to know that it is prohibited to kill children or to rape.

**5.22** Sixth, whereas later it will be shown that negative reciprocity is an invalid legal argument to violate IHL regardless of any prior violations by the enemy, positive reciprocity certainly plays an important role as a non-legal factor in encouraging belligerents to respect IHL. Specifically, soldiers, armed groups or States will respect IHL in order to induce the enemy to respect it. However, even if a State or soldier doubts whether the enemy will obey IHL, the other non-legal factors highlighted in this section will continue to promote the respect of IHL.

**5.23** Finally, the achievement of a durable peace is the only rational aim of most armed conflicts. Given that numerous complex territorial, political and economic issues remain to be resolved at the conclusion of most armed conflicts, peace is much more readily restored if it is not also necessary to overcome the hatred between peoples invariably spawned and most certainly exacerbated by IHL violations.

### 5.1.4 The perception is worse than reality

**5.24** Although IHL is most often respected and many factors contribute to its respect, the media, NGOs or official reports of enquiry cannot be relied upon to report even-handedly on respect and violations. They are right to consider that violations are scandals that must be immediately publicized while viewing the respect of IHL as 'normal' and as newsworthy as the fact that most drivers respect speed limits most of the time. In addition, claiming that the adversary systematically violates IHL is an important propaganda tool for every belligerent even though such claims may not necessarily be grounded in reality. Furthermore, instances in which the parties to a conflict respect IHL (for example, precautionary measures in attack, orders to stop a planned attack, sanctions taken by a non-State armed group against a member who violated IHL or ICRC visits to and the release of detainees) often occur in secret, while violations are increasingly publicized.

6 Restraints in War, above note 1, 64–5.

### 5.1.5 The increasing credibility gap between promises and reality

**5.25** While the reality of IHL violations is bleak and the perception of this reality is even bleaker, the expectation that parties to a conflict will respect IHL has increased. Statements of scholars, international tribunals, international organizations, States and now even armed groups might lead one to believe that the full machinery of international law will guarantee protection in times of armed conflicts. It is often stated that most rules of IHL have a *jus cogens* character[7] and are intransgressible.[8] Many now claim that customary IHL, based upon State practice, extends IHL rules previously applicable only in IACs to NIACs.[9] Additionally, the UN Security Council has consistently held that violations of IHL constitute threats to international peace and security.[10] However, victims of IHL violations in Ukraine, Palestine and Syria are still waiting for the Council to comply with the 'duties'[11] conferred upon it by the UN Charter to manage such threats. Furthermore, IHL experts optimistically recall that all States have an obligation to 'ensure respect' of IHL by belligerents.[12] In the halls of the UN, the doctrine of the 'responsibility to protect,'[13] including against war crimes, is debated. While both concepts represent truly lofty and laudable aspirations, they are lacking in clarity, and, more importantly, they are not always applied.

**5.26** Despite the explanations of sociologists and international lawyers to the contrary, many still ascribe to the (incorrect) idea that rules are only valid if their violations are punished. The widespread and nearly generalized impunity often associated with IHL violations therefore has a terribly corrupting effect on the potential future compliance with IHL, including in particular on belligerents implementing IHL rules who are left with the impression that they are the only ones who comply with them. Although there has been some progress in the international fight against impunity for violations of IHL, there are many armed conflicts in which not a single perpetrator has been punished. Even where serious international and domestic efforts towards criminal prosecutions have been made, most war criminals continue to benefit from de facto impunity. The case of the former Yugoslavia demonstrated that it is materially, socially

7 ILC Articles on State Responsibility, 113, para 5 commentary to Art 40; ICTY, *Prosecutor v Kupreškić et al.* (Judgment) IT-95-16-T (14 January 2000) para 520.

8 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 79.

9 See MNs 7.44–7.51.

10 See MNs 5.081, 5.084, 9.088.

11 UN Charter, Art 24.

12 See MNs 5.145–5.157.

13 International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (International Development Research Centre 2001); UNGA Res 60/1 (2005) paras 138–40.

and politically impossible to prosecute all perpetrators of war crimes. Additionally, while it is often chanted that there is 'no peace without justice', many war victims are unfortunately still deprived of both. With regard to *full and effective* reparations, there has not been one single case in which complete compensation was offered to all victims of violations after a conflict.[14]

### 5.1.6 The consequences of the credibility gap: a self-fulfilling prophecy

**5.27** The international community is all too often unable or unwilling to fulfil the aforementioned promises either because doing so may prove too costly in terms of human and material resources or because political interests prevent action. Populations affected by conflict may interpret the international community's failure to intervene as an indication that either their particular situation is not 'horrible enough' to warrant international action or that their lives and fortunes are being balanced against and ultimately sacrificed for geopolitical reasons that do not concern them.

**5.28** This credibility gap between promises and reality negatively affects the implementation of IHL. First, the perceived gap with respect to some rules affects how other rules are complied with. Some alleged customary rules unfortunately do not correspond to what States and armed groups actually do. This puts at risk other uncontroversial rules, for example, the rule prohibiting deliberate attacks on civilians. Second, in some cases, 'promises' to undertake certain actions in the future have also served as alibis for inaction. According to some sources, this is why some UN Security Council members set up the ICTY.[15] Third, victims frustrated by the credibility gap often no longer believe in the restraining power of the law. As a result, such victims as well as those fighting on their behalf are less likely to comply with IHL. Fourth, unrealistic expectations may, quite simply, place persons affected by armed conflicts in grave danger, as evidenced by the tragedy of Srebrenica. Had its inhabitants known at the outset that the UN could not realistically deliver on the promise of designating Srebrenica as a protected zone, it is possible that they may not have tolerated Bosnian Muslim forces' occasional provocation of the Bosnian Serb forces through raids on the

14 The UN General Assembly has determined that all victims of serious IHL violations are entitled to '[a]dequate, effective and prompt reparation…'. See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', para 11(b), as annexed to UNGA Res 60/147 (2006).

15 Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia* (James Thomas Snyder translator, Eugenia and Hugh M. Stewart '26 Series on Eastern Europe 2004).

surrounding villages[16] and that they would have likely either stayed in their villages of origin or have fled to real safety instead of concentrating in the place where they would eventually be massacred. Finally, and most importantly, only very few individuals would be ready to respect rules protecting those they perceive as their enemies if they are convinced that they are the only ones respecting those rules.

### 5.1.7 How to overcome the credibility gap?

**5.29** The credibility gap, however, can be bridged by first and foremost respecting IHL as promised. This will be easier to accomplish if commitments are realistic and nuanced. Second, work must be undertaken to overcome the perception that IHL is more frequently violated than respected. This perception is strongest in certain long-running conflicts where people have a profound sense of being the victims of historical injustice, such as the ongoing conflicts in the Near East. The perception that IHL is more often violated than not is inaccurate as well as extremely dangerous because it can result in a vicious cycle of non-respect. To counter this, it is necessary to foster a global attitude in which respect for IHL matters and violations are taken seriously regardless who committed said violations. Well-organized and powerful democratic States have an important role to play in this regard and should take the lead in setting this tone.

**5.30** Third, and perhaps most importantly, the selective perception of violations must also be countered. Parties and the public believe that those they favour respect IHL while the opposing party systematically violates IHL. Similarly, people who believe they are fighting for a just cause are usually convinced that their adversary violated *jus ad bellum* and, if so, necessarily IHL. These perceptions are not only misconceived, but they also undermine the readiness of people thus manipulated to respect IHL. To overcome such perceptions, dissemination of IHL should focus on highlighting the efforts made by an adverse party to respect IHL.

**5.31** Fourth, States accused of violations should – in all cases – carry out serious enquiries and make their results public in order to convince their adversaries and others of their general willingness to respect IHL.

**5.32** Fifth, all people, governments, NGOs and international organizations should endeavour to show – whenever possible and when it is true – that IHL is very

16 ICTY, *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) paras 104–5.

often respected. As mentioned above, this is not an easy task because for various reasons, such as media selection bias, it is difficult to come across real-life examples of respect. It is therefore good news that the ICRC has initiated a project documenting and discussing cases of respect.[17] Scepticism of IHL is the first step towards the worst atrocities. In order to guarantee that belligerents respect IHL in its entirety, scepticism of IHL must become as politically incorrect as scepticism of gender and racial equality has fortunately become in modern times.

## 5.2 THE WEAKNESSES OF IMPLEMENTING IHL AS A BRANCH OF PUBLIC INTERNATIONAL LAW

**5.33** Under the traditional structure of international law (we will see that IHL has to a large extent overcome it), only States are capable of committing IHL violations. Measures to stop and repress such violations must therefore be primarily directed against the State responsible for the violation. Such measures exist not only in IHL itself but also in the general international law of State responsibility as well as in the UN Charter, which is the 'constitution' of organized international society. This section will outline the mechanisms to stop and repress IHL violations that are not specific to IHL but which IHL often modifies in some respect. The next section will then discuss the specific mechanisms available under IHL – mechanisms that nevertheless must be understood, interpreted and applied within the general public international law framework.

### 5.2.1 Reciprocity, reprisals and mutual interest

While reciprocity considerations constitute an important incentive to respect IHL, a State may not suspend its performance of IHL obligations in reaction to IHL violations by its enemy. Reprisals are prohibited if they are directed at protected persons or protected objects in the power of a party. In the conduct of hostilities, they are only prohibited by Protocol I if directed at the civilian population, but not by customary law. The majority opinion is that reprisals are conceptually not possible in NIACs.

**5.34** As mentioned above, positive reciprocity is a powerful argument in favour of why parties to a conflict respect IHL. In general, reciprocity is a major sociological factor ensuring the respect of international law, and it has been translated

17 See 'IHL in Action: Respect for the Law on the Battlefield' Online Database <https://ihl-in-action.icrc.org/>.

into many primary and secondary rules. However, the usual mix of negotiations as well as mutual promises of advantages and inherent threats of disadvantages that lead to most rules of international law being respected most of the time does not work between belligerents who are trying to defeat each other. Reciprocity may not work in asymmetric conflicts and may also result in belligerent reprisals, which often lead in practice to a 'competition in barbarism'[18] rather than inducing the enemy to cease violations. Therefore, although reprisals were traditionally seen as one of the most important measures belligerents could use to enforce IHL, IHL today excludes reciprocity as an argument to suspend the respect of the obligations it foresees and severely limits the admissibility of reprisals.

**5.35** It is therefore regrettable that the Eritrea–Ethiopia Claims Commission found, in deciding whether Ethiopia violated IHL by stopping the repatriation of Eritrean prisoners of war pending clarification of the fate of some of its own prisoners in Eritrean hands, that:

> [A]ny state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise. …[I]t is [therefore] proper to expect that each Party's conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other.[19]

**5.36** As for measures of retorsion, which consist of unfriendly but lawful measures taken in response to another State's unfriendly or unlawful act, they are not prohibited by IHL. Nevertheless, it is difficult to imagine many unfriendly acts available between enemies that do not violate their legal obligations under IHL.

### a. Reciprocity and the '*tu quoque*' argument

**5.37** A material breach of IHL treaties by one party never allows another party to terminate or suspend the operation of such treaties as a consequence of that breach.[20] For ICL, international jurisprudence has also soundly rejected the '*tu quoque*' ('you too') argument that attempts to justify IHL violations by pointing to similar violations committed by the enemy.[21]

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18 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*: *The Law of Armed Conflict* (Stevens & Sons 1968) vol II, 99.

19 Online Casebook, Eritrea/Ethiopia, Partial Award on POWs: B. Prisoners of War, Eritrea's Claim 17, paras 148–9.

20 VCLT, Art 60(5), which does not apply as a matter of treaty law to the GCs because the GCs were concluded before its entry into force, but it may be considered to reflect – in addition to many other provisions of the VCLT – general international law.

21 *Kupreškić*, above note 7, paras 511–20.

### b. Reprisals as countermeasures

**5.38** Under the general rules of State responsibility, any State injured by a violation may invoke the responsibility of the State responsible for the violation and demand that the responsible State complies with its obligations arising from its responsibility.[22] Injured States may also take countermeasures in order to induce the violating State to comply with its primary (substantive obligations) and secondary obligations (that is, obligations resulting from its responsibility, such as to make reparation). Injured States, however, cannot use countermeasures to 'punish' the responsible State. 'Countermeasures' are the modern term used for reprisals, at least outside the context of IACs.[23] Such countermeasures can only consist of the non-performance of international obligations of the injured State towards the responsible State for as long as the responsible State continues its violations.[24] They must be commensurate with the injury suffered.[25] As soon as the responsible State complies with its international obligations, the countermeasures must then be terminated.[26]

**5.39** For IHL, however, the ILC Articles on State Responsibility explicitly state that countermeasures may not affect 'obligations of a humanitarian character prohibiting reprisals'.[27] The ILC comments that this provision 'reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under [the 1929 Geneva Convention, the 1949 Conventions and Protocol I], reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.'[28] The ILC therefore refers to the prohibition of reprisals foreseen by IHL.

#### *i. The prohibition of reprisals in IACs*

**5.40** In IACs, the Conventions and Protocol I prohibit reprisals (obviously only if they consist of IHL violations) directed against protected persons and objects[29] (that is, persons or objects in the power of the enemy). This rule is reflective of customary law.[30] Protocol I has added a prohibition of reprisals against the civilian population and protected objects in the conduct of hostilities.[31] Due

22 ILC Articles on State Responsibility, Art 42.
23 Ibid., 128, para 3 commentary to Chapter II: Countermeasures.
24 Ibid., Art 49.
25 Ibid., Art 51.
26 Ibid., Art 53.
27 Ibid., Art 50(1)(c).
28 Ibid., 132, para 8 commentary to Art 50. See also GC I, Art 46; GC II, Art 47; GC III, Art 13(3); GC IV, Art 33(3); P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4).
29 GC I, Art 46; GC II, Art 47; GC III, Art 13(3); GC IV, Art 33(3); P I, Art 20.
30 ICRC CIHL Database, Rule 146.
31 P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4).

to certain statements by States not party and even by some States parties to Protocol I made at the moment of ratification, this prohibition does not yet correspond to customary law.[32] In addition, reprisals during the conduct of hostilities that are directed at combatants (for example, reprisals relating to the choice of means and methods of warfare) are not prohibited. Nevertheless, any reprisal must be aimed at compelling the enemy to cease violations, necessary, proportional, preceded by a formal warning and decided at the highest level.[33] Under the general rules of State responsibility, such reprisals cannot be contrary to obligations concerning the protection of fundamental human rights nor may they be contrary to *jus cogens* obligations.[34] Additionally, in my view, IHL violations may never be committed in reaction to violations of other branches of international law. For example, this is a necessary consequence of the fundamental distinction and separation between *jus ad bellum* and *jus in bello* when the original violation is one of the '*jus ad bellum*'.[35] If IHL rules could be violated as a countermeasure against an act of aggression, those rules would be meaningless. Once it is admitted that even aggression – the most egregious violation of international law – cannot justify countermeasures that violate IHL, it is easy to see why countermeasures violating IHL cannot be employed in response to other violations of the law of peace. Based on this logic, only IHL violations that do not qualify as prohibited reprisals may constitute countermeasures in reaction to prior IHL violations by an adverse party.

#### *ii. Reprisals in NIACs?*

**5.41** The rules mentioned above only concern IHL of IACs because there are good reasons to argue that reprisals are conceptually inconceivable in NIACs.[36] First, it may be argued that reprisals are typically an (old-fashioned and exceptional) inter-State institution of international law that cannot be extended, as a circumstance precluding the wrongfulness of an act, to the fundamentally different relations that exist between States and non-State armed groups or as between non-State armed groups. One may object to this line of argument on the basis that non-State armed groups cannot be conferred with, as I suggest, a limited international legal personality[37] without bearing the disadvantages of such personality, which includes the risk of becoming victims of reprisals. However, nothing indicates that State practice has extended belligerent reprisals to their relations

32 Henckaerts and Doswald-Beck, 520–3.

33 See ICRC CIHL Database, Rule 145 and its commentary; Online Casebook, United Kingdom and Australia, Applicability of Protocol I: C. Reservations to Protocol I by the United Kingdom.

34 ILC Articles on State Responsibility, Art 50(1)(b) and (d).

35 See MNs 3.10–3.13, 9.089–9.096, 9.099–9.105.

36 ICRC CIHL Database, Rule 148; Updated ICRC Commentary GC I, paras 904–7.

37 See MNs 6.67–6.68.

with armed groups.[38] Second, a government resorting to reprisals against an armed group would inevitably violate its IHRL and domestic obligations towards the innocent persons affected by such reprisals. Indeed, the prohibitions of IHL of NIACs are formulated in an absolute way[39] and thus do not foresee the admissibility of countermeasures. Any reprisal against an entity other than a State would collectively punish the affected individuals, which is prohibited by IHL of NIACs.[40] Anyway, the territorial State will only have limited possibilities to take additional measures against a non-State armed group without violating the fundamental human rights of those who are under the group's control.

#### *iii. Countermeasures against IHL violations*

**5.42** Countermeasures against violations of IHL that do not themselves consist of IHL violations cannot violate either the prohibition against the threat or use of force as contained in the UN Charter, fundamental human rights, *jus cogens* or the obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents.[41]

### 5.2.2 State responsibility

The normal rules of State responsibility, which apply in cases of IHL violations, are nonetheless modified by IHL in several respects.

With regard to attribution of internationally wrongful acts, all acts of a State's armed forces (including resistance movements) and of participants of a *levée en masse* are attributable to the State they are fighting for. The level of control a foreign State must exercise over a non-State armed group fighting against the government of its own State for the latter's conduct to be attributable to the foreign State is, however, controversial and depends on whether one adopts the overall or effective control test.

As for circumstances precluding unlawfulness, it may be argued that necessity and self-defence cannot justify IHL violations because IHL already takes such circumstances into account.

With respect to the secondary obligations of third States under the rules of State responsibility, most IHL violations are serious breaches of peremptory norms of general international law, and third States must consequently cooperate to bring such violations to an end and may neither recognize the legality of

38 Henckaerts and Doswald-Beck, 527–8.

39 See, e.g., GCs, Common Art 3 (providing that its violations 'are and shall remain prohibited at any time and in any place whatsoever').

40 P II, Art 4(2)(b).

41 ILC Articles on State Responsibility, Art 50.

a situation created by such violations nor provide aid or assistance to maintain the situation.

Finally, as to which States can invoke the responsibility of the responsible State, IHL contains *erga omnes* obligations. This means that not only injured States but also any other State may (and must under its obligation to ensure respect of IHL) invoke the responsibility of a State responsible for an IHL violation and obtain cessation from the responsible State as well as reparation in the interest of the injured State or of the individuals affected by IHL violations.

**5.43** Beyond the aforementioned question of reprisals that is technically a special regime of the general rules on the implementation of State responsibility and the obligation to provide reparations, which will be dealt with in the next sub-section, the rules on the responsibility of States for internationally unlawful acts, as codified by the ILC in its Articles on State Responsibility, also apply to IHL violations. These rules, however, are modified in several respects in the field of IHL. In addition, the inter-State approach adopted by the ILC implies that the regime it codified can only partially satisfy the full requirements of IHL implementation because IHL violations primarily affect individuals who are, in addition and in particular in NIACs, often nationals of the responsible State.

**5.44** In contrast to the rules of State responsibility, the rules concerning the responsibility of non-State armed groups is still a very unchartered area, although such groups must also be responsible for violating IHL rules addressed to them.[42] One may nevertheless suggest that de facto control over a member of such a group plays a major role for attribution to the group. Arguably, in some circumstances, non-State armed groups may also avoid responsibility by invoking grounds that justify or excuse the breach of an international norm. If unlawful conduct can be attributed to a non-State armed group that is neither justified nor excused, the legal consequences of the group's responsibility may be very similar to the consequences that apply to States. Specifically, it must cease the wrongful conduct and make full reparation for any injury it caused. However, the operationalization and invocation of such legal consequences may differ significantly from procedures applicable to States in order to account for the inherently temporary and unstable nature of non-State armed groups.[43]

42 For the most thoughtful text that has been written on this issue, see Jan Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in André Nollkaemper and Harmen Van Der Wilt (eds), *System Criminality in International Law* (CUP 2009) 238–69.

43 These issues will be explored in a doctoral thesis that Ms Heleen Hiemstra is writing at the University of

### a. Attribution

**5.45** The law of State responsibility establishes rules concerning the attribution of internationally wrongful acts.

#### *i. Members of armed forces*

**5.46** Under Article 3 of Hague Convention IV and Article 91 of Protocol I, States are responsible for all acts committed by the members of their respective armed forces. The '*travaux préparatoires*' of Article 3 indicate the desire to modify the previous rule under which a State was not responsible for unauthorized acts of soldiers who were not officers. The only fear that persisted was that a State should not become an insurer relative to all damage caused by its troops.[44] The ILC considers that Articles 3 and 91 are simply an application of the general rule according to which the conduct of an organ is attributable to a State.[45] Under this general rule, however, a State would only be responsible for the conduct of members of its armed forces acting in that capacity. In most cases during armed conflict involving conduct regulated by IHL (which presupposes a nexus to the conflict) under this interpretation, members of the armed forces are always on duty and never act in a purely private capacity because, as private persons, they would never have entered into contact with enemy nationals or acted on enemy territory. The requirement that members of armed forces act in that capacity may nevertheless exclude all acts committed as a private person in certain situations, such as theft or sexual assault committed by a soldier *during leave* in an occupied territory. In such cases, however, IHL rules should be seen as the *lex specialis* ('the law governing more specifically a subject matter') under which States assumed responsibility for *all* conduct by members of their armed forces, including conduct committed in their capacity as private individuals. This position has been previously expressed by the ILC,[46] and it is further supported by pertinent scholarly writings[47] as well as a judicial opinion.[48] Absolute responsibility for such acts is further justified by the fact that soldiers are a particular category of State organs, over whom the State exercises a much stricter control in comparison to the control over other officials.

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Geneva on International Responsibility of Non-State Armed Groups.

44 Alwyn W. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces' (1955) 88 Recueil des Cours 263, 336–43; Yves Sandoz, 'Unlawful Damage in Armed Conflicts and Redress Under International Humanitarian Law' (1982) 22 IRRC 131, 137.

45 ILC Articles on State Responsibility, 45–6, paras 3–4 commentary to Art 7.

46 ILC, Yearbook…1975, vol II, 69–70, para 26 commentary to Draft Art 10.

47 Freeman, above note 44, 333–9; Remigiusz Bierzanek, 'The Responsibility of States in Armed Conflicts' (1981–1982) 11 Polish Yearbook of Intl L, 96–8; Luigi Condorelli, 'L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 13, 146–8; Sandoz, above note 44, 136–7.

48 *Spanish Zone of Morocco (Great Britain v Spain)* (1925) 2 Rep Intl Arbitral Awards 615, 645.

**5.47** Outside of issues concerning the attribution of private acts, the aforementioned IHL rule implies that a State is always responsible for members of its armed forces even if those forces do not have the status of State organs under its internal law and even if, as will be seen, there are valid reasons to consider that armed forces are not necessarily under the direction and control of the State according to the normal criteria of attribution.[49] This last point is particularly relevant for acts committed by members of resistance movements.

### *ii. Participants in a 'levée en masse'*

**5.48** A State is equally responsible for participants in a '*levée en masse*'. ILC Article 9 concerning '[c]onduct carried out in the absence or default of the official authorities' is even partly based upon the old-fashioned IHL institution according to which civilians in an IAC who spontaneously take up arms on the approach of the enemy in the absence of regular forces have combatant status and the right to directly participate in hostilities.[50]

### *iii. Non-State armed groups under the direction and control of a foreign State*

**5.49** The standard according to which a foreign State bears responsibility for the conduct of a non-State armed group involved in an apparent NIAC that it controls has given rise to major controversies in IHL that will be discussed later[51] because of its impact on the classification of the conflict as an IAC. It is sufficient to explain here that the standard of attribution (whether or not it is the same as the requisite standard to classify certain conflicts as IACs) is also controversial. The ICTY[52] and the ICRC[53] insist that overall control is sufficient for attribution, while the majority opinion as expressed by the ICJ considers that effective control over the conduct during which IHL was violated is necessary to make IHL violations by an armed group attributable to a foreign State.[54]

### *iv. Private actors exercising elements of governmental authority*

**5.50** Attribution of the conduct of private actors exercising elements of governmental authority is particularly important for IHL in relation to PMSCs and will be discussed further in that context.[55]

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49 See MNs 8.064 and 8.070.

50 See GC III, Art 4(A)(6); HR, Art 2. See also MN 8.067.

51 See MNs 6.13–6.21.

52 Online Casebook, ICTY, The Prosecutor v. Tadić: C. Appeals Chamber, Merits, paras 116–44.

53 Updated ICRC Commentary GC I, para 409.

54 See Online Casebook, ICJ, Nicaragua v. United States, para 115, affirmed by the ICJ in Online Casebook, ICTY, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 396–407.

55 See MNs 10.144–10.146.

### b. Circumstances precluding unlawfulness

**5.51** Circumstances precluding wrongfulness justify or excuse a State's failure to comply with its international obligations as long as the particular circumstance continues to exist.[56] Such circumstances include valid State consent, self-defence, countermeasures, force majeure, distress and necessity.[57]

**5.52** As a preliminary matter, it is debatable whether circumstances precluding unlawfulness are capable of excusing IHL violations under the law of State responsibility because most IHL rules are considered to be peremptory norms of general international law (in other words, *jus cogens*), violations of which, according to the ILC, cannot be excused by circumstances precluding wrongfulness.[58]

**5.53** At any rate, with regard to the circumstance of consent under IHL, a State may neither conclude special agreements depriving protected persons of their rights[59] nor absolve itself or another State of any responsibility incurred in respect to grave breaches.[60]

**5.54** As for self-defence, the ILC clarifies that it cannot justify IHL violations.[61] Any other outcome would unravel the strict separation between *jus ad bellum* and *jus in bello*.[62] It is therefore regrettable and astonishing that the ICJ 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.'[63] Indeed, if the use of nuclear weapons normally violates IHL – as implied in the opinion of the ICJ – it does so even in an extreme circumstance of self-defence.

**5.55** With respect to the circumstance of necessity (which must be strictly distinguished from military necessity as an additional IHL limitation to military action), the ILC comments that certain IHL rules 'expressly exclude reliance on

56 ILC Articles on State Responsibility, 71, paras 1–2 commentary to Chapter V: Circumstances Precluding Wrongfulness.
57 Ibid., Arts 20–25.
58 Ibid., Art 26.
59 GCs, Common Arts 6/6/6/7.
60 GCs, Common Arts 51/52/131/148.
61 ILC Articles on State Responsibility, 74, para 3 commentary to Art 21.
62 See MNs 3.10–3.13, 9.089–9.106.
63 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 97. In Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 139, the ICJ once again failed to address whether the circumstance of self-defence can be invoked to justify IHL violations.

military necessity', while others are intended to apply only in 'abnormal situations of peril for the responsible State' and the object and purpose of those rules excludes the possibility to invoke the plea of necessity.[64] Indeed, IHL was developed for armed conflicts, which are by definition emergency situations. It therefore implicitly excludes the defence of necessity,[65] except where explicitly stated otherwise in some of its rules.[66] In my view, similar considerations exclude the possibility to invoke distress as a justification for IHL violations.[67] It is therefore regrettable that the ICJ left open the question of whether necessity can be invoked to justify IHL violations.[68]

### c. IHL violations as serious breaches of peremptory norms

**5.56** The ICJ, the ICTY and the ILC consider that the basic IHL rules are peremptory norms.[69] Some eminent writers suggest that all IHL rules constitute peremptory norms.[70] When viewed in light of the rule voiding treaties that conflict with *jus cogens* norms,[71] IHL itself supports this view when it prohibits separate agreements that adversely affect the situation of protected persons.[72] It would be difficult to find rules of IHL that do not directly or indirectly protect rights of protected persons. In both IACs and NIACs, those rules furthermore protect 'basic rights of the human person', which are classic examples of *jus cogens*.[73]

**5.57** The ILC was only able to agree on some of the particular consequences resulting from serious breaches of peremptory norms.[74] Some of these consequences

64 ILC Articles on State Responsibility, 84, paras 19 and 21 commentary to Art 25. For a view advocating a strictly limited general exception for cases of military necessity, see Hilary McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 The Military L and L of War Rev 216.

65 ILC, 'Report of the International Law Commission on the Work of its 32nd Session' (5 May – 25 July 1980) UN Doc A/35/10, 46, para 28.

66 See, e.g., GC I, Art 33(2); GC IV, Arts 49(2) and (5), 53, 55(3) and 108(2); P I, Art 54(5).

67 See Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, 417.

68 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 140.

69 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 79; ILC Articles on State Responsibility, 113, para 5 commentary to Art 40. See also ILC Report, above note 65, 46, para 28; *Kupreškić*, above note 7, para 520.

70 Luigi Condorelli and Laurence Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des États de « respecter et faire respecter » le droit international humanitaire en toutes circonstances' in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law in Honour of Jean Pictet* (Martinus Nijhoff 1984) 33–4.

71 VCLT, Art 53.

72 GCs, Common Arts 6/6/6/7.

73 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3, para 34.

74 Hence the saving clause in ILC Articles on State Responsibility, Art 41(3), concerning further consequences that such serious breaches may entail under international law.

concern the rights and obligations of third States in case of such breaches. First, States must cooperate to bring to an end through lawful means any serious breach.[75] As discussed later, the content of the obligation to 'ensure respect' is particularly relevant in determining what measures a State must and may take.[76] Second, States must neither recognize as legal a situation created by a serious breach of a peremptory norm nor provide any aid or assistance that maintains the situation.[77] This latter obligation has been discussed in particular in relation to the commerce of goods produced in settlements in occupied territories established in violation of Article 49(6) of Convention IV.[78] It may equally mean that States may not recognize in their own national courts the legality of rights (such as civil rights) created or transferred under unlawful legislation introduced by an occupying power that exceeds its limited legislative powers[79] in occupied territory.[80] Conversely, it may also be argued that third States must allow protected persons from an occupied territory to exercise in their respective jurisdictions all of the rights conferred upon them by local legislation that were subsequently abolished or altered by unlawful legislation introduced by the occupying power. In my view, the prohibition against providing any assistance in maintaining an unlawful situation also prohibits the import of conflict diamonds that permits parties to perpetuate NIACs in which IHL, such as the prohibition against the recruitment and use of child soldiers, is systematically disregarded.[81]

### d. IHL as *erga omnes* obligations

**5.58** The *erga omnes* character of IHL obligations is important because most States are not directly injured by most IHL violations.[82] In the IHL context, 'injured' States within the meaning of the law of State responsibility include only the adverse party in an IAC, the State on the territory of which a violation of IHL has occurred or a victim's State of nationality. However, any State other than

75 Ibid., Art 41(1).

76 See MNs 5.145–5.158.

77 ILC Articles on State Responsibility, Art 41(2).

78 See UNGA Res ES-10/2 (1997) para 7; UNGA Res ES-10/6 (1999) paras 3–4.

79 For a more detailed discussion on the legislative powers of occupying powers, see MNs 8.239–8.246.

80 This does not preclude the recognition of certain acts produced by the occupying power's unlawful legislation as valid provided such acts benefit the population. See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 125; see also ECtHR, *Cyprus v Turkey* (Judgment) Application No 25781/94 (10 May 2001) (2002) 35 EHRR 731, para 90.

81 To inhibit the trade of blood diamonds that perpetuate NIACs, States began implementing a diamond certification and tracing programme called the Kimberley Process Certification Scheme on 1 January 2003. See UNGA, 'General Assembly Text Strongly Supports "Kimberley Process" Certification Scheme, Aimed at Combating Use of Diamonds for Financing Conflict' (2013).

82 For the possibility to draw a different conclusion from the obligation to ensure respect, see MN 5.152.

an injured State is entitled to invoke the responsibility of another State if the obligation breached has an *erga omnes* character or, in other words, it is owed to the international community as a whole. As witnessed by Common Article 1, all IHL rules constitute *erga omnes* obligations.[83] As examined later on, States may (due to the *erga omnes* character of the obligations) and must (under their Common Article 1 obligation to 'ensure respect') take certain measures to obtain cessation from the responsible State as well as 'reparation…in the interest of the injured State or of the beneficiaries of the obligation breached'[84] (that is, the individuals affected by IHL violations).

### 5.2.3 Reparation

IHL violations give rise to an obligation of the responsible State (and theoretically a responsible armed group) to cease an ongoing violation and make reparation. Reparation requires that the responsible party re-establish the situation as it would have existed if the violation had never been committed. If this is not (entirely) possible, it is then required to provide compensation and satisfaction. Reparation under the law of State responsibility is traditionally viewed as an inter-State obligation that does not entitle individual victims of an IHL violation to reparation. Reparations to individuals may, however, be based upon either domestic law or IHRL.

**5.59** Reparations are technically a consequence of State responsibility, but they deserve separate treatment for IHL because of both their theoretical importance as a remedy for individuals and the historical importance in practice of reparations made between States. With regard to the latter, it is often impossible to distinguish reparations for IHL violations from reparations for *jus ad bellum* violations. In practice, both are only requested from the vanquished. This section will only address reparations for IHL violations.

**5.60** Under the law of State responsibility, the responsible State must cease the unlawful conduct and make full reparation, which includes restitution, compensation or satisfaction.[85] For IACs, Article 3 of the Hague Convention IV and Article 91 of Protocol I specifically mention only financial compensation. However, compensation under those provisions only has to be paid 'if the case demands' and may therefore be seen (as is the case in general international law)

83 Condorelli and Chazournes, above note 70, 29; Mauro Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press 1997) 152–3.

84 ILC Articles on State Responsibility, Art 48(2).

85 Ibid., Arts 34–37.

as a subsidiary obligation to *restitutio in integrum* or, in other words, the re-establishment of the situation that either existed before the wrongful act was committed or that would have existed if the violation had never been committed.[86] The obligation to make reparation under the general rules on State responsibility leads to the same consequences for IHL violations committed in NIACs.

a. Do individuals have a right to reparation?

**5.61** The ILC admits that reparation obligations may also exist towards persons or entities other than States, in particular in the case of 'human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State,' but it did not deal with the rights of private persons corresponding to such obligations.[87] According to the ILC, whether and to what extent private persons 'are entitled to invoke responsibility on their own account' depends on each applicable primary rule.[88]

**5.62** It is controversial whether the primary rules of IHL grant individuals a right to reparation. According to a majority of writers[89] and court decisions,[90] the aforementioned IHL rules only imply, in conformity with the traditional structure of international law, that the State responsible for the violation must compensate the injured State. While the right to reparation is very often based on damage sustained by an individual, it is, from a legal point of view, the individual's country of origin that is injured. According to this view, IHL does not provide individual victims with a right to compensation. This traditional implementation structure is at variance with NIACs given that victims of violations in such conflicts are often nationals of the State concerned.

**5.63** IHRL, however, confers on victims of violations a right to domestic and international remedies. The State must then ensure that the victims receive reparation not only for the acts or omissions attributable to the State itself but also for acts or omissions by private actors who violate human rights of other

86 Ibid., Art 36(1).

87 Ibid., 87–9, para 3 commentary to Art 28.

88 Ibid., 94–5, Art 33(2) and para 4 commentary to Art 33.

89 See, e.g., Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 IRRC 529; Pictet Commentary GC III, 630; ICRC Commentary APs, para 3656. See also ICRC CIHL Database, Rule 150.

90 German Constitutional Court, BVerfG, NJW 1996, 2717, 2719; BVerfG, NJW 2004, 3257, 3258; BVerfG, NJW 2006, 2542, 2543; German Federal Supreme Court, *The Distomo Massacre Case* (*Greek Citizens v. Federal Republic of Germany*) (2003) 42 ILM 1030, 1037; District Court of Tokyo, Japan, *Ryuichi Shimoda et al. v. The State* (7 December 1963) (1966) 32 Intl L Rep 626, 638.

individuals under its jurisdiction to the extent of its obligation to guarantee the respect of human rights.[91]

**5.64** Under international law, it is therefore normally the State that has to make reparation because, legally speaking, it is the State that violated the rules even though in reality the violations were committed by persons whose conduct is attributed to the State. Indeed, international law rarely obliges individuals to provide reparation for a violation.[92] The obligation of an individual to make reparation, however, may be based on the applicable domestic law that may qualify conduct as unlawful with reference to international law and therefore also IHL.

**5.65** At the national level, claims against a State must be brought before its tribunals or its administration. The normal means of seeking reparation from an individual is through a civil lawsuit before a civil court. In Roman-Germanic judicial systems, the criminal tribunal that tries the perpetrator of an infraction may also adjudicate the victim's civil claims. However, courts in third countries do not necessarily have jurisdiction over civil lawsuits brought before them. Unlike criminal law, under which the principle of universal jurisdiction is applicable to international crimes, civil lawsuits are still not governed by such a principle. However, in the US, the Alien Tort Claims Act[93] (ATCA) initially enabled foreigners to bring civil suits in US District Courts against other foreigners who committed violations of customary international law against them outside of US territory.[94] Recently, however, the US Supreme Court severely limited the scope and reach of the ATCA,[95] thus calling into question the statute's future significance in providing recourse to victims of both IHRL and IHL violations.

**5.66** Potentially applicable international immunities pose a further obstacle to lawsuits against a responsible State or individual brought in the courts of a third country. Jurisprudence is not unanimous as to whether such immunities also

91 See Richard Falk, 'Reparations, International Law, and Global Justice: A New Frontier' in Pablo De Greiff (ed), *The Handbook of Reparations* (OUP 2006) 484.

92 See, however, ICC Statute, Art 75.

93 28 US Code Annotated Section 1350 (West).

94 See, e.g., *Filartiga v. Pena-Irala* 630 F 2d 876 (2nd Cir 1980). US District Courts, however, only obtained jurisdiction over such cases if the foreigner who committed the violation was 'found and served with process' in the US. Ibid., 878.

95 In 2013, the US Supreme Court held that there is a presumption against the extraterritorial application of ATCA claims and that ATCA claims must 'touch and concern' the US 'with sufficient force to displace the presumption against extraterritorial application.' *Kiobel v. Royal Dutch Petroleum Co.* 133 S Ct 1659, 1669 (2013). More recently, in 2014, the US Supreme Court held that a foreign corporation could not be sued under the ATCA despite its subsidiary's extensive contacts with California because there was 'no basis to subject [it] to general [personal] jurisdiction' given its own 'slim contacts' with California. *Daimler AG v. Bauman* 134 S Ct 746, 760–2 (2014).

apply to international crimes. While it is fairly well settled that there is no international crime exception to personal immunity (for example, head of State immunity),[96] there appears to be a trend consolidating such an exception with respect to functional immunity (in other words, immunity based on acts committed in an official capacity), although this too is not without controversy.[97]

### b. Forms of reparation

**5.67** Reparation made to individuals based upon an inter-State claim, domestic law or the right to reparation in IHRL may take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[98]

**5.68** Restitution, which should return the victim to the initial situation that existed before the violation if feasible, may include 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.[99] The restitution of real estate is a particularly sensitive issue in post-conflict settings. Although it may repair forced displacement, it can trigger other displacements or at least violate the economic and social rights of the people who obtained the real estate through transactions during the conflict.[100]

**5.69** To the extent restitution is not feasible, compensation 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case'.[101] Economically assessable damage can include physical or psychological harm, lost opportunities (including jobs and education), material losses including a loss of earnings and costs incurred for legal assistance or experts' reports, drugs, health services, psychological care or social support. The Inter-American Court of Human Rights has a very sophisticated, elaborate and generous way of calculating

96 See Online Casebook, ICJ, Democratic Republic of the Congo v Belgium, para 58; ICC, *Prosecutor v Al-Bashir* (Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09-302 (6 July 2017) para 109.

97 In 2017, the ILC provisionally adopted draft article 7 relating to its topic on the *Immunity of State officials from foreign criminal jurisdiction*, which provides that functional immunity shall not apply to several international crimes at the horizontal level between States, by a rare recorded vote with eight members voting against it. See ILC, 'Report of the International Law Commission on the Work of its 69th Session (1 May – 2 June and 3 July – 4 August 2017)' UN Doc A/72/10, 164–5, paras 74 and 100–106.

98 UN Basic Principles, above note 14, para 19.

99 Ibid., para 18.

100 See 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', Principle 17, as annexed to UN Commission on Human Rights, 'Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro' (2005) UN Doc E/CN.4/Sub.2/2005/17.

101 UN Basic Principles, above note 14, para 20.

compensation.[102] History shows that when the number of victims overwhelms the administrative and financial capacities of the responsible State, gestures offering symbolic satisfaction and reparation that are proportional to current needs often prevail over the concern for (and the feasibility of) assessing material and moral losses. Proportionality is a traditional requirement of reparation, yet the damage suffered by victims to their lives, health or freedom in their eyes can never be compensated proportionally.

**5.70** Beyond monetary compensation, reparations may also include the direct provision by the responsible party of rehabilitative services to victims. Such services 'should include medical and psychological care as well as legal and social services.'[103] In a post-conflict setting, rehabilitative services are crucial to ensuring that victims can successfully reintegrate back into society.

**5.71** Satisfaction repairs immaterial harm that often cannot be remedied through restitution, compensation or rehabilitation. States are usually content with the sole fact that the violation is acknowledged or apologies are made. On the other hand, individuals are usually compensated to repair moral damage. Satisfaction may include: verification of facts; public and full disclosure of the truth; the search for the disappeared; assistance in recovering, identifying and reburying the bodies; an official declaration or judicial decision restoring the dignity, reputation and rights of the victim; public apologies, including acknowledgement and acceptance of responsibility; legal and administrative sanctions against the persons liable for the violations; commemorations and tributes to the victims; and the inclusion of an account of the violations in teaching materials.[104]

**5.72** Finally, guarantees of non-repetition ensure that previous violations are not repeated in the future. To effectively contribute to prevention, such measures should include, among other things: civilian control over the State's armed forces; reinforcing the judiciary's independence; protecting key actors who protect others from IHRL and IHL violations; educating all sectors of society on IHL; promoting mechanisms to monitor and prevent new social conflicts; and reforming laws that may contribute to or permit IHL violations.[105]

102 Arturo J. Carrillo, 'Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past' in De Greiff (ed), above note 91, 504.

103 UN Basic Principles, above note 14, para 21.

104 Ibid., para 22.

105 Ibid., para 23.

**5.73** Whatever the form reparation takes, attention should be given to a specific gender issue: in many societies, only men are paid compensation or given property rights, thus excluding women from any effective reparation. In such societies, national governments should therefore make a particular effort to ensure the right of women to full and effective reparation.

### c. Setting up special mechanisms

**5.74** After an armed conflict, special national, mixed or international mechanisms are often created to deal with mass reparation. The UN Compensation Commission received 2.7 million claims amounting to $500 billion (US dollars) and paid more than $18 billion (US dollars) to victims of the Iraqi invasion of Kuwait. It adopted several solutions that broke from traditional international law criteria and practice, such as limiting Iraq's right to be heard. The Commission used, among other things, standard compensation scales, and it processed claims based upon computerized statistical models.[106] In Bosnia, a commission supported by a strong commitment from the international community undertook a long, painstaking process to restore houses and apartments to their pre-conflict owners or beneficiaries.[107] Occupying powers sometimes establish local proceedings to enable the people living in an occupied territory to bring claims for damage sustained due to the occupying forces (for instance, in the Allied occupation zones in Germany).[108]

**5.75** Of course, there are also examples of unilateral or *ex gratia* agreements or gestures that pay compensation without acknowledging either any legal obligation or violations. Such agreements often require victims to waive all future claims. While they do not satisfy all the aims of reparation, especially that of recognizing that a right has been violated, they do spare victims long and costly proceedings, the outcome of which is never guaranteed.

**5.76** Finally, in some cases, partial compensation or benefits are paid by the State to which the victim belongs according to need under social legislation, expense sharing or other social insurance schemes.

106 See Christophe S. Gibson *et al.* (eds), *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (OUP 2015).

107 See Antoine Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina* (Intersentia 2008).

108 Freeman, above note 44, 375–89.

### d. Can the right to reparation be waived?

**5.77** The question arises, particularly at the end of an armed conflict, whether the right to reparation for IHL violations can be waived. States often waive their own nationals' right to reparation against other States (and their nationals) in bilateral treaties. After World War II, however, States commonly waived reparation for IHL violations after a violation had occurred and the claim had arisen. Today, such waivers seem to be incompatible with the IHL rule stating that States cannot absolve themselves or any other State for liability resulting from grave breaches.[109] However, this rule is limited to grave breaches[110] and thus does not cover all IHL violations.[111] In addition, according to the preparatory work, this rule may also have been intended to only prohibit States from violating their obligation to prosecute war criminals by exempting them from criminal liability in cases where such States waived reparation.[112] Nevertheless, States may not waive reparation for future violations of a peremptory norm as consent cannot be given for such violations. Anyway, as a result of a waiver, the waiving State may need to ensure that individuals may not bring claims in its domestic legal system that the State itself has already waived. In such cases, however, a State may become liable to its nationals for having waived such claims contrary to the right to an effective remedy, the right to property and the right to be heard by a tribunal capable of adjudicating civil rights and obligations.

### e. The gap between the law and reality

**5.78** As IHL violations in an armed conflict unfortunately often occur on a massive scale, the ideal of full reparation for all of the harm caused by such violations, which is the central aim of reparation as a legal concept, is never achieved. Some even contend that, in such cases, full compensation for each individual case is neither appropriate nor in keeping with the requirements of justice. In all legal systems, the concept of reparation presupposes that violations are exceptional. Consequently, some argue that the concept of reparation cannot be applied when violations have become the rule because of their massive and systematic character. In the context of massive and systematic violations, attempting to address the staggering number of individual claims on a case-by-case basis in legal proceedings can lead to even more injustice for various reasons, including a lack of access to courts, difficulties in gathering evidence and an imbalance

109 GCs, Common Arts 51/52/131/148.

110 See MNs 5.206–5.207.

111 This was clearly the interpretation in Pictet Commentary GC I, 373, while the Updated ICRC Commentary GC I, paras 3022–4, is more nuanced.

112 Pierre D'Argent, *Les réparations de guerre en droit international public* (Bruylant 2003) 771–4.

favouring reparation for affluent victims who often have a better chance of obtaining justice.[113]

**5.79** A great discrepancy exists between the theoretical concept of reparation under public international law as outlined in the 'Basic Principles' concerning reparation for mass violations and the provision of reparation to victims in practice. In many cases, victim compensation programmes do not even exist (for instance, the case of El Salvador). Even when such programmes exist, several factors prevent victims from obtaining compensation they are entitled to under both domestic and international law. Frequently, reparation is linked to present needs rather than to past violations. Other factors include complex adjudication procedures that are difficult for victims to navigate, convoluted methods of calculating the amount of compensation owed and narrow eligibility definitions that exclude numerous victims of violations that would otherwise give rise to compensation. Additionally, it is extremely difficult to identify common international legal principles or even best practices given that widely differing State practices are influenced by several non-legal factors specific to each context, including the financial resources available, the historical distance of events, the political importance of victims, the existence of and links to other measures of transitional justice and the economic and social situation of the victims as well as the society in which they live.[114]

**5.80** Often, States use claims of financial hardship as an excuse for their lack of willingness to provide victims with reparation. While such claims often lack merit, compensation may have to be paid in some instances by a generation of taxpayers who were not even alive at the time the violation occurred because international law does not recognize State bankruptcy. After World War I, Germany's situation revealed the negative consequences that severe post-conflict reparations can have on the country's economy as well as on the international financial system, all of which can more generally increase the risk of the resurgence of armed conflicts. Similarly, reparations paid by Iraq via the UN Compensation Commission that were financed through the 'oil-for-food' programme have also revealed that reparations may have catastrophic humanitarian consequences for innocent people.

113 See also Pablo de Greiff, 'Justice and Reparations' in De Greiff (ed), above note 91, 454–66.
114 Falk, above note 91, 485.

### 5.2.4 The United Nations

Several of the UN's purposes provide it with a mandate to ensure the respect of IHL. First, one key purpose of the UN is to maintain international peace and security. Both armed conflicts, to which IHL applies, and IHL violations in and of themselves constitute threats to international peace and security. Second, the UN also promotes and protects human rights, and IHL protects human rights in armed conflicts. Finally, the UN aims to achieve international cooperation in solving international problems of a humanitarian character, which necessarily includes ensuring IHL's respect. Both the UN Security Council and the various UN human rights mechanisms therefore have an increasingly important and beneficial role in enforcing IHL against non-compliant States, armed groups and individuals. The effectiveness of the UN and its credibility in this field, however, are limited by several factors. First, the UN's main goal is to end ongoing armed conflicts. Second, member States often apply double standards, including when enforcing IHL. Finally, it is difficult for an organization comprised of States to be neutral and impartial in a conflict between one or more of its members versus a non-State armed group.

**5.81** The UN has today an important role in implementing IHL, as it has, as a manifestation of the organized international community, for most other rules of international law. In 1949, the ILC refused to codify IHL because 'public opinion might interpret [such] action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.'[115] In 1968, the UN still referred to IHL as 'human rights in armed conflicts'.[116] Today, the discourse has changed. The UN, acting through different organs, now makes significant contributions to the implementation of IHL in a number of ways.[117] While the UN is only marginally mentioned in IHL treaties,[118] the UN Charter provides the UN with the legal basis to implement and enforce IHL. The main purpose of the UN is to maintain international peace and security.[119] For that purpose, the UN Security Council can take binding decisions in situations threatening international peace and security. Furthermore, IACs and even NIACs are situations threatening international peace and security, and it is now well established that IHL violations in and of themselves constitute such a

115 See ILC, Yearbook…1949, 281.

116 International Conference of Human Rights, Res XXIII on Human Rights in Armed Conflict of (12 May 1968) UN Doc A/CONF.32/41, 18; UNGA Res 2444 (XXIII) (1968).

117 See generally, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 465–7; UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict* (UN 2011) 92–117.

118 See in particular P I, Art 89.

119 UN Charter, Art 1(1).

threat.[120] While coercive measures taken by the Security Council appear to be the only solution in many cases of widespread violations, such measures risk mixing *jus ad bellum* and *jus in bello*. Confusing the two is natural for the UN given that its main role is to ensure respect for *jus ad bellum*.

**5.82** The UN is also mandated to promote and protect human rights.[121] Most IHL rules either correspond to IHRL rules or substantively protect human rights in times of conflict. The extensive role UN human rights mechanisms play in implementing IHL will be examined later in this chapter.[122]

**5.83** Finally, in conformity with the purpose of the UN to achieve international cooperation in solving international problems of a humanitarian character,[123] many UN organizations engage in humanitarian work and thus have a central role in implementing IHL.

### a. The UN Security Council

**5.84** On several occasions, the UN Security Council has called upon parties to armed conflicts to abide by IHL,[124] verbally condemned[125] and even sanctioned[126] IHL violations, established peace operations with robust mandates to protect civilian populations from violations of IHL[127] and authorized the creation of fact-finding missions as well as international criminal tribunals with mandates to investigate IHL violations.[128] As for economic sanctions, which are another option at the disposal of the Council to stop IHL violations, 'it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.'[129]

120 Otherwise the UNSC could not have established international criminal tribunals for the former Yugoslavia and Rwanda (see MNs 5.224–5.228), which could have, at best, stopped IHL violations but not the conflict.

121 UN Charter, Arts 1(3), 55 and 56.

122 See MNs 5.107–5.115.

123 UN Charter, Art 1(3).

124 See, e.g., UNSC Res 1181 (1998) para 12.

125 See, e.g., UNSC Res 2134 (2014).

126 See, e.g., UNSC Res 2161 (2014).

127 See, e.g., MONUSCO and its adjusted mandate in UNSC Res 2147 (2014), in particular para 4.

128 See, e.g., the ICTY established by UNSC Res 827 (1993); the ICTR established by UNSC Res 955 (1994); International Commission of Inquiry on Darfur created by UNSC Res 1564 (2004).

129 On the effect of economic sanctions on civilian populations and especially children, see UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 8 (1997): The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (1997) UN Doc E/C.12/1997/8, para 4.

**5.85** The Security Council also established a monitoring and reporting mechanism to combat six grave violations committed against children in armed conflict. The mechanism operates by identifying and formally listing parties responsible for the six violations and then requesting them to formulate action plans that lead to compliance with international law. As such, the mechanism not only serves to 'name and shame' parties that violate IHL. It also functions as a regular 'follow-up' mechanism because parties are 'delisted' and thereby removed from scrutiny only after the Council verifies that activities listed in the action plan have been fully implemented.[130]

**5.86** Although the Security Council can be considered an embryonic centralized enforcement mechanism for some rules of international law, including IHL, several factors limit its effectiveness in implementing IHL and ensuring its respect. First, it is dominated (and often paralysed) by the veto-wielding permanent members. Their decisions (like those of most other members) are based on political interests rather than on objective – and even less legal – criteria relating to non-compliance. This state of affairs creates the impression that enforcement by the Council, as is also the case with the UN General Assembly, involves double standards. This impression leads to resentment by civilians and belligerents involved in armed conflicts. It may also offer leaders a convenient pretext to disregard the Council's decisions, especially if no action was taken in prior similar situations. Thus, in Arab countries such as Sudan, justified Security Council action to stop IHL violations is seen as politically motivated because no similar action is taken to stop Israeli IHL violations.

**5.87** Second, the Security Council's main concern must centre on *jus ad bellum*, that is, maintaining or restoring international peace and security.[131] As a consequence, its main priority is not to ensure the highest degree of respect for IHL *during* armed conflicts. Additionally, it is less capable of enforcing respect by both parties because, at least in IACs, one party necessarily violated *jus ad bellum* and therefore deserves harsher treatment by the Council, irrespective of its respect for IHL.

**5.88** Finally, it is extremely difficult for the UN to apply the principle of equality of belligerents to NIACs involving governments and non-State armed groups. The former represent constituent member States while the latter are inevitably

130 For more information, consult the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Monitoring and Reporting on Grave Violations' <https://childrenandarmedconflict.un.org/our-work/monitoring-and-reporting/> accessed 31 July 2018.

131 UN Charter, Art 24.

perceived as criminals – if not as 'terrorists' – even by the UN. This stance is unhelpful from a compliance viewpoint because all belligerents should be engaged to promote full respect of IHL and sanctioned if they do not.

#### b. Peace operations

**5.89** Although not explicitly authorized in the UN Charter, peacekeeping operations, which today have turned into what are euphemistically labelled as 'peace operations' even when such operations use of force, play an increasing role in the enforcement of IHL. While peace operations were traditionally based upon the consent of the parties to an armed conflict and were supposed to be impartial regardless of the conduct of those parties, the UN Security Council provides modern UN peace operations with increasingly robust mandates that include the authorization to use force to protect both civilians and humanitarian assistance from the parties to an armed conflict.[132] Such mandates can be viewed as a way of enforcing IHL. The important controversies on whether, why and to what extent UN and other peacekeeping forces are bound and protected by IHL will be addressed later in the book.[133]

#### c. Humanitarian organizations of the UN system

**5.90** UN organizations engaging in humanitarian work, such as the Office of the UN High Commissioner for Refugees (UNHCR), UN Children's Fund (UNICEF), UN Office for Coordination of Humanitarian Affairs (OCHA) and World Health Organization (WHO), try to distance themselves from the UN's political undertaking to maintain international peace and security. These organizations are nevertheless governed by member States, which are not and should not be neutral and impartial in armed conflicts.

### 5.2.5 Regional organizations

**5.91** While no regional organization has a specific IHL mandate, a variety of activities of such organizations also encompass IHL issues and may even go further than what is possible to achieve on the universal level. The role of regional human rights mechanisms in the enforcement of IHL will be discussed later.[134]

**5.92** Some regional organizations have adopted treaties that contain provisions specifically applicable to armed conflicts. In the AU, such provisions address

132 See, e.g., UNSC Res 2348 (2017) (concerning MONUSCO in the Democratic Republic of Congo); UNSC Res 2304 (2016) (concerning the UN Mission in South Sudan).

133 See MNs 9.116–9.127.

134 See MNs 5.107, 5.111–5.115.

women,[135] children[136] and internally displaced persons.[137] Most organizations, however, deal with IHL through non-binding decisions and declarations that encourage their members to become parties to IHL treaties, to adopt national legislation implementing those treaties and to respect as well as disseminate IHL, often in cooperation with the ICRC. For example, the AU and several sub-regional organizations in Africa – such as the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the Economic Community of Central African States (ECCAS) – have issued such decisions and declarations over the years.[138]

### a. Prevention

**5.93** The Organization for Security and Co-operation in Europe's (OSCE) Code of Conduct on Politico-Military Aspects of Security specifies what participating States must do to implement IHL at the national level, adding in particular that they must ensure that members of their armed forces are individually accountable for their actions; their armed forces are commanded, manned, trained and equipped consistently with international law; and their defence policy and doctrine is consistent with IHL.[139] States participating in the OSCE exchange information on the implementation of the Code of Conduct on a yearly basis by answering a questionnaire. IHL considerations are also included in the EU's policy documents regarding the export of arms,[140] the proliferation of certain types of weapons[141] and the provision of humanitarian aid.[142] The EU also encourages cooperation between member States for the investigation and prosecution of war crimes.[143]

135 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (11 July 2003) Art 11.

136 African Charter on the Rights and Welfare of the Child (11 July 1990) Art 22.

137 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (23 October 2009) (2010) 49 ILM 86, Arts 4, 7 and 9.

138 See Djacoba Liva Tehindrazanarivelo, 'The African Union and International Humanitarian Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 503, 506–9, 516.

139 OSCE, 'Code of Conduct on Politico-Military Aspects of Security' (3 December 1994) Doc No FSC/1/95.

140 Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment [2008] Official J of the EU L335/99.

141 Council of the EU, 'EU Strategy to Combat Illicit Accumulation and Trafficking of SALW and Their Ammunition' (2006) PESC 31, CODUN 4, COARM 5.

142 Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the European Commission (2008) Official J of the EU C25/01.

143 Council Decision 2003/335/JHA of 8 May 2003 on the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes (2008) Official J of the EU L118/12.

**5.94** As for the Organization of American States (OAS), its General Assembly has adopted several resolutions on IHL,[144] including on the establishment of review procedures for new means and methods of warfare and on the recruitment and use of children in armed forces.[145] The Inter-American Juridical Committee adopted a model law on the protection of cultural property in armed conflict.[146] Moreover, the OAS Committee on Juridical and Political Affairs has organized a number of special meetings on IHL, during which issues such as the protection of persons deprived of liberty in armed conflict,[147] cluster munitions and the role of private security or military firms[148] have been discussed.

**5.95** The League of Arab States created in 2001 a Follow-up Commission for the Implementation of IHL[149] that issues reports on the implementation of IHL in Arab States, organizes conferences for government experts, follows up on IHL dissemination and training programmes, supports Arab States in the creation of IHL national commissions and sets up special regional programmes for IHL. Finally, Article 2(2)(j) of the Charter of the Association of Southeast Asian Nations (ASEAN) provides that its member states shall uphold the UN Charter and international law, including IHL.

### b. Reaction to violations

**5.96** Regional organizations also directly contribute to the enforcement of IHL, but more often than not such organizations only address violations by non-members. They support or directly carry out the investigation, prosecution and adjudication of IHL violations. The EU has adopted guidelines on promoting

144 See, e.g., OAS General Assembly, 'Promotion of and Respect for International Humanitarian Law' (2013) AG/RES. 2795 (XLIII-O/13). A complete list of all OAS resolutions on IHL may be consulted at <http://www.oas.org/en/sla/dil/international_humanitarian_law_GA_Resolutions.asp> accessed 31 July 2018.

145 See, e.g., OAS General Assembly, 'Promotion of and Respect for International Humanitarian Law' (2010) AG/RES. 2575 (XL-O/10) paras 16–17; OAS General Assembly, 'Promotion of and Respect for International Humanitarian Law' (2009) AG/RES. 2507 (XXXIX-O/09) paras 15, 17.

146 Permanent Council of the OAS, 'Note from the Chair of the Inter-American Juridical Committee to the Chair of the Permanent Council Transmitting the Report on "Model Legislation on Protection of Cultural Property in the Event of Armed Conflict"' (2013) Doc No CP/doc.4857/13.

147 See, e.g., OAS Committee on Juridical and Political Affairs, 'Agenda of the Special Meeting on International Humanitarian Law [AG/RES. 2650 (XLI-O/11)]' (2012) Doc No CP/CAJP-3023/11 rev. 3; OAS Committee on Juridical and Political Affairs, 'Final Report: Special Meeting of the Committee on Juridical and Political Affairs on Topics of Current Interest in International Humanitarian Law [AG/RES. 2293 (XXXVII-O/07)]' (2007) Doc No CP/CAJP-2649/08 corr. 1.

148 See, e.g., OAS Committee on Juridical and Political Affairs, 'Final Report: Special Meeting on International Humanitarian Law [AG/RES. 2433 (XXXVIII-O/08)]' (2009) Doc No CP/CAJP-2708/09 rev. 1.

149 Chérif Atlam and Mohamed Radwan Bin Khadraa (eds), 'Seventh Annual Report on the Implementation of the International Humanitarian Law at the Level of Arab States 2012–2014' (ICRC and League of Arab States 2014) 8.

compliance with IHL[150] as well as guidelines on children and armed conflict.[151] It established an independent fact-finding mission to investigate the conflict in Georgia, including on the respect of IHL.[152] The EU Mission to Kosovo (EULEX), among other things, assists the Kosovo judicial authorities in the prosecution and adjudication of war crimes cases.[153] The EU also supports the ICC.[154]

**5.97** The Council of Europe (CoE) Parliamentary Assembly has also occasionally addressed IHL violations.[155] The OSCE mission in Bosnia and Herzegovina monitors, reports and assesses judicial responses to war crimes, including by making information regarding war crimes trials available to the public.[156] It has also participated in the preparation of an *Investigation Manual for War Crimes, Crimes against Humanity and Genocide in Bosnia and Herzegovina*.[157] Moreover, the OSCE asked the International Humanitarian Fact-Finding Commission (IHFFC) to look into an incident involving staff members of the OSCE Special Monitoring Mission to Ukraine which occurred in April 2017.[158] The AU and the Senegalese government signed an agreement for the creation of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed in Chad between 1982 and 1990,[159] which resulted in the trial and conviction of former Chadian President Hissène Habré for, among other things, war crimes.[160]

150 Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) (2009) Official J of the EU C303/12.

151 EU, Update of EU Guidelines on Children and Armed Conflict (2008).

152 See Online Casebook, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia.

153 EULEX, 'What is EULEX' <http://www.eulex-kosovo.eu/?page=2,16> accessed 26 July 2018; EULEX, 'Executive Division' <http://www.eulex-kosovo.eu/?page=2,2> accessed 26 July 2018.

154 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and Repealing Common Position 2003/444/CFSP (2011) Official J of the EU L76/56.

155 See, e.g., CoE Parliamentary Assembly Res 1633 (2008); CoE Parliamentary Assembly Res 2198 (2018).

156 OSCE, 'OSCE Mission to Bosnia and Herzegovina: Rule of Law' <http://www.osce.org/mission-to-bosnia-and-herzegovina/rule-of-law> accessed 26 July 2018.

157 OSCE, 'Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina' (OSCE 2013).

158 See MN 5.198.

159 'Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers Within the Senegalese Judicial System' (adopted on 22 August 2012).

160 Chambre Africaine Extraordinaire d'Assises, *Ministère Public c. Hissein Habré* (Judgment) 30 May 2016. Chambre Africaine Extraordinaire d'Assises d'Appel, *Le Procureur Général c. Hissein Habré* (Arrêt) 27 April 2017.

### c. The role of peace operations deployed by regional organizations

**5.98** Last, but not least, a number of regional organizations are engaged in military operations and are therefore potential addressees of IHL. For instance, the Peace and Security Council of the AU deploys peace operations[161] and supports and facilitates humanitarian action in, among other situations, armed conflict.[162] Peace support missions are carried out by an African Standby Force, whose functions include the provision of humanitarian assistance to the civilian population in conflict areas.[163] Contingents of this force are trained on IHL and IHRL, with particular emphasis on the rights of women and children.[164] The AU adopted Guidelines for the Protection of Civilians in such operations in 2012.[165]

**5.99** While the NATO does not have troops of its own, NATO-led operations are conducted on the basis of an operation plan that always includes a minimum common level of IHL provisions applicable to all contributing States as they may be parties to different IHL treaties.[166] While each troop-contributing nation is responsible for training its own armed forces, common instruction and training principles must be followed.[167] NATO also adopted military policy guidelines for the protection of civilians,[168] on the protection of children in armed conflict[169] and on conflict-related sexual and gender-based violence.[170]

**5.100** As part of its Common Security and Defence Policy (CSDP),[171] the EU has engaged in a number of military and civilian operations,[172] including some in which EU forces were authorized to use force beyond self-defence. This raises several delicate issues in EU law and general questions concerning the

161 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002) Art 6(d).
162 Ibid., Art 7(p).
163 Ibid., Art 13(3)(d) and (f).
164 Ibid., Art 13(13).
165 See AU, 'Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations' (2012).
166 Baldwin de Vidts, 'The NATO Perspective' in Gianluca Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations* 343–4.
167 Ibid., 345–6.
168 NATO, 'NATO Policy for the Protection of Civilians' (2016).
169 NATO, 'NATO and Children in Armed Conflict' (2016).
170 NATO, 'Taking Action on Conflict-related Sexual and Gender-based Violence' (2016).
171 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) Official J of the EU C306/01, Art 42.
172 European External Action Service, 'Military and Civilian Missions and Operations' (2016).

applicability and application of IHL to peace operations.[173] The latter questions, which also concern AU operations, will be discussed later for UN peace forces.[174]

### 5.2.6 Traditional peaceful settlement of disputes and international adjudication in particular

Although IHL treaties establish mechanisms for the peaceful settlement of disputes, those mechanisms as well as the general mechanisms foreseen by public international law to resolve disputes are rarely used. This is not astonishing given that there would be no IACs if the parties were capable of settling their disputes peacefully. With the exception of ICJ advisory opinions, adjudication of disputes only occurs after the end of a conflict, and even then such cases are rare. Judgments by the ICJ as well as those of some arbitral tribunals have nevertheless made important contributions to clarify certain legal concepts and standards in IHL.

**5.101** Public international law foresees several mechanisms for the peaceful settlement of disputes that are equally available in the event of any dispute relating to the interpretation or application of IHL, namely negotiation, good offices, mediation, conciliation, arbitration, judicial settlement and resort to the UN or regional organizations.[175]

**5.102** IHL itself specifically provides for a conciliation procedure involving the Protecting Powers, but this procedure, which needs the agreement of the parties,[176] has never been used. The Protecting Power system[177] itself is an institutionalization of good offices that theoretically could be used to resolve disputes. The general problem, however, remains: it would be astonishing if parties, who prove by their mere participation in an armed conflict that they are incapable of peacefully settling their disputes, could then – in the midst of conflict – peacefully resolve their disputes over IHL. Such miracles only rarely succeed.

**5.103** Member States, the UN General Assembly, the UN Security Council and other UN organs as authorized by the General Assembly may call upon the UN's

173 See Marco Sassòli and Djemila Carron, 'EU Law and International Humanitarian Law' in Dennis Paterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 414–8.

174 See MNs 9.116–9.129.

175 See UN Charter, Arts 33–38.

176 See GCs, Common Arts 11/11/11/12.

177 See MNs 5.159–5.162.

principal judicial organ – the ICJ – to interpret IHL. Indeed, the ICJ has dealt with several IHL issues in a number of contentious as well as advisory cases. The ICJ's Advisory Opinions on the *Legality of the Threat or Use of Nuclear Weapons*[178] and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[179] clarified important IHL issues, but those opinions did not actually resolve those issues. The famous *Nicaragua*[180] and *Congo v. Uganda*[181] cases also addressed and clarified important questions of IHL in depth.

**5.104** More unfortunate examples include the ICJ's decisions in the *Arrest Warrant* case between the Democratic Republic of the Congo and Belgium[182] and in *Germany v. Italy*.[183] In *Arrest Warrant*, the ICJ regrettably held that the immunities enjoyed by current rulers (in this case a minister of foreign affairs) for all acts as well as former rulers for official acts committed while in office prevail over the obligation and even the possibility to prosecute grave breaches before domestic courts in third States based upon the principle of universal jurisdiction. Similarly, in *Germany v. Italy*, the ICJ determined that claims of State immunity raised before domestic courts of other States must prevail over claims made by victims of IHL violations.

**5.105** Nevertheless, as most States refuse its compulsory jurisdiction, the ICJ can only have a very marginal role in settling disputes concerning the law applicable to armed conflicts. If States were willing to settle their disputes through adjudication, they would not engage in IACs. As for NIACs, the ICJ cannot offer armed non-State groups a forum for adjudication. Consequently, it can deal with such groups only to the extent another State is potentially responsible for their conduct, and this leads in my view to interpretations of IHL that are not realistic for those who actually fight the conflict.[184]

**5.106** Similarly, it is very rare that parties to an armed conflict are prepared to submit disputes on the interpretation and application of IHL to arbitration during or even after the conflict. Historical exceptions include the arbitrations created

178 See Online Casebook, ICJ, Nuclear Weapons Advisory Opinion.

179 See Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall.

180 See Online Casebook, ICJ, Nicaragua v. United States.

181 See Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo.

182 See Online Casebook, ICJ, Democratic Republic of the Congo v. Belgium.

183 ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) (Judgment) [2012] ICJ Rep 99.

184 See, e.g., MNs 6.15 and 6.17 for the ICJ theory according to which an armed conflict is an IAC as soon as a third State has overall control over a non-State armed group, but the conduct of the latter is only attributable to the State if it has effective control over the conduct of that group.

by the peace treaties following the two World Wars[185] and, more recently, the creation of an Arbitral Commission by Eritrea and Ethiopia after their IAC between 1999 and 2000 to adjudicate disputes on the treatment and repatriation of POWs, interned civilians, occupied territories and the conduct of hostilities.[186] Taking into consideration the Arbitral Commission's limited resources and time as well as the difficulties it experienced in establishing the facts, it did an admirable job of interpreting, applying and clarifying the rules of IHL concerning the protection of persons. In my view, however, it also committed some mistakes. Nevertheless, its arbitral awards provide rare, recent and real-life examples of the respect of IHL. Even after fighting an armed conflict that victimized hundreds of thousands of people, Eritrea and Ethiopia set an example by submitting their disputes on the respect of IHL to arbitration. Notably, while the Arbitral Commission found and adjudicated that both parties had committed some violations, it also determined that (in its award concerning POWs):

> [B]oth Parties had a commitment to the most fundamental principles bearing on prisoners of war. Both parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were hors de combat were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.[187]

### 5.2.7 Human rights mechanisms

Most IHL rules also protect human rights – rights that remain applicable even in times of armed conflict. Most human rights treaties allow derogations from certain human rights only if certain conditions are met, including the requirement that such derogations must be compatible with IHL. While the exact details are controversial, it is furthermore accepted that the content of certain human rights obligations during armed conflicts must be interpreted in light of IHL, and most would even argue that IHL prevails in some situations and in some

185 See, e.g., 'The Mixed Arbitral Tribunal Created by the Peace Treaties' (1931) 12 BYBIL 135; Pierre d'Argent, 'Conciliation Commissions Established pursuant to Art. 83 Peace Treaty with Italy (1947)' (2006) in MPEPIL; Maarten Bos, 'The Franco-Italian Conciliation Commission Constituted Under Article 83 of the Treaty of Peace with Italy of February 10th, 1947. A Study in International Procedure' (1952) 22 Nordic J of Intl L 133. See also generally Pietro Sullo and Julian Wyatt, 'War Reparations' (2015) in MPEPIL.

186 Extracts from most of those decisions are reproduced and discussed in the Online Casebook. See the following cases: Eritrea/Ethiopia, Partial Award on POWs; Eritrea/Ethiopia, Awards on Military Objectives; Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property; Eritrea/Ethiopia, Awards on Occupation.

187 Online Casebook, Eritrea/Ethiopia, Partial Award on POWs, A. Prisoners of War, Ethiopia's Claim 4, para 12.

respects over the applicable IHRL rules. Finally, the mandates of some human rights mechanisms allow them to deal equally with IHL violations.

Human rights bodies therefore have plenty of opportunities to address IHL issues. Victims of IHL violations often have no other remedy than to try and trigger a procedure before a human rights body. Human rights bodies, however, sometimes neglect the specificities of IHL and armed conflicts. This may lead to unrealistic findings. In addition, the jurisdiction of such bodies in NIACs is generally limited to violations committed by the governmental side.

**5.107** The controversial relationship between IHL and IHRL will be discussed later in more detail.[188] It is sufficient to mention here that most IHL rules also protect human rights and that IHRL remains applicable in armed conflicts. Most human rights treaties allow derogations from certain human rights only if, among other things, such derogations do not violate IHL. Even though the precise details are controversial, it is also accepted that some IHRL obligations must be interpreted during armed conflicts in light of IHL, and most would even argue that IHL prevails in armed conflicts on some problems and in some respects over the applicable IHRL rules. The relationship between IHL and IHRL, while controversial at times, provides many different entry points that allow various human rights mechanisms to apply and interpret IHL. Albeit to a differing extent, such mechanisms do indeed take IHL into account. The mandates of some human rights mechanisms even provide them with the authority to deal equally with IHL violations.

**5.108** UN human rights mechanisms are proving increasingly relevant in promoting compliance with and the implementation of IHL. UN Charter-based mechanisms (that is, organs whose mandate is not based upon a specific IHRL treaty) have historically labelled IHL as 'human rights in armed conflicts.'[189] '[G]iven the complementary and mutually interrelated nature of international human rights law and international humanitarian law', the UN Human Rights Council is entrusted with taking 'into account applicable international humanitarian law' during its universal periodic review of the human rights performance of all States.[190] In both its regular and special sessions, the Human Rights Council

188 See MNs 9.004–9.053.

189 See above note 116.

190 'United Nations Human Rights Council: Institution-Building', para 2, as annexed to HRC Res 5/1 (2007) and endorsed by UNGA Res 62/219 (2008). See, e.g., HRC, 'Report of the Working Group on the Universal Periodic Review: Israel' (2009) UN Doc A/HRC/10/76, paras 24, 34–5, 39, 55, 57, 59 and 100; HRC, 'Report

has condemned IHL violations in particular contexts,[191] and it has also established several fact-finding mechanisms with mandates to investigate potential IHL violations.[192] The establishment of such fact-finding missions has become nearly systematic in the event of major armed conflicts. For the time being, they have largely replaced the IHFFC discussed below, which has up until now been essentially ineffective.[193]

**5.109** The Human Rights Council's special procedures, such as the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on arbitrary detention, also regularly refer to IHL in fulfilling their mandates. In particular, these procedures have shed light on the relationship between IHL and IHRL obligations in times of armed conflict.[194] As will be seen later, the Working Group on Arbitrary Detention created a controversy when it determined that ability of a person to seek habeas corpus before a court to determine the legality of his or her detention continues to apply even in NIACs.[195]

**5.110** Human rights treaty bodies (that is, committees or courts established by specific IHRL treaties) have also made significant contributions to the monitoring and implementation of IHL. In addressing the continued application of IHRL in armed conflict and its relationship with IHL, the Human Rights Committee, which monitors the implementation of the ICCPR, wrote that 'both spheres of law are complementary, not mutually exclusive' even though the 'more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights.'[196] However, while it directly referred to IHL on various occasions, including with respect to derogations to the ICCPR in times of armed conflict,[197] it has largely refrained from directly applying and engaging with substantive IHL rules.[198] The Committee on the Rights of the Child and the Committee against Torture also

of the Working Group on the Universal Periodic Review: Sudan' (2011) UN Doc A/HRC/18/16, paras 83.124, 83.130.

191 See, e.g., HRC Res S-21/1 (2014) para 3.

192 See ibid., para 13; HRC Res 14/1 (2010) para 8; HRC Res 31/20 (2016); HRC Res 25/1 (2014); HRC Res 28/30 (2015).

193 See MNs 5.196–5.198.

194 OHCHR, above note 117, 109.

195 See MN 10.018.

196 HRCtee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 11.

197 See, e.g., 'General Comment No. 29: States of Emergency (Article 4)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 11.

198 Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 263–5; Online Casebook, Human Rights Committee, Guerrero v. Colombia.

contribute to the monitoring and implementation of key IHL norms.[199] For instance, the Optional Protocol (OPAC) to the Convention on the Rights of the Child (CRC)[200] requires its States parties to report on measures taken to implement its provisions, including how they defined 'compulsory recruitment and use of children in hostilities' as well as 'direct participation in hostilities'.[201]

**5.111** Regional IHRL treaty bodies may refer to IHL for a variety of reasons. First, they must verify that derogations are compatible with IHL because derogations under human rights treaties cannot be inconsistent with a State's other international obligations.[202] Relatedly, the right to life under the ECHR is non-derogable except for 'lawful acts of war',[203] which must necessarily be assessed in relation to IHL as it defines what is lawful in 'war'. Second, IHL may also specify actions that may be 'lawfully taken for the purpose of quelling insurrection',[204] which is one of the exhaustive exceptions to the right to life enumerated by the ECHR and a derogation would therefore not even be necessary in such cases. Third, and more broadly, many IHRL terms, such as the prohibitions against 'arbitrary' killing and detention, may and must be interpreted in light of other applicable rules of international law. In situations of armed conflict, those applicable rules include IHL.

**5.112** Finally, as will be explained later, most regional IHRL treaty bodies take IHL into account as the *lex specialis*.[205] Recently, even the European Court of Human Rights, which for a long time was reluctant to apply IHL,[206] decided that the ECHR's human rights guarantees 'should be accommodated, as far as possible' in accordance with the applicable provisions of IHL treaties.[207] In the Inter-American system, the Inter-American Commission on Human Rights affirmed that 'in a situation of armed conflict, the test for assessing the observance of a particular right [protected by the American Declaration of the Rights and Duties of Man], may, under given circumstances, be distinct from

199 OHCHR, above note 117, 107; Sivakumaran, above note 117, 467.

200 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) 2173 UNTS 222.

201 UN Committee on the Rights of the Child, 'Revised Guidelines Regarding Initial Reports to be Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2007) UN Doc CRC/C/OPAC/2, paras 18–9.

202 ECHR, Art 15; ICCPR, Art 4; ACHR, Art 27.

203 ECHR, Art 15(2).

204 Ibid., Art 2(2).

205 See MN 9.027.

206 See Marco Sassòli, 'La Cour européenne des droits de l'homme et les conflits armés' in Stephan Breitenmoser *et al*. (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike 2007) 709.

207 Online Casebook, ECHR, Hassan v. UK, para 104.

that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.'[208] The more reluctant Inter-American Court of Human Rights, however, initially decided that both the Commission and itself lacked the competence to directly assess IHL violations.[209] The Inter-American Court subsequently nuanced its position, admitting that it had the competence to observe that certain acts or omissions that violate the Inter-American Convention also violate IHL treaties.[210]

**5.113** In the African system, the African Commission on Human and Peoples' Rights addressed IHL issues only in one case in which it dealt rather indiscriminately with IHL and IHRL without explaining why and to what extent it had jurisdiction to adjudicate IHL violations.[211] According to one of the Commission's general comments, however, what qualifies as an arbitrary deprivation of life during armed conflict must be interpreted with reference to the rules of IHL.[212]

**5.114** As States reject new mechanisms to deal with IHL violations,[213] it is not astonishing that victims, NGOs and States turn to a variety of IHRL mechanisms – some of which lead to binding decisions and can be triggered by individual victims of IHRL violations – to enforce the respect of IHL. For this purpose, claimants must couch IHL violations in IHRL language, which thankfully is not particularly arduous given the increasing convergence of the substantive rules between both branches of law as will be demonstrated later.[214]

**5.115** This reliance on IHRL mechanisms to enforce IHL is inevitable, but it is not without risks. The community of IHRL practitioners and experts is distinct from the IHL community. As explained below, there are fundamental differences in the structure, approach and values between IHL and IHRL. Judges and members of other IHRL bodies often lack sufficient familiarity with IHL to fully understand the practical problems its implementation raises, particularly from a military perspective. Therefore, decisions by IHRL bodies that take

208 Online Casebook, Inter-American Commission on Human Rights, Coard v. United States, paras 38–44; see also IACommHR, *Decision on Request for Precautionary Measures* (*Detainees at Guantanamo Bay*, *Cuba*) (2002) 41 ILM 532.

209 Online Casebook, Inter-American Court of Human Rights, The Las Palmeras Case, paras 33–4.

210 Online Casebook, Inter-American Court of Human Rights, Bámaca-Velasquez v. Guatemala, para 208.

211 African Commission on Human and Peoples Rights, *Democratic Republic of the Congo v Burundi et al.* (29 May 2003) Communication No 227/99.

212 African Commission on Human and Peoples Rights, 'General Comment No. 3 on the African Charter on Human and People's Rights: The Right to Life (Article 4)' (2015) paras 13, 32.

213 Helen Durham, 'Strengthening Compliance with IHL: Disappointment and Hope' (*ICRC, Humanitarian Law & Policy Blog* 2018).

214 See MN 9.010.

IHL into account may contribute as much to the substantive fragmentation of international law as decisions that continue to exclusively apply IHRL in situations of armed conflict. Finally, determinations that an IHRL violation occurred in an armed conflict may be based upon lower standards of proof than what would be necessary to convict a person of war crimes. Such decisions may consequently give the erroneous impression (and sometimes they even explicitly state) that war crimes were committed.

### 5.2.8 The role of national courts

Decisions of national courts may demonstrate State practice and *opinio juris*, interpret IHL and enforce the respect of IHL by the authorities of their State as well as by individuals under their jurisdiction. Cases at the national level face obstacles such as immunities and domestic doctrines that courts sometimes use as avoidance strategies. Worse still, national courts sometimes legitimize IHL violations and also adopt utopian interpretations of IHL, in particular when adjudicating conduct by States other than the forum State.

**5.116** Apart from their character as State practice and evidence of an *opinio juris* and their role for the interpretation of IHL,[215] national court decisions have (and should have) a primary role for the enforcement of IHL, although the decisions of international courts often have a greater resonance than domestic ones. During ongoing armed conflicts, national courts may be seized to review the compliance of certain State measures with IHL, for instance, relating to the law of occupation[216] or the rules on detention.[217] In post-conflict situations, it is mainly domestic courts that try individuals[218] and impose reparations for IHL violations. Domestic jurisprudence on IHL mostly deals with the protection of the rights of individuals who are in the power of the State because domestic courts are normally reluctant to entertain cases regarding the law of the conduct of hostilities.[219] This reluctance can be explained by several factors. First, while a conflict is ongoing, the situation on the ground is in a constant state flux.[220] Consequently, courts may either lack relevant and sufficient information

215 See MN 4.77.

216 See, e.g., David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002).

217 See, e.g., Online Casebook, United States, Hamdan v. Rumsfeld.

218 On individual criminal responsibility, see MNs 5.204–5.222.

219 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 153–5.

220 Yael Ronen, '*Silent Enim Leges Inter Arma* – but Beware the Background Noise: Domestic Courts as Agents of Development of the Law on the Conduct of Hostilities' (2013) 26 Leiden J of Intl L 599, 601.

to reach a decision or be unable to react in a timely manner.[221] Second, Courts usually perceive the choice of means and methods of warfare as being under the exclusive discretion and domain of the executive branch.[222]

**5.117** At least in States governed by the rule of law, domestic courts are particularly well-placed to enforce IHL because, compared to international tribunals, they are more likely to have jurisdiction. They also have easier access to evidence, and they can rely on existing investigation authorities and procedures, including their coercive powers.[223] Additionally, and perhaps most importantly, their judgments, which are viewed with less suspicion, tend to have a stronger impact on the public opinion of their respective societies.

**5.118** However, the implementation of IHL by domestic courts also faces some obstacles. First, in order for national courts to enforce IHL rules, dualist States must adopt legislation of transformation, and even monist States must adopt domestic legislation for IHL rules that are not self-executing. Second, immunities under domestic law may bar a national court from exercising jurisdiction over some or all acts committed by an individual in the course of an armed conflict. Third, several doctrines prevent courts from adjudicating certain cases. These include the act of State doctrine, the political question doctrine and the doctrine of *forum non conveniens*. At times, these doctrines work as avoidance mechanisms through which domestic courts refrain from exercising judicial review over executive actions that are thus left entirely to the discretion of the political branch.[224] In such cases, court decisions nevertheless implicitly legitimize government action. However, domestic courts are increasingly more willing to exercise judicial review over matters of IHL, and they do so by gradually redefining their institutional stand vis-à-vis the executive in order to strike a balance between their role as law enforcers and the political sensitivity of the issues under their review.[225]

**5.119** In some unfortunate instances, national courts are openly apologetic or even legitimize the role of illegal State policies.[226] This may result in incorrect and harmful jurisprudence that may then be adopted and cited by other courts.[227] On the other hand, while domestic courts may be prone to adopt an apologetic

221 Ibid.
222 Weill, The Role, above note 219, 155.
223 Sharon Weill, 'Building Respect for IHL Through National Courts' (2014) 96 IRRC 859, 859.
224 Weill, The Role, above note 219, 69–81.
225 Ibid., 117–56.
226 Ibid., 13–67; Kretzmer, above note 216, 190.
227 Weill, The Role, above note 219, 67.

approach vis-à-vis cases brought against the forum State and its agents, they might be more willing to adopt utopian decisions at odds with the position of the executive in the name of ethical values when confronted with cases brought against foreign States or their nationals.[228] For instance, even though the Italian Supreme Court of Cassation held that a case alleging the commission of war crimes by Italian officials was nonjusticiable because it concerned 'acts of government',[229] it subsequently found that Germany did not enjoy State immunity before Italian courts because the victims' claims were based on international crimes committed against them by the Nazi regime that amounted to *jus cogens* violations.[230] The ICJ, however, later determined that this decision violated international law.[231]

### 5.2.9 The role of NGOs

IHL treaties refer to NGOs for different tasks as humanitarian organizations or using other terms. Some NGOs provide humanitarian assistance to people affected by armed conflicts, while other NGOs engage belligerents with a view toward encouraging them to respect IHL. Other NGOs, which originally existed as pure human rights organizations, now also monitor the respect of IHL, report about IHL violations and mobilize public opinion. Some even advocate for developments in IHL.

**5.120** NGOs, which are not-for-profit civil society organizations that operate independently from governments, address public objectives. NGOs perform a variety of tasks in both armed conflicts and with regard to IHL more generally.

**5.121** IHL treaties do not specifically use the term 'NGOs'. Instead, IHL treaties mention and confer rights to a number of organizations other than the ICRC and the other components of the Red Cross and Red Crescent Movement. Specifically, such organizations are identified as, for instance, impartial humanitarian bodies or organizations,[232] organizations assisting POWs[233] or protected

228 Ibid., 157–63.

229 Italian Supreme Court of Cassation, *Presidency of the Council of Ministers v Markovic et al.* (Ordinance) No 8157 (5 June 2002).

230 Italian Supreme Court of Cassation, *Ferrini v Federal Republic of Germany* (Judgment) No 5044/2004 (6 November 2003). See also Italian Supreme Court of Cassation, *Federal Republic of Germany v Vojotia Region* (Ordinance) No 14199 (29 May 2008).

231 ICJ, *Germany v Italy*, above note 183.

232 GCs, Common Arts 3 and 9/9/9/10. For a list of 13 types of organizations mentioned in IHL treaties, see Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Brill Nijhoff 2014) 86–180.

233 GC III, Art 125.

civilians,[234] voluntary aid societies contributing medical and religious personnel or hospital ships[235] and organizations engaged in reuniting families.[236] Certain NGOs have been recognized as qualifying as one or more of these organizations referred to in IHL treaties.[237]

**5.122** The right of initiative allows not only the ICRC but also other impartial humanitarian organizations to offer and deliver their services in both IACs and NIACs[238] to a consenting party.[239] *Médecins Sans Frontières* (Doctors without Borders) is such an NGO, delivering medical services where belligerents are unwilling or unable to provide such services even though they should under IHL.

**5.123** NGOs are also often involved in relief delivery subject to consent by belligerents.[240] Once consent is given, however, all High Contracting Parties (not simply the parties to the conflict) must allow and facilitate the unimpeded passage of relief consignments, equipment and personnel.[241] As for relief personnel, their freedom of movement may only be limited in cases of imperative military necessity and even then only temporarily.[242]

**5.124** Except for very limited exceptions for medical personnel assigned exclusively to medical tasks by a party to the conflict, NGOs may not use the emblem of the red cross, the red crescent or the red crystal,[243] including even for humanitarian activities for which the ICRC may use it such as the transport of food or medical assistance.[244] While the above-mentioned IHL provisions address the tasks of and access for NGOs, they do not specifically protect NGO staff (or ICRC staff) against attacks or abductions. However, as NGO staff are nearly always civilians, they benefit from the general protection IHL affords to civilians against such practices, which are unfortunately very frequent.

234 GC IV, Art 122.
235 GC I, Arts 26 and 27; GC II, Arts 24 and 25; P I, Art 8(c)(iii).
236 GC IV, Art 26.
237 Barrat, above note 232, 182–97.
238 GCs, Common Arts 3 and 9/9/9/10; P I, Art 81; P II, Art 18 (1) (which requires, however, that they are 'located in the territory of the High Contracting Party').
239 See MNs 5.175–5.176.
240 See MNs 10.201–10.216.
241 P I, Arts 70(2), 71.
242 P I, Art 71(3).
243 See MN 8.041.
244 For an illustrative example, see Online Casebook, United Kingdom, Misuse of the Emblem.

**5.125** As part of the civil society, NGOs are particularly well placed to raise the general public's awareness of IHL and to hold both governments as well as armed groups accountable for their actions in armed conflicts in the arena of public opinion. NGOs also work directly with parties to armed conflicts to improve their respect of IHL. As we will see, for example, Geneva Call engages non-State armed groups with a view toward enhancing their respect of IHL without the various diplomatic and political obstacles that intergovernmental organizations and even the ICRC face. Specifically, it provides IHL training and technical advice to non-State armed groups, and it encourages such groups to sign (and monitors the respect of) deeds of commitments through which they undertake to respect the ban on the use of anti-personnel mines, the rules protecting children from the effects of armed conflict, the prohibition against sexual violence and the elimination of gender discrimination.[245]

**5.126** NGOs, such as Human Rights Watch and Amnesty International, that initially monitored only the respect of IHRL now play an important role in monitoring the conduct of belligerents and publish reports about IHL violations.[246] Some NGOs even advocate for the development of IHL. For instance, several NGOs were instrumental in the adoption of the CCW Protocol I on Blinding Laser Weapons and the Ottawa Convention on Landmines.[247]

## 5.3 SPECIFIC IHL IMPLEMENTATION MECHANISMS

**5.127** The general enforcement mechanisms of international law are inherently inadequate to ensure the respect of IHL or they are at least in practice insufficient due to, among other things, political realities. IHL therefore establishes its own implementation mechanisms, but the real-life impact of these mechanisms on the implementation of IHL and its respect is equally insufficient as long as belligerent States, non-State armed groups and third States lack political will.

245 See MNs 10.243–10.246.

246 See the cases referred to in Online Casebook, 'Implementation mechanisms' at Section 'VII. Role of Non-Governmental Organizations', sub-section '2. Monitoring, reporting and mobilization of public opinion'. See also, e.g., Human Rights Watch, *'They Said We Are Their Slaves': Sexual Violence by Armed Groups in the Central African Republic* (Human Rights Watch 2017); Human Rights Watch, *All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria* (Human Rights Watch 2017).

247 Ved Nanda, 'Nongovernmental Organizations and International Humanitarian Law' (1998) 71 ILS 337, 344, 352.

### 5.3.1 Measures to be taken already in peacetime

IHL provides measures that must be undertaken in peacetime to ensure the respect of IHL in the event an armed conflict occurs. Armed forces must be properly instructed and trained on the rules of IHL, while the whole population must be educated so they have a basic understanding of IHL. Education is essential to ensure that decision-makers who implement IHL, such as the police forces, civil servants, politicians, diplomats, judges, lawyers and journalists, and students who will have those roles in the future as well as the public at large know the limits constraining everyone's actions in armed conflicts that apply even to the worst enemy.

Furthermore, IHL instruments must be translated into the law of the land through national implementing legislation according to the constitutional system of each State. In some respects, such implementing legislation is necessary to enable the national law enforcement system to apply IHL, including during peacetime, because courts must have national laws permitting them to adjudicate and sanction war crimes committed in foreign conflicts as well as the misuses of the emblem of the red cross, the red crescent or the red crystal in peacetime.

Finally, States must take additional practical measures to enable them to respect IHL. Qualified personnel and legal advisors must be properly trained in peacetime so as to be operational in wartime. Combatants and certain other persons require identity cards or tags to be identifiable so rules protecting them are not violated, and identity cards cannot obviously be produced only when a conflict breaks out. Military objectives must be separated, as far as possible, from protected objects and persons.

**5.128** Even though most IHL rules only apply during armed conflict, the respect of those rules can only work in the exceptional chaos created by armed conflict if certain peacetime measures are taken to facilitate the respect of IHL. IHL therefore prescribes (or inherently demands) certain preparatory measures to be taken at all times, including in peacetime. Article 80 of Protocol I provides that the parties to a conflict *as well as all High Contracting Parties* must 'without delay take all necessary measures for the execution of their obligations'. While most of those measures are only prescribed by IHL of IACs, even if merely undertaken in a given country in view of an IAC, they will also beneficially support the respect of IHL if a NIAC breaks out.

### a. Dissemination and training

**5.129** Most rules of public international law can be respected by States even if only a few specialized key executive and judicial officials are familiar with them. This is not the case with IHL. Therefore, all individuals who fight, all officials who make decisions that may affect persons protected by IHL and even the general public must be familiar with IHL. Indeed, the general public must be educated in IHL because everyone in an armed conflict is an addressee of, at a minimum, the rules of IHL that criminalize certain conduct having a sufficient nexus with the armed conflict. Furthermore, it is equally important that all people know their rights under IHL. More importantly, it essential to educate the public in IHL because it is impossible to determine who will fight for a non-State armed group before a NIAC breaks out, and once that happens it is too late, practically difficult and politically delicate to train insurgents in IHL. Finally, in democratic States, the general population must also be aware of IHL principles because it plays a key role in ensuring that the government complies with IHL in armed conflicts and does not fall into the trap of populism, nationalism and exclusion once an armed conflict breaks out.

**5.130** IHL refers to this important aspect of generating respect for it as 'dissemination'. IHL treaties require States parties 'in time of peace as in time of war, to disseminate the[ir] text[s]…as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.'[248]

**5.131** Members of the armed forces are the most traditional and indeed important addressees of IHL training. It is obviously insufficient to provide them, as the aforementioned provisions suggest, with merely the text of IHL treaties or academic lectures. IHL should rather be systematically integrated by commanders into the regular training for everyone according to their level of responsibility and specialization, including and in particular through practical exercises and manoeuvres. Just as soldiers undergo repeated drills so they can handle their weapons during situations of chaos, they must also be specifically trained on when and who they may use their weapons against so that such decisions become automatic even under battlefield conditions. Manoeuvres and exercises that include IHL-related problems are more realistic because civilians, the wounded, refugees, cultural property and surrendering enemies will inevitably

248 GCs, Common Arts 47/48/127/144; P I, Arts 83 and 87(2), contain similar wording as does P II, Art 19, for NIACs. See more generally ICRC CIHL Database, Rules 142–3.

appear in modern (often urban) armed conflicts, and soldiers must be adequately prepared for the complexities inherent in actual contemporary armed conflicts and not just for a hypothetical battle between blue and red forces in the midst of a desert. Additionally, as armed forces are increasingly used in law enforcement operations and as it becomes increasingly difficult to distinguish such operations from the conduct of hostilities, the reality of modern conflicts implies that it is necessary to integrate IHRL, in particular those rules relating to law enforcement, into the training of a State's armed forces. Sufficient training, in particular of commanders, must not only enumerate prohibitions but rather must also provide all members of the armed forces with IHL-compatible solutions to problems that they will inevitably encounter in the field. Such training will facilitate both the accomplishment of their military objective and the respect of IHL. IHL should therefore be perceived not as an obstacle as it facilitates efficient fighting.

**5.132** IHL rules must also be integrated into general rules of engagement as well as specific engagement rules that must be adhered to during a particular military operation.[249] Although some States have produced confidential military manuals, many States have published military manuals that provide their armed forces with their respective interpretations of IHL. Published military manuals provide an invaluable source of practice for the determination of customary law and of subsequent practice relevant for treaty interpretation. While such manuals may be important in the training of military lawyers, many of them are, however, too detailed, sophisticated and nuanced to properly train soldiers or even officers.

**5.133** States must also provide IHL training to police forces, some of which may be called upon to fight in a NIAC and may therefore be confronted with persons protected by IHL. For them, the interface with IHRL will be even more important than for armed forces because of their law enforcement tasks.

**5.134** IHL training raises particular problems when it comes to non-State armed groups, which will be discussed elsewhere in this book.[250]

**5.135** Ensuring that the whole population has a basic understanding of IHL is perhaps the most promising preventive action States and humanitarian organizations can undertake. The aim is that they understand that IHL rules apply

249 See International Institute of Humanitarian Law, 'Sanremo Handbook on Rules of Engagement' (2009).
250 See MNs 10.240–10.241.

irrespective of who is right and who is wrong and thus protect even the most unprincipled belligerents. Thus, political or social activists, journalists, students, schoolchildren or anyone else who may become a member or supporter of an armed group must understand the obligations imposed by IHL as well as the rights everyone may claim under it. Schools and universities provide the best forums to ensure that the entire population is properly educated in IHL. Students in schools should be taught the basic idea that even enemies in war, who are justly considered as enemies because of their past behaviour and the threat they represent, deserve a minimum of level of respect and protection. Additionally, universities educate the future leaders and public officials, journalists, judges, doctors and diplomats who apply IHL and make decisions concerning people protected by it. For lawyers, IHL provides an ideal training ground for legal thinking. But to ensure the full respect of both IHL and the affected war victims, it is equally important that IHL is taught to students studying political science, international relations, history, anthropology, medicine and communication. An interactive and practical teaching methodology that focuses on case studies is preferable not only from an academic point of view but also for the benefit of victims of future armed conflicts. An interactive discussion of cases taken from real contemporary armed conflicts shows students (and future leaders) that IHL matters in contemporary armed conflicts because it offers realistic solutions to resolve problems that invariably arise in such conflicts.[251]

### b. Legislation of application

**5.136** Domestic law enforcement systems are more effective than the international law enforcement system. The enforcement of IHL will, in many respects, only occur if IHL can take advantage of domestic law enforcement systems, which presupposes that IHL is translated into domestic laws in every State. Enforcement through domestic law also has other the key advantages. It transforms the respect of IHL into a routine matter, rather than requiring a political decision. It also shows nationalist and sovereignty-obsessed governments as well as public opinions, which are often the cause and the result of armed conflicts, that the respect of IHL is not the result of outside interference but rather a national agenda.

**5.137** Most countries except those with an English constitutional tradition, Germany and Italy have monist constitutional systems. In monist countries, judges and all public officials can immediately apply IHL treaty rules that are 'self-executing', or, in other words, rules that are sufficiently precise so as to enable courts

251 See, e.g., the more than 500 cases appearing in the regularly updated Online Casebook.

and administrative authorities to directly deduce the rights and obligations at issue in order to provide a remedy in a given case. Specific national implementing legislation is thus not necessary for self-executing IHL rules. In all constitutional systems, national implementing legislation is also not required for customary IHL rules. For all other IHL treaty rules in monist systems as well as for all IHL treaty rules in dualist constitutional systems, national legislation must be adopted to operationalize those rules at the domestic level.

**5.138** In general, IHL does not explicitly require States to adopt implementing legislation.[252] IHL treaties simply prescribe that such legislation must be communicated to the other States parties,[253] which may be argued to imply that it must be adopted. IHL, however, explicitly requires legislation of application in two fields: criminal repression and the use of the emblem of the red cross, the red crescent or the red crystal (distinctive emblem).

**5.139** The fact that all States have an express obligation to prosecute grave breaches – a subcategory of war crimes – will be discussed in depth below.[254] However, even in countries in which the grave breaches listed in IHL instruments are considered to be self-executing, national courts cannot punish individuals for committing grave breaches without violating the principle *nulla poena sine lege* ('no crime without law') unless the penalties for such behaviour have been stipulated in advance by national legislation. Furthermore, only national legislation can translate the rules relating to grave breaches to comply with the very different traditions of penal law concerning, for example, the elements of crimes, modes of criminal liability and defences.[255] Additionally, only national legislation is capable of determining the courts (military or civil) that are competent to adjudicate different types of cases and try violations as well as the appropriate procedure to be applied. The Conventions and Protocol I require States to adopt national legislation to repress grave breaches and to establish universal jurisdiction over them.[256] Beyond that, customary law requires investigation and prosecution of all alleged war crimes over which a State has jurisdiction under the usual principles of territoriality and personality.[257] Finally, we will see below that the principle of complementarity foreseen in the ICC Statute makes the ICC a court of last resort by providing it with jurisdiction only when

252 P I, Art 80, simply requires measures of execution.
253 GCs, Common Arts 48/49/128/145; P I, Art 84.
254 See MNs 5.204–5.213.
255 ICRC, 'The Domestic Implementation of International Humanitarian Law: A Manual' (ICRC 2015) 28–41.
256 GCs, Common Arts 49/50/129/146; P I, Art 85.
257 ICRC CIHL Database, Rule 158.

a State is unable or unwilling to genuinely investigate or prosecute alleged war criminals.[258] To benefit from this principle, States must adopt adequate legislation enabling them to prosecute such crimes.

**5.140** It will also be explained elsewhere that IHL establishes rules that limit the use of the distinctive emblem both in peacetime and in wartime to specific persons, objects and circumstances.[259] The emblem's use is always subject to the permission and control of the competent authority. Only national legislation can designate that competent authority and prescribe the necessary details to implement these rules. IHL therefore specifically mandates the adoption of legislation to prevent misuses of the emblem,[260] while several other IHL provisions imply that States must also adopt legislation on the use of the emblem.[261]

**5.141** Beyond the Conventions and Protocol I, other IHL treaties regulating the protection of cultural property, the involvement of children in armed conflicts and certain weapons require or imply that States must adopt implementing national legislation.[262]

**5.142** More generally, where IHL imposes an obligation on the State to act, only national legislation can clarify the State organ or entity that must act to fulfil such obligations. Without such a clarification, the international obligation will remain a dead letter – and will therefore be violated when it becomes applicable.

**5.143** For these reasons, national legislation is the cornerstone of IHL's implementation. The ICRC has drawn up an impressive list of provisions of the Conventions and Protocols that require national implementation,[263] which, under the principle of legality, implies in most cases a need to adopt legislation.

### c. Practical measures of implementation

**5.144** Beyond legislation, the effective implementation of IHL also requires the adoption of domestic administrative and practical measures before an armed conflict breaks out. Protocol I explicitly requires that all States parties (and not just parties to armed conflicts) conduct review procedures before introducing a new weapon in order to determine the legality of its use in combat.[264] States

258 See MN 5.241.
259 See MNs 8.034–8.049.
260 GC I, Art 54.
261 GC I, Arts 42, 44 and 53; GC II, Arts 44–5.
262 For a detailed overview, see ICRC, above note 255, 64–118.
263 Ibid., 61.
264 See MNs 8.375–8.377.

must also select and train qualified personnel and legal advisors[265] in peacetime so they can be operational in wartime. To be identifiable, combatants and certain other persons require identity cards or tags[266] that cannot obviously be produced only when a conflict breaks out. Similarly, medical and civil defence personnel, transports and units as well as objects containing dangerous forces and cultural property cannot be effectively identified and marked only after an armed conflict begins. Later in this book, we will see that National Information Bureaux play an essential role in reducing the number of missing persons by aggregating and transmitting information on persons affected by armed conflicts, processing enquiries about their fate in particular and informing their families about their whereabouts or their deaths.[267] Such bureaux and their staff cannot be made operational only after hostilities commence. Furthermore, military objectives have to be separated, as far as possible, from protected objects and persons.[268] It is evident that a hospital, for example, cannot be whisked away from army barracks or a weapons factory when an armed conflict breaks out.

### 5.3.2 The obligation to respect IHL and ensure its respect

States must respect their IHL obligations, which means that they are responsible for IHL violations committed by their armed forces, other organs and persons as well as groups that are attributable to them. In addition, States have a due diligence obligation to ensure respect of IHL by the entire population under their control. Beyond these obligations, all States, including those that are not involved in an armed conflict, must do everything reasonably within their power to prevent and bring to an end IHL violations committed by other States and armed groups. This implies a negative obligation not to encourage, aid or assist in the commission of such violations as well as a positive obligation to take measures either collectively or individually to prevent or end such violations.

**5.145** Article 1 common to the Conventions and Protocol I reads: 'The High Contracting Parties undertake to respect and to ensure respect for the [relevant treaty] in all circumstances.' The ICJ determined that this obligation (presumably to ensure respect for customary IHL) also exists under customary law and that it also applies to NIACs.[269] This obligation must be understood in the

265 See P I, Arts 6 and 82, respectively; ICRC CIHL Database, Rule 141.

266 See GC I, Arts 16, 17(1), 27, 40 and 41; GC II, Arts 19, 20 and 42; GC III, Arts 4(A)(4) and 17(3); GC IV, Arts 20(3) and 24(3); P I, Arts 18 and 79(3).

267 See MNs 8.100, 8.166, 8.273–8.278.

268 See GC I, Art 19(2); GC IV, Art 18(5); P I, Arts 12(4), 56(5) and 58(a)–(b).

269 See Online Casebook, ICJ, Nicaragua v. United States, paras 220, 255–6.

framework of the rules on State responsibility for internationally unlawful acts, but it goes beyond those general rules and constitutes the *lex specialis* in several respects. The obligation has an internal and an external dimension, and it implies negative and positive obligations.

### a. Dimensions

#### *i. Internal dimension*

**5.146** The internal dimension of the obligation to *respect* confirms the well-established principle of *pacta sunt servanda* ('agreements must be kept'). While the internal aspect of the obligation to *ensure respect* recalls that States parties must guarantee the respect by their own organs and anyone else attributable to them under the law of State responsibility, this may also be considered as part of the obligation to *respect* and applies to all rules of international law. Beyond that, under the obligation to ensure respect, States also have a due diligence obligation to ensure that everyone on their territory or under their jurisdiction complies with IHL.[270] This due diligence obligation is specified by certain positive measures that must be taken, such as criminalizing and punishing grave breaches.[271]

#### *ii. External dimension*

**5.147** The external aspect is much more revolutionary. It reflects the 'special character of the Conventions',[272] and it has been qualified as having 'a quasi-constitutional nature'.[273] Every State, including those that are not a party to a particular armed conflict, has a due diligence obligation to ensure that the parties to the conflict (namely, States and non-State armed groups) respect their obligations under IHL. Although this external aspect reflects the *erga omnes* character of IHL obligations, it goes beyond this character as it *obliges* States to take action rather than simply authorizing them to do so. According to the ICRC, States 'must do everything reasonably in their power to prevent and bring [IHL] violations to an end.'[274]

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270 See Updated ICRC Commentary GC I, para 150; Robin R. Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Academy Commentary, 118; Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 YIHL 3. For the *travaux préparatoires*, see 'Final Record of the Diplomatic Conference of Geneva of 1949' (Federal Political Department of Switzerland 1950) vol II-B, 53.

271 GCs, Common Arts 49/50/129/146; P I, Art 85.

272 Pictet Commentary GC I, 25.

273 Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 IRRC 67, 68.

274 Updated ICRC Commentary GC I, para 154.

**5.148** The drafters of the 1949 Conventions probably did not envisage this external dimension during the drafting process.[275] Rather, the ICRC first highlighted this external feature of the obligation to ensure respect in its 1952 Commentary to the Conventions.[276] It remains subject to controversy in both scholarly writings[277] and the positions of States, in particular the US.[278] However, in practice subsequent to the 1949 Conventions, the UN Security Council,[279] the ICJ,[280] the UN General Assembly[281] and an overwhelming majority of the States parties[282] to Convention IV have relied on this obligation to call on third States to react to Israeli violations of Convention IV in the Occupied Palestinian Territory. Although practice concerning other conflicts has been less frequent, the ICJ applied this obligation to US support to rebels fighting against the government of Nicaragua.[283] Likewise, the ICRC has used it to make both confidential and public appeals to third States.[284] States have also invoked the external dimension of Common Article 1.[285] In any case, if practice applies and interprets the obligation in this way as to Israel, the selective failure to do so in many other cases cannot hinder its general applicability.

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275 See Kalshoven, above note 270.

276 Pictet Commentary GC I, 25.

277 See Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 EJIL 170; Robert Kolb, 'Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949' (2013) 46 Revue Belge de Droit International 513 (who considers, in line with State practice, that it only implies a faculty but not an obligation).

278 Brian Egan [then Legal Adviser of the US State Department], 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations' (2016) 92 ILS 235, 245.

279 UNSC Res 681 (1990), operative para 5.

280 See Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 158.

281 See Online Casebook, UN, Resolutions and Conference on Respect for the Fourth Convention: B. UN General Assembly Resolution ES-10/2, C. UN General Assembly Resolution ES-10/3, E. UN General Assembly Resolution ES-10/4, H. UN General Assembly Resolution ES-10/6, J. UN General Assembly Resolution ES-10/10, K. UN General Assembly Resolution ES-10/15, L. UN General Assembly Resolution 64/10 and M. UN General Assembly Resolution 64/92.

282 See ibid., G. Chairman's Report, Expert's Meeting, October 1998 and I. Declaration adopted by the High Contracting Parties to the Fourth Geneva Convention, 5 December 2001; see generally Pierre-Yves Fux and Mirko Zambelli, 'Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997–2001)' (2002) 84 IRRC 661. For more recent related practice, see Matthias Lanz *et al.*, 'The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law' (2014) 96 IRRC 1115.

283 See Online Casebook, ICJ, Nicaragua v. United States, para 220.

284 See ICRC appeals to all High Contracting Parties to ensure respect of IHL in the conflict between Iran and Iraq in Online Casebook, ICRC, Iran/Iraq Memoranda, and Yves Sandoz, 'Appel du C.I.C.R. dans le cadre du conflit entre l'Irak et l'Iran' (1983) 29 Annuaire Français de Droit International 161.

285 For a comprehensive review of the relevant practice, see ICRC CIHL Database, 'Practice on Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes', and Robin Geiss, 'Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to "Ensure Respect" – "Narrow but Deep" or "Wide and Shallow"?' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 417.

**5.149** The external obligation in turn implies a negative obligation not to encourage, aid or assist in violations. In my view, these negative obligations go beyond the general rule of the law of State responsibility on aiding and assisting in violations that requires, according to the ILC, establishing knowledge and intent.[286] Here, due to the specific wording of Common Article 1, mere knowledge is sufficient to trigger a State's negative external obligations. This has particular implications for arms transfers. In my view, as soon as the State transferring arms knows that the receiving State uses the weapons to systematically commit IHL violations, continued assistance by the transferring State necessarily violates Common Article 1.[287]

**5.150** Common Article 1, however, also implies a positive obligation to take measures against a State or an armed group violating IHL to bring such violations to an end. This applies with particular regard to violations committed by international organizations because member States have more opportunities to influence the conduct of such organizations, including through the decision-making bodies of those organizations and by refusing to place troops at the disposal of such an organization.

### b. Possible measures

#### *i. Countermeasures?*

**5.151** When faced with IHL violations, which measures may and must each State take under the law of State responsibility? Common Article 1 is arguably a precursor of the general rules on State responsibility as codified by the ILC that recall, in the case of a breach of an *erga omnes* obligation (in other words, an obligation that is owed to the entire international community), all States have the right to demand its cessation and, if necessary, guarantees of non-repetition as well as reparation in the interest of 'the beneficiaries of the obligation breached'.[288]

**5.152** As for countermeasures taken by non-injured States in response to a breach of an *erga omnes* obligation, the ILC considers that their lawfulness if taken in the 'general or collective interest' remains 'uncertain'.[289] Rather, it simply allows States to take 'lawful' measures against the responsible State without concluding whether countermeasures, which by definition involve an action that would

286 ILC Articles on State Responsibility, 66, para 1 commentary to Art 16.

287 See Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, 413. For a detailed analysis of the interaction between Article 16 of the ILC Articles on State responsibility and Common Article 1, see Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese J of Intl L 13.

288 ILC Articles on State Responsibility, Art 48.

289 Ibid., 139, para 6 commentary to Art 54.

be unlawful under international law if it was not taken in response to a prior unlawful act, qualify as 'lawful' measures.[290] The question consequently remains open as to whether Common Article 1 constitutes the *lex specialis* that transforms all States in cases of IHL violations into injured States as defined by the law of State responsibility, thus implying that all States may take countermeasures that comply with general international law (which excludes the use of force based on IHL)[291] and are not otherwise excluded by IHL (such as reprisals against protected persons).[292] I do not think that Common Article 1 turns all States into injured States. Indeed, in its second reading on the draft articles concerning State responsibility, the ILC explicitly abandoned the approach it adopted during the first reading under which the definition of the injured States included any other State bound by a conventional or customary rule protecting human rights as well as all States in the case of an international crime.[293] As a compromise, it introduced a special rule on 'invocation of responsibility by a State other than an injured State' in order to cover such cases. In my view, Common Article 1 should therefore be viewed as a forerunner codifying the possibility for all States to invoke State responsibility on the basis of community interest, rather than as the *lex specialis* transforming all States into injured States with respect to IHL violations, thus universally bilateralizing violations of IHL. The rules governing claims that third States may possibly make (such as claims for IHL violations in NIACs) appear to be more appropriate because those rules focus on the rights of the beneficiaries of the IHL rule that was breached rather than on the interests of the claiming State. In cases of IHL violations, '[a]ny State' may therefore claim (and must claim under Common Article 1) cessation from the responsible State as well as 'reparation…in the interest of the injured State or of the beneficiaries of the obligation breached'[294] who will often be individual war victims.

#### *ii. Collective or individual measures?*

**5.153** As all States are obliged to ensure respect with regard to each IHL violation, States should ideally coordinate their action. Article 89 of Protocol I envisages such collective action without excluding individual action, stipulating that States faced with serious violations must 'act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations

290 Ibid., Art 54.

291 See also ibid., Art 50(1)(a).

292 See ibid., Art 50(1)(c); see also MNs 5.039–5.040.

293 Compare ILC, Yearbook…1996, vol II, part II, 62–3 with ILC, Yearbook…2000, vol II, part II, 29 and 69 as well as ILC Articles on State Responsibility, Arts 42 and 49.

294 ILC Articles on State Responsibility, Art 48(2).

Charter'. As outlined above, however, the UN is not necessarily the ideal international forum to address IHL violations. International law is a largely self-administered system. States have refused to create a treaty body with the competency to deal with IHL violations. Furthermore, States have discussed their action under Common Article 1 only with regard to Israeli violations, and they have refused to establish a conference of States parties. Nevertheless, the term 'any State' in Article 48 concerning the measures that States other than injured States may take under the law of State responsibility was 'intended to avoid any implication that these States have to act together or in unison.'[295] Any State must therefore act individually under Common Article 1 and Article 89 of Protocol I once it concludes that IHL has been seriously violated even if other States take the view that no violation has been committed.

*iii. Measures which may and must be taken*

**5.154** Even if countermeasures by non-injured States are unlawful, it is clear that a State can – and therefore must – respond to all IHL breaches of IHL through measures of retorsion (that is, unfriendly measures that do not violate its international obligations). No State is obliged to receive representatives from another State, to conclude treaties with it, to support it within an international organization or to purchase weapons from it. States are even less obliged to sell weapons to other States, even in instances where those weapons have no link to IHL violations. The ICRC suggests that State may take the several such measures, including 'halting…ongoing negotiations or refusing to ratify agreements already signed, the non-renewal of trade privileges, and the reduction or suspension of voluntary public aid…[,] arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements.'[296]

**5.155** Measures of retorsion must obviously comply with the proportionality principle. Ideally, such measures should either be linked to the violation committed (such as the prohibition of importing goods produced in settlements established in an occupied territory in violation of IHL) or target only individuals responsible for the violations.

**5.156** The ICRC furthermore suggests: using diplomatic dialogues 'to address questions of compliance' with the responsible State; 'exerting diplomatic pressure by means of confidential protests or public denunciations'; 'conditioning joint

295 Ibid., 126, para 4 commentary to Art 48.
296 Updated ICRC Commentary GC I, para 181.

operations on a coalition partner's compliance with its IHL obligations and/or planning operations jointly in order to prevent such violations'; 'intervening directly with commanders in case of violations…by a coalition partner'; 'offering legal assistance' to the responsible party, 'such as instruction or training'; 'referring…a situation to the International Humanitarian Fact-Finding Commission'; 'requesting a meeting of the High Contracting Parties'; 'referring the issue to a competent international organization, e.g. the UN Security Council or General Assembly'; 'referring, where possible, a specific issue to the [ICJ] or another body for the settlement of disputes'; 'resorting to penal measures to repress violations of [IHL]'; and 'supporting national and international efforts to bring suspected perpetrators of serious violations of [IHL] to justice'.[297]

**5.157** As for the minimum actions that must be taken under Common Article 1, absolute indifference clearly violates the text of the provision. While diplomatic representations may be a first step, diplomacy cannot be the end of the matter if violations continue. The additional steps a State must take, however, depends on many factors, such as the gravity of violation, whether further violations are imminent, the resources and means available to the responding State, the effectiveness of the measures, the impact of measures on persons not involved in the violation and the responding State's degree of influence, which, in turn, depends on several geopolitical factors.[298]

### c. Consequences of the widespread non-respect of the obligation to 'ensure respect'

**5.158** After analysing actual State practice, which is scarce or at the very least not as systematic as it should be considering the obligations imposed on States by Common Article 1 and which certainly does not live up to the standards outlined above, one may express doubts whether the obligation to ensure the respect of IHL under Common Article 1 actually exists. First, however, steps to ensure respect do not have to be taken publicly and confidential steps may often be more efficient. Second, while insufficient practice may lead one to question whether such an obligation indeed exists under customary international law (while practice and *opinio juris* are certainly sufficient to conclude that a faculty exists under customary law), the treaty obligation to ensure the respect of IHL, however, does not disappear merely because it has not been complied with. Only desuetude, which would require showing consistent contrary State

297 Ibid.

298 For the analogous case of the obligation to prevent genocide ICJ, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43, para 430, discussed by Geiss, The Obligation, above note 270, 127.

practice accompanied by a clear indication that States consider that an obligation no longer exists, could achieve such a result.[299] The mere practice concerning Israel referred to above shows that such desuetude does not exist in the case of the obligation to ensure respect under Common Article 1.

### 5.3.3 Scrutiny by Protecting Powers

> Theoretically, parties to IACs must designate third States as Protecting Powers to represent them and the interests of their nationals with the adverse party in IHL matters.

**5.159** The institution of the Protecting Power developed from the law of diplomatic relations. A Protecting Power is a State that is entrusted by another State (the 'protected State') to represent its interests, in particular to engage in diplomatic protection of its nationals, in a State in which the power of origin has no diplomatic representation (the 'receiving State'). IHL has used this system to monitor its implementation in IACs,[300] even in cases where adversaries in IACs maintain diplomatic relations.[301] The protected State nominates a Protecting Power, which has to be accepted by the enemy, to monitor and provide reports to it regarding the respect of IHL towards its protected persons in the enemy's power. As the Protecting Power system was the main mechanism to monitor the respect of IHL in both World Wars, it became the central mechanism under the Conventions for this same purpose. If a Protecting Power cannot be appointed because the two parties concerned fail to agree upon one State fulfilling this role, a detaining or occupying power can bilaterally request a third State to act as a substitute Protecting Power. If even this fails, the adverse party must accept the offer of a humanitarian organization such as the ICRC to act as a humanitarian substitute for a Protecting Power. Protocol I provides more detailed rules concerning the appointment procedure. Nevertheless, given that a cooperation-oriented approach is required for the effective implementation of IHL, Protecting Powers (or their substitutes) cannot act efficiently without the belligerents' consent. In any case, neutral States will be unwilling to act absent such consent.

299 Jan Wouters and Sten Verhoeven, 'Desuetudo' (2008) in MPEPIL.
300 GCs, Common Arts 8/8/8/9 and 10/10/10/11; see also P I, Art 5.
301 P I, Art 5(6).

**5.160** Although Protocol I obliges parties to IACs to designate Protecting Powers[302] to ensure that every protected person in an IAC benefits from a Protecting Power or a substitute, the system declined after World War II, and it was last used in the 1982 Falkland-Malvinas conflict between Argentina and the UK. There are several reasons for this decline. First, the three States concerned must agree on using the system and then on designating one State as the Protecting Power, which poses understandable challenges when two of those States are at war. Second, the Protecting Powers system has become increasingly obsolete because it only applies to IACs and most contemporary armed conflicts are NIACs. Third, belligerent States often do not legally recognize each other, deny that the adversary is even a State or deny that they are engaged in an IAC. In such circumstances, belligerents fear that designating a Protecting Power could imply recognition of either the enemy or their involvement in an IAC. Fourth, neutrality plays a smaller role in contemporary international society. Even neutral States that are proud of their status, such as Switzerland, are hesitant to act as Protecting Powers in an environment where most IACs are perceived as international law enforcement operations against international 'outlaws' (for example, Slobodan Milošević's Yugoslavia, Saddam Hussein's Iraq or Muammar Gaddafi's Libya).

**5.161** More than 80 provisions of the Conventions and Protocol I refer to Protecting Powers in connection with a variety of tasks, such as visiting protected persons, providing consent for certain extraordinary measures concerning protected persons, receiving information updates concerning certain other measures, supervising relief missions and evacuations, receiving applications by protected persons, assisting in judicial proceedings against protected persons, transmitting information, documents and relief goods, and the offering of good offices. Most of these tasks mirror those of the ICRC. This duplication is intended as it should lead to increased supervision regarding respect for IHL.

**5.162** The ICRC has no interest in acting as a substitute of the Protecting Power[303] because it can fulfil most of the latter's functions in its own right without giving the impression that it represents only one State rather than all victims. One of the rare functions that IHL confers only upon the Protecting Powers and not also upon the ICRC is that of being notified of and providing assistance in judicial proceedings against protected persons. The ICRC is, however, recognized

302 P I, Art 5(1).
303 As suggested by GCs, Common Arts 10(3)/10(3)/10(3)/11(3); P I, Art 5(4).

as a de facto substitute when there is no Protecting Power to perform this function.[304]

### 5.3.4 The International Committee of the Red Cross (ICRC)

IHL did not create the ICRC, which is a humanitarian organization that, on the contrary, initiated the process that resulted in the modern codifications of IHL and created the International Red Cross and Red Crescent Movement (which also comprises National Societies of the Red Cross and the Red Crescent and their International Federation). IHL, however, provides the ICRC with a mandate in armed conflicts. While the ICRC is not an intergovernmental organization, it is nevertheless a functional subject of international law. Its mission as an impartial, neutral and independent organization is to protect the lives and dignity of all persons affected by armed conflicts and other situations of violence and to assist such persons. The Conventions grant the ICRC a right to visit protected persons in IACs and give its Central Tracing Agency the right to obtain and transmit information concerning persons affected by IACs in order to re-establish family links and to clarify the fate of missing persons. Much more importantly in practice, the ICRC can offer its services through its right of initiative to protect and provide assistance to persons affected by both IACs and NIACs. While IHL itself is an important tool that allows the ICRC to fulfil its protection and assistance mission, the first-hand findings and the field experience of its delegates make its interventions in favour of the respect of IHL and its proposals for developing IHL more credible. The ICRC typically works on a confidential basis because it prefers access over public condemnation, and it aims at cooperation with State authorities and armed groups. This latter aspect, however, constitutes at the same time its strength as well as its weakness as an IHL implementation mechanism.

**5.163** The ICRC is an impartial, neutral and independent humanitarian organization with the mission to protect the lives and dignity of persons affected by armed conflicts as well as other situations of violence and to assist such persons. International law, specifically IHL governing armed conflicts, provides the ICRC with the mandate to fulfil its mission. Monitoring the respect of IHL is one of the major means through which the ICRC fulfils its mission. Its monitoring function is based upon its access to the affected persons and generally occurs through a confidential dialogue with the parties to an armed conflict. The ICRC also plays an important role in promoting the development of IHL and generating respect for IHL. IHL did not create the ICRC. It is

304 Hans-Peter Gasser, 'Respect for Fundamental Judicial Guarantees in Time of Armed Conflict – The Part Played by ICRC Delegates' (1992) 32 IRRC 121.

rather the ICRC that has taken the initiative to encourage States to adopt the Conventions and Protocols.

a. The institution

**5.164** The ICRC is a member of and at the origin of the International Red Cross and Red Crescent Movement, which is comprised (as of 2017) of 190 National Societies of the Red Cross or the Red Crescent (all of which must be recognized by the ICRC) and their Federation known as the International Federation of Red Cross and Red Crescent Societies. The Movement convenes every four years along with the 196 States parties (as of 2017) to the Geneva Conventions in an International Conference of the Red Cross and the Red Crescent. These conferences provided a key forum to discuss draft IHL treaties proposed by the ICRC before such treaties were submitted to diplomatic conferences of States. The conferences also result in the adoption of resolutions that play a major role in taking stock of challenges to IHL and promoting its development. Finally, the conferences also adopt the Statutes of the Movement that provide the ICRC, the National Societies and the International Federation with their mandates (additional to their mandates under IHL treaties). These Statutes, although not legally binding for States, have a high authority because they were adopted by States through consensus.

**5.165** The ICRC is not an intergovernmental organization. It has no member States, which crucially allows it to maintain its independence. Rather, it is constituted as an association under Swiss law that is comprised of a governing body of 25 Swiss citizens (a reminiscence of Swiss neutrality) who also decide who becomes a new member. The ICRC's main work is done by the administration comprising some 16 500 staff from 80 countries, 1000 of whom work in Geneva while the others comprise both 2200 mobile field staff (or expatriates) as well as resident field staff (or local staff).

**5.166** Although it is constituted as an association under Swiss law, the ICRC also has a functional international legal personality based both upon the mandate it is given by IHL treaties (which implies the legal personality, rights, immunities and privileges necessary to fulfil that mandate) and on customary international law. It has concluded headquarters agreements with 95 States that treat it like an intergovernmental organization.

**5.167** The ICRC receives most of its annual funding (1.8 billion US dollars in 2018) from States and the European Commission. Private donors (3 per cent) and National Societies (2 per cent) contribute more limited amounts to the ICRC's

budget. Its largest donors are the US, the UK, the European Commission, Switzerland, Germany, Canada, Sweden and the Netherlands. This concentration of the source of its revenue in Western countries is embarrassing for the perception of its independence, and the ICRC invests a lot of effort to diversify its sources of revenue, but up to now without a lot of success. Nevertheless, the fact that it regularly criticizes, including publicly,[305] its major donor, the US, more often than Russia, China, Saudi Arabia and Turkey (countries that do not contribute proportionately to their resources) shows that it can remain independent from its donors when insisting upon the respect of IHL. Admittedly, it is also easier to criticize publicly democracies than States whose leaders would expel the ICRC if provoked.

### b. ICRC activities

**5.168** In armed conflicts, ICRC activities can be categorized into protection activities, humanitarian assistance, restoring family links and prevention of IHL violations (although those aspects are obviously interrelated). The ICRC itself classifies its activities as helping detainees, protecting civilians, addressing sexual violence, promoting economic security, dealing with water and habitat-related issues, enabling people with disabilities, mine action, ensuring access to health (by assisting ongoing health services or by temporarily replacing them, providing war surgery, protecting health services in danger and undertaking forensic science), restoring family links, building respect for the law, humanitarian diplomacy, working with the corporate sector, cooperating with National Societies and migrants. Although the ICRC's categorization of its activities provides a clearer picture of what it actually does (enriched by some compulsory buzzwords in humanitarian action), it also leads to even more overlap between the categories than suggested by the four main areas of work outlined above. The ICRC's categorizations apply equally and without distinction to its activities both in and outside armed conflicts, which spares the ICRC in certain situations the controversy of having to determine whether an armed conflict actually exists. While the ICRC's activities in both contexts are indeed very similar in substance, this book inevitably focuses on the ICRC's role in armed conflicts because it is governed by IHL. The ICRC's increasingly important activities outside armed conflicts will not be discussed in this book to the extent such activities are not related to armed conflicts.

305 See its public statement of its divergences with the US on the 'war on terror' in ICRC, News Release, 'Geneva Convention on Prisoners of War' (9 February 2002).

**5.169** One of the ICRC's most traditional protection activities consists of visiting persons deprived of their liberty and interviewing them without witnesses in order to engage with the detaining authorities to provide them with a clear picture of how the rights of those persons are respected and to advocate for improvements in their treatment. During such visits, the ICRC also registers detainees to avoid their disappearance and to restore family links. Whenever necessary, the ICRC assists the detainees, usually through the detaining authorities, in the fields of basic health, water as well as sanitation and, exceptionally, food.

**5.170** Other ICRC activities benefit civilians that are either affected by the conduct of hostilities or located (without being detained) in an occupied territory or in the hands of a party to a NIAC that views them as enemies. Special attention, including particular protection methods and assistance, is needed for victims of sexual violence and for disabled people. Monitoring the respect of rules protecting the civilian population against the effects of hostilities is particularly difficult because compliance with such rules centres not on the results or effects that ICRC staff can assess in the field but rather on the plans and the knowledge of the attacking forces as well as the use of certain objects by the defending forces, both of which are decisive in evaluating whether IHL was respected.[306] Serious reports provided to the responsible authorities and a dialogue with them can often only raise questions as to why a certain target was hit, how proportionality was evaluated and what precautionary measures were taken.

**5.171** The ICRC offers its relief and health services to not only civilians in the power of the (perceived) enemy but also generally to all civilians affected by an armed conflict even when they are in the power of their own party and, in conformity with IHL, even to wounded and sick combatants or fighters. In the field of health assistance, the ICRC prioritizes assisting and protecting existing local health services over replacing them. The importance of the ICRC's activities relating to water in this area cannot be understated given that, even in armed conflicts, more people die worldwide from diarrhoea caused by unsafe water than from wounds caused by weapons or diseases requiring sophisticated medicine.

**5.172** The ICRC also has a central role in restoring family links by exchanging family news between persons separated by frontlines, detention or displacement from their loved ones (an activity which has decreased where portable phones are available), registering detainees, registering and responding to enquiries by family members and clarifying the fate of missing persons with the parties (or

306 See MN 3.32.

former parties) to the conflict. In this context, exhumations and the identification of dead bodies are sometimes necessary to clarify the fate of the missing. The ICRC has therefore developed its expertise in forensic sciences – an expertise that is also important to ensure that human remains are handled in dignity.

**5.173** Due to the complex realities of contemporary armed conflicts, preventing violations before they occur offers the best chance to ensure that IHL is respected. The ICRC helps States fulfil their preventive obligations, in particular in the fields of national legislation and dissemination and training, during both peacetime and in times of armed conflict. In its own dissemination activities during times of armed conflict, however, the ICRC faces a key dilemma because its first (understandable) priority is to ensure that its staff and activities are respected, while IHL's most important message is that the adversary must be respected. While the latter message is not popular in an armed conflict, it may be more credible than the message of those who plead in favour of their own protection. The ICRC also fulfils its prevention activities through increasingly important humanitarian diplomacy aimed at ensuring that parties to an armed conflict and third States do not forget the humanitarian aspects of the problem while struggling to find solutions.

**5.174** In most of its armed conflict-related activities, the ICRC cooperates with the National Red Cross or Red Crescent Society of the affected country and coordinates – in conformity with the rules of the Movement – the activities of third-country National Societies, although this is not always easy nor always appreciated by them. While the ICRC attempts to coordinate with other humanitarian or political organizations, it refuses to be coordinated by anyone, including the host country (whose consent is nevertheless necessary for its activities). The ICRC's refusal is the price it must pay to maintain its independence and impartiality, even though its position is not popular in a time in which donors understandably insist on better coordination, the UN promotes an integrated approach and host countries as well as the World Humanitarian Summit insist on 'localization' (in other words, engaging more and more local NGOs into the humanitarian 'architecture'). The ICRC's refusal also leads to accusations of arrogance as well as both criticism and admiration for its principled approach in favour of a neutral and impartial humanitarian space. Indeed, experience shows that when political authorities coordinate humanitarian activities some victims will not benefit from those activities if they chose the side (or simply happen to live under control of the side) that opposes the organized international community's peace-building plans.

### c. The legal basis for ICRC activities

**5.175** In IACs, IHL provides the ICRC with the right to visit both POWs and protected civilians wherever such persons may be located regardless of whether or not they are detained, to interview them without witnesses[307] and to bring them humanitarian relief.[308] In addition, the IHL of IACs grants the Central Tracing Agency of the ICRC (which is in practice the ICRC itself) the right to obtain information on POWs and protected civilians from official sources, ICRC delegates or any other source; to transmit it to the each person's country of origin as well as family; and to answer enquiries by the families regarding such persons.[309] Although not legally required, the ICRC's effective implementation of these two activities still requires the concerned State's consent on a practical level. Conversely, the ICRC's other activities in IACs[310] and, most importantly, all of its activities in NIACs under Common Article 3 described in the previous sub-section are based upon its right of initiative, which legally (and not only practically) requires the consent of the parties concerned.[311]

**5.176** In NIACs, however, the question of who the parties concerned are is controversial. Although it did not always follow this interpretation in the past, the ICRC considers that, legally speaking, it needs under Common Article 3 only the consent of the government of the State concerned even if the services are delivered from a neighbouring country to an area controlled by a non-State armed group.[312] The ICRC's interpretation is likely based upon the rule in Protocol II, which was adopted subsequently, that requires 'the consent of [only] the High Contracting Party concerned' to engage in relief actions.[313] In my view, however, the consent of the non-State armed group is legally sufficient in such a case because Common Article 3 (2) provides that '[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'. As the text refers to parties of a NIAC in the plural, the ICRC may offer its services to non-State armed groups and, if they consent, the ICRC may deliver its services. The State concerned already provided its consent by becoming a party to the Geneva Conventions, which foresee such a possibility to deliver services to a party of a NIAC which consents.[314]

307 GC III, Art 126(5); GC IV, Art 143(5).

308 GC III, Art 125(3); GC IV, Art 142(3).

309 GC I, Art 16(2); GC III, Art 123; GC IV, Art 140; P I, Art 33(3).

310 GCs, Common Arts 9/9/9/10; P I, Art 81(1). As mentioned above in MN 5.162, the theoretical possibility for the ICRC to act as a substitute of a Protecting Power has never materialized and the ICRC has no interest to act based upon this legal basis.

311 GCs, Common Art 3(2).

312 See ICRC, 'ICRC Q&A and Lexicon on Humanitarian Access' (2014) 96 IRRC 359, 369.

313 P II, Art 18(2).

314 Nishat Nishat, 'The Right of Humanitarian Initiative of the ICRC' in Academy Commentary, 502.

### d. The role of IHL in the ICRC's work

**5.177** As its mandate depends on it, the ICRC has the right to legally classify a situation as either an IAC or NIAC, but its classification is obviously not binding upon the parties to the conflict. Frequently, the ICRC does not publicly classify conflicts, and sometimes it does not even do so on a confidential basis if it considers that this would jeopardize its dialogue with the party concerned. This latter approach may also be justified when a classification obliges the ICRC to take a position on the very controversy that is at the heart of a conflict (for instance, whether South Ossetia is an independent State or whether Russia has overall control over the rebels in Eastern Ukraine) or when the ICRC is genuinely unable to assess the relevant facts (which may also be the case in Eastern Ukraine). In such cases, the ICRC may instead simply classify a situation as an armed conflict without specifying whether it is an IAC or NIAC. Additionally, claiming that India and Pakistan are engaged in an IAC due to artillery exchanges in Kashmir may create an impression of the ICRC as a 'war-monger'. The ICRC's silence, however, obviously has a high price because it hinders the ICRC from invoking rules that provide the most protection to war victims. On the other hand, silence may nevertheless give the ICRC access based upon its right of humanitarian initiative, a right that exists even in the absence of an armed conflict.[315]

**5.178** In most cases, the ICRC refers to IHL when fulfilling its various functions as the guardian of IHL. It defends IHL against criticisms aimed at weakening it, such as suggestions that new developments make the respect of IHL unrealistic for those who actually fight or arguments, including flawed interpretations, attempting to weaken the protection it offers. The ICRC also promotes debates and thought on IHL that hopefully do not lead to its deconstruction, but that rather help IHL better adapt to contemporary armed conflicts, new trends in public international law as well as in international relations and the perceptions of weapons bearers and the public. Importantly, the ICRC, also suggests new developments based upon the field experience of ICRC staff that obviously build upon IHL's existing rules. Additionally, the ICRC promotes accession to the relevant IHL treaties, including new treaties that come into existence based on its recommendations. Finally, the ICRC itself disseminates IHL through a variety of means and also assists States, non-State armed groups, academic circles and journalists to do so themselves.

315 Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva, Switzerland in 1986, and amended in 1996 and 2005) Art 6(3).

**5.179** The role of IHL is obviously most prominent in the ICRC's protection activities. IHL provides the ICRC with a key tool to obtain the respect of war victims regardless of cultural or political biases when it monitors the respect of IHL by parties to armed conflicts and when it implements IHL through its own activities. When an armed conflict starts, the ICRC often appeals preventively to all parties to comply with IHL, recalling its main rules.[316] During a conflict, the ICRC also uses IHL-based arguments to obtain access to the persons affected by conflict, in negotiations with belligerents on their behaviour and when it requests parties to repress violations and conduct enquiries into any alleged violations.[317] In the case of violations, the ICRC usually tries to confidentially persuade the parties to stop them and only exceptionally mobilizes third States or even public opinion against them.[318] Finally, the ICRC usually makes implicit (very rarely does it make such appeals explicit) appeals to third States to comply with their obligation under the external aspect of their obligation to ensure respect.[319]

**5.180** When engaging in its protection activities in the field, the ICRC often does not invoke specific articles of IHL treaties. For example, when it intervenes against instances of torture or sexual violence, reference to the specific treaty provisions prohibiting them is unnecessary. Indeed, references to a specific treaty rule when suggesting a solution foreseen by IHL might also raise unnecessary controversies concerning the classification of the conflict.[320] Often, it is simply sufficient for the ICRC to present facts and to ask questions to representatives of a party who are already familiar with IHL in order for IHL to provide a key role in assisting a negotiation without ever being mentioned.

### e. The ICRC's approach

**5.181** All ICRC activities are governed by the Red Cross and Red Crescent principles of humanity, independence, impartiality and neutrality.[321] Under the principle of humanity, the ICRC seeks to fulfil its 'purpose…to protect life and health and to ensure respect for the human being' by 'prevent[ing] and alleviat[ing] human suffering wherever it may be found.' What is specific to the ICRC, however, is its obsession to remain independent, which is obviously not easy in

316 See, e.g., Online Casebook, ICRC's Appeals on the Near East.

317 See, e.g., Online Casebook, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners.

318 See, e.g., Online Casebook, ICRC/Lebanon, Sabra and Chatila and ICRC, Iran/Iraq Memoranda.

319 See MNs 5.147–5.150.

320 See, e.g., Online Casebook, Sri Lanka, Jaffna Hospital Zone.

321 The seven Red Cross and Red Crescent Principles proclaimed by the 20th International Red Cross Conference meeting in Vienna in 1965 are humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

the contemporary world and even less so in armed conflicts. According to the principle of impartiality, the ICRC endeavours only to relieve suffering without discrimination, giving priority only to the most urgent cases of distress. In endeavours to obtain respect, impartiality obviously does not require (and actually does not even allow) treating a party that violates IHL and a party that respects it on the same footing. The Red Cross principles explain neutrality in the following way: 'In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.' However, the ICRC is not neutral when it comes to IHL violations.

**5.182** Outside of its principles, the ICRC is often best known for its pragmatic operational approach that privileges access over confrontation or even investigations of violations, confidential dialogue over publicity and cooperation rather than conflict with belligerents. In the past, I have qualified this approach as victim-oriented rather than violation-oriented.[322] Indeed, Jean Pictet once wrote: 'One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.'[323] Today, however, such descriptions appear to be outdated because charity now appears to contradict an empowering rights-based approach under which the punishment of violations is viewed as essential. While even the ICRC promotes international criminal justice at a general and theoretical level, it will not designate either the criminals or the crimes in a specific case in order to maintain its access to the victims and to be able persuade those individuals (who are often war criminals) in whose power the victims find themselves in.

**5.183** Finally, the ICRC's confidentiality is neither a principle nor absolute; it is simply a mode of action. In exceptional cases, the ICRC may resort to a public condemnation of specific IHL violations committed by one party to a conflict if:[324]

1. 'the violations are major and repeated or likely to be repeated';

322 Marco Sassòli, 'The Victim-Oriented Approach of International Humanitarian Law and of the International Committee of the Red Cross (ICRC)' in Cherif Bassiouni (ed), *International Protection of Victims* (Erès 1988) 147.

323 Jean Pictet, *The Fundamental Principles of the Red Cross* (ICRC 1979) 59–60.

324 See, e.g., the following cases in the Online Casebook: ICRC/Lebanon, Sabra and Chatila; ICRC/South Lebanon, Closure of Insar Camp; Lebanon, Helicopter Attack on Ambulances; ICRC, Iran/Iraq Memoranda: A. The Memorandum of May 7, 1983, Appeal; UN/ICRC, The Use of Chemical Weapons: B. ICRC Press Release of March 23, 1988; Case Study, Armed Conflicts in the former Yugoslavia, para 21; ICRC, Visits to Detainees: Interviews without Witnesses: A. Withdrawal of the ICRC from Burma in 1995: newspaper article.

2. ICRC staff have witnessed the violations, or their existence 'have been established on the basis of reliable and verifiable sources';
3. bilateral and confidential steps, including with third States, have failed; and
4. 'publicity is in the interest of the persons or populations affected'.[325]

**5.184** This last condition is the most difficult one to assess because the ICRC will nearly always consider that its continued access benefits victims, while the protective effect of a public statement is often hypothetical because it is unable to provide the media with the necessary photos and individual heart-breaking stories. Consequently, the ICRC will not make such a public condemnation if it fears expulsion from a country. This, of course, leads to a certain double standard under which the worst violators may be spared if they are powerful, if they grant the ICRC access without any real power (Russia) or even if they just leave the hope open that one day the ICRC will be granted access (Turkey).

### f. Challenges

**5.185** The ICRC's greatest assets are its independence, its exclusive focus on humanitarian problems, its impartiality and its principled approach. It continues to be the main, and unfortunately in some cases such as forgotten conflicts, the only actor monitoring the respect of IHL on the ground. However, the ICRC is not without its own limitations.

**5.186** First, the ICRC prioritizes its humanitarian work and securing access to persons as well as areas affected by conflict. Accordingly, when confronted with the choice of obtaining access to persons in need of its protection and assistance or insisting that IHL is respected, the ICRC will choose the former. Take, for instance, the manner in which the ICRC decides to share its determinations as to whether a situation is an armed conflict, an IAC or a NIAC. Even if the ICRC concluded that the situation in Eastern Ukraine is an IAC because Russia exercises overall control over the insurgents there[326] and that Crimea is an occupied territory, it would neither make its conclusions public nor share them with the Russian Federation, because doing so would jeopardize its chances of remaining present and assisting war victims not only in that region but also in other conflict areas in which Russia has influence (such as Syria).

325 'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence' (2005) 87 IRRC 393, 397.

326 See MNs 6.13–6.21.

**5.187** This 'softly-softly' approach prioritizing access, while an understandable policy choice, raises several challenges. Beyond frustrating legal scholars, it also means in the above Ukrainian example that the ICRC cannot initiate a dialogue on the more protective rules governing occupation contained in Convention IV. Indeed, in an increasing number of cases that fortunately still remain a minority, it is impossible for the ICRC even in its bilateral and confidential dialogues to invoke IHL and to discuss its violations. In most other cases, the ICRC engages authorities in bilateral and confidential discussions on legal issues, but the fact that this occurs 'behind the scenes' increases the public's perception that the law does not matter. The confidential nature of the ICRC's bilateral dialogues also fails to provide States with a solid basis to implement their obligation to ensure respect for IHL under Common Article 1.[327] Unfortunately, even this confidential approach does not always guarantee the ICRC's secure access to the victims because even then States' obsession with sovereignty sometimes prevents the ICRC from being present in conflict areas. Even when it is denied access, the ICRC rarely speaks out as it maintains hope that it may nevertheless be granted access at a later stage. In some cases, the ICRC lacks even meaningful access to the parties themselves, including, for instance, when the government does not permit engagement with non-State armed groups classified as 'terrorist' or when the government or non-State armed group mistrusts the ICRC.

**5.188** Second, as most armed conflicts today are properly classified as NIACs, it is crucial for the ICRC, as an impartial organization and neutral intermediary in humanitarian matters, to develop and maintain a dialogue with non-State armed groups. While the ICRC always attempts to engage in such a dialogue, some non-State armed groups refuse to participate. In most other cases, such dialogue must be undertaken in secret because of State obsession with sovereignty and the risk of being accused of supporting 'terrorists' (given that every single non-State armed group in the world is labelled as 'terrorist' by the government it fights against). Clandestine contacts with such groups, however, diminish the perception of the ICRC's impartiality. Additionally, the ICRC knows that the development of IHL and its implementation mechanisms can only be based upon the perceptions, aspirations and practical problems faced by those supposed to apply it, which – for the IHL of NIACs – are mainly non-State armed groups. Faced with sovereignty-obsessed States and the fight against terrorism, the ICRC, however, does not dare – with one laudable

327 See MNs 5.145–5.158.

exception[328] – to officially consult armed groups or to even introduce the perspectives of armed groups into meetings of governmental 'experts' preparing developments or interpretations of IHL.

**5.189** Third, despite being independent, the ICRC exists on a planet dominated by States. Its leverage over powerful States like India (Kashmir) and Russia (Chechnya) is so limited that it may not even try to publicly pressure them on key issues. Although from a legal and humanitarian point of view it should probably have done otherwise, it is therefore understandable why the ICRC accepted the (rather counter-factual and counter-intuitive) determination by a unanimous UN Security Council that the occupation of Iraq came to an end on 30 June 2004.[329]

**5.190** Fourth, repeated attacks against ICRC premises and personnel have unfortunately forced the organization to balance its mission to protect victims of armed conflicts against such risks. In an increasing number of situations (for example, the Eastern Congo, Iraq, Syria, Chechnya, the Tribal areas in Pakistan), the ICRC is no longer able to be fully present in the midst of the fighting and therefore cannot directly monitor the respect of IHL in places where it is most likely to be violated. In addition, if ICRC delegates must be more concerned with their security, they are less likely to engage in contacts with everyone, demonstrate openness and empathy and listen to the victims, all of which, in turn, makes them appear as suspect outsiders and therefore threatens their security even further.

**5.191** Fifth, the ICRC has become a very large organization with an annual budget of 2 billion USD. Its relief activities, which are sometimes not conflict-related, require a larger expenditure of its resources, are easier to fund and provide enhanced media visibility than visits to persons deprived of their freedom due to an armed conflict. The large budget, some of which is clearly not used for activities for which a neutral intermediary is needed, has some great advantages: it gives ICRC the critical mass necessary for it to immediately react to any new conflict situation without having to raise funds. As for activities directly related to IHL, it is obviously easier to engage in general activities to spread knowledge of IHL (a field in which the ICRC has adopted genuinely innovative

328 See ICRC, 'Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups' (ICRC 2015).

329 UNSC Res 1546 (2004); Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 German Yearbook of Intl L 293, 307–12.

approaches[330]), to advise the Ivory Coast and Niger on new domestic legislation implementing IHL or to draft new Commentaries of the Geneva Conventions than it is to discuss with the Russian authorities their responsibility to respect IHL when supporting rebels in Eastern Ukraine or with Pakistani authorities regarding their respect of IHL in Balochistan.

**5.192** Sixth, humanitarian action is increasingly seen by the international community or by those who claim to represent it (such as NATO in Afghanistan until 2014) as a key peace-building mechanism that can undermine popular support for insurgents (for example, the Taliban). The fact that such insurgents do not appreciate these peace-building efforts makes it increasingly difficult to carry out neutral and impartial humanitarian action that is not linked to any political goals and accepted by all parties.

**5.193** Seventh, all ICRC initiatives concerning the development of both IHL and new implementation mechanisms are presently stalled. The ICRC pursued these initiatives through generally closed negotiations with governmental 'experts' or official State representatives regarding new ideas based upon very thorough preliminary research, but it did not attempt to mobilize either the support of civil society, including that of even the National Red Cross or Red Crescent Societies, or public opinion.[331] The ICRC feared – fuelled by State representatives – that public advocacy or involvement of civil society would stall the process, which is now stalled even without those factors. In my view, the ICRC must convince States to accept again the difference between its operational role, on the one hand, and its general advocacy for the respect of IHL, its progressive development and new enforcement mechanisms, on the other hand. In its operational role, the ICRC has excellent reasons to pursue its confidential and cooperative approach. In its role as guardian and promoter of IHL outside specific operational contexts, the ICRC must become the advocacy organization it once was by mobilizing public opinion against their reluctant governments and cooperating with civil society. It has successfully mobilized public opinion and civil society support in the past when it came to the banning of chemical weapons in

330 See, e.g., the different tools, initiatives and information available on the ICRC Law and Policy Platform <https://www.icrc.org/en/war-and-law/law-and-policy> accessed 31 July 2018.

331 See the two concluding reports from the 32nd International Conference of the Red Cross and Red Crescent held in Geneva, Switzerland from 8–10 December 2015: ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty: Concluding Report' (October 2015) Doc No 32IC/15/19, and ICRC and the Swiss Department of Foreign Affairs, 'Strengthening Compliance with International Humanitarian Law: Concluding Report' (October 2015) Doc No 32IC/15/19.2. For the outcome, see above note 213.

the 1920s[332] and anti-personal landmines in the 1990s,[333] and it still occasionally does so (for instance, on the issue of nuclear weapons).[334] It may in addition be that our times and the attitude of most States require 'guerrilla tactics with cluster bombs' (that is, hoping that in the spur of the moment one piece of shrapnel will hit and obtain the necessary consent of States to achieve some progress), rather than pursuing 10-year-long processes aiming at consensus within a profoundly divided international community. It may also be that the requirement to achieve consensus on new developments in IHL must be abandoned.

### 5.3.5 Fact-finding, in particular the IHFFC

Impartial enquiries into alleged IHL violations would theoretically play an essential role to increase the respect of IHL and its credibility. Although Protocol I established an IHFFC, it may only act based upon the consent of all parties concerned by an alleged violation of IHL and has therefore never been able to act based upon its treaty mandate. An international organization has, however, called upon the IHFFC to determine the relevant facts under IHL.

**5.194** Although lawyers are fascinated by legal debates, most controversies on whether IHL has been violated in contemporary armed conflicts revolve around the facts and not the law. The Syrian regime does not claim that it is lawful to use chemical weapons, and neither Russia nor Saudi Arabia nor the US claims that it is lawful to attack hospitals. As such, the impartial, independent and reliable establishment of facts by a neutral, legitimate body could greatly contribute to ensuring better respect of IHL. It would also serve to prevent or suppress rumours, perceptions or propaganda that IHL is always violated, all of which lead to further violations.[335] Such fact-finding would also provide third States with reliable information on the situation, allowing them to make appropriate decisions in light of their obligation to ensure respect of IHL.[336]

**5.195** The Conventions provide that an enquiry must be instituted into alleged violations if requested by a party to the conflict.[337] However, the parties must agree on the enquiry's procedure. Experience shows that it is difficult to reach the necessary agreement once an alleged violation has occurred, including, in

332 See ICRC, 'The ICRC in WWI: Efforts to Ban Chemical Warfare' (ICRC 2005).

333 See Peter Herby, '1997: The Year of a Treaty Banning Anti-Personnel Mines?' (1997) 37 IRRC 192, 193–5.

334 See ICRC, 'Nuclear Weapons: Overdue Debate on Long-term Impact Begins' (2014); see generally Ritu Mathur, *Red Cross Interventions in Weapons Control* (Lexington Books 2017).

335 See MNs 5.024 and 5.028.

336 See GCs, Common Art 1; P I, Art 1; see also MNs 5.145–5.158.

337 See GCs, Common Arts 52/53/132/149.

particular, as between parties fighting an armed conflict against each other. States have therefore never resorted to such an enquiry.

**5.196** Article 90 of Protocol I therefore constituted an important step forward by establishing the IHFFC and its procedure. Under this provision, the IHFFC may enquire into allegations of serious violations committed in IACs between States having accepted – ex ante or ad hoc – its jurisdiction. Similar to the optional clause of compulsory jurisdiction in Article 36(2) of the ICJ Statute, States parties may make an ex ante declaration under Article 90(2) of Protocol I accepting the IHFFC's competency to enquire into allegations of serious IHL violations when requested by any other State party having made the same declaration. Seventy-two States have already made this ex ante declaration. Even though the IHFFC has members, a secretariat and a budget, States have yet to use this treaty-based procedure to investigate IHL violations. Today, there arguably exists an IAC between two States – Russia and Ukraine – that have made the necessary Article 90(2) declaration, but even Ukraine has not seized the IHFFC to enquire into the numerous IHL violations by insurgents it considers attributable to Russia. Finally, despite the Commission's considerable efforts, it has never succeeded in obtaining an ad hoc agreement between two belligerents to enquire into alleged IHL violations.

**5.197** In my view, there are several reasons for this failure. First, it is incredibly difficult to secure the agreement of both parties to a conflict. Second, as the IHFFC has never been used until recently, it could not demonstrate its expertise and impartiality, and many viewed it as an obsolete mechanism. Third, unlike the UN's ad hoc enquiries, the IHFFC is not linked to an international body that could follow up on its findings and recommendations. Fourth, according to Article 90(5)(c), the IHFFC's findings are made public only if all parties agree. In today's world, it is unrealistic to prevent the public and third States from learning whether an alleged serious violation has or has not been committed. Such secrecy would undermine the beneficial effect of enquiries for the credibility of IHL. Fifth, and in my view, States simply dislike automatic procedures, preferring instead ad hoc mechanisms over which they have greater control. States have therefore preferred to impose enquiries through the UN system (which produces a published report) or to establish ad hoc commissions of enquiry.

**5.198** Outside of its treaty mandate, the IHFFC recently concluded its first enquiry pursuant to a request by the OSCE to investigate the death of one paramedic and the injury of two members of the OSCE Special Monitoring Mission to Ukraine that occurred in Ukraine in April 2017. Such a request by the OSCE

would certainly not have been possible if Ukraine, non-State armed groups in Eastern Ukraine and Russia had not consented to this request. The redacted summary of the final confidential report, which is available to the public online,[338] shows that the Commission did not limit its investigation only to establishing whether the OSCE Mission members were the intended targets of the attack. Rather, the IHFFC concluded the placement of an anti-tank mine on a road that was frequently used by civilian traffic violated IHL because of its predictable indiscriminate effects.[339] The Commission should be praised for this conclusion, and one can only hope that its first enquiry will constitute an important step toward allowing the IHFFC to become an important mechanism to ensure IHL's respect.

### 5.3.6 The role of National Red Cross and Red Crescent Societies

In the field of IHL, National Red Cross and Red Crescent Societies (National Societies) have a traditional role as auxiliaries of their respective States in the humanitarian field (in particular medical services) and such societies may also provide humanitarian services in armed conflicts abroad under the auspices of the ICRC. IHL furthermore protects the activities of National Societies in places coming under the control of the adversary of the State to which they belong.

**5.199** IHL mentions National Societies of the Red Cross and the Red Crescent mainly as medical auxiliaries to the armed forces of their own respect States,[340] a role which they are increasingly reluctant to play. Although National Societies may also put themselves at the disposal of the armed forces of another State,[341] this has not occurred since 1949. In practice, National Societies more frequently participate in assistance activities abroad under the auspices of the ICRC, which coordinates the international activities of the International Red Cross and the Red Crescent Movement in times of armed conflict.[342] IHL furthermore protects National Societies in cases of occupation[343] and mentions their role relating to relief actions in their own territory in IACs and NIACs

338 'Executive Summary of the Report of the Independent Forensic Investigation in Relation to the Incident Affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017' (2017).

339 Ibid.

340 GC I, Art 26.

341 GC I, Art 27.

342 Statutes of the Movement, above note 315, Art 5(4)(b); see also 'Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement – The Seville Agreement' (adopted by consensus in Res 6 of the Council of Delegates in Sevilla, Spain on 26 November 1997) Art 5.3.1.

343 GC IV, Art 63.

as well as in the territory of another State in IACs.[344] While National Societies also have the right to use the emblem of the red cross, the red crescent or the red crystal (distinctive emblem), they can only use the small emblem during an armed conflict except when providing auxiliary medical services as part of a State's armed forces.

**5.200** Beyond their specific roles foreseen in IHL treaties, National Societies are particularly well-placed to promote the implementation of IHL within their own countries given their contacts with national authorities and other interested bodies as well as their own expertise on national and international law. The Statutes of the International Red Cross and Red Crescent Movement, which have been adopted by all States parties to the Conventions, recognize the role of National Societies in cooperating with their respective governments to ensure respect for IHL,[345] including the protection of the distinctive emblem. Many National Societies also promote and discuss adherence to IHL treaties with their national authorities. Such societies may also suggest national legislation implementing IHL, an issue on which they have a particular interest because implementing legislation must protect the emblem they use. They then often participate in monitoring the respect of such legislation, in particular in peacetime.[346]

**5.201** National Societies also engage in dissemination activities to make IHL known to their staff and volunteers, the public at large (in particular to young people) and sometimes even to the armed forces. They provide national authorities with advice concerning their obligation to spread knowledge of IHL and also train legal advisors as well as other qualified personnel.

**5.202** Besides the aforementioned IHL-related activities, the 190 National Societies currently operating carry out a wide range of activities, particularly during peacetime. These activities include: setting up and managing hospitals; training medical personnel; organizing blood donor clinics; assisting the disabled, the elderly and the needy; providing ambulance services and road, sea and mountain rescue services. In addition, many National Societies are also responsible for emergency relief in the event of human-made or natural disasters (for example, technological catastrophes, floods, earthquakes and tidal waves). More recently, many National Societies have also considerably increased their relief

344 P I, Art 81(2)–(3); P II, Art 18(1).

345 Statutes of the Movement, above note 315, Art 3(2).

346 See Online Casebook, United Kingdom, Misuse of the Emblem.

to refugees and displaced persons as well as assistance to victims of epidemics like HIV/AIDS.

Each Society must fulfil strict conditions in order to be recognized by the ICRC as a National Society and to become a member of the International Red Cross and Red Crescent Movement. In particular, it must be recognized by its own government as a voluntary aid society, constituted on the territory of a State party to the Conventions, use one of the recognized emblems and respect the Fundamental Principles of the Red Cross and Red Crescent Movement. **5.203**

### 5.3.7 Individual criminal responsibility for violations

States must suppress all IHL violations. Furthermore, IHL criminalizes certain violations, which are called war crimes. The concept of war crimes includes – but is broader than – the violations listed and defined in the Conventions and Protocol I as grave breaches in IACs. IHL requires States to enact legislation to punish such grave breaches, to search for persons who allegedly committed such crimes and to bring them before their own courts or to extradite them to another State for prosecution. This *aut dedere aut judicare* ('either extradite or prosecute') obligation applies regardless of both where the crime was committed and either the victim's or suspect's nationality. It therefore counts among the first and still rare treaty provisions that provide for what is generally classified as compulsory universal jurisdiction. IHL also contains provisions on command responsibility, mutual assistance in criminal matters, the defence of superior orders and the right of the accused to call witnesses. IHL neither provides for nor excludes the possibility to prosecute those accused of war crimes before an international criminal tribunal. Despite this, both ad hoc international criminal tribunals and the ICC play an important role in implementing IHL by rendering its prohibitions credible and clarifying its rules.

Traditionally, international law prescribes rules governing the conduct of States, leaving it for each State to establish practical measures, such as penal or administrative legislation, to ensure that individuals whose behaviour is attributable to it or even (under some primary rules) all individuals under its jurisdiction comply with those rules. Indeed, only human beings can ultimately violate or respect rules of international law. ICL, however, is a growing branch of public international law that consists of specific rules criminalizing certain individual behaviour and obliging States to criminally repress such behaviour. **5.204**

IHL was one of the first branches of international law to contain rules of ICL. It prescribes that certain violations must be punished. Unfortunately, a majority **5.205**

of States have failed to adopt the necessary implementing legislation and many belligerents allow – or even order – their subordinates to violate IHL with complete impunity. International criminal tribunals were consequently established.

### a. The obligation to prosecute grave breaches and war crimes

**5.206** IHL obliges States to suppress all its violations.[347] IHL criminalizes certain violations called war crimes, which means that States must prosecute them. War crimes include – but are not limited to – grave breaches in IACs that are listed and defined in each Convention and Protocol I.[348] In other words, every grave breach is a war crime.[349] The Conventions and Protocol I require States to enact legislation to punish such grave breaches, to search for persons who allegedly committed such crimes and to bring them before their own courts or to extradite them to another State for prosecution.[350] This latter obligation is referred to in Latin as '*aut dedere aut judicare*', and there is no priority between those two options.

**5.207** According to the text of the Conventions and the Protocols, the concept of grave breaches does not apply in NIACs. First, the concept does not appear in either Protocol II or in the only provision of the Conventions applicable to NIACs – Common Article 3. Second, grave breaches can only be committed against 'protected persons', which is a concept that exists only in IACs. However, international instruments,[351] a customary rule elucidated by the ICRC,[352] domestic and international judicial decisions,[353] national legislation[354] and scholarly writings place serious violations of the IHL of NIACs under the broader concept of war crimes to which a customary international law regime similar to

347 P I, Art 86(1).

348 See GCs, Common Arts 50/51/130/147; P I, Arts 11(4), 85 and 86.

349 P I, Art 85(5).

350 See GCs, Common Arts 49/50/129/146; P I, Art 85(1).

351 See, e.g., UNSC, Statute of the International Criminal Tribunal for Former Yugoslavia (as adopted by UNSC Res 827 on 25 May 1993) Art 3, as interpreted by the ICTY in Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, paras 86–93; UNSC, Statute of the International Criminal Tribunal for Rwanda (as adopted by UNSC Res 955 on 8 November 1994, amended by UNSC Res 1431 on 14 August 2002) Art 4; ICC Statute, Art 8(2)(c) and 8(2)(e); CCW Protocol II on the Use of Mines, Booby-Traps and Other Devices, Art 14(2).

352 ICRC CIHL Database, Rule 156.

353 See the cases referred to in Online Casebook, 'Implementation mechanisms' at Section 'IX. Implementation in time of non-international armed conflict', sub-section '6. Repression of individual breaches of IHL' and in Online Casebook, 'Criminal repression' at Section 'I. Definition of crimes', sub-section 'b. the extension of the concept of grave breaches to non-international armed conflicts?'.

354 See the following cases in the Online Casebook: Germany, International Criminal Code, Section 8; United States, War Crimes Act: B. 1997 Amendment to the War Crimes Act of 1996; Canada, Crimes Against Humanity and War Crimes Act, Section 4(3); Belgium, Law on Universal Jurisdiction: A. 2003 Criminal Code, Art 136(c); Switzerland, Criminal Code, Art 264b.

that applicable under the Conventions and Protocol I to grave breaches would apply. The key difference, however, between the two regimes is that the exercise of universal jurisdiction over war crimes is only an option and not an obligation as it is for grave breaches.[355]

**5.208** The concept of war crimes (other than grave breaches) covers all war crimes committed in NIACs as well as certain serious violations committed in IACs that are not defined as grave breaches in IHL treaties. The ICTY held that the following four conditions must be cumulatively fulfilled to give rise to individual criminal responsibility for war crimes: (1) a rule of IHL must be violated; (2) the rule must either belong to customary law or be 'unquestionably binding' upon the parties to the conflict as treaty law; (3) 'the violation must be "serious"'; and (4) 'the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.'[356] The last condition is controversial. The ICRC considers that under customary law all serious violations of IHL are war crimes.[357]

**5.209** Amnesties, statutes of limitations and international immunities all pose potential limitations to the prosecution of war crimes. The obligation to prosecute war crimes appears to exclude the possibility of granting amnesty to those who commit such crimes. While IHL encourages granting amnesties in NIACs,[358] this encouragement is considered to cover only punishment for the mere fact of having participated in hostilities and not war crimes.[359] The exclusion of amnesty for war crimes must at least apply to blanket amnesties. I, however, would not exclude the possibility of offering amnesty in a transitional justice arrangement to some persons who committed war crimes if that arrangement guarantees the victims' right to the truth and punishes the most serious perpetrators. Both international treaties and customary law also exclude statutory limitations for war crimes.[360] The complex relationship between the obligation to prosecute war crimes and international immunities arises mainly in prosecutions according to the principle of universal jurisdiction and will therefore be discussed in the following sections. Immunities under domestic law, however, cannot justify a violation of the obligation under international law to prosecute war crimes.

355 ICRC CIHL Database, Rule 157.
356 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 94.
357 ICRC CIHL Database, Rule 156.
358 P II, Art 6(5).
359 ICRC CIHL Database, Rule 159.
360 Ibid., Rule 160.

### b. Universal jurisdiction

**5.210** Normally, a State can exercise its criminal jurisdiction only over acts committed on its territory or by its nationals, and sometimes equally over acts committed against its nationals. IHL, however, not only permits States to exercise universal jurisdiction over grave breaches; it also obliges all States to prosecute (or extradite) those suspected of such breaches regardless of their nationality, the nationality of the victim or where the crime was committed.[361] National legislation is therefore necessary to implement these obligations. Even though IHL treaties do not require that the suspect be present in the prosecuting State's territory or at least under its jurisdiction, most domestic legislation interprets the obligation to prosecute in this manner.[362] This interpretation is reasonable. An obligation independent of the presence of the suspect would only lead to chaos and not really reduce impunity because it would be difficult for the prosecuting State to obtain the suspect abroad given that all 196 States parties to the Conventions are obliged to prosecute persons suspected of grave breaches. Nevertheless, domestic legislation should authorize prosecutors to begin enquiries even before suspects are present in the State's territory with a view to arresting suspects expected to arrive soon within the State's jurisdiction.

**5.211** As mentioned above, IHL permits but does not oblige States to exercise universal jurisdiction for war crimes that do not constitute grave breaches, such as, in particular, war crimes committed in NIACs.

**5.212** The principle of universal jurisdiction over war crimes has an important symbolic value, and it would have, if regularly implemented, a more important deterrent effect than even the existence of international criminal tribunals. It cannot be denied, however, that prosecutions based on universal jurisdiction face many obstacles. First, even when the suspect is present, witnesses and evidence are abroad, often in a State that will not cooperate. Second, prosecutions and trials are extremely expensive when witnesses and the evidence are located abroad. Third, personal immunity under international law may hinder the prosecution of incumbent heads of State as well as heads of government in foreign States, while functional immunity may also derail in such States the prosecution of all former government officials who acted in an official capacity.[363] Indeed, controversy surrounds the question of whether there is an excep-

361 See GCs, Common Arts 49(2)/50(2)/129(2)/146(2), to which P I, Art 85(1) refers.

362 See, e.g., Online Casebook, Spain, Universal Jurisdiction over Grave Breaches of the Geneva Conventions. On the particular problems Belgium faced when it extended its jurisdiction beyond persons present on its territory, see Damien Vandermeersch, 'Prosecuting International Crimes in Belgium' (2005) 3 JICJ 400.

363 On the latter aspect, see Online Casebook, ICJ, Democratic Republic of the Congo v. Belgium, para 61. The

tion to functional immunity, including for war crimes.[364] In cases where the government of the official suspected of having committed the crime remains in power, the prosecuting State will face diplomatic problems – if not measures of retorsion or countermeasures – with the State whose national it prosecutes as it will invariably deny that a war crime has been committed.

**5.213** The UN General Assembly recently took an innovative initiative to overcome some of the obstacles to the actual exercise of universal jurisdiction. Since 2011, all parties to the conflict in Syria, but in particular the Russian-backed regime and the 'Islamic State' armed group, have committed most horrible war crimes. Syria is not a party to the ICC Statute, and Russia and China vetoed a UN Security Council resolution that could have given the ICC jurisdiction.[365] The UN General Assembly, in which no veto right exists, therefore created an interesting precedent by establishing an international enquiry mechanism that collects evidence for international crimes committed in Syria, including war crimes, and identifies the individuals responsible for such crimes.[366] The mechanism will then place the evidence it collected at either the disposal of States exercising universal jurisdiction or of an international tribunal once it is established. This may exercise a deterrent effect on rulers and their executants who would like to be able to travel again one day, and it may also make it more difficult for politicians to reach a deal that buries these crimes into oblivion.

### c. Modes of criminal liability: command responsibility

**5.214** This is not the place to discuss the different modes of criminal liability in ICL, all of which apply equally to war crimes. Only command responsibility will be addressed here in detail for two reasons. First, it is prescribed and defined in IHL treaties. Second, command responsibility is particularly important in ensuring the respect of IHL because armed forces as well as armed groups are characterized by a hierarchical structure and must even be under a responsible command.[367] IHL obliges all States and parties to a conflict to require commanders to first prevent violations and, if necessary, to suppress and report them to the competent authorities.[368] Commanders who are aware that subordinates

Swiss Federal Criminal Court, however, disagrees. See Online Casebook, Switzerland, The Immunity of General Nezzar, Section 5.4.3.

364 See ILC, 'Report of the International Law Commission on the Work of its 69th Session' (1 May-2 June and 3 July-4 August 2017) UN Doc A/72/10, 164–5, 168–70, paras 74, 93–4, 100–101, 103, 105–6.

365 See draft Res 348 (2014) UN Doc S/2014/348, which was submitted by France to the UNSC.

366 See UNGA Res 71/248 (2016) establishing an 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011'.

367 GC III, Art 4(A)(2)(a); P I Art 43(1); P II, Art 1(1).

368 P I, Art 87(1).

or other persons under their control are going to commit or have committed a violation must initiate steps to prevent the violation and, where appropriate, initiate disciplinary or penal action against such persons.[369] These obligations extend to all violations of the Conventions and Protocol I, including war crimes. Only war crimes, however, lead to the criminal responsibility of commanders 'if they knew, or had information which should have enabled them to conclude in the circumstances at the time,' that a subordinate 'was committing or was going to commit' a war crime and 'did not take all feasible measures within their power to prevent or repress the breach'.[370]

**5.215** Although command responsibility only exists in IACs as a matter of treaty law, the ICRC[371] and ICTY jurisprudence[372] consider that it also applies as customary law to NIACs. Indeed, the ICC Statute provides that command responsibility is available in both IACs and NIACs.[373] I would simply nuance that commanders of non-State armed groups do not necessarily have the same means to prevent violations (that is, the capacity to monitor their subordinates) and even less means to repress war crimes in criminal trials that would respect judicial guarantees. Similarly, forcing them to hand the suspect over to the justice system of the State they are fighting against is, in my view, unrealistic. The ICC Statute clarifies that command responsibility also applies beyond just military commanders to civilian commanders as well, but it restricts the cases in which the latter bear such responsibility. Specifically, instead of the 'should have known' standard, civilian commanders must consciously disregard information that clearly indicated their subordinates were committing or about to commit a war crime.[374]

### d. Defences

**5.216** Defences normally available to an accused are excluded, restricted or raise particular problems in cases of war crimes. Contrary to defences typically available at the national level in most States, war crimes cannot be justified on the grounds that the act was prescribed by domestic law.

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369 P I, Art 87(3).
370 P I, Art 86(2).
371 See ICRC CIHL Database, Rule 153.
372 See ICTY, *Prosecutor v Hadžihasanović et al.* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47 (16 July 2003).
373 ICC Statute, Art 28, which was applied to a NIAC in ICC, *Prosecutor v Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) paras 170–208.
374 ICC Statute, Art 28(b)(i).

**5.217** Less clear, however, is whether the defence based on superior orders, which contends that the accused should not be held criminally responsible because they simply obeyed orders issued by a superior, is acceptable in war crimes cases. The Charter of the Nuremberg Tribunal explicitly ruled it out as a valid defence but allowed it to be a mitigating circumstance.[375] However, the Nuremberg Tribunal refused to take into account superior orders during sentencing. The ICTY and ICTR Statutes accept superior orders as a mitigating circumstance only 'if justice so requires'.[376] However, the ICC Statute accepts superior orders as a defence for war crimes if the following cumulative conditions are fulfilled: the subordinate was under a legal obligation to obey the order; they 'did not know that the order was unlawful'; and the order was not manifestly unlawful.[377]

**5.218** The difference between duress and superior orders is that a person receiving an order still has a moral choice, while the person acting under duress is threatened by imminent death or continuous or serious bodily harm. Although the ICTY decided by three votes to two that the duress-based defence was not a ground for exoneration in the case of war crimes,[378] the ICC Statute stipulates that duress may justify relieving the individual of criminal responsibility.[379]

**5.219** The most astonishing defence explicitly accepted by the ICC Statute for war crimes is self-defence, that is, when the accused acted reasonably to defend himself or herself or another person (or even property essential to survival or to the accomplishment of a military mission) against an imminent and unlawful use of force and the act was proportionate to the danger posed.[380] The provision fortunately but ambiguously clarifies that to use this defence, it is not 'in itself' sufficient for an act to be carried out as self-defence in the sense of *jus ad bellum*. Even then, it is difficult to imagine circumstances in which this defence could actually be advanced to justify a war crime. Indeed, IHL does not prohibit using force against a person who unlawfully resorts to force, which therefore cannot possibly constitute a war crime that would have to be justified by self-defence. In particular, killing civilians who resort to force will not constitute a war crime because such civilians cease to enjoy protection against attacks.[381] If the attacker is a combatant targeting a civilian in violation of IHL, such a civilian attacked can respond with force without committing a violation of IHL and therefore

375 Charter of the International Military Tribunal (8 August 1945) 82 UNTS 284, Art 8.
376 ICTY Statute, above note 351, Art 7(4); ICTR Statute, above note 351, Art 6(3).
377 ICC Statute, Art 33(1).
378 See ICTY, *Prosecutor v Dražen Erdemović* (Appeals Judgment) IT-96-22-A (7 October 1997) para 19.
379 ICC Statute, Art 31(1)(d).
380 ICC Statute, Art 31(1)(c).
381 P I, Art 51(3); P II, Art 13(3).

needs no defence (of self-defence) to justify a 'war crime'. Similarly, IHL does not prohibit the defence of property essential to survival or to the accomplishment of a military mission, and I do not understand why it would necessitate the commission of war crimes that would need to be justified by a defence.

### e. Judicial guarantees

**5.220** While it is important to repress war crimes to generate better respect of IHL, individuals suspected or accused of committing war crimes and even those sentenced for war crimes remain persons affected by an armed conflict and therefore deserve the protection of IHL. The protections afforded by IHL are particularly important when such persons are prosecuted or sentenced by the adverse party, which is – despite the risk of abuses – permitted and even required by the principle of universal jurisdiction.

**5.221** First, IHL maintains all guarantees of humane treatment even for persons suspected, accused or sentenced for war crimes. There is no derogation clause stripping those who violate IHL from all or even some of the guarantees of humane treatment. The need to ensure that convicted POWs remain protected by Convention III was even explicitly foreseen in an article,[382] which was, however, subject to reservations by the Soviet Union (continued by Russia) and former 'socialist' countries precisely in the case of a sentence for international crimes.[383]

**5.222** Second, IHL protects against the greatest risk of abuse – unfair trials that falsely sentence persons for war crimes. IHL therefore provides that anyone accused of a grave breach must 'benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided' for POWs in Convention III.[384] This provision protects not only enemy combatants (who are nevertheless POWs) but also all people, including civilians and other persons who are not otherwise protected by IHL, if they are, for example, prosecuted by a neutral State exercising its universal jurisdiction. Protocol I extends this protection through an analogous rule that covers all war crimes in IACs.[385] Although such an explicit rule does not exist for war crimes committed in NIACs, accused persons at least benefit from the usual judicial guarantees when tried by a party to the conflict.[386]

382 See GC III, Art 85.
383 See MN 8.097.
384 GCs, Common Arts 49(4)/50(4)/129(4)/146(4); GC III, Arts 105–108.
385 P I, Art 75(7).
386 See GCs, Common Art 3(1)(1)(d); P I, Art 6.

### f. International criminal tribunals

**5.223** IHL does not mention international criminal courts. It merely requires that war crimes be prosecuted, which may be accomplished independently of the existence of international criminal courts. However, IHL provisions concerning the prosecution of war crimes were largely ignored until 1990 when the range of systematic atrocities committed in the armed conflicts in the former Yugoslavia brought about a radical change. The international community, which felt duty-bound to respond, established the ICTY through the sole emergency procedure available under current international law: an UN Security Council resolution.[387] The creation of the ICTY would have led to an obvious double standard if the international community did not establish a similar tribunal – the ICTR – following the armed conflict and the genocide that took hundreds of thousands of lives in Rwanda.[388] The establishment of the ICTY and the ICTR paved the way for States to create the ICC because, once again, failing to do so would have resulted in another blatant double standard by excluding all the numerous other situations in which international crimes are committed.

#### *i. The ad hoc international criminal tribunals*

**5.224** The ICTY's subject matter jurisdiction covered acts of genocide, crimes against humanity, grave breaches of the Conventions and violations of the laws and customs of war. As mentioned above, grave breaches only exist in IACs. Surprisingly, the ICTY Statute failed to mention grave breaches of Protocol I, despite the fact that the former Yugoslavia and its successor States were parties thereto. This failure resulted from the fact that the UN Secretariat, which prepared the Statute, feared that permanent members of the Security Council would vote against the Statute because they were not (and some are still not) parties to Protocol I, which expanded the concept of grave breaches to cover several violations of the rules governing the conduct of hostilities. Instead, the ICTY Statute referred to violations of 'the laws or customs of war', listing examples using the old-fashioned, outdated wording contained in the Hague Regulations. The ICTY, however, resolved the legal gaps as far as NIACs and the conduct of hostilities are concerned by broadly interpreting the concept of 'violations of the laws or customs of war'.[389]

**5.225** In contrast to the ICTY, the ICTR's subject matter jurisdiction covered acts of genocide, crimes against humanity and serious violations of Article 3 common to the Conventions and of Protocol II. The drafters chose the term 'serious

387 UNSC Res 827 (1993).
388 UNSC Res 955 (1994).
389 See Online Casebook, ICTY, The Prosecutor v. Tadić, A. Appeals Chamber, Jurisdiction, paras 86–136.

violations' to overcome the fact that 'grave breaches' exist only in IACs as the conflict in Rwanda was a NIAC. It was the first explicit reference in an international document to the fact that IHL violations committed during NIACs may constitute international crimes.

**5.226** The ICTY further only had jurisdiction over natural persons who committed one of the crimes listed in its Statute on the territory of the former Yugoslavia since 1991. By contrast, the ICTR was authorized only to adjudicate crimes committed in 1994 by natural persons in Rwanda or by Rwandan citizens in the territory of neighbouring States.

**5.227** The ICTR and ICTY both ceased functioning at the end of 2015 and 2017, respectively. Since then, only the 'International Residual Mechanism for Criminal Tribunals'[390] is mandated to perform residual functions of both former tribunals, such as trying the remaining seven ICTR fugitives if they can be apprehended as well as dealing with requests by those already sentenced, including ongoing or new appeals.

**5.228** There is certainly room for doubt about whether these ad hoc tribunals could be created by Security Council resolutions. However, if the international community attempted to establish these tribunals through a treaty, which is the traditional method of constituting new international institutions, then the world would have waited too long for them to come into existence, to have jurisdiction over, and to have any real possibility of apprehending most persons suspected of committing war crimes in those conflicts.

**5.229** Apart from the ICTY and the ICTR, certain hybrid tribunals merging international and domestic criminal justice also contributed to the implementation and development of IHL. The UN, in agreement with the Government of Sierra Leone, established the Special Court for Sierra Leone[391] in 2000 with the objective to try the most important war criminals from the 1996 conflict in Sierra Leone. This hybrid tribunal charged and sentenced several individuals from all the warring parties with war crimes, crimes against humanity and other serious IHL violations.

390 See UNSC Res 1966 (2010).

391 Having completed its mandate and all its pending cases, the SCSL transitioned to a residual mechanism in 2013.

**5.230** The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2005 to try the ageing leaders of the Khmer Rouge after almost a decade of negotiations between the UN and the Government of Cambodia. Two Extraordinary Chambers were established under Cambodian laws: one court conducts the trials of those accused of killing thousands of civilians during the 1970s while the other hears appeals within the existing justice system. The ECCC prosecutes former Khmer Rouge leaders for, among other things, war crimes they committed during the conflict that took place between 1975 and 1979 in Cambodia.

**5.231** The War Crimes Chamber in Bosnia and Herzegovina[392] was created in 2005 with the mandate to prosecute lower-ranking persons suspected of having committed war crimes on the territory of Bosnia and Herzegovina so that the ICTY could concentrate on high-ranking criminals.[393] Contrary to the abovementioned hybrid courts, the War Crimes Chamber was not directly created by the UN and hence is not controlled by it. It was established under Bosnian law, and it is integrated into the Criminal Division of the Court of Bosnia and Herzegovina.

**5.232** Furthermore, in March 2000, following the establishment of the UN Transitional Administration of East Timor (UNTAET), Special Panels for Serious Crimes in Timor-Leste were established within the framework of the Dili District Court. The Panels, composed of one national and two international judges, were tasked with prosecuting serious crimes committed in 1999, including genocide, war crimes, crimes against humanity and torture.[394]

**5.233** Finally, and more recently, hybrid tribunals have been established in Senegal, Kosovo, the Central African Republic and South Sudan, and the establishment of others has been suggested for Colombia, the Democratic Republic of the Congo, Syria, Sri Lanka, Ukraine and the 'Islamic State'.[395]

**5.234** All tribunals develop and refine the law they apply. In that respect, some tribunals, in particular the ICTY and the ICTR, have exceeded all expectations. As far as IHL is concerned, these tribunals in a short space of time have, among

392 See its website <http://www.sudbih.gov.ba/?jezik=e> accessed 31 July 2018.

393 See UNSC Res 1503 (2003) and UNSC Res 1534 (2004) requesting domestic courts to assist the ICTY.

394 Although the Special Panels still exist on paper, they stopped operating in 2005. See Caitilin Reiger, 'Hybrid and Internationalized Tribunals' in Chiara Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff 2012) 308.

395 For more information on this, see The Hybrid Justice Project's website <https://hybridjustice.com/> accessed 31 July 2018.

other things: considerably developed the law of NIACs by identifying applicable customary rules; clarified the meaning of many substantive rules of IHL; modified the distinction between IACs and NIACs; redefined the concept of protected persons; and made more explicit IHL's active and passive scope of application. ICTY and ICTR case law, however, could be well criticized from many points of view. In particular, both tribunals had a tendency to interpret IHL based upon criteria that either could only be established ex post facto or that cannot realistically be applied by those fighting during a conflict.[396] Nevertheless, ICTY and ICTR jurisprudence has given a remarkable boost to IHL, and it is now referred to daily by defence lawyers and public prosecutors, discussed in learned articles and finally forms the basis for well-reasoned verdicts.

**5.235** It was only logical that the development of international criminal justice could not be limited to crimes committed in the former Yugoslavia and Rwanda. Such selectivity would have seriously undermined the credibility of ICL and therefore indirectly IHL. It is therefore fortunate that the international community took advantage of a brief window of opportunity in international relations to adopt the ICC Statute in 1998.

*ii. The ICC*

**5.236** The ICC Statute – the successful outcome of more than 50 years of effort – is an international treaty that binds only States party to it and applies only to persons under their jurisdiction. It entered into force on 1 July 2002 upon its ratification by 60 States and, by the end of 2017, 123 States were parties to the Statute. Two States recently withdrew from the Court: Burundi (effective October 2017) and the Philippines (effective March 2019). Although the Court is authorized to deal with genocide, crimes against humanity, war crimes and (most recently) the crime of aggression, only war crimes will be addressed here given that IHL violations necessarily underlie every war crime.[397]

**5.237** Contrary to the ICTY and the ICTR Statutes, which could only confer jurisdiction but could not establish new international crimes without violating the prohibition against retroactive criminal laws, the ICC Statute's status as a multilateral treaty allowed it to do so. States nevertheless wanted to closely follow

396 For a more detailed criticism, see Marco Sassòli and Julia Grignon, 'Les limites du droit international pénal et de la justice pénale internationale dans le mise en œuvre du droit international humanitaire' in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du XXIe siécle* (Bruylant 2012) 144.

397 One may doubt whether attacks directed at peacekeepers, which now constitute a war crime under ICC Statute, Arts 8(2)(b)(iii) and 8(2)(e)(iii), actually violated IHL before the ICC Statute was adopted.

existing customary international law and IHL.[398] In IACs, all grave breaches of the Conventions fall within the Court's jurisdiction.[399] Although Protocol I is again not mentioned, the ICC Statute lists as 'serious violations' of IHL of IACs most of Protocol I's grave breaches in language nearly identical to that of Protocol I. This list, however, does not cover all the grave breaches defined by Protocol I. For example, the Statute makes no reference to unjustified delays in repatriating POWs and civilians. On the other hand, the Statute – in contrast to Protocol I – explicitly defines several other IHL violations as war crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization[400]; the enlistment of children under 15 years of age and using them to participate actively in the hostilities[401]; and the use of certain weapons, such as chemical weapons, poison and dum-dum bullets.[402] States, however, remained opposed to referring to nuclear weapons, biological weapons and laser weapons in the Statute and also relegated listing weapons likely to cause superfluous injury to an annex that has yet to be drawn up by the States parties.[403] Without such a list, no one can be tried for the related crime.

**5.238** As far as NIACs are concerned, the ICC Statute represents spectacular progress in terms of IHL. It is the first treaty to contain a detailed list of war crimes in NIACs, confirming once and for all that the concept of war crimes exists for such situations. The list covers serious violations of Article 3 common to the Conventions[404] as well as a large number of other violations, including crimes committed on the battlefield, in a distinct sub-section of the Statute.[405] Nevertheless, the list of NIAC war crimes is much shorter than the one for IACs, and it does not contain crimes such as attacks against civilian objects, attacks with clearly excessive effects on civilians, using human shields and starving civilians. A 2010 amendment that has been ratified only by only 36 States (as of 2017) extended the limited list of war crimes consisting of using certain weapons in IACs to NIACs.[406]

398 See also ibid., Arts 8(2)(b) and 8(2)(e), which explicitly mention that the listed crimes must be understood 'within the established framework of international law'.

399 Ibid., Art 8(2)(a).

400 Ibid., Art 8(2)(b)(xxii).

401 Ibid., Art 8(2)(b)(xxvi).

402 Ibid., Art 8(2)(b)(xvii)–(xix).

403 Ibid., Art 8(2)(b)(xx).

404 Ibid., Art 8(2)(c).

405 Ibid., Art 8(2)(e). For a further discussion on the question of whether the fact that war crimes in NIACs have been divided up into two lists with a different wording on their respective scope of application means that different thresholds exist for those crimes and arguably the underlying IHL rules, see MN 6.41.

406 The Review Conference of the Rome Statute, 'Amendments to Article 8 of the Rome Statute' (10 June 2010) Res RC/Res.5, which added Art 8(2)(e)(xiii) to 2(e)(xv) to the ICC Statute.

**5.239** The Court may exercise its authority vis-à-vis the States parties without having to obtain consent for each case of application. If either the State on whose territory the crime being prosecuted took place or the State of which the person accused of a crime is a national is bound by the Statute or otherwise recognizes in a separate declaration the authority of the ICC, the ICC may exercise its jurisdiction.[407] Therefore, even nationals of a State not party that has not made a declaration granting the ICC jurisdiction may be tried by the Court if they commit crimes in the territory of either a State party or a State having made such a declaration. The US sharply criticizes this result, arguing that, under international law, treaties may not create obligations for third parties without their consent. The ICC Statute, however, establishes obligations for individuals, and it is normal that the law of the territorial State binds individuals under its jurisdiction even against the will of their State of nationality. Why then should the territorial State be prohibited from delegating such jurisdiction to the ICC through the ICC Statute?

**5.240** State consent to the exercise of the ICC's jurisdiction – either through ratification or a declaration – is also unnecessary when the UN Security Council refers a situation to the ICC by means of a resolution adopted pursuant to Chapter VII of the UN Charter.[408] Conversely, the Security Council may also use such a resolution to prevent the Court from opening or continuing enquiries and prosecutions for a renewable period of 12 months.[409]

**5.241** In addition to lack of jurisdiction, the principle of complementarity equally limits the admissibility of cases before the ICC. This principle gives national prosecutions for the same crime priority over prosecutions by the Court, except if the prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution.[410]

**5.242** Only the Prosecutor, who is elected by the States parties, may refer a specific case to the Court. Situations may be referred to the Prosecutor by any State party and by the Security Council, but the Prosecutor may also open enquiries on her own initiative.[411] In the latter case, the Prosecutor must, however, present

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407 ICC Statute, Art 12(2)–(3).

408 For the first time the UNSC referred a case to the ICC, see Online Casebook, Sudan, Arrest Warrant for Omar Al-Bashir: A. United Nations Security Council Resolution.

409 ICC Statute, Art 16. In applying this provision, the UNSC granted the US a stay of 12 months for its staff that it contributed to UN peace forces in UNSC Res 1487 (2003) para 1. This stay, however, was not renewed in 2004.

410 ICC Statute, Art 17.

411 Ibid., Arts 13–15.

a request for authorization to the Pre-Trial Chamber. If the Chamber decides to authorize the opening of an enquiry or if the Prosecutor intends to conduct an enquiry pursuant to a State referral, the Prosecutor must notify all the States parties as well as the other States that would normally exercise jurisdiction over the case. If one of those States informs the Prosecutor that proceedings concerning the matter in question are already under way at the national level, the Prosecutor must defer to that State's proceedings unless the Pre-Trial Chamber authorizes the continuation of the investigation.

**5.243** There may be serious doubts about whether, on the one hand, the above procedure contributes to the efficacy of the prosecutions and, on the other, whether it allows the ICC and States to respect the right of the accused to have their case heard within a reasonable time. The ICC has a regrettable tendency to spend a lot of time, energy and resources on convoluted interlocutory procedures concerning procedural issues. However, the complicated procedure foreseen in the ICC Statute does reflect States' fears of allowing a court to judge the conduct of their agents independently of their wishes.

*iii. An assessment of the role of international criminal tribunals*

**5.244** In the traditional view of international law, even when certain individual acts had been declared international crimes, the obligation or the right to prosecute the perpetrators used to be the task of one, several or (in the case of pirates) even all States. The State was thus a vital intermediary between the rule of international law and the individual who had violated that law. The establishment of international criminal courts lifted this veil, and the responsibility of the individual before international law as well as the international community finally became visible. The creation of international criminal tribunals also paradoxically resulted in States taking their obligation to prosecute war crimes, including based upon the principle of universal jurisdiction, slightly more seriously. International criminal tribunals are the most obvious manifestations of a new layer of international law that superimposes itself on traditional international law governing the coexistence of and cooperation between States – namely, the internal law of the international community.[412] Compared to sanctions that form the typical response to violations according to the traditional international law, criminal trials before international tribunals have obvious advantages. First, they are governed by law and depend less on the good intentions of States. Second, they operate under a regular, formalized procedure that applies equally to

412 On this distinction between two layers of international law, see Juan-Antonio Carrillo-Salcedo, 'Droit international et souveraineté des États, Cours général de droit international public' (1996) 257 Recueil des Cours 35, 47–51, 70, 115–6, 211–21.

everyone. Third, they are not subject to veto by powerful States. Fourth, they are influenced far less by geopolitical considerations than sanctions decided by individual States or by the UN Security Council. Finally, they are directed against the guilty individuals and therefore do not affect innocent individuals as military or economic sanctions inevitably do.

**5.245** Despite all this, national jurisdictions retain a key role in the prosecution of war crimes and will maintain such a role even when the ICC functions more effectively and is empowered to deal with every situation in which war crimes are committed. First, that role is quantitative, as international justice is unable to cope with the hundreds of thousands of crimes that, unfortunately, blemish every major conflict. Instead, international courts can only to select a few specific, symbolic cases in order to put a stop to impunity, while national systems must deal with the remaining cases. Moreover, implementation of international criminal policy and the defence of the international society[413] by the international judicial bodies alone would run counter to the principle of subsidiarity and would require disproportionate funds. The role of national justice is also qualitative, however. As the rule of law and its credibility in each country depend on the quality, the independence and the effectiveness of the courts of first instance, justice for victims of war crimes will continue to depend on national courts. Without them, the international courts will at most function as a fig leaf when it comes to war criminals. For those reasons, the existence of international courts should not discourage States, their prosecutors and their courts from fulfilling their obligations with regard to war crimes – including based upon the principle of universal jurisdiction.

**5.246** In conclusion, war crimes and the obligation to prosecute them already existed before international courts were established. However, international courts, by implementing those rules, have brought them into reality. As in so many other areas, setting up an institution and paying its staff for the sole purpose of dealing with a problem is an important step toward solving it, but it is not sufficient in itself.

**5.247** For example, the ICC is currently confronted by a dilemma that is difficult to resolve. Its first alternative is to continue prosecuting the most widespread crimes in the situations over which it has complete jurisdiction, but it will then be accused of applying double standards and prosecuting mainly Africans. In

413 For the old and new school views on 'défense sociale' in domestic criminal law, see, respectively, Adolphe Prins, *La défense sociale et les transformations du droit pénal* (Misch et Thron 1910) and Marc Ancel, *La défense sociale nouvelle* (3rd edn, Cujas 1981).

my opinion, such accusations against the ICC are unjustified because most cases currently before it involving African States began at the request of an African State and, more importantly, all of its cases aim to deliver justice to African victims. Nevertheless, it is true that the ICC's current caseload gives the erroneous impression that war crimes are mainly committed in Africa. The second alternative for the ICC is therefore to prosecute equally (in terms of the crimes it has jurisdiction for) less widespread crimes committed in situations for which it has only incomplete jurisdiction (for instance, violations committed in Iraq are under the ICC's jurisdiction only if committed by UK citizens) to demonstrate that there is no impunity for representatives of powerful States. It will then face serious political resistance from permanent members of the Security Council (such as Russia and the US) as well as other powerful States (such as Israel), accusations that it is politicized and even greater difficulties than those it currently faces in obtaining the necessary evidence and the transfer of the suspects to The Hague. The ICC faces a similar dilemma between its current tendency to prosecute mainly rebels and the fact that it was mainly needed to prosecute those in government.

**5.248** There is one solution to side-step the tension between the Court's imperative to stop the most widespread violations and its need to be seen to work everywhere: the Prosecutor could consider prosecuting some random 'small' cases falling under the Statute and announce that she will do so. This would serve an important deterrent effect by showing all perpetrators of international crimes around the world that their crimes no longer remain under the ICC's radar. It would also encourage domestic prosecutors to take 'small' war crimes cases seriously so that they can benefit from the complementarity principle. In a domestic legal system, where all crimes are supposed to be brought to court, the rule of law may require prosecutors to announce and adhere to a prosecutorial policy. At the international level, the Prosecutor can anyway not deal with all crimes.

**5.249** Throughout all of these challenges and their potential solutions, the very credibility of international justice is at stake because justice which is not the same for everyone is not justice. A genuine solution would be universal ratification of the ICC Statute by all States along with their genuine will to prosecute those who commit war crimes at the national level by all means at their disposal, including the principle of universal jurisdiction. While we still have much work to do to realize this dream, significant progress has been made over the last 20 years.

# 6

# SCOPE OF APPLICATION: WHEN DOES IHL APPLY?

**6.01** One of IHL's distinguishing features is that it does not apply to all people in all places at all times. Except for rules that are also applicable in peacetime, IHL applies only to armed conflicts. This chapter will examine IHL's material, geographical, temporal and personal (active and passive) scope of application as well as the concept of nexus. As IHL only applies to armed conflicts, its material scope requires understanding what constitutes an armed conflict. Its geographical scope relates to determining where IHL applies if an armed conflict exists, while its temporal scope addresses the period of time IHL applies. IHL's active and passive personal scope of application addresses who is bound and who is protected by IHL, respectively. Finally, we will also examine the concept of nexus that determines which acts committed during an armed conflict are governed by IHL.

## 6.1 MATERIAL SCOPE OF APPLICATION: WHAT CONSTITUTES AN ARMED CONFLICT?

> No single concept of armed conflicts exists. IHL applies to IACs and NIACs. For IHL to apply in NIACs, in particular the degree of violence must be much higher than in IACs. Some IHL rules, however, also apply in peacetime.

**6.02** No single concept of armed conflict exists. There are two types of armed conflict: IACs and NIACs. As NIACs are defined by opposition to IACs (in the treaty provisions they are referred to as 'armed conflict not of an international character'[1]), it is appropriate to first determine (at least in cases of doubt) whether an IAC exists and then only if this is not the case whether the situation is a NIAC. We will see, however, that both kinds of armed conflicts may exist in parallel. The classification of whether a situation is an IAC, a NIAC or not an armed conflict depends on the fulfilment of objective legal criteria and not on the will

1 GCs, Common Art 3. For the definition by opposition to IACs, see also P II, Art 1(1).

or the opinions of the parties involved.[2] Nevertheless, the classification is nearly never subject to binding adjudication and, as international law is a self-applied system by default, one actor (such as a State or the ICRC) cannot – even if it is correct – impose its classification on others.

### 6.1.1 International armed conflicts

**6.03** Common Article 2 states that the Conventions (other than Common Article 3) apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.' Protocol I also applies to all situations referred to in Common Article 2 as it incorporates Common Article 2 by reference, but it also adds national liberation wars to the scope of its material application.[3]

#### a. Inter-State armed conflicts

> IACs are typically fought between States. While the existence of an IAC usually depends on the facts, a declaration of war would nevertheless make IHL of IACs applicable. To trigger an IAC, it is sufficient that persons attributable to one State commit an act of violence that is approved by its highest authorities against another State. The intensity of those acts does not matter. The target must be the armed forces of a State or on its territory. It is controversial whether acts exclusively targeting a non-State armed group or a person on another State's territory trigger the applicability of IHL of IACs when the territorial State does not consent.

**6.04** The prototypical armed conflict is an IAC between two or more States. The existence of an IAC is exclusively a question of fact. It exists if someone attributable to a State commits acts of violence against persons or objects representing another State. Although I do not think the parties must have an *animus belligerendi* ('intention to fight') for IHL of IACs to apply, the mere fact that the person using force is attributable to a State is not sufficient in my opinion. Rather, the highest authorities of the State must (previously or subsequently) additionally approve the use of force. The legality (or not) of those acts, which is governed by *jus ad bellum*, cannot influence the applicability of IHL. Similarly, the denial by one[4] or even both[5] parties that they are engaged in an IAC is also

2 See Online Casebook, Belgium and Brazil, Explanations of Vote on Protocol II: B. Brazil and ICTR, The Prosecutor v. Jean-Paul Akayesu: A. Trial Chamber, para 603.

3 See P I, Art 1(3)–(4).

4 GCs, Common Art 2(1).

5 Updated ICRC Commentary GC I, para 213.

irrelevant. Consent of the State against whom force is used nevertheless precludes the existence of an IAC.

**6.05** The status of one of the parties as a State, however, is not merely a question of facts, but it is governed by international law rules outside of IHL. IHL does not offer any criteria on this issue. IHL simply does not require for its application that the belligerents recognize each other or that the government conducting the conflict is recognized by the adversary as long as it is either the de jure government of a State or has de facto control over the State.

*i. Violence*

**6.06** In my view, an act of violence is necessary to trigger the applicability of IHL. According to the ICRC, the capture of a single soldier is sufficient to make Convention III applicable.[6] This interpretation, with all respect to its humanitarian motives, overstretches IHL.[7] Assuming it is correct that IHL applies as soon as a situation for which it contains rules arises, the internment of a single foreign civilian for imperative security reasons should equally trigger the applicability of Convention IV. This, however, is not possible because one cannot make the necessary determination that the person is an 'enemy' civilian without pre-existing acts of violence.

*ii. Intensity?*

**6.07** As for the intensity of the violence necessary to trigger the applicability of IHL of IACs, it was recently suggested that violence between two States must reach a certain threshold.[8] I agree with the ICRC that State practice does not support this conclusion and that such an interpretation would leave a dangerous gap in the protection offered by *jus in bello*.[9] If force is used and as long as the State 'attacked' (in the *jus in bello* sense of the term[10]) does not consent, it must not necessarily defend itself to make IHL applicable.

*iii. Target*

**6.08** Although attacks against the armed forces of a State are clearly sufficient, the target can be anyone or anything that, in the eyes of the attacker, represents the State. This is at least the case when the attack occurs on the territory (including

6 Ibid., para 238; Pictet Commentary GC III, 23.

7 Djemila Carron, *L'acte déclencheur d'un conflit armé international* (Schulthess 2016) 193–9.

8 Committee on Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law' in *International Law Association Report of the Seventy-Fourth Conference* (The Hague, 2010) (International Law Association, London 2010) 677, 702, 712–3.

9 Updated ICRC Commentary GC I, paras 239–44. See already Pictet Commentary GC III, 23.

10 See P I, Art 49(1); see also MN 8.295.

the airspace or the territorial waters) of the targeted State. Outside that territory, the target may be limited to the armed forces (or warships) of the attacked State.

**6.09** It is controversial whether a State's attack directed at a non-State armed group on the territory of a non-consenting State (for instance, the US attacks against 'Islamic State' targets in Syria) makes IHL of IACs applicable between the two States. Many answer affirmatively[11] on the basis that the territory as such represents the State. However, this solution does not help overcome most of the humanitarian problems that arise in reality. First, the members of the armed group against which the violence is directed would be civilians and not combatants because they do not belong to the territorial State, and they consequently could be attacked only if and for such time as they directly participate in hostilities. IHL of NIACs, however, provides a more appropriate solution as it allows the direct targeting of members of an armed group who have a continuous fighting function. Second, the protection needs of 'enemy' nationals interned for imperative security reasons, which most consider today is authorized by IHL of IACs,[12] is often invoked as a justification for the application of IHL of IACs. However, I wonder whether IHRL guarantees, which are more protective, are more appropriate in this respect.

**6.10** Indeed, the insistence on applying IHL of IACs to such situations appears to be a kind of 'sanction' against the intervening State for violating *jus ad bellum*.[13] This criticism also applies to the ICRC's compromise solution according to which IHL of IACs would apply in such a situation 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.[14] This solution, also called 'double classification theory', raises three questions. First, how can one determine which acts are covered by IHL of IACs and which by IHL of NIACs? Second, what (other than the undesirable internment of 'enemy' nationals) would remain governed by IHL of IACs? Third, even under the ICRC's solution, if the parallel situation between the non-State armed group and the attacking State does not fulfil the necessary level of intensity for IHL of NIACs to apply, IHL of IACs would again exclusively cover the entire situation.

11 See, e.g., Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 73–9; Sayeman Bula-Bula, *Droit international humanitaire* (Bruylant-Academia 2010) 98–9; Dieter Fleck, 'The Law of Non-International Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 582; International Institute of Humanitarian Law, 'The Manual on the Law of Non-International Armed Conflict With Commentary' (2006) 2.

12 See MN 8.178.

13 Carron, L'acte, above note 7, 356–8.

14 Updated ICRC Commentary GC I, paras 257–64.

**6.11** I therefore prefer a third solution: one should apply only IHL of NIACs because no armed conflict between States exists.[15] This solution conforms to the text of Common Article 2 that limits the applicability of the Conventions to an 'armed conflict arising *between* High Contracting Parties.'[16] It also corresponds to the well-accepted fact that what makes an armed conflict international is not where it occurs but that it occurs between States. Furthermore, this solution is also preferable because IHL of IACs is simply not adapted to address fighting between a State and a non-State armed group. Admittedly, however, this approach raises the question of when hostilities on the territory of a non-consenting State can be considered to be exclusively directed against an armed group. The answer may be to apply the following presumption: IHL of IACs normally covers the use of force against targets on the territory of a non-consenting State except if that use exclusively targets the armed group (or an individual) not linked to the territorial State. Assessing this requires examining how closely the target is related to the armed group rather than to the territorial State and whether the armed group controls the territory on which the attack occurs. The history of the relations between the intervening State, the territorial State and the armed group as well as the declarations and other relevant conduct of the intervening State are also relevant. Cases of mistake must obviously be solved by reference to the intervening party's intention[17] (the intervening State remains nonetheless liable for any damage caused). The territorial State could turn the conflict into an IAC at any moment if it forcibly resists the armed intervention. Even if the territorial State does not respond with force, IHL of IACs would still apply if the intervening State's ground forces obtain control of any part of another State's territory even if that territory was previously under the exclusive control of an armed group (for example, the Turkish intervention against Kurdish armed groups in Northern Syria in 2018).[18] Indeed, this would be a case of belligerent occupation without armed resistance (by the governmental forces of the territorial State), which is discussed hereafter.[19]

#### *iv. Declarations of war still matter*

**6.12** While the old concept of 'war' has been superseded in IHL by the more factual term of 'armed conflict' and 'wars' are no longer 'declared', the clear text of Common Article 2 and the majority of scholars consider that any 'declaration of war' triggers the applicability of IHL of IACs even in the absence of violence.

15 Carron, L'acte, above note 7, 353–75, whose arguments are summarized in the rest of this paragraph.
16 Emphasis added.
17 Carron, L'acte, above note 7, 314–7.
18 Ibid., 372–4.
19 See MNs 6.22–6.25.

This may be justified as nationals of the State against which the territorial State has declared war deserve and need the protection of IHL of IACs.

### b. Inter-State armed conflicts by proxy

IHL of IACs equally applies when a non-State armed group fighting against governmental forces of one State is under the overall control of another State. The necessary degree of control a State must exercise over the armed group and the consequences of such classification are controversial.

**6.13** As noted above, IHL of IACs is only applicable if the use of force against a State is attributable to another State. Such attribution is equally possible in cases in which one State uses force against another State through an armed group fighting the latter State on its territory. This is a frequent situation in practice and has led to major debates in scholarly writings as well as between the ICJ and the ICTY. This may occur either when the foreign State has the necessary control over the armed group from the very beginning of the conflict or when it gains control over the armed group at a later time during a NIAC between the armed group and the (territorial) State, thereby turning the NIAC into an IAC.

**6.14** This scenario presents two controversial issues. First, it is debated whether the rules on attribution of the law of State responsibility are decisive for this classification of the conflict issue. Second, controversy also surrounds the degree of control that is necessary to make IHL of IACs applicable or, in other words, the applicable test that should be applied.

**6.15** On the first issue, some argue (including the ICJ) that State responsibility and the classification of armed conflicts as IACs (which in turn may lead to individual criminal responsibility for grave breaches of IHL of IACs) are distinct issues that are governed by different tests.[20] I agree with the ICTY,[21] the ICRC and the majority of scholars that the underlying test must be the same. Even though only human beings can act in the real world, many rules of international

20 Online Casebook, ICTY, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, para 405; Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 AJIL 236, 237–42; Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013) 272–3; Djemila Carron, 'When is a Conflict International? Time for New Control Tests in IHL' (2016) 98 IRRC 1019, 1026–8 and the authors she refers to.

21 Online Casebook, ICTY, The Prosecutor v. Tadić: C. Appeals Chamber, Merits, para 104; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649.

law, including those on whether an armed conflict is international, refer to States. Therefore, one must attribute the actions of those who acted to a State in order to determine whether one State has used force against another State. The rules on attribution of the law of State responsibility not only determine State responsibility; they are also used in international law to determine whether certain conduct is attributable to a State and therefore subject to rules of international law addressing States (that is, rules other than those of ICL). Indeed, the law of State responsibility provides the only solution because international law does not contain any other general rules to determine what constitutes the conduct of a State and IHL contains no special rules to attribute necessarily human conduct to a State. Article 4(A)(2) of Convention III, which offers under certain conditions POW and combatant status to members of an armed group 'belonging' to a State, deals with a distinct issue that arises only when IHL of IACs already applies.

**6.16** The second controversial issue concerning the degree of control necessary to make IHL of IACs applicable overlaps with the first controversial issue. The ICJ and a majority of scholars insist that an armed group's conduct is only attributable to a State if that State had 'effective control of the military or paramilitary operations in the course of which the alleged violations were committed,'[22] or if the armed group was 'completely dependent' of the foreign State.[23] In the *Tadić* case, by opposition, the ICTY considered that the ICJ's reasoning was not 'consonant with the logic of the law of State responsibility' and was 'at variance with judicial and State practice'.[24] For both attribution under the law of State responsibility and for the purpose of classifying the conflict as an IAC, the ICTY found that it is sufficient that the outside State had 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.'[25] Today, the ICRC follows the ICTY's position,[26] while the ICC does so at least for classification purposes.[27] As for the ICJ, it determined that 'overall control test' may be appropriate to classify a conflict but not to attribute State responsibility.[28]

22 Online Casebook, ICJ, Nicaragua v. United States, para 115, reaffirmed by the ICJ in Online Casebook, ICTY, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 404–7.

23 Online Casebook, ICTY, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 391–5.

24 Online Casebook, ICTY, The Prosecutor v. Tadić, C. Appeals Chamber, Merits, paras 115–44.

25 Ibid., paras 131, 145.

26 Updated ICRC Commentary GC I, paras 271–3.

27 ICC, *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 541.

28 Online Casebook, ICTY, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, para 405.

The majority of scholars and the ILC (at least implicitly) follow the ICJ's approach.[29]

**6.17** Along with the ICRC, I think that the two tests must be the same not only for logical reasons mentioned above but also for practical reasons.[30] Indeed, the ICJ's approach would leave a serious responsibility gap because an intervening State with overall but not effective control could be party to an IAC but not responsible for the actions of those fighting on its behalf, and the responsibility of the armed group for IHL of IACs violations is a completely unchartered area. I furthermore think that the effective control test is not appropriate for classification purposes as the classification of the conflict would constantly change depending on whether the outside State has (or does not have) effective control over a certain operation. For these reasons and as the test must be the same, I agree with the ICRC that the overall control test applies both for attribution of State responsibility and classification purposes.

**6.18** Even so, I sympathize with one scholar's new approach to these controversial issues. This approach, however, partly contradicts my conclusion that the test must be the same for attributing State responsibility and classifying a conflict. This scholar follows the effective control test for the attribution of State responsibility.[31] As to classification, she suggests a test of 'general and strict control' when the question is whether an existing NIAC turns into an IAC because an outside State gains control over the armed group involved.[32] According to her, it is sufficient that the control of the State over the group is 'general' and it is not necessary that the State has control over each of the group's actions to be covered by IHL of IACs. As for the requirement that the control is 'strict', it refers, according to this author, to the intensity of the control of the State over the group. When there is no pre-existing NIAC, however, the same author suggests a test of 'specific (scope) and strict (intensity) control' to determine whether acts of violence by an armed group controlled by a foreign State trigger an IAC.[33]

**6.19** In any case, I suggest that, in contrast to direct confrontations between the armed forces of two States, a minimum level of violence between an armed group and the State it is fighting against is necessary to make IHL of IACs

29 ILC Articles on State Responsibility, 48, para 5 commentary to Art 8.
30 Updated ICRC Commentary GC I, paras 271–3.
31 Carron, When is a Conflict, above note 20, 1025–6; Carron, L'acte, above note 7, 273–4.
32 Carron, L'acte, above note 7, 422–33; Carron, When is a Conflict, above note 20, 1031–7.
33 Carron, When is a Conflict, above note 20, 1028–31.

applicable. However, I do not think this minimum level should be required when a third State gives instructions to an armed group regarding certain conduct.

**6.20** Finally, we cannot ignore that, while the internationalization of an armed conflict through State control conforms to legal logic, it does not correspond to State practice and it is not easy to apply in the field. Except for Georgia's fighting against South Ossetia in 2008, States have never considered that the IHL of IACs governs their fighting against a rebellious armed group, even when they denounced those rebels as mere agents of foreign powers.[34] To require an armed group to comply with IHL of IACs simply due to the fact that it is subject to overall control by an outside State is also nearly impossible to imagine from a political point of view because the group or the foreign State will always deny such control. Additionally, as only the State and not the armed group is a party to the IAC, it will be difficult for organizations like the ICRC to engage the armed group in view of respecting IHL or to offer its services.

**6.21** Furthermore, an armed group will have great difficulties in practice to comply with many rules of IHL of IACs because those rules were drafted for States.[35] Some suggest solving this problem by holding the controlling State to the standards of IHL of IACs and the armed group only to the standards of IHL of NIACs.[36] This solution, however, makes the entire construction of internationalization through proxy nearly meaningless because IHL of IACs would then not apply to most conduct. The alternative is to adapt, as far as the conduct of the armed group is concerned (or at least for conduct not effectively controlled by the outside State), IHL of IACs functionally to what the group is actually able to comply with.[37]

### c. Belligerent occupation without armed resistance

> IHL of IACs also applies to belligerent occupation of a foreign State's territory without its consent that does not meet any armed resistance by governmental forces.

34 See Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 129–34.

35 See, e.g., GC III, Arts 39(1), 82, 84(1), 87(1), 99, 102, 108(1), 122; GC IV, Arts 64, 66, 99(1), 136. See also MNs 10.219–10.220.

36 Andrew Clapham, 'The Concept of International Armed Conflict' in Academy Commentary, 25–6.

37 See Tom Gal, 'Unexplored Outcomes of *Tadić*: Applicability of the Law of Occupation to War by Proxy' (2014) 12 JICJ 59, in particular 73–5. See already Henri Meyrowitz, 'Le droit de la guerre dans le conflit vietnamien' (1967) 13 Annuaire Français de Droit International 153, 168–82.

**6.22** Common Article 2(2) covers a situation not addressed by Article 2(1). According to Article 2(2), the Conventions and Protocol I[38] (and, in my view, also the rules of the Hague Regulations concerning occupied territories) apply 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.' If the occupation meets resistance, IHL of IACs applies under Common Article 2(1). Therefore, despite the use of the term 'even', 'paragraph 2 only addresses itself to cases of occupation without…hostilities.'[39] Historically, the drafters introduced Common Article 2(2) based upon the failure of the Czechoslovak and Danish armed forces to resist the German occupation of Bohemia and Moravia in March 1939 and of Denmark in April 1940, respectively, because they considered that such resistance was useless.[40]

**6.23** Despite its historical reason, Article 2(2) in fact goes beyond such a limited scenario to equally cover several distinct situations of occupation. First, it applies to the occupation of a country that has no means to resist, such as a country that does not have any armed forces. Second, it makes IHL of IACs applicable to the continued presence of foreign armed forces once the territorial State withdraws its consent or when the presence of those forces otherwise becomes unlawful, such as South Africa's continued presence in Namibia after its mandate terminated.[41] Finally, it extends the application of IHL of IACs to even an occupation that is resisted by armed non-State actors who are not controlled by the occupied State,[42] such as the Turkish invasion of Northern Syria in 2018.

**6.24** Article 2(2) only applies if the foreign presence is belligerent. The territory must be 'coercively' seized. The mere presence of foreign forces without the territorial State's consent is sufficient to satisfy this requirement.[43] We will discuss later whether the territory must, as the wording of the provision suggests, actually belong to another High Contracting Party.[44]

38 See P I, Art 1(3).

39 ICRC Commentary APs, para 64; see also Pictet Commentary GC IV, 21–2; Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 95.

40 Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 31–2; Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels* (Bruylant 2009) 76.

41 Kolb and Vité, ibid., 79–80. In UNGA Res 2871 (XXVI) (1971) para 8, the UNGA explicitly calls upon South Africa to respect GC IV.

42 Kolb and Vité, ibid., 76.

43 Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Pedone 2010) 27; Kolb and Vité, ibid., 76.

44 See MN 8.206.

**6.25** Finally, Article 2(2) should make IHL applicable to UN-authorized operations that do not meet armed resistance and that establish control over a territory without the consent of the territorial State. Australia, for example, considered that IHL of military occupation applied de jure to its UN operation in Somalia, which met no armed resistance by the territorial sovereign.[45] It is more doubtful whether the law of military occupation applies to UN-run peacekeeping forces deployed based upon Chapter VII of the UN Charter when they effectively run, without meeting armed resistance, a State's territory in the absence of its consent.[46]

### d. National liberation wars

> Under Protocol I, IHL of IACs also applies to armed conflicts in which a national liberation movement representing a people is fighting against colonial domination, racist regimes or alien occupation in the exercise of the right of that people to self-determination if the movement declares its willingness to comply with the IHL of IACs.

**6.26** When Protocol I was adopted in 1977, decolonization had been practically accomplished, but South Africa was still under apartheid rule. Newly independent States insisted that decolonization armed conflicts and the fight against apartheid be subject to the IHL of IACs and not, as they were before, to the IHL of NIACs. As soon as they were successful because they had a majority at the Diplomatic Conference, they unfortunately lost interest in improving Protocol II.

**6.27** The Conference therefore adopted Article 1(4) of Protocol I, which subjects to IHL of IACs 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.' This change meant in particular that the 'freedom fighters' of national liberation movements would obtain combatant and POW status instead of being treated as criminals and terrorists as they had been by the colonial powers. Many people criticized this shift in classifying

45 Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Martinus Nijhoff 1999) 178.

46 For a further discussion on this issue, see MNs 9.128–9.129.

a conflict for IHL purposes based upon its justification(s) as incorrectly mixing up *jus ad bellum* and *jus in bello* and even as supporting terrorism.[47] It may be that this change is contrary to the idea that *jus ad bellum* should not influence the applicability of IHL.[48] However, it preserves the crucial equality of both belligerents before IHL. IHL equally binds both the national liberation movement and the 'colonial dominator', 'alien occupier' or 'racist regime' against which it is fighting.[49] Nevertheless, Article 1(4) is one of the major reasons why the US has not become a party to Protocol I.[50]

**6.28** Colonial domination refers to colonies administered by European powers that are separated from them by salt water. Racist regimes, which was initially meant to refer to apartheid South Africa and Rhodesia, could apply to new situations in which inhabitants are segregated according to their race. Alien occupation could refer to people who have never had an opportunity to exercise their right to self-determination, such as the Palestinians, the Kurds or the Saharaouis. In any case, this concept is not the same as that of belligerent occupation in IHL[51] because it would otherwise deprive the notion of alien occupation in Article 1(4) of any scope and purport given that IHL of IACs would already be applicable to a belligerent occupation under the Conventions.

**6.29** Putting aside the issue of whether a national liberation movement could comply with the detailed and sophisticated rules of IHL of IACs (such as those governing the treatment of POWs or occupied territories), States today will recognize only a few situations as fulfilling the necessary criteria. More importantly, the territorial State will never recognize such a conflict as a national liberation war. Indeed, no State will support such a classification if doing so implies that it is a colonial dominator, a foreign occupier or a racist regime. States such as Israel (the Palestinian people), Apartheid South Africa or Turkey (the Kurdish people) therefore did not become parties to Protocol I to avoid any risk.

**6.30** Nevertheless, Article 1(4) has become operational in the case of Polisario, a national liberation movement fighting against Morocco for the self-determination of the Saharaouis living in Western Sahara that was annexed by Morocco. Morocco is a party to Protocol I. In 2015, the Polisario made a unilateral declaration under Article 96(3) of Protocol I that it undertakes to apply the

47 See Online Casebook, United States, President Rejects Protocol I.
48 See MNs 9.099–9.102.
49 This is explicitly stated in P I, Art 96(3)(c).
50 See Online Casebook, United States, President Rejects Protocol I.
51 ICRC Commentary APs, para 112.

Conventions and Protocol I in its relations with Morocco.[52] The Saharaouis have a good claim to exercise their right to self-determination given that the ICJ recognized their right to self-determination,'[53] and the AU recognized Polisario as their representative. As a result, and in my view rightly so, Protocol I's depositary, Switzerland, circulated Polisario's declaration. The only question that remains is whether an armed conflict existed in 2015 when Polisario made its declaration because there has not been any fighting in the region for many years. Nevertheless, as mentioned above, an armed conflict may be replaced by a belligerent occupation to make IHL of IACs applicable. Switzerland therefore apparently considered that the Moroccan presence in Western Sahara constituted an occupation.

### 6.1.2 Non-international armed conflicts

**6.31** Today, it is inappropriate to refer to NIACs as internal armed conflicts because such conflicts may involve many States and their respective territories. Whether the conflict occurs on the territory of one or more States is not relevant. The actors involved is what differentiates NIACs from IACs, that is to say, an IAC exists if at least one State is involved on both sides of a conflict.

#### a. The lower threshold of application of Common Article 3 and customary IHL of NIACs

> Common Article 3 and customary IHL of NIACs apply to violence that reaches a sufficient intensity between a sufficiently organized armed group and State armed forces, or between such armed groups. Such a NIAC may occur over the territories of several States, and it may also have several States participating on one side.

##### *i. Differentiation from IACs*

**6.32** Common Article 3 refers to 'armed conflict not of an international character', which, in other words, means that all armed conflicts that are not IACs (and that fulfil the requirements of intensity of violence as well as the degree of organization of the groups involved) are NIACs.[54] The provision's addition that such conflicts must occur 'in the territory of one of the High Contracting

52 See Swiss Federal Department of Foreign Affairs, 'Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims' (26 June 2015).

53 ICJ, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 162.

54 Online Casebook, United States, Hamdan v. Rumsfeld: I. United States Supreme Court Decision, Section VI(D)(ii).

Parties' is not a geographical restriction; it simply indicates that the treaty provision applies only to States parties, which is irrelevant today because all States are parties to the Conventions and the provision anyway corresponds to customary law.

*ii. The concept of NIAC in customary law*

**6.33** It is generally considered, more often implicitly than explicitly, that the same threshold of application applies for Common Article 3 and customary IHL of NIACs.[55] Technically, the ICTY defined the criteria of intensity and organization that are discussed hereafter in determining when customary IHL of NIACs applies, and not with regard to Common Article 3's threshold of application. Although the threshold of application of every customary IHL rule should theoretically be determined based upon the State practice and *opinio juris* concerning that rule, tribunals and scholars in practice consider that it has the same application threshold as Common Article 3.

*iii. Intensity and degree of organization*

**6.34** Common Article 3 is silent on the elements of a NIAC. It is, however, uncontroversial that NIACs must satisfy two specific requirements: it must have a certain level of intensity, and the armed group(s) involved must have a certain degree of organization. This is a difference between IACs and NIACs. While violence between States is fortunately a rare occurrence that must necessarily be governed by international law, it is appropriate that domestic law and IHRL (for the State) normally regulates violence against State officials or between inhabitants (which is a frequent phenomenon in all States) as long as such violence does not rise to a certain level.

**6.35** A clear definition of this threshold is not possible. The ICTY summarized a non-exhaustive list of indicative factors based upon its jurisprudence, all of which do not have to be satisfied to establish the element of intensity:

> 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

55 Françoise Hampson, however, suggests a higher threshold of application for customary IHL of NIACs rules pertaining to Hague Law. See Françoise Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' in Raul A. Pedrozo and Daria P. Wollschlaeger (eds), *International Law and the Changing Character of War* (US Naval War College 2011) 196–7.

> combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.[56]

**6.36** As to the whether an armed group is sufficiently organized, the ICTY non-exhaustively listed the following indicators:

> the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.[57]

*iv. Duration?*

**6.37** The ICTY initially viewed the 'protracted' character of the violence as important,[58] and this terminology still appears in the ICC Statute.[59] This criterion of duration may be appropriate for a criminal tribunal because it has hindsight. For those who are supposed to respect IHL during an armed conflict, it cannot be decisive because it is not foreseeable at the outset of a conflict. It is difficult to imagine that the obligation to respect IHL should arise only from the time the conflict becomes 'protracted', and it would even be shocking if IHL applied retroactively to conduct before the conflict became 'protracted'. At any rate, the Inter-American Commission on Human Rights applied IHL to a conflict that lasted only two days,[60] while the ICTY later reinterpreted the term 'protracted' as simply referring to the intensity of the violence.[61]

*v. Political aim of the armed group?*

**6.38** Some, including States confronted by drug violence such as Mexico, suggest an additional implicit requirement for a NIAC to exist: the armed group(s) involved must have a political aim. This is understandable from a historical perspective, and it is true that the chances are greater to obtain the respect of IHL from a group that wants to govern the country (or parts of it) than from a criminal gang that simply wants to pursue its criminal business. The problem with such a requirement is definitional: it would lead to endless discussions about

56 Online Casebook, ICTY, The Prosecutor v. Tadić: E. ICTY, The Prosecutor v. Ramush Haradinaj *et al.*, para 49.
57 Ibid., para 60.
58 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 70.
59 ICC Statute, Art 8(2)(f).
60 Online Casebook, Inter-American Commission on Human Rights, Tablada, para 154.
61 Online Casebook, ICTY, The Prosecutor v. Tadić: E. ICTY, The Prosecutor v. Ramush Haradinaj *et al.*, para 49.

whether the purpose of a given group is 'political'. For example, is the purpose of the 'Islamic State' or the 'Lord Resistance Army' political? Such a requirement would allow States to easily deny the applicability of IHL. Jurisprudence and the ICRC have therefore rightly rejected it.[62]

*vi. Policy considerations*

**6.39** The humanitarian approach towards the lower threshold of application of IHL of NIACs has changed over time. Pictet suggested in 1952, when IHRL was in its infancy, that Common Article 3 'should be applied as widely as possible'.[63] Today, as IHRL is more robust, people affected by a situation of violence may prefer that the threshold of application of IHL of NIACs is not too low. Indeed, life and personal dignity are better protected if only IHRL applies. This is not because the prescriptions of Common Article 3 would be less protective than IHRL. Rather, it is generally considered that the customary IHL of NIACs, which has same threshold of application as Common Article 3, has been enriched by many IHL rules originally adopted for IACs. This, however, is less humanitarian than that foreseen by IHRL, in particular due to the fact that many now consider that IHL, including IHL of NIACs, not only prohibits and prescribes conduct but also authorizes conduct (such as killing or depriving an enemy fighter of liberty) that would not be admissible under IHRL.[64]

### b. Higher thresholds of Protocol II and possibly of some rules in the ICC Statute

> Protocol II applies only to NIACs that occur in a State's territory between its armed forces and non-State armed group(s) that sufficiently control parts of the territory to comply with Protocol II.
>
> It is controversial whether certain war crimes defined in the ICC Statute for NIACs require a higher threshold than Common Article 3 to apply.

**6.40** Article 1(1) of Protocol II clarifies that Protocol II only applies if conditions additional to those of Common Article 3 and customary IHL of NIACs are fulfilled. Specifically, Protocol II applies only to NIACs 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible

62 ICTY, *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 170; Updated ICRC Commentary GC I, paras 447–51.

63 Pictet Commentary GC I, 50.

64 See MNs 10.002–10.019.

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.' Article 1(1) explicitly clarifies that this does not modify the 'existing conditions' of Common Article 3's application. Protocol II thus adds several additional requirements to the traditional conditions of application. First, the territorial State must be a party to Protocol II. Second, Protocol II only applies if the State's governmental armed forces are involved in a conflict occurring on its territory. In other words, Protocol II does not apply to NIACs between non-State armed groups or to NIACs in which State forces fight an armed group abroad. Third, the non-State armed group must have control over part of the territory. The extent of that territory and the sufficient degree of control is functionally determined: it must *enable* the group to comply with Protocol II (that it actually respects Protocol II is obviously not a condition for its applicability) and to conduct sustained and concerted military operations. The latter is a necessary condition for Protocol II's application but only one of the non-exhaustive indicators for the application of Common Article 3 and customary IHL. Although humanitarians often criticize Protocol II's high threshold of applicability, I think it is preferable not to require armed groups to comply with rules with which they cannot comply because unrealistic rules do not protect anyone and undermine IHL's credibility.

**6.41** It is controversial whether the ICC Statute also requires a higher threshold for some war crimes it defines. The ICC Statute divides war crimes in NIACs into two lists. According to the text of the Statute, one list ostensibly applies to all NIACs,[65] while the other list applies only to other NIACs 'that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'[66] Under the normal rule of treaty interpretation according to which a provision (or difference between provisions) is to be presumed to have an *effet utile*, one would conclude that there are two different scopes of application for the rules in each list of the ICC Statute (and therefore possibly equally for the underlying rules of IHL). However, the ICC decided differently, holding that both lists are subject to the same threshold of application.[67] This interpretation may be correct given that NIACs must perforce take place on a State's territory, they must always be protracted in the sense of fulfilling certain conditions of

65 ICC Statute, Art 8(2)(c), whose scope of application is defined in Art (8)(2)(d).

66 See the definition in ibid., Art 8(2)(f) on the scope of application of Art 8(2)(e).

67 ICC, *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) paras 132–4, 138–9.

intensity and armed groups must always have a minimum level of organization in order to make IHL of NIACs applicable.

### 6.1.3 Mixed conflicts

> An IAC and a NIAC may exist in parallel, in particular if another State intervenes in a NIAC to support an armed group without having overall control over that group or if both the governmental forces and the non-State armed group are supported by outside States. In such cases, the applicable IHL must be determined for each relationship. IHL of IACs applies only to relationships in which a State appears on both sides of the conflict.

**6.42** As discussed above, a NIAC may transform into an IAC when the non-State armed group fighting against governmental forces comes under overall control of an outside State. Practice also shows that it is possible for an IAC to turn into a NIAC if the government of one of the States party to the conflict changes and calls the former enemy State for support against forces of the former (de facto) government. This was the case in Afghanistan in 2002.[68] Such a change, however, should be admitted only very restrictively. Indeed, Convention IV and arguably Convention III contain rules that seek to prevent a State from reclassifying an IAC to the detriment of the affected persons by establishing a new government in parts of the adverse State it occupies.[69] However, free elections and a call by the UN Security Council to assist the new government (which occurred in 2002 for Afghanistan and in 2004 for Iraq) cannot be considered as mere changes introduced by the occupying power[70] that are unable to change the nature of the conflict.

**6.43** Outside of changes to a conflict's classification, it is also possible that IACs and NIACs co-exist. In particular, this is the case when an outside power intervenes in a NIAC to support a non-State armed group without having overall control of that group, such as the interventions in Kosovo in 1999 and in Libya in 2011. IHL of IACs governs such an intervention. The reverse case, in which an outside State intervenes to support governmental forces fighting a NIAC against a non-State armed group, remains subject to IHL of NIACs except for hostilities between that intervening State and another State intervening to support the rebels (for example, the conflict in Angola in the 1980s when Cuba

68 See Updated ICRC Commentary GC I, para 400.
69 See GC IV, Art 47, and indirectly GC III, Art 4(A)(3).
70 GC IV, Art 47.

supported the MPLA government while South Africa supported the UNITA rebels). State practice, ICJ jurisprudence, the ICRC and most scholars support such a subdivision of a conflict into the following components:[71]

1. The government versus an armed group: NIAC;
2. State supporting the government versus an armed group: NIAC;
3. State supporting an armed group versus the government: IAC;
4. State supporting an armed group versus State supporting the government: IAC.

**6.44** Such fragmentation does not facilitate the application of IHL as it can result in, for example, the application of different rules to the soldiers of the intervening State than to their comrades-in-arms from the rebel group.[72] It has therefore been suggested (in my view unsuccessfully) to apply collectively and *en bloc* IHL of IACs to mixed conflicts.[73]

## 6.2 IHL RULES EQUALLY APPLICABLE IN PEACETIME

Some IHL rules apply equally in peacetime to ensure preparation for the respect for IHL in a possible armed conflict or in relation with past armed conflicts or present armed conflicts fought elsewhere.

**6.45** While IHL normally applies only to and during an armed conflict, some IHL rules apply even in peacetime. In most cases, such rules apply because an armed conflict existed or exists elsewhere. In other cases, these rules help prepare for a possible future armed conflict. For example, States are obliged to ensure respect

71 See Zamir, above note 34, 103–11 (for the State practice); Online Casebook, ICJ, Nicaragua v. United States, para 219; Updated ICRC Commentary GC I, paras 402–5; Dietrich Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 Recueil des Cours 117, 131; Hans-Peter Gasser, 'Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon' (1983) 33 American University L Rev 145; James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313.

72 Under GC III, Art 12, the outside State intervening with the rebels may not transfer government soldiers to the rebels while government soldiers captured by the rebels turn into POWs under GC III, Art 4, once transferred into the power of the intervening State.

73 Eric David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 171–8; 'Final Report of the Commission of Experts Established pursuant to Security Council Res 780 (1992)', para 118, as annexed to UNSC, 'Letter Dated 24 May 1994 from the Secretary-General to the President of Security Council' (1994) UN Doc S/1994/674; ICRC, 'Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts' (ICRC 1971) paras 290–91, 301.

of IHL in an armed conflict, even when they are not parties to a particular conflict.[74] States must also prosecute individuals wherever they have committed grave breaches based upon the principle of universal jurisdiction.[75] Some IHL obligations are genuinely independent of the existence of any armed conflict but are simply designed to the lay the foundation during peacetime for the respect and implementation of IHL in case an armed conflict develops.[76] Specifically, States must disseminate the rules of IHL to their armed forces and the general public. States must also adopt legislation implementing IHL, including legislation that defines war crimes and establishes legal procedures for the prosecution of such crimes as well as legislation that protects the emblem of the red cross or the red crescent (and, if applicable, the red crystal). Even in peacetime, IHL strictly limits the use of those emblems.[77] Those rules apply even in the absence of any past, present or future armed conflict. Their main aim is to ensure that the emblem can perform its protective function in armed conflicts.

## 6.3 GEOGRAPHICAL SCOPE OF APPLICATION: WHERE DOES IHL APPLY IF THERE IS AN ARMED CONFLICT?

In an armed conflict, IHL does not only apply where hostilities occur; it applies to the entire territory controlled by the parties to the conflict. However, for conduct that occurs far away from where the actual fighting occurs, one must carefully assess whether IHRL prevails over the applicable IHL rules.

Beyond the entire territory of the States parties to an IAC or the State in which a NIAC occurs, the geographical limits of the IHL's applicability are controversial, especially in the case of NIACs. It is accepted that IHL of NIACs applies to the neighbouring State's territory when a NIAC spills over into that State's territory. However, it is controversial whether IHL of NIACs applies worldwide to hostilities between the parties. In my view, it applies to any conduct that has a sufficient nexus with the conflict, but other rules of international law may nevertheless prohibit such conduct, and IHRL may prevail over IHL.

**6.46** IHL of IACs applies in any location where opposing State forces exercise belligerent activity against each other irrespective of whether or not this activity occurs on their territories. In my view, even hostilities on the territory of a non-consenting neutral State are governed by IHL even though they are prohibited

74 See MNs 5.147–5.158.
75 See MNs 5.205–5.213.
76 See MNs 5.128–5.144.
77 See MNs 8.034–8.036, 8.043–8.044, 8.046–8.049.

by *jus ad bellum* and the law of neutrality, they are neither outside the geographical scope of application of IHL of IACs[78] nor prohibited by IHL. However, for conduct that occurs far away from actual hostilities between the parties, the conduct's nexus to the IAC and the question of whether IHRL prevails must be carefully examined.

**6.47** IHL's geographical scope of application in NIACs presents several controversies. First, it is controversial whether IHL of NIACs applies to the entire territory of the affected State if the conduct in question occurs very far away from the fighting. One may consider as an example the hypothetical situation in Vladivostok during the NIAC in Chechnya in the Russian Federation as Vladivostok is on the opposite side of the globe compared to Chechnya. Was IHL applicable in Vladivostok? Only in Chechnya, where hostilities occurred? Would it have been lawful for Russian security forces to target a Chechen fighter visiting relatives in Vladivostok? Alternatively, should those forces have tried to arrest and to detain the individual under domestic criminal law and IHRL? I agree with the ICTY that IHL of NIACs applies to 'the whole territory under the control of a party, whether or not actual combat takes place there.'[79] However, this is only the case for conduct that has a sufficient nexus to the NIAC. In addition, and in my view, IHRL would prevail on most issues in Vladivostok, including even for conduct that has a nexus to the NIAC.[80]

**6.48** The ICTY's view on geographical scope has a distinct consequence: IHL of NIACs equally applies on the territory of a State that either supports government forces abroad against a non-State armed group (for instance, the US in Afghanistan) or fights against such a group without the consent of the territorial government (for example, France in Syria).[81] Indeed, IHL cannot apply only in the territory controlled by one side. However, before IHL is applied in the mentioned examples in the US or France, the nexus with the NIAC and whether IHRL prevails must again be carefully examined.

**6.49** Beyond the border of the State where the NIAC originated or of the State that is a party to the NIAC, what is probably the majority opinion holds that there is a geographical limit to the applicability of IHL of NIACs. The main

78 The ICRC apparently disagrees. See Online Casebook, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015, para 54.

79 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 70. See also ibid., para 69.

80 See MNs 9.049–9.051, 10.273–10.283.

81 See Online Casebook, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015, paras 57–8.

reason why many are reluctant to admit that IHL applies worldwide once a NIAC exists is that IHL (even IHL of NIACs) is now often viewed as not only prohibiting and prescribing certain conduct but also as authorizing certain conduct that would otherwise be unlawful if IHL did not apply. For example, IHL of NIACs is often claimed as constituting a sufficient legal basis to target or detain enemies.[82]

**6.50** The most restrictive view posits that IHL of NIACs applies only on the territory of the State involved. This view could even be based upon the text of both Common Article 3 and Article 1(1) of Protocol II. This would make borders decisive, which they are for *jus ad bellum*. IHL, however, must apply according to the facts and protection needs, both of which may exist across borders. If fighting between governmental armed forces and an armed opposition group spills over into a neighbouring country, it would be artificial not to apply IHL until the intensity criterion is also satisfied in the neighbouring State. However, what is the acceptable geographical extent of this spill over? Does IHL apply worldwide to an individual or – a different criterion – their conduct linked to a pre-existing NIAC in another geographical location?

**6.51** This issue was at the heart of one of the controversies in the so-called 'war on terror'. Some States took the view that the nexus between an individual or event to a pre-existing armed conflict was sufficient to justify the application of IHL with respect to that person or event. The US, a proponent of this approach, took it one step further (at least theoretically speaking), alleging that a worldwide armed conflict existed against 'terrorism' and that IHL applied everywhere in the world to all US actions against terrorists.[83] This extreme view, however, did not prove to be legally tenable, and the US has since abandoned the term 'war on terror'. However, the US and other States continue to extend the geographical scope of the battlefield beyond the territories of States involved in NIACs, particularly with the ever-increasing use of drones. The limits of IHL's geographical scope – rather than the nature of the weapon system itself – is what challenges the growing use of drones.[84]

82 On detention, see Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye' (2011) 93 IRRC 189, 207. On the lethal use of force, see ICRC Expert Meeting, 'The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms' (Report prepared and edited by Gloria Gaggioli, ICRC 2013) 13–23; see also Online Casebook, Inter-American Commission on Human Rights, Tablada, para 178.

83 See, also for what follows, Marco Sassòli and Yvette Issar, 'Guantánamo, Detainees' (2015) in MPEPIL, paras 7–12.

84 See MN 10.063.

**6.52** The ICRC accepts the applicability of IHL in case a conflict spills over into a neighbouring country. By contrast, it rejects for 'law and policy' reasons the idea that IHL of NIACs applies worldwide, even when a legitimate target is attacked in an attack linked to the original NIAC. The ICRC, however, cannot clarify where the geographical limit lies between the spill over it accepts and the 'global battlefield' it rejects.[85] It merely indicates that this must 'be assessed on a case-by-case basis'[86] without providing any criteria for such an assessment.

**6.53** The ICRC's fears linked to worldwide targeting and detention of 'enemy fighters' based upon an 'authorization' provided by IHL of NIACs are understandable. However, I think that logic as well as the reality of modern weapons and conflicts dictate that geography as a decisive criterion for the application of IHL should be abandoned in favour of placing emphasis on the nexus of the conduct, the legitimacy of the target and the protections offered by other branches of international law even where IHL applies. Under this approach, IHL would apply worldwide to every act linked to a NIAC. First, however, conduct to be regulated must have a stronger nexus with the NIAC the further away from the NIAC it occurs. Second, the determination of legitimate targets and who may be detained in the midst of hostilities versus in places far away from the battlefield would differ in IHL. Third, and most importantly, IHRL would prevail on most issues and in most places as the *lex specialis*.[87] This presupposes, however, that IHRL is accepted as applying extraterritorially, even in the absence of territorial control, which is by far not the majority opinion.

## 6.4 TEMPORAL SCOPE OF APPLICATION: WHEN DOES THE APPLICATION OF IHL START AND END?

IHL starts to apply as soon as an IAC or a NIAC, as defined above, exists. Its applicability ends with the general close of military operations, which is later than the end of hostilities. In NIACs, it is irrelevant that the intensity of violence or the degree of organization of the armed group(s) involved falls below the level necessary to trigger the applicability of IHL of NIACs. IHL of military occupation ceases to apply only when the occupation ends. In all cases, persons who are still deprived of their liberty after the general end of applicability of IHL remain protected by it until they are released, repatriated or resettled.

85 See Online Casebook, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015, paras 55–68. For a more nuanced view, see Updated ICRC Commentary GC I, paras 472–81.

86 Updated ICRC Commentary GC I, para 482.

87 For a detailed discussion on this, see MNs 10.259–10.308. See also Noam Lubell and Nathan Dereijko 'A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65.

**6.54** Except for the above-mentioned rules that also apply in peacetime, IHL begins to apply as soon as the conditions for the existence of an armed conflict discussed above are fulfilled. For IACs, IHL applies as soon as force is used between States or as soon as the first segment of territory is occupied. For NIACs, it applies as soon as the necessary level of violence and degree of organization of the non-State armed group(s) involved are reached.

**6.55** When IHL ceases to apply is much more difficult to define. One difficulty that arises in practice is that armed conflicts seldom end with the total defeat of one side or genuine peace given that international society outlaws the use of force and often stops conflicts before total defeat or peace. Most frequently, contemporary armed conflicts result in unstable cease-fires, continue at a lower intensity or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later. Nevertheless, it is difficult for humanitarians to plead that the conflict in reality continues with parties that made declarations ending the conflict as humanitarians do not want to appear as 'war-mongers'.

**6.56** Another difficulty results from the treaty texts as they use vague terms to define the end of their application. IHL of IACs ceases to apply, with some exceptions, on the 'general close of military operations.'[88] This often occurs much later than the end of active hostilities,[89] but the ICTY wrongly appears to require 'a general conclusion of peace'.[90] Military operations comprise not only actual hostilities but also any hostile troop movements.[91] On foreign territory, troop movements always prevent the end of IHL's applicability unless those movements occur with the consent of the territorial State or relate to the administration of an occupied territory. On a party's own territory, in contrast, troop movements alone are obviously insufficient for IHL to remain applicable; they must be linked to a specific armed conflict. In practice, the close of military operations can only be determined ex post. In my view, declarations, agreements and UN Security Council Resolutions must be taken into account, but what counts is whether in reality they translate to a general close of military operations on the ground. Without declarations or agreements, a relatively long time must pass before it can be determined whether an absence of hostile military operations

88 See GC IV, Art 6(2) and (3); P I, Art 3(b).

89 However, at this stage, POWs nevertheless must be repatriated. See GC III, Art 118; see also MN 8.110.

90 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 70.

91 See Julia Grignon, *L'applicabilité temporelle du droit international humanitaire* (Schulthess 2014), 244–82, in particular 276–81, whose findings are summarized in the rest of this paragraph.

corresponds to a close or just to a lull. Declarations or agreements may shorten this period. Obviously, the end of IHL's applicability cannot occur only when a resumption of hostilities is impossible. Otherwise, IHL would cease to apply only once one side is completely defeated.

**6.57** An essential additional requirement is that this close of military operations must be 'general'. This means that it must occur between all allies on both sides of the (former) IAC. Therefore, even though Germany surrendered in May 1945, modern IHL would have continued to apply in Europe during the Second World War until Japan surrendered in August 1945. This additional requirement was misunderstood by the ICJ when it considered the end of the 'military operations leading to the occupation of the West Bank' as the decisive moment.[92]

**6.58** For occupied territories, IHL of military occupation continues to apply beyond the general close of military operations until the termination of the occupation[93] or, according to the wording of Convention IV, for one year beyond the general close of military operations with the exception of some rules that remain applicable as long as the occupying power exercises the functions of government.[94] These concepts will be discussed later in the context of the law of occupation[95] because they end the application of only some substantive IHL rules and presuppose an understanding of the concept of occupation.

**6.59** For NIACs, IHL ceases to apply, according to treaty law, at the 'end of the armed conflict',[96] while the ICTY requires the achievement of a 'peaceful settlement'.[97] The latter criterion cannot be correct because many NIACs, such as the NIAC in Sri Lanka that concluded in 2009, end without a settlement between the parties but rather with the simple defeat of one party. In my view, however, the ICTY correctly held that, while IHL of NIACs applies once there is a sufficient level of violence and organization of the parties, IHL continues to apply until the end of the conflict even when those levels are no longer met.[98] The beginning and the end of a NIAC therefore have different triggering

92 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 125.

93 P I, Art 3(b).

94 GC IV, Art 6(3).

95 See MNs 8.227–8.233.

96 P II, Art 2(2), does this very indirectly when it prescribes, as we will see hereafter, that some persons continue to be protected after that point in time.

97 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 70.

98 Online Casebook, ICTY, The Prosecutor v. Tadić: E. ICTY, The Prosecutor v. Ramush Haradinaj et al., para 100.

criteria. However, this leaves open the question of when a NIAC has ended. There are good reasons to also apply the 'general close of military operations' criterion to NIACs.[99]

**6.60** What limits the inconveniences resulting from such vagueness and the grey areas appearing in practice is that IHL continues to protect persons whose liberty is restricted until they are released, repatriated or, in particular if they are refugees, resettled.[100] This continued protection is therefore very important in practice. In IACs, this protection continues to apply to protected civilians deprived of their liberty during the conflict even if their deprivation was not related to the conflict, but it does not apply to persons arrested after the conflict. In contrast, this protection in NIACs extends to the frequent cases of persons arrested after the end of the conflict but only if their arrest is related to the conflict.[101]

## 6.5 PERSONAL SCOPE OF APPLICATION

### 6.5.1 Who is bound by IHL?

States are addressees of IHL. Most IHL rules, however, are only addressed to States parties to an armed conflict. Whether a State supporting another State in a NIAC is party to that NIAC depends on whether it is directly involved in undermining the military capacity of the adverse party.

The circumstances under which and the reasons why international organizations are bound by IHL are controversial. Even when they are not bound, troop-contributing States must ensure the respect of IHL rules by both their forces and the organization itself.

IHL of NIACs also binds non-State armed groups, but it is controversial why.

IHL rules criminalized as war crimes apply to all individuals (not only those linked to a party) for any conduct that has a sufficient nexus to an armed conflict. It is controversial whether and why other IHL rules apply to individuals except through the applicable domestic law.

99 Grignon, above note 91, 273–5; ICTY, *Prosecutor v Gotovina et al.* (Judgment) IT 06-90-T (15 April 2011) vol 2, para 1694.

100 See GC I, Art 5; GC III, Art 5; GC IV, Art 6(4); P I, Art 3(b).

101 P II, Art 2(2).

### a. States

**6.61** IHL treaties bind only their States parties, while customary law binds all States. Most IHL rules, however, are only addressed to parties to the conflict. When an armed conflict as defined above exists, it is therefore important to determine who are the States parties to that conflict.

**6.62** Who is a party to a conflict is a question mainly addressed by IHL's material scope of application. It can nevertheless raise problems when several States support governmental forces in a NIAC against one or several non-State armed groups. Specifically, one might argue that each State contributing to such a multinational operation is only bound as a party to the conflict if its forces individually fulfil the intensity requirement of IHL of NIACs. This, however, cannot be the case because it might – in an extreme case – result in no State being a party to the conflict when only the combined contribution of several States satisfies the necessary level of intensity. The ICRC has therefore suggested a support-based approach to this question.[102] When multinational forces intervene to support the governmental side in an existing NIAC, each contributing State is bound by IHL when its forces 'directly damage the party opposed to the armed forces they support…[or] directly undermine its military capabilities [even if the] action has an impact on the enemy only in conjunction with other acts undertaken by the supported party.'[103] Mere war-sustaining activities are insufficient.

### b. International organizations

**6.63** International organizations are not and cannot become parties to IHL treaties. They anyway cannot respect certain rules of IHL as only a State with territory, laws and courts can do so. IHL may nevertheless bind international organizations because either their internal law mandates it, they have otherwise undertaken to respect IHL or customary law applies to them. As with States, most IHL rules apply to an international organization only if it is a party to an armed conflict, and this status must be determined according to the same criteria used for States.

**6.64** With regard to unilateral commitments, the UN Secretary-General's Bulletin on Observance by UN Forces of IHL includes and summarizes many – but not all – rules of IHL and instructs UN forces to comply with them when engaged

102 Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', (2013) 95 IRRC 561, 583–7; Updated ICRC Commentary GC I, paras 445–6.

103 Ferraro, ibid., 585.

as combatants in armed conflicts.[104] This Bulletin raises a key question: are the rules it fails to summarize (such as those on combatant status and treatment of protected persons in occupied territories) never binding upon UN forces? We will deal with the questions of whether, why, when and to what extent IHL binds UN peace forces later on.[105] These same arguments also largely apply to the AU's peace forces.

**6.65** Customary law binds international organizations. Scholars generally assume that customary IHL is the same for States and international organizations.[106] They argue that, by virtue of their limited international personality, international organizations are bound by the same obligations as States when they engage in the same activities as States. I, however, doubt that this is the case because the organization most concerned by this issue – the UN – has insisted for a long time that it is bound only by the 'principles and spirit' of IHL.[107] Although this formulation has changed over time to become the 'principles and *rules*' of IHL,[108] the UN still denies that it is bound by many of the detailed rules of IHL. Instead, I submit that this precise issue of whether and to what extent international organizations are bound by IHL should be determined based upon the practice and *opinio juris* of not just States but also of international organizations.

**6.66** Even assuming that international organizations are not bound by IHL, those who actually act on their behalf may be bound either as individuals or as organs of (contributing) States that are bound. While States contributing troops are parties to IHL treaties, they certainly would not like to be parties to an armed conflict. It is also controversial whether and to what extent an operation can also be attributed to States if an organization has command and control.[109]

104 UN Secretary-General, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (1999) UN Doc ST/SGB/1999/13.

105 See MNs 9.116–9.125.

106 In this context, scholars often refer to the ICJ's famous dictum stating that '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.' See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179. In my view, the phrase 'incumbent upon them' simply admits that they may have such obligations and leaves it open which obligations they have under general international law.

107 For example, this phrase is used in the 'Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peace-keeping Operations', para 28, as annexed to UNGA, 'Report of the Secretary-General: Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects' (1991) UN Doc A/46/185.

108 See UN Department of Peacekeeping Operations, 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008) 15–6 (emphasis added).

109 See ECtHR, *Behrami and Behrami v France and Saramati v. France, Germany and Norway* (2007) 45 EHRR 85, paras 70–71, 132–44, 151–2.

In my view, the answer to the complex questions of attribution that arise in this case as in other situations depends on the facts. A State may contribute troops to a peace operation in such a way that it no longer has control over what those troops do, such as when an international organization retains exclusive command and control. In reality, however, contributing States maintain a very large degree of control over their forces. For example, UN peace forces remain subject to the disciplinary system of the contributing State. Everyone familiar with NATO operations knows of national caveats through which a contributing State insists that its troops may not perform certain acts.[110] Finally, even if the operation cannot be attributed to contributing States, they must still 'ensure respect' for IHL obligations.[111]

### c. Non-State armed groups

**6.67** In NIACs, it is obviously essential that both States *and* non-State armed groups are bound by IHL. Victims must be protected from those groups. Additionally, if IHL did not respect the principle of the equality of belligerents before IHL in NIACs, it would have an even smaller chance to be respected than it currently is in NIACs. Indeed, government forces would not benefit from any protection under IHL and opposing forces could claim that it does not bind them. Common Article 3 clearly provides that each party to a NIAC 'shall be bound to apply, as a minimum,' its rules. Although sovereignty-obsessed States avoided such a mention of non-State armed groups in Protocol II by formulating its rules in the passive voice, it is uncontroversial that its rules are equally addressed to non-State armed groups.[112]

**6.68** It is less clear *why* IHL of NIACs binds armed groups given that they can neither become parties to IHL treaties nor have – according to the majority opinion[113] – an opportunity to contribute to customary IHL.[114] There are several theories that attempt to answer this question. One answer suggests that when rules of IHL of NIACs are created by agreement or custom, States implicitly confer on non-State armed groups involved in such conflicts the international legal personality necessary to have rights and obligations under those rules. According to this theory, States confer through the IHL of NIACs the status of subjects of IHL onto the parties to such conflicts; otherwise, their legislative

110 See NATO Parliamentary Assembly, 'Resolution 336 on Reducing National Caveats' (15 November 2005).

111 GCs, Common Art 1.

112 ICRC Commentary APs, para 4442.

113 See MNs 4.41–4.44.

114 For references concerning the possible answers given to this question, which are summarized hereafter, see Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 The J of Intl Humanitarian Legal Studies 5, 13–4.

effort would not have the desired effect contrary to the *effet utile* principle. At the same time, however, States explicitly stated that the application of IHL by and to 'rebels' would not confer on the latter a legal status.[115] I think, however, this is only true with regard to rules of international law other than those of IHL.

**6.69** A second theory posits that non-State armed groups are bound by IHL because a State that incurs treaty obligations has legislative jurisdiction over everyone found on its territory, including armed groups. The State's treaty obligations then become binding on the armed group either through the implementation or transformation of international rules into national legislation or through the direct application of self-executing international rules. Under this construction, IHL indirectly binds non-State armed groups, who would only be directly bound if they become the effective government.

**6.70** A third explanation proposes that armed groups may be bound under the general rules on the binding nature of treaties on third parties.[116] This presupposes, however, that those rules are the same for States and non-State armed groups and, more importantly, that a given armed group has actually expressed its consent to be bound. According to a fourth theory, the principle of effectiveness necessarily implies that any effective power in the territory of a State is also bound by the State's obligations. Fifth, non-State armed groups often want to become the government of the State, which is bound by the international obligations of that State. Indeed, international treaties and customary law do not bind governments but States.

**6.71** Despite these explanations, it is preferable to obtain a commitment by the group itself to respect IHL, which the NGO Geneva Call tries to obtain through Deeds of Commitment deposited with the government of the Swiss Canton of Geneva.[117]

### d. Individuals

**6.72** It is clear that individuals are addressees of IHL rules that, if violated, have been criminalized as war crimes. Otherwise, such individuals could not have been tried by international tribunals, in particular by tribunals that were constituted after the crimes were committed.

115 See GCs, Common Art 3(4).

116 Antonio Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 423–9.

117 See MNs 10.243–10.250.

**6.73** Whether individuals are addressees of other IHL rules is less clear.[118] That other IHL rules also address individuals is often assumed based upon the principle of effectiveness. Indeed, even the members of the armed forces would otherwise not be bound by IHL and only the State to which they belong would be bound. Another explanation is based upon the obligation to disseminate IHL. Why would individuals need to know IHL rules if they are not obligated to respect them? The problem with both explanations is that the aforementioned phenomena may also be explained simply by a State's desire that *its* obligations are complied with by its organs and by persons finding themselves under its jurisdiction.

**6.74** The traditional alternative explanation is that IHL binds individuals through domestic laws States must adopt in order to implement their IHL obligations or as self-executing obligations in monist constitutional systems. This explanation, however, presents a serious weakness: it does not explain why the individuals are bound if the State fails to adopt implementing legislation and if the relevant IHL rule is not self-executing. Some people try to overcome this weakness by referring to customary IHL, but, as is the case for international organizations, it is not clear why non-criminalized customary law obligations of States should bind individuals except if those obligations become part of the common law in Anglo-Saxon legal systems.

**6.75** The jurisprudence to date has discussed in the NIAC context the precise range of persons who are the addressees of IHL.[119] Certainly, members of armed forces or non-State armed groups as well as all others mandated to support the war effort of a party to the conflict are bound by IHL. Beyond that, all those acting for such a party, including all public officials on the government side, must comply with IHL in the performance of their functions. Otherwise, judicial guarantees (which are essentially of concern to judges), rules on medical treatment (which are equally addressed to ordinary hospital staff) and rules on the treatment of detainees (which also apply to ordinary prison guards) could not have their desired effect because those groups cannot be considered as supporting the war effort. Individuals who are not connected to one party but nevertheless commit acts of violence contributing to the armed conflict for reasons connected with it

118 For a thorough discussion of the answers summarized in the following paragraphs and references, see Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (CUP 2013) 350–82.

119 In my view, the ICTR Appeals Chamber correctly held that the Trial Chamber had erred with its much more restrictive view, which still transpires in many ICTR judgments. See Online Casebook, ICTR, The Prosecutor v. Jean-Paul Akayesu: B. Appeals Chamber, paras 432–45.

are at least bound by the criminalized rules of IHL. If such individuals were not considered to be addressees of IHL, most acts committed in anarchic conflicts would be neither covered by IHL nor consequently punishable as violations of IHL. In my view, there is no limitation to the persons addressed by criminalized rules of IHL. Everyone is an addressee of rules defining war crimes. Only the nexus requirement, which is discussed below, limits the applicability of IHL. However, it is unclear whether individuals, especially those who do not represent a party to the conflict, are bound by all rules of IHL that are not criminalized for behaviour that has the necessary nexus to the armed conflict.

### 6.5.2 Who is protected by IHL?

> Geneva Conventions III and IV mainly protect 'protected persons', that is, enemies in the power of a party. To a differing extent and subject to some controversies, other rules increasingly cover all persons affected by an armed conflict or all civilians.

**6.76** As IHL was initially developed for IACs to cover, in conformity with the traditional function of international law, inter-State relations, it aimed essentially to protect 'enemies' or, in other words, members of the enemy armed forces and civilians of enemy nationality. Until today, Convention IV therefore defines 'protected persons' who enjoy its full protection as basically consisting of civilians of enemy nationality.[120] Similarly, Convention III protects combatants belonging to the armed forces of the enemy. In their case, however, what counts is the power on which they depend and not their nationality. Nevertheless, it is often considered that customary law permits a Detaining Power to deny its own nationals POW status even if they fall into its hands as members of enemy armed forces. In any event, such persons may be punished for their mere participation in hostilities against their own country.[121]

**6.77** Nonetheless, the Geneva Convention of 1864 prescribed that '[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.'[122] Even today, the definitions of protected persons under Conventions I and II do not refer to nationality or the need to be in the power of the

120 See GC IV, Art 4. For nuances and a discussion on the ICTY's new interpretation of this rule referring to the allegiance rather than the civilian's nationality, see MNs 8.150–8.158.

121 See MN 8.085.

122 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) 129 CTS 361, Art 6(1).

enemy.[123] Furthermore, the rules on the conduct of hostilities apply equally to all hostilities in IACs, and all civilians, whatever their nationality, benefit from those rules as long as an attack is directed against the adversary in the IAC.[124]

**6.78** Finally, persons in IACs affected by the conflict who are not 'protected persons' do not completely lack protection when in the power of a party. In conformity with and under the influence of IHRL, they benefit from a growing number of protective rules.[125] In particular, Article 75 of Protocol I offers basic human rights-like guarantees to all those who do not benefit from more favourable treatment under IHL.[126] These rules, however, never offer the full protection that is foreseen for 'protected persons'.

**6.79** IHL of NIACs by definition protects persons vis-à-vis their fellow citizens. It therefore applies equally to all persons affected by such a conflict. Article 3 common to the Conventions and Protocol II even go so far as protecting members of armed forces or armed groups who are 'hors de combat by sickness, wounds, detention or any other cause' against their own comrades as long as a nexus with the conflict exists.[127]

## 6.6 NEXUS: IHL APPLIES ONLY TO CONDUCT LINKED TO AN ARMED CONFLICT

IHL applies only to conduct linked to an armed conflict. This can be viewed as a distinct and additional nexus requirement for the applicability of IHL or as an aspect of the determination of whether certain conduct falls under the material, geographical, temporal or personal scope of application of IHL. Factors indicative of whether a sufficient nexus exists include the conduct's geographical proximity to the hostilities, the actor's affiliation to a party, the (perceived or real) affiliation of the target or victim to a party and the conformity of the conduct with a party's aims. Arguably, different rules require a different kind of nexus to become applicable to a given event.

123 GC I, Art 13; GC II, Art 13.

124 See P I, Arts 49(1)–(2) and 50; see also MN 8.296.

125 See, e.g., GC IV, Art 13 (on the field of application of Arts 14–26); P I, Arts 68–79. For further details, see MNs 8.130–8.148.

126 See MNs 8.146–8.148.

127 Updated ICRC Commentary GC I, paras 547–9; ICC, *Prosecutor v Ntaganda* (Judgment on the appeal of Mr Ntaganda) ICC-01/04-02/06 (15 June 2017) paras 51–63.

**6.80** Even on the territory controlled by a party during an armed conflict, IHL only governs conduct that has a sufficient nexus to the armed conflict. International criminal jurisprudence (through the requirement that a war crime must have a nexus to the conflict)[128] has mainly developed the nexus concept, and it is a requisite element of all war crimes under the ICC Statute.[129] Admittedly, it would be conceivable that the nexus requirement exists only for war crimes and not for the general application of IHL to a given conduct. Nevertheless, war crime jurisprudence and ICL scholarly writings hold that the nexus requirement must be satisfied because war crimes exist only if IHL applies and IHL applies only if there is a sufficient nexus.[130] This is reasonable given that IHL was developed to address the specificities of armed conflicts and simply does not provide appropriate rules for conduct unrelated to an armed conflict, even if that conduct occurs in a place where there is an ongoing armed conflict. Indeed, even if there is an armed conflict, IHL should not govern shoplifting, killings for jealousy or the ill-treatment of children by their parents or teachers except if particular factors establish the necessary link to the conflict.

**6.81** War crime jurisprudence as well as some scholarly works on IHL have clarified the nature of the nexus requirement for war crimes and have offered some indicative factors for it. However, the contours of the nexus requirement for the applicability of IHL remain totally unexplored in IHL scholarship, and it is unclear whether the type and scope of nexus required for IHL to apply are the same as the necessary nexus for war crimes. I believe that the jurisprudence on the requisite war crime nexus may also be used to determine the nexus necessary for IHL to apply because the case law adopts a very wide concept of nexus and the IHL concept must be at least as wide given that there can be no war crimes without an IHL violation.

**6.82** The nexus necessary for IHL to apply can be seen as a fifth cumulative requirement for IHL to apply (in addition to the requirements that the conduct falls into IHL's material, geographical, temporal and personal scope of application). It can also be viewed as merely one aspect in the evaluation of whether an

128 See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 38–61.

129 For all war crimes, the ICC Elements of Crimes require that '[t]he conduct took place in the context of and was associated with an international armed conflict [or a NIAC]'. See ICC, *Elements of Crimes* (ICC 2011) 13–42, Articles 8(2)(a) through 8(2)(e), including, for instance, element 4 of Article 8(2)(a)(i).

130 See Online Casebook, ICTY, The Prosecutor v. Tadić, B. Trial Chamber, Merits, paras 572–3; ICTY, *Prosecutor v Aleksovski* (Judgment) IT-95-14/1-T (25 June 1999) para 45. For scholarly writings, see, e.g., Michael Bothe, 'War Crimes' in Antonio Cassese *et al*. (eds), *The Rome Statute for an International Criminal Court: A Commentary* (OUP 2002) vol II, 388; Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 77–9; Mettraux, above note 128, 39; Gideon Boas *et al*., 'War Crimes' in *International Criminal Law Practitioner Library* (CUP 2008) vol II, 233.

act falls under IHL's material, geographical, temporal and personal scope of applicability. In particular, one may view the nexus requirement as one aspect restricting the material scope of application of IHL. While this categorization issue likely has no practical consequences, I favour the former view under which the necessary nexus is a distinct requirement. Even so, as I have suggested above, this approach displaces any geographical limitation to the scope of application of IHL and renders one aspect of determining who is an addressee of IHL superfluous. A particular nexus to a future armed conflict may even make IHL applicable before an armed conflict actually breaks out, such as, for example, if a weapon is programmed in view of a future attack.[131]

**6.83** When it comes to defining when a nexus exists, the ICTY adopts, at least in theory, a very broad definition (it was never confronted with a real borderline case where the nexus definition would have mattered for the outcome). Some, but not all, ICTR judgments adopted a more restrictive definition that led to acquittals for those accused of war crimes.[132] For the ICTY, it is sufficient that the armed conflict 'play[s] a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed *or* the purpose for which it was committed'.[133] In other words, one must simply establish that 'that the perpetrator acted in furtherance of or under the guise of the armed conflict.'[134]

**6.84** Whether a sufficient nexus exists for IHL to apply (or, in practice, whether a thorough examination of the nexus is necessary in a given case, which is often not the case) depends on different indicative factors in a given case and (probably) the rule to be applied. Indicative factors for this analysis include the geographical proximity to the hostilities, the author's affiliation to a party, the (perceived or real) affiliation of the target or victim to a party and the conformity of the act with the aims of a party.[135] In my opinion, the fact that the chaos caused by the conflict merely gave the perpetrator the opportunity to commit the act is insufficient.[136]

131 See also P II, Art 2(2), which requires a nexus between a deprivation of liberty and the conflict for IHL to continue protecting those deprived of liberty after a NIAC ends.

132 For a thorough analysis, see Antonio Cassese, 'The Nexus Requirement for War Crimes' (2012) 10 JICJ 1395, 1405–12.

133 ICTY, *Prosecutor v Kunarac et al.* (Appeals Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) para 58.

134 Ibid.

135 See ibid., para 59.

136 A US district court also rejected the ICTY's interpretation in the framework of a civil litigation for war crimes. See *In re XE Services Alien Tort Litigation* 665 F Supp 2d 569 (E.D. Va. 2009) 587.

**6.85** Furthermore, the type and degree of nexus required likely varies for different rules of IHL. Even a common law criminal tried by an occupying power in the absence of functioning local courts is a protected civilian who benefits from all of Convention IV's judicial guarantees.[137] A relationship between the attacker and a party is necessary for the rules on the conduct of hostilities to apply. A direct participation in hostilities also requires a belligerent nexus.[138] Likewise, Protocol II protects individuals detained during a NIAC only if they have been deprived of their liberty 'for reasons related to the armed conflict'.[139] Similarly, family reunification rules only apply to families dispersed owing to the armed conflict.[140] Only someone representing a party can violate judicial guarantees or the obligation to restore family links. The obligation to care for the sick applies as soon as the conflict reduces the health system's capacity to provide adequate care,[141] while the care given in a US hospital to a US cancer patient even during the US invasion of Iraq in 2003 is not covered by IHL. The fact that the conflict provided the perpetrator with an opportunity to commit rapes and reduced the likelihood of prosecution may be sufficient for IHL to apply to that conduct, but this is not sufficient for the IHL prohibition of hostage-taking to apply. In my view, an additional factor is required in both cases, such as the perpetrator's status as a soldier or the attacker's perception that the victim is affiliated with the enemy. Details on these examples, however, are unclear and deserve a serious analysis.[142]

137 See GC IV, Arts 4 and 64(1).

138 See MN 8.313.

139 P II, Art 5.

140 GV IV, Art 26; P I, Art 74.

141 Updated ICRC Commentary GC I, para 736. Ibid., para 743, goes even further.

142 I expect a doctoral thesis by Elvina Pothelet entitled *Searching for the nexus: a proposal to refine the applicability of IHL* in 2019.

# 7

# INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

**7.01** IHL rules applicable to IACs and NIACs are different but increasingly similar. Chapter 8 will present the substantive protective regimes of IHL by examining the more detailed IHL of IACs, and it will also mention the extent to which those regimes also apply to NIACs. The present chapter discusses why and to what extent IHL of IACs and IHL of NIACs are different or similar as well as where the rules applicable to NIACs can be found. It also addresses some controversies specific to IHL of NIACs.

## 7.1 THE RELATIONSHIP BETWEEN IHL OF NIACS AND IHL OF IACS

### 7.1.1 IHL of IACs as a starting point for the understanding of IHL

> While NIACs occur more frequently in practice, it is impossible to study IHL of NIACs without understanding IHL of IACs, which is older and more detailed. In addition, IHL of NIACs fails to answer many questions that necessarily arise in armed conflicts. Those gaps may be filled in by analogy to IHL of IACs or by customary rules, which are allegedly largely the same in both types of armed conflict. Both ways of filling the gaps nearly always lead to the same results.

**7.02** Two distinct branches of IHL exist in treaty law: IHL of IACs and IHL of NIACs. As for customary IHL, the ICRC and international criminal tribunals at least pay lip service to the idea that the customary character of a rule in IACs and in NIACs must be assessed separately, which is correct because customary rules also have a scope of application. Considering that NIACs are today much more frequent than IACs, an IHL book should start with a detailed presentation of IHL of NIACs followed by an overview of IHL of IACs for the few IACs that still exist (even then the practical importance of IHL of IACs is in

reality often limited because the parties do not accept the classification of the conflict as an IAC). However, this is not possible for different reasons.

**7.03** First, modern IHL initially developed as IHL of IACs. Only one lonely provision of the Conventions adopted in 1949 – Common Article 3 – applied automatically to NIACs. Second, the treaty provisions of IHL of NIACs offer less detailed protection. One might have to accept this if it is the will of the legislator. However, IHL of NIACs is also more rudimentary in the sense that it fails to provide answers to questions that necessarily arise in armed conflicts.[1] For example, it is simply impossible to follow Protocol II's prescription to respect civilians when conducting hostilities without knowing what constitutes a military objective and who can be lawfully targeted (in other words, who is not a civilian). Third, the customary rules of IHL of NIACs were largely formulated using nearly identical wording as the treaty rules of IHL of IACs.[2] Fourth, no one knows exactly how close the increasing tendency fuelled by tribunals, the ICRC and scholars to bridge the gap, which has been followed (at least in words) by States, has brought IHL of NIACs to IHL of IACs, which is more stable and most of its rules are less controversial.

**7.04** For these reasons, Chapter 8 will begin its discussion on substantive rules of IHL starting from the law of IACs, indicating, however, the extent to which each protective regime also applies (or at least may be claimed to apply) in NIACs. In particular, the questions of whether fighters may be detained and targeted similarly to combatants in IACs are very controversial as they are linked to discussions concerning the relationship between IHL and IHRL. These questions will therefore be discussed later on among the cross-cutting issues.[3] This chapter, however, will examine more broadly why the two kinds of conflicts are distinguished, the disadvantages and advantages of such a distinction, why these two branches of IHL have begun to converge and the limits of that convergence. It will also present some of the specific rules of IHL of NIACs.

### 7.1.2 Policy considerations

Applying IHL of IACs in NIACs by analogy or as customary law considerably increases the protective IHL rules. This may, however, decrease protection when less humanitarian IHL rules prevail over more humanitarian IHRL rules. Belligerents might also claim that applying IHL of IACs by analogy authorizes conduct

1 See MN 7.60.

2 Compare, e.g., ICRC CIHL Database, Rules 5–24, with P I, Arts 50–51, 57–58.

3 See MNs 10.259–10.308.

that would be otherwise prohibited under IHRL. Finally, it may also lead to unrealistic obligations for non-State armed groups.

**7.05** Humanitarian concerns originally prompted the idea of either bringing IHL of NIACs closer to IHL of IACs or even applying the latter to what is substantively a NIAC.[4] The aim was to improve the protection of persons affected by NIACs through the application of more detailed and protective rules that have been accepted by States for IACs. The gap between the two subsets of IHL can be bridged by applying IHL of IACs by analogy to NIACs, claiming that the customary rules (which are astonishingly similar to treaty rules of IACs) are the same in IACs and NIACs or reclassifying conflicts that are in substance NIACs as IACs. Two assumptions underlined the effort to bridge the gap. It was assumed that protection would not exist without the application of IHL and that the application of additional rules of IHL could only improve the fate of affected persons. Both assumptions have proven to be partially erroneous. Ironically, it is States and their military who today want to selectively apply IAC rules, in particular its 'authorizations', in NIACs. In fact, there are several drawbacks to applying IHL of IACs either as customary IHL or by analogy to NIACs.

### a. Crowding out IHRL

**7.06** First, IHRL developed significantly since the Geneva Conventions were adopted in 1949, and its applicability in times of armed conflicts is now uncontroversial, although it still remains controversial whether and in what circumstances it applies extraterritorially.[5] Pictet wrote in 1958 that:

> [T]he scope of application of [Common] Article [3] must be as wide as possible. There can be no drawbacks in this… It merely demands respect for certain rules, which were already recognized as essential in all civilized countries… What Government would dare to claim before the world, in a case of…mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?[6]

**7.07** What Pictet wrote about Common Article 3 is clearly no longer true for the whole of IHL of NIACs, in particular when it is expanded by analogy from that of IACs. According to the prevailing *lex specialis* approach, IHL rules prevail

4 See MNs 6.13–6.21, 7.17–7.22.
5 See MNs 9.021–9.022.
6 Pictet Commentary GC IV, 36.

over even more protective IHRL rules on the same subject matter.[7] When the rules of IHL in NIACs are more detailed, there is a greater risk for the comparatively more protective IHRL rules to be displaced by this *lex specialis*. Common Article 3 and Protocol II leave many crucial questions open, such as when a fighter belonging to an armed opposition group may be targeted or the reasons as well the procedure under which said fighter may be detained.[8] For such unanswered questions, treaty IHL of NIACs cannot constitute the *lex specialis* and IHRL should therefore apply. Once IHL of IACs applies to NIACs (either as customary law or by analogy), however, its rules displace IHRL as the *lex specialis*. Thus, fighters may be attacked at any time until they surrender or are otherwise *hors de combat*, and they may be detained without any individual procedure until the close of active hostilities. This would justify worldwide drone attacks against suspected associates of Al-Qaeda (assuming that the fighting against Al-Qaeda constitutes a NIAC) and indefinite detention without trial in Guantánamo.

### b. Does IHL of NIACs authorize killing and detention?

**7.08** Second, and intimately related to the first drawback, modern IHL was initially regarded as only imposing requirements and prohibitions on States. While treaty-based IHL may still be seen in this way, we will see, however, that many States, especially the US, increasingly argue that IHL also provides authorization to do certain things.[9] Even the ICRC has accepted this idea, and it is indeed undeniable for IACs. Therefore, according to an increasingly accepted argument, applying IHL of IACs by analogy or as customary law to NIACs authorizes the targeted killings of suspected Al-Qaeda associates (as the Obama administration argued) and the internment of fighters without any possibility to challenge the detention's lawfulness (as the US and UK administrations initially argued).[10] IHL would thus become a justification for denying protection afforded by IHRL and domestic legislation. It would also move away from being the protective legal regime envisaged by Henry Dunant to one that authorizes the deprivation of life and liberty during armed conflict. Humanitarians who argued for the analogous application of IHL of IACs to NIACs were unintentionally complicit in this metamorphosis.

7 See MNs 9.026–9.027, 9.031, 9.033, 9.043–9.051.

8 For a further discussion on these issues, see MNs 10.259–10.308.

9 See MN 10.003, 10.290.

10 For arguments by the US, see Marco Sassòli, 'The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect?' (2011) 104 Proceedings of the Annual Meeting of the American Society of Intl L 277, 277–80. For the UK's arguments, see Online Casebook, United Kingdom, The Case of Serdar Mohammed (High Court Judgment), paras 232–68.

### c. Are non-State armed groups able to comply with IHL of IACs?

**7.09** Law must take into account the social reality it seeks to govern. As IACs are fought between States, IHL of IACs accounted for the social reality of States as belligerents when it was adopted. By definition, NIACs are fought by non-State armed groups at least as much as by governmental armed forces. However, scholars and judges sometimes forget that IHL of NIACs also binds armed groups. IHL of NIACs will be less realistic and effective if it only accounts for the needs, difficulties and aspirations of one side due to the fact that it derives by analogy from the law accepted for IACs that addresses only States. In this respect, bringing IHL of NIACs closer to the law applicable to IACs may lead to rules that are unrealistic for armed groups. Unrealistic rules, however, do not protect anyone. The following examples highlight this risk.

**7.10** The ICTY's conclusion that command responsibility necessarily applies in NIACs[11] is logical only as far as State agents are concerned. However, did the judges realize that their pronouncement implies that command responsibility also applies to non-State armed groups in which commanders may not have the legal capacity to punish members who have committed violations as required by IHL of IACs to avoid responsibility for crimes committed by their subordinates?[12] Do they really require a commander of an armed group to conduct a trial in order to avoid criminal responsibility for war crimes committed by their subordinates? Would such a trial even be admissible under IHRL?

**7.11** When the ICRC Customary Law Study claims that most customary IHL rules, many of which parallel Protocol I's rules that apply to IACs as a matter of treaty law, apply equally to NIACs, does it bear in mind that this claim implies that each of these rules are also binding upon armed groups? For example, the ICRC contends (mainly based upon the practice of human rights bodies) that customary IHL prohibits arbitrary detention.[13] According to the ICRC, this prohibition requires that a basis for internment is previously established by law and that 'a person deprived of liberty [must be provided] an opportunity to challenge the lawfulness of detention'.[14] However, did the ICRC realize that its interpretation prevents non-State armed groups from detaining anyone unless they legislate and institute habeas corpus proceedings? Is this realistic?

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11 See ICTY, *Prosecutor v Hadžihasanović et al.* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47 (16 July 2003) paras 26–7, 29–31.

12 See P I, Art 86(2), last sentence.

13 ICRC CIHL Database, Rule 99.

14 Henckaerts and Doswald-Beck, 350.

**7.12** In my view, a serious enquiry into the perspective of armed groups should be made before drawing analogies between the IHL of IACs and NIACs on the basis of customary law or otherwise.

## 7.2 REASONS FOR THE DISTINCTION

From the point of view of States, IACs and NIACs are fundamentally different. In particular, no State would offer combatant status and combatant privilege to citizens or non-State armed groups fighting against the State or each other.

**7.13** In the next section, we will see that most humanitarian problems are the same in NIACs and in IACs and that there is no humanitarian justification to discriminate against persons affected by NIACs. Despite this and the fact that it is difficult and often controversial to differentiate NIACs from IACs,[15] all States want to maintain this distinction for several reasons.

**7.14** First, wars between States were considered to be a legitimate form of international relations until recently. Even today, the use of force between States is still not totally prohibited. Conversely, a State's monopoly on the legitimate use of force within its boundaries is inherent in the concept of the modern State, and this necessarily precludes non-State armed groups from waging war against other factions or the government.

**7.15** Second, the protection of victims of IACs must necessarily be guaranteed through rules of international law. States have accepted such rules for a long time, including States that adhere to the most absolutist concept of sovereignty. For example, even the most sovereignty-obsessed State accepts that enemy soldiers killing its own soldiers on the battlefield may not be punished for their mere participation because they have a 'right to participate' in the hostilities,[16] including even on its territory and under its jurisdiction.

**7.16** On the other hand, IHL of NIACs is more recent. For a long time, States took the position that such conflicts are internal affairs exclusively governed by domestic law. As for combatant and POW status, no State accepts that its citizens can wage war against their own government. No government would renounce in advance the right to punish its own citizen for participating in a rebellion,

15 See MNs 6.08–6.11, 6.13–6.21, 6.43–6.44.
16 P I, Art 43(2).

which would be necessary to apply all of IHL of IACs to the situation. Indeed, applying all the rules of the contemporary IHL of IACs to NIACs is incompatible with the very concept of the contemporary international society made up of sovereign States. Conversely, if the international community is ever organized as a world State, all armed conflicts would be 'non-international' in nature, and it would thus be inconceivable for combatants to have the right to participate in hostilities independently of the cause for which they fight as foreseen by IHL of IACs. In my view, despite the noble aspirations of humanitarians and the desire of professors to make the study of IHL easier for students, the distinction between IACs and NIACs can only disappear in a world State.

## 7.3 DISADVANTAGES OF THE DISTINCTION

From a strictly humanitarian point of view, the IAC and NIAC distinction has many disadvantages in terms of protection. It also requires classifying an armed conflict as IAC or NIAC, which is often difficult as well as politically delicate and which can lead to artificial distinctions.

**7.17** From a humanitarian point of view, victims of NIACs should be protected by the same rules as victims of IACs because all victims face similar problems and need the same protection. Furthermore, the fact that different rules for protection apply in IACs and NIACs obliges humanitarian players and victims to classify the conflict before those rules can be invoked. This can be theoretically difficult,[17] and it is always politically delicate. Classifying a conflict may involve assessing questions of *jus ad bellum*. For instance, invoking the law of NIACs in a war of secession implies that the secession is not (yet) successful, and this is not politically acceptable for the secessionist authorities fighting for independence. On the other hand, invoking the law of IACs suggests that the secessionists succeeded in constituting a separate State, which is not acceptable for the central authorities. Finally, applying in parallel both branches of law, which have different rules, in mixed conflicts raises major difficulties in practice.[18]

17 See MNs 6.08–6.11, 6.13–6.21, 6.43–6.44.
18 See MNs 6.43–6.44.

## 7.4 FACTORS THAT CONTRIBUTED TO BRINGING IHL OF NIACS CLOSER TO IHL OF IACS

While IHL of NIACs has come much closer to IHL of IACs in the last 25 years, the extent to which this has occurred is controversial and unclear. Both ICTY jurisprudence and the ICRC Customary Law Study contributed to this rapprochement. Even States – at least in their statements and laws – have largely accepted this tendency.

**7.18** In the last few decades, the law of NIACs *has* indeed become much more similar to the law of IACs. This also corresponds to the increasing influence of IHRL, which does not differentiate between IACs and NIACs. However, this development mainly started with the ICTY's case law. In its first decision in the *Tadić* case, the ICTY initiated the rapprochement of the law of NIACs with the law of IACs, holding that the same rules largely apply to IACs and NIACs and that the concept of war crimes is equally applicable in NIACs under customary international law.[19] In its famous *dicta*, the Court noted the following:

> [I]in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[20]

**7.19** In addition, relying on 'elementary considerations of humanity and common sense', the Court considered that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.'[21] However, the Court admits at the end of its discussion that there are differences between the two types of conflict:

> The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all

19 See, in particular, Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, paras 96–136.

20 Ibid., para 97.

21 Ibid., para 119.

> its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[22]

**7.20** States accepted the ICTY's finding, which was revolutionary[23] despite the last-mentioned caveat, rather favourably, and they included similar crimes for IACs and NIACs in the ICC Statute, although they still preferred to list those crimes separately.[24] Outside the field of criminal law, recent treaties on the use of weapons and on the protection of cultural property apply the same rules to both categories of conflict.[25]

**7.21** More recently, the ICRC Customary Law Study also contributed to bridging the law of NIACs with the law of IACs by concluding that 136 (if not 141) rules out of 161 rules apply to both categories of conflict.[26] This is even more revolutionary as many of these rules resemble Protocol I's provisions that were drafted for IACs.

**7.22** Finally, several States abolished the distinction between IACs and NIACs in their national war crime legislation.[27] As this legislation applies equally based on universal jurisdiction (the exercise of which is permitted by international law only for international crimes), such States must necessarily consider that war crimes defined by international law (and the underlying IHL rules) are the same in IACs and NIACs.[28] An interesting case is Switzerland because

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22 Ibid., para 126.

23 Eminent UN experts wrote only one year earlier: 'The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.' See 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', para 52, as annexed to UNSC, 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' (1994) UN Doc S/1994/674.

24 Compare ICC Statute, Art 8(2)(a) and 8(2)(b) with ibid., Arts 8(2)(c) and 8(2)(e).

25 For the amendments adopted to the CCW in 2001 and its Protocol II in 1996 to extend the application of both treaties to NIACs, see MN 4.17. See also HC on Cultural Property, Art 19; Protocol II to the HC on Cultural Property, Art 22.

26 See generally ICRC CIHL Database.

27 See Online Casebook, Belgium, Law on Universal Jurisdiction: A. 2003 Criminal Code, Art 136(c), and, to a large extent Germany, Online Casebook, Germany, International Criminal Code, section 8(1) and (2) while section 8(3) maintains the distinction.

28 Online Casebook, Switzerland, Criminal Code, Arts 264c–264j.

it foresees such equal application 'unless the nature of the offence requires otherwise'.[29]

## 7.5 THE LAW APPLICABLE IN NIACS

### 7.5.1 Treaty law of NIACs

**7.23** Despite the fact that it is impossible to understand and apply IHL of NIACs in isolation from IHL of IACs and despite the inevitable need to either analogize or find applicable customary rules (which are miraculously the same as in IACs), practitioners and students must first examine treaty provisions that are specifically applicable to NIACs when looking for a solution to a NIAC problem. They will often find the necessary solution by correctly interpreting the applicable treaty rules, including by taking other branches of international law into account.

#### a. Common Article 3

> Article 3 common to the Conventions offers basic guarantees to civilians who do not or no longer directly participate in hostilities as well as to members of armed forces or non-State armed groups who have laid down their arms or are *hors de combat*. It is controversial whether the prohibition against 'murder' also covers the killing of civilians in the conduct of hostilities.

**7.24** This section does not constitute a commentary on Common Article 3.[30] This book discusses elsewhere this provision's scope of application,[31] the right of initiative it gives impartial humanitarian bodies,[32] the ad hoc agreements it encourages,[33] who its addressees are[34] and its impact on the status of non-State armed groups.[35] Many aspects of its substantive rules of conduct will be examined in Chapter 8 along with the same rules applicable in IACs. In addition to providing a brief overview, this section will therefore only discuss problems specific to Common Article 3.

29 Ibid., Art 264b.
30 For an extensive commentary on Common Article 3, see Updated ICRC Commentary GC I, paras 351–907 (consisting of 200 pages in the printed version).
31 See MNs 6.32–6.39.
32 See MNs 5.121–5.123, 5.175–5.176.
33 See MN 4.22.
34 See MN 6.67.
35 See MN 6.68.

**7.25** Common Article 3 has been defined as 'a Convention in miniature'.[36] The ICJ determined that it corresponds to customary law, and the ICJ and the US Supreme Court applied it as a common minimum to both IACs and NIACs in order to avoid classifying the conflict.[37] Indeed, all of Common Article 3's substantive rules also appear somewhere in IHL of IACs, but it obviously only applies as a treaty rule to NIACs.

**7.26** Common Article 3 protects '[p]ersons 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'. We will see that the addition 'who have laid down their arms' is an important argument for considering that – in contrast to civilians – members of armed forces or non-State armed groups are not protected against attacks merely as soon as they do not directly participate in hostilities.[38]

**7.27** In my view, this wording is also pertinent to the controversy concerning whether Common Article 3 also applies to the conduct of hostilities as the ICTY argues[39] or whether it only protects persons in the power of a party as the ICRC and most scholars contend.[40] Admittedly, the customary rules on the conduct of hostilities, which are arguably the same in IACs and NIACs, are much more detailed than Common Article 3's prohibition against 'murder'. I also concede that a belligerent can commit mutilations, cruel treatment, taking of hostages and executions without previous judgment, all of which Common Article 3 prohibits, only in respect of persons who are in its power. Nevertheless, I agree with the ICTY that at least the prohibition of murder also covers attacks against civilians during the conduct of hostilities. Otherwise, why would Common Article 3 define exactly who is protected and why did the ICRC Commentary dedicate four pages to this question?[41] As no one in the power of a party, including even members of armed forces or non-State armed groups, may be mutilated, tortured or murdered, Common Article 3's limited personal scope of application is only meaningful for determining who is protected against attacks.

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36 'Final Record of the Diplomatic Conference of Geneva of 1949' (Federal Political Department of Switzerland 1950) vol II-B, 326, Article 2A.

37 See Online Casebook, ICJ, Nicaragua v. United States, paras 218–9; Online Casebook, United States, Hamdan v. Rumsfeld: I. United States Supreme Court Decision – Part 1, Section VI(D)(ii).

38 See MN 8.316.

39 ICTY, *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) paras 234–40, 260–61, 277–83; see also the decisions and reports as well as scholarly writings referred to in Updated ICRC Commentary GC I, para 541, fns 282 and 283, respectively.

40 See Updated ICRC Commentary GC I, paras 540–43, with references to the *travaux préparatoires*, military manuals and academic writings.

41 Ibid., paras 518–39.

**7.28** The persons defined above must '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.' The principle of humane treatment is left undefined. The following sub-paragraphs provide only examples of what humane treatment implies in terms of prohibitions. Humane treatment requires respect for a person's inherent dignity as a human being.[42] Beyond that, it may be argued that, in an effort of systemic integration,[43] this term must be interpreted in light of IHRL[44] and ICL jurisprudence.[45] However, there is a problem with using IHRL to better understand the meaning of humane treatment: IHRL, according to the majority opinion, is not addressed to non-State armed groups.[46] This problem could be overcome by considering that, as Common Article 3 obliges non-State armed groups to treat persons humanely, the meaning of humane treatment must be interpreted in conformity with the rest of international law. It may even be argued that all of the prohibitions and prescriptions of IHL of IACs discussed in Chapter 8 that are neither related to combatant and POW status nor limited to occupied territories are simply more precise definitions of humane treatment.[47]

**7.29** Although Common Article 3's related non-discrimination clause is not autonomous but rather linked to the obligation of humane treatment, it is very important. There is no NIAC in which belligerents treat everyone inhumanely. In reality, such treatment is always limited to persons of a certain ethnic origin or religion or those having a real or perceived affiliation with the adversary, and it is therefore prohibited by the non-discrimination clause.

**7.30** Article 3(1)(1)(a)–(d) respectively prohibit 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'; the 'taking of hostages'; 'outrages upon personal dignity, in particular humiliating and degrading treatment'; and 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. For the same reasons discussed above, these prohibitions

42 Ibid., para 557 (citing to ICTY, *Prosecutor v Aleksovski* (Judgment) T-95-14/1-T (25 June 1999) para 49).

43 Gabriel Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (Lit 2012) 145–322; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

44 See, e.g., ICCPR, Arts 7 and 10.

45 With respect to the crime against humanity of persecution under the ICC Statute, see Art 7(1)(h).

46 See MNs 9.023–9.025; Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye' (2011) 93 IRRC 189, 190.

47 See Gabor Rona and Robert McGuire, 'The Principle of Non-Discrimination' in Academy Commentary, 201. See also Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 119.

must also be interpreted in light of similar prohibitions contained in IHL of IACs[48] and, in my view, IHRL. In particular, IHRL details the judicial guarantees that 'are recognized as indispensable by civilized peoples.' In this respect, IHRL constitutes the *lex specialis*,[49] but, even though derogations from judicial guarantees may be admissible pursuant to the text of IHRL treaties, Common Article 3(1)(1)(d) clarifies that those guarantees fully apply in NIACs.

### b. Protocol II

Although States seriously watered down Protocol II when compared to the ICRC's initial draft and Protocol I, it offers details on Common Article 3's fundamental guarantees. It also contains (very rudimentary) rules on the conduct of hostilities, the protection of children, the protection of medical personnel and units as well as their use of the emblem, relief operations and the prohibition of forced movements of civilians. However, it only applies to some NIACs.

**7.31** We have already seen that Protocol II applies only to some NIACs.[50] It provides more detail on issues previously covered by Common Article 3. It also adds rules that provide further guarantees for people in the power of a party. Furthermore, it contains – for the first time in a treaty on IHL of NIACs – a prohibition against forced displacement as well as rules on the conduct of hostilities, relief operations and the dissemination of IHL.

#### *i. The drafting history of Protocol II*

**7.32** It is necessary to briefly explain Protocol II's history before examining its provisions. In 1974, the ICRC submitted a draft Protocol II containing 49 articles to the Diplomatic Conference.[51] The conference committees discussed its provisions in parallel with the provisions concerning the same issues in draft Protocol I. While this process led to a text that was very similar to Protocol I (obviously without provisions on combatants and POWs), it was clear that it would not be adopted by consensus and it would perhaps not even reach the necessary two-thirds majority. Newly independent States of the Global South lost all interest in Protocol II after 'their' national liberation wars were incorporated into IACs, and they feared that detailed provisions protecting 'rebels'

48 See Pejic, above note 46, 205–19.

49 See MN 9.046.

50 See P II, Art 1; see also MNs 6.40–6.41.

51 'Official Records of Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)' (Federal Political Department of Switzerland 1978) vol III, 33–46.

could be used to undermine their recently gained sovereignty and territorial integrity.[52] In addition, some rules were difficult to apply for non-State armed groups. Therefore, the Pakistani delegation submitted a 'simplified' draft based upon an earlier 'simplified' Canadian draft. The Pakistani draft was elaborated at the initiative of Iraq and in close coordination with Canada.[53] It is interesting to note that these three very diverse States either faced or feared secessionist movements at the time.

**7.33** The Pakistani draft deleted half of the provisions in the ICRC's draft, fearing that those provisions would otherwise imply a 'recognition' of non-State armed groups. It systematically deleted the terms 'parties to the conflict' and formulated all rules in the passive voice. It also removed most rules on the conduct of hostilities. After further negotiations and additions, this draft was adopted as Protocol II.[54] Owing to its history, there are no useful '*travaux préparatoires*' that could help interpret Protocol II's provisions.[55]

*ii. Additional details provided by Protocol II compared with Common Article 3*

**7.34** Article 4 of Protocol II provides fundamental guarantees to '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities…'. The prohibition against ordering that there are no survivors shows that Article 4's fundamental guarantees are not only limited to persons in the power of a party. Although it repeats some guarantees previously prescribed in Common Article 3, it also clarifies what was already implicit in that provision, such as the prohibitions against collective punishments,[56] rape, enforced prostitution as well as any form of 'indecent assault',[57] acts of terrorism,[58] slavery as well as the slave trade and threats to commit prohibited acts.

**7.35** Article 5 deals with the treatment of anyone whose liberty has been restricted for reasons related to the armed conflict. Paragraph 1 outlines certain aspects of the minimum level of treatment that such persons are to be accorded in addition to the treatment already due to them under Article 4. These include the provision of food, drinking water and safeguards regarding health and hygiene

52 P II, Art 3, was introduced to reduce these fears.

53 Rosemary Abi-Saab, *Droit humanitaire et conflits internes: origines et évolution de la réglementation internationale* (Institut Henry-Dunant and Pédone 1986) 138.

54 For this history, see ICRC Commentary APs, paras 4402–18.

55 However, for a systematic effort to regroup the discussions on every single provision of draft Protocol II, see Howard S. Levie, *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff 1987).

56 P II, Art 4(2)(b). For a further discussion on this prohibition, see MN 8.163.

57 P II, Art 4(2)(e); see also MN 8.135.

58 P II, Art 4(2)(d). For the meaning of this term, see MNs 10.033–10.039.

as well as the rights to receive collective and individual relief, to practice their religion and to appropriate working conditions. Detaining authorities must respect the other guarantees listed in paragraph 2 only 'within the limits of their capabilities', a limitation which may be particularly realistic for non-State armed groups. These include the obligations to: separately detain men and women (except for members of the same family); allow detainees to correspond with their families[59]; locate detention facilities such that detainees are not exposed to the dangers arising out of the armed conflict; and allow detainees the benefit of medical examinations. The final paragraph requires those deciding on the release of persons deprived of their liberty to take measures necessary to ensure their safety.

**7.36** Article 6 outlines the judicial guarantees that apply to criminal 'prosecution and punishment' for 'offences related to the armed conflict.' It may be seen as specifying the judicial guarantees that Common Article 3 considers as recognized by civilized peoples. One textual change worth mentioning is that persons must be tried and sentenced before 'a court offering the essential guarantees of independence and impartiality.' In contrast, Common Article 3 requires prosecutions before a 'regularly constituted court' – a phrase that appears to include only courts established by law.[60] Such a requirement would be nearly impossible for non-State armed groups to fulfil.[61] We will discuss later paragraph 5's encouragement to grant amnesty.[62]

### *iii. New issues covered by Protocol II*

**7.37** Protocol II also covers other issues that are not addressed in Common Article 3, namely, the prohibition of pillage,[63] the protection of children,[64] the protection of medical personnel and units[65] as well as their use of the emblem,[66] the regulation of relief operations[67] and the prohibition against forced movements of civilians. The latter shows that IHL of NIACs can go further than IHL of IACs except for occupied territories. Indeed, Article 17 of Protocol II is very similar to Article 49(1)–(5) of Convention IV that applies to occupied territories.[68] First, Article 17 prohibits the forced displacement of civilians 'for reasons

59 See MNs 8.144–8.145.
60 See ICRC Commentary APs, para 4600.
61 Ibid.
62 See MN 8.123.
63 P II, Art 4(2)(g). For the meaning of this concept, see MNs 8.164–8.165.
64 P II, Art 4(3). For further details, see MNs 8.136–8.141.
65 P II, Arts 9–11. For additional details, see MNs 8.011–8.029.
66 P II, Art 12. For a further discussion on this issue, see MNs 8.034–8.049.
67 See P II, Art 18(2); see also MNs 10.205–10.215.
68 See MNs 8.261–8.262.

related to the conflict' unless it is required by 'the security of the civilians involved or military necessity'. Second, in cases of lawful displacement, it provides guarantees to displaced civilians in addition to expressly stipulating that they may never be compelled 'to leave their own territory for reasons related to the conflict.' This last prohibition clearly covers the territory of the State concerned, and it equally covers individual deportations. It also arguably applies to territory held by a non-State armed group.

**7.38** Finally, Protocol II contains specific rules on the conduct of hostilities. The civilian population and civilians 'enjoy general protection against dangers arising from military operations.'[69] This protection can be considered to include the rules on proportionality and precautions.[70] Civilians may not be targeted (which may be regarded as including the prohibition of indiscriminate attacks)[71] except if and for such time as they directly participate in hostilities.[72] Furthermore, acts and threats of violence with the primary purpose to spread terror among the civilian population are prohibited.[73] Finally, Protocol II has specific provisions that summarize the rules of IHL of IACs that protect objects indispensable for the survival of the civilian population,[74] works and installations containing dangerous forces[75] and cultural heritage.[76] To the extent these summarized rules remain unclear, recourse to the parallel rules of IHL of IACs is appropriate.

### 7.5.2 Methods to make IHL of IACs directly applicable to NIACs

> Parties to a NIAC may agree that the whole of IHL of IACs or only parts of it apply. Traditionally, the government could also make IHL of IACs applicable to a NIAC by recognizing the belligerency of a non-State armed group, but this possibility is no longer used.

**7.39** Recognition by a government of a non-State armed group's belligerency and ad hoc agreements are the most orthodox and traditional ways to directly apply IHL of IACs to a NIAC. We discussed the nature of ad hoc agreements

69 P II, Art 13(1).
70 See MNs 8.319–8.337.
71 See P II, Art 13(2).
72 See Ibid., Art 13(3); see also MNs 8.311–8.313.
73 See P II, Art 13(2); see also MNs 8.284, 8.303.
74 See P II, Art 14; see also MNs 8.353–8.354.
75 See P II, Art 15; see also MNs 8.355–8.356.
76 See P II, Art 16; see also MNs 10.171–10.185.

elsewhere.[77] Common Article 3 encourages parties to NIACs to conclude such agreements in order to bring all or parts of IHL of IACs into force in a NIAC.

**7.40** Prior to Common Article 3, IHL of IACs could directly apply to NIACs only if the government of the State concerned recognized the non-State armed group's belligerency through a unilateral and discretionary act.[78] Many argue that recognition of belligerency can also be tacit if the government adopts in a NIAC measures affecting third States that it could adopt towards those third States only in an IAC (such as declaring a blockade on the high seas).[79] Third States may also recognize a group's belligerency, but this would not make IHL of IACs directly applicable between the parties to the NIAC.[80] It would rather allow the law of neutrality to apply directly between the third State and the parties to the NIAC. In any event, there have been no recognitions of belligerency – even alleged ones – in the last 120 years.[81] In 1999, Venezuelan President Hugo Chavez suggested that the Colombian government should recognize the FARC's belligerency, but Colombia refused to do so.[82] Even if the possibility to recognize belligerency has not fallen into desuetude, it is at least no longer used.[83]

**7.41** Several problems arise in both ad hoc agreements and a recognition of belligerency. First, it must be clarified who constitutes a 'protected civilian' in a NIAC and thus benefits from the full protection of Convention IV. In contrast to the text of Article 4 of Convention IV, protected civilian status in this context cannot depend on a person's citizenship because most people in a NIAC have the same citizenship. Here, the allegiance criterion developed by the ICTY for IACs could prove useful,[84] but it is important not to forget those who have no allegiance to any party.

**7.42** Second, a non-State armed group will face even more difficulties to comply with all rules of IHL of IACs than an armed group acting under overall control

77 See MN 4.22.

78 For a discussion and further details on this issue as well as those that follow, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 9–20.

79 ICRC Commentary APs, para 4345.

80 Updated ICRC Commentary GC I, para 361.

81 The last cases involving a recognition of belligerency were the American Civil War (1861–65) and the Boer War (1899). See Sivakumaran, above note 78, 17–19.

82 Colombia, 'Statement of the Government of Colombia Regarding the Status of FARC, 16 June 1999' (1999) 2 YIHL 440.

83 Ibid., 441.

84 See MNs 8.156–8.158.

of an outside State.[85] To avoid asking parties to do what is not possible, an ad hoc agreement must expressly solve these difficulties, while they must be tackled through interpretation in the case of a recognition of belligerency. In my view, it is simply not possible to realistically apply all rules of IHL of IACs in a NIAC, and an ad hoc agreement should not create this illusion.

**7.43** Third, IHL of IACs could deprive some persons affected by the conflict from rights they would have had in a NIAC. For example, according to the prevailing opinion, members of a non-State armed group captured by State forces must have the possibility to challenge the legality of their detention,[86] while as POWs they could be detained without this right until the end of active hostilities. Similarly, only members of an armed group with a continuous combat function may be targeted according to the ICRC,[87] while all members of the armed forces and armed groups (other than medical personnel) may be targeted if IHL of IACs becomes applicable. It may be argued that parties may not thus deprive individuals of their rights under IHL by agreement or a unilateral declaration either because Common Art 3 is *jus cogens* or by analogy to the Conventions.[88] Given that IHL specifically foresees ad hoc agreements and the possibility of a recognition of belligerency, I reluctantly accept their effects as most of them will increase protection. Although members of an armed group would thus lose the possibility to challenge the lawfulness of their detention, they would nevertheless obtain POW status and treatment according to Convention III.

### 7.5.3 Allegedly largely the same customary law

The ICRC determined that official State practice shows that most customary law rules are the same for IACs and NIACs. Indeed, it would be astonishing if armed forces fought NIACs differently than IACs. However, customary rules on combatant status and privilege as well as those concerning occupied territories apply exclusively in IACs. In my view, a serious reality check is also needed as to whether the customary rules applicable to NIACs based upon official State practice in IACs are realistic for non-State armed groups, which are bound by such rules.

85 See MNs 6.13–6.21.
86 See MNs 10.289, 10.297, 10.299, 10.303–10.308.
87 See MN 8.318.
88 GCs, Common Arts 6/6/6/7.

**7.44** As previously discussed, the ICRC Customary Law Study, which is based only upon official State practice and not the practice of non-State armed groups,[89] concluded that 136 (possibly even 141) out of the 161 rules of customary IHL are the same for IACs and for NIACs, although many of them follow the wording of Protocol I.[90] The main purpose of the ICRC Study (and ICTY jurisprudence on customary IHL) was to fill the gaps in the treaty law of NIACs, in particular in the field of the conduct of hostilities, by finding applicable customary rules.[91]

**7.45** This sub-section cannot realistically summarize the customary rules identified by the ICRC Study. Rather, Chapter 8 will discuss pertinent rules of the ICRC Study when examining the substance of the customary and treaty rules of IHL of IACs, including any particularities in NIACs. The customary rules are essential to ensure protection in NIACs as Common Article 3 and Protocol II (if applicable) frequently fail to provide the necessary answer even when interpreted very creatively.

**7.46** The ICRC Study, however, determined that certain rules of customary IHL of IACs do not apply in NIACs. These obviously include rules related to combatants and POWs[92] as well as occupied territories.[93] In addition, a rule on the release of civilian internees applies only in IACs as that concept does not exist in NIACs.[94] The absence of an 'authorization' to seize the adversary's military equipment[95] and of the concept of reprisals[96] may also be seen as resulting from inherent differences between the two kinds of armed conflicts. This is possibly also the case for the obligation to return human remains.[97] The absence of a customary *right* of the ICRC to visit protected persons[98] in NIACs parallels an explicit difference in the universally accepted treaty rules.[99]

**7.47** For other rules, the ICRC was not sure that they equally apply in NIACs. These cases of doubt show that the ICRC took cases of insufficient State practice in NIACs into account, even where humanitarian reasons or logic fail to explain

89 See MNs 4.41–4.44.
90 See MN 4.34.
91 See Henckaerts and Doswald-Beck, xxxiv–xxxv.
92 See ICRC CIHL Database, Rules 3, 4, 106–108, 128(A).
93 See ibid., Rules 41, 51, 129(A), 130.
94 See ibid., Rule 128(B).
95 See ibid., Rule 49.
96 See ibid., Rules 145–147; see also MN 5.041.
97 See ICRC Customary IHL Database, Rule 114.
98 See ibid., Rule 124(A).
99 See MNs 5.175–5.176.

why the same rule should not apply in NIACs as in IACs. Such cases include the rules on target choice in the conduct of hostilities,[100] the protection of the environment,[101] the improper use of some flags or uniforms[102] and the recording of the placement of landmines[103] as well as most rules on passive precautions.[104]

**7.48** In some cases where a rule does not apply in NIACs, the ICRC found that a similar replacement rule nonetheless applies.[105] Although a logical consequence of the difference between States and non-State actors, it is most remarkable that the ICRC considers that rules on implementation, in particular those concerning criminal prosecution, only bind States in NIACs.[106] In my view, it may also be preferable to formulate some substantive rules differently for non-State armed groups in order to make them realistic even if one ignores, as the ICRC does, the practice of such groups.

**7.49** It is not astonishing that the ICRC Study very often achieves the same results as reasoning by analogy in terms of the IHL rules applicable to NIACs. First, only a few States prepare for NIACs in peacetime. Most often, States train their soldiers, devise tactics and draft military manuals with a view towards defending the State against an outside aggression. This fact makes it less astonishing that the ICRC Study found that official State practice is the same in IACs and NIACs, especially in the field of the conduct of hostilities, even though States did not want Protocol II to have the same rules on the conduct of hostilities. This refusal occurred not by votes on each rule; rather, it resulted from a package that answered diffuse concerns of States about their sovereignty through an overall 'simplification'.[107]

**7.50** Second, it is not surprising that States apply the same solutions that they adopted in treaty law and State practice for IACs to the same problems in NIACs. To reason by analogy and to apply an existing rule that covers a situation that is similar to a non-regulated problem is, as shown below, a usual part of legal reasoning and also a normal way of how all human beings solve a problem similar to one they already solved successfully. This is what they will normally do, and it will therefore be the practice of their State. As for establishing *opinio juris*

100 See ICRC CIHL Database, Rule 21; see also MN 8.330.
101 See ICRC CIHL Database, Rule 45; see also MNs 10.186–10.197.
102 See ICRC CIHL Database, Rules 62–63; see also MNs 8.412–8.416.
103 See ICRC CIHL Database, Rule 82.
104 See ibid., Rules 23–24; see also MNs 8.334–8.337.
105 See ICRC CIHL Database, Rules 124(B), 128(C), 148, 159.
106 See ibid., Rules 141, 143–144, 149–150, 157–158, 161.
107 See MNs 7.32–7.33.

in both IACs and NIACs, it is anyway difficult to prove that States adopted certain conduct or instructions out of a sense of legal obligation and not merely for policy reasons.

**7.51** Finally, as an alternative to solving problems encountered in NIACs in conformity with what they do or are prepared to do in IACs, the military could try to find the solution elsewhere. Obviously, IHRL could offer appropriate solutions, but we will see that the military is often allergic towards that law, does not understand it well and think that it is unrealistic for warfare as it supposedly makes successful military operations impossible.[108] By contrast, the military is much more familiar with IHL of IACs and cannot possibly consider that it is unrealistic because they were heavily involved in the State delegations that adopted the existing IHL treaties and their practice plays an important role in creating customary law.

### 7.5.4 The need and limits of analogies

When IHL of NIACs does not provide an answer to a question that necessarily arises in NIACs, different justifications allow the application of the pertinent rules of IHL of IAC by analogy. Reasoning by analogy is well accepted for some issues (such as the definition of military objectives), while it remains very controversial for other issues (for instance, the definition of who may be targeted and interned without trial as well as the obligation of fighters to distinguish themselves from the civilian population). Once again, combatant status as well as privilege, occupied territories and, in my view, the possibility of non-State armed groups to comply with certain rules all impose limits to analogies.

#### a. Analogy in international legal reasoning and for IHL in particular

**7.52** Reasoning by analogy, that is, applying an existing rule to an unregulated issue to the extent of the similarities between the two issues on legally relevant points, is a usual form of legal reasoning claimed to be 'common to all legal systems that subscribe to the rule of law'.[109] It is based on the concept of equality before the law and the idea of justice. Reasoning *e contrario* is the obvious counter-argument to reasoning by analogy, but both methods of reasoning do

108 See, e.g., Richard Ekins *et al.*, 'Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat' (Policy Exchange 2015); see also statements by former UK military leaders in House of Commons Defence Select Committee, 'UK Armed Forces Personnel and the Legal Framework for Future Operations' (House of Commons 2014) 5, 7, 13, 23, 28, 61, 83, 95, 97–9.

109 Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2nd edn, CUP 2016) 124.

not really contradict each other in my view. Rather, it is the similarity or dissimilarity of the two situations that decides which type of reasoning prevails in a given case.

**7.53** In international law, however, it is controversial whether reasoning by analogy can be applied as a general principle of law.[110] Voluntarist positivists, who see international law as based upon the will of States, contend that it does not. They consider that international law has no lacunas given that States are simply free to act in the absence of a rule governing that action. On the other hand, those who regard international law as a coherent and just legal order require analogical reasoning to fill in lacunas that exist in international law. The ICJ explicitly used analogy as an argument concerning another international legal issue.[111] Despite this debate, it may be particularly appropriate to use reasoning by analogy in IHL because the Martens Clause rejects the idea that States may proceed freely in unregulated cases.[112]

**7.54** The real question therefore is whether IACs and NIACs are sufficiently similar to permit reasoning by analogy. Sovereignty-obsessed States traditionally give a negative answer, arguing that international law always differentiates between a situation that occurs between two States or between a sovereign and a non-sovereign. Humanitarians, in contrast, argue that the two situations are always comparable because the balance between the affected people's suffering and military necessities that IHL tries to achieve is the same and does not change according to the legal classification. Although this contrast in approaches continues to exist, as we have seen, even States today accept that IHL automatically regulates NIACs, and they tend to apply similar rules both situations.

**7.55** In my view, there is no single answer. Instead, there must be a case-by-case analysis, and it all depends on the rule. Frontiers, occupation, combatant status are relevant differences between IACs and NIACs, as is, in my view, the fact that not only States but also armed non-State actors are addressees of IHL of NIACs. However, the actual questions that arise during the conduct of hostilities or that concern the treatment of persons in the power of a party are the same in IACs and NIACs. I therefore suggest that the same rules must apply

110 For this point and those that follow on the issue of analogy, see Silja Vöneky, 'Analogy in International Law' (2008) in MPEPIL, paras 13–15, 24.

111 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*) (Judgment on Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 63.

112 See MN 4.52.

except if the legal differences between the two types of conflict, as perceived by States, are opposed to such equality of treatment.

**7.56** I therefore submit that a sliding scale should be used. In some cases, analogy is compelling either for logical reasons or when a certain rule is necessary to apply existing rules of IHL of NIACs. States cannot have freedom of action on how to define military objectives as long as it is uncontroversial that civilians must be protected, and I am not aware of any argument why the definition should be different in the two categories of conflicts. In borderline cases, some arguments favour analogical reasoning, while others favour *e contrario* reasoning. We will see as well that humanitarian interests are not always in favour of reasoning by analogy and military interests are not always against it. Finally, some differences will continue to persist between the two types of conflict as long as sovereign States exist.

**7.57** As mentioned above, it is logical that a nuanced reasoning by analogy or *e contrario* leads in nearly all cases to the same result as deducing customary law from the official practice of States except (not astonishingly) when it comes to the obligations of armed non-State actors.

### b. Reasons for analogies and examples

**7.58** It is uncontroversial that the same principles of distinction, military necessity (as a restriction to violence), proportionality, equality of the belligerents before IHL and elementary considerations of humanity apply in NIACs as in IACs.[113] While these principles can be equally deduced from the treaty and customary rules applicable to NIACs, the exact meaning of a principle and its relation to certain rules can often only be determined by reference to IHL of IACs.

**7.59** First, the precise rule resulting from a common principle as well as from combining a principle with a provision of IHL of NIACs or with simple legal logic can be found in some cases by analogy to the much more detailed treaty rules for IACs. For instance, the prohibition against indiscriminate attacks does not appear in the treaty rules of IHL of NIACs. Nevertheless, one may argue that the prohibition, as codified in Article 51(4) and (5) of Protocol I, is a necessary consequence of the principle of distinction, which is reinforced by Article 13 of Protocol II offering civilians 'general protection against the dangers arising from military operations' and prohibiting attacks directed at civilians. Likewise, the precautionary measure in Article 57(2)(b) of Protocol I that requires the

113 See MN 4.50.

cancellation or suspension of an attack when it becomes apparent that it is not directed at a military objective or would violate the proportionality rule is also merely a logical consequence of the principles of distinction and proportionality, respectively. Additionally, the prescription in Article 57(3) of Protocol I requiring that the attacking party choose the military objective that presents the least danger to the civilian population when there is a choice between several military objectives offering the same or similar military advantage is a necessary consequence of the combination of the general protection of the civilian population against dangers arising from military operations with the principle of military necessity (as a restrictive principle). Indeed, if a choice is possible and both objectives offer a similar military advantage, attacking an objective that poses a higher risk to the civilian population is simply not necessary. Finally, the detailed treaty rules of Conventions I and IV as well as Protocol I that regulate who may use the emblem of the red cross, the red crescent and the red crystal under specific conditions and in certain circumstances provides another example of the necessity to refer to IHL of IACs.[114] As Article 12 of Protocol II merely provides that the emblem 'shall not be used improperly', only IHL of IACs elucidates what constitutes a prohibited 'improper use' under that provision. Additionally, the equality of the belligerents before IHL clarifies that the 'competent authority' mentioned in Article 12 (under the direction of which the emblem may be used) includes in NIACs the competent authority of a non-Sate armed group.

**7.60** Second, certain rules and regimes of IHL of IACs must be applied in NIACs to make the application of explicit provisions of IHL of NIACs even possible. For example, the treaty rules of IHL of NIACs fail to define what is a valid military objective because States feared that a definition may be used to 'justify' rebel attacks. Such a definition is required, however, to apply the principle of distinction applicable in both types of conflict as well as the explicit prohibitions against attacking the civilian population, individual civilians and certain civilian objects.[115] Moreover, there is no fundamental difference between the regimes applicable to the two types of conflict that precludes the application of the same definition.

**7.61** Prohibitions or limitations on the use of certain weapons are also moving in the direction of abandoning the distinction between IACs and NIACs. There are no relevant differences between the two categories of conflict that prevent the

114 See MNs 8.034–8.036, 8.041–8.049.
115 See P II, Arts 13–14.

application of the prohibitions or restrictions on the use of certain weapons in IACs to NIACs.[116] More importantly, States recently accepted proposals explicitly extending such prohibitions to NIACs.[117]

### c. Controversial cases

**7.62** A striking feature of IHL of NIACs is the absence of combatant status. IHL of NIACs neither defines combatants nor prescribes specific rights and obligations for them, and its provisions do not even use the term 'combatant'. The reason for this absence lies in the fact that no one in a NIAC has the 'right to participate in hostilities', which is an essential feature of combatant status. Some authors conclude that IHL of NIACs protects people according to their actual activities rather than their status. If this is correct, one cannot analogize to IAC rules relating to combatants and POWs to answer crucial questions concerning when a fighter (that is, a member of an armed group with a continuous fighting function)[118] may be attacked or which procedures must be followed when a fighter is detained. Without reasoning by analogy, fighters could only be attacked if and for such time as they directly participate in hostilities. The admissibility of their detention would also be governed, in the absence of specific rules of the IHL of NIACs, by domestic law and IHRL. As we will see, most authors, the ICRC and States contend that fighters may be attacked in NIACs in the same manner as combatants in IACs, namely, at any time until they surrender or are otherwise *hors de combat*.[119] Some of those who promote this analogy also take the position that captured fighters may be detained without any individual judicial determination until the end of the conflict just like POWs in IACs.[120] They, however, do not extend this analogy to the treatment of such fighters as they contend that the lack of combatant privilege in NIACs should prevail. This controversy, which has important humanitarian consequences in NIACs, shows that an analogy between IACs and NIACs does not always lead to better protection for those affected by the conflict.

**7.63** In any case, if civilians are to be respected in NIACs as prescribed by the applicable provisions of IHL, those conducting military operations must be able to distinguish those who fight from those who do not, and this is only possible if the former distinguish themselves from the latter. As the treaty rules of IHL of

116 See Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, paras 119–24.

117 For example, the CCW and its Protocol II on the Use of Mines, Booby-Traps and Other Devices have recently been extended to NIACs. See MN 4.17.

118 For a discussion on this concept, see MNs 8.314–8.318.

119 See MNs 10.261, 10.263, 10.276.

120 See MNs 10.287–10.293.

NIACs are silent on this issue, detailed solutions in IHL of IACs (in particular in Protocol I for the asymmetric situations that are so frequent in NIACs) must be applied *mutatis mutandis* to NIACs.[121] In addition, as in IACs, it might be reasonable to distinguish fighters from civilians who may be attacked only if and for such time as they directly participate in hostilities. This, however, presupposes clear criteria and a real possibility to determine who is a fighter, which does not exist in NIACs. On the other hand, captured fighters should not be detained by analogy to POWs in my view because it is more difficult to identify fighters than State soldiers at the moment of arrest. Rather, a tribunal should make the correct classification, but it can only do so if the arrested person is not classified (by analogy) under the same procedure that would apply to a POW.

### d. The remaining differences

**7.64** First, combatant and POW status exist only in IACs. This may serve the interests of civilians as they would be the main victims if everyone had a right within a State to directly participate in hostilities against the government or fellow citizens. The absence of combatant and POW status in NIACs mainly affects Geneva law, but it also impacts who may be targeted and under what conditions in the conduct of hostilities. Relatedly, in contrast to IHL of IACs, IHL of NIACs does not establish the reasons for which a person may be interned, and it is controversial whether the reasons that exist in IHL of IACs may be applied by analogy in NIACs and to whom they may be applied.[122]

**7.65** Second, the law of occupation cannot be applied in NIACs.[123] Occupation involves control over territory without consent of the authority that had control prior to the armed conflict. Therefore, any application by analogy of the rules of IHL of military occupation to a NIAC could only refer to territory controlled by the insurgents, but never to the territory under governmental control. However, IHL must treat both parties to an armed conflict equally. It would be impossible to convince insurgents to treat territory that they believe they liberated as occupied. Nevertheless, there are suggestions that IHL rules on military occupation should be applied by analogy to the legislative powers and detention authority of an armed group.[124] In my view, convincing a non-State armed group to comply with IHRL rules has a greater chance of success and

121 See P I, Art 44(3), second sentence; see also MNs 8.068–8.070.

122 See MNs 10.290–10.293, 10.307.

123 Philip Spoerri, 'The Law of Occupation' in Academy Handbook, 185.

124 Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 743, 756.

would lead to more realistic results.[125] Others suggest that if secessionist authority gains control of parts of metropolitan territory over which it has no claim of secession in the course of a NIAC, it should apply the IHL of military occupation. However, a metropolitan government that takes control of secessionist territory cannot be required to apply the IHL of military occupation.[126]

**7.66** Third, in my view, another important limit to using IHL of IACs by analogy in IHL of NIACs results from the fact that the latter also binds non-State armed groups. Before IHL of IACs can be applied by analogy, one must first determine whether the relevant non-State armed group has the necessary capacity to comply with the rule based on IHL of IACs as that body of law was drafted to address States.[127] Unrealistic rules do not protect anyone and undermine the IHL's credibility with armed groups.

**7.67** Finally, other differences between IHL of IACs and that of NIACs mentioned elsewhere in this book could theoretically be overcome but nevertheless remain under the existing law. Analogies therefore cannot be used for these differences. For example, the concept of grave breaches does not exist in NIACs.[128] This is arguably also true for reprisals.[129] The rules on the transfer of detained protected persons are much stricter in IACs[130] than the *non-refoulement* principle, which at best can be derived from the humane treatment obligation in Common Article 3.[131]

125 See Geneva Call, *Positive Obligations of Armed Non-State Actors: Legal and Policy Issues* (Report in The *Garance* Series: Issue 1, Geneva Call 2016).

126 Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 61; Michael Bothe, 'Occupation, Belligerent' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier 1997) vol III, 765.

127 See MNs 7.09–7.12.

128 See Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, paras 79–84; see also MNs 5.206–5.208, 5.211.

129 See MN 5.041.

130 See MNs 8.098–8.099, 8.261–8.262.

131 Updated ICRC Commentary GC I, paras 708–16.

# 8

# THE PROTECTIVE REGIMES

This chapter presents the substantive rules of protection contained in IHL. While accounting for the specificities of NIACs, it is structured according to the classical protection regimes foreseen by IHL treaties for IACs that cover the wounded, sick and shipwrecked; combatants and prisoners of war; civilians in the power of the enemy; belligerent occupation (which is technically a subcategory of the rules on civilians in the power of the enemy); the missing and the dead; the protection of the civilian population against the effects of hostilities; means and methods of warfare more generally; the law of naval warfare; and the law of aerial warfare. **8.01**

## 8.1 WOUNDED, SICK AND SHIPWRECKED

That the wounded, 'to whatever nation they may belong, shall be collected and cared for,'[1] that is, even if they belong to the enemy's military (who may therefore, if healed, again form part of the military potential of the enemy), is one of the few IHL rules that was genuinely born on the battlefield of Solferino. Henry Dunant suggested this rule following his experience that the wounded were left unattended at that battle. To allow the deliberate injuring of the enemy's military and then to prescribe that those wounded must be treated may be seen as one of the absurdities of IHL, but the latter obligation is what can be respected in war. Unfortunately, the rule's underlying philosophy is no longer accepted in some conflicts in which hospitals and medical personnel are deliberately attacked. In Syria, for example, governmental as well as some insurgent forces prohibit the passage of medical supplies into enemy-controlled areas because they could benefit wounded fighters. **8.02**

To make the collection and care of such wounded realistic on the battlefield, Dunant furthermore suggested that this specific task should be allocated to **8.03**

1 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) 129 CTS 361, Art 6.

certain staff (the initial idea was that this should be the National Societies of the Red Cross) who would be identified by an emblem.

### 8.1.1 Obligations towards the wounded, sick and shipwrecked

> Wounded, sick and shipwrecked members of the armed forces and civilians must be respected (that is, they may not be attacked), protected, collected and cared for. However, they lose this protection if they commit any act of hostility.

#### a. The beneficiaries

**8.04** Wounded and sick are persons who require medical assistance because of trauma, disease or other physical or mental disorder or disability. This equally covers new-born babies, maternity cases and other persons in immediate need of medical assistance.[2] Shipwrecked are persons who are in peril in waters as a result of misfortune affecting them or their vessel.[3] The IHL definitions are more restrictive than common parlance because persons who commit acts of hostility despite their condition are excluded from the definition and consequently the specific protection afforded to the wounded, sick and shipwrecked (although it is not unlawful for a soldier to continue fighting when he or she is wounded). In my view, IHL does not require that the person is unable to fight in order to receive protection;[4] it is sufficient that the person needs medical assistance and does not commit any act of hostility. Neither surrender nor an indication of unwillingness to fight is necessary. Rather, the presumption is reversed. Normally, combatants and fighters are protected only if they show that they want to cease fighting; once wounded, sick or shipwrecked, they are protected except if they fight. In practice, however, the enemy obviously only has an obligation to respect and to provide care if the medical condition is detectable.[5] Finally, nationality or the fact that the person belongs to enemy forces is irrelevant. It is widely accepted that a party is obliged to respect, protect and care for 'its own' wounded, sick and shipwrecked.[6]

**8.05** Initially, Conventions I and II protected only wounded, sick and shipwrecked members of the armed forces. Convention IV established similar albeit more

2 P I, Art 8(a).
3 Ibid, Art 8(b).
4 Updated ICRC Commentary GC I, para 1344.
5 Ibid., para 1350.
6 Ibid., para 1337.

rudimentary obligations for the benefit of civilians.[7] Under Protocol I, however, military and civilian wounded, sick and shipwrecked benefit from the same regime.[8] The definition of protected persons in Articles 13 of Conventions I and II has therefore lost its practical relevance.

**8.06** In NIACs, the distinction between military and civilian is irrelevant at any rate. All those who are *hors de combat* due to sickness or wounds as well as those who are no longer directly participating (or who never so participated) in hostilities are protected,[9] and the wounded, sick and shipwrecked must be collected and cared for.[10]

### b. The obligations

**8.07** First, the wounded, sick and shipwrecked must be *respected*. In other words, such persons may neither be attacked when not in the power of a party nor killed or ill-treated by a party in whose power they are.[11] In my view, this also implies that they must be taken into account in the proportionality evaluation of the anticipated adverse incidental effects of an attack in the conduct of hostilities,[12] and it is uncontroversial that precautionary measures must be undertaken to avoid incidental effects upon them.[13]

**8.08** Second, a party must also *protect* the wounded, sick and shipwrecked. Specifically, a party must exercise due diligence in preventing the wounded and sick from being harmed by others (pillage and ill-treatment are specifically mentioned[14]) or natural causes. This comprises an obligation to take all feasible measures to search for them and to collect them,[15] which is aimed at protecting the wounded and sick against the dangers arising from the battlefield but also to enable their medical treatment and to ensure that they will be cared for. On land, this must be done at all times and particularly after each engagement, while at sea this obligation only exists after each engagement.[16] To facilitate

7 GC IV, Art 16.
8 P I, Art 8(a), (b), (c)(i) and (e).
9 GCs, Common Art 3(1)(1).
10 GCs, Common Art 3(2). Only GC II, Art 3(2), adds the shipwrecked.
11 GC I, Art 12; GC II, Art 12. See also the detailed list of prohibited acts and precautionary measures to be taken in P I, Art 11.
12 Updated ICRC Commentary GC I, para 1357. For a contrary view, see US Law of War Manual, para 5.10.1.2.
13 US Law of War Manual, para 5.10.1.2.
14 GC I, Art 15(1); ICRC CIHL Database, Rule 111.
15 GC I, Art 15(1); ICRC CIHL Database, Rule 109.
16 GC II, Art 18(1).

search and evacuation, ceasefires and agreements to remove them from besieged areas are encouraged.[17]

**8.09** Third, they must be treated humanely and *cared* for without any adverse distinction to the fullest extent practicable and with the least possible delay by the party in whose power they are.[18] Only medical reasons (and not nationality) authorize priority in treatment.

**8.10** To avoid that the wounded, sick or shipwrecked are considered missing, certain information about them must be recorded and transmitted to the power upon which they depend through the Central Tracing Agency of the ICRC and, when it exists, the Protecting Power.[19]

### 8.1.2 Medical personnel

Military and civilian medical personnel may not be attacked and must be allowed to perform their mission, even in the midst of the fighting. Once in enemy hands, permanent military medical personnel must be repatriated as they are not part of the military potential of the enemy.

To benefit from this special protection, medical personnel must have been assigned to their task by a party to the conflict. Any inhabitant of the battlefield, however, may also collect and care for the wounded and sick. Medical personnel lose their special protection when they commit, outside their humanitarian duties, acts harmful to the enemy. Nevertheless, medical personnel may be armed with light individual weapons that they may only use in self-defence or in defence of the wounded and sick against unlawful attacks.

**8.11** To ensure care for the wounded and sick, those who care for them, namely, medical personnel, must equally be protected and allowed to perform their duties. Although this presupposes a certain stability of the status of such personnel, IHL foresees both permanent and temporary medical personnel. In either case, they must be designated as such by a party to the conflict.

**8.12** In practice, however, States (and even more so armed groups) increasingly abandon using a distinct category of medical personnel as regulated by IHL

17 GC I, Art 15(2)–(3); see also GC II, Art 18(2).

18 GCs I and II, Arts 12(2)–(3); P I, Art 10(2); GCs, Common Art 3(2); P II, Art 7(2); ICRC CIHL Database, Rule 110.

19 GC I, Art 16; GC II, Art 19.

in their armed forces. This allows them to have a greater number of medically trained persons within their troops without renouncing their capacity to fight. Additionally, they do not believe that their enemy will respect identified medical personnel. However, they thus forego the protection such personnel benefit from and the probability that their wounded forces may be attended to even in the midst of the fighting.

### a. Definition

**8.13** The protected medical personnel comprises members of the armed forces exclusively assigned to the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked; to the prevention of disease; the administration of medical units; or the operation or administration of medical transports.[20] IHL distinguishes between permanent and temporary military medical personnel as the latter are only protected while carrying out their medical duties.[21] Both categories of personnel, however, must be exclusively assigned to medical tasks.

**8.14** Civilian medical personnel benefit from a rudimentary protection regime under Convention IV[22] and are treated largely in the same manner as military medical personnel under Protocol I[23] with some notable exceptions. While civilian medical personnel are granted identical substantive protection, their legal status if they fall into the hands of the enemy remains different under IHL.[24] Furthermore, while military religious personnel benefit always from the same protection as medical personnel, civilian religious personnel do so only when they are assigned to the armed forces, medical units as well as transports or civil defence units and are exclusively engaged in religious work.[25]

**8.15** The same regime also covers personnel of a National Red Cross or Red Crescent Society recognized and specifically authorized by a party to the conflict *to exercise the functions of its military medical personnel.*[26] This regime equally applies to medical personnel made available to a party to the conflict with the same assignment by third States or organizations, including National Societies of other States.[27] The former was the main task Henry Dunant originally wanted

20 GC I, Art 24; see also P I, Art 8(c).
21 GC I, Arts 24–25; GC II, Arts 36–37.
22 GC IV, Art 20.
23 P I, Art 8(c).
24 ICRC Commentary APs, para 304.
25 GC I, Art 24; P I, Art 8(d); ICRC CIHL Database, Rule 27.
26 GC I, Art 26.
27 Ibid.

to assign to those National Societies but that they today fulfil only very rarely. The latter has never occurred since World War II.

**8.16** It must be stressed that medical personnel categories benefit from the regime foreseen by IHL not simply if they have medical training and duties, but only if they were designated, that is, if they were assigned to their task by a party to the conflict. In my view, medical personnel employed in the public health service may be considered as being automatically 'assigned' because the public health service is part of the public administration of the party to the conflict. In the case of private hospitals or organizations, however, a specific act of State is needed to satisfy the assignment requirement of medical personnel.[28] The requisite specific act of State will take different forms depending on the domestic legal order.[29] For instance, a State might effectuate the necessary assignment by issuing laws and decrees, setting up registries or signing memoranda of understanding. While the ICRC recommends that States adopt legislation clearly defining the respective roles and responsibilities of medical personnel,[30] it is doubtful whether in practice many States implement these measures in peacetime, but they should because it would be impractical to make the assignments only after a conflict has broken out.

**8.17** While other individuals, such as ordinary doctors and nurses as well as the staff of medical NGOs, do not benefit from the special regime afforded to medical personnel under IHL, they nevertheless remain civilians who may not be attacked and must be respected as such when in the power of a party to the conflict.

**8.18** The inhabitants of the combat zone, whether invaded or occupied, are mentioned separately.[31] Although they are not medical personnel, belligerents may appeal 'to their charity' to collect and care for the wounded and sick, must permit them to do so spontaneously and may neither molest them nor convict them for doing so. In my view, this international law rule prevails over domestic legislation that prohibits unlicensed persons from performing medical acts. However, all inhabitants also have obligations. Specifically, in 1949 when international law was still largely considered as establishing obligations only for

28 Bothe/Partsch/Solf Commentary, 105–6.
29 Ibid.
30 ICRC, 'The Implementation of Rules Protecting the Provision of Health Care in Armed Conflicts and Other Emergencies: A Guidance Tool' (ICRC 2015) 370.
31 GC I, Art 18.

States, Convention I remarkably stated: 'The civilian population shall respect these wounded and sick and in particular abstain from offering them violence.'[32]

### b. Protection

**8.19** Medical personnel may not be attacked and must be allowed to perform their duties even in the midst of the fighting.[33] Once in enemy hands, permanent military medical personnel – contrary to temporary medical personnel – must be repatriated as they are not part of the enemy's military potential.[34] They may only be retained if they are needed to care for POWs. Although they do not have formal POW status if they are retained, they nevertheless benefit from treatment as POWs.[35]

**8.20** When military or civilian medical personnel work under the control of the enemy, they have the right to continue to perform their medical mission and not to perform acts contrary to medical ethics.[36] They may not be punished for doing so.[37] They also may keep medical information confidential except as required by the law of their party[38] in IACs or by national law in NIACs.[39] The latter exception is regrettable because most national legislation requires medical personnel to report gunshot wounds in peacetime. The application of such legislation in a NIAC means that wounded rebel fighters will no longer dare to use the official health system, thus depriving them of care and leading to the establishment of a parallel health system. It also undermines the perception that medical personnel are impartial and subjects them to pressure by both sides that makes the performance of their task more difficult.

### c. Loss of protection

**8.21** IHL contains no explicit treaty rule on when medical personnel lose their special protection. There are, however, detailed rules on when fixed medical establishments and mobile medical units lose their special protection.[40] While it is accepted to apply those rules by analogy to medical personnel, this must be done *mutatis mutandis* in my view. Special protection is lost when they commit, outside their humanitarian duties, *acts harmful to the enemy* but only after due

32 GC I, Art 18(2).
33 GC I, Arts 24–27; GC II, Arts 36–37; P I, Arts 15–20; P II, Art 9; ICRC CIHL Database, Rule 25.
34 GC I, Art 30; GC II, Art 37.
35 GC I, Art 28; GC II, Art 37; GC III, Art 33.
36 P I, Art 16(2); P II, Art 10(2); ICRC CIHL Database, Rule 26.
37 P I, Art 16(1); P II, Art 10(1); ICRC CIHL Database, Rule 26.
38 P I, Art 16(3).
39 P II, Art 10(3)–(4).
40 GC I, Arts 21–22; P I, Art 13.

warning and after a time limit given to stop such acts has remained unheeded.[41] To avoid misunderstandings, IHL lists certain circumstances that do not lead to a loss of protection. The most important circumstance is that such personnel may be armed (Protocol I specifies that they may be armed only with light individual weapons) and that they may use those weapons in self-defence or in the defence of the wounded and sick but only in response to unlawful attacks. For example, it is not unlawful for an enemy to take control of a medical unit or the wounded and sick. Therefore, medical personnel would lose special protection if they try to hinder the enemy from doing so.

**8.22** What constitutes acts harmful to the enemy is controversial. Some consider that the term is larger than that of direct participation in hostilities, which is correct for medical *units* and *transports* for whom the concept is specifically used in the treaties. In my view, however, *persons* lose their special protection only if they directly participate in hostilities.[42] Civilian medical personnel who do so lose their protection as civilians only if and for such time as they directly participate in hostilities. For military medical personnel, the consequences and duration of such loss of protection are again controversial. Some argue that, as members of the armed forces, they turn into combatants who turn into POWs if captured. Others contend that they regain the special protection afforded to medical personnel as soon as they no longer commit acts harmful to the enemy. This is in my view unrealistic as it would mean that they must be repatriated if they fall into the power of the enemy.[43]

### d. Duties of medical personnel

**8.23** Apart from the obligation not to directly participate in hostilities, medical personnel must respect medical ethics, give care without discrimination, respect the principle of neutrality and identify themselves. The failure to fulfil these duties – with the exception of the obligation not to directly participate in hostilities – does not make them subject to attack but simply constitutes a violation of IHL. Despite the text of the treaty provisions,[44] however, the obligation to identify themselves using the emblem of the red cross, the red crescent or the red crystal is considered not to be compulsory.[45] Nonetheless, a US court decision claims that the wearing of an identity card designating them as medical

41 GC I, Art 21; GC II, Art 34; P I, Art 13(1). See also ICRC CIHL Database, Rule 25, which does not include the latter part.

42 For a discussion on this concept, see MNs 8.311–8.313.

43 See Marco Sassòli, 'When Do Medical and Religious Personnel Lose What Protection?' (2014) 44 Collegium 50, 56.

44 GC I, Art 40; GC II, Art 41; P I, Art 18; P II, Art 12.

45 Updated ICRC Commentary GC I, para 2590.

personnel is required to prove their status as such and their entitlement to protection.[46] In my view, the status of medical personnel can also be proved through other means.

### 8.1.3 Medical units and transports

> Medical units (including hospitals) and transports also benefit from special protection. Specifically, they must be respected (that is, not attacked) and protected, but they may not be used to shield military objectives. If they fall into the power of the enemy, requisition is permitted only if it is ensured that the wounded and sick can continue to be cared for. To benefit from this special protection, they must either belong to a party to the conflict or be assigned and authorized by it.
>
> This special protection is lost if they are used to commit, outside their humanitarian function, acts harmful to the enemy but only after a warning has been given setting, whenever appropriate, a reasonable time limit and only after such warning has remained unheeded.

**8.24** Under IHL, medical units are fixed or mobile units that are permanent or temporary, such as hospitals, blood transfusion centres, medical depots and medical and pharmaceutical stores, and that are organized for medical purposes, namely, the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked or for the prevention of disease.[47] Medical transports are means of transportation assigned exclusively to the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by IHL.[48] Under Protocol I, the distinction between military and civilian medical transports no longer exists.

#### a. Protection

**8.25** To receive special protection, medical units and transports must either belong to a party to the conflict or be assigned and authorized by it. They must be respected (that is, not attacked) and protected, but they may not be used to shield military objectives from attack and should be situated at a sufficient distance from objectives that may be lawfully attacked.[49] The requisition of medical units

46 See Online Casebook, United States, Mukhtar Yahia Maji Al Warafi v. Obama.

47 P I, Art 8(e).

48 P I, Art 8(f)–(j).

49 GC I, Arts 19 and 35; P I, Art 12; P II, Art 11. See also ICRC CIHL Database, Rules 28–30.

or transports that fall into the power of the enemy is strictly limited to ensure that the wounded and sick continue to be cared for,[50] especially in occupied territories,[51] and they must nevertheless be allowed to function.

**8.26** Convention II foresees a detailed regime for hospital ships.[52] Medical aircraft benefit from protection against attacks under the Conventions only based upon an agreement between belligerents[53] (which does not occur in practice), while such agreement is no longer necessary under Protocol I as long as they fly over territory controlled by their own side. Protocol I also limits the right to require them to land for inspection to cases in which they fly over enemy-controlled or contested areas.[54]

### b. Loss of protection

**8.27** Medical units lose their protection if they are used to commit, outside their humanitarian function, acts harmful to the enemy.[55] This includes not only overt hostilities but also sheltering able-bodied combatants or fighters. As mentioned above, IHL treaties list some situations that do not lead to a loss of protection, namely: (1) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge; (2) that the unit is guarded by a picket or by sentries or by an escort (which may also carry only light individual weapons and use them only in self-defence and defence of others); (3) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; or (4) that members of the armed forces or other combatants are in the unit for medical reasons.[56]

**8.28** However, protection is only lost after a warning has been given setting, whenever appropriate, a reasonable time limit and only after such warning has remained unheeded.[57] Here, in contrast to the obligation to issue a warning in advance of attacks that may be expected to have incidental effects for civilians and civilian objects unless the circumstances do not permit,[58] the warning requirement is absolute.

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50 GC I, Arts 33–35.
51 GC IV, Art 57; P I, Art 14.
52 See MNs 8.424–8.425.
53 GC I, Art 36; GC II, Arts 39 and 40.
54 For details, see P I, Arts 24–31.
55 GC I, Art 21; GC II, Art 34; P I, Art 13; ICRC CIHL Database, Rules 28–29.
56 GC I, Art 22; GC II, Art 35; P I, Art 13.
57 GC I, Art 22; GC II, Art 35; P I, Art 13.
58 See MN 8.330.

**8.29** Once protection is lost, medical units may be attacked, but only if and for such time as they constitute military objectives, and the proportionality rule as well as the obligation to take precautions other than the aforementioned warning requirement continue to apply.

### 8.1.4 Possibility to create hospital, safety or neutralized zones

> Belligerents may agree on the creation of hospital and safety zones as well as localities in which the wounded and sick may be treated (and certain other civilians may take refuge) without the risk of becoming incidental victims of hostilities directed at combatants and military objectives.

**8.30** The basic idea of IHL is that the wounded and sick must be respected and protected wherever they happen to be and that they must be cared for where the necessary medical facilities are. IHL, however, also foresees a subsidiary solution: the possibility to constitute special areas (that is, small parts of territory) where the wounded and sick can be cared for. Only the wounded and sick as well as medical personnel and permanent residents of the zone may be allowed into such areas, and they cannot perform any work connected to military operations or the production of war materials. The zone itself may not contain any military objectives, and it must be located far away from potential military objectives. In Convention I, hospital zones and localities may be established for the benefit of the wounded and sick members of the armed forces,[59] while under Convention IV hospital and safety zones and localities may be created for wounded and sick civilians.[60] The latter may also receive military wounded and sick, aged persons, children under 15, expectant mothers and mothers of children under seven. In sea warfare, Convention II does not foresee such zones, but State practice has known the constitution of something similar. In the Falkland/Malvinas conflict, the belligerents agreed to establish a sea area adjacent to the islands where hospital ships were stationed ready to rescue shipwrecked sailors and evacuate them with helicopters.[61] This area was called the 'Red Cross Box'.

**8.31** The basic idea of such zones is to protect the wounded and sick as well as medical personnel from the effects of hostilities by delimiting an area in which the adversary has no reason to conduct hostilities because it is assured that the area

59 GC I, Art 23.

60 GC IV, Art 14.

61 See Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action* (2nd edn, ICRC 1985) 23–4, 26.

does not contain legitimate military targets. IHL, however, does not prohibit the enemy from taking control of the zone, but it must continue to respect the zone by not placing military objectives or combatants within it. We will discuss later in the context of protected areas for civilians the difficulties and risks to constitute protected areas in contemporary armed conflicts.[62]

**8.32** Such zones can be established in peacetime as between High Contracting Parties or once hostilities arise as between belligerents either in the form of a written agreement or a unilateral declaration by the party having control over the zone that is recognized by the adversary. To facilitate the conclusion of such agreements, both Convention I and IV have an Annex I that provides the parties with a draft agreement. In NIACs, such agreements can be concluded as a special agreement encouraged by Common Article 3(3). Thus, in December 1991, the belligerents in the former Yugoslavia concluded an agreement under the auspices of the ICRC declaring the hospital of Osijek and its surroundings 'a protected zone according to the principles of Article 23 of the First Geneva Convention of 1949 and of Articles 14 and 15 of the Fourth Geneva Convention.'[63]

**8.33** The zones under Convention I may be marked using the distinctive emblem of the red cross, red crescent or red crystal, while this is only possible for the zones under Convention IV if they are reserved exclusively for the wounded and sick (as well as medical personnel). Otherwise, the latter may only be marked by oblique red bands on a white ground.

### 8.1.5 The distinctive emblems

The emblems of the red cross, red crescent and red crystal have both protective and indicative functions.

As a protective device in times of conflict, the emblem identifies medical personnel, units and transports. To be effective in such circumstances, it must be visible and therefore large. It may only be displayed for medical purposes, and such use must be authorized and controlled by a party to the armed conflict.

The emblem is also used as an indicative device mainly in peacetime. The indicative use of the emblem does not signify protection but rather identifies persons, equipment and activities (in conformity with Red Cross principles) affiliated with the Red Cross or the Red Crescent. Indicative uses of the emblem

62 See MNs 8.359–8.360.

63 Updated ICRC Commentary GC I, para 1886.

must comply with national legislation. If used for indicative purposes in times of armed conflict, the emblem must be small in size.

The ICRC and the International Federation of Red Cross and Red Crescent Societies may use the emblem, including the large version, at all times and for all their activities.

**8.34** It is important to distinguish the protective and the indicative use of the emblems of the red cross, red crescent and red crystal ('the emblem'). As a protective device it identifies military and civilian medical personnel, units (including hospitals) and transports (such as ambulances) that are entitled to special protection under IHL. As an indicative device, it demonstrates a link with a Red Cross or Red Crescent organization or the provision of free first aid in conformity with national legislation. The ICRC and the International Federation may use the emblem at all times without anyone's authorization.

**8.35** In order to fulfil the emblem's functions, national legislation, adopted in accordance with what IHL authorizes and prescribes, must regulate the use of the emblem in peacetime and in wartime. In particular, such legislation must prevent and repress misuses and abuses. Before presenting those rules, however, the fact that different emblems exist must be explained.

**8.36** As is often the case in IHL, IHL of IACs provides the most detailed rules on the use of the emblem. Protocol II, however, explicitly foresees that the emblem 'shall' (which in practice means 'may') be used in NIACs 'under the direction of the competent authority.'[64] This must imply that an armed non-State actor may equally authorize – and must then control – the use of the emblem by its medical personnel as well as by persons and objects under its control who would have the right to use the emblem in IACs if they were authorized by a State.[65] In addition, the restrictions on the use of the emblem that IHL of IACs prescribes for 'peacetime'[66] must also apply in NIACs because they are not IACs.

### a. The three emblems and technical means of identification

**8.37** Originally, the red cross was adopted as an emblem manifesting the protection offered to medical personnel, transports and units. In a rare case in which

64 P II, Art 12. See also ICRC CIHL Database, Rules 30 and 59.

65 ICRC, 'Study on the Use of the Emblems: Operational and Commercial and Other Non-Operational Uses' (ICRC 2011) 64, 167–9.

66 GC I, Art 44.

an international treaty justifies its rule, Convention I states the cross was not meant as a (Christian) religious symbol but 'as a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, [being] formed by reversing the Federal colours.'[67] Nevertheless, many Muslim countries preferred to use the red crescent on a white ground, and the Conventions explicitly recognize the validity of this alternate emblem.[68] Despite the text that seems only to allow States to keep the red crescent rather than to choose it, State practice has accepted that States may now freely choose whether they use the red cross, the red crescent or – under Protocol III – the red crystal.[69]

**8.38** Although IHL now foresees four emblems – the red cross, the red crescent, the red crystal and the red lion and sun – on a white background,[70] only the first three authorized emblems are utilized today as Iran renounced its use of the red lion and sun. For a number of years, the International Red Cross and Red Crescent Movement encountered problems arising from the use of a host of other non-recognized signs. This threatens the emblem's essential universality, neutrality and impartiality, ultimately undermining the protection it provides. The entry into force of Protocol III solved these problems by enabling States to adopt the red crystal. Although the use of a sign devoid of any perceived religious connotations would have many advantages, no State has actually adopted it in hostilities, not even on a temporary basis.[71] One of the reasons may be that Protocol III was essentially adopted to accommodate Israel's understandable wish not to adopt either the red cross or the red crescent and the reluctance of many States (often motivated by political reasons) to allow Israel to adopt the red star of David as an emblem. Presently, although Israel is a party to Protocol III and it has clarified that it intends to use the emblem of the red crystal,[72] its armed forces still appear to be actually using the red star of David, which is contrary to Protocol III.[73]

**8.39** The legal effects of and protection offered by all three emblems are exactly the same. In addition, it must be stressed that the emblems only facilitate the identification of medical personnel, transport or units and do not confer protection

67 GC I, Art 38(1).
68 GC I, Art 38(2); GC II, Art 41(2).
69 Updated ICRC Commentary GC I, para 2551.
70 See GC I, Art 38; GC II, Art 41; P I, Art 8(1); P II, Art 12; and, for the red crystal, P III.
71 As Israel could under P III, Art 2(4).
72 See State of Israel, Declarations made on 22 November 2007 and 5 November 2008, and Sweden, Communication by Sweden made on 26 November 2008, both of which are available online <https://ihl-databases.icrc.org> accessed 6 August 2018.
73 P III, Art 2.

upon them. Protection of medical personnel, transport or units derives instead from the functions they perform under the control and with the authorization of a party to the conflict. Thus, for example, if an adversary knows that a State identifies its ambulances with green frogs, it would be as unlawful to attack them as if they were identified with a recognized emblem or even with no emblem at all.[74]

**8.40** With modern means of warfare, in particular over-the-horizon attacks (that is, attacks against targets that cannot be seen due to the earth's curvature), technical means of identification are needed because missiles cannot recognize the emblem. Annex I to Protocol I,[75] which was updated in 1993,[76] regulates in detail light, radio and electronic identification signals, which are subject to the same rules and provide the same protection as the emblems. The lack of trust between States, however, remains a fundamental problem, and States therefore have not agreed on establishing electronic frequencies that would automatically divert an incoming missile attack.

### b. Protective use

**8.41** Although the emblem is often perceived as being related to the Red Cross or Red Crescent organizations, the first and most important function of the emblem is to identify medical personnel, units and transports in times of armed conflict in order to facilitate the special protection they benefit from under IHL. Under the original scheme of the Conventions, the military, in particular their medical services, is the most important user of the emblem.[77] Today, it may equally be used by civilian medical personnel, units, establishments and transports.[78] Doctors and medical staff may only use the emblem if they are authorized and controlled by a party. NGOs, food transports or relief convoys may not use the emblem unless they are working under the direction of the ICRC.

74 However, Arts 8(2)(b)(xxiv) and 8(2)(b)(e)(ii) of the ICC Statute define as war crimes only '[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' and therefore seem to criminalize attacks on the mentioned objects and persons only if they actually use one of the recognized emblems. However, other war crimes could be relevant when no emblem is used. See ICC Statute, Arts 8(2)(a)(i), 8(2)(b)(ix) and 8(2)(e)(iv).

75 'Annex I: Regulations Concerning Identification', Arts 6–9, as annexed to P I.

76 'Annex I: Regulations Concerning Identification' as annexed to P I (as amended on 30 November 1993).

77 GC I, Arts 39–43; GC II, Arts 41–43. For medical transports, see GC I, Art 35 (by land); GC II, Arts 22, 24, 26–27 and 43 (by sea); GC I, Art 36, and GC II, Art 39 (by sea).

78 As it stood in the past, see GC IV, Arts 18(3) and 20(3). For the updated modern rule, see P I, Art 18, and P II, Art 12.

National Societies may use the emblem as a protective device only if they work as the medical services of a party[79] or if they work under the ICRC's control.

**8.42** To be effective in times of armed conflict, the protective emblem must be visible and therefore large. The emblem can obviously fulfil its protective purpose only if it is not misused (that is, if it is used for purposes other than medical purposes) and only if a party to the conflict prevents and stops such misuses. Therefore, any protective use of the emblem must be authorized and controlled by the relevant State (or, in NIACs, the relevant party to the NIAC).

### c. Indicative use

**8.43** The emblem is used as an indicative device mainly in peacetime. The emblem's indicative use does not signify protection but rather identifies persons, equipment and activities (carried out in conformity with Red Cross principles) affiliated with the Red Cross or the Red Crescent, mainly those of the National Societies.[80] Any use for indicative purposes must comply with national legislation, and, in times of armed conflict, the indicative emblem must be small in size.

**8.44** Exceptionally, subject to explicit authorization by the pertinent National Society and if foreseen by national legislation, the emblem may also be used in peacetime by ambulances and first-aid stations operated by others that provide *free* treatment to the wounded and sick.[81] Beyond that, however, doctors, hospitals and pharmacies that are unrelated to a National Society may not use the emblem.

**8.45** In contrast to the above-mentioned limitations, the ICRC as well as the International Federation of Red Cross and Red Crescent Societies may use the emblem, including the large emblem, at all times and for all their activities. In my view, however, this constitutes a special indicative use of the emblem because it does not signify any special protection under IHL.[82] Indeed, ICRC personnel, transports or buildings are protected like any other civilian or civilian object and possibly as relief personnel,[83] all of which are normally not authorized to use the emblem.

79 GC I, Art 44(1) (referring to GC I, Arts 26–27).
80 GC I, Art 44(2)–(4).
81 GC I, Art 44(4).
82 For the contrary view, see Updated ICRC Commentary GC I, para 2687.
83 P I, Art 71.

### d. The need for national legislation and the repression of misuses

**8.46** All States must adopt in peacetime national legislation specifying, in accordance with IHL: (1) who may use the emblem and in what circumstances, (2) which of the three recognized emblems must be used, and (3) the authority that authorizes and controls the emblem's use. In order to avoid undermining the protection the emblem provides, national legislation must also prevent and criminalize misuses of the emblem as characterized by IHL.[84] The use of the terms 'Red Cross' and 'Geneva Cross' is subject to the same rules pertaining to the emblem itself.[85]

**8.47** Misuses may be categorized into imitations, improper use and perfidious use.[86] Imitations are signs or designations that, due to their shape, colour or title, may be confused with the emblems or their name.[87] In this context, the use of the Swiss flag is also prohibited,[88] but this prohibition obviously does not apply to Switzerland and Swiss persons authorized to use the Swiss flag under Swiss legislation. Improper use includes use by persons or entities not authorized to use the emblem (such as pharmacies, private doctors or NGOs) or use by persons or entities who may use it but fail to comply with the restrictions imposed by IHL (for example, the use of a large emblem by a National Society in times of armed conflict).[89]

**8.48** Perfidious use, however, is the most serious misuse of the emblem. It involves the use of the emblem for the purpose of 'inviting the confidence of an adversary to lead him to believe that he is entitled, or is obliged to accord protection…with intent to betray that confidence,'[90] such as using the emblem to transport ammunition or to camouflage military objectives.

**8.49** All such misuses must be criminalized by domestic legislation and prosecuted if they occur. Additionally, perfidious use is also a grave breach and a war crime if it is made for the purpose of killing, injuring or capturing an adversary and effectively leads to death or serious injury to the body or health.[91]

84 GC I, Art 54; GC II, Art 45; P III, Art 6(1).
85 GC I, Arts 44(1), 53(1).
86 Antoine Bouvier, 'The Use of the Emblem' in Academy Commentary, 873–4.
87 GC I, Art 53(1).
88 GC I, Art 53(2).
89 GC I, Art 53(1); P I, Art 38; P II, Art 12.
90 P I, Art 37.
91 P I, Art 85(3)(f); ICC Statute, Art 8(2)(b)(vii).

## 8.2 COMBATANTS AND POWS

In IACs, combatants are members of the armed forces of a party. To obtain or retain combatant status, they must fulfil additional conditions. While these exact conditions differ under Convention III and Protocol I, both treaties and customary law impose on combatants an obligation to distinguish themselves from the civilian population.

Persons who either lost combatant status or never had it but nevertheless directly participate in hostilities are sometimes referred to as 'unprivileged combatants' because they do not have the combatant's privilege to commit acts of hostility. They are also referred to as 'unlawful combatants' because their acts of hostility are not permitted by IHL. The status of such persons has given rise to controversy.

In an IAC, combatants who fall into the power of the enemy are POWs. As such, they enjoy combatant privilege: they may not be punished for having participated in hostilities. POWs may be interned without any individual reason or a particular procedure. The purpose of this internment is not to punish them but only to hinder their participation in hostilities. They therefore must be released and repatriated when they are no longer able to participate in the conflict, such as due to health reasons during the conflict or, in all cases, as soon as active hostilities have ended.

During their internment, the very detailed regulations of Convention III only serve the purpose of either protecting them or preventing them from participating in hostilities again. The protection afforded by those regulations constitutes a compromise between the interests of the Detaining Power, the interests of the power on which the prisoner depends and the prisoner's own interests.

In NIACs, the term 'combatant' does not exist. There is, however, an increasing tendency to call members of an armed group 'fighters' and to treat them by analogy to combatants regarding the possibility to target or detain them but without the privileges of POWs.

### 8.2.1 Importance and implications of the regime

**8.50** The concept of combatants is central to the protective system of IHL of IACs. First, as civilians are defined by opposition to combatants, the principle of distinction, which is crucial in the regime on the conduct of hostilities, presupposes a definition of combatants and that those combatants distinguish themselves from the civilian population. Second, at least in IACs, the regimes protecting

combatants and civilians who have fallen into the power of the enemy are also very different.

**8.51** Combatant status is linked to the idea that modern State has a monopoly over the legitimate use of force[92] under which only State agents are authorized to use force. As such, combatant status has been historically attributed to members of the regular armed forces of a State as they manifest the State's monopoly on the use of legitimate force in the pursuit of its interests. Therefore, combatants alone have the 'right'[93] to take a direct part in hostilities, and they may not be prosecuted for such participation. However, they may be attacked until they surrender or are otherwise *hors de combat*. Upon falling into the power of the enemy, they obtain POW status if they fulfil the individual conditions of distinction from the civilian population. Although those conditions are meant to protect the civilian population from attacks, they are formulated as requirements to obtain or retain combatant status (including combatant immunity from prosecution). Nevertheless, combatants who fail to distinguish themselves as prescribed in the relevant instrument or customary rule commit an act of perfidy, which is prohibited if it results in the killing, injury or – at least under Protocol I[94] – capture of an adversary.

**8.52** Some argue that combatant status and POW status are distinct legal questions.[95] Indeed, not all POWs are (former) combatants,[96] and combatants who fail to distinguish themselves from the civilian population do not gain POW status when falling into the power of the enemy. In my view, they also retroactively lose combatant status and thus immunity from prosecution. At any rate, the two statuses are intimately linked because the question of who constitutes a combatant is most often dealt with, including in treaty law, from the standpoint of the fate of those who fall into the power of the enemy, which is the most crucial question from a humanitarian point of view.

**8.53** Historically, powerful States advocated for a restrictive definition of combatants, wishing to limit the concept to members of their regular armed forces. On the other hand, militarily weaker States wanted to broaden the concept in order to enable them to use their populations to resist an enemy invasion. Bearing in

92 Max Weber, 'Politics as a Vocation' in David Owen and Tracy B. Strong (eds), *Max Weber: The Vocation Lectures* (Hackett Publishing Company 2004) 33.

93 For the meaning of this 'right', see MN 10.009.

94 P I, Art 37(1).

95 Sean Watts, 'Who is a Prisoner of War' in Academy Commentary, 890.

96 See, e.g., the category of persons referred to in GC III, Art 4(A)(4)–(5).

mind the experience of World War II, Convention III extended POW status to members of organized resistance movements in occupied territories (and, according to the text, armed groups fighting for a State in any other territory) if they fulfil certain conditions[97] and to members of regular armed forces, such as the Free French Army of General de Gaulle, professing allegiance to a government not recognized by the Detaining Power.[98] States emerged from the process of decolonization, however, tended to advocate for fewer conditions and lower thresholds for combatant status. This can partly be interpreted in the light of their wish to legitimize struggles for independence and to make guerrilla warfare in the exercise of the right to self-determination of peoples legally possible under IHL.[99] Indeed, we will see that Protocol I contains a much-criticized relaxation of the threshold conditions for combatant status.[100]

**8.54** Current armed conflicts directed at terrorist groups have generated controversy around the question of whether members of terrorist groups, who do not fulfil the conditions for combatant status, may nevertheless be attacked (such as from drones) and detained (for example, at the Guantánamo Bay detention facility) as 'unlawful combatants' in the same manner as combatants but without the privileges attached to combatant and POW status.

### 8.2.2 Who is a combatant?

> Members of armed forces belonging to a party of an IAC have combatant status if they fulfil the individual requirement to distinguish themselves from the civilian population. This requirement is different under general international law and under Protocol I. Under Convention III (but not under Protocol I), armed groups other than regular armed forces must fulfil additional collective requirements before their members obtain combatant and POW status.

**8.55** The conditions for combatant and POW status are one of the few issues on which the regimes under the Conventions and general international law, on the one hand, and under Protocol I, on the other hand, must be discussed separately for a few reasons. First, the latter does not correspond in certain respects to customary law. Second, some important States, such as the US, Israel, Turkey, Iran,

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

98 GC III, Art 4(A)(3).

99 See the references in Bothe/Partsch/Solf Commentary, 245–8; see also Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 90–91.

100 P I, Arts 43 and 44(3) in particular.

Pakistan and India, are not parties to Protocol I. Third, the US and Israel in particular have voiced criticism against the relaxation of the conditions for combatant and POW status under Protocol I, arguing that it favours 'terrorists'.[101]

### a. Under general international law and Convention III

**8.56** Both the Hague Regulations and Protocol I define combatants as members of the armed forces of a party to an IAC.[102] No one can be a combatant of his or her own volition. He or she must belong to a group, which in turn must belong to a party to an IAC or, in other words, a State under the Conventions or a national liberation movement as defined under Protocol I.

**8.57** Conversely, there may be some confusion over whether all members of the regular armed forces of a State are combatants. Indeed, the Hague Regulations state that '[t]he armed forces of the belligerent parties may consist of combatants and non-combatants' and that both benefit from POW status.[103] The non-combatants referred to are, for example, cooks and other members of the armed forces whose primary activity does not involve combat. Contemporary terminology, however, does not make any distinction according to the primary role of the members of the armed forces and consequently virtually all members are combatants, that is, they may directly participate in hostilities and may also be attacked at any time.[104] Only military medical and religious personnel are members of armed forces but not combatants. As seen above, they may not participate directly in hostilities, may not be attacked and do not become POWs if they fall into the power of the enemy.[105]

**8.58** Based on the practice of World Wars I and II, it is generally considered that a combatant who, at the time of falling into the power of the enemy, fails to individually distinguish himself or herself from the civilian population as prescribed by the applicable rules loses combatant status and has no right to obtain POW status under customary international law.[106]

101 See Online Casebook, United States, President Rejects Protocol I.

102 HR, Art 3; P I, Art 43(2). According to ICRC CIHL Database, Rule 3, this corresponds to customary international law.

103 HR, Art 3.

104 P I, Art 43(2).

105 See MNs 8.019–8.023.

106 ICRC CIHL Database, Rule 106. In treaty law, this rule is only laid down in P I, Art 44(3)–(5). See MN 8.083.

**8.59** The exact requirements for retaining combatant privilege differ between those that result from the requirements for POW status in the Convention III and those laid down in Protocol I. However, one may safely state that all those who fulfil the conditions of Convention III are combatants under customary international law. This is equally true for those who meet the unified conditions of Protocol I without relying on the relaxation of the requirement to distinguish oneself set out in the second sentence of Article 44(3) of Protocol I discussed below, which has met with too much criticism from relevant States to have gained the status of customary international law.

**8.60** As for Convention III, its Article 4 defining POWs covers a wider range of individuals other than combatants.[107] However, as combatants are the largest subset of those who benefit from POW status, this provision is also relevant to the definition of combatants.

*i. Members of regular forces*

**8.61** Article 4(A)(1) of Convention III includes '[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. This also includes, as per Article 4(A)(3), '[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power'. Such a government or authority must belong to a recognized State, otherwise Convention III does not apply. If it is controversial whether an entity to which a combatant belongs is a State, IHL has no solution and the controversy must be solved according to the criteria of Statehood under general international law.

*ii. Members of irregular forces, including resistance movements*

**8.62** Article 4(A)(2), which elaborates upon and expands a category as well as conditions already listed in Article 1 of the Hague Regulations, covers '[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied' provided that they fulfil the famous four conditions, which are:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly; [and]

107 See GC III, Art 4(A)(4)–(5).

(d) that of conducting their operations in accordance with the laws and customs of war.

**8.63** These conditions are collective. In other words, what is determinative is whether the group as a whole generally fulfils them. Individuals who fulfil the conditions themselves but belong to a group that does not collectively comply with them are not combatants. Conversely, even if the group to which they belong complies collectively with the conditions, those who fail to individually distinguish themselves sufficiently from the civilian population forfeit combatant privilege and POW status. Individuals who violate other IHL rules, however, retain their combatant and POW status if the group to which they belong complies with the conditions, including condition (d).[108]

**8.64** It is important to realize when studying conditions (a) to (d) that the initial sentence preceding the four conditions contains a fifth condition, which is in fact the first and most important one: a combatant must be member of a group (which is also reflected by condition (a)) that 'belong[s]' to a party to an IAC. This condition of 'belonging' has been subject to different interpretations.[109] Some argue that it corresponds to the requirement of control under the law of State responsibility. However, I agree with others who contend that the concept is wider, at least when resistance movements are concerned. Indeed, the purpose of the article was to confer POW status to resistance movements, such as those that were active in France, Italy, Yugoslavia, Belarus and Ukraine during World War II. Those movements were not subject to 'overall control' and even less to 'effective control' by the States for whom they were fighting. A tacit agreement must therefore be sufficient.[110] In my view, it is sufficient if the government of a State does not reject an armed group's claim that it is fighting on the State's behalf. The State, however, must accept that the group is *fighting* for it[111] and that the group is armed and actually fighting.[112] Members of secret services or staff of private military and security companies[113] therefore do not have combatant status, even if they complied with all of the other conditions. For the same reason, members of an armed group through which a State intervenes

108 Both GC III, Art 85, and State practice confirm this, and it has been explicitly clarified in P I, Art 44(2).

109 Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law' (2010) 21 EJIL 105.

110 Pictet Commentary GC III, 57.

111 Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 140–41.

112 Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies Under Public International Law* (CUP 2013) 393–5, 400–401.

113 For further details, see MN 10.150.

indirectly in another State through overall control over such a group are not POWs in most cases, even though IHL of IACs applies.[114]

**8.65** When defining the status of members of Taliban forces captured in Afghanistan, who arguably fell under paragraphs (1) or (3) of Article 4(A), controversy arose as to whether the four conditions listed under paragraph (2) implicitly and customarily also apply to regular armed forces.[115] In my view, such forces cannot be 'regular' if they do not comply with condition (a). In addition, their members must individually comply with the obligation to distinguish themselves from the civilian population as required in conditions (b) and (c); otherwise, they do not obtain POW status and they also individually lose combatant privilege. To require the entire force to collectively distinguish themselves and to respect the laws of war (as required by condition (d)) as a precondition to obtaining combatant and POW status could endanger all regular forces. In all armed conflicts, the enemy is accused of not complying with those laws and such accusations are all too often accurate. If accusations of violations by regular armed forces were permitted to deprive all their members of their POW status independently of whether the individual member to be classified complied with IHL, POW status would frequently have little or no protective effect. Historically, such an argument has never been invoked, not even against the German Wehrmacht nor the North Korean, North Vietnamese or Iraqi regular forces during various conflicts involving the US. Members of those forces were treated as combatants and POWs even though their enemies did not believe that they regularly complied with IHL. In the spirit of traditional inter-State international law, which is still the underlying starting point for combatant status, it is entirely conceivable to differentiate between de jure agents of a State and others who belong more loosely to a State. In order to benefit from combatant status, which is a typical privilege of the inter-State system, the former do not have to fulfil additional conditions collectively, while the latter must comply with additional collective conditions to benefit from combatant privilege.

**8.66** Even concerning forces that clearly fall under Article 4(A)(2) of Convention III, the collective conditions, in particular the collective requirement to comply with IHL, should not be interpreted too strictly. It should be sufficient that such forces are under instruction to comply with IHL and that most of their members actually do not commit obvious violations of those rules. Condition (d) cannot reintroduce through the back door a condition of reciprocity, which

114 See MNs 6.13–6.21.

115 The UK Privy Council has already addressed this issue in Online Casebook, Malaysia, Osman v. Prosecutor.

is excluded in IHL.[116] From a policy perspective, it may also be wise to put the emphasis on the individual behaviour of the person whose status is to be determined and not on characteristics of the group (which the individual cannot control) in order to include as many groups as possible and to encourage individual adherence to IHL.

#### *iii. Participants in a* levée en masse

**8.67** Article 4(A)(6) confirms combatant status for some civilians who are not incorporated into any armed group in an exceptional situation: participants in a *levée en masse*. Such participants are defined as '[i]nhabitants of a *non-occupied* territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war'.[117] Inhabitants of an occupied territory do not have such a privilege and thus do not have combatant status if they take up arms against the occupying power.

### b. Under Protocol I

**8.68** Protocol I adopts a broad and unified concept of armed forces that comprises all organized armed groups under a command responsible to a party to the IAC, adding that such forces shall be subject to an internal disciplinary system enforcing, among other things, compliance with IHL.[118]

**8.69** Under Protocol I, members of such groups are combatants, but they retain combatant and POW status only if they individually respect the obligation to distinguish themselves from the civilian population at the time of capture.[119] Article 44(3) of Protocol I – a complicated and convoluted compromise that was extremely difficult to negotiate and is still highly controversial – explains how a combatant must satisfy the obligation to distinguish. Under that provision, the obligation of distinction by a fixed distinctive sign, which must be, at a minimum, a characteristic piece of visible clothing, normally applies while engaged in an attack or a military operation preparatory to an attack. The conditions are relaxed, however, in exceptional situations, such as in occupied territory or during wars of national liberation that were mentioned in the *travaux préparatoires* and in declarations by States becoming parties to the Protocol. In

116 See MNs 5.034–5.037.

117 GC III, Art 4(A)(6) (emphasis added), and already in HR, Art 2.

118 P I, Art 43. According to ICRC CIHL Database, Rule 4, this wide definition of armed forces and combatants corresponds to customary international law.

119 P I, Art 44(3).

such circumstances, it is sufficient that the combatant carries his or her arms openly: '(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.' We will discuss later the fate of combatants who fail to fulfil even those relaxed conditions.[120]

**8.70** Article 44(6) of Protocol I adds that anyone who is a combatant under Convention III does not lose such status because of Protocol I's application. This provision is important in two respects. First, it is not clear whether the requirement that armed forces are under a command 'responsible' to a party of an IAC can be understood so widely as suggested above for resistance movements to 'belong' to such a party. Second, it clarifies, at least for regular armed forces, that the disciplinary system enforcing IHL must not necessarily be successful. Even members of armed forces who regularly violate IHL are combatants and POWs, but individual members may and must be punished for violations they committed. They only lose combatant and POW status if they do not sufficiently distinguish themselves from the civilian population.

### 8.2.3 Excluded, special and controversial categories

#### a. Mercenaries

> Mercenaries, as restrictively defined by Protocol I, are not combatants and have no right to POW status.

**8.71** Mercenaries do not have the right to combatant and POW status.[121] They are defined restrictively by several cumulative negative conditions, including the requirement that they are not members of the armed forces of a party to the conflict. This exclusion may be seen as a loophole, but it also reflects the will of States to be able to hire foreigners into their armed forces and to pay them substantially more than their nationals.[122] The exclusion may nevertheless lead to the conclusion that this provision corresponds to customary international law.[123] Indeed, as seen above, the first condition a person must fulfil to obtain POW status is that of belonging to the armed forces of a party to an IAC.

120 P I, Art 44(4); see MNs 8.083, 8.112–8.119.
121 P I, Art 47.
122 Cameron and Chetail, above note 112, 68–9.
123 ICRC CIHL Database, Rule 108.

**8.72** Logically, if they are not combatants, they are then civilians protected as such but who may be punished for the mere fact of having participated in hostilities and for the crime of mercenarism that is foreseen by domestic law as well as some international treaties.[124] The status of members of private military and security companies will be discussed later.[125] Most of them do not fall under the IHL definition of mercenaries.

### b. Spies

> Spies, even if members of armed forces, benefit from combatant and POW status only if they are wearing their own military's uniform when captured.

**8.73** Combatants engaged in espionage who are captured while not wearing their own military's uniform do not have the right to POW status or combatant privilege.[126] In my view, they are therefore civilians who are protected by Convention IV if they fulfil the nationality requirements contained in its Article 4. If they are members of the armed forces, however, one may argue that they do not benefit from civilian immunity against attacks during the conduct of hostilities.[127]

### c. Deserters

> Deserters who have left their armed forces before falling into the power of the enemy become civilians. In contrast, POWs who sever their allegiance with the power on which they depend only once in the power of the enemy keep their POW status.

**8.74** Deserters who sever their allegiance while interned as POWs must be distinguished from those who have severed their allegiance even before falling into the power of the enemy. Although the former remain POWs[128] as POWs cannot renounce their status[129] because the risk of abuses due to pressure by the Detaining Power would otherwise be too great, we will see that they may not

124 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989) 2163 UNTS 75, Arts 2–3; OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977) OAU Doc No CM/817 (XXIX) Annex II Rev 3, Art 2.

125 See MN 10.150.

126 P I, Art 46; ICRC CIHL Database, Rule 107.

127 ICRC DPH Guidance, 22.

128 Pictet Commentary GC III, 549.

129 GC III, Art 7.

be repatriated against their will at the end of the conflict. Conversely, the latter in my view lose their combatant status by quitting their armed forces and are therefore protected civilians when falling into the power of the adversary to their country of nationality.[130] Indeed, Convention IV foresees a more appropriate regime than Convention III for individuals who no longer want to be members of their armed forces, in particular the requirement of an individual determination to ascertain whether their internment is required by imperative security reasons.

### d. Political leaders

> Political leaders are only combatants if they are members or commanders-in-chief of the armed forces. Otherwise, they are civilians who do not have the right to directly participate in hostilities, but who are also protected from attack unless and for such time as they directly participate in hostilities.

**8.75** Subject to the possible exception of special immunity of Heads of State against attacks that some contend is a simple rule of comity and others assert is a rule of customary international law, political leaders – even if they give orders to military commanders – are not combatants unless they are members of the armed forces, including as nominal or effective commanders-in-chief. In other cases, they may be legitimate targets of attacks only if and for such time as they give orders directly related to specific attacks, which is increasingly the case. They also do not benefit from combatant privilege and may therefore be punished by the adversary for their participation. The default rule that political leaders may not be targeted obviously does not hinder attacks on their workplaces that qualify as military objectives, such as ministries contributing to the military effort. However, attacks directed against civilian leaders individually, such as when they are at home, would be unlawful.

### e. Child soldiers

> Although child soldiers are combatants if they are members of the armed forces, they also benefit from the special protection offered to children. One may argue that they may be attacked only if they directly participate in hostilities and only if capture is not possible.

130 For further details on deserters, see Marco Sassòli, 'The Status, Treatment and Repatriation of Deserters Under International Humanitarian Law' (1985) YIIHL 9. Deserters were treated as POWs in the Second Gulf War. See Peter Rowe, 'Prisoners of War in the Gulf Area' in Peter Rowe (ed), *The Gulf War 1990–91 in International and English Law* (Routledge 1993) 191.

**8.76** We will see later that IHL prohibits the recruitment and use of children in hostilities.[131] Nonetheless, if States enrol children – even those under the age of 15 – into their armed forces or if children form part of a group that meets the conditions for combatant status discussed above, those children are combatants and become POWs if captured.

**8.77** Difficult questions arise, however, when children below the age of 15 are incorporated into the regular armed forces or when children not so incorporated take a direct part in hostilities. It is unclear whether such children are legitimate targets who may be attacked according to the same rules that apply to adult combatants or adult civilians directly participating in hostilities. It may be argued that IHRL considerations or the principle of military necessity should somehow restrict attacks against child combatants to cases where capture is impossible. In any case, child soldiers who have fallen into the power of a party to the conflict also benefit from the additional protection afforded to children regardless of whether or not they benefit from POW status.[132] If they are not POWs and meet the requisite nationality requirements, they benefit from protected civilian status under Convention IV.

### 8.2.4 Who is a POW?

> Combatants are POWs if they fall in an IAC into the power of the enemy except if they lose combatant status because they failed to distinguish themselves from the civilian population at the time of capture. Although some other categories of persons closely related to the armed forces do not have combatant status, they nevertheless also have POW status. Some individuals benefit only from the rules governing the treatment of POWs but not from the status.

#### a. The principle

**8.78** A combatant as defined above who falls into the power of the enemy is a POW. Article 4 of Convention III deliberately refers to 'falling into the power of the enemy' and not to 'capture' to cover those who surrender. This phrase also covers cases in mixed conflicts where a combatant of a party to an IAC is first captured by a rebel armed group in a NIAC and is then handed over to the adversary in the IAC.

131 See MNs 8.138–8.141.
132 P I, Art 77.

### b. POWs who are not combatants

**8.79** For historical reasons, certain individuals who are not combatants nevertheless benefit from POW status. Article 4(A)(4) and (5) of Convention III respectively grant POW status (but some argue not combatant status) to some civilians closely connected to the armed forces, such as 'civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces,' and to crews of the merchant marine and civilian aircraft of a party to an IAC. In 1949, this could still be seen as a privilege because, at that time, POW status was well established (while the status of protected civilian was new), ships flying the flag of a belligerent normally sailed for that belligerent and crews normally had the nationality of that belligerent. Today, it may be felt as shocking that either third-State nationals sailing as crew on a merchant ship flying a convenience flag that happens to be that of a belligerent or third-country national supply contractors running the canteen of a military unit could be interned for the duration of the hostilities without any individual procedure. I would therefore argue that, under IHRL as the *lex specialis* and *lex posterior*, they must have the possibility to argue in habeas corpus proceedings that, in their individual case, there is no reason to intern them as being part of the military potential of the enemy.

### c. Combatants who lose POW status

**8.80** As explained above, combatants who individually fail to distinguish themselves from the civilian population *at the moment of capture* do not have POW status if they were at that time engaged in an attack or a military operation preparatory to an attack. In my view, they therefore turn into protected civilians. Outside of the moment of capture, a prior failure to distinguish may constitute the war crime of perfidy,[133] which may and must be punished. However, neither the commission of war crimes[134] nor a previous failure to distinguish lead to a loss of POW status. The latter is explicitly foreseen in Protocol I, which only requires combatants to distinguish themselves while engaged in an attack or a military operation preparatory to an attack.[135] In all other circumstances, combatants who fail to distinguish themselves retain their POW status when falling into the power of the enemy. Likewise, as discussed hereafter, although combatants who fail to comply with the relaxed requirements of distinction in special situations lose their formal POW status, they are nevertheless entitled to the same treatment afforded to POWs.[136]

133 ICC Statute, Art 8(2)(b)(xi).
134 GC III, Art 85.
135 P I, Art 44(5).
136 P I, Art 44(4).

### d. Persons benefiting from POW treatment without POW status

**8.81** Some persons benefit from POW treatment without having POW status. They benefit from all rules of Convention III but not from the combatant immunity afforded to POWs. In other words, they may be prosecuted for the mere fact of having directly participated in hostilities.

**8.82** Under Article 4(B)(1) of Convention III, members of the armed forces of an occupied State who are in an occupied territory benefit from POW treatment if the occupying power reinterns them after having initially released them. They do not benefit from combatant immunity for acts committed after they were released and before they were reinterned. In my view, reinternment is permissible only if hostilities between the occupying power and the occupied power are ongoing outside the occupied territory given that all POWs must be released once active hostilities end.[137]

**8.83** Article 44(4) of Protocol I provides for another very astonishing case of POW treatment. Under this provision, '[a] combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war.' While this seems absurd, it must be correctly understood. First, it only covers persons failing to comply with the relaxed distinction requirements in special situations referred to in the *second sentence* of paragraph 3. Thus, it does not apply to those who fail to distinguish themselves in normal situations and who, as explained above, consequently lose POW status and treatment but, in my view, turn into protected civilians. Second, as such persons lose POW status, they may not only be punished for an act of perfidy to which the lack of distinction may amount to but also for the mere fact of having participated in hostilities. In my opinion, this paragraph therefore simply foresees a *lex specialis* exception to the general rule that persons who are not POWs are civilians because a person obviously cannot be treated according to both Convention III and Convention IV.

**8.84** As will be further discussed below in connection with the law of neutrality,[138] Article 4(B)(2) of Convention III provides that combatants of belligerent States interned by a neutral State benefit, as a minimum, from some but not all rules of Convention III. Although such persons benefit from partial POW

137 GC III, Art 118.
138 See MNs 9.141–9.144.

treatment, they do not have POW status and may therefore be punished by the neutral State if they directly participate in hostilities against the neutral State on their own volition, which would not trigger an IAC between the two States.

**8.85** Finally, the question arises whether a Detaining Power must grant POW status to its own nationals who serve in the armed forces of the enemy in an IAC. Under the wording of Convention III, this should be the case because nationality is irrelevant under Convention III. The majority view, however, is that such persons do not have POW status,[139] but, in my view, this nevertheless implies that they must be treated in accordance with Convention III. An alternative view asserts that they have POW status but may nevertheless be prosecuted for treason.[140]

### 8.2.5 Procedures to determine combatant and POW status

In cases of doubt, everyone must be presumed to be a civilian during the conduct of hostilities. Conversely, individuals who fall into the power of the enemy after having committed a belligerent act must be presumed to be a POW and must be treated accordingly. Such persons may be deprived of POW status only by a competent tribunal, which does not necessarily need to be a judicial body.

**8.86** In cases of doubt during the conduct of hostilities, a person must be presumed to be civilian and may therefore not be attacked.[141] Similarly, as a general rule, an individual who has fallen into the power of the enemy must be presumed by the latter to be a civilian because Convention IV defines persons protected by it as all those who (fulfil the nationality requirements and) are not protected by Convention III.[142] However, IHL provides an exception to this general rule: when doubt exists regarding the status of persons who 'committed a belligerent act', they must be treated as POWs 'until such time as their status has been determined by a competent tribunal'.[143] The *travaux préparatoires* of the more demanding provision of Protocol I discussed in the next paragraph and State practice indicate that such a competent tribunal does not have to comply with the requirements of an independent and impartial tribunal capable of

139 US Law of War Manual, para 4.4.4.2; Online Casebook, Malaysia, Public Prosecutor v. Oie Hee Koi; Yoram Dinstein, 'Unlawful Combatancy' (2002) 32 IYBHR 247, 259–60. For this view with some nuances, see Zamir, above note 111, 142–7.

140 René-Jean Wilhelm, 'Peut-on modifier le statut des prisonniers de guerre?' (1953) 35 IRRC 681, 682; Tse Ka Ho, 'The Relevancy of Nationality to the Right to Prisoner of War Status' (2009) 8 Chinese J of Intl L 395, 399.

141 P I, Art 50(1).

142 GC IV, Art 4(4). See also MN 8.152.

143 GC III, Art 5(2).

conducting a criminal trial under IHRL. The US established such tribunals in the Vietnam War[144] and in the Iraq–Kuwait War (1990–91) but argued that there was no doubt as to the status of those detained in the 'war on terror'.[145] Furthermore, it is controversial whether the frequently amended periodic review procedures in Guantánamo, which determine whether a detainee should continue to be detained, prosecuted or released, provide each detainee 'with much the same process afforded by Article 5'[146] or whether such procedures are insufficient under that provision because they cannot result in the conclusion that a detainee is a POW.[147]

**8.87** Protocol I clarifies and develops – arguably beyond customary international law – the presumption of POW status.[148] First, the presumption applies to all persons who took part in hostilities if either they or the party on which they depend claim such status or if they appear to be entitled to it. Second, a person who is denied POW status and is tried for offences arising out of the hostilities has the right to assert POW status before a judicial tribunal.

**8.88** No procedure, however, is prescribed for the reverse case: persons who are treated by a belligerent as POWs but who want to contest their qualification as combatants. In 1949, only the advantages of POW status and the related combatant immunity from prosecution were foreseen. Today, it is understood that Convention III also implies the disadvantage of 'authorizing'[149] internment for the duration of hostilities without any individual procedure. It may therefore be argued that a person must be able to oppose POW status. Possible solutions include allowing such persons to institute habeas corpus proceedings under domestic law and IHRL[150] or applying Article 5 procedures to such cases.[151]

144 Online Casebook, United States, Screening of Detainees in Vietnam.

145 On the question of when sufficient doubt exists to make Art 5 of GC IV applicable, see Online Casebook, Malaysia, Public Prosecutor v. Oie Hee Koi.

146 *Khalid v Bush* 355 F Supp 2d 311 (DDC 2005) 323, fn 16, vacated sub nom. on other grounds by *Boumediene v Bush* 476 F 3d 981 (DC Cir 2007), reversed on other grounds by *Boumediene v Bush* 533 US 723 (2008); see also IACommHR, *Towards the Closure of Guantanamo* (IACommHR 2015) OAS Doc No OAS/Ser.L/V/II.Doc.20/15, paras 251–66.

147 See ICRC, 'Geneva Convention on Prisoners of War' (ICRC Press Release, 9 February 2002) <https://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/57jrm3.htm> accessed 6 August 2018.

148 P I, Art 45.

149 For a discussion on whether this is the case, see MNs 10.002–10.003, 10.015.

150 UN Working Group on Arbitrary Detention, 'United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court', Principle 16 and Guideline 17, paras 30 and 95, as annexed to UNGA, 'Report of the Working Group on Arbitrary Detention' (2015) UN Doc A/HRC/30/37.

151 See Françoise Hampson, 'The Geneva Convention and the Detention of Civilians and Alleged Prisoners of War' (1991) Public Law 507; Marie-Louise Tougas, 'Determination of Prisoner of War Status' in Academy Commentary, 953–4.

### 8.2.6 Protection of POWs

POWs may – but must not necessarily – be interned without any particular procedure and for no individual reason. They may not be held in close confinement or in prisons. The purpose of their internment is not to punish them but only to hinder their participation in hostilities or to protect them. Restrictions imposed on them under the very detailed provisions of Convention III serve only the former purpose. The protection afforded by those provisions constitutes a compromise between the interests of the Detaining Power, the interests of the power on which the prisoner depends and the prisoner's own interests. It offers a combination between the obligation to offer them the same conditions given to members of the armed forces of the Detaining Power and minimum guarantees defined in Convention III.

#### a. Protection from the moment of falling into the power of the enemy

**8.89** Combatants benefit from the protections afforded to POWs as soon as they are in the power of the enemy until they are released and repatriated.[152] To come within the enemy's power, it is not necessary that they are captured or physically detained. It is sufficient that they surrender or are otherwise rendered *hors de combat* if in a place controlled by the enemy. Although the enemy may no longer attack combatants who are *hors de combat* in the contact zone, it has no obligation to gain control over them. It may also let them re-join their forces or flee.

**8.90** In particular situations, such as when a commando operation is conducted deep into enemy-controlled territory or when an organized resistance movement conducts military operations in occupied territory, evacuation and internment as regulated by Convention III may be impossible. In such situations, POWs must be released, even at the risk that they re-join their forces.[153]

#### b. Internment

**8.91** Once the enemy obtains control over combatants, it may intern them,[154] but it is not obliged to do so. It may free them unconditionally on territory under its control or, if the power on which they depend permits, on parole if they promise not to either leave territory controlled by the enemy or re-join their armed forces.[155]

152 GC III, Art 5(1).
153 P I, Art 41(3).
154 GC III, Art 21.
155 See GC III, Art 21(2)–(3).

Traditionally, the internment of POWs is not viewed as requiring an individual decision or a legal basis in domestic law because it is based upon the status of POWs as combatants and not on individual conduct or personal characteristics. This regime is seen to prevail as the *lex specialis* over the right to habeas corpus in IHRL. **8.92**

### c. Treatment during internment

The rules on POW treatment are divided into Parts II and III of Convention III entitled 'general protection of prisoners of war' and 'captivity', respectively. The latter's Section II entitled 'internment of prisoners of war' is its longest, which could suggest that the rules of Part III or at least its Section II apply only when POWs are interned and possibly only when interned in camps.[156] The *travaux préparatoires* demonstrate, however, that each provision of Convention III immediately applies as soon as someone is a POW in the power of the enemy.[157] Nevertheless, it is true that some rules, such as those on the election of POW representatives or on canteens, are irrelevant if a POW is not interned. Even so, such limitations are generally indicated in the wording of the relevant provision. **8.93**

The internment of POWs is not intended as punishment. Rather, it seeks to prevent their further participation in hostilities and to protect them. They may only be interned in camps in which they may move freely, and they may not be held in close confinement, in penitentiaries or with prisoners serving a sentence.[158] Convention III's rules on the treatment of POWs constitute a highly developed compromise between three interests: (1) the interest of the prisoners to be treated humanely, to survive in safety, to maintain links with their families, to have their allegiance to the power on which they depend respected and to be protected from forcibly contributing to the war effort of the enemy; (2) the interest of the Detaining Power to maintain its security by preventing the prisoners from re-joining the fighting; and (3) the interest of the power on which the prisoners depend to have those members of its forces interned by the enemy treated humanely. Its rules combine the principle of assimilation (that is, POWs must be afforded, depending on the rule, the same treatment as members of the armed forces of the Detaining Power or, in some cases, the local civilian population) and specific minimum guarantees that must now be interpreted in light of IHRL guarantees (which are more detailed) placing, depending on the issue regulated, more emphasis on one aspect or the other. Rules **8.94**

156 See Julia Grignon, *L'applicabilité temporelle du droit international humanitaire* (Schulthess 2014) 55–7.
157 Silvia Sanna, 'Treatment of Prisoners of War' in Academy Commentary, 979, with references.
158 GC III, Art 21.

on discipline, ranks, labour and POW representatives take into account POWs' submission to their own military hierarchy as well as their allegiance to the power on which they depend.

**8.95** The very detailed regime covers issues such as humane treatment; the obligation to provide for their maintenance free of charge; questioning; property; evacuation from the battlefield; security; quarters; food, clothing and canteens; hygiene and medical attention; religious, intellectual and physical activities; discipline; respect of rank; work; financial resources; relations with the detaining authorities; POW representatives; and death. This is not the place to fully discuss these rules because commentaries explain them,[159] many of the rules are self-explanatory and POWs recognized as such are becoming increasingly rarer than even IACs themselves, to which this legal regime exclusively applies. Nevertheless, Convention III's protective regime has been the model for many rules on the treatment of persons deprived of their liberty in other situations.

### d. Punishment

**8.96** POWs may obviously not be punished for directly participating in hostilities or for any domestic crime involved in such participation. They may, however, be prosecuted for any crimes under the legislation of the Detaining Power committed while POWs. Such legislation must be the same as that applicable to the Detaining Power's own armed forces.[160] Escapes may only be punished disciplinarily if unsuccessful and not at all when successful, that is, when a POW has re-joined his or her armed forces and subsequently falls again into the power of the former Detaining Power.[161] Furthermore, as with all suspected perpetrators, POWs may and must be prosecuted for war crimes.[162] If it has jurisdiction, a Detaining Power may also prosecute POWs for other crimes committed before they fell into its power that do not constitute acts of hostility, but it is suggested that this is limited only to extraditable crimes.[163] In all of the above cases, however, they remain POWs.[164]

**8.97** The appropriate court and applicable procedure must be the identical as for the same offence committed by members of the armed forces of the Detaining

159 See Sanna, above note 157, 977–1012; Updated ICRC Commentary GC III (forthcoming, 2019).
160 GC II, Art 82.
161 GC III, Arts 91–94.
162 See MNs 5.206–5.213.
163 Pictet Commentary GC III, 419; Online Casebook, United States, United States v. Noriega: A. Jurisdiction, Section III.
164 GC III, Art 85.

Power.[165] POWs may only be brought before civilian courts if soldiers of the Detaining Power could be brought before such courts for the same crime. If convicted and sentenced, POWs continue to benefit from POW status (except under reservations made by some former 'socialist' countries[166]) and must serve their sentence in the same manner as members of the Detaining Power's armed forces.[167] Convention III also prescribes a regime concerning judicial guarantees, applicable law, competent courts and admissible punishment as well as treatment while serving a sentence that combines the principle of assimilation and specific minimum guarantees.[168] Similar detailed rules as outlined above apply to disciplinary proceedings and punishment.[169]

### e. Transfers

**8.98** Specific rules protect POWs who are transferred to another camp.[170] POW transfers to another Detaining Power are subject to even more safeguards. Specifically, POWs may only be transferred to another State party to Convention III (which excludes transfers to armed groups) and only if that Detaining Power is able and willing to comply with Convention III,[171] which excludes the transfer of POWs to a State that does not consider them to be POWs but instead as, for example, 'unlawful combatants'. Furthermore, if the transferee power violates Convention III 'in any important respect', the transferring power must correct the situation or request the return of the POWs – a request that the transferee power must comply with.[172] The ICTY determined that, at minimum, the 'obligation of each agent in charge of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to' corresponds to customary international law,[173] and it convicted an officer for murders committed by an armed group to which he had transferred POWs.[174]

165 GC III, Arts 84, 102.

166 Such as by Albania, Angola, China, North Korea, Russia and Vietnam. For the text of some of the reservations, see Online Casebook, USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III. Poland and Hungary have since withdrawn their respective reservations.

167 GC III, Art 88.

168 GC III, Arts 82–88, 99–108.

169 GC III, Arts 82–98.

170 GC II, Arts 46–48.

171 GC III, Art 12(2). This rule was applied in the following cases that are reproduced in the Online Casebook: ICTY, The Prosecutor v. Mrkšić and Šljivančanin: B. Appeals Chamber, Judgement, para 71; United States, United States v. Noriega: C. Extradition, D. Interim Order on POW Treatment by France and E. Final Order on POW Treatment by France.

172 GC III, Art 12(3).

173 See Online Casebook, ICTY, The Prosecutor v. Mrkšić and Šljivančanin: B. Appeals Chamber, Judgement, para 70.

174 See ibid., para 71.

**8.99** Repatriations are obviously not transfers that must comply with this rule. Otherwise, they could never occur because the power on which POWs depend is not obliged to treat its repatriated soldiers in conformity with Convention III.

### f. Transmission of information

**8.100** To avoid the belief that POWs are missing by the power on which they depend and their families, IHL ensures the transmission of relevant information concerning POWs through three channels. First, the Detaining Power (or technically the National Information Bureau that it must establish) must notify, through the ICRC's Central Tracing Agency, the power on which the POW depends of the transfer, release, repatriation, escape, admission to hospital or death of any POW who has fallen into its power.[175] In my view, and by analogy to what Convention IV explicitly prescribes for protected civilians,[176] such information should not be transmitted by the Central Tracing Agency if it may be detrimental to the person concerned or his or her family. Second, POWs must be allowed to complete capture cards that must be transmitted to their respective families and the Central Tracing Agency.[177] Third, POWs have the right to correspond with their family, but such correspondence may be censored both by the Detaining Power and the power of the destination of the correspondence.[178]

### g. ICRC visits

**8.101** The application of Convention III is subject to the external scrutiny of the representatives of Protecting Powers (which have been absent in recent conflicts) and of the ICRC.[179] Their delegates must be provided access to all places where prisoners are located (that is, not only to camps and working detachments but also to those places where they are left free) and permitted to interview them in private. The ICRC also performs its customary activities in the fields of assistance based upon its right of initiative[180] and the re-establishment of family links based upon the role of its Central Tracing Agency mentioned above. It reports its findings and suggestions for improvement directly to the detaining authorities. Due to controversies in recent armed conflicts, it has abandoned its practice of also transmitting such reports to the authorities on which the prisoners depend.

175 GC III, Arts 122–123.
176 GC IV, Art 137(2).
177 GC III, Art 70.
178 GC III, Arts 71, 76. For both IACs and NIACs, see ICRC CIHL Database, Rule 125.
179 GC III, Art 126.
180 GC III, Art 9.

### 8.2.7 Release, repatriation and accommodation in neutral countries

POWs must be unilaterally released and repatriated at the end of active hostilities unless, according to practice, they express their refusal to be repatriated to the ICRC. Some POWs, such as those who are seriously wounded and sick, must be repatriated even during hostilities. Others, in particular POWs who are less seriously wounded or sick, may be interned in a neutral country.

**8.102** In conformity with one of the central purposes of Convention III, POWs may be interned until the cessation of active hostilities subject to the following exceptions. POWs who are so incurably ill or wounded that they could no longer realistically participate in hostilities must instead be repatriated even as the conflict is ongoing. Less seriously ill or injured prisoners may continue their internment in a neutral country. Able-bodied POWs may also benefit from internment in a neutral country based upon special agreements concluded by the belligerents. Conversely, POWs who are subject to criminal proceedings or who are serving sentences may continue to be held even after the cessation of active hostilities.

#### a. During hostilities

##### *i. Direct repatriation*

**8.103** During hostilities, certain categories of seriously wounded or sick POWs as well as those who suffered from serious accidents must be directly repatriated.[181] Annex I to Convention III (which is technically a model agreement but is binding for belligerents unable to agree on other terms[182]) details the various medical conditions that require direct repatriation. Direct repatriation decisions are made by a mixed medical commission consisting of three members: one appointed by the Detaining Power and two neutral nationals appointed by the ICRC, who should be a surgeon and a physician.[183]

**8.104** Although frequent in practice, exchanges of able-bodied POWs during an armed conflict are not favoured (but are not prohibited) by IHL because they can be considered to be an exercise in trading human beings, and such exchanges always risk leaving some POWs behind as adversaries never detain exactly the same number of POWs.

181 GC III, Arts 109, 110(1) and 114.

182 GC III, Art 110(4).

183 Detailed regulations for mixed medical commissions can be found in 'Annex II: Regulations Concerning Mixed Medical Commissions' as annexed to GC III.

**8.105** POWs may not be repatriated during hostilities against their will.[184] Repatriated POWs may not be employed on active military service.[185]

*ii. Accommodation in neutral countries*

**8.106** IHL also encourages the accommodation of other categories of wounded and sick POWs in neutral countries[186] as well as agreements for the repatriation or internment in neutral countries of able-bodied POWs who have been interned for a long time.[187] Annex I to Convention III also clarifies the medical reasons that allow accommodation in a neutral country.

**8.107** The armed conflict in Afghanistan between 1979 and 1989 is the only context since World War I in which persons who were arguably POWs were interned in neutral countries. During that conflict, a significant amount of USSR soldiers fell into the power of Afghan resistance movements. To alleviate their fate, the ICRC successfully negotiated an agreement with the USSR, the Afghan opposition movements, Pakistan and Switzerland that applied Convention III *by analogy*. Under this agreement, Soviet soldiers detained by the Afghan opposition movements could be transferred to and interned in Switzerland for two years. Eleven Soviet soldiers visited by the ICRC accepted this offer, and those who still wished to be repatriated after the two-year period of internment were repatriated to the Soviet Union.[188]

b. At the end of active hostilities

**8.108** POWs must be released and repatriated as soon as active hostilities end.[189] Ideally, modalities should be laid down in a repatriation plan agreed upon by the former belligerents. IHL, however, formulates with great care and detail (although not entirely successfully) rules to ensure that POWs can be repatriated without such an agreement and to apportion the related costs. Only POWs who are subject to criminal proceedings or who have been convicted may continue to be held even after the cessation of active hostilities until either the end of the proceedings or the completion of their sentence.[190] In such circumstances, they remain protected by Convention III.[191]

184 GC III, Art 109(3).
185 GC III, Art 117.
186 GC III, Arts 109(2) and 110(2)–(3).
187 GC III, Art 111.
188 'International Committee of the Red Cross, External Activities' (1984) 24 IRRC 230, 239–40.
189 GC III, Art 118.
190 GC III, Art 119.
191 GC III, Art 5(1).

**8.109** There are several legal issues relating to the repatriation of POWs that have frequently led to controversies and human suffering in the past. First, controversy surrounds the exact timing as to when the obligation to repatriate all POWs arises. Second, issues have arisen as to whether this obligation is unilateral and independent of the adverse party's fulfilment of its repatriation obligation. Finally, questions exist as to whether and when objections by POWs to repatriation may authorize or oblige the Detaining Power not to repatriate them and what protections must be afforded to such POWs if they have not been repatriated.

**8.110** IHL links the point in time when repatriation must begin to the facts on the ground and not to the legal situation or to agreements between the former belligerents. The mere absence of fighting is insufficient, but one cannot wait until certainty exists that hostilities will not resume. Repatriation must also occur even if an occupation is ongoing. A reasonable expectation that hostilities have ended must be sufficient, and the evaluation must be based upon the facts on the ground, agreements or declarations by the former belligerents (if not contradicted by the facts) or a combination thereof.[192] Even though an arbitral tribunal suggested the opposite, the obligation to repatriate POWs is unilateral and not subject to reciprocity.[193]

**8.111** Although repatriation is compulsory under Convention III and POWs cannot renounce their rights,[194] the *jus cogens* principle of *non-refoulement* under IHRL and international refugee law now prohibits the forcible repatriation of POWs fearing persecution.[195] However, as this exception offers the Detaining Power room for abuse and risks rekindling mutual distrust, the prisoner's wishes should be the determining factor, but it can be difficult to ascertain those wishes. The practice of the last 50 years is to let the ICRC ascertain the wish of the POW and not to repatriate those who refuse.[196] If the Detaining Power is unwilling to grant them asylum, they may continue to be interned, but they lose POW status in my opinion and therefore turn into civil internees protected by Convention IV until they can be resettled.[197]

192 For a case of application that was not very well argued, see Online Casebook, Eritrea/Ethiopia, Partial Awards on POWs: B. Prisoners of War, Eritrea's Claim 17, paras 145–7.

193 See ibid., paras 148–63; see also MNs 5.034–5.036.

194 GC III, Art 7.

195 For a detailed argument, see Marco Sassòli 'Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War' in Academy Commentary, 1051–4.

196 For detailed references on this point, see ibid., 1055–6.

197 See GC IV, Arts 4 and 6(4).

### 8.2.8 Status and treatment of persons who do not have combatant and POW status: 'unlawful combatants'?

It is controversial whether everyone who is not a combatant is, as the text of IHL treaties suggests, a civilian or whether an intermediate 'unlawful combatants' category exists. In the conduct of hostilities, it is largely accepted that members of armed forces may be targeted in IACs like combatants even if they lost their combatant status.

Once in the power of the enemy, it is preferable, however, to consider that everyone in IACs who do not have POW status is a civilian except for the few categories for whom IHL explicitly prescribes POW treatment.

**8.112** As explained above, certain persons taking a direct part in hostilities either are not combatants or forfeit POW status. Such persons may be referred to as 'unprivileged combatants' or 'unprivileged belligerents' because they lose or never had the combatant's privilege to commit acts of hostility. As their acts of hostility are not 'permitted' by IHL, they may also be called 'unlawful combatants'.[198] In NIACs, one may even claim that every fighter is an 'unlawful combatant' because no combatant privilege exists in NIACs.[199] In IACs, although acts of hostility committed by persons who have lost or never had combatant status may be punished under the domestic law of the captor, such acts do not constitute war crimes.[200]

**8.113** There is considerable controversy over the status of such persons. In my view, they must perforce be civilians in light of the text of IHL treaties. Others, however, contend that they remain combatants but simply lose the privileges of combatant and POW status. Here, as always, the question of status during the conduct of hostilities must be distinguished from that concerning persons who have fallen into the power of the enemy.

#### a. In the conduct of hostilities

**8.114** In the conduct of hostilities, Article 50(1) of Protocol I defines civilians as all those who are not 'referred to in Article 4 A) 1), 2), 3) and 6) of the Third Convention and in Article 43 of' Protocol I. Article 51(3) clarifies that civilians enjoy protection against attacks and effects of hostilities 'unless and for such

198 US Law of War Manual, paras 4.3, 4.3.1, 4.3.2.2 and 4.3.4.

199 For a discussion of the consequences flowing from the lack of combatant status in NIACs, see MNs 8.120–8.124.

200 Yoram Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 103.

time as they take a direct part in hostilities', which confirms that they remain civilians even when they do so. Despite these textual arguments, the ICRC now accepts that members of armed forces who have lost their combatant status for any reason, such as due to a failure to distinguish themselves from the civilian population, are not civilians for targeting purposes but rather remain targetable at any time just as combatants.[201] This outcome is reasonable because it would be absurd if a combatant who disguises himself as civilian gains civilian immunity. The US goes much further than the ICRC, arguing that anyone belonging to an armed group involved in an armed conflict is not a civilian and therefore may be attacked, like a combatant, at any time until they surrender. We will discuss this issue further in relation to the question concerning who may be targeted,[202] in particular in a NIAC.[203]

### b. When fallen into the power of the enemy

**8.115** The idea that some people are neither combatants nor civilians, however, is not justified once they have fallen into the power of the enemy. Article 4 of Convention IV defines protected civilians as all individuals who fulfil the nationality requirements and are not protected by the other Conventions, in particular Convention III. The 1960 Pictet Commentary confirms that '[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.'[204] This continues to be the position of the ICRC,[205] and it has also been affirmed by international[206] as well as domestic[207] courts. Indeed, it would be astonishing if the drafters of the Conventions, who were familiar with the fact that some individuals in World War II participated in hostilities but did not fulfil the requirements of POW status, had left such persons without any protection under the Conventions. On the contrary, they introduced a derogation clause into Convention IV that permits a party to an IAC to deprive civilians engaged in hostile activities of some of the protections offered therein.[208] Protocol I, however, explicitly provides that persons in occupied territory who are not spies and who have taken part in hostilities but are either not combatants or have lost that status retain the

201 ICRC DPH Guidance, 22.
202 See MNs 8.314–8.318.
203 See MNs 10.259–10.283.
204 Pictet Commentary GC IV, 51.
205 ICRC DPH Guidance, 20.
206 ICTY, *Prosecutor v Delalić et al.* (Judgment) IT-96–21-T (16 November 1998) para 271.
207 See, e.g., the Israeli Supreme Court in Online Casebook, Israel, The Targeted Killings Case, para 28.
208 GC IV, Art 5.

communication rights afforded to civilians under Convention IV.[209] These rules indicate that 'unlawful combatants' who are in the power of the enemy benefit from civilian status. The special case foreseen in Article 44(4) of Protocol I that seems to contradict this conclusion has been discussed above.[210]

**8.116** Various scholarly writings[211] and the US, especially in the context of fighting international terrorism, espouse the opposite view. According to this view, a person who does not fulfil the requirements of combatant status is an 'unlawful combatant', a third category of persons.[212] Such 'unlawful combatants' have the disadvantages associated with POW status (for example, they may be held without an individual internment decision) without benefiting from the advantages of Convention III.[213] At best, such persons benefit from the fundamental guarantees laid down in Article 75 of Protocol I.

**8.117** The US Supreme Court first used the term 'unlawful combatant' prior to the adoption of Convention IV in order to refer to members of the German armed forces who had lost combatant privilege (that is, immunity from prosecution) as a result of having acted in disguise as spies on US territory during World War II.[214] The Privy Council[215] and an Israeli military court in the Palestinian Occupied Territory[216] also used this concept without explicitly denying the applicability of Convention IV. The US claims that 'unlawful combatants' may be detained just like lawful combatants without any judicial decision. Furthermore, according to the US, the detention of 'unlawful combatants' is, as it is for combatants, neither governed by domestic criminal legislation nor by IHRL. However, the US Supreme Court held that 'unlawful combatants' must have access to habeas corpus if they are US citizens[217] or, in the case of non-citizens, if they are detained in places where the US 'exercises plenary and exclusive jurisdiction…' even if it does not exercise de jure sovereignty, such as in Guantánamo Bay.[218] However, as the US does not exercise such jurisdiction over the Bagram Air Force Base in Afghanistan and given the 'practical obstacles' in

209 P I, Art 45(3).
210 See MN 8.083.
211 Dinstein, The Distinction, above note 200, 103–6; Dinstein, Unlawful Combatancy, above note 139, 249–51.
212 US Law of War Manual, para 4.3.
213 US Law of War Manual, para 4.2.3.3.
214 See Online Casebook, United States, Ex Parte Quirin *et al.*
215 See Online Casebook, Malaysia, Osman v. Prosecutor.
216 See Online Casebook, Israel, Military Prosecutor v. Kassem and Others.
217 See *Hamdi v Rumsfeld* 542 US 507 (2004) 509, 524–5, 532–9; *Reid v Covert* 354 US 1 (1957) 5–6; Restatement (Third) of Foreign Relations Law (1987) Section 721(b).
218 *Rasul v Bush* 542 US 466 (2004) 466, 475–85; *Boumediene v Bush* 553 US 723 (2008) 724–6, 792–3.

implementing habeas corpus there, the US Court of Appeals held that non-citizen detainees held there are not entitled to habeas corpus.[219]

**8.118** The logic of the argument denying 'unlawful combatants' civilian status under Convention IV is that those who fail to comply with the necessary conditions for combatant status should not be privileged in relation to those who do. Indeed, captured lawful combatants (that is, POWs) may be interned without any judicial or individual administrative decision, while 'unlawful combatants' if classified as civilians could be detained only for imperative security reasons or in view of a trial pursuant to an individual determination. In my opinion, one could reply that lawful combatants can be easily identified based on objective criteria that they normally do not deny, such as being a member in the armed forces of a party to an IAC. In contrast, the membership and past behaviour of unprivileged combatants as well as the future threat they may represent can only be determined individually.

**8.119** Some also argue that it would be absurd to classify heavily armed members of 'terrorist groups' captured in an IAC who do not to benefit from combatant and POW status as civilians and to let them thus benefit from Convention IV. In my view, however, what is determinative is that such civilian status does not lead to absurd results. As civilians, unprivileged combatants may be attacked while they unlawfully directly participate in hostilities. After arrest, Convention IV does not bar their punishment for unlawful participation in hostilities, and it even prescribes punishment for war crimes. In addition, it permits administrative detention for imperative security reasons,[220] and it allows for derogations from protected substantive rights of civilians within the own territory of a State and communication rights within occupied territory.[221] Convention IV thus fully takes into account the security needs of a State confronted with dangerous people, and its application to unprivileged combatants does not lead to absurd results in my opinion. Additionally, from a teleological perspective, I fear that the concept of 'unlawful combatants' denied protection by Convention IV could constitute an easy escape route for detaining powers as none of the Conventions contain rules on the treatment of someone in the power of the enemy who is neither a combatant nor a civilian.[222]

219 *Al Maqaleh v Gates* 605 F 3d 84 (DC Cir 2010) 94–9.
220 GC IV, Arts 42, 43, 78.
221 GC IV, Art 5.
222 See, however, P I, Art 75.

### 8.2.9 The regime of NIACs

Technically, combatant and POW status do not exist in NIACs. However, protection is extended under the applicable treaty law to all those who do not or no longer directly participate in hostilities. It is nevertheless increasingly argued that members of armed groups may be attacked at any time like combatants in IACs. When in the power of a party, it is uncontroversial that – in contrast to combatants in IACs – members of such groups may be punished for the mere fact of having directly participated in hostilities. Some States and scholars argue that – like POWs in IACs – they may also be interned in NIACs without any further legal basis or individual determination without, however, benefiting from POW status or treatment.

**8.120** The concept of combatants does not technically exist in NIACs because such conflicts involve, by definition, the participation of non-State armed groups and States do not want to accord immunity from prosecution for participation in hostilities to members of such groups. This position is understandable as it undermines the State's monopoly on the use of legitimate force, and, as this is a defining characteristic of statehood, it thus threatens the very existence of States as such. The rule that only the State may use force also has considerable advantages from a humanitarian point of view. Situations involving the use of force between individuals and groups within a State, which frequently occurred in history and still exist now, increase insecurity for the civilian population. IHL of NIACs, which was developed by States, therefore does not refer to combatants, combatant status or POW status. Instead, IHL of NIACs simply provides basic guarantees of humane treatment for all those who do not or no longer actively participate in hostilities, 'including members of armed forces who have laid down their arms.'[223]

**8.121** IHL of NIACs nevertheless refers to civilians. Specifically, attacks on civilians are prohibited, and the civilian population enjoys general protection against the dangers arising from military operations.[224] Although IHL of NIACs fails to define the concept of civilians, it is impossible to imagine how they could be defined other than by opposition to those who fight. It has therefore been submitted that the definition of combatants in IHL of IACs customarily applies to fighters in NIACs only for the purpose of the principle of distinction[225] without granting such fighters combatant or POW status. Such fighters must

223 GCs, Common Art 3.
224 P II, Art 13.
225 ICRC CIHL Database, Rule 3, and its commentary.

necessarily distinguish themselves from the protected civilian population; otherwise, their adversary cannot possibly comply with the principle of distinction in order to respect civilians. Such an obligation, however, is not expressly foreseen in IHL of NIACs because, once again, States feared that it would confer legitimacy upon those who kill their security forces while distinguishing themselves from the civilian population.

### a. In the conduct of hostilities

**8.122** Regarding the question of who is a legitimate target of attack in NIACs, the difficulty of defining combatants shifted traditionally to that of defining the acts that constitute direct participation in hostilities. Today, however, it is increasingly accepted that a kind of status-based approach also prevails in NIACs. According to this approach, members of armed forces and armed groups are targetable until they surrender or are otherwise *hors de combat*, and they do not benefit from the rule concerning civilians who may be targeted only if and for such time as they directly participate in hostilities.[226]

### b. Protection when in the power of the enemy

**8.123** The absence of combatant status in NIACs results in another consequence: States are not prohibited from punishing members of rebel forces for the mere fact of having directly participated in hostilities even if they complied with IHL. Legally, killing a government soldier on the battlefield or killing defenceless women and children may both be classified and punished as murder under domestic legislation, which deprives those who fight of an important incentive to respect IHL that exists in IACs. Article 6(5) of Protocol II is the only provision constituting a kind of very limited surviving remnant of combatant privilege and offering a very limited reward to rebel forces who complied with IHL. It encourages the authorities in power (which may be the rebels) to grant such persons the broadest possible amnesty at the end of the conflict.

**8.124** We will discuss later the increasingly relied upon argument that, although they have no combatant or POW status, members of armed groups may be interned in NIACs – like POWs in IACs – without any further legal basis or individual determination but without benefiting from POW treatment.[227]

226 For a detailed discussion, see MNs 10.259–10.283.
227 See MNs 10.290–10.293.

## 8.3 CIVILIANS IN THE POWER OF THE ENEMY

**8.125** As explained above for all persons affected by armed conflicts,[228] civilians require protection against two distinct threats in armed conflicts. On the one hand, civilians must be protected against attacks and the effects of hostilities. We will discuss this protective regime in sub-chapter 8.6. On the other hand, civilians also require protection against arbitrary treatment by the power in whose hands they are. The latter protective regime will be discussed in this sub-chapter with the exception of the special rules contained in the law of occupation that protect civilians against abuses by an occupying power, which will be addressed in sub-chapter 8.4.

### 8.3.1 The structure of Convention IV

Except for some rules that benefit the entire population of countries affected by an IAC, most of the substantive IHL rules protecting civilians against arbitrary treatment by a party to an IAC apply only to 'protected civilians', that is, principally civilians of enemy nationality. The rules applicable to protected civilians are subdivided in Convention IV into two different regimes: one regime covers aliens on the own territory of a party to an IAC, while the other applies to occupied territories. In practice, this territorial subdivision leaves gaps that can be filled in either by considering that some rules are common not only to those two territories but to all protected civilians or by expanding the concept of 'occupied territory' to any place on the earth where a party to an IAC gains control over 'protected civilians' outside of its territory.

**8.126** Convention IV is the most important source for IHL protecting civilians in the power of a party. Its structure, however, creates a particular problem: it gives the impression that its rules on protected civilians apply only to (enemy) aliens finding themselves on the own territory of a belligerent party and to protected civilians located in occupied territory. However, civilians may also fall into the power of the adverse party in other circumstances, such as during a raid or commando operation in enemy territory, in neutral territory or on the high seas.

**8.127** As in each Convention, Part I of Convention IV deals with important common rules that are not specific for civilians except for Articles 4 and 5, which are discussed below.[229] Part II, which applies to the entire populations of belligerent

228 See MNs 3.28–3.43.

229 See MNs 8.149–8.158 and 8.168–8.170, respectively.

countries and not only to 'protected civilians',[230] covers issues such as protected zones, wounded and sick civilians, hospitals, the transport of wounded and sick civilians, humanitarian assistance, child welfare and the re-establishment of family links. Importantly, however, it does not contain basic guarantees of humane treatment.

**8.128** Part III, which benefits only 'protected civilians' as defined in Article 4, contains most of the substantive rules of Convention IV in Articles 27 to 141. Section I of Part III, which is entitled 'provisions common to the territories of the parties to the conflict and to occupied territories', provides 'common' rules benefiting protected civilians that apply to both a belligerent party's own territory (that is, a State's non-occupied territory) and occupied territory. Both the terms of its title and a systemic interpretation of the term 'common' indicate that Section I's common rules must apply only to a party's own territory or occupied territory, thus leaving a normative gap discussed below in more detail. Part III is further divided into Section II, which protects foreigners on a belligerent party's own territory, and Section III, which applies to protected civilians in occupied territory. Section IV contains detailed rules protecting civilians interned for imperative security reasons in own and occupied territories. Finally, Part IV of Convention IV comprises articles that are mostly common to the Geneva Conventions and that deal with their execution.

**8.129** In my view, even though the two categories of territory referred to above are mutually exclusive, they must together cover all possible situations in which a civilian is in enemy hands. The *travaux préparatoires*, however, indicate that Part III was intended to only cover only two categories of persons: foreigners on the non-occupied territory of a party to the conflict and the population of occupied territories.[231] Therefore, under this interpretation, not one single rule of Part III would protect a 'protected civilian' who is neither in a party's own territory nor in occupied territory and only the minimum guarantees foreseen in Article 75 of Protocol I would apply. Nothing indicates that the drafters of Convention IV consciously left such a gap in the protection offered to 'protected civilians' as

230 See GC IV, Art 13.

231 See *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department of Switzerland 1950) vol II-A, 821, which states: 'Part III constitutes the main portion of our Convention. Two situations presenting fundamental differences had to be dealt with: that of aliens in the territory of a belligerent State and that of the population-national or alien-resident in a country occupied by the enemy.' The ICRC's 'preliminary remarks' to the text of the Geneva Conventions are even more explicit: '[Convention IV] distinguishes between foreign nationals on the territory of a party to the conflict, and the population of occupied territories. It is divided into five Sections. Section I contains provisions common to the above two categories of persons…'. See ICRC, *The Geneva Conventions of 12 August 1949* (ICRC 1995) 32.

defined in Article 4 (that is, essentially, enemy nationals) apprehended during an invasion of their territory, a commando operation or (with or without the consent of the neutral State) in the territory of a neutral State. There are two ways to resolve this normative gap. First, one might contend that, despite the wording of its title, Section I covers all protected civilians under the enemy's control in all places.[232] While this would fill in most gaps, there would still be no rule prohibiting the forcible transfer of protected civilians apprehended in, for example, neutral territory or on the applicable legislation as well as competent courts as those rules can only be found in Section III. The other solution is discussed below as it extends the concept of occupation to the invasion phase. It consists of considering that a civilian falling into the power of a State outside the territory of that State is perforce on a piece of land which is under control of that State and therefore, for the purposes of IHL (perhaps only for one hour) functionally occupied by that State.[233]

### 8.3.2 Rules benefiting all civilians

Some IHL rules benefit all civilians, including civilians in the power of 'their own' party, and not only 'protected' civilians. These rules comprise most provisions concerning humanitarian assistance; wounded and sick civilians; medical personnel, units and transports; fundamental guarantees, in particular for women, children (including the prohibition against recruiting them or using them to participate in hostilities) and journalists; family news; and family reunifications.

**8.130** Certain IHL rules benefit all civilians whether they are in the power of the adverse party or the power of their own party as soon as they are affected by conduct with a nexus to the IAC. Many of these rules address problems relating to both the conduct of hostilities and the protection of persons in the power of a party, such as those concerning humanitarian assistance, wounded as well as sick civilians and medical personnel, units and transports. Other rules concern fundamental guarantees that must be provided to everyone or specific guarantees for women, children or journalists. Some provisions deal with issues that cannot be solved only by the party controlling enemy civilians, namely the re-establishment of family news and family reunifications. Finally, certain rules, such as those relating to the recruitment of children, even impose obligations typically on a party with respect to its own population.

232 Nishat Nishat, 'The Structure of Geneva Convention IV and the Resulting Gaps in that Convention' in Academy Commentary, 1080–81. Nishat also demonstrates that considering every territory that is not occupied to constitute a party's own territory is not an adequate solution. Ibid., 1081–3.

233 See MN 8.218.

**8.131** Humanitarian assistance, which will be dealt with later,[234] must perforce also impose obligations on a party towards a civilian population that, although not in its power, needs such assistance to pass freely through the frontlines. The rules on protected areas, which are dealt with elsewhere,[235] mainly aim to protect those admitted in such areas against the effects of hostilities. Finally, we previously discussed the wounded, sick and shipwrecked as well as medical personnel, units and transports that are protected against both their own party and the adversary.[236]

### a. Special protection afforded to women

In addition to prohibiting discrimination based on sex, IHL also affords preferential treatment, called 'special protection', to women based upon their perceived unique vulnerabilities. Some of these vulnerabilities are objectively and physiologically justified, such as pregnancy and childbirth, while others are mostly based upon social stereotypes that nevertheless lead to specific protection needs in reality. Many of the latter rules aim at protecting their sexual integrity by prescribing, for example, that women must be detained separately from men. Treaty law applies the specific prohibition of sexual violence to women, while general rules on humane treatment and customary law apply it equally to men.

**8.132** We will deal elsewhere with the gender perspective that must permeate the understanding and critical analysis of many – and, according to some, all – rules of IHL.[237] Here, it is sufficient to mention that specific IHL rules on women exist in a tension. On the one hand, IHL prohibits adverse distinctions based on sex. On the other hand, it affords women special protection based upon their specific vulnerabilities, only a few of which are objectively justified, such as those based on physiological reasons, and many of which are based upon social stereotypes that nevertheless lead in reality to specific protection needs of women. Controversy exists over the extent to which IHL should fight such stereotypes, be neutral about them or even reinforce them indirectly, such as, for example, by considering women as 'vulnerable' and in need of special protection against sexual violence simply because this is often the sad reality in armed conflicts.

234 See MNs 10.198–10.216.
235 See MNs 8.030–8.033, 8.357–8.360.
236 See MNs 8.002–8.029.
237 See MNs 10.158–10.170.

*i. The prohibition of discrimination against women*

**8.133** IHL prohibits discrimination against women.[238] Thus, women who are wounded, sick or shipwrecked, combatants, civilians in the power of the enemy, civilian internees in own or occupied territory, beneficiaries of humanitarian assistance and members of the civilian population protected against attacks as well as the effects of hostilities must be protected according to their status under IHL in the same manner as men. Today, this prohibition against discrimination must be understood in light of IHRL as covering not only direct discrimination (when men and women are treated differently in the rules or in their interpretation and application) but also indirect discrimination (when men and women are treated alike on issues that require different treatment or when the effects of a general policy or measure disproportionately prejudice women).[239]

*ii. Grounds for preferential treatment*

**8.134** Taking into account the uncontroversial physiological difference between men and women, namely, the possibility to bear children, IHL specially protects all pregnant women and maternity cases – even if they do not fall under the concept of protected persons – against arbitrary treatment by the power in whose hands they are and in some particular ways against the effects of hostilities.[240] Pregnant women and maternity cases are also included in the definition of the wounded[241] and benefit from certain privileges in terms of humanitarian assistance.[242] Some of those rules also include mothers of young children,[243] which, although obviously based upon a gender stereotype, responds to the reality that in nearly all conflict areas mothers are still the main caretakers of children. Women also benefit from special protective rules when deprived of their liberty as POWs or civilian internees.[244] Many of those rules, referring in old-fashioned language to women's 'honour', try to protect their sexual integrity, including by prescribing the separate detention of men and women. While this may be based on gender stereotypes of vulnerability and neglects different sexual orientations as well as gender identities, it provides most women with an important aspect of protection.

238 GCs, Common Art 3; GC I, Art 12; GC II, Art 12; GC III, Arts 16 and 88(2); GC IV, Arts 13 and 27(3).

239 For the prohibition of adverse distinctions in Common Article 3, see Updated ICRC Commentary GC I, para 573.

240 GC IV, Arts 14, 16, 21–23. In occupied territory, the occupying power must not hinder the continued application of measures taken for their benefit.

241 P I, Art 8(a).

242 GC IV, Art 23.

243 GC IV, Arts 14 and 132; P I, Arts 76(2)–(3).

244 GC III, Arts 25, 97 and 108; GC IV, Arts 76, 85, 89, 119, 124 and 132; P I, Art 76(3); P II, Art 6(4).

**8.135** As for the prohibition of rape and sexual violence itself, women appear in many treaty rules of IHL of IACs as its only beneficiaries.[245] However, due to the influence of ICL over the last 25 years, customary IHL now recognizes that men may also be victims of such crimes and applies the same prohibitions.[246] Even without this development, treaty law of IACs prohibits such practices against men through the prohibitions against inhuman and degrading treatment. In NIACs, Protocol II prohibits sexual violence in gender-neutral language.[247]

### b. Special protection afforded to children

Children benefit from 'special protection' under IHL due to their unique vulnerabilities and protection needs. Paramount among these rules is the prohibition against recruiting them into armed forces or armed groups or using them to participate in hostilities. The age limit to which such prohibition applies varies between 15 and 18 years according to the applicable instrument and to whether they join State armed forces or rebel armed groups. Controversy exists as to what kinds of participation are prohibited, but it is uncontroversial that the prohibition does not only cover acts of direct participation that would make a civilian lose protection against attacks. Children who nevertheless participate in hostilities benefit from general protection due to their status as combatants or civilians in addition to special protection as children.

#### *i. Special rules on the treatment of children*

**8.136** In the first place, IHL provides general protection to children in the same manner as anyone else belonging to the category of persons in which they fall, such as the wounded, sick or shipwrecked, civilians and as members of the civilian population, women, refugees or internees. The general obligation to treat those persons humanely or to respect and protect them, however, obviously applies differently in practice when the beneficiary is a child.

**8.137** However, children also benefit from special protection under IHL because of their unique vulnerability and needs. In every armed conflict, numerous children are left without resources, separated from their families or deprived of education, all of which are situations that render them even more vulnerable. IHL therefore contains specific rules aimed at protecting children from the effects of hostilities[248] as well as from any form of assault[249] or when they are

245 GC IV, Art 27(2); P I, Art 76(1).
246 ICRC CIHL Database, Rule 93.
247 P II, Art 4(2)(e).
248 See GC IV, Arts 14 and 17; P II, Art 4(3)(e).
249 P I, Art 77(1); GC IV, Art 51.

detained[250] or prosecuted.[251] IHL also ensures that children continue to benefit from humanitarian assistance[252] in addition to proper education and care.[253] Furthermore, it seeks to prevent their separation from their families and favours reunification with their families if they have been separated from them.[254] Most of those rules specifically define the age of the children that benefit from them, often as persons under the age of 15. In other cases, the term must be defined in conformity with other rules of international law, which define a child as a person under 18.[255]

*ii. Prohibition of recruitment and use of children in hostilities*

**8.138** IHL aims to prevent the participation of children in hostilities. Belligerents may not recruit children under 15 into their armed forces and must take feasible measures to ensure that they do not directly participate in hostilities, including if they wish to do so.[256] At least Protocol I uses the same term ('direct' or 'active' 'participation in hostilities') for this prohibition in IACs as in the rules indicating when a civilian loses protection from attacks.[257] However, due to the jurisprudence of international criminal tribunals, it is now accepted that concept of participation as it pertains to children is much broader and includes indirect forms of participation that put children in danger but do not deprive civilians of protection against attacks.[258]

**8.139** In Protocols I and II, the ICC Statute and the Convention on the Rights of the Child, 15 is the age threshold for this prohibition.[259] The 2000 Optional Protocol on Children in Armed Conflict to the Convention on the Rights of the Child (OPAC) raises the threshold for use in hostilities and compulsory recruitment to 18.[260] As to the permissible age of voluntary recruitment of children, OPAC creates an inequality between States and non-State armed groups.[261]

250 GC IV, Art 76(4).
251 GC IV, Art 68(4).
252 GC IV, Arts 23 and 89(5); P I, Arts 70(1) and 77(1).
253 GC IV, Arts 24, 38(5), 50 and 94; P II, Art 4(3)(a).
254 GC IV, Arts 26, 50(4), 82(2)–(3) and 132; P I, Arts 74 and 78 in particular; P II, Art 4(3)(b).
255 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, Art 1.
256 P I, Art 77(2); P II, Art 4(3)(c).
257 See GCs, Common Art 3; P I, Art 51(3); P II, Art 13(3). The equally authentic French text uses the same term for active and direct participation.
258 See in particular ICC, *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) paras 627–8.
259 P I, Art 77(2); P II, Art 4(3)(c); Convention on the Rights of the Child, above note 255, Art 38; ICC Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii).
260 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) 2173 UNTS 222, Arts 1–2.
261 Compare ibid., Arts 3 and 4.

Specifically, OPAC merely obliges States parties to raise the minimum age of voluntary recruitment, subject to other strict conditions, into their armed forces to 16 with the exception that States may allow the voluntary enrolment of persons aged 15 to 16 into military schools.[262] In contrast, it prohibits non-State armed groups from allowing the voluntary recruitment of children under 18 into their forces.[263]

**8.140** A combination between the minimum age of 18 and the expanded concept of prohibited involvement of children with armed groups should not result in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the entire population for which they claim to fight. Here, one must again remember the principle of equality of belligerents before IHL. As IHL does not prohibit States from involving children in any governmental activity, it should not be interpreted as prohibiting any association of children with armed groups. If a 17-year-old girl volunteers to update the computer software used by an armed group or a 16-year-old boy duplicates propaganda leaflets, this should not be considered as a prohibited participation in hostilities.

**8.141** If children participate in hostilities despite the aforementioned prohibitions, a complex question, which is discussed above, arises as to whether they may be targeted like adults.[264] If captured, such children still benefit from preferential treatment afforded to them by IHL. The prohibition against participation is not addressed to the children but to the parties to an armed conflict. Thus, if children are members of armed forces despite the above-mentioned prohibitions, they benefit from combatant and POW status.[265]

### c. Special protection afforded to journalists

> Journalists normally are civilians and may receive a special identity card certifying their professional function.

**8.142** 'War correspondents' who have a special authorization permitting them to accompany the armed forces are POWs if they fall into the power of the enemy.[266]

262 Ibid., Art 3.
263 Ibid., Art 4.
264 See MN 8.077.
265 P I, Art 77(3).
266 GC III, Art 4(A)(4).

In the conduct of hostilities, they are nevertheless not combatants in my view and therefore not legitimate targets of attacks. However, they obviously assume the risk of becoming lawful incidental victims of attacks directed against valid military persons or objects in their vicinity.

**8.143** All other journalists are civilians who may not be attacked except if and for such time as they directly participate in hostilities.[267] Seeking, transmitting or making public information, even if such information is neither neutral nor objective, does not constitute direct participation in hostilities except if it directly allows the enemy to conduct a military operation. If in the power of a party, such journalists benefit from the same guarantees of humane treatment as any other civilian.[268] What differentiates them from other civilians is that their profession requires them to seek information in the midst of hostilities, and they therefore risk being treated as spies. To reduce this risk, they may obtain an identity card issued by the authorities of their country certifying that they are journalists.[269] IHL, however, does not protect a right to access information and a conflict zone, which must be assessed under IHRL.

### d. Restoring family links

> Families must be enabled to exchange news, and belligerents must facilitate enquiries with a view toward family reunifications.

**8.144** Armed conflicts invariably result in the separation of families. The various ways IHL tries to ensure that family links are maintained will be mentioned hereafter when we discuss how IHL avoids that protected persons falling into the power of a party are considered by their families as missing.[270] Article 25 of Convention IV goes further as it requires that all persons in the territory of a party to the conflict or in occupied territory must be enabled to exchange family news, including even between persons who do not consider each other missing. If necessary, such exchanges can be facilitated by the Central Tracing Agency of the ICRC or a National Red Cross or Red Crescent Society. The absolute minimum that must be allowed consists of one letter per month with 25 freely chosen words. Today, modern means of communication, such as Skype, may be used in lieu of letters.

267 P I, Art 79(1) confirms the obvious.
268 P I, Art 79(2) again confirms the obvious.
269 P I, Art 79(3).
270 See MNs 8.273–8.275.

**8.145** Separated families do not only want to exchange news; they obviously want to be reunited as soon as possible. In this respect, Article 26 of Convention IV is rather weak as it merely obliges belligerents to facilitate enquiries with the object of meeting. A right to be admitted to the territory controlled by another party can only be based upon IHRL, which allows limitations for security and immigration reasons. The latter, however, should not apply to individuals who want to return to where they lived before the conflict began or to territory controlled by an occupying power, which must comply, subject to exceptions for security reasons, with the local legislation in force. When families are only founded for the first time while IHL applies, such as if a protected civilian in an occupied territory marries a civilian from the non-occupied territory of a partly occupied State, jurisprudence of IHRL bodies on where the right to family life may be exercised applies,[271] and there is no right to immigrate into an occupied territory under IHL.

### e. Fundamental guarantees for everyone

> Everyone affected by an armed conflict who does not have a protected status or whose status does not offer better protection benefits from detailed fundamental humane treatment and fair trial guarantees.

**8.146** Article 75 of Protocol I enumerates a long list of fundamental guarantees that benefit all persons affected by the armed conflict (which refers to the requirement of a nexus to the conflict[272]) who are in the power of a party to an IAC and who do not benefit from more favourable treatment under the Conventions or Protocol I. This personal scope covers civilians who do not benefit from 'protected civilian' status, in particular those who are in the power of their country of nationality, as well as protected civilians with respect to issues not covered by the specific protective regime applicable to them (such as judicial guarantees for protected civilians in a party's own territory) or with regard to issues on which Article 75 provides more protection (except for POWs[273]).

**8.147** The listed guarantees include humane treatment without adverse distinction; an enumeration of specifically prohibited acts; supplementary guarantees for all interned or detained persons; judicial guarantees for those subject to a criminal

271 See, e.g., ECtHR, *Jeunesse v The Netherlands* (2014) 60 EHRR 17, para 107; ECtHR, *Gül v Switzerland* (1996) 22 EHRR 93, para 38; John Quigley, 'Family Reunion and the Right to Return to Occupied Territory' (1992) 6 Georgetown Immigration L J 223, 247–8.

272 See MNs 6.80–6.85.

273 See P I, Art 72, which defines the personal scope of application of P I, Art 75.

procedure, including if accused of war crimes or crimes against humanity; and special protection for women and children.

**8.148** Given their conformity with IHRL, the guarantees contained in Article 75 are now considered as corresponding to customary law,[274] and the US declared in 2011 that it will apply these guarantees 'out of a sense of legal obligation' to all individuals it detains in an IAC.[275]Another source of fundamental guarantees is Common Article 3. While it only applies as a treaty provision to NIACs, the ICJ held that its rules also apply to IACs.[276] It is certainly correct that the contents of the prohibitions and prescriptions contained in that Article exist in the more detailed rules for IACs, both in treaty law and in customary law. The conclusion that 'Common Article 3 applies also in IACs' (which is technically erroneous in my view) is particularly useful when it circumvents the need to classify a given conflict as IAC or NIAC, which is often fraught with legal, political and psychological difficulties.

### 8.3.3 Rules on all 'protected civilians'

Some rules of Convention IV benefit all 'protected civilians' who are either in a party's own territory or in occupied territory. Under these rules, belligerents must treat 'protected civilians' humanely and must protect them. Other rules impose limitations on the possibility to oblige such civilians to work in addition to guaranteeing humane working conditions to them. They also prohibit pillage and collective punishments (but not preventive administrative measures that have a collective effect). In cases of detention, the rules guarantee that their families are informed through three different channels and grant the ICRC the right to visit them wherever they are as well as to interview them without witnesses.

A party may suspend communication rights of protected persons in occupied territory and their substantive rights on its own territory if they are definitely suspected of activities hostile to its security and the exercise of such rights would be prejudicial to its security. However, humane treatment and a fair trial must always be guaranteed.

274 See, e.g., IACommHR, 'Report on Terrorism and Human Rights' (2002) OAS Doc No OEA/Ser.L/V/II.116. Doc.5/1, paras 64, 190, 257; ICRC CIHL Database, 'Practice Relating to Rule 87. Human Treatment'.

275 The White House Office of the Press Secretary, 'Fact Sheet: New Actions on Guantánamo and Detainee Policy' (7 March 2011) 300 <https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Documentary-Supp-2015_Ch36.pdf> accessed 6 August 2018.

276 See Online Casebook, ICJ, Nicaragua v. United States, para 218.

### a. Who is a 'protected civilian'?

Most of Convention IV's rules only apply to 'protected civilians'. In an IAC, this concept covers all persons who are not combatants and who are in the power of the enemy of their State of nationality as well as certain neutral nationals and nationals of a co-belligerent State subject to specific conditions. Jurisprudence also suggests that mere allegiance (as opposed to nationality) with the enemy State may lead to this status.

**8.149** Article 4 of Convention IV defines who is a 'protected civilian' benefiting from the full protection of Convention IV. Article 4 is not easy to understand because it provides a general rule along with several exceptions that actually lead to the real definition of who constitutes a protected civilian. Its exceptions also implicitly lead to counter-exceptions (that is, categories of persons who qualify as 'protected persons' although they seem to be covered by one of the exceptions) that are broader in occupied territory than in own territory.

**8.150** Under Article 4(1), Convention IV seems to protect nearly everyone, and therefore it is only Article 4's exceptions that give the 'protected civilian' concept its actual meaning. Indeed, protected civilians 'are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' The exclusion of persons who are in the power of their country of nationality (or, in the case of multiple nationalities, of one of their countries of citizenship) constitutes the first exception. However, as we will see below, international criminal tribunals have interpreted away this citizenship exclusion. What is uncontroversial is that a person does not have to be detained by a party to be in its power; rather, it suffices if the person is merely in a territory under the control of that party. Whether a person is lawfully present in said territory is irrelevant. Instead, a factual assessment of presence and control is determinative.

**8.151** Article 4(3) simply restates that Part II of Convention IV benefits the entire population of territories controlled by parties to the conflict and not just 'protected civilians'. Each provision of Part II clarifies who exactly is covered.

**8.152** Article 4(4) provides the second key exception to the general rule, excluding those protected under the other Conventions, namely, wounded, sick and shipwrecked combatants and military medical personnel who are covered by Conventions I and II as well as POWs who are protected by Convention III. The

interplay between the broad rule and this exception leads to the conclusion that anyone who is in the power of a party and not a POW (including 'unprivileged' or 'unlawful' combatants) is a civilian protected by Convention IV.[277]

**8.153** Finally, Article 4(2) excludes certain persons based on their nationality. Stateless civilians are therefore always 'protected civilians'. The status of refugees will be dealt with elsewhere.[278] Article 4(2) also provides a third exception to the general rule that excludes nationals of a State that is not bound by Convention IV. Today, however, this exception is irrelevant because all States are parties to the Convention.

**8.154** The fourth and fifth exceptions enumerated by Article 4(2) concerning nationals of neutral and co-belligerent States, respectively, must be read very carefully. The fourth exception to the general rule excludes neutral nationals *in a belligerent's own territory* if they benefit from normal diplomatic protection by their State of nationality. Thus, neutral nationals in occupied territory are always protected persons irrespective of the existence of normal diplomatic relations between their State of nationality and the occupying power. Conversely, the fifth exception concerning nationals of a co-belligerent State is different: such nationals in a party's own territory *and in occupied territory* are only protected if their State of nationality does not have normal diplomatic relations with the occupying power. Textually, this difference in treatment between neutral and co-belligerent nationals is due to the limitation of the fourth exception to neutral nationals 'who find themselves in the territory of a belligerent State' – a phrase that does not modify and thus does not limit the exclusion concerning co-belligerent nationals.

**8.155** The concept of 'normal diplomatic representation in the State in whose hands they are' must be interpreted according to the object and purpose of the exclusion. The mere fact that diplomatic relations exist is insufficient for the exclusion to apply. Rather, a factual assessment that shows that the diplomats of the sending State are actually able to visit their nationals and to take diplomatic steps in their favour is what is determinative for its application. However, in my view, the State of nationality's unwillingness to protect its nationals, either in general or in a given case, does not qualify as a lack of normal diplomatic representation and thus does not make either a neutral national (in a party's own territory) or a national of a co-belligerent country a 'protected civilian'.

277 See MNs 8.115–8.119.
278 See MNs 9.073–9.087.

**8.156** The ICTY criticized and reinterpreted the crucial definition of 'protected civilian' in the famous *Tadić* case,[279] and the ICC has subsequently affirmed the ICTY's approach.[280] The ICTY was confronted with the (hypothetical) problem that Bosnian Serb civilians were arguably nationals of Bosnia and Herzegovina and therefore not 'protected civilians' if in the power of the Bosnian government, even if the conflict was considered to be an IAC, because the then Federal Republic of Yugoslavia had overall control over the Bosnian Serb forces actually fighting that conflict. Conversely, Bosnian Muslims in the power of the Bosnian Serbs were protected civilians as they were constructively – through the Bosnian Serbs – in the power of the Federal Republic of Yugoslavia, of which they were not nationals. To avoid this situation that the ICTY qualified four years earlier as 'absurd',[281] the Tribunal wrote:

> While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. …Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[282]

**8.157** However, this is not what the text of Article 4 says. As for the drafting history, it reveals that nationality should not be the sole criterion only with regard to excluding refugees from protection. The ICTY's argument concerning Convention IV's object and purpose should lead to the conclusion that everyone in every armed conflict (even in NIACs) should be protected by the Convention because it offers the best protection available. Finally, the ICTY's criterion is unclear. It is clear that the determinative test is a person's allegiance to a party and not his or her nationality. But what is the meaning of the Tribunal's addition 'and, correspondingly, control by *this* Party over persons in a given territory'? Textually, this addition is non-sensical: it requires that the party to whom persons have allegiance must have control over them for the Tribunal's allegiance theory to apply. However, persons who are in the power of the party to which they have allegiance do not need protection against that party!

279 See Online Casebook, ICTY, The Prosecutor v. Tadić: C. Appeals Chamber, Merits, paras 163–9.

280 ICC, *Prosecutor v Katanga et al*. (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) paras 289–93.

281 See Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 76.

282 See Online Casebook, ICTY, The Prosecutor v. Tadić: C. Appeals Chamber, Merits, para 166.

**8.158** The ICTY's reinterpretation of the protected person concept, which substitutes allegiance for nationality as the determinative test, is doubtful because of the method of interpretation it applied. From the point of view of the principle '*nullum crimen sine lege*', it is also astonishing that the Tribunal reinterpreted – contrary to clear treaty provisions – an essential element of a crime after its commission to the detriment of the accused. Practically, the Tribunal's allegiance theory is also very difficult to apply during a conflict: allegiance is more difficult to determine than nationality and may change more easily in the heat of a conflict. I would not recommend to any detainee to claim protected person status on the basis that they have severed allegiance with detaining authority as this might further undermine their chance to be respected, and the ICRC would never make this claim on a detainee's behalf.

### b. Humane treatment

**8.159** Article 27 of Convention IV stipulates that protected persons must be treated humanely. Their persons, honour, family rights, religious convictions and practices as well as their manners and customs must be respected. Convention IV prohibits not only torture and inhuman and degrading treatment (extermination, murder, corporal punishment, mutilation and medical or scientific experiments and measures of brutality are explicitly mentioned[283]) but also more generally any physical or moral coercion, 'in particular to obtain information from them or from third parties.'[284] This renders moot for protected civilians any debate on what constitutes torture and whether certain enhanced methods of interrogation or 'moderate physical pressure' are permissible.[285] The taking of hostages is also prohibited.[286]

**8.160** The obligations to treat protected persons humanely and to respect their person can be interpreted as a reference to IHRL on issues not regulated by IHL, such as when and what force may be applied during arrest or in other law enforcement operations.

**8.161** Protected civilians must also be protected against other civilians, especially against threats, acts of violence, insults or public curiosity. This implies a due diligence obligation. Finally, any adverse distinction based on any criteria other

283 GC IV, Art 32.
284 GC IV, Art 31.
285 See Online Casebook, Israel, Methods of Interrogation Used Against Palestinian Detainees: A. Report of the Landau Enquiry Commission of 1987.
286 GC IV, Art 34.

than those IHL expressly foresees specific privileges for, such as citizenship, civilian status, age, gender and health, is also prohibited.

### c. Forced labour and working conditions

**8.162** Forced labour appears to be permissible under Convention IV beyond the limited circumstances that IHRL allows in peacetime. Indeed, protected civilians who are adults in occupied territory may be 'enlisted on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.'[287] In own territory, the prescription that protected civilians may be compelled to work only to the same extent as a party's own nationals[288] implies a dynamic reference to IHRL. In both cases, the compulsory work may not be related to military operations against their own country,[289] and detailed prescriptions regulate working conditions, including for voluntary workers.[290] The prohibition against creating unemployment in occupied territory will be discussed below.[291]

### d. Prohibition of collective punishment

**8.163** In addition to outlawing measures of intimidation and terrorism, Article 33 also prohibits 'collective penalties'. Today, this is interpreted as a general prohibition of collective punishment[292] that prohibits not only criminal punishment for acts committed by others but also any other measure in reaction to an individual act taken against the entire population of an occupied territory, all enemy aliens or all members of a family.[293] In my view, however, this covers only measures taken to punish or harass protected civilians. It does not ban preventive administrative measures aimed at avoiding future acts (for example, attacks against the occupying forces), such as curfews or a blockade, that inevitably have a collective impact. The lawfulness of such other measures must be evaluated under other rules of IHL.

### e. Prohibition of pillage

**8.164** Pillage, which constitutes the appropriation of movable private property of protected civilians or public property in occupied territory belonging to the

287 GC IV, Art 51.
288 GC IV, Art 40(1).
289 GC IV, Arts 40(2) and 51(2).
290 GC IV, Arts 40(3) and 51(3)–(4).
291 See MN 8.265.
292 See ICRC CIHL Database, Rule 103.
293 See Shane Darcy, 'The Prohibition of Collective Punishment' in Academy Commentary, 1161–3.

enemy State, is prohibited.[294] The difference between prohibited pillage and exceptionally lawful requisitions is that the former must be committed for private purposes and must not be authorized by law. After World War II, however, the Nuremberg Tribunal held that the appropriation of property regulated and legally authorized by an occupying power constitutes pillage even if it is achieved through contracts as long as the result is the deprivation of property by private actors under legislation that an occupying power may not adopt in an occupied territory under IHL.[295]

**8.165** In NIACs, the prohibition against pillage[296] is often interpreted, for example, by those who fight against businesses complicit with armed groups in pillaging natural resources in conflict areas as covering any appropriation of private or public property by armed groups without the consent of the owner.[297] As the owner is not defined in international law, it is considered to be defined by domestic law. Under the latter, however, the owner of natural resources is the State represented by the government in most countries. Thus, the State's appropriation of natural resources cannot, by definition, constitute pillage. In contrast, armed groups who exploit natural resources commit the war crime of pillage even when they continue an existing exploitation of natural resources in a territory they control or perhaps even in the territory of the people for which they fight. This remains the case regardless of how such groups use the proceeds therefrom, such as for the benefit of the local population or to continue fighting, as they claim, on behalf of the people. Such a discriminatory result does not further the willingness of non-State armed groups to respect IHL.

### f. Transmission of information

**8.166** To avoid that protected persons deprived of their liberty are considered missing by their families, IHL ensures the transmission of information concerning them through three different channels. First, the Detaining Power (or technically the National Information Bureau it must set up) must notify the power of origin through the Central Tracing Agency of the ICRC of any detention lasting longer than two weeks except if such information may be detrimental to the person concerned or his or her family.[298] Second, civilian internees (but

294 GC IV, Art 32(2); HR, Arts 28 and 47; ICRC CIHL Database, Rule 52.

295 See Online Casebook, United States Military Tribunal at Nuremberg – United States v. Alfried Krupp *et al.*, Section 4(ii).

296 P II, Art 4(2)(g).

297 James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (The Open Society Institute 2010) 21. He only concedes that the exceptions under the HR allowing an occupying power to use public property can be applied by analogy. See MN 8.255.

298 GC IV, Arts 136 and 140.

not protected civilians deprived of their liberty in a criminal procedure) must be permitted to complete internment cards that must be transmitted to their family and the Central Tracing Agency.[299] Finally, all civilians must be allowed to exchange news with their families.[300]

### g. ICRC visits

**8.167** Like Convention III, Convention IV is also applied under the external scrutiny of representatives of Protecting Powers (which have been absent in recent conflicts) and of the ICRC.[301] Their delegates must be provided access to all places where protected civilians are located. Access must therefore be granted not only to persons deprived of their liberty but also to everyone belonging to the local population in an occupied territory and foreigners on a party's own territory even if they are free. This provides the legal basis allowing the ICRC to access occupied territories. Delegates must be permitted to interview protected civilians in private. The ICRC also performs its customary activities in the fields of assistance based upon its right of initiative[302] and the re-establishment of family links based upon the role of its Central Tracing.[303] The ICRC reports its findings and suggestions for improvement directly to the authorities in whose power the protected persons are.

### h. Possible derogations

**8.168** Article 27 of Convention IV, which prescribes the principles on the treatment of protected persons, nuances that belligerents 'may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.' Obviously, such measures may not violate other prohibitions of IHL.

**8.169** However, Article 5 of Convention IV – in contrast to other IHL treaties – allows belligerents to derogate from some of their obligations concerning protected civilians. The derogations permitted under this provision are more restricted in occupied territory than in own territory. In their own territories, States may limit the *substantive rights* of protected persons who are 'definitely suspected of or engaged in activities hostile to the security of the State' if the exercise of those rights would be 'prejudicial to the security of such State.' In occupied territories, States may only derogate from the *communication rights* of protected persons 'detained as a spy or saboteur, or as a person under definite

299 GC IV, Art 106.
300 GC IV, Arts 25, and, specifically for civilian internees, Art 107.
301 GC IV, Art 143.
302 GC IV, Art 10.
303 GC IV, Art 140.

suspicion of activity hostile to the security of the Occupying Power' if absolute military necessity so requires. Thus, the essential difference between the two territories is that substantive rights may be derogated from in own territory, while only communication rights may be derogated from in occupied territory. Importantly, ICRC visits do not constitute communication rights as such visits are a mechanism to ensure the Convention's respect. However, under Article 5, an occupying power may provisionally prevent the ICRC from sending information concerning the protected person to his or her family or power of origin.

**8.170** In either case, Article 5(3) expressly provides that the rights to humane treatment and fair trial must be guaranteed.

### 8.3.4 Specific rules concerning 'protected civilians' in a party's own territory

A party to an IAC must treat protected civilians who find themselves on its territory according to the peacetime rules applicable to foreigners. Convention IV also prescribes some specific guarantees, such as the right to leave enemy territory unless it is contrary to the State's national interests.

#### a. Applicability of the rules protecting foreigners in peacetime

**8.171** The rules concerning protected civilians in enemy territory are perforce more rudimentary than those for occupied territories. Article 38 of Convention IV foresees that their situation continues to be 'regulated, in principle, by the provisions concerning aliens in time of peace.' This general rule refers not only to the traditional rules of international law on the treatment of foreigners but also to IHRL. Article 38, however, exempts from this general rule measures of control and security in regard to protected persons as may be necessary as a result of the conflict, including the possibility discussed hereafter to intern them without trial for imperative security reasons. In addition, international law permits serious restrictions concerning the enjoyment and transfer of enemy property,[304] which includes the property of enemy foreigners. Restrictive measures concerning protected persons and their property, however, must be lifted 'as soon as possible after the close of hostilities.'[305]

#### b. Some specific rules

**8.172** Beyond the general principle mentioned above, Article 38 enumerates specific rules on relief, the right to practice their religion, medical treatment and to leave

304 See Hans-Georg Dederer, 'Enemy Property' (2015) in MPEPIL.
305 GC IV, Art 46.

areas particularly exposed to the dangers of war. The latter two must be applied to foreigners to the same extent as a party's own nationals. Persons detained in the framework of criminal procedures must be treated humanely,[306] and those who have lost their employment due to the conflict must be allowed to search for work and must be provided with the necessary means of existence if measures of control prevent them from supporting themselves and their families.[307]

**8.173** The rules regulating the possible transfer of protected civilians to another power[308] are *mutatis mutandis* the same as those concerning POWs[309] subject to two differences. First, protected civilians may be extradited for ordinary crimes in conformity with extradition treaties concluded before the outbreak of the conflict even when the transferee power is neither willing nor able to respect Convention IV. Second, the principle of *non-refoulement* is explicitly mentioned as a limit to any transfer.

### c. Right to leave?

**8.174** Protected civilians located in an enemy's own territory during an IAC between their State of nationality and their State of residence will often (but not always) wish to return to their State of nationality. Article 35 of Convention IV gives them such a 'right to leave' but allows a State to refuse permission to leave if the 'departure [would be] contrary to the national interests of the State'. National interest is a very wide concept that covers not only security reasons, such as the risk that enemy nationals join their armed forces or relay knowledge of confidential information, but also, for example, even economic reasons resulting from a lack of workers if all protected civilians leave a country that is highly dependent on foreign workers to run the general economy or certain subsets of the economy. Nevertheless, decisions denying the right to leave must be taken on an individual basis according to a 'regularly established procedure', and the individual so denied must have a right of appeal to an appropriate court or administrative body. The Protecting Power (if one exists) must normally be given the reasons for a denial. As the decision must be taken on an individual basis, the reasons for a refusal must relate to a person's individual circumstances. Thus, in my view, the mere fact that someone is of military age is insufficient if the person has no military training and has not yet been incorporated into the armed forces.[310]

306 GC IV, Art 37.
307 GC IV, Art 39.
308 GC IV, Art 45.
309 See MNs 8.098–8.099.
310 For a similar view, see Pictet Commentary GC IV, 258. However, in Online Casebook, Eritrea/Ethiopia,

**8.175** Despite the aforementioned restrictions on enemy property, Article 35 further prescribes that those who are permitted to leave must be allowed to take with them the funds necessary for their journey as well as a reasonable amount of objects for personal use. By inverse implication, they do not have the right to take all of their property and funds with them.

**8.176** Finally, Article 36 outlines details concerning the modalities of and treatment during such repatriation.

### 8.3.5 Specific rules on the protection of civilian internees

> Protected civilians may be interned preventively without a trial for imperative security reasons, but each case must be decided according to an individual procedure. Although this procedure may be administrative in nature, it must include a right of appeal and a periodic review of the initial internment decision every six months. Civilian internees benefit from Convention IV's detailed regime that is very similar to the regime protecting POWs.

**8.177** In general, and in contrast to POWs, protected civilians may not be deprived of their liberty as they typically do not directly participate in hostilities nor do they have the right to so participate. Therefore, there is no need to hinder them from joining the fighting. However, a party to an IAC may obviously detain civilians in the context of criminal proceedings or to serve criminal sentences. In addition, they may be interned for imperative security reasons in occupied territory[311] or by a party on its own territory if either its security renders internment absolutely necessary or if a protected civilian demands to be interned for his or her own security.[312] Such internment of civilians outside of the criminal context is also called 'administrative detention'. It is crucial to note that, while POWs are interned on the mere basis of their status as combatants, the internment of civilians is based on the threat they present individually to the Detaining Power, and the decision to intern must therefore be made on a case-by-case basis.

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Award on Civilian Internees and Civilian Property, para 117, the arbitral commission decided otherwise, accepting that 85 Eritrean university students of military age could even be interned by Ethiopia under Article 35 since they 'might have returned to Eritrea and joined the Eritrean forces if left at large'. For a discussion on whether mere military age constitutes an admissible reason to intern civilians, see MN 8.179.

311 GC IV, Art 78(1).

312 GC IV, Art 42.

### a. The legal basis for internment

**8.178** Later on in this book we will examine the general debate on whether IHL only prohibits and prescribes conduct or if it also authorizes conduct and, if the latter is the case, the meaning of such authorization.[313] One of the less controversial points in that debate is the acceptance that IHL provides a sufficient legal basis (which is required by IHRL) to deprive civilian internees (and POWs) of their liberty. After some hesitation,[314] even the very demanding European Court of Human Rights found that, in the context of IACs, the ECHR's provisions on the admissibility of detention 'should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.'[315] Nevertheless, IHL itself requires the Detaining Power to prescribe a procedure for internment decisions,[316] which implies that an additional legal basis in domestic law (or military orders adopted by the occupying power) for the detention is necessary. This is also in line with the IHRL principle of legality.[317]

### b. Admissible reasons for internment

**8.179** IHL permits the internment of protected civilians in either own territory or occupied territory for essential security reasons. '[T]he measure of activity deemed prejudicial to the internal or external security of the detaining power which justifies internment is…left largely to the discretion of the authorities of the detaining power itself.'[318] However, 'the mere fact that a person is a national of or aligned with an enemy party cannot be considered as threatening the security of the opposing party where he is living', and '[t]he fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures.'[319] Indeed, as evidenced by the prescribed individual procedure, the admissible security reason must relate to the individual threat posed by the particular person. Thus, the mere fact that an individual belongs to a certain category of persons is insufficient. The fact that an enemy civilian is of military age, may at most, constitute a reason to prevent the individual from leaving the country,[320] but, in my view, it does not justify the internment of that person for the purpose of hindering them from returning

313 See MNs 10.002–10.019.

314 See Online Casebook, ECHR, Al-Jedda v. UK, paras 99 and 107.

315 See Online Casebook, ECHR, Hassan v. UK, para 104, discussed more in detail in MNs 9.034, 9.036.

316 Art 78(2) of GC IV clearly requires this in occupied territory, while it is less clear that Art 43(1) of GC IV also requires this in a party's own territory.

317 This is stated slightly ambiguously in Updated ICRC Commentary GC I, para 728.

318 *Delalić*, above note 206, para 574.

319 Ibid., para 577.

320 GC IV, Art 35; see also MN 8.174.

to their country and later joining its armed forces.[321] Otherwise, all men (and increasingly women) of military age could be interned, which is contrary to the very idea of Convention IV that enemy civilians must normally be left free except for individual reasons.

**8.180** Except in the very exceptional case, which may lead to confusion, that a court sentences a protected civilian to 'internment' after criminal conviction for offences against an occupying power not involving an attempt on 'life or limb',[322] internment may not be a substitute for a criminal prosecution in cases in which the Detaining Power lacks sufficient evidence or cannot use that evidence, such as in cases where it was obtained by unlawful means like coercion. Internment is not a punishment for past behaviour but an administrative measure to hinder future risks. Nevertheless, to predict the future behaviour of a person, past conduct may be taken into account.

### c. Procedure to be followed

**8.181** The procedure that must be followed to intern a protected civilian varies slightly depending on whether internment occurs on own or occupied territory. In both cases, internment must be decided on an individual basis. In occupied territory,[323] internment decisions must be made according to a regular procedure prescribed by the occupying power. This procedure must include 'a right of appeal'. In own territory, IHL specifies that the competent body to hear the appeal may be 'an appropriate court or administrative board designated by the Detaining Power for that purpose.'[324] An administrative board is also sufficient to hear appeals in occupied territory. The admissibility of the internment must also be periodically reviewed at least every six months to determine whether its maintenance is justifiable.[325] In occupied territory, however, the periodic review must occur every six months only if it is 'possible'.

**8.182** Neither the procedure resulting in the initial internment of a protected civilian nor the internment's subsequent review amount to a criminal trial. As both constitute administrative procedures, IHRL guarantees concerning a fair trial as well as the full independence and impartiality of a tribunal that may convict a person do not apply. In particular, decisions to intern and to maintain

321 For a contrary view, see Online Casebook, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property, para 117.
322 See GC IV, Art 68(1).
323 GC IV, Art 78(2).
324 GC IV, Art 43(1).
325 See GC IV, Arts 43(1) and 78(2).

that internment may be based upon secret evidence that is not available to the protected civilian concerned. Nevertheless, the relevant court or administrative board must have the necessary power to make a final decision on the release.[326] Taking IHL into account, the Inter-American Commission on Human Rights held that a 'quasi-judicial body' is sufficient even under IHRL in the case of internees in IACs.[327] The European Court of Human Rights recognized that the constraints inherent in operating during an IAC might render it impractical for States to use independent 'courts' to determine the legality of internment, but it also held that the IHL requirement that internment is reviewed periodically by a 'competent body' must be read in accordance with IHRL obligations. In its view, 'the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness.'[328]

**8.183** Additionally, it might be argued that the six-month review requirement is outdated and should be replaced by the much shorter intervals specified under IHRL. The European Court of Human Rights stated that 'the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.'[329] Moreover, the UN Working Group on Arbitrary Detention claims that internees should have prompt access to habeas corpus as such access is non-derogable under IHRL.[330] With regard to the nature of the reviewing body, it requires '[a] court…[that] shall be established by law and [that] bear[s] the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is arbitrary or unlawful.'[331] In its view, this requirement applies to any '[r]econsideration, appeal or periodic review of decisions to intern or place in assigned residence alien civilians in the territory of a party to an international armed conflict, or civilians in an occupied territory.'[332] This interpretation has met stiff resistance by some States.[333]

326 *Delalić*, above note 206, para 1137.

327 See Online Casebook, Inter-American Commission on Human Rights, Coard v. United States, para 58.

328 See Online Casebook, ECHR, Hassan v. UK, para 106.

329 Ibid.

330 UN Basic Principles and Guidelines, above note 150, Principles 4 and 16 and Guideline 3, paras 4–5, 27–8 and 50, respectively.

331 Ibid., Principle 6, para 9.

332 Ibid., Principles 6 and 16, paras 9 and 29. See, however, ibid., Guideline 17, para 94.

333 See, e.g., comments by the governments of Canada, para 6, and Australia, paras 5 and 6, both available at <http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx> accessed 22 July 2018.

### d. Treatment of civilian internees

**8.184** Articles 79 to 135 of Convention IV contain very detailed rules governing the treatment of civilian internees. The Eritrea–Ethiopia Claims Commission rejected the argument that the humanitarian crisis facing Eritrea justified the failure to provide those internationally required minimum standards of humane treatment to civilian internees.[334] The regime is very similar to that prescribed by Convention III for POWs, but it takes into account the specific needs of civilians. For example, the respect for family life requires that members of the same family are interned together and that civilian internees may receive family visits.[335] Civilian internees must be accommodated separately from POWs and any other prisoners or detainees.[336] In contrast to POWs, who may be transferred out of occupied territory, civilians arrested in an occupied territory must be interned in that territory and cannot be transferred from it.[337]

**8.185** However, civilian internees may – unlike POWs – be held in close confinement or even separately in a penitentiary.

**8.186** The internment of civilians must end as soon as the reasons for it no longer exist and, in any case, as soon as possible after the close of hostilities.[338]

**8.187** The offence of unlawful confinement of protected civilians is punishable as a grave breach.[339] Such unlawfulness may be due to the absence of admissible reasons under IHL for the internment or the absence of a proper procedure.[340]

**8.188** We will discuss later the very controversial question regarding the extent to which the rules on internment or at least the possibility or even authorization to intern persons – in particular fighters – for imperative security reasons apply equally in NIACs by analogy or as customary law.[341]

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334 Eritrea–Ethiopia Claims Commission, *Partial Award: Civilian Claims–Ethiopia's Claim 5* (17 December 2004) para 107, reprinted in (2005) 44 ILM 630.
335 GC IV, Arts 82 and 116.
336 GC IV, Art 84.
337 GC IV, Art 49(1).
338 GC IV, Arts 132–133.
339 GC IV, Art 147.
340 ICTY, *Prosecutor v Delalić et al.* (Appeals Judgment) IT-96-21-A (20 February 2001) para 322.
341 See MN 10.293.

## 8.4 IHL OF BELLIGERENT OCCUPATION

**8.189** IHL offers better protection to protected civilians who find themselves in an occupied territory than to anyone else. Such expanded protection is justified because such civilians are living in their own territory and through no choice of their own come into contact with the enemy who gained territorial control over the place where they live.

**8.190** The main sources of the law of belligerent occupation are Section III of the Hague Regulations (Articles 42 to 56) and the following sections of Part III of Convention IV: Section I (with rules covering protected persons both in own and occupied territory, discussed above), Section III (with specific rules applicable to occupied territories, discussed below) and Section IV (on civilian internees, discussed above).

**8.191** In addition to combatant and POW status, the legal regulation of military occupation constitutes one of the few sets of rules to escape the contemporary tendency to apply rules of IHL applicable to IACs equally to NIACs by analogy or as customary law. Occupation presupposes an IAC. Indeed, as occupation involves control over territory without the consent of the authority that had control prior to the armed conflict, any application by analogy of the rules of IHL of military occupation to a NIAC can only refer to territory controlled by the insurgents but never to the territory under governmental control. However, IHL must treat both parties to an armed conflict equally, and it would anyway be impossible to convince insurgents to treat territory they consider to be 'liberated' as 'occupied'. Nevertheless, some suggest that the rules of IHL on military occupation regarding legislative powers and detention authority should be applied by analogy to non-State armed groups.[342] In my view, IHRL provides a more promising avenue to solve such issues, although the argument that IHRL binds non-State armed groups poses difficulties that are not easy to overcome.[343]

### 8.4.1 Concept and beginning of occupation

IHL of belligerent occupation applies as soon as three cumulative criteria are satisfied. First, one State must effectively control part of another State's territory.

342 Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 743, 756.

343 For arguments that IHRL binds non-State armed groups, see Darragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury 2016) 82–170.

Second, the territorial State must have lost effective control over that territory. Third, the territorial State did not consent to the enemy State's presence in its territory. While it is argued that such control requires the presence of enemy armed forces on the ground, it can also be exercised through an armed group over which the foreign State has effective control. IHL equally applies if the foreign armed forces meet no armed resistance.

It is controversial whether occupation begins during an invasion from the moment foreign forces gain control over protected persons. In my view, a functional concept of occupation should apply to the invasion phase under which certain rules of IHL of military occupation gradually start to apply to certain issues as soon as a foreign State obtains control over those issues, while other rules would not yet apply.

**8.192** Logically, occupation must first be defined before one can enquire into when it begins, yet these two questions are so interlinked that they may be considered as two sides of the same coin. In recent history, it is not surprising that belligerents have either denied or were reluctant to admit that a territory over which they gained control was an occupied territory. This was partly done in order to justify the non-respect of this regime's detailed rules. Other reasons are, however, perhaps even more important. In an international legal order prohibiting the acquisition of territory by force, military occupation is inevitably suspect; it has a 'pejorative connotation' in public opinion,[344] even when the use of force that leads to an occupation does not violate *jus ad bellum*. In addition, occupation necessarily deprives the local population, if it constitutes a people, of its right to self-determination at least temporarily, and it is incompatible with the idea that the will of the population must be the basis of the authority of government.[345] Furthermore, when an armed conflict erupts due to a dispute over territory, the party gaining control over that territory will never treat it as 'occupied'. Lastly, the very concept of military occupation is based upon territorial control and one State hindering another State from exercising control over its own territory. Modern warfare, however, is often not about territorial control as control may be exercised from a distance, and the enemy may be more or less a failed State. However, as long as specific rules covering such new situations are not adopted, the law of occupation should apply even to situations that do not conform to

344 ICRC Expert Meeting, 'Occupation and Other Forms of Administration of Foreign Territory' (Report prepared and edited by Tristan Ferraro, ICRC 2012) 16.

345 Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A(III), Art 21(3).

the traditional pattern of military occupation. Deviation from the traditional stereotype of occupied territory is an insufficient reason for the law not to apply.

**8.193** Article 42 of the Hague Regulations, which is regarded as defining the concept of occupation, states:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

**8.194** The authentic French version stresses more clearly that occupation is exclusively a question of fact[346] when it indicates that the territory must be 'placé de fait' ('placed in fact') under the authority of the hostile army. Although, as discussed below, it is controversial whether the concept of occupation under Convention IV is broader, Article 42 can be summarized as requiring three cumulative criteria for a territory to be considered occupied: (1) effective control by one State over another State's territory (or parts thereof) or over territory otherwise controlled by another State before the outbreak of the conflict; (2) loss of effective control by the invaded State over that part of its territory; and (3) lack of consent by the invaded State.[347] If the invaded State consented, the occupying army would not be 'hostile' as required by Article 42.[348] The following sections will examine these criteria in turn and will then discuss other criteria that are irrelevant.

### a. Effective control by the occupying power

#### *i. Are 'boots on the ground' required?*

**8.195** Most believe that an occupation can only begin with the presence of foreign armed forces on the ground.[349] Others contend that effective control may be exercised remotely either through control of the entry into the territory, the territorial airspace or sea or through control over the living conditions in a territory.[350]

346 ICTY, *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003) para 211; Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Pedone 2010) 20–74, 97–149; Tristan Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' (2012) 94 IRRC 133, 134–6.

347 ICRC Expert Meeting, above note 344, 17–23; Ferraro, above note 346, 139–43.

348 Grignon, above note 156, 119–22.

349 ICRC Expert Meeting, above note 344, 17–19; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 44; Ferraro, above note 346, 143–7; Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook on International Humanitarian Law* (3rd edn, OUP 2013) 269; Maarten Zwanenburg, 'The Law of Occupation Revisited: The Beginning of an Occupation' (2007) 10 YIHL 99, 126; Michael Bothe, 'Beginning and End of Occupation' (2006) 34 Collegium 26, 27.

350 At least for a territory with small dimensions and if the presumed occupier has the necessary technology,

**8.196** In reality, those taking the latter view focus on the issue of when an occupation ends as they want to argue that the Gaza Strip is still occupied by Israel even though Israeli forces withdrew from there in 2005.[351] Indeed, a majority of international institutions adopt this position regarding the Gaza Strip.[352] From a strictly logical point of view, one might argue that the same criteria must be used to determine the beginning, the existence and the end of an occupation.[353] However, on the question of whether foreign armed forces must be present on the ground, one may also consider that there is no congruence between the criteria for the beginning of an occupation and its end.[354] We will discuss the end of occupation below.[355] In any case, no one argues that a besieged town, such as Leningrad during World War II, constitutes an occupied territory before the besieged forces surrender simply because the besieger controls the airspace as well as all entry and exits to and from the territory, and therefore life in the besieged town.

**8.197** Many consider that the mere *possibility* to exercise control over the territory or part of it is sufficient.[356] In my view, however, this possibility must be based upon a ground presence in the territory. The mere military capability of a belligerent to control a given territory at its will is insufficient if that belligerent chooses not to invade it with ground forces.

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see Philip Spoerri, *Die Fortgeltung völkerrechtlichen Besatzungsrechts während der Interimsphase palästinensischer Selbstverwaltung in der West Bank und Gaza* (Peter Lang 2001) 237.

351 Solon Solomon, 'Occupied or Not: The Question of Gaza's Legal Status After the Israeli Disengagement' (2011) 19 Cardozo J of Intl and Comparative L 59, 72–3; Mustafa Mari, 'The Israeli Disengagement from the Gaza Strip: An End of the Occupation?' (2005) 8 YIHL 356, 363, 365; Eyal Benvenisti, 'The Law on Asymmetric Warfare' in Manoush Arsanjani *et al.* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 929, 943; Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15 J of Conflict and Security L 211, 220, 226–7; Sander Dikker Hupkes, *What Constitutes Occupation?: Israel as the Occupying Power in the Gaza Strip After the Disengagement* (E.M. Meijers Instituut 2008) 22, 35, 51, 84–9.

352 See HRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) UN Doc A/HRC/12/48, paras 273–9; HRC, 'Report of the International Fact-finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (2010) UN Doc A/HRC/15/21, paras 63–6. For an overview of these positions, see Grignon, above note 156, 293–5.

353 Ferraro, above note 346, 156. See also ICRC Expert Meeting, above note 344, 11, which mentions, with a little hesitation, that the *sui generis* character of some situations could alter the criteria.

354 ICRC Expert Meeting, above note 344, 17, 19; Ferraro, above note 346, 157–8. For a contrary opinion, see Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement' (2005) 8 YIHL 369, 378.

355 See MNs 8.226–8.234.

356 ICRC Expert Meeting, above note 344, 19; Dinstein, Belligerent Occupation, above note 349, 44–5; Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 49–50; Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) 29; *Naletilić*, above note 346, para 217.

**8.198** In addition, the ICJ seems to require that the authority *is actually* exercised.[357] This would mean that a foreign State is not an occupying power if it chooses not to exercise authority while it is present in enemy territory. In my opinion, however, if the territorial sovereign is hindered from exercising authority and does not consent to the enemy's presence, it is contrary to legal logic to relieve the occupying State from its obligations under the IHL rules on military occupation, which include, for instance, the obligation to exercise authority to maintain law and order, simply because it elected not to exercise authority.[358]

*ii. The existence of occupation despite resistance?*

**8.199** While resistance within an occupied territory does not necessarily end an occupation, it is difficult to imagine that occupation can be *established* over a place while ground forces of the occupied power still resist and control that place. However, once a place is occupied and the armed forces of the occupied power are no longer able to resist, periodic resistance in some places of the occupied territory does not bar it from being considered occupied.[359] Article 4(A)(2) of Convention III indirectly confirms this by conferring (under certain conditions) POW status to '[m]embers of…organized resistance movements…operating in or outside their own territory, even if this territory is occupied' should they fall into the power of the occupying power. If any organized resistance barred occupation, such resistance fighters could never 'operate' in an occupied territory by definition.

**8.200** Following a decision of a US Military Tribunal after World War II,[360] it is often added that even temporarily *successful* resistance does not bar occupation.[361] This may be applied by a criminal tribunal operating with hindsight but not by those who fight during an armed conflict. If resistance fighters succeed in liberating part of an occupied territory, neither they nor the occupying power will know whether the liberation is 'temporary'. In my view, and in conformity with the second sentence of Article 42 of the Hague Regulations that provides

357 Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo, para 173.

358 For a view supporting this opinion, Michael Bothe, "'Effective Control": A Situation Triggering the Application of the Law of Belligerent Occupation", 39, annexed as Appendix 1 in ICRC Expert Meeting, above note 344; Ferraro, above note 346, 150–51; UK Military Manual, para 11.3.

359 ICRC Expert Meeting, above note 344, 17; *Naletilić*, above note 346, para 217; Benvenisti, The International, above note 356, 51; Dinstein, Belligerent Occupation, above note 349, 45; Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 German Yearbook of Intl L 293, 308.

360 United States Military Tribunal at Nuremberg, *The Hostages Trial – Trial of Wilhelm List and Others* (8 July 1974 – 19 February 1948), reproduced in UN War Crime Commission, *Law Reports of Trials of War Criminals* (1949) vol VIII, 34, 56.

361 Dinstein, Belligerent Occupation, above note 349, 45.

'[t]he occupation extends only to the territory where such authority has been established and can be exercised', any act of resistance that leads to a loss of the occupying power's territorial control over a part of a territory must end – possibly temporarily – the occupation in that part of the territory.[362] In any case, an occupying power would be materially unable to fulfil its obligations in a place controlled by resistance fighters. What such an end of occupation implies in terms of the occupying power's residual obligations is another issue that will be discussed below.[363]

**8.201** Finally, it is not necessary for the occupying forces to be present on each square metre of a territory for it to be occupied. According to the topographical features of the territory, the density of the population and the degree of resistance (even passive or non-military), it is sufficient if occupying troops are positioned strategically on the ground so that, if necessary, they may be dispatched fairly quickly to demonstrate and enforce their authority.[364]

*iii. Necessary duration and extent*

**8.202** The occupying power does not need to control a part of a territory for a minimum duration. The Eritrea–Ethiopia Claims Commission found that control lasting 'just a few days' was sufficient.[365]

**8.203** As for the minimum extent of territory that a party must control, Article 42 envisages partial occupation of a State. A single village or a small island may also be occupied.[366] As discussed below, however, extreme adherents to the position that IHL of occupation applies during the invasion phase argue that invading forces must necessarily control the very small area on which a person is found in order to torture, beat, arrest, detain or deport that person,[367] and this small area would therefore constitute occupied territory. One may consider the portion of land on which a single house is built as occupied if the enemy controls that house but not the neighbouring house if the 'frontline' separates it from the former. Admittedly, a concept of occupation fragmenting single houses and the portion of land on which they are located must lead to a functional concept of

362 For a similar view, see ICRC Commentary APs, para 1700; Ferraro, above note 346, 151–2. UK House of Lords, *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, para 83.

363 See MN 8.229.

364 ICRC Expert Meeting, above note 344, 1, 17; Eyal Benvenisti, 'Occupation, Belligerent' (2009) in MPEPIL, para 8; US Department of the Army, *Field Manual FM 27-10: The Law of Land Warfare* (1956) para 356.

365 See Online Casebook, Eritrea/Ethiopia, Awards on Occupation: A. Eritrea's Claims 2, 4, 6, 7, 8 & 22, para 57.

366 ICRC Expert Meeting, above note 344, 24.

367 Marco Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories Under Invasion: The Case for the Applicability of Convention IV During the Invasion Phase' (2012) 94 IRRC 42, 45.

occupation under which only certain rules of IHL on occupation apply to that portion of land but not others.

*iv. Indirect occupation through a non-State armed group*

**8.204** As noted above, armed forces of the occupying power must exercise effective control over a territory for it to qualify as an occupied territory. Whether an occupying power exercises the necessary control is a question of fact. A State's armed forces as well as other de jure or de facto State agents may exercise such control. A foreign State is constructively an occupying power if exercises the requisite control over a non-State armed group that, in turn, exercises effective control over a territory during an armed conflict against the territorial State.

**8.205** To reach such a conclusion, however, one must determine what constitutes the necessary degree of control by the foreign State over the armed group,[368] which is a controversial issue. The ICTY considers that a foreign State's *overall* control over an armed group is sufficient for the purpose of both attribution of conduct of the armed group to the controlling State and for the classification of the conflict as an IAC.[369] Logically, an ICTY Trial Chamber therefore determined that a State's *overall* control over an armed group is sufficient to trigger an occupation.[370] Another ICTY Chamber rejected this finding, holding that the law of military occupation applies only if the foreign State has 'a further degree of control' than mere overall control.[371] That Chamber, however, did not clarify whether effective control was required, and, if so, whether effective control must be exercised by the foreign State over the group or, alternatively, by the group or the foreign State over the territory in question. In my assessment, the foreign State must have effective control over the non-State armed group's conduct that, in turn, establishes the group's effective control of the territory in question.[372]

*v. The special case of occupation without armed resistance*

**8.206** Paragraph 2 of Common Article 2 covers a situation not covered by paragraph 1. 'Despite its wording ["even" if the occupation meets without armed resistance], paragraph 2 only addresses itself to cases of occupation without…

368 See MNs 6.16–6.21.

369 Online Casebook, ICTY, The Prosecutor v. Tadić: C. Appeals Chamber, Merits, paras 116–44. See also MNs 5.049 and 6.16.

370 ICTY, *Prosecutor v Blaškič* (Judgment) IT-95-14-T (3 March 2000) para 149. There was no appeal on this aspect of the finding.

371 *Naletilić*, above note 346, para 214.

372 That effective control is the decisive test in this context is also the opinion of the ICRC Expert Meeting, above note 344, 23, and Benvenisti, The International Law of Occupation, above note 356, 61, who justifies his position by referring to the obligations to protect. In my view, the effective control test also applies to obligations to respect. For a contrary view, see Ferraro, above note 346, 158–60.

hostilities.'[373] Chapter 6 addresses in more detail the historical reasons of this provision, the specific factual situations of occupation that it covers and the extent to which Article 2(2) applies to UN-authorized operations as well as to UN peacekeeping forces deployed pursuant to Chapter VII of the UN Charter.[374] As this chapter deals with the substantive protection afforded by IHL of occupation, it is sufficient to recall here that Article 2(2) only applies if the foreign presence is 'belligerent' and that the mere presence of foreign forces without the territorial State's consent satisfies this requirement.[375] Arguably, contrary to paragraph 1, the wording of paragraph 2 requires that the territory occupied is that of another High Contracting Party. This would, however, introduce an important *jus ad bellum* and legitimacy issue into the determination of whether IHL is applicable. If all other conditions for the applicability of IHL of military occupation discussed above are fulfilled, it must be sufficient if a State invades a territory which is not its own, even if it denies that the territory is that of another State. The reference in paragraph 2 to the 'territory of a High Contracting Party' may simply be understood as clarifying in 1949 that the State controlling the territory before the invasion must be a party to the Conventions.

### b. Loss of effective control by the adverse party

**8.207** Most authors and judicial decisions discuss the territorial State's loss of control or authority over its own territory as a separate criterion that must be fulfilled for an occupation to exist.[376] In my view, however, it seems that the territorial State's loss of effective control is inherent in the first requirement, namely the enemy's acquisition of effective territorial control.

**8.208** Additionally, the mere fact that the administration or local authorities of the territorial State continue to exercise functions of government does not bar an occupation. On the contrary, as shown below, the rules of IHL on military occupation largely require that local authorities be permitted to function. Such possible power-sharing is generally qualified as a vertical relationship whereby the occupying power maintains control over the local administration in the

373 ICRC Commentary APs, para 64; See also Pictet Commentary GC IV, 21–2; Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 95.

374 See MNs 6.22–6.25.

375 Koutroulis, above note 346, 27; Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire : perspectives historiques et enjeux juridiques actuels* (Bruylant 2009) 76.

376 *The Hostages Trial*, above note 360, 55; Bothe, Effective Control: A Situation, above note 358, in ICRC Expert Meeting, above note 344, 38; Kolb and Vité, ibid., 139; Dinstein, Belligerent Occupation, above note 349, 39.

occupied territory and has the final say.[377] Nevertheless, occupation is not simply a vertical relationship. Rather, as we will see, IHL requires that local authorities have the final say in many fields. Thus, in my opinion, the possibility that the occupying power could, if it so wished and absent express IHL rules to the contrary, have the final say in all respects is decisive for the existence of an occupation. This ability, in turn, is based upon the presence of the occupying forces because the local authorities have no control over the presence of the occupying forces whose conduct is regulated by the occupying power as well as IHL and not by the authorities of the occupied State.

**8.209** The local authorities that are replaced need not necessarily be those of the legitimate sovereign. They may be those of a third State, including a previous occupying power (except if the sovereign liberates its own territory), or of an armed group. It does not matter whether that group fought against the later occupying power independently of the occupied country. What counts are the facts: establishment of effective control by a State over a territory over which it had no control before the IAC (or before a belligerent occupation without armed resistance). Establishing effective control over (parts of) the territory of a failed State constitutes military occupation.[378]

### c. Lack of consent

**8.210** IHL of IACs, including but not limited to IHL of military occupation, is inapplicable if a State consents to the presence of foreign troops on its territory and their exercise of control over that territory.[379] The consent must obviously be given before the foreign military presence begins and must be genuine, valid and explicit.[380] Some also claim that the consenting State must additionally have effective control over the territory.[381] Only an authority with de facto control over the territory just before the occupation can validly consent.[382] De jure authority without de facto control is insufficient. In my opinion, mere consent by authorities with de facto control against the will of the de jure authority is equally insufficient.

377 Ferraro, above note 346, 148–9.

378 This approach was implicitly shared by Australia when it considered that IHL of military occupation applied to its presence in Somalia. See Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer Law International 1999) 178.

379 ICRC Expert Meeting, above note 344, 21; Benvenisti, Occupation, above note 364, para 1; UK Military Manual, para 11.1.2.

380 ICRC Expert Meeting, above note 344, 21.

381 Bothe, Beginning, above note 349, 30.

382 Ferraro, above note 346, 153–4.

**8.211** In my view, the validity of the requisite consent must be evaluated by reference to the rules of the law of treaties relating to the validity of a State's consent to be bound by a treaty as codified in the VCLT.[383] Consent must be explicit and cannot be presumed. It is also particularly important to determine whether consent obtained by a foreign State through coercion prevents the application of IHL on military occupation. According to the VLCT, consent is only invalid due to coercion if it has been obtained through a threat or use of force that is contrary to the UN Charter.[384] The conclusion of a ceasefire or armistice agreement or even surrender[385] cannot imply consent precluding the applicability of IHL rules on military occupation, even if such agreement specifically allows one belligerent to control the territory of another that it did not control before the outbreak of hostilities.[386] Otherwise, the archetype of an occupied territory – the Israeli-occupied Palestinian territories – would not be occupied because the Israeli presence in the West Bank and the Gaza Strip is implicitly permitted by the 1967 ceasefire agreement.

**8.212** The continued presence of foreign troops after a State withdraws its consent to that presence turns the once lawful presence into an occupation[387] provided that the foreign forces control the territory where they are present and hinder control of the territorial State under the criteria discussed above.[388] If the territorial State defends itself against this aggression, Article 2, paragraph 1 governs the occupation, otherwise Article 2, paragraph 2 applies.[389]

### d. Other criteria are irrelevant

**8.213** For a belligerent occupation under Article 2(1) of Convention IV, which occurs when a territory falls under a belligerent's control due to the armed conflict, it is irrelevant whether the enemy was the sovereign over that territory.[390] For

383 ICRC Expert Meeting, above note 344, 21.

384 VCLT, Art 52.

385 Pictet Commentary GC IV, 22; Dinstein, Belligerent Occupation, above note 349, 32–3.

386 Pictet Commentary GC IV, 22; Adam Roberts, 'What is a Military Occupation?' (1984) 55 BYBIL 249, 267; Michael Bothe, 'Occupation After Armistice' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier 1997) vol III, 763. For a contrary view, see Dinstein, Belligerent Occupation, above note 349, 36. Bothe, Beginning, above note 349, 27, considers that IHL of military occupation only applies if the armistice refers to it.

387 Dinstein, Belligerent Occupation, above note 349, 37, 42; Bothe, Beginning, above note 349, 32; Koutroulis, above note 346, 87–8, who rightly mentions that this is one of the few situations in which *jus ad bellum* influences *jus in bello*.

388 When the ICJ found that Congo had withdrawn its consent to the presence of Ugandan troops in Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo, para 53, it analysed whether the Ugandan presence satisfied its requirements for effective control over the territory. Ibid., paras 172–80.

389 For the latter case, see Kolb and Vité, above note 375, 79–81, who mention Namibia as an example.

390 If an occupation results from an IAC between States, I disagree with the statement in ICRC Commentary APs,

example, Israel argued (and still argues) that the West Bank and Gaza, which it occupied in 1967, are not occupied territories because those territories did not belong to 'a High Contracting Party' at the time of occupation as required by Common Article 2(2) for the Conventions to apply.[391] The ICJ rejected this argument under Common Article 2(1), stating that it was sufficient that Jordan and Israel (the ICJ only had to address the West Bank's status) were, at the relevant time, parties to the Conventions and engaged in an IAC that led to the West Bank's occupation.[392] It is therefore irrelevant whether occupied territory belongs to another High Contracting Party. The Eritrea–Ethiopia Claims Commission correctly held that the ICJ's finding applies even to a territory that is subsequently found to have belonged to the occupying power but that was not controlled by the occupying belligerent before the conflict.[393] The only exception is the case where a State liberates its own territory that was occupied by its adversary during a previous armed conflict and remained occupied.[394] However, if the sovereignty over the territory is contested, the IHL rules on military occupation apply.[395] Thus, this regime applies in all cases in which a State invades territory it considers to be its own if such ownership is contested by the adversary, such as when Argentina invaded the Falkland/Malvinas Islands in 1982.[396]

**8.214** As with every other rule or concept in IHL, *jus ad bellum* considerations, such as whether the occupation is lawful or unlawful, are irrelevant to determining whether a territory is occupied.[397] Even territory coming under the effective control of a belligerent exercising its right to self-defence or which is authorized by the UN Security Council to use force constitutes an occupied territory.[398] However, it is controversial whether IHL of military occupation applies when the Security Council authorizes the very presence of the occupying power. In my assessment, as explained later on, Security Council resolutions prevail over

para 112, that occupation of a territory that has not yet been formed as a State is covered by P I, Art 1(4), but not by GCs, Common Art 2, although this interpretation appears (mistakenly) in the preparatory works of P I.

391 Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 IYBHR 262, 262–77.

392 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, paras 90–101.

393 Ethiopia-Eritrea Claims Commission, *Partial Award: Central Front – Ethiopia's Claim 2* (28 April 2004) paras 28–9, reproduced in (2004) 43 ILM 1275.

394 Benvenisti, The International Law of Occupation, above note 356, 43, who requires that the occupying power 'has no title'.

395 Ibid., 59.

396 Roberts, above note 386, 280

397 *The Hostages Trial*, above note 360, 59.

398 Dörmann and Colassis, above note 359, 302.

IHL but such a derogation from IHL must be explicit.[399] In line with IHL, the Council explicitly stated in the case of Iraq in 2003 and 2004 that at least the US and the UK were occupying powers. The question of whether the rules of IHL on military occupation apply to an UN-led territorial administration presents a distinct issue that is discussed elsewhere.[400]

e. Does IHL of belligerent occupation apply during the invasion phase?

**8.215** Many authors, military manuals, the ICJ and the Eritrea–Ethiopia Claims Commission distinguish between the invasion phase and occupation phase, arguing that IHL of military occupation does not apply during the invasion phase.[401] This argument is based mainly on a certain understanding of Article 42 of the Hague Regulations and the argument, which is now even accepted by the ICRC, that the concept of occupation under Convention IV must necessarily be the same as under the Hague Regulations.[402]

**8.216** On the contrary, Jean S. Pictet, with whom many experts and the ICTY (but no longer the ICRC) agree, holds that the concept of occupation under Convention IV is different from that of the Hague Regulations. He wrote: 'There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.'[403] This approach may be justified by several alternative arguments, some of which overlap.

**8.217** A systemic interpretation that takes the object and purpose of Convention IV into account leads to the conclusion that its rules on occupied territory must apply from the very moment the enemy assumes control over a person in an invaded territory. Most of the rules of Convention IV benefit only 'protected

399 See MNs 9.107–9.109.

400 See MNs 9.128–9.129.

401 See Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo, paras 172–3 and 219; Online Casebook, Eritrea/Ethiopia, Awards on Occupation: A. Eritrea's Claims 2, 4, 6, 7, 8 & 22, para 57; US Law of War Manual, para 11.1.3.1; Dinstein, Belligerent Occupation, above note 349, 41–2; Zwanenburg, The Law, above note 349, 107–8; Maarten Zwanenburg, 'Challenging the Pictet Theory' (2012) 94 IRRC 30; Michael Bothe, 'Effective Control During Invasion: A Practical View on the Application Threshold of the Law of Occupation' (2012) 94 IRRC 37, 37–9; Koutroulis, above note 346, 47–69; Georg Schwarzenberger, 'The Law of Belligerent Occupation: Basic Issues' (1960) 30 Nordic J of Intl L 10, 18–21. For a more nuanced but unclear view, see Updated ICRC Commentary GC I, para 300.

402 Updated ICRC Commentary GC I, paras 294–300.

403 Pictet Commentary GC IV, 60, as followed by ICRC Expert Meeting, above note 344, 24–6; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2011) Doc No 31IC/11/5.1.2; Kolb and Vité, above note 375, 65–86; *Naletilić*, above note 346, 219–22; Sassòli, A Plea, above note 367, 42–50.

civilians', as defined in Article 4, who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals.' When inhabitants of an invaded territory fall under the control of invading forces, such as by arrest and detention, they are without a doubt in the hands of a party to the conflict of which they are not nationals and are therefore protected persons. As such, they must benefit from some rules of Part III of Convention IV dealing with the 'status and treatment of protected persons'. However, as explained above, Part III is separated into rules applicable to foreigners who find themselves in the non-occupied territory of a State (Section II) and those applicable to occupied territories (Section III),[404] thus creating a legal gap as to protected persons who are neither in own nor occupied territory. Therefore, defenders of the 'Pictet theory' argue that, if the invaded territory is not considered occupied under the categories of Convention IV, 'protected civilians' falling into the hands of the enemy on invaded territory would not be protected by any rule in Part III.[405] To take an example mentioned by Pictet,[406] it seems absurd that the deportation of civilians would be allowed during the invasion phase[407] but absolutely prohibited once the invasion turns into an occupation. Indeed, inhabitants of an invaded territory are enemy nationals encountering a belligerent on their own territory, which is precisely the situation IHL rules on military occupation were made to address.

**8.218** Pictet, however, goes too far when he argues that control over a person in a territory which is not the invader's own must be sufficient to trigger the application of Convention IV to that particular person.[408] A person may be arrested or detained but cannot be 'occupied'. However, even if occupation is defined from a purely territorial perspective, civilians falling into the power of the enemy during an invasion perforce find themselves on a piece of land controlled by that enemy. Thus, as suggested above, a functional approach should apply to the size of territory that can be occupied.

**8.219** The main objection to the 'Pictet theory' of occupation is that invading forces would be unable to immediately comply with all of the obligations foreseen by Convention IV, in particular the positive obligations. However, it should not be forgotten that some IHL rules of occupation in Geneva Convention IV may also be seen as conferring invading forces certain 'rights', such as those

404 See MNs 8.128–8.129.
405 Benvenisti, Occupation, above note 364, para 6; Koutroulis, above note 346, 63.
406 Pictet Commentary GC IV, 60.
407 GC IV, Art 49(1), only applies in occupied territory.
408 Pictet Commentary GC IV, 60–61; *Naletilić*, above note 346, para 221.

providing a legal basis for security measures, internment or the requisition of labour. Arguably, if IHL of military occupation does not apply during the invasion phase, invading forces would simply have no legal basis to arrest and detain civilians who threaten their security.

**8.220** In my view, the arguments of Pictet and his opponents can be reconciled with a flexible understanding of the obligations of an occupying power and the concept of occupation itself. Indeed, the rules of IHL of military occupation are not strict obligations of result. For example, under Article 50 of Convention IV, which is a provision often mentioned by adherents to the distinction between invasion and occupation,[409] an occupying power is obliged to facilitate, with the cooperation of the national and local authorities, the proper functioning of children's educational institutions. First and foremost, this obligation prohibits interfering with the activities of those institutions,[410] which is a negative obligation that invading forces can easily comply with. Admittedly, the positive obligation imposed by Article 50 to support such institutions might require a certain degree of control and authority. Nevertheless, according to the clear wording of Article 50 ('facilitate'), supporting these institutions is an obligation of means and will depend upon the circumstances as well as the capabilities of the invading troops.

**8.221** Going one step further, the very concept of occupation itself can also be understood using a functional approach under which a territory may be considered occupied along a sliding scale for the purpose of the applicability of certain rules of IHL of military occupation but not for others. In particular, this approach may be defended on the arguably distinct issue concerning the end of occupation where the occupying power still retains some aspects of control after withdrawing, such as Israel after it withdrew from the Gaza Strip.[411]

**8.222** This idea that only some rules of IHL apply during the invasion phase is not new. Many who distinguish between occupation and invasion phases nevertheless admit that some of Convention IV's rules on occupation apply during an invasion.[412] Pictet distinguishes between the rules that apply and those that do not during the invasion phase along the dividing line between

409 Zwanenburg, Challenging, above note 401, 35.

410 Pictet Commentary GC IV, 286.

411 ICRC Expert Meeting, above note 344, 31–3.

412 See Online Casebook, Eritrea/Ethiopia, Awards on Occupation: B. Ethiopia's Claim 2, para 27; Dinstein, Belligerent Occupation, above note 349, 40–42; Benvenisti, The International Law of Occupation, above note 356, 51–3; Koutroulis, above note 346, 69–71; Dörmann and Colassis, above note 359, 301; Updated ICRC Commentary GC I, para 300.

the Hague Regulations and Convention IV, arguing that for the latter 'the word "occupation"…has a wider meaning than it has in Article 42 of the Hague Regulations.'[413] However, one may argue that an invader must respect Article 44 of the Hague Regulations that prohibits a belligerent from forcing 'the inhabitants of territory occupied by it to furnish information about the army of the other belligerent'.[414] To draw the dividing line between Convention IV and the Hague Regulations is therefore an oversimplification.

**8.223** Others, including the ICTY,[415] distinguish between the rules protecting persons[416] and those protecting property, arguing that only the former apply during the invasion phase. One may consider, however, that property is protected because of the individuals who own it. In addition, why should Article 57 of Convention IV, which limits an occupying power's ability to requisition hospitals, not yet apply during the invasion phase?

**8.224** In my opinion, determining which rules apply during the invasion phase should not be made according to pre-established broad categories. Rather, a sliding-scale approach should be used that analyses every rule in every case according to the degree of control the invader exercises in that given case. For the beginning of occupation, such an understanding would parallel the functional concept of end of occupation, which is inherently adopted by all scholars, UN documents and States that still consider Gaza to be occupied by Israel[417] but do not require Israel to re-enter the Gaza Strip to maintain law and order or to ensure that detainees in Gaza are treated humanely.[418] Pictet's remarks point in the same direction, whereby 'Articles 52, 55, 56 and even some of the provisions of Articles 59 to 62…presuppose the presence of the occupation authorities for a fairly long period'.[419] Under such a functional understanding of occupation, an invaded territory could at a certain point already be occupied for the purpose of the applicability of Article 49 (prohibiting deportations) but not yet occupied for the application of Article 55 (on the duty to ensure food and medical supplies). Under a sliding scale of obligations that apply according to the degree of control, negative obligations to abstain would be applicable as soon as the

413 Pictet Commentary GC IV, 60. For a criticism of this approach, see Ferraro, above note 346, 136–9.

414 See Michael Siegrist, *The Functional Beginning of Belligerent Occupation* (Graduate Institute Publications 2011) 66–7.

415 *Naletilić*, above note 346, paras 221, 587. However, in Online Casebook, The Prosecutor v. Rajić: A. Rule 61 Decision, paras 38–42, the ICTY applies Art 53 of GC IV during the invasion phase.

416 Benvenisti, The International Law of Occupation, above note 356, 52.

417 See MN 8.229.

418 As Art 43 of HR as well as Arts 27 and 76 of GC IV would oblige it to do.

419 Pictet Commentary GC IV, 60.

conduct they prohibit is materially possible (such as when the person benefiting from the prohibition falls into the hands of the invading forces), while positive obligations to provide and to guarantee would apply only at a later stage. This sliding scale would also be more adapted to the fluid realities of modern warfare and the absence of frontlines than the traditional 'all or nothing' approach. This approach also avoids the difficulty of determining when the invasion phase turns into the occupation phase.[420] In scholarly writings, several categorizations have been suggested to identify the rules applicable during the invasion phase. One author suggested making a distinction between:

1. rules where a significant protection gap would exist if they are not applicable during the invasion phase (such as Articles 49, 51(2)–(4), 52, 53, 57 and 63 of Convention IV);
2. obligations to provide or respect which are triggered by activities of the occupying power and which, in any event, therefore only apply during the invasion phase if the occupying power is able and willing to undertake such activities (in particular, Articles 54, 64 to 75, 64(1), 66 and 78 of Convention IV), such as prosecuting or interning protected civilians; and
3. obligations to provide or respect due to the mere fact of occupation (namely, Article 43 of the Hague Regulations and Articles 48, 50, 51(1), 55, 56 and 58 to 62 of Convention IV) that would not yet apply during an invasion.[421]

**8.225** After a detailed analysis, another scholar suggests that Articles 47, 48, 49, 51(1), 53, 58, 59, 61 (the first sentence only), 63, 64 to 76 and 78 of Convention IV apply during the invasion phase, while Articles 50, 51(2)–(4), 52, 54 to 57, 60, 61 (starting with the second sentence), 62 and 77 of Convention IV do not yet apply during an invasion.[422]

### 8.4.2 The end of application of IHL on belligerent occupation

The applicability of IHL of military occupation ends as it starts: when the occupying power loses effective control or when the occupied power consents to its control in a peace treaty. It is controversial whether occupation can continue to exist when occupying forces withdraw from the territory but nonetheless continue to exercise control over it. In such a case, it might be that the occupying power keeps its obligations concerning the fields over which it retains control. An effective hand-over of governmental authority to genuinely independent

420 Bothe, Effective Control, above note 401, 39–40.
421 Siegrist, above note 414, 47–77.
422 Grignon, above note 156, 133–43.

local authorities ends the applicability of IHL of military occupation, even if the former occupying forces remain present in the territory based upon the free consent of those local authorities. It is argued that a UN Security Council resolution may also end the applicability of IHL of military occupation.

**8.226** As there is a certain relationship between the criteria for the beginning and end of occupation, it is appropriate to discuss the end of IHL of military occupation's application before addressing its substantive rules.

**8.227** Under Convention IV, some or all of its rules governing military occupation may cease to apply even if the occupation persists. Indeed, its provisions that are not enumerated in Article 6(3) of Convention IV cease to apply one year after the general close of military operations. The other provisions of Convention IV expressly listed in Article 6(3) only cease to apply as soon as the occupying power no longer exercises the functions of government in the occupied territory. This rule has been considered to be replaced by Article 3 of Protocol I as customary law under which IHL as a whole remains applicable until the actual termination of the occupation.[423] Indeed, while Israel contested the applicability of Convention IV to the Occupied Palestinian Territory for different reasons, it never invoked Article 6(3). Likewise, no occupying power has ever considered that it was no longer authorized to intern civilians beyond one year after the general close of military operations, although the rules applicable to new cases of internment cease to apply after that point in time. Nevertheless, the ICJ applied Article 6(3) according to its letter and therefore considered that only the provisions reserved in Article 6(3) still applied in the Occupied Palestinian Territory as there was no doubt that Israel still exercised the functions of government on the land upon which the Wall was built.[424] Furthermore, it did not refer to the *general* close of military operations but to the end of the military operations that led to the occupation as a starting point for the one-year period, which is certainly wrong.

**8.228** Even if one believes, as I do, that the ICJ erred and that IHL of military occupation applies as long as the occupation lasts, the central question remains: when does an occupation end? A peace treaty transferring the sovereignty of

423 P I, Art 3(b); Grignon, above note 156, 316–22; Koutroulis, above note 346, 175–6; Robert Kolb, *Ius in bello: Le droit international des conflits armés: précis* (2nd edn, Helbing & Lichtenhahn 2009) 225.

424 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 125.

the occupied territory to the occupying power and the withdrawal of the occupying power are the classical ways in which occupation ends.

**8.229** In the latter case, it is uncontroversial that occupation ends (along with the obligations flowing therefrom) if the occupying power is ousted militarily by the occupied State. Some, however, argue that a unilateral withdrawal cannot end an occupying power's obligations, in particular the obligation to maintain public order and civil life, as long as those responsibilities have not been handed over to the appropriate local authority.[425] Even if one agrees with my opinion that IHL cannot possibly hinder an occupying power from withdrawing, the question, which has been intensely debated in UN Human Rights Council documents and by scholars in relation to the Gaza Strip, from which Israeli forces withdrew in 2005, arises as to whether mere withdrawal of troops is sufficient to end the occupation when the (former) occupying power uses other means to retain some measure of control over the territory.[426] In my view, the starting point in this discussion must be the three criteria discussed above for an occupation to exist; when those criteria are no longer fulfilled, the occupation ends.[427] Although my opinion that a physical military presence on the ground is necessary for an occupation to start is outlined above,[428] an occupation may nevertheless be arguably maintained remotely once ground forces establish sufficient control over territory (and over persons so they are considered to be in the hands of the occupying power). In my assessment, however, it is doubtful that Gaza has always been 'occupied' from 2010 to 2017 as it was controlled by Hamas – a hostile armed group – that regularly fired rockets against Israel from that territory and Israel only managed to partly reinvade it in 2014 by fully-fledged hostilities with heavy weapons. Moreover, and more importantly, holding that Israel remained the occupying power of the Gaza Strip in these circumstances would lead to patently absurd results. As Israel would have the obligation to maintain law and order in the Gaza Strip as the occupying power, it would therefore have to reinvade it to fulfil that obligation. In addition, if Israel is viewed as having effective control over the Gaza Strip, the use of force against persons and objects under its effective control would not be governed by IHL on the conduct of hostilities but by IHRL on law enforcement operations.[429] One solution could be to apply a similar flexible and functional concept

425 ICRC Expert Meeting, above note 344, 30–32.

426 See above notes 351 [Solomon] and 352 [UN Doc A/HRC/12/48].

427 For views clearly in favour of such a parallelism, see Shany, above note 354, 378; Updated ICRC Commentary GC I, para 306, which nevertheless reserves 'specific and exceptional cases' in para 307. Several experts, however, are against such a parallelism. See ICRC Expert Meeting, above note 344, 17 and 19.

428 See MNs 8.195–8.197.

429 See MNs 9.048, 10.269 and 10.278.

of occupation suggested above for the beginning of occupation to the end of occupation.[430] Thus, under this approach, a former occupying power that has unilaterally withdrawn would remain bound by IHL of military occupation in all those fields over which it keeps effective control, such as entry and exit from the territory and the provision of food supplies, but not in those fields over which it has abandoned control.[431]

**8.230** Apart from a peace treaty or withdrawal, a binding UN Security Council resolution under Chapter VII of the UN Charter may also, in my view, end the applicability of IHL of military occupation.[432]

**8.231** As it obviously opens the door to possible abuses, it remains controversial whether an occupation ends once an occupying power hands governmental authority over to a new local government, but its troops remain present based upon an agreement ('invitation') by those same authorities. Article 47 of Convention IV states that protected persons 'shall not be deprived' of the benefits of IHL 'by any change introduced, as the result of the occupation of a territory, into the institutions or government of the…territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power.' Understood in conformity with the general rules on State responsibility for conduct directed or controlled by a State,[433] this means that a government instituted by the occupying power, such as the Interim Governing Council in Iraq before 30 June 2004, may not subject the local population to changes going beyond those that could be introduced by the occupying power itself. This raises the question of when the devolution of governmental authority to a national government is effective enough to end the applicability of IHL on belligerent occupation altogether. In my opinion, the decisive factor is who effectively exercises governmental authority. Article 3(b) of Protocol I goes further than Convention IV in prescribing that IHL applies until the termination of the occupation, but such termination must also depend upon who effectively exercises governmental authority.

**8.232** Many contend that the end of the applicability of IHL of military occupation in such a situation depends on the democratic legitimacy of a new national

430 See MNs 8.220–8.225.

431 See Updated ICRC Commentary GC I, paras 307–12.

432 See, e.g., UNSC Res 1546 (2004) para 2 (concerning US and UK occupied Iraq). For a general discussion on whether Security Council resolutions may deviate from IHL, see MNs 9.107–9.109.

433 See ILC Articles of State Responsibility, Art 8. The Pictet Commentary GC IV, 212, considers (concerning Art 29 of GC IV) that when a violation has been committed by local authorities, 'what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given.'

government[434] given that a democratic election cannot be considered as a change 'introduced' by the occupying power (in the sense of Article 47) even if held under the latter's initiative and supervision. Such democratically elected government could then end the occupation, even though troops of the former occupying power remain present on the territory of the State, by freely agreeing to their presence.[435] The main problem with this argument, however, is that the legitimacy of the new government is often controversial as is the question of whether the new government's consent to the continued presence of foreign troops is freely given. IHRL provides insufficient indications of such legitimacy through the right to self-determination, political rights and the rights of minorities.[436] International recognition of such legitimacy, in particular by the UN Security Council, may offer a clearer indication.

**8.233** In the case of the end of Iraq's occupation on 30 June 2004, Security Council Resolution 1546 (2004) prevailing over IHL (and not the normal rules of IHL on the end of occupation) ended the applicability of IHL of military occupation in my view. Under IHL, that law would have continued to apply until a much later stage, namely, until the moment the Iraqi government assumed effective control over the country, including the power to freely determine whether or not US forces should remain in Iraq. Instead, the Council adopted Resolution 1546 when the US-led coalition itself admitted that it was still exercising effective control over Iraq, and the resolution did not make the determination that the occupation had ended dependent upon an effective change on the ground. Factually speaking, the more than 100 000 Coalition troops who remained in Iraq were involved in daily fighting and were not placed under the direction of the Iraqi provisional government, which could not even directly ask them to withdraw from Iraq. Resolution 1546 only granted the newly formed Interim Government of Iraq the power to *request* that the Security Council review the multinational force's mandate.[437] When evaluating whether the Interim Government constituted a change introduced by the occupying power in terms of Article 47 of Convention IV, one must admit that it was chosen under the supervision of a UN representative and not directly by the occupying powers. On the other hand, several observations indicate that the Interim Government did

434 This appears to be the ICRC position, which requalified the conflict in Afghanistan into a NIAC once the Karzai government was elected by the Loya Jirga. See Adam Roberts, 'The Laws of War in the War on Terror' (2002) 32 IYBHR 193.

435 However, the ECtHR considers Northern Cyprus to be occupied by Turkey, and it attributes the conduct of local authorities, though freely elected, to Turkey in *Loizidou* v. *Turkey* ECHR 1996-VI 2216, 2235–36, para 56, and *Cyprus* v. *Turkey* ECHR 2001-IV, paras 69–77.

436 See, e.g., ICCPR, Arts 1, 25 and 27.

437 UNSC Res 1546 (2004) para 12.

in fact constitute such a change. First, the US had an important influence over its composition, and Iraq's new prime minister had a long record of US connections.[438] Second, the Interim Government could not yet possibly be considered as democratically legitimated prior to the elections held in January 2005.

**8.234** It must be finally recalled that the protection of Convention IV continues to apply even after the end of the occupation to protected persons who remain detained by the former occupying power. This should normally not occur because they must be transferred at the end of occupation to 'the authorities of the liberated territory'.[439] However, where they may not or do not want to be handed over to such authorities, the Convention applies until they are re-established in a third State.[440]

### 8.4.3 The general principles of IHL on belligerent occupation

> IHL of belligerent occupation is designed to allow protected civilians to continue their lives as normally as possible while allowing the occupying power to protect the security of its armed forces. The status of the occupied territory may not be changed. Any such change, annexation or an agreement with local authorities cannot deprive protected civilians of their protection under IHL.

**8.235** Two, possibly three, general principles underline the substantive rules of the law of occupation. First, local civilians must be allowed to continue their lives as normally as possible. This implies both a negative obligation not to interfere as well as a positive due diligence obligation to ensure public order and civil life.

**8.236** Second, the occupying power's only protected interest is to occupy the territory using its armed forces. It may therefore interfere with the life of local civilians to protect the security of its occupying forces and to allow them to be present. Civilians do not have any obligations towards the occupying power other than those inherent in their civilian status, namely, the resulting absence of a right to directly participate in hostilities. As they do not have such a right and regardless of whether they have a right to resist the occupation under *jus ad bellum* or to exercise their right to self-determination, IHL hinders them from violently resisting the enemy's occupation of their territory[441] or from liberating it by

438 Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 ICLQ 27, 38.

439 GC IV, Art 77.

440 GC IV, Art 6(4).

441 Civilians may only engage in a *levée en masse* against the approaching enemy during an invasion (in which case

violent means.[442] Civilians who want to resist must form a resistance movement, the members of which then turn into combatants and may therefore be attacked as well as interned without any individual procedure by the occupying power.

**8.237** Third, although it may be argued that many rules, in particular those in the Hague Regulations, also protect the occupied State's interest not to have the status of the occupied territory changed during the occupation, this interest merges with the interest of the local population not to be subject to such changes. Indeed, IHL presumes that the local population lacks the necessary free choice during an occupation to agree to such changes or to renounce their rights.[443] Similarly, special agreements between the parties may not diminish their rights.[444] More specifically, Article 47 of Convention IV prescribes that changes introduced as the result of the occupation into the institutions or government of the occupied territory, any agreement concluded between the authorities of the occupied territories and the occupying power or annexation cannot deprive protected persons of the benefits of Convention IV. While Article 47 does not prohibit annexation, it safeguards benefits afforded by Convention IV to protected persons in an occupied territory even if it is annexed. Annexation nevertheless necessarily leads to violations of IHL as it implies by definition that a State applies its own legislation to the occupied territory, which is prohibited by IHL.

**8.238** In light of these general principles, IHL strongly protects the *status quo ante* ('the way things were before' the situation of occupation) but is rather weak in responding to any new needs experienced by a population in occupied territory. Indeed, the longer an occupation lasts, the more shortcomings IHL tends to reveal. IHL of military occupation can obviously not provide a solution for all of the problems arising out of occupation. As with all IHL more broadly, it can only guarantee a minimum of humanity in a situation that should end as soon as possible. Suggestions to adopt special rules for long-term or transformative occupations are unrealistic because States would never accept such rules and they would lead to never-ending classification disputes. Nevertheless, an

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they become combatants), but not to liberate their territory during an ongoing occupation. See GC III, Art 4(A)(6).

442 Although civilians who commit hostile acts do not lose their status of protected civilians, they may be punished for doing so under legislation introduced by the occupying power, and they may also lose their communication rights under Art 5(2) of GC IV. They may be targeted if and for as long as they directly participate in hostilities. See P I, Art 51(3), and ICRC DPH Guidance.

443 GC IV, Art 8.

444 GC IV, Art 7(1).

occupation continuing over a long period of time impacts the way an occupying power's duties and obligations under IHL are interpreted.[445]

### 8.4.4 Legislation to be applied

> Local legislation remains applicable in the occupied territory, and local institutions must be allowed to continue to function. The occupying power may only change existing legislation or introduce new legislation to protect the security of its forces, if necessary to comply with IHL (including its obligation to maintain public order and civil life in the territory), to respect its obligations under IHRL or if explicitly authorized to do so by the UN Security Council.

**8.239** Article 43 of the Hague Regulations prescribes that the occupying power must respect the local legislation existing at the beginning of the occupation and leave it in force 'unless absolutely prevented' from doing so. It must therefore also respect institutions based upon such legislation. The text of this provision could be interpreted as only requiring the occupying power to respect local legislation when it is restoring and ensuring public order as well as civil life or that it can only legislate within those fields. However, it is generally accepted that the introductory words and the *travaux préparatoires* indicate that it constitutes a general and free-standing rule regarding the legislative powers of the occupying power.[446]

**8.240** When determining when an occupying power is 'absolutely prevented' from respecting the local legislation and may therefore legislate, Article 64 of Convention IV constitutes a more precise, albeit less restrictive formulation than Article 43. Article 64(1) seems to allow derogations from the local legislation by the occupying power only for security reasons or when such legislation is an obstacle to the application of IHL and, according to its text, appears to apply only to criminal laws. Article 64(2), however, authorizes the occupying power to create new legislation (and not only criminal legislation) when, in addition

445 See, e.g., Tristan Ferraro, 'The Law of Occupation and Human Rights Law: Some Selected Issues' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 279; Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 AJIL 44, 52. On the impact of prolonged occupation on the scope of the occupying power's legislative power, see Yoram Dinstein, 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding' (HPCR Occasional Paper Series No 1, 2004) 14.

446 Dinstein, Belligerent Occupation, above note 349, 90–91; Edmund Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations' (1945) 54 Yale L J 397; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Martinus Nijhoff 2009) 94.

to the reasons above, it is 'essential' to 'maintain the orderly government in the territory'. Such authorization to legislate necessarily implies that the occupying power also has the power to derogate from *all* existing legislation for this purpose. Taking Article 64 of Convention IV as well as the rest of international law (including IHL) into account, it is suggested that an occupying power may legislate if it is essential to achieve one of the following purposes.

**8.241** First, it may legislate to protect its security and that of its occupying forces (for instance, through laws limiting rights of public assembly or the bearing of arms). In this field, the occupying power obviously has a wide margin of appreciation to decide what is necessary, but it may not take measures contrary to other IHL obligations (for example, the prohibitions against coercing protected persons to give information, deporting them or punitively destroying their property).

**8.242** Second, an occupying power may pass legislation in order to implement its obligations under IHL, such as in the fields of child welfare, labour, food, hygiene, public health or to abolish 'provisions which adversely affect racial or religious minorities'.[447]

**8.243** Third, it may also establish laws to respect its IHRL obligations.[448] However, those obligations often provide only a framework that leaves States with great latitude on how to implement it. As the occupying power is not the sovereign of the occupied territory, it may not replace existing local legislation as long as it falls within this latitude. Even if local legislation does not fall within the territorial State's margin of discretion, any changes to such legislation must be limited to only what is essential for the occupying power to respect its IHRL obligations. Such changes must also stay as close as possible to similar local standards as well as to local cultural, legal and economic traditions. This conservative approach is especially important when it comes to the obligation to protect many rights and to fulfil social, economic and cultural rights in particular. The ICJ correctly stressed that an occupying power is only bound by economic, social and cultural rights '[i]n the exercise of the powers available to it' as an occupying power, but that it also has 'an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has

447 Pictet Commentary GC IV, 335.

448 On the applicability of IHRL in occupied territory, see MNs 9.021–9.022.

been transferred' to (or, I would add, has remained with) the local authorities in occupied territory.[449]

**8.244** Fourth, an occupying power must legislate to maintain public order and civil life. Such legislation might include, for example, regulations fixing prices or securing the equitable distribution of food and other commodities or that call on, if necessary, local inhabitants to help with firefighting or to perform other duties that may be required of citizens for the public good.[450] In practice, aside from the obligation to amend legislation contrary to IHRL mentioned above, legislative action by the occupying power to ensure civil life will mainly be necessary where a failed State is occupied. Once again, such legislation must stay as close as possible to similar local standards as well as to local cultural, legal and economic traditions. It may also be that Article 43, which constitutes an exception to the general rule that local legislation must remain in place, should be interpreted more extensively the longer an occupation lasts. Thus, in the case of a prolonged occupation, the occupying power must arguably legislate to enhance civil life so that the occupied country can evolve. However, measures taken to enhance civil life must be genuinely necessary and in the interest of the local population, and measures that do not achieve their intended result when implemented must be modified.

**8.245** Fifth, and finally, it may also legislate if explicitly authorized to do so by the UN Security Council. The Security Council may authorize more fundamental changes than those mentioned above in order to restore or maintain international peace and security. Such resolutions adopted under Chapter VII of the UN Charter prevail over IHL limitations. The Council may thus mandate or authorize an occupying power to create conditions in which the population of the occupied territory can freely determine its future, live under the rule of law and enjoy human rights. It may consider that these objectives require the occupying power to establish new local and national institutions and to implement legal, judicial or economic reforms. According to the principles of the rule of law that are essential to any peace-building effort, all of this implies the need to adopt legislation that may go further than what can be justified under the other IHL exceptions discussed above. As explained later, any derogation

449 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 112.

450 UK Military Manual, paras 11.16 and 11.25.1. For other examples, see the references to various court cases in Eric David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 588.

from IHL by the Security Council must be explicit in my view.[451] A simple encouragement of international efforts to promote legal and judicial reform by an occupying power[452] is certainly too vague to allow it to legislate beyond what IHL permits.[453]

**8.246** If an occupying power may legislate under the aforementioned exceptions, its parliament may not pass such legislation as this would be tantamount to an annexation. Rather, only the military commander of the occupying forces may legislate under the above exceptions through a military order as he or she is the only lawful legislator and the executive branch of the occupying power in the occupied territory.[454]

### 8.4.5 Treatment of detainees and judicial guarantees

> Protected persons in occupied territory may only be deprived of their liberty as civilian internees for imperative security reasons, in view of a criminal trial or to serve a criminal sentence. Convention IV prescribes detailed guarantees for protected persons who are deprived of their liberty in occupied territory. In particular, they must be treated humanely and can only be detained in the occupied territory.

**8.247** As explained above, protected civilians finding themselves in either occupied territory or a party's own territory may be interned for imperative security reasons. While the procedure and admissible reasons to administratively detain protected civilians are only regulated very summarily, IHL regulates their treatment in great detail.[455] The reverse, however, is true for those deprived of their liberty in occupied territory for the other two admissible reasons: protected civilians who are awaiting a criminal trial or those who have been sentenced for a crime. Only one provision – Article 76 of Convention IV – regulates their treatment very summarily. Article 76 covers both those accused of or sentenced for a crime either under the local criminal law of the occupied territory or pursuant to legislation that the occupying power may introduce as explained above.[456]

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451 See MN 9.109.

452 UNSC Res 1483 (2003) para 8(i).

453 For a contrary opinion, see UK Military Manual, para 11.11, fn 15.

454 See, e.g., Lassa Oppenheim, *International Law: A Treatise – Disputes, War and Neutrality* (7th edn edited by Hersch Lauterpacht, Longmans 1952) vol II, 438. The very wording of the title of Section III of the HR (which comprises all provisions – Arts 42 to 56 – on occupation) manifests this point as it reads '*Military* Authority over the Territory of the Hostile State'. Emphasis added.

455 See MNs 8.177–8.188.

456 See MNs 8.239–8.246.

Even those held for reasons unrelated to the occupation in an occupied territory are protected civilians and at least conceptually in the power of the occupying power because they are held in a territory that is under its effective control.

**8.248** In contrast to administrative internments, IHL regulates the procedure and admissible reasons under which an occupying power may try protected civilians in an occupied territory in great detail because it considers that the main risk consists of abusive criminal trials. Those guarantees apply to trials conducted before military courts, which may be constituted by the occupying power and which must sit in the occupied territory, to try violations of penal legislation the occupying power may introduce under Article 64 discussed above.[457] Although the local courts must be normally allowed to adjudicate violations of local penal laws, an occupying power's military courts may try crimes under the existing criminal law of the occupied territory if necessary for the effective administration of justice,[458] such as when all judges have fled or have resigned according to their right to do so under IHL.[459] The fact that IHL prescribes that the occupying power may constitute only military courts to try local civilians constitutes one of the very few direct contradictions with IHRL, whose implementing bodies are very sceptical towards military courts trying civilians.[460] On this, however, the IHL rule should prevail as the *lex specialis* because the establishment by an occupying power of its own civilian courts in the occupied territory would be tantamount to an annexation.

**8.249** Such courts of the occupying power must be non-political and properly constituted,[461] which is now interpreted as a referring to IHRL requirements for courts. They may only adjudicate crimes committed after the proper publication of the relevant penal legislation and must respect 'general principles of law' (which must again be understood as a reference to IHRL), in particular the principle of proportionality of penalties.[462] The occupying power's courts

457 GC IV, Art 66.

458 GC IV, Art 64(1), second sentence.

459 GC IV, Art 54(1).

460 See Online Casebook, ECHR, Cyprus v. Turkey, A. European Court of Human Rights, Cyprus v. Turkey, paras 354–9; ECHR, *Martin v United Kingdom* (2007) 44 EHRR 31, para 22; HRCtee, 'General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (2007) UN Doc CCPR/C/GC/32, para 22; IACtHR, *Castillo Petruzzi et al. v Peru* (Judgment on Merits, Reparations and Costs) IACtHR Series C No 52 (30 May 1999) para 161; IACtHR, *Lori Berenson-Mejía v Peru* (Judgment on Merits, Reparations and Costs) IACtHR Series C No 119 (25 November 2004) paras 193, 198; IACtHR, *Palamara-Iribarne v Chile* (Judgment on Merits, Reparations and Costs) IACtHR Series C No 135 (22 November 2005) para 222.

461 GC IV, Art 66.

462 GC IV, Arts 65, 67.

must also take into account the fact that the accused is not a national of the occupying power.[463] Particular rules outline the permissible penalties that may be applied,[464] in particular when and according to what procedure a protected person may be sentenced to death.[465]

**8.250** Except for war crimes, the occupying power may not arrest, try or convict protected persons for crimes committed before the occupation.[466] Nationals of the occupying power who have sought refuge in the territory of the occupied State are only protected civilians if Protocol I applies.[467] Nevertheless, they may only be arrested, tried, convicted or deported for offences committed after the outbreak of hostilities or for common law offences committed before the outbreak of hostilities if the offence under the law of the occupied State would have justified extradition in time of peace.[468]

**8.251** Detailed rules cover the applicable criminal procedure.[469] The Protecting Power plays an important role under those rules as it must be notified of certain details without which a trial may not proceed. As Protecting Powers do not exist in contemporary armed conflicts, a notification to the ICRC is not only sufficient but also necessary. Today, it is well accepted that an accused's rights of defence that are not regulated in sufficient detail in IHL must be interpreted in light of the more developed rules of IHRL instruments and the corresponding jurisprudence of human rights bodies.

### 8.4.6 Protection of property

Although private property, including the property of municipalities and of State institutions dedicated to religion, charity, education, the arts and sciences, may not be confiscated, it may be requisitioned for the needs of the occupying army. It may be argued that the concept of property also covers both tangible and intangible interests. The destruction of private property is only permitted when rendered absolutely necessary by military operations.

Movable enemy public property, including cash, that can be used for military operations may be seized as war booty, while immovable enemy State property

463 GC IV, Art 67.
464 GC IV, Arts 67 and 68(1).
465 GC IV, Arts 68(2)–(4) and 75.
466 GC IV, Art 70(1).
467 See P I, Art 73; see also MN 9.083.
468 GC IV, Art 70(2).
469 GC IV, Arts 71–75.

may only be administered by the occupying power according to the rules of usufruct.

**8.252** In addition to the general rule discussed above according to which local legislation remains applicable, including laws that define, protect and regulate property, IHL contains specific rules protecting property against interference by the occupying power. Those rules, which can mainly be found in the Hague Regulations, make a strict distinction between private and public property in conformity with the liberal system in force in the Western world when they were adopted around 1900. Except for the prohibition against pillage for private purposes discussed above[470] that covers all property, IHL provides more protection to private property than public property.

### a. Private property

**8.253** Private property may not be confiscated by an occupying power.[471] The only exception covers all goods susceptible to direct military use, such as 'munitions of war',[472] but not, for example, raw materials that must first be extracted, transformed or refined.[473] When such 'munitions' constitute private property, they must be 'restored and compensation fixed' but only 'when peace is made'.

**8.254** Contrary to confiscations that transfer property and deprive the owner definitely of a good, requisitions that transfer (except for property such as food that can be consumed) only possession and use are exceptionally lawful under strict conditions.[474] Requisitions are only permitted for the needs of the occupying army, such as land for army barracks, houses for soldiers or means of transportation. Even then, the requisitions must be proportionate to the resources of the country and must not involve (in particular in the case of requisitions of services) the inhabitants in military operations against their own country. Any requisition must be paid for as far as possible in cash; otherwise, a receipt must be given, and the payment must be made as soon as possible. The requisition of hospitals is only allowed in even more exceptional circumstances.[475] To make it easier to distinguish them from pillage, requisitions and services may

470 See MNs 8.164–8.165.
471 HR, Art 46(2); ICRC CIHL Database, Rule 51(c).
472 HR, Art 53(2).
473 See Online Casebook, Singapore, Bataafsche Petroleum v. The War Damage Commission.
474 HR, Art 52.
475 GC IV, Art 57.

only be demanded pursuant to 'the authority of the commander in the locality occupied.'[476]

### b. Public property

**8.255** An occupying power may seize as war booty all of the enemy's movable public property, including cash, that may be used for military operations.[477] In contrast, the occupying power may only administer immovable public property according to the rules of usufruct[478] as the occupied State is no longer able to do so. The rules of usufruct allow the occupying power to use and to own the fruits or proceeds of immovable public property but not to use the underlying capital, or substance, of such property. To the extent that raw materials not yet extracted constitute immovable public property, one could imagine that any extraction of a non-renewable resource necessarily depletes its capital and is therefore unlawful under the rules of usufruct. However, in conformity with Roman law that initially developed the concept of usufruct and most civil law systems using it today, a reasonable exploitation is permissible if it takes place at the same rate as before the occupation began. The opening of new oil wells, however, would be prohibited under the rules of usufruct.[479]

### c. The delimitation between private and public property

**8.256** The delimitation between public and private property may be delicate, especially where collective rights (for instance, those of indigenous peoples) to use land for certain purposes exist. The occupying power may manipulate this distinction[480] as it may use public property. Local legislation, which may be modified by the occupying power only in the exceptional circumstances discussed above, is the starting point for determining whether property is private or public. However, the delimitation between private and public property is not entirely left to local legislation. Rather, IHL expressly provides that '[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.'[481] Additionally, the object and purpose of the rule allowing the occupying power to administer State property because the ousted sovereign is by definition

476 HR, Art 52(2).

477 HR, Art 53; ICRC CIHL Database, Rule 51(a).

478 HR, Art 55; ICRC CIHL Database, Rule 51(b).

479 'United States: Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez' (1977) 16 ILM 733, 736.

480 On the Israeli practice to declare land 'state land' for the purpose of using it to construct settlements, see Norwegian Refugee Council, 'A Guide to Housing, Land and Property Law in Area C of the West Bank' (2012) 43–8 in particular.

481 HR, Art 56(1).

unable to do so should lead to a restrictive interpretation of public property that is limited only to land that was directly owned by central State authorities.

### d. The definition of property

**8.257** IHL does not define the concept of property, and it is doubtful whether an occupying power's obligations vary according to the terminology and concepts used by local legislation. As in IHRL and international investment law, it may be appropriate to consider that the IHL concept is autonomous. However, this does not solve the difficulty as the concept of property is much larger in common law systems where, for example, a debt can be owned by a creditor and petrol by the grantee of a concession even before it is extracted. As civil law systems also tend to abandon the strict distinction between real and obligatory rights, it may be appropriate to adopt a large and functional concept of property similar to that accepted by the European Court of Human Rights in IHRL. Specifically, the Court determined that the following interests are protected by the right to property: 'tangible or intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim, and the clientele of a cinema.'[482] The Inter-American Court of Human Rights uses a similar autonomous concept, and this is also the tendency in interpreting international investment protection treaties.[483] In any case, if a certain claim is not considered property, it is nevertheless based upon local legislation that the occupier must respect except in exceptional circumstances.

### e. The destruction of property

**8.258** Compared to requisition, the destruction of private property is permissible only in an even more exceptional circumstance: when it is 'rendered absolutely necessary by military operations' (which is more restrictive than military necessity).[484] This rule prohibits, among other things, the punitive destruction of homes, such as the destruction of a home where a crime has been committed or planned or where the alleged perpetrator lived.[485] The destruction of houses built without the necessary permits is not covered by this rule but by local legislation that

482 Monica Carss-Frisk, 'The Right to Property: A Guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights' (CoE 2001) 6. See also William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 971–2.

483 Ursula Kriebaum and Christoph Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in Stephan Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike 2007) 743.

484 GC IV, Art 53.

485 On the Israeli practice, see Online Casebook, Israel, House Demolitions in the Occupied Palestinian Territory.

the occupying power must respect.[486] It is not up to an occupying power to give or refuse (except for security reasons) building permits. If an occupying power such as Israel establishes an urban planning regime beyond its legislative powers, the destruction of houses built in violation of that unlawful regime cannot be justified.[487]

### 8.4.7 The administration of the territory

> The occupying power must ensure public order and civil life in the occupied territory. Normally, this must be achieved through the existing local institutions. However, if local institutions are not functioning, the occupying forces must themselves ensure the proper administration of the territory.

**8.259** Under Article 43 of the Hague Regulations, the occupying power must ensure public order and civil life in occupied territory, while, as explained above, normally respecting local legislation. The French version of the Hague Regulations, which is the only authentic text, shows that the obligation concerns not only 'public order and safety' mentioned in the English text but also much more broadly 'l'ordre et la vie publics', which should be translated as the 'public order and civil life'.[488] This, however, does not mean that the occupying power must or even may administer the territory through its own (military) authorities. It must rather support the administration of the territory by the local authorities, interfering only for the exceptional reasons for which it may legislate as discussed above (for instance, to ensure the security of its occupying forces). Nevertheless, if the local administration does not function in some fields, the occupying power must itself ensure public order and civil life in the occupied territory.

**8.260** Any measures it takes under this obligation are subject to the limitations IHRL sets for any State action. It must also abide by the special rules on the administration of public property that have been discussed above as well as IHL's

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486 See MNs 8.239–8.246.

487 For a detailed discussion, see Théo Boutruche and Marco Sassòli, 'Expert Opinion on International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank' (2011) <http://rhr.org.il/heb/wp-content/uploads/62394311-Expert-Opinion-FINAL-1-February-2011.pdf> accessed 7 August 2018.

488 See Benvenisti, The International Law of Occupation, above note 356, 9; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Suny Press 2002) 58. See also Supreme Court of Israel, *The Christian Society for Holy Places v Minister of Defence et al*. (Judgment) High Court of Justice 337/71 (1971), summarized in (1972) 2 IYBHR 354.

specific rules on taxation.[489] Additionally, although the occupying power may not alter the status of public officials and judges, it may remove them from their posts.[490] The latter authorization, however, must be exercised with caution because its results, if exercised beyond individual cases, may contradict the occupying power's obligation to ensure civil life and to let local courts apply local legislation.[491] On the other hand, public officials may resign, but if they do so, they may be required as any inhabitant to work for the needs of the army of occupation, for the public utility services or for the feeding, clothing, sheltering, transportation or health of the population.[492]

### 8.4.8 Prohibitions of transfers

> Protected persons may neither be forcibly transferred or otherwise deported out of the occupied territory nor forcibly transferred within the occupied territory. The occupying power may not transfer parts of its own population, even if they consent, into the occupied territory.

**8.261** Article 49 of Convention IV prohibits two very different kinds of transfers. Its first paragraph prohibits – 'regardless of their motive' – forcible transfers or deportations of protected civilians out of the occupied territory as well as their forcible transfer even within the occupied territory.[493] The second paragraph exceptionally allows evacuations of protected persons within the occupied territory if required by their security or for 'imperative military reasons', and this further corroborates that the general prohibition also covers transfers within the occupied territory.[494] In contrast, such evacuations may result in displacement outside of occupied territory only if it cannot be avoided for 'material reasons'. Paragraphs three to five deal with the conditions under which such transfers must take place and the (unrelated) obligation not to detain protected civilians in places 'particularly exposed to the dangers of war'. In defining forcible transfer as a crime against humanity, the ICTY clarified that a transfer

489 HR, Arts 48–49, 51.
490 GC IV, Art 54.
491 GC IV, Art 64(1).
492 GC IV, Art 51(2) to which Art 54(2) refers to.
493 For the desperate attempts of the Israeli Supreme Court to justify such deportations despite the clear wording of the prohibition, see Online Casebook, Israel, Cases Concerning Deportation Orders.
494 The ICTY held in several cases that the term 'transfer' as opposed to 'deportation' refers to a transfer within an occupied territory. See ICTY, *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) para 521; ICTY, *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 474; *Naletilić*, above note 346, para 521. See also the clear texts of P I, Art 85(4)(a), and ICC Statute, Art 8(2)(b)(viii). For the contrary position, see Online Casebook, Israel, Ajuri v. IDF Commander.

is 'forcible' even if it is merely the result of a coercive environment or, in other words, when the protected person has no real choice other than to leave.[495]

**8.262** The sixth paragraph of Article 49 covers a totally different situation: it prohibits an occupying power from transferring, even voluntarily, parts of its own population into the occupied territory. The Israeli settlements in the Occupied Palestinian Territory show the serious humanitarian consequences of such a policy. IHL, however, does not prohibit the truly individual choice of a national of the occupying power to relocate into the occupied territory. Rather, it prohibits – in addition to active transfers – an occupying power's policy that favours, organizes or encourages such relocations, which is clearly the case for the Israeli settlements in the Occupied Palestinian Territory.[496] As it is the policy and not the move that is prohibited, even settlers unlawfully transferred under such a policy neither commit a violation of IHL nor lose protection against attacks afforded to them as civilians, except if they are members of the armed forces or if and for such time as they directly participate in hostilities.

### 8.4.9 A right to leave occupied territory?

**8.263** Protected persons in occupied territory not only fear being forcibly transferred; they may also wish to voluntarily leave the occupied territory. However, IHL – in contrast to own territory – does not grant a right to leave to all protected persons in an occupied territory. Instead, Article 48 only provides such a right to third-country nationals under the same procedure and rules applicable in a party's own territory as it incorporates Article 35 by reference.[497]

### 8.4.10 Protection of social, economic and cultural rights

Food, health, hygiene, spiritual assistance and education must be ensured by the existing local system, which the occupying power may not interfere with except for the reasons allowing it to legislate. However, if the needs of the local population cannot be thus satisfied, the occupying power must itself provide goods and services while respecting local traditions and sensitivities. If it still cannot satisfy the needs of the local population, the occupying power must agree to and facilitate external humanitarian assistance. IHL also provides key rules concerning the protection of cultural heritage in occupied territory.

495 *Krnojelac*, ibid., para 475; ICTY, *Prosecutor v Stakić* (Appeals Judgment) IT-97-24-A (22 March 2006) para 281; *Naletilić*, ibid., para 519.

496 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 120.

497 See MNs 8.174–8.176.

**8.264** Various IHL provisions protect what could be considered in human rights terms as the economic, social and cultural rights of the occupied territory's population. Those provisions cover food and medical supplies,[498] public health and hygiene,[499] spiritual assistance,[500] the education of children[501] and the protection of workers.[502] The general idea under these provisions is that the occupying power must first and foremost respect and not interfere with the local system that respects, protects and fulfils those rights. In this regard, the occupying power remains under its general obligation discussed above[503] to respect local legislation and institutions. Some of the specific provisions relevant here not only affirm this general obligation, such as those concerning the respect of hospitals and of the local Red Cross or Red Crescent Society,[504] but also provide more precise exceptions to it.

**8.265** First, as to the rights of workers, the limits to working obligations and the guarantees of appropriate working conditions have been discussed above.[505] Although the text of the specific provision prohibiting the occupying power from creating unemployment seems to cover such practice only if the purpose is to make protected persons work for it, the ICJ equally mentioned it in relation to measures that simply hindered workers from accessing their workplaces even though they could not work for the occupying power.[506] This may be justified by the obligation of the occupying power to restore and ensure civil life as well as by the right to work under IHRL, which remains applicable in occupied territory.

**8.266** Second, if the needs of the local population cannot be satisfied by the local system in place, the occupying power must itself provide goods and services while respecting local traditions and sensitivities.[507] Third, if the needs of the local population still remain unsatisfied, the occupying power must agree to (and must facilitate) external humanitarian assistance.[508] In the field of humanitarian assistance, this is the only blackletter IHL provision obliging a State to

498 GC IV, Arts 55, 59–62; P I, Art 69.
499 GC IV, Arts 56–57, 63.
500 GC IV, Art 58.
501 GC IV, Art 50.
502 GC IV, Arts 51–52.
503 See MNs 8.239–8.246.
504 GC IV, Art 63.
505 See MN 8.162.
506 See GC IV, Art 52; see also Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 126.
507 See, e.g., GC IV, Arts 50(3), 55(1), 56 and 60.
508 GC IV, Art 59(1); P I, Art 69.

accept humanitarian assistance,[509] but it nevertheless implies that an impartial humanitarian organization or a State must ask for the occupying power's consent and coordinate assistance activities with it as the occupying power has the overall responsibility for territory's public order and civil life. However, if the population is in need and the relief is humanitarian as well as impartial, a refusal by the occupying power violates IHL.

**8.267** We will deal elsewhere with the protection of cultural rights, both by protecting persons performing or participating in intangible cultural heritage and by protecting tangible cultural property in occupied territories.[510] Here too, the occupying power must firstly respect that property, support the local authorities if necessary and, only if this fails, undertake itself only the most necessary measures of preservation. Protocol I to the 1954 Hague Convention on Cultural Property prohibits the export or transfer of cultural property from occupied territory and provides for the restitution of illegally exported objects,[511] while Protocol II thereto additionally prohibits excavations or alterations of cultural property.[512]

## 8.5 THE MISSING AND THE DEAD

Persons are considered missing if their relatives or the power on which they depend have no information on their fate. Each party is obliged to search for persons who have been reported as missing by the adverse party.

If missing persons are alive in reality, they benefit from the protection IHL offers to the category to which they belong (for instance, as a civilian, POW or when wounded or sick). In addition, belligerents must promote the exchange of family news and the reunification of families. Information on the hospitalization or detention of a protected person must be forwarded rapidly to their family and their authorities through three channels: notification of hospitalization, capture or arrest; transmission of capture or internment cards; and the right to correspond with the family.

As for missing persons who are dead, each party to an armed conflict must – whenever circumstances permit and particularly after an engagement – take all

509 See MN 10.204.
510 See MNs 10.181–10.185.
511 Protocol I to the HC on Cultural Property, paras 1–4.
512 Protocol II to the HC on Cultural Property, Art 9.

possible measures without delay to search for, collect and evacuate the dead, including by agreeing to establish search teams. It must also attempt to collect as well as record information that may assist in the identification of the deceased. The collection of such information is facilitated if individuals wear identity cards or tags as prescribed for combatants. If such identification is successful, the family must be notified.

In all cases, the remains of the deceased must be respected, they must be given decent burials and their gravesites must be marked. An agreement between the parties concerned, which can generally only be reached once the conflict has ended, is required for relatives to have access to the graves and to have the remains of their loved ones returned to them.

**8.268** IHL also deals with two related but distinct phenomena that inevitably arise in any armed conflict: persons die or go missing. Persons are considered missing if their relatives, the power on which they depend (in the case of combatants) or the country of which they are nationals or in whose territory they reside (in the case of civilians) have no information on their fate. As always, even though IHL rules are more specific and obligations are more detailed for IACs, the problems and principles nonetheless remain the same in NIACs. Although the application of certain IHL rules on the missing after the end of hostilities is not addressed by the general IHL rules on its temporal scope of application, the object and purpose as well as even sometimes the very wording of the relevant IHL rules[513] requires the continued application of such rules even after a conflict has ended.[514]

**8.269** Conflict-related disappearances are a highly emotional issue. They involve death, love and family links – phenomena dealt with by every culture and religion – that, in this context, are overshadowed by uncertainty, which is more and more difficult for contemporary human beings to accept. Families, authorities and staff of humanitarian organizations are affected by those emotions, leading to attitudes that cannot be rationally explained, such as the reluctance of some to handle mortal remains.

### 8.5.1 The relationship between the missing and the dead

**8.270** In armed conflicts, the only logical conclusion is that persons who remain missing for a certain time are dead, but their family understandably always hopes

513 See, e.g., P I, Art 33(1), which requires certain conduct 'at the latest from the end of active hostilities'.
514 Grignon, above note 156, 350–53.

that this is not the case. In relation to the missing, IHL rules address a specific concern: 'the right of families to know the fate of their relatives'.[515] If missing persons are alive, the first priority is obviously to find them and to ensure that they are treated in conformity with IHL. If the missing person is dead, the main concern is to inform the family about the death and the place of burial. Beyond that, the respect of human dignity applies beyond the death of a person to his or her remains. IHL therefore also addresses other humanitarian concerns relating to the dead, including ensuring the respect of the family's as well as the community's religious and other feelings towards the dead.

### 8.5.2 The obligation to search for the missing

**8.271** Each party to an armed conflict is obliged to search for persons who have been reported as missing by the adverse party.[516] Obviously, this is not an obligation of result but an obligation of means. Compliance with this obligation is hindered by not only technical, practical and logistical difficulties but often also political obstacles. Indeed, humanitarian issues are often regrettably intermingled with political considerations. The demand for reciprocity, which all too often undermines the respect for IHL, prevents the initiation of the search, and the families (whether manipulated or not) of each side unfortunately even approve in many cases of this behaviour by 'their' side's authorities in respect of missing 'enemy' persons. Belligerents furthermore withhold information in order to either leave the 'enemy' population in uncertainty and distress, to put pressure upon the enemy or to avoid criticism from their own population for losses suffered. Leaders whose power is based on hatred of another community have an interest in perpetuating the missing persons issue as it will consolidate their power.

### 8.5.3 Prevention

**8.272** Besides the obligation to search for the missing as well as specific rules on re-establishing family links between the living and identification of the dead and information of their family dealt with hereafter, all of the basic IHL rules studied in this chapter would, if duly respected, necessarily reduce the number of missing persons. If civilians and persons *hors de combat* are not attacked but respected and treated in conformity with IHL or if the ICRC is given access to war victims as foreseen by that law,[517] very few protected persons could in

515 P I, Art 32.

516 P I, Art 33(1). See also ICRC CIHL Database, Rule 117.

517 In IACs, the ICRC has a right to visit prisoners of war and protected civilians. See GC III, Art 126; GC IV, Art

fact disappear. Those who remain unaccounted for would be mostly combatants missing in action, and we will see later that IHL provides several mechanisms to clarify their fate.

### 8.5.4 Re-establishing family links between persons who are alive

**8.273** If missing persons are alive, they are missing because they have either been detained by the enemy or separated from their families by the frontlines or borders. In both cases, they first and foremost benefit from the protection IHL offers to the category to which they belong (for instance, as a civilian, POW or when wounded or sick). Second, IHL also contains rules designed to ensure that such individuals do not remain missing. If the person is missing due to, as is regularly the case in armed conflicts, the disruption of postal and telecommunication services or the displacement of groups of people, family links should be quickly re-established as long as belligerents respect their obligation to promote the exchange of family news and the reunification of families, including through, among other ways, the ICRC's Central Tracing Agency.[518] Today, technology facilitates the re-establishment of family links because people displaced by armed conflict who have a mobile phone are able to remain in contact with their family without outside help, assuming, of course, that the mobile network continues to function in the midst of a conflict.

**8.274** A family's uncertainty concerning missing protected persons who have been detained or hospitalized by the enemy should not last for long as IHL prescribes that information concerning such circumstances must be forwarded rapidly to the family and their authorities through three channels: (1) the notification by the Detaining Power of the protected person's hospitalization, capture or arrest;[519] (2) the transmission of capture or internment cards concerning prisoners of war and civilian internees;[520] and (3) the right of protected persons to correspond with their families.[521] The personal details of every person deprived of their liberty must be recorded.[522] Therefore, assuming a belligerent complies with its obligations, a lawfully detained person cannot remain missing for long. Secret detention, which constitutes forced disappearance, is absolutely prohibited.[523]

143. In NIACs, the ICRC may offer its services in view of performing such visits. See GCs, Common Art 3.

518 GC IV, Arts 25–26.

519 GC I, Art 16; GC II, Art 19; GC III, Arts 122–123; GC IV, Arts 136 and 140; P I, Art 33(2).

520 GC III, Art 70; GC IV, Art 106.

521 GC III, Art 71; GC IV, Art 107. For both IACs and NIACs, see ICRC CIHL Database, Rule 125.

522 ICRC CIHL Database, Rule 123.

523 Ibid., Rule 98.

**8.275** In some cases, persons affected by an armed conflict do not want their State to know of their fate and even fewer want it to remain unknown to their family. IHL does not cover the problems raised by such a wish except by stipulating that a Detaining Power may not transmit information concerning protected civilians to a power of origin if such information may be detrimental to the person concerned or his or her family.[524] Nevertheless, in light of IHRL as well as modern concepts and laws on data protection, a wish of war victims that their family or their power of origin should not be informed about their fate must be respected even though it provokes mistrust between belligerents and exacerbates the suffering of the person's relatives.

### 8.5.5 Identification of the dead and information to their family

**8.276** It is more difficult to inform the family that a missing person is dead. Such information is nevertheless important because the family can only start the mourning process once the hope that their beloved one is still alive has disappeared. Although being so informed initially increases their suffering, it relieves them from the ongoing torture of uncertainty. Furthermore, credible information about a missing person's death is necessary so a widow can remarry and so inheritance issues can finally be settled.

**8.277** 'Whenever circumstances permit, and particularly after an engagement, each party to an armed conflict must, without delay, take all possible measures to search for, collect and evacuate the dead,'[525] including by agreeing to establish search teams.[526] Each party must also attempt to collect and record information that may assist in the identification of the deceased.[527] The collection of such information is facilitated if individuals wear identity cards or tags as prescribed for combatants.[528] Otherwise, identifying the dead often requires comparing forensic data obtained from a dead body, such as dental forensics, with data about the dead person previously collected when he or she was living or which is still available through the family.[529] This process, however, necessitates cooperation between two belligerents (or, after the conflict, former belligerents): the party with control over the remains of the deceased individual and the party with the information necessary to identify those remains thanks to, among other

524 GC IV, Art 137(2).
525 ICRC CIHL Database, Rule 112. See also GC I, Art 15; GC II, Art 18.
526 P I, Art 33(4).
527 GC I, Art 16; P I, Art 33(2).
528 GC III, Art 17(3).
529 See ICRC, 'Missing People, DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Armed Violence' (2nd edn, ICRC 2009).

things, data provided by the deceased's family. Unfortunately, belligerents often do not cooperate but rather manipulate and exploit the issue of missing persons to perpetuate hate, to conceal the extent of a defeat or to gain or maintain international support against the 'enemy'.

**8.278** If the identification of human remains is successful, the family must be notified. In any case, a careful examination must be made to confirm the death, attempt to identify the dead person and establish a report.[530] The first reaction when seeing a dead body in war should therefore be to identify it and not to bury it, although this is a normal human reaction. Identification immediately after death is much easier than at a later stage, and it avoids controversies about an exhumation.

### 8.5.6 Handling of human remains

**8.279** Once identified, the remains of the deceased must be respected and must be given a decent burial, if possible according to the demands of the religion to which they belonged.[531] Some religions, such as Islam, may be opposed to later exhumations for identification purposes or the purpose of criminal investigations against those responsible for the death. However, it may be argued that the prohibition by Islamic Law is not absolute and allows for a balancing between legitimate interests: on the one hand, its general rule that ensures respect for the dead and for the family's feelings, and, on the other hand, exceptional countervailing interests, such as the need to identify the dead person to inform the family (which will only very rarely require exhumation) and, in some cases, to prosecute those responsible. Under international law, while the wishes of the families must certainly be taken into account, they do not necessarily always prevail in all circumstances, including, for example, when a serious crime that must be prosecuted necessitates an exhumation.

**8.280** In any case, gravesites must be 'maintained and marked' to ensure they can always be located.[532] Each party to the conflict must also take all possible measures to prevent the dead from being despoiled, and the mutilation of dead bodies is prohibited.[533] Burial at sea is possible for persons dying in sea warfare,[534]

530 GC I, Art 17; GC II, Art 20; ICRC CIHL Database, Rule 116.

531 GC I, Art 17; P I, Art 34(1). For further details on the management of dead bodies, see ICRC *et al.*, *Management of Dead Bodies After Disasters: A Field Manual for First Responders* (2nd edn, Pan-American Health Organization 2016).

532 GC I, Art 17; P I, Art 34(1); ICRC CIHL Database, Rule 115.

533 ICRC CIHL Database, Rule 113.

534 GC II, Art 20.

but it inevitably deprives the families of the possibility to receive the remains and to visit the grave site.

**8.281** As seen above, IHL emphasizes providing families with information about the fate of their beloved ones. The return of the human remains is not an absolute obligation as it requires an agreement between the parties concerned that can generally only be reached once the conflict has ended.[535] However, families are increasingly unsatisfied with the information they are entitled to receive under IHL. They mistrust death certificates issued by the (former) enemy and thus prefer to be given the mortal remains of their loved ones. Such attitudes are sometimes due to manipulations by their own authorities who want to keep missing person files open, the reluctance of families to accept the sad truth or their desire to see those responsible punished. IHL's emphasis on providing answers rather than the bodies of the relatives concerned possibly neglects some factors. First, the dead body is the object of rituals in many religions and cultures that the relatives believe are necessary to ensure peace in the afterlife for those who have passed away.[536] Second, in order to start the mourning process, families need to be certain that their relative is dead.[537] In the absence of mortal remains, such certainty depends on the extent to which they trust the source of information, and they generally do not trust the (former) enemy.

### 8.5.7 Clarification of the fate of persons who remain missing at the end of the conflict

**8.282** Even the mere clarification of the fate of persons who remain missing at the end of the conflict requires the good faith cooperation between the former belligerents, which the ICRC and other international organizations can support. Here again, some former belligerents take advantage of the problem to continue the 'war' by other means by hiding information concerning the missing. Sometimes even the home state of the missing abuses the issue for propaganda purposes, for instance, by making unrealistic demands to keep the wounds open.

### 8.5.8 The need for domestic legislation

**8.283** IHL does not solve a key problem that must therefore be addressed by domestic law: families need pragmatic solutions to legal problems they face while a person

535 P I, Art 34(2) and (4).

536 Philippe Ariès, *The Hour of Our Death* (OUP 1991); Louis-Vincent Thomas, *Rites de mort, pour la paix des vivants* (Fayard 1985).

537 Marie Ireland, *Apprivoiser le deuil* (Presses du Châtelet 2001) 238.

remains missing. Such solutions as well as parts of the above-mentioned measures to prevent disappearances, elucidate the fate of missing persons and assist their families necessitate domestic legislation that should already be adopted in peacetime. The ICRC and the Inter-Parliamentary Union have published a guide for parliamentarians that provides a model law to facilitate the adoption of such comprehensive legislation.[538]

## 8.6 THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES

### 8.6.1 Prohibitions or rules on targeting?

IHL protects civilians against the effects of hostilities through prohibitions against directly targeting them (including to spread terror among them), directly targeting civilian objects (with special rules protecting some specially protected objects and areas) and indiscriminate attacks, which include attacks that violate the proportionality rule. Even if the target is lawful under IHL, the proportionality rule furthermore protects civilians and civilian objects from the incidental effects of those attacks that may be excessive in relation to the concrete and direct military advantage anticipated from carrying out the attack. IHL also ensures the protection of civilians during the conduct of hostilities by imposing precautionary obligations on both the attacker and the defender in order to avoid or minimize such incidental effects and to ensure that only lawful targets are attacked. In this book, all of these rules on targeting are discussed as positive instructions on what must be done when launching an attack rather than in terms of prohibitions.

**8.284** In addition to the protection afforded to civilians when in the power of a belligerent, IHL also protects civilians against the conduct of hostilities conducted by the enemy of the party in whose hands they are. Protocol I thus defines, in conformity with the traditional prohibitive approach of IHL, several attacks that are prohibited:

1. attacks targeting civilians or the civilian population (Article 51(1)) except if and for as long as a civilian directly participates in hostilities (Article 51(3));
2. attacks intended to spread terror among the civilian population (Article 51(2));

538 ICRC and Inter-Parliamentary Union, 'Missing Persons: A Handbook for Parliamentarians' (2009).

3. attacks targeting civilian objects (Article 52), non-defended localities (Article 59) and demilitarized zones (Article 60); and
4. indiscriminate attacks (Article 51(4) and (5)), which may be further subdivided into attacks:

    a. that are not directed at a specific military objective (Article 51(4)(a));
    b. using weapons that cannot be directed at a specific military objective (Article 51(4)(b)); and
    c. whose effects cannot be limited as required by IHL (Article 51(4)(c));

5. attacks in violation of the cardinal proportionality rule prohibiting 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' (Article 51(5)(b)), which technically constitute an example of indiscriminate attacks;
6. attacks (which are another example of indiscriminate attacks) that treat an area containing different military objectives located in 'a concentration of civilians or civilian objects' as a single military objective (Article 51(5)(a)); and
7. any of the aforementioned prohibited attacks by way of reprisals (Article 51(6)).

**8.285** Protocol I then prescribes precautionary measures for the benefit of the civilian population and civilian objects, which must be taken by both the attacker (Article 57) and the defender (Article 58) even when an attack is not prohibited. The defender is also prohibited from using civilians as human shields (Article 51(8)).

**8.286** Certain objects also benefit from a special, additional protective regime in terms of distinction, proportionality and precautionary measures that must be taken when they are attacked. Such specially protected objects under IHL include cultural property (Article 53), objects indispensable to the survival of the civilian population (Article 54), the natural environment (Article 55) and works and installations containing dangerous forces (Article 56). According to the ICRC, all of the aforementioned rules, with only a few arguable exceptions, are customary law applicable equally in NIACs.[539] Finally, Protocol I also protects

539 ICRC CIHL Database, Rules 1–24, 35–45.

the civilian population by protecting civil defence organizations (Articles 61 to 67).

**8.287** Instead of following Protocol I's list of prohibitions, the sections below will rather discuss the rules according to the order they must be presented to armed forces and armed groups. It will therefore discuss first the three steps that must be taken when targeting, while the preliminary step of verifying that the weapon used is lawful will be discussed in the next sub-chapter. After which, we will highlight some particularities applicable to specially protected objects, the concept of protected areas and the protection of civil defence. Both ways of presenting the rules lead exactly to the same result and do not imply any substantive divergences.

### 8.6.2 Fundamental principles

> Only legitimate targets may be directly targeted. Even then, certain means and methods of warfare may not be used, the expected incidental effects of an attack on the civilian population may not be excessive in relation to the military advantage anticipated and both the attacker as well as the defender must take measures to avoid and, in any event, minimize such incidental effects.

**8.288** According to the fundamental principle of distinction codified in Article 48 of Protocol I, which uncontroversially applies as customary IHL in both IACs and NIACs,[540] parties to an armed conflict must distinguish between the civilian population and combatants as well as between civilian objects and military objectives. Only combatants and military objectives may be attacked. This limitation is not so much due to the higher danger military objectives and combatants represent for the enemy, which is probably more afraid of nuclear scientists (who nevertheless belong to the civilian population) than of infantrymen. This limitation rather flows from the understanding that, if we want to have rules as well as restraints in war, violence should only be lawful if it is militarily necessary. Already in 1868, the Saint Petersburg Declaration encapsulated this understanding, stating that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'. IHL on the conduct of hostilities is thus a compromise between the competing principles of humanity and military necessity. Unnecessary military actions are always prohibited because no compromise between military necessity and humanity is needed.

540 Ibid., Rules 1, 7.

**8.289** This principle of distinction translates into the first restriction IHL imposes on any attack: it must be directed at a *legitimate target*, namely, a military objective, a combatant, a civilian while directly participating in hostilities or, at least in NIACs, a member of an armed group with a continuous combat function. Thus, attacks directed at any other target are *ipso facto* unlawful.

**8.290** Second, even an attack directed against a legitimate target becomes unlawful if it violates the *proportionality* rule, which prohibits 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.'

**8.291** Third, even if an attack is conducted against a legitimate target and respects the proportionality rule, the attacking party must take all *feasible precautionary measures in attack* to avoid and, in any event, minimize incidental effects on the civilian population and civilian objects – effects that are not prohibited as such.

**8.292** Fourth, in addition to the above principles that specifically protect the civilian population, IHL also limits the *means* (that is, weapons) or *methods* (that is, tactics) of warfare an attacking party may use, even when attacking legitimate targets. Such prohibitions and restrictions of certain weapons and tactics, which will be discussed in more detail in the next sub-chapter, also benefit the civilian population and some restrictions are even aimed exclusively at avoiding the effects of hostilities on the civilian population.

**8.293** As all of these steps are cumulative, an attack is unlawful if it fails to satisfy even one of them.

### 8.6.3 Field of application

> The rules on the conduct of hostilities apply to any act of violence against the adversary, whether in defence or in offence, in whatever territory. They also apply independently of the nationality of the civilians potentially affected and of the party in whose power they are. They apply to attacks in air and sea warfare directed at targets on land or otherwise affecting civilians on land.

**8.294** Article 49 of Protocol I contains important clarifications on when the rules protecting the civilian population against the effects of hostilities apply, all but one of which correspond to customary law.

**8.295** First, Article 49(1) defines attacks as acts of violence against the adversary committed either in offence or defence. Acts of violence therefore constitute attacks independently of whether they are made in offence or defence. This, however, does not correspond to the normal use of the term 'attack' in military language (nor is it related to the separation of *jus in bello* from *jus ad bellum*) but rather to the uncontroversial idea that, for instance, laying mines and returning fire must also comply with the rules on distinction, proportionality and precautions. In contrast to the detailed rules, only the fundamental principles outlined above also apply to military operations,[541] which is a larger concept than 'attacks' that equally covers, for example, a foray through a village.[542]

**8.296** Second, with only one exception,[543] Article 49(2) clarifies that the same rules apply to all attacks aimed at the adversary regardless of the territory where the fighting is being conducted or the nationality as well as allegiance of the victims. Thus, the same rules apply to fighting on both a party's own territory and foreign territory. The concept of protected persons, which was discussed above at length in relation to the protection of persons who are in the power of the enemy in an IAC, is irrelevant when it comes to the conduct of hostilities. An army liberating its own occupied territory from enemy occupation must make exactly the same proportionality calculation and take the same precautionary measures under IHL as it would have to if it were attacking enemy territory.

**8.297** Third, according to the second sentence of Article 49(3), the rules discussed hereafter equally 'apply to all attacks from the sea or from the air against objectives on land.' While this provision has given rise to controversies in the context of naval warfare,[544] it is uncontroversial that the rules apply to aerial bombardments directed at targets on land.[545]

**8.298** Fourth, the first sentence of Article 49(3) goes further than the second sentence because it makes the rules discussed below applicable to 'air or sea warfare which may *affect* the civilian population, individual civilians and civilian

541 See P I, Arts 48, 51(1) and 57(1); P II, Art 13(1).

542 For a discussion of the difference between attacks and military operations, which is particularly important in cyber warfare, see MN 10.120.

543 See P I, Art 54(5), which allows a scorched earth policy but only by a party in defence and only on its own territory.

544 For the dispute on whether and to what extent the provisions of Protocol I apply to naval warfare, see Henri Meyrowitz, 'Le protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime' (1985) 89 Revue générale de droit international public 243, 254, and Elmar Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* (Duncker & Humblot 1984) 57.

545 See MN 8.442.

objects on land', even if they are not targeted as such. Given its impact on naval blockades, this provision is too controversial in all respects other than attacks directed at targets on land for it to be considered as reflecting customary international law.[546]

### 8.6.4 Legitimate targets

Only combatants, military objectives, civilians while directly participating in hostilities and, arguably in NIACs, members of an armed group with a continuous combat function may be directly targeted.

#### a. Military objectives and combatants

Combatants are obviously legitimate targets.

Whether an object may be targeted depends not so much on the intrinsic qualities of the object but on the prevailing circumstances at the time of the attack. Thus, an object may only be lawfully targeted if it satisfies two conjunctive elements at the time of attack: (1) it must effectively contribute by its nature, location, purpose or use to the enemy's military action and (2) its destruction, capture or neutralization must offer the attacking party a definite military advantage. Indirect contributions are sufficient to satisfy the first element as is only one of an object's several functions if it concerns the enemy's 'military' action. Contributions to the so-called war effort, however, are insufficient.

**8.299** Opinions differ on whether combatants fall under the general concept of military objectives or whether that concept only covers objects with combatants constituting a separate category of legitimate targets. In any case, it is uncontroversial that combatants may be targeted as long as they do not surrender, are not wounded, sick or shipwrecked or are not otherwise *hors de combat*. This is even the main implication (and disadvantage) of combatant status in IACs. No such status exists in NIACs. It is equally uncontroversial that the definition of military objectives contained in Article 52(2) of Protocol I, which is customary law in both IACs and NIACs,[547] applies only to objects and that persons do not become targetable just because they fulfil those criteria. The definition of who may be targeted is more restrictive than that of what may be targeted, although the

546 ICRC Commentary APs, paras 1892–9. Natalino Ronzitti, 'The Codification of Law of Air Warfare' in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International 2006) 11.

547 See ICRC CIHL Database, Rule 8.

latter is also very important for the protection of civilians as it is not unlawful to kill them incidentally when attacking a military objective if the proportionality rule is complied with and feasible precautionary measures are taken.

**8.300** As military objectives may be targeted according to the principle of distinction, the need to define them is imperative. Without a definition of at least one of the categories between which the attacker must distinguish, the principle of distinction is practically worthless. According to IHL's normal prohibitive approach, it should have defined civilian objects that may not be attacked.[548] However, this approach is not possible because many objects become military objectives according to their use or potential use by the enemy or even the potential use by the attacker (if captured) rather than due to their intrinsic character. Thus, Article 52(1) of Protocol I defines civilian objects as all objects that do not satisfy the definition of military objective contained in Article 52(2), which defined the complementary category of military objectives for the first time in treaty law. Indeed, all objects other than those benefiting from special protection[549] can become military objectives. Although an exhaustive list of military objectives would have greatly simplified the definition's practical implementation, it has not been possible to draw up such a list because whether an object is a valid military objective depends upon the circumstances at the time of the attack. Most definitions are therefore abstract but provide a list of examples. Protocol I illustrates its definition with an open-ended list of examples of civilian objects that are presumed not to be military objectives.[550]

**8.301** Under the definition provided in Article 52(2), an object must cumulatively meet two criteria to be a military objective. First, the targeted object's 'nature, location, purpose or use' must contribute effectively to the enemy's military action. The list of an object's possible contributions to enemy military action clarifies that not only objects of a military nature qualify as military objectives. 'Nature' refers to the object's intrinsic character. An operational tank, for example, is thus a military objective by its nature. 'Location' indicates that a specific area of land may be a military objective. However, the ICTY clarified that this must be determined on a case-by-case basis and that the principle of distinction is violated when entire areas are considered as military zones in which any

548 P I, Art 52(1).

549 As will be shown hereafter in MNs 8.351–8.356, most specially protected objects may not be used by those who control them for military action and should therefore never become military objectives. However, if they are used for military purposes, even they can become military objectives under restricted circumstances.

550 See P I, Art 52(3); see also MN 8.350.

objective can be targeted.[551] 'Purpose' refers to the enemy's intended future use, which must be based upon a reasonable belief. The US even includes an object's *possible* future use,[552] but such an interpretation would leave very few protected civilian objects. In addition, according to the text of Article 52(2), the object must 'make' – in the present tense – an effective contribution to military action. Bridges are therefore only legitimate targets if the enemy may be expected to use them according to the plans of the attacker and to the known plans or logical conduct of the enemy. 'Use' refers to the current function of the object. For example, it is accepted that weapons factories and even extraction industries providing raw materials for such factories are military objectives because they support the military, albeit indirectly.

**8.302** Second, and cumulatively, the object's total or even partial destruction, capture or neutralization must also offer the attacking party a 'definite military advantage' under the 'circumstances ruling at the time'. A definite military advantage may consist of, for example, the attacker gaining ground or weakening the fighting ability of enemy armed forces.

**8.303** Both conditions must be cumulatively fulfilled. Thus, although an attack aimed at capturing a food convoy destined to civilians may present the attacker with the military advantage of feeding its soldiers, it is nevertheless unlawful because the convoy does not contribute to the adversary's military action. Taken literally, the separate requirement that the attack must offer the attacking party a definite military advantage means that even an attack on an objective of a military nature would be unlawful if its main purpose is to affect the morale of the civilian population and not to reduce the enemy's military strength.[553] Such an interpretation would have important repercussions for the weaker party in current asymmetric conflicts that could not reasonably hope to defeat the stronger enemy militarily. However, the ICTY held, in my view correctly, that an attack directed at military objectives was not prohibited even if its primary purpose was to spread terror among the civilian population – although this is certainly not a military advantage.[554]

**8.304** By characterizing the necessary contribution as 'effective' and the advantage as 'definite' as well as by linking them to the 'circumstances ruling at the time',

551 ICTY, *Prosecutor v Milošević* (Appeals Judgment) ICTY-98-29/1-A (12 November 2009) paras 52–4.
552 US Law of War Manual, para 5.7.6.1.
553 Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge 2015) 49, 137.
554 Online Casebook, ICTY, The Prosecutor v. Galić: A. Trial Chamber, Judgement and Opinion, para 135.

Article 52(2) avoids that everything can be considered a military objective by preventing parties from taking into account indirect contributions and possible future advantages. Allowing such considerations would otherwise permit parties to easily undermine the limitation of attacks to 'military' objectives. Likewise, without the limitation to the actual situation at the time of an attack, the principle of distinction would be void as every object could become a military objective in the wake of possible future developments, such a school being used by enemy troops. However, according to declarations of understanding made by the UK, Canada, Belgium, France, Germany, New Zealand, the Netherlands, Italy, Spain and the US, the military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole and not just from isolated or particular parts of the attack. Admittedly, a direct connection with specific combat operations is not necessary. An attack as a whole must, however, be a finite event that should not be confused with the entire war. In my opinion, it is therefore wrong to contend that the advantage anticipated from the attack 'must be considered in the context of its relation to the armed conflict as a whole' and that it includes the potential to end the conflict.[555]

**8.305** Thus, what counts is that both the contribution to the enemy's action and the advantage obtained from the attack must be 'military'. The political aim of victory may be achieved only by weakening the military potential of the enemy through violence against military objectives. Indeed, if force could be used to achieve the political aim by directing it at any advantage and not just military objectives, the civilian population as such could be attacked as they might very well influence the enemy government to surrender. Then, however, instead of IHL there would be merely speculations about what could make the adversary surrender.

**8.306** Only material things can be a target.[556] Immaterial objectives (such as victory) or abstract targets (such as civilian morale) cannot be attacked but only achieved or affected through attacking tangible things. Contrary to World War II, it is now generally accepted that those things must be military objectives under existing law and that civilian objects may not be attacked for the purpose of shattering civilian morale.

555 For the contrary position, see Eritrea–Ethiopia Claims Commission, *Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26* (19 December 2005) paras 113, 121, reprinted in (2006) 45 ILM 396.

556 For the special case of cyber warfare, see MN 10.121.

**8.307** Another issue discussed in relation with military objectives is the status of dual-use objects, which are objects that serve both civilian and military purposes. Especially in times of war, the military uses civilian infrastructure, telecommunications and logistics for military purposes. Power-generating stations are crucial for civilian access to clean water, but they also provide power to war industries in an integrated power grid. Computer hardware and software may be essential for military purposes, but it may be nearly impossible to identify technology actually destined or useful for those purposes. Dual-use objects, however, do not constitute a separate category in IHL. Rather, when a certain object is (or may reasonably be expected to be) used for both military and civilian purposes, even a secondary military use turns it into a military objective under Article 52(2). However, an attack on a dual-use object may nevertheless be unlawful under the proportionality rule if civilians are excessively affected by the impact of the attack on the civilian use of the object. In practice, it admittedly may be extremely difficult to determine the importance of a dual-use object's military use and thus the military advantage in destroying it, in particular if the military has priority access to all remaining infrastructure.

**8.308** Most often implicitly, but sometimes explicitly, the limitation of admissible attacks to *military* objectives is violated in State practice and contested in scholarly writings.[557] Based on a tradition that began during the US civil war, the US substitutes 'war-fighting or war-sustaining capability' for military action in the definition of Article 52(2) and includes targets that 'indirectly but effectively support and sustain the enemy's war-fighting capability.'[558] Such a broad interpretation might justify attacks on political, financial and economic targets (for instance, a country's main export industry, stock market or taxation authorities) or even psychological targets as long as such targets influence the capability of the enemy to continue the war.[559] This is indeed how France and Russia extended the concept when they justified the targeting of oil wells used by the 'Islamic State' armed group to generate revenue.[560] It is true that acts of violence against objects of political, economic or psychological importance may sometimes be more efficient to overcome the enemy than attacking military objectives or combatants. They are, however, never necessary because every enemy can be

557 For an overview of recent practice and discussions, see Marco Sassòli, 'Military Objectives' (2015) in MPEPIL, paras 24–9.

558 US Law of War Manual, para 5.7.6.2; United States Military Commissions Act of 2009, 10 US Code Annotated Section 950p(a)(1).

559 See Jeanne M. Meyer, 'Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine' (2001) 51 Air Force L Rev 143, 181.

560 See Online Casebook, Syria, Press conference with French President Francois Hollande and Russian President Vladimir Putin.

overcome by sufficiently weakening its military forces. Once its military forces are neutralized, even the politically, psychologically or economically strongest enemy can no longer resist. This logic may be seen as 'oversimplistic',[561] in particular in modern conflicts often classified as 'asymmetric' and when a belligerent is unwilling to occupy the enemy country.

**8.309** Some also question the philosophy behind the limitation to military objectives, pointing out that the aim of contemporary conflicts is often the capitulation of a (dictatorial) government or modifying its decisions (in other words, defeating the enemy's will). Acquiring a non-military advantage over the enemy can more effectively accomplish that aim. Under the widely used theory of 'effects-based targeting', the desired aim will result from the effects of attacking specific links, nodes or objects.[562] If the enemy is seen as a system,[563] attacks upon certain targets that politically, financially or psychologically sustain an enemy regime may have a greater impact than attacks that affect military operations.[564] In many countries, the centre of gravity is not in the armed forces. The aim of impacting persons other than the armed forces may appear particularly necessary if those attacking are not prepared to occupy the enemy country and if there is no fighting on land. Aerial bombardments may then 'run out of military targets' even though the enemy government is not yet ready to surrender.[565] The limitation to military objectives may also oblige belligerents to provide hypocritical justifications for their attacks. When they interrupt the power supply to show the civilian population that it will live in the dark as long as it does not get rid of a regime, they must claim that the power stations also produce power for the military. When they attack a radio station because it maintains the morale of the population, they must assert that the station also serves as a military communications relay station.[566] Nevertheless, hypocrisy also demonstrates the *opinio juris* of States and therefore contributes to the development of IHL's rules.

**8.310** In any case, no one has suggested an alternative definition that would be practicable and as objectively assessable as the contribution to the military effort and that sufficiently grants the civilian population a minimum level of protection.

561 Michael N. Schmitt, 'Targeting and Humanitarian Law: Current Issues' (2004) 34 IYBHR 59, 68.

562 Ibid., 60–65; Tony Montgomery 'Legal Perspective from the EUCOM Targeting Cell' in Andru E. Wall (ed), *Legal and Ethical Lesson of NATO's Kosovo Campaign* (Naval War College 2002) 190.

563 J.A. Warden, 'The Enemy as a System' (1995) 9 Airpower Journal 40.

564 See, e.g., Meyer, above note 559, 181; Charles J. Dunlap, 'The End of Innocence: Rethinking Non-combatancy in the Post-Kosovo Era' (2000) 28 Strategic Rev 9, 14.

565 James E. Baker, 'When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict' (2002) 55 Naval War College Rev 11; Adam Roberts, 'The Laws of War After Kosovo' in Wall (ed), above note 562, 416.

566 See, e.g., Online Casebook, Federal Republic of Yugoslavia, NATO Intervention.

Debates about the precise meaning of Article 52(2) and whether it is respected in current conflicts focus disproportionately on the practice of aerial forces of technologically advanced States. Critics and large swathes of public opinion believe that those aerial forces do not comply with the restrictions of IHL, while hard-line military experts and advisors adopt expanding interpretations that their aerial forces fortunately do not apply in actual belligerent practice. That most war victims around the world die or suffer from land warfare and from attacks that cannot be seen as being directed against military objectives is largely forgotten in public and scholarly debates. The stalemate resulting from discussions about aerial bombardments leads many to doubt whether anything more precise than the admittedly vague Article 52(2) definition could even be achieved. The priorities therefore may be to enforce the existing law where it is clearly violated, to engage in practice-oriented training to obtain good faith respect of those rules according to their purpose and to convince those on the weaker side of asymmetric warfare as well as their constituencies that the existing rules are not unrealistic for them to comply with and that the stronger side cares about legal restraints.

### b. Civilians directly participating in hostilities

> Civilians directly participating in hostilities may be targeted for the duration of their participation. The meaning of direct participation is controversial. It is suggested that the concept comprises the following cumulative elements. First, an act must be likely to adversely affect the military operations or military capacity of a belligerent or, alternatively, inflict death, injury or destruction on persons or objects protected against direct attack. Second, a direct causal link must exist between the act and the result. Third, that act must be specifically designed to directly cause the aforementioned harm in support of a party to the conflict and to the detriment of another.

**8.311** The concept of 'direct participation in hostilities' is a cornerstone of IHL on the conduct of hostilities, and its practical importance has grown as armed conflicts have become 'civilianized'.[567] As the equally authentic French text of the Conventions and Protocols show, the term 'active participation' in Common Article 3 and the term 'direct participation' used in the Protocols have the same meaning in IHL as the French text uses the same term – 'participation directe' – in both places.

567 Giulio Bartolini, 'The "Civilianization" of Contemporary Armed Conflicts' in Hélène Ruiz Fabri *et al.* (eds), *Select Proceedings of the European Society of International Law* (Hart 2008) vol II, 570.

**8.312** In both IACs and NIACs, civilians lose their protection against direct attack as well as their protection against the incidental effects of attacks if and for such time as they participate directly in hostilities.[568] Neither treaty nor customary law, however, define this concept. After a broad consultation of experts revealed an absence of agreement on certain crucial points, the ICRC tried to clarify several concepts in an 'Interpretive Guidance',[569] namely, what conduct amounts to direct participation; the duration of the loss of protection; the precautions to be taken and the types of protection afforded in cases of doubt; and the consequences of regaining protection. The ICRC DPH Guidance also deals with two related points that are the most controversial:[570] who is covered as a 'civilian' by the rule prohibiting attacks except in cases of direct participation (discussed in the next sub-section) and which rules govern attacks against persons who take a direct part in hostilities.[571]

**8.313** Regarding the question concerning what conduct amounts to 'direct participation', the ICRC DPH Guidance concludes, based on a broad agreement among experts, that the following criteria must be cumulatively satisfied in order to classify a specific act as a direct participation in hostilities:

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).[572]

568 P I, Art 51(3), and P II, Art 13(3).

569 ICRC DPH Guidance. See also ICRC, 'Direct Participation in Hostilities Under International Humanitarian Law' (ICRC 2003); ICRC and TMC Asser Institute, 'Second Expert Meeting: Direct Participation in Hostilities Under International Humanitarian Law' (ICRC and TMC Asser Institute 2004); ICRC and TMC Asser Institute, 'Third Expert Meeting on Notion of Direct Participation in Hostilities' (ICRC and TMC Asser Institute 2005) [DPH 2005 Report].

570 For criticism of the ICRC DPH Guidance, see Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance' (2010) 42 New York University J of Intl L & Politics 641; Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security J 5; W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 New York University J of Intl L & Politics 769.

571 See MN 8.373.

572 ICRC DPH Guidance, 46.

### c. Members of armed groups?

> As combatant status does not exist in NIACs, it is suggested that members of an armed group fighting for a non-State party to a NIAC may be targeted at all times by analogy to combatants in IACs. Taking into account the factual differences between such groups and State armed forces in addition to the difficulties in identifying members of such groups, it is preferable to limit this analogy to members of an armed group with a continuous combat function, which the ICRC's DPH Guidance defines as a continuous function to commit acts that constitute a direct participation in hostilities.

**8.314** Even more controversial than the question of what constitutes direct participation in hostilities is the question of who benefits, as a civilian, from protection except if and for such time as they directly participate in hostilities. In particular, are the categories of civilians and combatants in the conduct of hostilities complementary and everyone falls under one of the two, or are there people, in particular members of an armed group (who do not belong to a party to an IAC), who are not combatants but may nonetheless be attacked at all times like combatants?

**8.315** This question has been discussed above for IACs[573] where it was explained that, in my opinion and along with the ICRC DPH Guidance, everyone in IAC who does not qualify as a combatant is a civilian benefiting from protection against attacks except if (and as long as) he or she takes a direct part in hostilities. Indeed, the combined wording of Articles 50(1) and 51(3) of Protocol I is clear in this respect. Members of the armed forces of a party to the IAC who have lost their combatant status (for instance, due to the fact they did not distinguish themselves from the civilian population) may also reasonably be excluded from the category of 'civilians' for the purpose of protection against attacks.[574] Some scholars also exclude (and therefore consider to be targetable at any time) members of armed groups in an IAC that do not belong to a party to the conflict.[575] In my view, however, such persons are either civilians or 'fighters' covered by the rule applicable to a parallel NIAC, which is discussed further below.

**8.316** In NIACs, the absence of any mention of 'combatants' might lead one to conclude that everyone is a civilian and that no one may be attacked unless they directly participate in hostilities. However, this would render the principle of

573 See MN 8.114.
574 ICRC DPH Guidance, 22.
575 Watkin, above note 570, 650–53, 666; Schmitt, above note 570, 20.

distinction meaningless and impossible to apply. To avoid unrealistic results, some suggest that 'direct participation in hostilities' can be understood to encompass simply being a member of an armed group or keeping a fighting function in such a group.[576] Such an interpretation, however, is incompatible with the terms 'direct participation', which hint to an activity and puts 'genuine' civilians into danger because it opens the definition of what makes them lose protection subject to creative interpretations. On the other hand, Common Article 3 confers protection on 'persons taking no active part in hostilities, including members of armed forces who have laid down their arms, or are otherwise *hors de combat*. The latter part of the phrase suggests that – in contrast to civilians – it is not sufficient for members of armed forces and groups to no longer take a direct part in hostilities to be immune from attack. Rather, they must take additional steps and actively disengage to benefit from such protection.

**8.317** On a more practical level, prohibiting government forces from attacking clearly identified fighters unless (and only while!) the latter engage in combat against government forces is militarily unrealistic as it would oblige them to merely react to the enemy rather than to take preventive action to weaken it, while facilitating hit-and-run operations by the rebel group. These arguments may explain why the Commentary to Protocol II considers that '[t]hose belonging to armed forces or armed groups may be attacked at any time.'[577] On the other hand, non-State armed groups are organized differently than State armed forces. Their members often do not distinguish themselves from the civilian population (nor do they have an obligation to do so under treaty IHL), and it is often difficult to distinguish the fighting members of a non-State party to a NIAC from everyone else affiliated with it. The notion that mere membership suffices to make someone targetable at all times therefore puts genuine civilians into danger.

**8.318** The ICRC DPH Guidance consequently suggests that only those members of an armed group whose specific function in the group is to continuously commit acts that constitute direct participation in hostilities are not 'civilians' and therefore do not benefit from the rules that protect civilians against attacks unless and for such time as they directly participate in hostilities.[578] This approach, which reminds me of German schools of conceptual jurisprudence that use definitions to solve substantive problems, excludes persons without a continuous

576 See the opinion of several experts in DPH 2005 Report, above note 569, 48–9; see also the opinion of the Israeli Supreme Court in Online Casebook, Israel, The Targeted Killings Case, para 39.

577 ICRC Commentary APs, para 4789.

578 ICRC DPH Guidance, 33–5.

fighting function from the very concept of group membership.[579] Even if this concept (or, as I would suggest, at least the implied substantive rule on who may be targeted) is adopted, the difficult and complex question arises in practice as to how government forces can determine that a person has a 'continuous combat function' for an armed group while he or she does not commit hostile acts. In my opinion, the enemy must base its targeting decisions on appearances except where very reliable intelligence information exists. Therefore, in the absence of sound intelligence information to the contrary, those who do not identify themselves as members of an armed group are civilians who may only be attacked if and for such time as they commit acts of direct participation.

### 8.6.5 The proportionality rule

> Even if directed against a legitimate target, an attack is prohibited if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is unclear which factors count on both sides of the balancing test and how the comparison must be made.

**8.319** Whether or not proportionality is a general principle of law inherent in the idea of justice,[580] a general principle of international law or a principle of IHL applicable to most of its rules (but not to, for instance, the prohibition of torture), a specific rule in the conduct of hostilities applies it to attacks that may have excessive incidental effects on civilians or civilian objects. Protocol I mentions this rule as an example of an indiscriminate attack[581] and as one of the precautionary measures an attacker must take, that is, it must refrain from attacks violating the proportionality rule.[582] This rule, which is applicable as customary law in both IACs and NIACs,[583] prohibits an attack directed at a military objective 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.' Those incidental effects that may make an attack prohibited under this rule are often referred to as 'collateral damage' by both the military and in common parlance.

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579 Ibid., 34.

580 Max Huber, 'Quelques considérations sur une révision éventuelle des Conventions de la Haye relatives à la guerre' (1955) 37 IRRC 417, 423.

581 P I, Art 51(5)(b).

582 P I, Art 57(2)(a)(iii).

583 ICRC CIHL Database, Rule 14.

The 'concrete and direct' qualifier indicates the anticipated military advantage should be both 'substantial and relatively close' in time as opposed to advantages that are merely hypothetical or that would otherwise only manifest 'in the long term'.[584] Although powerful States have a tendency to place great importance on this rule, it is only one of several rules in IHL that must be respected in every attack. It is interesting to note that Protocol I criminalizes a violation of the proportionality rule as a grave breach,[585] while the ICC Statute criminalizes it only if the incidental effects are 'clearly' excessive.[586] Both foresee this crime only in IACs.

**8.320** The rule was controversial at the Diplomatic Conference that negotiated and elaborated Protocol I. Many delegations objected to any mention of the proportionality rule because it implicitly allows for incidental civilian losses as long as they are not excessive,[587] while other critics considered the term 'disproportionate' to be too vague.[588] Therefore, the text of the Protocol uses the term 'excessive' instead of 'disproportionate'.

**8.321** The proportionality evaluation must include possible reverberating effects.[589] Thus, prior to the 1991 Gulf War, US planners used tests to verify the possible release of radioactive material and anthrax spores if nuclear and biological weapons facilities were attacked.[590] How far those effects must be taken into account remains, however, an open question. Based on its field experience, the ICRC launched a campaign to draw the attention to the effects of urban warfare – effects that would exist to a certain extent even if only military objectives were targeted in cities.[591] Basic health, water, sanitation and education infrastructure are heavily affected by urban warfare. Indeed, there may be a water

584 ICRC Commentary APs, para 2209.

585 P I, Art 85(3)(b).

586 ICC Statute, Art 8(2)(b)(iv).

587 'Official Records of Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)' (Federal Political Department of Switzerland 1978) vol III, 205 (Algeria, Egypt, Yemen, Iraq, Kuwait, Libya, Morocco, Sudan, Syria, United Arab Emirates); 206 (Philippines); 204, 227 (Romania); 228 (Ghana); 230 (Egypt, Jordan, Kuwait, Libya, Mauritania, Qatar, Sudan, United Arab Emirates). See also ibid., vol VI, 236 (Rumania). See also ibid., vol XIV, 48 (Syria); 49 (Hungary); 52 (Ghana); 56 (German Democratic Republic, Rumania); 61 (Poland, North Korea, Uganda); 62 (Mauritania); 69 (Czechoslovakia); 193 (North Vietnam); 303, 305 (Romania); 308 (Ivory Coast).

588 Ibid., vol VI, 212 (Switzerland, Austria); 213 (Iran); 219 (Afghanistan); 231 (Italy).

589 See US, 'International Law and Legal Considerations in Targeting', annexed as Appendix A in US Joint Chiefs of Staff, 'Joint Publication 3-60: Joint Doctrine for Targeting' (2002) I-6; see also Michael N. Schmitt, 'The Principle of Discrimination in 21st Century Warfare' (1999) 2 Yale Human Rights & Development J 143, 168.

590 Interview with Brig. Gen. David A. Deptula (15 March 1998), quoted by Michael W. Lewis, 'The Law of Aerial Bombardment in the 1991 Gulf War' (2003) 97 AJIL 481, 489.

591 ICRC, 'War in Cities' <https://www.icrc.org/en/war-in-cities> accessed 7 August 2018; see also the special issue of the IRRC on this topic in 'War in Cities' (2016) 98 IRRC 1, 1–381.

pipe beneath a military objective or a power line next to it, and the destruction of either will have effects in other places of an urban area. The ICRC suggests that the cumulative effect of repeated attacks and the successive degradation of infrastructure must be taken into account. Going a step further, one could wonder whether someone attacking a military objective in the Strait of Hormuz between Iran and Oman must take the immediate rise of oil prices caused by such an attack into account that may make certain people elsewhere in the world die from cold or hunger because they can no longer afford to buy the oil necessary to cook their food or to heat their homes – at least if such effects were, by hypothesis, perfectly foreseeable.

**8.322** Even apart from the question of reverberating effects and despite the qualifications of the anticipated military advantage as 'concrete and direct', it remains very difficult to compare a military advantage with civilian losses as such an evaluation inevitably involves subjective value judgments. This is especially true if, in addition, the actual probability of gaining the advantage and of affecting the civilian population is not 100 per cent but different. Furthermore, the fact that the evaluation must be made ex ante from the perspective of the attacker, while the consequences of an attack are only known ex post, poses another difficulty in evaluating an attack's compliance with this rule. Finally, the military's obsession to keep their evaluation methods and plans secret, even once a conflict is over, presents another key challenge to any an external evaluation of whether a given attack respected the rule. In the hope of overcoming some of these challenges, the ICRC has recently engaged in an exercise with military and IHL experts aimed at identifying indicators and criteria to evaluate the proportionality of an attack in order to make the subjective assessment slightly more objective.[592]

**8.323** Some questions that should be clarified are whether an attacker must take into account as incidental effects foreseeable unlawful enemy reactions to an attack? The psychological effects on civilians? Economic losses and their displacement? Furthermore, does the availability of shelters or enemy defence systems diminish the incidental effects that an attacker must expect? Does the perspective that the enemy will be able to repair civilian or military infrastructure respectively diminish the expected incidental effects and the military advantage? Is

592 ICRC and University of Laval, International Experts' Meeting on 22–23 June 2016, Québec, 'The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law' (ICRC 2018). See also Emanuela-Chiara Gillard, 'Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment' (Chatham House 2018).

the military advantage diminished if the hearts and minds of the civilian population are lost due to an attack? If the enemy has air defence systems? Is the advantage of destroying a power station reduced if the enemy has generators available? Does the protection of civilians constitute a military advantage?

**8.324** The military tend not to provide clear answers to such questions. They argue instead that the proportionality of attacks must be decided on a case-by-case basis and that the decisive criterion is whether a reasonable commander would have engaged in the attack based on the available information at the time of the attack. While it is true that in common law systems proportionality has traditionally been discussed under the concept of reasonableness, I do not believe that States simply train their military commanders 'to be reasonable'. One reason why States are reluctant to share the criteria they use in evaluating proportionality may be that they want to avoid that the enemy takes advantage of knowing their restraints. Another reason may be that a prosecution of the war crime of intentionally attacking a military objective with clearly excessive incidental effects upon civilians[593] will never occur as long as the factors to evaluate excessiveness remain controversial.

**8.325** Another issue that is widely discussed is whether the protection of attacking forces is a military advantage that may be balanced against an attack's incidental effects on civilians. Some scholars assert that such force protection should be taken into account in the proportionality equation.[594] In my opinion, however, force protection can only be included in the assessment of whether a precautionary measure is practically feasible if it implies risks for the attacking forces. Indeed, according to the text of the rule, a proportionality assessment only involves comparing the military advantage of destroying or neutralizing the target with the risks posed to the civilian population. The goal of preserving, for example, the attacking aircraft and the lives of pilots could be better achieved by not engaging in the attack at all.

**8.326** Even assuming the relevant criteria and their respective weight can be identified one day, the application and respect of such criteria would be largely based upon the good faith of the military who will naturally tend to over-evaluate the importance of the military advantage part of the equation. It is probably unrealistic to expect transparency during the conflict. On the other hand, ex

593 See ICC Statute, Art 8(2)(b)(iv).

594 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd edn, CUP 2016) 168. Peter Margulies, 'Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict' (2012) 37 Vermont L Rev 271.

post monitoring that could perhaps achieve some preventive effect would be possible if belligerents kept records of their evaluation and made them public after a certain period of time. Subsequent disclosure would allow belligerents to counter false accusations and avoid the impression among the public that IHL is most often violated.

**8.327** Finally, the application of the proportionality rule involves additional considerations when applied by non-State armed groups.[595] In particular, how should the expected military advantage be evaluated when those who launch the attack are unaware of the group's overall plan? How should it be assessed when the advantage to be gained is not a military one or does not weaken the military potential of the enemy but instead are political or propaganda advantages?

**8.328** In conclusion, although the proportionality rule is an important instruction for those who engage in attacks, its respect can only be evaluated in extreme cases given the challenges outlined above.

### 8.6.6 Precautions

> The attacker and the defender must take all feasible precautions to avoid and, in any event, minimize the incidental effects of lawful attacks on the civilian population. The defender may not use human shields, while the attacker keeps its obligations in attack if this prohibition is violated.

**8.329** While an attack does not become unlawful merely because civilians and civilian objects are affected, IHL prescribes that both the attacker and the defender must take all feasible precautionary measures to try to avoid or at least to minimize an attack's effects on civilians. The concepts of attacker and defender in this context have nothing to do with the *jus ad bellum* issue of who started the armed conflict but merely refer to the question of who is engaged in an act of violence in offence or defence[596] as well as who is subject to that attack and has control over the civilian population to be protected.

595 For an attempt to apply the proportionality rule to asymmetric warfare, see Lorenzo Redalié, *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire* (Schulthess 2013) 201–26.

596 This is how P I, Art 49(1), defines an attack.

### a. Active precautions to be taken by the attacker

> Even when launching an attack that complies with the principle of distinction and the proportionality rule, an attacker must take all feasible precautionary measures to reduce its possible impact upon the civilian population, in particular by: (1) verifying that the target is in fact a lawful one under IHL; (2) warning the civilian population of the attack if possible; (3) cancelling or suspending an attack when 'it becomes apparent' it will violate IHL; and (4) selecting the target (when a choice is possible between several targets offering a similar military advantage) as well as the means and method of warfare that may be expected to represent the smallest risk for the civilian population.

**8.330** An attack that is directed at a legitimate target and that is not be expected to cause excessive incidental effects on civilians is lawful even if it affects civilians. The attacking party, however, must take all feasible precautionary measures to avoid or, in any event, minimize such incidental effects. Articles 57 of Protocol I explains the precautionary measures an attacking party must take if they are feasible. These measures, which correspond to customary law obligations in both IACs and NIACs according to the ICRC,[597] are as follows:

1. An attack must obviously be cancelled once it becomes apparent that it is prohibited (Article 57(2)(b)).
2. Unless circumstances do not permit, effective advance warning must be given whenever the civilian population may be affected by an attack (Article 57(2)(c)).[598] To be effective, the warning 'must reach those who are likely to be in danger from the planned attack,…it must clearly explain what they should do to avoid harm and it must be a credible warning.'[599] Circumstances that may be considered as not permitting a warning include, for example, when the enemy could deploy (additional) defences around the announced military objective, whether the enemy can move certain military objectives after a warning or otherwise diminish the military advantage of attacking them and if the warning would increase the risks posed to civilians, such as when the enemy is expected to use civilians as human shields to 'protect' the military objectives concerned by the warning.
3. When it is possible to choose among several objectives conferring a similar military advantage, the objective that may be expected to cause the least danger to the civilian population must be chosen (Article 57(3)). The

597 See ICRC CIHL Database, Rules 15–21.
598 This obligation already appears in HR, Art 26.
599 UN Doc A/HRC/12/48, above note 352, para 530.

traditional example given is a railway line that may be interrupted on open land or in the midst of a town. The first alternative implies fewer risks for the civilian population and must therefore be selected.

**8.331** Those who plan or decide upon an attack have additional obligations:

1. They must verify that the targets they attack are legitimate targets under IHL and that the proportionality rule is expected to be respected (Article 57(2)(a)(i)).
2. They must choose means (that is, the weapons) and methods (that is, the time of the attack and tactics) to avoid or, in any event, minimize civilian losses (Article 57(2)(a)(ii)). Thus, in most circumstances a night-time attack is preferable to a day-time attack, precision-guided munitions are preferable to dumb bombs and a bridge over a river in a town is preferably attacked flying along the river rather than along the bridge because if the munitions miss their target they will fall into the river using the former tactic and not into populated areas. It is in this context that the question of whether there exists a duty to use precise weapons is mainly discussed. In my view, no country has an obligation to acquire modern technology. If it does so, however, it gains many military advantages, including that of being able to lawfully attack some targets it could not attack with less precise weapons under the proportionality rule.[600] When such choice is available, financial considerations should not be included in the feasibility evaluation. However, a belligerent may take into account the fact that it only has a limited number of smart weapons and must therefore save them for targets that are either particularly important (from a military perspective) or particularly risky (for the civilian population).[601]
3. It is obvious that they must refrain from an attack if it would violate the proportionality rule (Article 57(2)(a)(iii)).

**8.332** An attacker must only comply with the above obligations to the extent feasible. Military and humanitarian considerations may influence the feasibility of such precautions, such as the importance and the urgency of destroying a target; the range, accuracy and effects radius of available weapons; the conditions affecting the accuracy of targeting; the proximity of civilians and civilian objects; the

600 HPCR Manual, 83–4, 96, 145–6. See also Jean-François Quéguiner, 'Precautions Under the Law Governing the Conduct of Hostilities' (2006) 88 IRRC 793, 798, 801–3; Thilo Marauhn and Stefan Kirchner, 'Target Area Bombing' in Ronzitti and Venturini (eds), above note 546, 101–2.

601 See Christopher J. Markham and Michael N. Schmitt, 'Precision Air Warfare and the Law of Armed Conflict' (2013) 89 ILS 669, 687. This approach is also shared by Kolb, above note 423, 263–4.

possible release of hazardous substances; the protection of the party's own forces (and the proportionality between the additional protection for those forces and the increased risks for civilians and civilian objects when a certain means or method of warfare is chosen); the availability and feasibility of alternatives; and the necessity to keep certain weapons available for future attacks on targets that are militarily more important or more risky for the civilian population. As mentioned above, this is the only place in my opinion where the issue of force protection plays a role (and not in the proportionality evaluation).

**8.333** These rules are more operational and precise than the proportionality rule. However, compared to the latter, it is even less possible to objectively assess whether an attacker respected its precautionary obligations. The planning and decision-making process of commanders are by definition secret, and it is therefore difficult to know what they knew at the time of the attack or the alternatives they had available to them. In this respect too, it may be appropriate to ask belligerents to keep records, but it may be even more difficult to ask them to subsequently make those records public. One possible solution, however, is to have military experts from different countries compare practical examples of best practices and exchange them with IHL experts.

### b. Passive precautions to be taken by the defender

> If possible from a legal, factual and humanitarian point of view, a defender must take feasible measures to protect civilians and civilian objects under their control against the effects of attacks, including by separating them from legitimate targets.

**8.334** Article 58 of Protocol I provides that a defending party must take feasible precautionary measures to protect civilians against the effects of attacks against military objectives, such as removing the civilian population and civilian objects 'from the vicinity of military objectives' and avoiding 'locating military objectives within or near densely populated areas'. The wording of the provision, however, clearly indicates that these obligations are weaker than those of an attacker. All of the identified measures must be taken only 'to the maximum extent possible', and the defender is only required to 'endeavour to remove' the civilian population and objects away from military objectives. The latter obligation is furthermore limited by a reference to the prohibition to forcibly transfer civilians in and from occupied territories in Article 49(1) of Convention IV.

**8.335** Even with those qualifications, several delegations at the 1974 to 1977 Diplomatic Conference that adopted Protocol I stressed that the provision may not hinder a State from organizing its national defence as it deems necessary. Participants in the competent working group of the conference reported that:

> [M]any representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas. This was deemed by representatives of densely populated countries to restrict their right to self-defence, and by others to impose too heavy an economic burden to disperse their industrial, communications and transportation facilities from existing locations in densely populated areas.[602]

**8.336** When becoming a party to Protocol I, Belgium, Italy, the Netherlands and Algeria declared that the term 'feasible' must be understood as taking into account the available means or other military considerations. Switzerland and Austria made even formal reservations subjecting Article 58 to the 'exigencies dictated by the defence of the national territory.' Switzerland, however, has since withdrawn its reservation.

**8.337** The obligation to take passive precautions is indeed subject to feasibility limitations. Military considerations must be taken into account in addition to risks posed to the civilian population beyond the prohibition in Article 49(1) of Convention IV in removing them from their usual living place.[603] The feasibility criterion, however, does not allow the combatants of a defending force to disguise themselves as civilians while they are engaged in an attack or a military operation preparatory to an attack.[604] Similarly, intermingling combatants with civilians with the intent to hinder an attack in the hope that the adversary will ultimately call it off under its obligation to respect the proportionality rule would constitute a prohibited use of human shields. However, combatants may disguise themselves as civilians if the intent of such an action is not to engage in an attack but merely to avoid being attacked by making their identification more difficult for the attacker.

602 Bothe/Partsch/Solf Commentary, 372.

603 See Marco Sassòli, 'The Obligation to Take Feasible Passive Precautions and the Prohibition of the Use of Human Shields: Can Military Considerations, Including Force Protection, Justify Not to Respect Them?' (2016) 46 Collegium 76, 76–85.

604 This results indirectly from the fact that such combatants would forfeit combatant status under Art 44(2)–(3) of P I and possibly commit an act of perfidy under Art 37(1)(c) of P I.

### c. The prohibition against using human shields

It is prohibited to use civilians as human shields to 'protect' legitimate targets.

**8.338** Technically, the prohibition against using human shields is a free-standing prohibition and not a passive precautionary measure. However, as it is addressed to the defender and often difficult to distinguish it from a mere lack of passive precautions, it is justified to deal with it at this stage.

**8.339** Article 51 (7) of Protocol I reads:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

**8.340** It is important to note that the prohibition against using human shields covers only the 'civilian population or individual civilians' and not civilian objects. Indeed, camouflage, which is not prohibited by IHL, effectively consists of making combatants and military objectives look like civilian objects and to use civilian objects, such as barns and trees, for that purpose.

**8.341** The decisive factor distinguishing the use of human shields from a mere violation of the obligation to take passive precautions is whether the defender's intermingling of military forces and the civilian population results from a desire obtain 'protection' for its military forces and objectives or simply from a lack of care for the civilian population. The defender's intent therefore separates the two concepts from each other.[605]

**8.342** Contrary to the ICRC's doubts regarding the customary character of the obligation of the defending force to take certain passive precautions also in NIACs, it considers that the prohibition against using human shields is a rule of customary IHL in both IACs and NIACs.[606]

605 Henckaerts and Doswald-Beck, 337–40; Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (CUP 2003) 344–8. Bothe/Partsch/Solf Commentary, 316, even refers to the 'subjective intent of [the] military commander'.

606 Compare ICRC CIHL Database, Rules 23–24 and 97.

### d. Consequences of a violation

An attacker must comply with its precautionary obligations in attack even when the defender does not comply with its own obligations to take passive precautions. It is, however, controversial whether voluntary human shields lose the benefit of the proportionality rule and precautionary measures.

**8.343** It is uncontroversial that a defender's omission to take passive precautions does not absolve the attacker from its obligations to take active precautionary measures. In my opinion, however, the attacker may take into account a defender's passive precautions (or lack thereof) when evaluating whether an attack's expected incidental effects on the civilian population are excessive compared to the anticipated military advantage.

**8.344** The consequences of a defender's use of human shields on an attacker's obligations, in particular its obligation to comply with the proportionality rule, are more controversial. Article 51(8) of Protocol I clarifies that, among other things, the use of human shields does not release the attacking party from its 'obligations with respect to the civilian population and civilians'. However, if a defender violates the prohibition against using human shields, the 'shielded' military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects. It is also uncontroversial under the clear wording of Article 51(8) that the attacker must take precautionary measures at least for the benefit of involuntary human shields as they indisputably remain civilians who are protected from attack. In an extreme case, the proportionality rule may render unlawful an attack against a military objective 'protected' by involuntary human shields. This will be the case if the anticipated incidental loss of life or injury among involuntary human shields is excessive in relation to the concrete and direct military advantage expected from attacking the military objective or combatants. To avoid this result, some suggest that involuntary human shields should weigh less in the proportionality evaluation.[607] In my view, even though, as admitted above, the way a proportionality calculation must be made is unclear, involuntary human shields remain civilians who must be afforded the same weight as any other civilian.

**8.345** The status of voluntary human shields is even more controversial. Some contend that the act of being a voluntary human shield constitutes a direct participation in hostilities and that such persons therefore lose protection against the

607 Dinstein, Conduct of Hostilities, above note 594, 160, 185; UK Military Manual, para 5.22.1.

effects of hostilities while they act as human shields.[608] In my assessment, and in accordance with ICRC's stance, voluntary human shields lose this protection only if they physically hinder an operation.[609] First, in order for an act to qualify as direct participation, it must harm the enemy or its military operations through a physical chain of causality. Human shields are moral and legal (rather than physical) obstacles to an enemy's attack. Second, the theory considering voluntary human shields as civilians directly participating in hostilities is self-defeating. If it were correct, the presence of human shields would not have any legal impact on the ability of the enemy to attack the shielded objective, and an act that does not impact the enemy cannot possibly be classified as a direct participation in hostilities. Third, the distinction between voluntary and involuntary human shields involves a factor – the voluntary involvement of the target – that is completely irrelevant in IHL, although it is very important in criminal law and, to a lesser extent, in law enforcement operations. A soldier of a country with universal compulsory military service is just as much (and for just as long) a legitimate target as a soldier who is a member of an all-volunteer army. Fourth, the distinction between voluntary and involuntary human shields cannot be readily determined in practice. How can a pilot or soldier launching a missile know whether the civilians he observes around a military objective are there voluntarily or involuntarily? What counts as a voluntary presence? Must a pilot observing a spouse accompanying a Taliban fighter in Afghanistan determine whether she was the victim of an arranged marriage or is engaged in a love match? Fifth, in a self-applied system like IHL, the suggested loss of protection against attacks may prompt an attacker to abusively invoke the prohibition against using human shields as an alibi, a mitigating circumstance or to ease his or her conscience.

**8.346** In my view, the obligation to take precautionary measures, like so many other obligations under IHL, depends on the facts on the ground. It therefore must be adapted to the enemy's actual practices and not to the obligations the enemy has but does not respect.

608 Dinstein, ibid., 183–4; see also HPCR Manual, 169.

609 See Marco Sassòli, 'Human Shields and International Humanitarian Law' in Andreas Fischer-Lescano *et al.* (eds), *Peace in Liberty: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos and Dike 2008) 567–78. See also ICRC DPH Guidance, 58–60 (in particular fn 141).

### e. Do attackers and defenders have an equal obligation to take precautionary measures?

> The precautionary obligations of the attacker are much more demanding than those of the defender.

**8.347** The US and some writers claim that both sides bear an equal responsibility to protect the civilian population from the effects of hostilities[610] or even that the defender has the main responsibility.[611] Indeed, the civilian population is best protected if both sides take precautionary measures. However, State practice as well as the text, legislative history and context of Protocol I indicate that IHL confers the main responsibility to take precautionary measures on the attacker. As shown above, the wording of Article 58 on passive precautions is weaker and much more nuanced than that of Article 57. Additionally, doubts about the customary character of the obligation to take passive precautions may be based upon the fact that such precautions are very frequently not taken and that the obligation was subject to controversy at the Diplomatic Conference. Even when such precautionary measures are actually taken, the existence of an *opinio juris internationalis*, which is necessary to create customary international law, should be separately assessed as those measures are taken within the jurisdiction of the State, and it may well be that States protect their own population without feeling legally obliged to do so by international law.[612] These doubts are reinforced by the fact that only violations by the attacker are qualified as grave breaches under Protocol I and as war crimes under the ICC Statute.[613] Bearing all this in mind, it is astonishing that the ICTY not only classified Article 58 indiscriminately as customary law but even concluded that its customary status does 'not appear to be contested by any State'.[614]

610 For a forceful argument and further references, see W. Hays Parks, 'Air War and the Law of War' (1990) 32 Air Force L Rev 1, 149–68; Anthony P. V. Rogers, *Law on the Battlefield* (2nd edn, Manchester University Press 2004) 111–3.

611 US Law of War Manual, para 5.2.1; Danielle L. Infeld, 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?' (1992–1993) 26 George Washington J of Intl Law and Economics 109, 141; Dieter Fleck, 'Strategic Bombing and the Definition of Military Objectives' (1997) 27 IYBHR 41, 52.

612 See Benedetto Conforti, *Diritto internazionale* (5th edn, Editoriale scientifica 1997) 44.

613 P I, Art 85(3)(a)–(c); see also ICC Statute, Arts 8(2)(b)(i)–(v), (ix), (xxiii) and 8(2)(e)(i)–(iv).

614 ICTY, *Prosecutor v Kupreškić et al.* (Judgment) IT 95-16-T (14 January 2000) paras 524–5.

**8.348** Unsurprisingly, the US, which has not experienced attacks on its mainland for two centuries[615] and which has a relatively thinly populated territory, favours a rule putting the burden of protecting the civilian population mainly upon the belligerent controlling that population. Other States, in contrast, have rejected such a rule. Customary law and treaties clearly do not impose obligations on the defender that are comparable to those of a belligerent launching an attack. The defender, which otherwise only has a weaker obligation to take precautionary measures, may simply not abuse the attacker's precautionary obligations in order to render its military objectives immune from attack.

#### f. The particular challenges for non-State armed groups

**8.349** When it comes to implementing precautionary measures, non-State armed groups will face greater difficulties to collect information and to verify its veracity in order to ascertain, for example, the legality of their targets. Even if such a group is willing to respect IHL, the range of feasible measures available to it is relatively limited. For instance, how can they choose the means causing the least damage when they have at their disposal only one weapon capable of reaching the enemy? Respecting passive precautionary measures presents another challenge: States often equate the obligation of an armed group to avoid locating military objectives within or near densely populated areas with the prohibition against using human shields, while States themselves only rarely implement the passive precaution to separate civilian objects from military objectives.

### 8.6.7 Presumptions

> In cases of doubt during the conduct of hostilities, persons must be presumed to be civilians. A treaty rule, the customary status of which is controversial, establishes a similar presumption for certain objects.

**8.350** In cases of doubt during the conduct of hostilities, persons must be presumed to be civilians[616] who are not directly participating in the hostilities.[617] Under Protocol I, objects that are 'normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school,' must be presumed in cases

615 The obvious exceptions are the attacks of 11 September 2001 against the World Trade Center and the Pentagon. One may wonder whether those US military experts (such as Meyer, above note 559) who argue that targeting financial institutions may be more destructive in the long run are prepared – in case a war (including the 'war against terror'?) breaks out – to move Wall Street out of Manhattan, in conformity with the alleged obligation of defenders under the principle of distinction.

616 P I, Art 50(1).

617 ICRC DPH Guidance, 75–6.

of doubt not to be used to make an effective contribution to military action.[618] There are serious misgivings as to whether this presumption corresponds to customary law, including if presumptions can even be a part of customary law.[619] However, in clear cases where nothing indicates that an object contributes to military action, objects typically 'dedicated to civilian purposes' already benefit from a factual presumption that they are civilian. Furthermore, in cases of genuine doubt, an opposite presumption that the object is a military objective does not exist under customary law. Rather, attackers must, as always when they lack sufficient information, do everything feasible to obtain such information. This kind of procedural due diligence obligation necessarily results from the customary obligation to distinguish civilian objects from military objectives.[620]

### 8.6.8 Specially protected objects

> Specially protected objects benefit from a particular protection regime. They comprise medical material, cultural property, the natural environment, objects indispensable to the survival of the civilian population and works as well as installations containing dangerous forces. They may not be used for military purposes and even when so used do not necessarily turn into military objectives. The special protection regime protecting such objects prescribes additional considerations that must be accounted for in terms of distinction, proportionality and precautionary measures.

**8.351** First, with the exception of material involved in peace operations, those who control specially protected objects may not use them for military purposes. Therefore, such objects should normally not become military objectives under IHL's two-pronged test. Second, even if specially protected objects are actually used for military purposes and satisfy the test to become valid military objectives, they may only be attacked under restricted circumstances and only if the attacker complies with additional precautionary measures.

**8.352** Cultural property is the most important category of protected objects. However, the wider issue of respecting and protecting cultural heritage in armed conflicts goes well beyond mere targeting issues and concerns equally the respect

618 P I, Art 52(3).

619 See Marco Sassòli and Anne Quintin, 'Active and Passive Precautions in Air and Missile Warfare' (2014) 44 IYBHR 69, 89–90.

620 William G. Schmidt, 'The Protection of Victims of International Armed Conflict: Protocol 1 Additional to the Geneva Conventions' (1984) 24 Air Force L Rev 189, 235. See also Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 Pacific Basin L J 55, 89.

of objects in the power of a party and of persons involved in intangible cultural heritage. Therefore, the rules providing special protection to cultural property during the conduct of hostilities will be discussed later as a cross-cutting issue.[621] Similar arguments also require us to address the protection of the natural environment, which is generally seen as a 'protected object', later on as a cross-cutting issue.[622] The special protection IHL affords to medical material has already been addressed above,[623] while the protection granted civil defence material will be discussed below.[624] Consequently, this section will only present the specific rules concerning objects indispensable to the survival of the civilian population as well as works and installations containing dangerous forces.

### a. Objects indispensable to the survival of the civilian population

**8.353** Objects indispensable for the survival of the civilian population, such as foodstuffs, agricultural areas, crops, livestock, drinking water and irrigation systems, are normally civilian objects that may neither be attacked in the conduct of hostilities nor destroyed by a belligerent controlling them (except if rendered absolutely necessary by military operations). Article 54 of Protocol I provides special protection to such objects by going further than the general protection afforded to civilian objects in two respects.[625] First, it also prohibits – in addition to attacks against such objects – the destruction, removal or rendering useless of such objects independently of whether the objects are private or public property. Second, even when such objects become valid military objectives, they lose protection from direct attack only if used exclusively as sustenance for the opposing armed forces or in direct support of military action. Even then, it is prohibited to take any action against them that may be expected to starve the civilian population or force its movement.

**8.354** However, Article 54 is also more restrictive in two respects. First, it applies only to attacks, destructions, removals and actions that render the object useless undertaken for the *specific purpose* of denying the civilian population or the adverse party of their sustenance value for any motive, including to starve civilians or to cause them to move away. Second, a belligerent party may derogate from the prohibition where required by imperative military necessity for the defence of its national territory against invasion but only within territory under its own control. In such limited circumstances, a scorched earth policy to delay

621 See MN 10.180.
622 See MNs 10.186–10.197.
623 See MNs 8.024–8.029.
624 See MNs 8.361–8.365.
625 See also ICRC CIHL Database, Rule 54.

the enemy's advance is therefore not prohibited. This is one of the few instances in which the rules on the conduct of hostilities are different for offensive and defensive action as well as action on own and enemy territory.

#### b. Works and installations containing dangerous forces

**8.355** Works and installations containing dangerous forces, namely, dams, dykes and nuclear power stations, are specially protected from attack because the release of dangerous forces (such as water or radiation) resulting from their destruction would likely have disastrous reverberating effects for the surrounding civilian population and objects.[626] Thus, even when such works and installations are military objectives or when military objectives are located in their vicinity, attacks against them that may cause the release of the dangerous forces resulting in 'severe losses among the civilian population' are prohibited. Reprisals against them are also prohibited. In order to facilitate their identification, such works and installations should be marked with a special sign consisting of a group of three orange circles placed on the same axis,[627] but this is not a precondition for the special protection afforded by IHL to apply.

**8.356** The only exception to this prohibition allows attacks against such objects and nearby military objectives that are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. Even in such circumstances, the attacker must take all practical precautions beyond the usual precautions in attack to avoid the release of the dangerous forces.

### 8.6.9 Protected zones

> Protected zones may be established to protect their civilian inhabitants from the danger of being incidentally affected by attacks directed against legitimate targets.

**8.357** While IHL mainly tries to protect civilians and other categories of protected persons by obliging combatants to positively identify and only attack legitimate targets as well as to respect civilians wherever they happen to be, it also foresees different types of zones aimed at protecting civilians by separating them from legitimate targets. The specific areas that may be constituted to protect

626 P I, Art 56; ICRC CIHL Database, Rule 42.
627 'Annex I: Regulations Concerning Identification', Art 17, as annexed to P I.

the wounded and sick have been discussed above.[628] The following protected zones may be constituted under IHL to protect all civilians from the effects of hostilities:

1. Neutralized zones, which may be constituted provisionally inside the combat zone based upon a written agreement between the belligerents to receive civilians who do not take part in hostilities nor perform work of a military character,[629] may not be attacked but may be occupied by a belligerent unless contrary to the agreement creating them;
2. Demilitarized zones[630] may be established far from the fighting to protect the civilian population residing there either in peacetime or during a conflict through express agreement between the parties. They may neither admit combatants nor comprise military objectives. The authorities as well as the population may not commit acts of hostility in such zones. Belligerents may then not extend military operations to such zones and civilians who reside in them may not take part in hostilities nor perform work of a military character; and
3. Non-defended localities, which may be declared by one belligerent on territory it controls near or inside the combat zone to protect the civilian population residing there if such localities are open to occupation, military personnel and equipment are evacuated, fixed military objectives are not used in a hostile manner and the authorities as well as the population do not commit acts of hostility. If these conditions are fulfilled, the adversary must accept the constitution of such localities. Logically, such localities may not be attacked because they do not contain any legitimate targets by definition, but they may be occupied by the enemy.[631]

**8.358** All of these zones may also be established in a NIAC based upon an ad hoc agreement between the parties under Common Article 3(3) that may be facilitated by the ICRC, which may equally assist in the implementation of such zones. All three share the common purpose of protecting war victims from the effects of hostilities (but not from falling under the enemy's control) by assuring the adversary that there are no military objectives in the defined area where war victims are concentrated. Therefore, it is crucial to also create a method of supervision for such zones.

628 See MNs 8.030–8.033.
629 GC IV, Art 15.
630 P I, Art 60.
631 P I, Art 59.

**8.359** If the enemy respects IHL, individuals in such zones run no risk of being harmed by the effects of hostilities. The danger with these zones is that they presuppose the enemy's willingness to respect IHL. Hence, they are pointless if an enemy is determined to violate IHL. In such a situation, these zones may actually help the enemy target and abuse civilians by concentrating them in a certain location. In addition, such zones may lead to the displacement of civilians, contribute to ethnic cleansing and even create new assistance needs. Furthermore, they may give the erroneous impression that everyone and everything outside their perimeter may be attacked.

**8.360** The aforementioned zones, which are established under *jus in bello*, must be distinguished from the safe areas, humanitarian corridors or safe havens created under Chapter VII of the UN Charter (that is, under *jus ad bellum*) meant to prevent certain areas and the war victims in them from falling into enemy hands.[632] Such zones lead to risks similar to those mentioned above. In addition, they presuppose that those constituting them, such as the UN, are willing and able to defend them militarily. If that is not the case, these zones endanger the war victims they receive, as evidenced by the tragedy of Srebrenica.[633] Indeed, had its inhabitants known at the outset that the UN could not realistically deliver on the promise of designating Srebrenica a protected zone, it is possible that they may not have tolerated Bosnian Muslim forces' occasional provocation of the Bosnian Serb forces through raids on the surrounding villages,[634] and they would likely have either stayed in their villages of origin or fled to real safety instead of concentrating in the place where they would eventually be massacred.

### 8.6.10 Civil defence

> Personnel and material exclusively dedicated to civil defence tasks are both protected, and such personnel must be allowed to pursue their tasks.

**8.361** The creation of a civil defence organization is one of the precautionary measures against the effects of attacks that the defending party may and even must[635] take. Protocol I affords protection to civil defence organizations, personnel and

632 See Online Casebook, Bosnia and Herzegovina, Constitution of Safe Areas.

633 UNGA, 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica' (1999) UN Doc A/54/549, para 499.

634 ICTY, *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) paras 104–5.

635 P I, Art 58(c).

material, and it also provides a distinctive sign to identify them,[636] which consists of an equilateral blue triangle on an orange background.[637]

**8.362** Although IHL of NIACs contains no direct reference to civil defence, the rules regarding that activity should also be complied with in NIACs as part of the general protection accorded to the civilian population against the dangers resulting from military operations[638] and due to the fact that civil defence organizations do not directly participate in hostilities.[639]

**8.363** Article 61 of Protocol I enumerates an exhaustive list of 'humanitarian tasks' that may be performed by civil defence organizations to protect the civilian population against the dangers arising from hostilities or other disasters, to help it to recover from their immediate effects and to provide the conditions necessary for its survival. To benefit from special protection under IHL, the personnel must exclusively carry out such civil defence tasks. For civilian organizations, temporary assignments to exclusively carry out these tasks is sufficient, while military forces must be permanently assigned to the mentioned tasks and they may only act on their own territory.[640] In both cases, activities contributing to military action, such as extinguishing a fire in an ammunition depot, are not considered as civil defence even if they equally protect neighbouring civilian objects.[641] Civilian civil defence personnel falling into the power of the adverse party are protected civilians and may continue to fulfil their tasks in occupied territory,[642] while military civil defence personnel turn into POWs if they fall into the power of the adverse party but may be used to continue to fulfil their task in occupied territory.[643]

**8.364** Civil defence personnel are protected against attacks. In addition, they are entitled to carry out the civil defence tasks except in cases of imperative military necessity.[644] Civil defence material, which benefit from general protection as civilian objects, may, in addition, not be destroyed or diverted from their proper use except by the State to which they belong.[645]

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636 P I, Arts 61–67.
637 P I, Art 66; 'Annex I: Regulations Concerning Identification', Arts 15–16, as annexed to P I.
638 P II, Art 13(1).
639 GCs, Common Art 3; P II, Art 4.
640 P I, Art 67(1)(a) and (f).
641 ICRC Commentary APs, para 2378.
642 P I, Art 63.
643 P I, Art 67(2).
644 P I, Art 62(1).
645 P I, Art 62(3).

**8.365** The rest of the regime protecting such organizations, personnel and material is very similar to that discussed above for medical units, personnel, and transports[646] in terms of special protection in occupied territory; the possibility for organizations from third States to intervene (although the possibility of an international organization, in practice the International Civil Defence Organization, to intervene is specifically mentioned in this context); the loss of protection, including that civil defence personnel equipped with light weapons do not lose protection; and the use as well as abuse of the protective emblem.[647]

## 8.7 MEANS AND METHODS OF WARFARE

**8.366** In addition to complying with the above-mentioned rules protecting the civilian population against the effects of hostilities, the rules of IHL on the means and methods of warfare must be respected. Means refer to weapons, weapons systems and platforms, while methods address the way in which weapons are used and, more largely, military tactics. As civilians and civilian objects may not be directly targeted regardless of the means or method, the rules outlined below are traditionally seen as protecting, above all, combatants and persons who are legitimate targets. IHL, however, outlaws some weapons, such as anti-personnel landmines, mainly because of their frequent indiscriminate effects on civilians and imposes limits on the use of others, such as incendiary weapons, exclusively with the aim of sparing the civilian population.

### 8.7.1 The principles

> Only means (weapons) and methods (tactics) of warfare may be used that are not prohibited, that are not of a nature to cause superfluous injury or unnecessary suffering and that are not inherently indiscriminate. It is controversial whether and to what extent the principle of military necessity implies that a person who is a legitimate target must be captured if possible rather than killed.

#### a. The right to choose means and methods of warfare is not unlimited

**8.367** Article 35(1) of Protocol I provides the basic rule on the methods and means of warfare, stating that: 'In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.'[648] This may be

646 See MNs 8.011–8.029.
647 P I, Arts 63–65, 66.
648 See also HR, Art 22.

understood as reversing the 'Lotus' presumption under which everything that is not prohibited by international law is lawful.[649] However, international law does not contain any authorization of specific weapons. Therefore, 'State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.'[650] Prohibitions, however, may not only be contained in specific rules on certain weapons but also result from the general principles discussed hereafter. In my view, the principle presented here has therefore no independent normative content, other than arguably reminding us that military necessity cannot justify violations of IHL[651] and that IHL rules must be interpreted in good faith.[652]

### b. The prohibition against causing superfluous injury and unnecessary suffering

**8.368** Article 35(2) of Protocol I prohibits the use of 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.' This prohibition's underlying logic was first articulated in the preamble of the 1868 Saint Petersburg Declaration related to the ban on exploding bullets and further formulated as general principle regarding weapons in the Hague Regulations.[653] The contemporary prohibition, which is a norm of customary law applicable in both IACs and NIACs, applies to both weapons and methods of warfare.[654] In the original French text of the Hague Regulations, superfluous injury and unnecessary suffering are designated by the single term of 'maux superflus'. 'Superfluous injury' and 'unnecessary suffering' therefore have the same meaning.

**8.369** This principle limits equally the suffering or injury caused to combatants even though they are legitimate targets of attack under IHL. The test used to determine what is deemed superfluous or unnecessary must be examined in light of

649 Patrycja Grzebyk, 'Who Can Be Killed?: Legal Targets in Non-International Armed Conflicts' in Steven J. Barela (ed), *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs* (Ashgate Publishing 2016) 52. For a detailed discussion on the 'Lotus' presumption, see MNs 10.005–10.008.

650 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 52.

651 ICRC Commentary APs, paras 1386–98.

652 Ibid., para 1409.

653 HR, Art 23(e).

654 ICRC CIHL Database, Rule 70. For an overview of the meaning and scope of this prohibition and its application to a specific weapon, see Theo Boutruche, 'Superfluous Injury or Unnecessary Suffering' (2013) in *Weapons Law Encyclopedia of the Geneva Academy of International Humanitarian Law and Human Rights* <http://www.weaponslaw.org/glossary/superfluous-injury-or-unnecessary-suffering> accessed 23 March 2018, and Théo Boutruche, 'The Legality of Flamethrowers: Taking Unnecessary Suffering Seriously' (ICRC Humanitarian Law and Policy Blog 2018). I would also like to take this occasion to thank Théo Boutruche for having critically reviewed this sub-section.

the fact that IHL does not prohibit the deliberate killing of an enemy combatant and that (subject to the 'capture rather than kill' discussion hereafter) the necessity of such a death does not need to be determined before each deadly attack. What is a greater suffering than death? The test requires a comparison between the effects of a weapon or method with its military utility. As such, the latter will be easier to identify with regard to weapons designed to render an individual combatant *hors de combat*. Conversely, weapons or methods used for a different purpose, such as against troops or against material objectives, would justify greater harm than necessary to put one soldier *hors de combat*. The prohibition certainly refers to harm that is not justified by military utility because of either the lack of even the slightest utility or when the utility is outweighed[655] by the suffering caused. The latter concept refers to the proportionality principle beyond the proportionality rule discussed above that does not benefit legitimate targets. The term 'suffering' covers both objective physical injury as well as subjective psychological suffering and pain. It is controversial whether what counts is the intended or calculated effect of the weapon as the US claims[656] or whether, as the treaty texts state, the weapon is of a 'nature' to cause unnecessary suffering.

**8.370** ICRC doctors tried to determine, according to strict medical and public health criteria, what amounts to superfluous suffering based upon battlefield and hospital mortality rates, health consequences and impact on the public health system compared with consequences of conventional weapons in the last 50 years.[657] This SIrUS project encountered stiff resistance by governments, military lawyers and military doctors who considered that it neglected the military utility aspect of a given weapon.[658] They relied on, in particular, the ICJ's definition of unnecessary suffering as suffering that is 'greater than that unavoidable to achieve military objectives'.[659] Due to this resistance, the ICRC abandoned its SIrUS project for all practical purposes.

**8.371** The majority utilitarian opinion therefore holds that a weapon is only outlawed under this prohibition if 'a) an alternative weapon is available, causing less injury

655 US Law of War Manual, para 6.6.3, adds 'clearly' [disproportionate].

656 Ibid., para 6.6.1.

657 See Robin Coupland, 'The SIrUS Project: Towards a Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering"' (ICRC 1997); Robin Coupland and Peter Herby, 'Review of the Legality of Weapons: A New Approach – The Sirus Project' (1999) 81 IRRC 583.

658 Justin McClelland, 'The Review of Weapons in Accordance with Article 36 of Protocol I' (2003) 85 IRRC 397, 399–400; William Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP 2016) 56–7; 'USA: Letter of 23 September 1998 from the Uniformed Services University of the Health Services to the American Medical Association' (1999) 2 YIHL 439–40.

659 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 78.

or suffering; and b) the effects produced by the alternative weapon are sufficiently effective to achieve the lawful objective'.[660] There are several problems with this utilitarian approach. First, it is challenging to compare suffering with the military advantage to be achieved as they involve two radically different values. Second, the facts needed to assess the effectiveness of a given a weapon and alternatives to it are often covered by military secrecy. Third, both sides of the equation are merely hypothetical at the time a weapon is evaluated. Finally, it is difficult to apply this rule because, just as with the proportionality rule benefiting civilians, the military do not want to clarify its criteria and parameters.

**8.372** In part due to the essence of this principle, which recognizes as lawful significant injury and death caused to legitimate targets, most of the weapons prohibited through particular treaty or customary norms are those with a strictly individual anti-personnel purpose. There is thus a debate over the normative autonomy of this principle regarding whether, outside of weapons that are specifically prohibited by a treaty or customary norm (such as the use of fragments that are not detectable by an X-ray), this general principle may independently make the use of a weapon not otherwise prohibited unlawful.[661] Many scholars contend that only a specific treaty or customary norm on a particular weapon can give effect to the rule's general prohibition. This interpretation seems to come from the general principle's limited results to date in regulating specific weapons that are not already covered by a specific treaty or customary prohibition. However, it appears to confuse the absence of a consensus among States with regard to controversial weapons whose nature is not manifestly deemed as causing unnecessary suffering with the normative value of the prohibition as such. State practice demonstrates that this general principle is being used in and of itself as a prohibition, although it is very often controversial whether it has been violated. Some military manuals clearly state that, although a weapon may not be unlawful as such, its use in certain ways can cause unnecessary suffering and therefore be unlawful.[662] Furthermore, States with legal review mechanisms for weapons refer to the general principle when assessing the legality of a weapon that is not otherwise prohibited by treaty or customary law.[663] The fact that a given weapon is not determined to cause unnecessary suffering does not dismiss the normative value of the general principle used to review its lawfulness. Finally, some States assert that the specific anti-personnel use

660 Yoram Dinstein, 'Warfare, Methods and Means' (2015) in MPEPIL, para 4.

661 For a sceptical view on this issue, see ibid., para 5.

662 See UK Military Manual, para 6.2.2.

663 W. Hays Parks, 'Joint Service Combat Shotgun Program' (1997) 1997 The Army Lawyer 15, 24.

of certain weapons, such as incendiary weapons, is unlawful on the basis of the general principle alone.[664]

### c. Does military necessity imply additional restrictions?: the 'capture rather than kill' debate

**8.373** It is controversial whether the principle of military necessity imposes additional restrictions on attacks against individuals who are legitimate targets independently of any possible incidental effect on the civilian population. Given the close relationship between the principle of military necessity and the prohibition against causing superfluous injury and unnecessary suffering, those restrictions could also be derived from the latter prohibition. The principle of military necessity is generally recognized as a restrictive principle only permitting the 'degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.'[665] Controversy, however, surrounds whether this principle is simply part of many IHL rules or whether it directly creates independent obligations for belligerents. In the ICRC DPH Guidance, the ICRC writes that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.'[666] This must obviously apply not only to civilians directly participating in hostilities but also to combatants and members of armed groups with a continuous combat function. However, it does not mean that, as in law enforcement operations under IHRL, one must capture rather than kill suspects unless they pose an imminent threat to human life. Nevertheless, the ICRC subscribes to the view that 'it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.'[667] Even such a moderate interpretation of the principle of military necessity has encountered stiff resistance by the US and its scholars.[668] The underlying reason for such resistance against a rule, which corresponds to basic moral imperatives (and which could be seen as an application of IHRL as the *lex specialis* if the issue is indeed not regulated by IHL), may be the military's

664 See UK Military Manual, para 6.12.6.

665 Ibid., para 2.2.

666 ICRC DPH Guidance, 77.

667 Ibid., 82.

668 US Law of War Manual, para 2.2.3.1; W. Hays Parks, Part IX, above note 570, 769; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819.

fear that – if the rule is not clear-cut – soldiers will hesitate to use lethal force and retroactively second-guess their decision, leading them to them feel guilty for having killed another human being.

#### d. The prohibition of indiscriminate means and methods of warfare

**8.374** Some add the prohibition of indiscriminate means and methods of warfare to the principles listed in Protocol I on the methods and means of warfare. This view results from the prohibition against indiscriminate attacks, which Article 51(4) of Protocol I[669] defines as including attacks that 'employ a method or means of combat which cannot be directed at a specific military objective' or 'the effects of which cannot be limited as required by' the pertinent rules of IHL. Technically, however, Article 51(4) expressly states that the use of such means or methods is only prohibited if they are 'of a nature to strike military objectives and civilians or civilian objects without distinction.' The prohibition against indiscriminate means and methods of warfare therefore belongs to the rules protecting the civilian population against the effects of hostilities discussed in the previous sub-chapter.

### 8.7.2 The obligation to determine the legality of new means and methods of warfare

> Before adopting a new method or means of warfare, a State must determine whether its use would violate IHL in some or all circumstances.

**8.375** Article 36 of Protocol I obliges States to determine '[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare,… whether its employment would, in some or all circumstances, be prohibited by [IHL]'. Several States, including the US (which is not a party to Protocol I), have implemented this requirement through specific procedures.[670] According to the ICRC, this obligation binds all States as it is implicit in their substantive obligations.[671] Although the establishment of an international body that monitors weapons development would obviously be highly desirable,[672] secrecy concerns still present an insurmountable barrier.[673] Transparency on the find-

669 See also ICRC CIHL Database, Rules 12, 71.

670 See, e.g., Online Casebook, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons.

671 ICRC, 'A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977' (ICRC 2006) 4.

672 Dinstein, Conduct of Hostilities, above note 594, 101.

673 Boothby, above note 658, 345.

ings of a review unfortunately cannot be expected except in conformity with Common Article 1 in cases of weapons transfers or training missions. In such circumstances, States must arguably exchange information on the results of their review under Article 36.[674]

**8.376** In addition to weapons, the text of the treaty provision clearly covers new methods, or tactics, of warfare. In practice, however, the (relatively few) review mechanisms established by States often only deal with weapons.[675] IHL obviously does not require that the same procedure deals with methods and weapons. What is necessary is that the doctrine or training branch of armed forces developing new tactics is also sensitive to their IHL implications, including foreseeable but unintended IHL violations that result from certain tactics.

**8.377** In my assessment, a review, at least with regards to a new weapon, should involve legal, military, health, arms technology and environmental experts. The reviewers must not only evaluate the new weapon, the method or the method combined with a weapon but also how operators will react or what errors will be committed when using certain technologies or tactics. In my opinion, a comprehensive evaluation requires answers to the following questions.[676] First, it must determine whether the weapon or method is prohibited by specific IHL rules. Second, it must assess whether the weapon or method or the combination of both may be contrary to or limited by general rules of IHL, in particular due to their accuracy or effects. Both the expected use and the foreseeable effects may lead to the conclusion that they are prohibited or allowed only if accompanied by specific instructions or by construction changes that make certain uses impossible. Third, particular attention must be paid to the interplay between the means and methods. The result of the review may require that a new weapon must be combined with a certain method (or vice versa) or, conversely, that the weapon may not be combined with a certain method (or vice versa). The obligation to take feasible precautions in the choice of means and methods may also imply that those who plan or decide upon an attack must have not just one weapon at their disposal but also other weapons available. Fourth, it should examine whether new methods may make the obligation to take precautionary measures impossible or more difficult. When a new weapon or method is developed, the conclusion that precautionary measures that were feasible with

674 See P I, Art 84; see also ICRC, A Guide, above note 671, 27–8.

675 ICRC, A Guide, above note 671, 5, fn 8; Isabelle Daoust *et al.*, 'New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare' (2002) 84 IRRC 345, 354, 358.

676 For comprehensive comments on how Article 36 should be implemented, see ICRC, A Guide, above note 671, and Boothby, above note 658, 342–55.

existing means and methods are no longer feasible should be very exceptional and reserved to cases in which the new means or method represents a revolutionary military advantage.

### 8.7.3 Specific rules on certain weapons

Some weapons, or at least their use, are explicitly prohibited, such as chemical weapons, bacteriological and other biological weapons, poison, weapons causing fragments that are not detectable by X-ray, blinding laser weapons, explosive bullets and dum-dum bullets. The use of other weapons, such as incendiary weapons and booby-traps as well as explosive remnants of war, are not prohibited but instead subject to particular additional restraints to avoid their incidental effects on civilians. Anti-personnel landmines and cluster munitions are prohibited for most States, while their use is subject to particular regulations for other States. Nuclear weapons are not prohibited by specific rules binding nuclear powers. It is controversial whether every possible use of nuclear weapons would violate IHL's general rules that equally apply to the use of those weapons.

**8.378** Traditionally, IHL does not prohibit or regulate the use of specific weapons but rather establishes rules applicable to the use of all weapons. The advantage of this approach is that future weapons are also covered without the need to formulate new rules. In contrast, an explicit prohibition of certain weapons has its own advantages: it is easier to monitor the prohibition's respect, and, if combined with a peacetime prohibition on their development, possession and transfer, it is less likely to be violated because those who fight cannot misuse weapons that are not available to them. In recent years, certain weapons that could be used in conformity with IHL have also been prohibited simply because experience has shown that they are too often used in violation of IHL.

**8.379** Many discussions related to the use of weapons, in particular about drones, autonomous weapons, cyber warfare and arms trade, raise cross-cutting issues that will be addressed in Chapter 10,[677] such as on what is an armed conflict, its geographical scope, the relationship between IHL and IHRL, who and what may be targeted, responsibility for violations of IHL and adapting existing rules to new means and methods of warfare.

677 See MNs 10.062–10.072 (drones), 10.073–10.096 (autonomous weapons), 10.097–10.106 (arms trade) and 10.107–10.132 (cyber warfare).

### a. Prohibitions against using certain conventional weapons

**8.380** Most rules prohibiting or regulating certain conventional weapons are contained in Protocols to the 1980 CCW,[678] which is a framework convention that does not contain substantive rules and which was amended in 2001 to equally cover NIACs.[679]

#### *i. Non-detectable fragments*

**8.381** CCW Protocol I prohibits the use of any weapon that has the primary effect of injuring people by fragments in the human body that cannot be detected by X-rays. As this effect serves no military purpose and instead increases the suffering of the person so injured, it violates the prohibition of unnecessary suffering.[680]

#### *ii. Blinding weapons*

**8.382** Blinding laser weapons have been prohibited by CCW Protocol IV since 1995[681] if at least one of their combat functions is specifically designed to cause permanent blindness. This is one of the few weapons that have been prohibited even before they were ever used in combat. Permanent blindness is considered to constitute a superfluous injury or unnecessary suffering because the temporary flash blinding of enemy personnel would be sufficient for military purposes. However, laser systems that only have an incidental blinding effect, such as certain target recognition or munition guidance systems, and weapons designed to blind temporarily (also called 'dazzling lasers') are not prohibited. When using such permitted laser systems, belligerents must take all feasible precautions to avoid causing permanent blindness to unenhanced vision.

#### *iii. Explosive bullets*

**8.383** It is also prohibited to use against humans projectiles weighing below 400 grammes that are either explosive or charged with fulminating or inflammable substances.[682] The limit of 400 grammes was supposed to draw a dividing line between explosive artillery shells designed for attacking 'hard' targets, such as fortifications, and rifle or machine-gun bullets designed for attacking 'soft' targets, namely, humans. Some contend that this prohibition has fallen into desuetude or that it does not apply to air warfare.[683]

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678 CCW.

679 Amendment to Article 1 [in particular paras 2 and 3] of the CCW (21 December 2001) 2260 UNTS 82.

680 CCW Protocol I on Non-Detectable Fragments; ICRC CIHL Database, Rule 79.

681 CCW Protocol IV on Blinding Laser Weapons; ICRC CIHL Database, Rule 86.

682 [St. Petersburg] Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (11 December 1868) 138 CTS 297; ICRC CIHL Database, Rule 78.

683 Dinstein, MPEPIL, above note 660, para 9.

*iv. Dum-dum bullets*

**8.384** It is illegal to use bullets (also called 'dum-dum' bullets) that expand or flatten easily in the human body, such as bullets with a hard envelope that either does not entirely cover the core or is pierced with incisions.[684]

### b. Restrictions on the use of conventional weapons for the benefit of the civilian population

*i. Incendiary weapons*

**8.385** CCW Protocol III restricts the use of incendiary weapons in circumstances in which they can endanger civilians.[685] However, in light of the use of napalm in Vietnam by the US, many States during the negotiations of the CCW advocated for their total ban, and a total ban is still the widely-held position in civil society. CCW Protocol III defines incendiary weapons 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 combination thereof.' The Protocol does not cover weapons with merely incidental incendiary effects, such as illuminants or smoke systems. Nor does it prohibit munitions 'designed to combine penetration, blast or fragmentation effects with an additional incendiary effect,' but only if '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.'

**8.386** Like any other weapon, incendiary weapons may obviously not be used to directly target civilians who are not directly participating in hostilities. Beyond that, the Protocol specifically prohibits the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians (for instance, cities, villages or refugee camps). In other cases, it restricts their use to targeting military objectives that are clearly separated from the surrounding concentration of civilians and only if all feasible precautions are taken with a view to protecting civilians and civilian objects from incidental harm. Finally, incendiary weapons may not be used to attack 'forests or other kinds of plant cover…except when [they] are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.' This prohibition results from the general rules on the conduct of hostilities discussed above.

**8.387** According to the ICRC, customary IHL requires belligerents using incendiary weapons to take particular care to avoid causing incidental harm to civilians,

684 [Hague] Declaration (IV, 3) Concerning Expanding Bullets (29 July 1899) 187 CTS 459; ICRC CIHL Database, Rule 77; ICC Statute, Art 8(2)(b)(xix).

685 CCW Protocol III on Incendiary Weapons.

and it also prohibits the anti-personnel use of such weapons against combatants 'if such use would cause unnecessary suffering' or, in other words, 'if it is feasible to use a less harmful weapon to render a combatant *hors de combat*.'[686]

*ii. Booby-traps*

**8.388** Although CCW Protocol II is generally dedicated to mines, it also restricts the use of booby-traps, which are defined as a weapon that 'functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act', as well as other devices that are 'designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.'[687] Such weapons may only be used when 'placed on or in the close vicinity of a military objective' or 'when measures are taken to protect civilians from their effects'. While these restrictions could already be deduced from the general rules on the conduct of hostilities, the Protocol also prohibits belligerents from specifically attaching or associating such devices with a list of apparently harmless or protected objects. Even beyond banning attachment to the objects listed, it further outlaws the use of devices deliberately prefabricated in the form of apparently harmless portable objects that are specifically designed to detonate when disturbed or approached.

**8.389** According to the ICRC, customary IHL prohibits the 'use of booby-traps… attached to or associated with objects or persons entitled to special protection under [IHL] or with objects that are likely to attract civilians'.[688]

c. Conventional weapons with differentiated regimes

**8.390** While all regulations of weapons by treaties technically only bind the States parties to those treaties, some weapons are clearly regulated by different regimes for different States according to their treaty obligations or even customary law.

*i. Anti-personnel landmines*

**8.391** An anti-personnel landmine is designed to explode by the presence, proximity or contact of a person in order to incapacitate, injure or kill that person. Experience shows that, even if such mines are specifically planted to target combatants, they kill and injure civilians (often even after the end of the armed conflict) as they remain activated for a long time and move from their original locations through, for example, landslides and floods.

686 ICRC CIHL Database, Rules 84–85.
687 CCW Protocol II on the Use of Mines, Booby-Traps and Other Devices.
688 ICRC CIHL Database, Rule 80.

**8.392** The 1980 CCW Protocol II,[689] which was amended in 1996[690] in particular to extend the regime to NIACs and to add additional restrictions for anti-personnel mines, was the first effort to limit the use of anti-personnel landmines and to prescribe safeguards for their use. As amended, the Protocol prohibits the use of non-detectable anti-personnel mines. It also bans hand-emplaced anti-personnel mines that do not have self-destruct and self-deactivation mechanisms unless they are placed within a marked area monitored by military personnel and protected by visible and durable fencing or other means ensuring the effective exclusion of civilians. Anti-personnel mines that are remotely delivered, such as by artillery, rocket, mortar or aircraft, must also be equipped with self-destruct as well as self-deactivation features, and their use must be recorded. The Protocol also contains general rules regulating the design and use of both anti-personnel and anti-vehicle landmines. In particular, they may not be designed to explode when detected by commonly available mine-detection equipment or be of a nature to cause unnecessary suffering or superfluous injury. After the end of active hostilities, belligerents must remove these mines and take all feasible precautions to protect civilians from their effects. They must maintain records on their locations at all times and take measures to protect missions of the UN, the ICRC and other humanitarian organizations against the effects of these weapons.

**8.393** In the ICRC's view, customary IHL obliges those using anti-personnel (as well as anti-vehicle) landmines to take particular care to minimize their indiscriminate effects, in particular by recording their placement and by removing or neutralizing them at the end of active hostilities.[691]

**8.394** The above legal regime could not sufficiently protect the civilian population against anti-personnel landmines because it has not always been respected, its respect was difficult to monitor and, even when respected, civilians nevertheless ended up being killed or injured by such mines. States that genuinely wanted to completely outlaw anti-personnel landmines therefore met and negotiated a treaty for that very purpose – the 1997 Ottawa Convention on Landmines.[692] The Ottawa Convention, which currently binds 164 States, prohibits the use, development, production, acquisition, stockpiling, retention or transfer of anti-personnel mines and establishes specific deadlines for the destruction of

689 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (10 October 1980) 1342 UNTS 168.

690 CCW Protocol II on the Use of Mines, Booby-Traps and Other Devices.

691 ICRC CIHL Database, Rules 81–83.

692 Ottawa Convention on Landmines.

anti-personnel mine stockpiles as well as the clearance of land contaminated with such weapons.

**8.395** The Ottawa Convention shows that a widely ratified treaty may also impact the conduct of States not parties as the latter now use anti-personnel mines much more restrictively than before the Convention was adopted. Nevertheless, the Convention is only addressed to States, and it is mainly armed groups that still use anti-personnel landmines today. An NGO, Geneva Call, therefore developed a deed of commitment allowing non-State armed groups to commit not to use such mines, and it monitors the respect of such commitments and cooperates with such groups to ensure respect of the ban.[693]

*ii. Cluster munitions*

**8.396** The main concern about cluster munitions is the relatively high rate of failed, unexploded and abandoned munitions that can be spread over a vast area, thus potentially affecting civilians. As in the case of the Ottawa Convention banning anti-personnel landmines, States that were ready to accept a complete ban of such munitions (often under the pressure of public opinion) met, negotiated and adopted a treaty comprehensively banning cluster munitions. The Oslo Convention on Cluster Munitions (also referred to as the Dublin Convention), which has been ratified by 103 States, prohibits cluster munitions subject to certain exceptions, such as, in particular, when they are equipped with self-destroying or self-deactivating mechanisms.[694] The Convention has had an impact on States not party by seriously reducing their use of such munitions, which was still very widespread 15 years ago.

**8.397** In any case, as long as alternatives exist, the use of cluster munitions in densely populated areas is contrary to the general rules on the protection of the civilian population against the effects of hostilities discussed above because these munitions are inherently less discriminate in their effects than other weapons when military objectives are collocated with civilians or civilian objects regardless of how accurate the weapons are in striking their intended military target.

### d. Explosive remnants of war

**8.398** Unexploded ordnance may have similar effects as landmines on civilians, peacekeepers and humanitarian workers after the end of an armed conflict. CCW Protocol V,[695] which was adopted in 2003, does not prohibit or restrict a weapon

693 For more details on the approach and working methods of Geneva Call, see MNs 10.243–10.247.
694 Oslo Convention on Cluster Munitions.
695 CCW Protocol V on Explosive Remnants of War.

but instead requires belligerents to take measures to reduce the dangers posed by unexploded and abandoned ordnance, both of which are referred to as 'explosive remnants of war'. Under the Protocol, each party must record information on explosive ordnance used by its armed forces during an armed conflict and must share it after the end of active hostilities so as to facilitate clearance. Once active hostilities have ended, each party must mark and clear explosive remnants of war in the territory that it controls. It must also provide technical, material and financial assistance to facilitate the removal of explosive remnants of war that result from its operations but are located in areas it does not control. Additionally, until such remnants are removed or destroyed, each party must take all feasible precautions to protect civilians, which include, among other things, fencing, monitoring the territory affected by such remnants and providing warnings in addition to risk education. Most of the Protocol's requirements, which are formulated using terms such as 'where feasible' or 'as far as practicable', are only obligations of means and not results.

### e. Other conventional weapons for which limitations are under discussion

**8.399** Although the use of other weapons, such as light weapons, anti-vehicle mines, small-calibre high-velocity bullets or incapacitating weapons, is subject to controversies, their use is not likely to lead to regulations in hard law any time soon.

**8.400** Another important problem is the use of explosive weapons with wide area effects (which were originally designed for use in open battlefields) in densely populated areas, in particular cities. Both the direct effects of attacks with such weapons as well as their reverberating effects disrupting essential services to the civilian population are of great humanitarian concern.[696] Nevertheless, pending specific regulation in hard or soft law towards which major military powers (such as the US and UK) are very reluctant, such use must be evaluated under the general rules on the protection of the civilian population against the effects of hostilities discussed above, in particular the controversial extent to which reverberating effects must be taken into account in the proportionality evaluation.[697]

696 See MNs 8.321–8.324.

697 Isabel Robinson and Elen Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98 IRRC 107.

### f. Weapons of mass destruction

#### *i. Chemical, biological and bacteriological weapons*

**8.401** A 1925 Geneva Protocol[698] already prohibits the use of chemical, biological and bacteriological weapons, but it was ratified by many States subject to a reservation on the basis of reciprocity. 'Employing asphyxiating, poisonous, or other gases, and all analogous materials or devices' is also a war crime[699] and prohibited by customary law.[700] The 1993 Paris Convention, which includes a unique verification mechanism, achieved a total ban of chemical weapons.[701] Yet, this treaty does not solve the issue of the use of herbicides, which are chemical agents directed against plants. It also does not rule out the use of chemical-based riot-control agents for law enforcement purposes, and the extent to which such use for law enforcement purposes is admissible even in the case of an armed conflict remains controversial.

**8.402** The 1972 Biological Weapons Convention[702] prohibits the development, production and stockpiling of 'microbial or other biological agents, or toxins' of types or in quantities that cannot merely serve peaceful purposes as well as weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflicts. This Convention, however, lacks efficient verification mechanisms. Customary law also outlaws the use of biological weapons in both IACs and NIACs.[703]

**8.403** Finally, while the use of poison or poisoned weapons is forbidden,[704] this prohibition is interpreted as being limited only to substances that have a chemical effect on the human body.

#### *ii. Nuclear weapons*

**8.404** A treaty adopted in 2017 prohibits the possession or use of nuclear weapons,[705] but States that possess nuclear weapons and their close allies do not plan on becoming parties to that treaty. The question of whether the use of nuclear weapons by States not bound by this new treaty would nonetheless be prohibited

698 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (17 June 1925) 94 LNTS 65.

699 ICC Statute, Art 8(2)(b)(xviii).

700 ICRC CIHL Database, Rule 74.

701 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (3 September 1992) 1974 UNTS 45.

702 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (10 April 1972) 1015 UNTS 163.

703 ICRC CIHL Database, Rule 73.

704 HR, Art 23(a); ICRC CIHL Database, Rule 72; ICC Statute, Art 8(2)(b)(xvii).

705 Treaty on the Prohibition of Nuclear Weapons (7 July 2017, not yet in force).

by IHL as necessarily violating rules applicable to the use of any weapon is fortunately theoretical because nuclear weapons have not been used since their first use in 1945. It is nevertheless an important question because the use of nuclear weapons could lead to unthinkable levels of death, injury and devastation that could even mean the end of human life on our planet. It is also important because the inherent claim by States possessing nuclear weapons that they may use them seriously undermines the credibility of any criticism of violations of the rules on the conduct of hostilities, even in cases like today in Syria where such violations are so widespread and systematic. How can the international community credibly show its outrage at the unacceptable killing of civilians by chemical weapons in Syria, when, at the same time, some of its most prominent members implicitly claim that they could kill hundreds of thousands of civilians with nuclear weapons to achieve their military objectives? Admittedly, however, the debate over the legality of the use of nuclear weapons is falsified by the fact that such weapons are the archetype of weapons a reasonable State or person can only possess for the purpose of deterrence. It is remarkable that most States with nuclear weapons have such a high opinion about the force of international law that they consider that their deterrence strategy would lose credibility if they admitted that a use of such weapons violated international law.

**8.405** Part of the deterrence strategy adopted by nuclear-armed States and their allies consists of leaving the circumstances in which – and the rules according to which – they could use such weapons vague. Nevertheless, even States possessing nuclear weapons admit that they are bound by IHL when using them.[706] In its advisory opinion on the issue, the ICJ correctly held that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law'.[707] Indeed, one cannot imagine how a nuclear attack, even if it targets a military objective, could be compatible with the proportionality rule and the prohibition against indiscriminate attacks. This is particularly the case because the long-term radioactive fallout would spread widely and would have reverberating effects for centuries on a large number of civilians, if not on all of humanity by possibly making life on our planet impossible. The ICJ unfortunately went on to state that it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.' Indeed, this conclusion confuses *jus ad bellum* and *jus in bello*. IHL must be

706 See Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 86.
707 Ibid., para 105, Section E.

respected at all times, even in such an extreme circumstance that is furthermore only relevant under *jus ad bellum*.

**8.406** While nuclear-armed States agree that IHL applies to the use of such weapons, they and their allies insisted when the Additional Protocols were elaborated that 'the new rules introduced by the Protocols were not intended to have any effect on and did not regulate or prohibit the use of nuclear…weapons.'[708] Some claim that this led to a consensus that such rules do not apply to nuclear weapons.[709] While, in my assessment, the validity of this construction remains doubtful, the declarations made by the UK, France and other Western States when becoming parties to Protocol I must admittedly count as reservations. For these States, only customary IHL applies to the use of nuclear weapons but arguably only as far as the customary character of such rules does not depend on States' acceptance of Protocol I. However, it is obviously very difficult to hypothetically determine the rules of customary IHL on the conduct of hostilities without taking into account that Protocol I has been elaborated, accepted, complied with and invoked in its substance even by States that are not parties to it. The applicable law cannot possibly be only customary IHL as it existed in 1973 as IHL would have developed even without Protocol I. In addition, there is fortunately no customary IHL specific to the use of nuclear weapons because they have been used only twice in 1945. Similarly, States with nuclear weapons and their allies could not possibly create distinct customary rules on the use of nuclear weapons through their declarations because they did not encounter sufficiently widespread verbal practice by other States supporting such rules.

**8.407** Anyway, the debate on which customary rules of IHL apply to a possible use of nuclear weapons is purely academic with one important exception. A limited tactical use of a nuclear weapon that by hypothesis would not violate the proportionality rule (which necessarily assumes that the inevitable risk of escalation does not count in the proportionality evaluation) would nonetheless be contrary to the customary obligation to choose means that avoid or, in any event, minimize incidental effects upon the civilian population.[710] All other uses

708 See, e.g., Official Records, above note 587, vol V, 134, and vol VII, 303 (UK). For a very similar position by the US, see ibid., vol VII, 295, and vol XIV, 441. For positions that are less clear, see ibid., vol VII, 193 (France) and vol XVI, 188 (former Soviet Union). See also the declarations made on this issue by the UK and the US when signing the Protocol and by the UK, France, Belgium, Germany, Italy, the Netherlands and Spain when ratifying Protocol I in Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff 2004) 795–6, 800–803, 807–10, 812–8.

709 Henri Meyrowitz, 'Le statut des armes nucléaires en droit international' (1982) 25 German Yearbook of Intl L 219, 229–32; Bothe/Partsch/Solf Commentary, 189–91; George Aldrich, 'New Life for the Laws of War' (1981) 75 AJIL 764, 780–81.

710 See P I, Art 57(2)(a)(ii); see also ICRC CIHL Database, Rule 17. On whether this rule already corresponded to

of nuclear weapons would necessarily violate the proportionality rule,[711] which was already well established in customary law before 1974.[712] The use of nuclear weapons in reprisal to a first use of nuclear weapons, which would be prohibited by Protocol I as it outlaws such reprisals but not by customary IHL, is the only exception to this prohibition.[713]

### 8.7.4 Prohibited methods of warfare

IHL also prohibits certain methods of warfare, such as indiscriminate methods of warfare, orders not to give quarter, the failure to accept a surrender and attacks against legitimate targets by resort to perfidy. Perfidy invites the confidence of an adversary that leads him or her to believe that he or she is entitled to or is obliged to provide protection under the rules of IHL.

**8.408** The rules on the protection of the civilian population against the effects of hostilities studied above clearly imply that any tactics not respecting the rules on distinction, proportionality or precautions are unlawful. The prohibition against using the starvation of civilians as a method of warfare will be addressed later as an aspect of the cross-cutting issue of humanitarian assistance.[714] This section will highlight two methods of warfare that are specifically prohibited even when exclusively directed at and affecting only combatants: (1) the prohibition against giving or ordering no quarter and (2) perfidy.

#### a. Giving or ordering no quarter

**8.409** It is prohibited 'to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.'[715] An enemy who is *hors de combat* may no longer be attacked as long as he or she neither engages in hostile acts nor attempts escape.[716] Persons must be considered *hors de combat* as soon as they are in the power of an adverse Party, clearly express an intention to surrender or have been rendered unconscious or are otherwise incapacitated by wounds or sickness and are therefore incapable of defending themselves.[717]

customary IHL before its codification in P I, see Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht* (Helbing & Lichtenhahn 1990) 470–71.

711 See MNs 8.319–8.328.

712 See Sassòli, Kodifikation, above note 710, 412–5.

713 See MN 5.040.

714 See MNs 10.199–10.200.

715 P I, Art 40; ICRC CIHL Database, Rule 46. See also P II, Art 4(1).

716 P I, Art 41(1); ICRC CIHL Database, Rule 47.

717 P I, Art 41(2); ICRC CIHL Database, Rule 47.

**8.410** After the 2011 operation leading to the killing of Osama Bin Laden, the Legal Adviser of the US State Department clarified his opinion on when a surrender must be accepted or, in other words, when it leads to immunity from attack. While he correctly mentioned that '[t]he laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force', he erroneously added the requirement of 'circumstances where it is feasible for the opposing force to accept that offer of surrender'.[718] This is plainly wrong because a person who surrenders may never be attacked unless he or she commits a hostile act or attempts to escape. However, while wounded or sick enemies must be collected and cared for,[719] those who surrender or are otherwise *hors de combat* do not have to be taken prisoner.[720] If a belligerent chooses not to take such persons prisoner, they must nevertheless be respected as long as they abstain from hostile acts and do not attempt to escape. Once the enemy has definitely renounced its intention to capture such persons, they do not violate IHL if they resume fighting, but they may then be attacked again.

**8.411** A special rule applies to combatants parachuting from an aircraft.[721] Airborne troops may be attacked while descending (except, obviously, if they surrender, are wounded or sick or are otherwise *hors de combat*). By contrast, those parachuting from an aircraft in distress may not be attacked while descending and must be given an opportunity to surrender once they reach the ground on enemy-controlled territory. The latter obligation does not apply if it is apparent that they are engaging in a hostile act.

### b. Perfidy

**8.412** While ruses of war are lawful, perfidy is not. Technically, however, IHL only prohibits using perfidy to kill, injure or capture an adversary. It is even argued that mere capture by resort to perfidy is not a violation of customary law,[722] and, in any event, it does not constitute a grave breach of Protocol I.[723]

**8.413** The difference between ruses of war and perfidy is that the former are intended to mislead an adversary or to induce her to act recklessly based upon an erroneous representation of facts that would *not*, if true, imply protection under

718 See Online Casebook, United States of America, The Death of Osama bin Laden: H. Harold Koh, Legal Adviser, United States Department of State.

719 See MNs 8.007–8.009.

720 See also P I, Art 41(3).

721 P I, Art 42; ICRC CIHL Database, Rule 48.

722 US Law of War Manual, para 5.22.2.1.

723 P I, Art 85(3)(f).

IHL.[724] Examples of ruses of war include camouflage, decoys, mock operations, misinformation and even feigning that an object or a person is a legitimate target. While camouflage makes the adversary believe the object is civilian and could therefore be seen as invoking the prohibition against directly attacking civilian objects, it is explicitly listed as a lawful ruse of war.[725]

**8.414** By contrast, perfidy invites the confidence of an adversary to lead her to believe that she is entitled to or is obliged to provide protection under the rules of IHL. Examples of perfidy are feigning 'of an intent to negotiate under a flag of truce or of a surrender', 'an incapacitation by wounds or sickness' or 'civilian, non-combatant status'.[726] The use of the red cross and the red crescent as well as of other recognized emblems identifying protected objects or persons is prohibited even if it does not constitute perfidy and even if such prohibited use is not used to kill, injure or capture.[727]

**8.415** Under the distinction just explained, the use of enemy uniforms does not constitute an act of perfidy as no IHL rule prohibits friendly forces from attacking their own soldiers. Protocol I, and arguably customary IHL, nevertheless prohibits the use of enemy uniforms or emblems in land warfare 'while engaging in attacks or in order to shield, favour, protect or impede military operations'.[728]

**8.416** The use of uniforms or emblems belonging to neutral States or the UN would technically only constitute perfidy under the definition above if IHL prohibited attacks against neutral or UN forces,[729] which is not the case in my view. Such use is in any case prohibited and constitutes an act of perfidy under Article 37 of Protocol I.[730]

## 8.8 THE LAW OF NAVAL WARFARE

**8.417** This sub-chapter cannot present all of the sometimes astonishing and often outdated rules of the law of naval warfare. Even when not outdated by technological or commercial developments, the traditional rules of naval warfare have

724 P I, Art 38(2); see also ICRC CIHL Database, Rule 57.
725 Ibid.
726 P I, Art 37(1)(a)–(c).
727 See MNs 8.047–8.049; P I, Art 38; ICRC CIHL Database, Rules 59 and 61.
728 P I, Art 39(2); ICRC CIHL Database, Rule 62.
729 In this sense, see P I, Art 37(1)(d). For additional rules concerning the UN in this context, see ICC Statute, Arts 8(2)(b)(iii) and 8(2)(e)(iii).
730 P I, Arts 38(2) and 39(1); ICRC CIHL Database, Rules 60 and 63.

had limited humanitarian importance in armed conflicts of the last 70 years because, among other things, they only regulate armed conflicts between States with major navies and commercial fleets that no longer occur. While such conflicts may happen again, especially given the rising tensions between the US and China, it is unlikely that future conflicts involving naval warfare will raise the same questions and issues as in the two World Wars for which the traditional law of naval warfare was developed but in which it was largely violated. The aim of this sub-chapter therefore is only to sensitize the reader to this body of law's distinctive features and surprising rules from the point of view of the IHL rules that have been studied up to now.

### 8.8.1 Distinctive features

Although the general IHL principles remain the same in naval warfare, many of its particular rules are due to the peculiarities of the naval environment, the existence of the high seas as an international space, the importance of economic warfare on the sea and the traditional rules of genuine customary international law developed by long-standing practice. *Jus ad bellum*, the law of the sea and the law of neutrality have a special influence on the law of naval warfare, and the IHL aspects of this body of law cannot be clinically isolated from its other aspects.

**8.418** The principles on the conduct of hostilities (distinction, proportionality and precautions) and on the respect of protected persons (the wounded, sick and shipwrecked, POWs and protected civilians) studied above largely apply, with some particularities, to naval warfare. When targets on land are attacked, even all of the detailed rules on the protection of the civilian population against the effects of hostilities apply.[731] The law of naval warfare also applies to aircraft over the sea, although the application of rules regulating search and visit is impossible without a previous diversion to an airport controlled by the captor.

**8.419** When it comes to hostilities between warships (only warships may exercise belligerent rights at sea) and military aircraft, on the one hand, and enemy and neutral ships at sea, on the other hand, several factors lead to different rules than for land warfare. First, all States may encounter each other on the high seas, and navies have often used the high sea globally, especially for the interdiction of enemy's trade and neutral trade with the enemy. Therefore, *jus ad bellum* and the law of neutrality have a greater impact on the law of naval warfare than

731 See P I, Art 49(3).

on the law of land warfare, and the strict separation between *jus ad bellum* and *jus in bello* is relativized in naval warfare. The right to self-defence and the possibility of neutral ships turning into legitimate targets are thus issues governed by the law of naval warfare. Similarly, in contrast to land warfare, it is in my view impossible in naval warfare to separate the *jus ad bellum* and *jus in bello* aspects of the law of neutrality. Indeed, conducting hostilities in neutral territorial waters violates the law of naval warfare,[732] while attacking neutral territory is not a violation of IHL. Second, although economic warfare gives belligerents at sea more latitude than on land as 90 per cent of all international freight is transported by ships, the commerce of and to neutral countries and their communications are also important factors that must be taken into account at sea.

### 8.8.2 Sources

Except for Convention II, which protects in particular the shipwrecked and hospital ships, treaties applicable to naval warfare are more than 100 years old, and it is not clear whether their rules still apply. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which is viewed by Western navies as authoritative, is therefore particularly useful as a restatement of the law that applies today.

**8.420** Most international instruments governing the naval warfare were adopted in the second half of the nineteenth or the early twentieth century. The Paris Declaration of 1856 respecting Maritime Law abolished privateering and established rules for blockades as well as prizes. Eight of the 1907 Hague Conventions, a few of which still have some relevance today (albeit subject to controversy), tackle different aspects of naval warfare: Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships; Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War; Hague Convention (XI) relative to Certain Restrictions with regard to the Exercise of Capture in Naval War; and Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.[733] However, it became clear during various subsequent conflicts that the rules governing naval warfare had become in many respects obsolete. The 1936 London Protocol[734] stipulated

732 See San Remo Manual, para 15.

733 For the text of all these treaties, see ICRC, 'Treaties, States Parties and Commentaries' <https://ihl-databases.icrc.org/ihl> accessed 7 August 2018.

734 'Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930' (6 November 1936) (London Submarine Protocol), reproduced in (1937) 31 AJIL 137.

that submarines were bound by the same rules as surface ships, but no belligerent complied with this rule in World War II. In 1949, Convention II, a revised codification treaty, covered only the protection of the wounded, sick and shipwrecked as well as hospital ships.

**8.421** Facing this normative void, experts and high-ranking government officials from 24 countries convened several times between 1987 and 1994 at the International Institute of Humanitarian Law in San Remo to draft the San Remo Manual.[735] The Manual is a non-binding document modelled on its ancestor, the Oxford Manual,[736] and it contains laudable clarifications of the rules currently applicable to naval warfare. Its main virtue is that it explicitly combines developments in international law that occurred after World War II, in particular in IHL (such as the 1949 Conventions and 1977 Protocol I), with the traditional rules of naval warfare. It recalls that the key legal principles governing war on land are also applicable to naval warfare. Importantly, it adapted the concept of 'military objective' to the specificities of naval warfare. The Manual also deals with certain problems specific to maritime hostilities. Specifically, it contains detailed provisions on the use of certain weapons (namely, mines and torpedoes) and addresses the interaction between ships and aircraft as well as distinctions between different kinds of maritime zones reflective of developments in the law of the sea after the adoption of the UN Convention on the Law of the Sea in 1982. The Manual acquired considerable credibility very quickly, and the navy manuals of Western States refer to it as an authoritative restatement of the law.[737] However, as its declared purpose was limited to restating the (then) existing law, it could not adapt that law in light of important technological and commercial developments.

### 8.8.3 Zones in which naval warfare may occur

> Belligerents may conduct naval warfare not only in their territorial and internal waters but also on the high seas as well as in the contiguous zones and the exclusive economic zones of neutral States.

735 See San Remo Manual.

736 'The Laws of Naval War Governing the Relations Between Belligerents: Manual Adopted by the Institute of International Law' (Oxford Manual of Naval War) (9 August 1913), reproduced in Schindler and Toman, above note 708, 1123–38.

737 See, e.g., UK Military Manual, vii; US Departments of Navy and Homeland Security, 'The Commander's Handbook on the Law of Naval Operations' (2007) <www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf> accessed 7 August 2018.

**8.422** Acts of naval warfare may be conducted not only in the territorial sea and internal waters of the parties to the conflict but also on the high seas. It may even be conducted in zones in which neutral states have limited jurisdiction, namely, their contiguous zones and exclusive economic zones. In such zones, belligerents should nevertheless have due regard for the economic rights of neutral States. Acts of naval warfare, however, are prohibited in a neutral State's internal, territorial or, if applicable, archipelagic waters.[738] Belligerents nonetheless have the right to innocent passage through neutral straits and archipelagic waters.[739]

### 8.8.4 The protection of the shipwrecked

> The shipwrecked must be respected, protected and collected after each engagement, and then cared for.

**8.423** As mentioned above, the shipwrecked benefit from the same protective regime as the wounded and sick[740] except for to two major differences: the obligation to search for wounded, sick and shipwrecked at sea applies only 'after each engagement' (in contrast to 'at all times' on land[741]), and it is also subject to more extended military and security considerations (such as protecting the ship potentially engaged in the search) than on land.[742] A similar obligation covers the search for the dead that is now facilitated by certain modern technologies but which is limited by the fact that sunken warships are war graves that must be respected.[743] Search and rescue craft (including aircraft) rescuing military personnel in sea areas controlled by the enemy are only protected if they act with the consent of that enemy.[744]

### 8.8.5 Hospital ships

> Hospital ships specially and solely equipped for that purpose and notified to the adversary must be respected.

738 San Remo Manual, paras 10, 12.
739 Ibid., paras 23–33.
740 See MNs 8.004–8.010.
741 GC I, Art 15.
742 GC II, Art 18; Updated ICRC Commentary GC II, paras 1635–58.
743 See Updated ICRC Commentary GC II, paras 1686–7. For a detailed discussion, see Wolff Heintschel von Heinegg, 'Belligerent Obligations Under Article 18(1) of the Second Geneva Convention: The Impact of Sovereign Immunity, Booty of War, and the Obligation to Respect and Protect War Graves' (2018) 94 ILS 127.
744 Natalino Ronzitti, 'Naval Warfare' (2009) in MPEPIL, para 27.

**8.424** Enemy, neutral and private hospital ships 'built or equipped…specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them' must be respected and protected 'on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.'[745] Presently, only the US, Russia and China possess altogether six hospital ships.[746] The ICRC is exploring how feasible it would be to have 'an ICRC hospital ship',[747] but such a ship would not qualify as a hospital ship protected by Convention II because it would neither depend on a party to the conflict nor on a neutral State.[748]

**8.425** Hospital ships lose their special protection in cases and under conditions similar to those applicable to other medical transports.[749] The only controversial condition resulting in the loss of protection concerns the use of a 'secret code'. Article 34(2) of Convention II stipulates that hospital ships 'may not possess or use a secret code for their wireless or other means of communication.' Technological developments, however, have made this prohibition obsolete as modern communication technology is always based on some form of encryption. According to the equally authentic French text of the provision, it may be argued that the prohibition applies only to transmission and not to reception devices. There are also good arguments, including based upon military manuals of great naval powers, to interpret the provision as merely prohibiting any intelligence transmission or transmission for any other purpose incompatible with the mission of a hospital ship.[750] Strictly legally speaking, however, this would require an amendment of Convention II.[751]

### 8.8.6 Legitimate targets of attacks and protected ships

Enemy warships and auxiliary ships may be attacked at all times unless they surrender. Even enemy and neutral civilian merchant ships may be destroyed in certain circumstances. This is not only the case when they turn into military objectives, but also if they resist visit and search or capture, do not stop or divert from their route notwithstanding an order to do so, sail under an enemy convoy or are escorted by warships or military aircraft. Hospital ships, coastal rescue

745 GC II, Art 22.
746 Updated ICRC Commentary GC II, para 1928, fn 4.
747 Peter Maurer, 'Protection Considerations in the Law of Naval Warfare: The Second Geneva Convention and the Role of the ICRC' (2016) 98 IRRC 635, 636.
748 GC II, Art 22, as correctly interpreted by Updated ICRC Commentary GC II, para 1947; GC II, Art 25.
749 See MNs 8.027–8.029.
750 San Remo Manual, para 171; Updated ICRC Commentary GC II, paras 2393–403.
751 Wolf Heintschel von Heinegg, 'Maritime Warfare' in Academy Handbook, 157–9.

craft and other medical transports, cartel vessels, ships engaged in local trade and coastal fishery enjoy special protection, but even they may lose that protection in certain circumstances.

**8.426** Enemy warships and auxiliary ships may be attacked at all times unless they surrender. Today, however, it is unclear how surrender can occur over the horizon (that is, when an enemy is unable to see the ship due to the earth's curvature). Enemy and neutral merchant ships may be attacked if they constitute military objectives. This is certainly the case if merchant ships engage in belligerent acts on behalf of the enemy or are incorporated into or otherwise assist the enemy's intelligence or communication system. According to the San Remo Manual, however, such ships lose protection under certain circumstances in conformity with the traditional law of naval warfare that would not turn an object into a military objective in the law of land warfare, namely: if they resist visit and search or capture, do not stop or divert from their route notwithstanding an order to do so, sail under an enemy convoy or are escorted by warships or military aircraft.[752] In land warfare, those circumstances could at best raise suspicion and may justify the use of force according to a law enforcement paradigm. The fact that those conditions are similarly formulated for both enemy and neutral merchant ships reduces but does not eliminate the importance of whether a ship belongs to the enemy.[753] The starting point for determining the country to which a vessel belongs is its flag, but this criterion now has little substantive significance due to the changed structure of the international commercial shipping industry,[754] in particular the emergence of convenience flags. Therefore, it is important that a vessel's enemy character may also be determined by ownership, charter or other criteria.[755]

**8.427** Ships enjoy special protection that may only be lost in certain circumstances include hospital ships, coastal rescue craft and other medical transports, cartel

752 Compare San Remo Manual, paras 60 and 67.

753 However, the fact of 'being armed to an extent that they could inflict damage to a warship' makes only enemy vessels liable to attack (ibid., para 60(f)), while carrying military materials (for the enemy) makes a neutral merchant vessel only subject to attack 'if it is not feasible for the attacking forces to first place passengers and crew in a place of safety' (ibid., para 67 (f)). The US Law of War Manual, paras 13.5.2. and 15.14.2., establishes more pronounced differences between neutral and enemy merchant ships.

754 Steven Haines, 'War at Sea: Nineteenth-century Laws for Twenty-first Century Wars?' (2016) 98 IRRC 419, 438–9.

755 San Remo Manual, paras 112–7.

vessels, ships engaged in local trade and coastal fishery and some other protected vessels.[756]

### 8.8.7 Means and methods of naval warfare

#### a. Mines and torpedoes

> Mines must remain under the control of the belligerent using them and torpedoes must become harmless if they miss their target.

**8.428** While the rules of the 1907 Hague Convention VIII are outdated in that they cover only automatic submarine contact mines, the underlying principle reflects customary law: mines must remain under the control of the belligerent laying them (unanchored contact mines are therefore prohibited) and they must become harmless within a fixed period of time after control over them is lost. Torpedoes must also become harmless if they miss their target.

#### b. Submarines

> As a matter of law, submarines must respect the same rules as surface vessels.

**8.429** Under the 1936 London Protocol, submarines are subject to the same rules as surface vessels,[757] but this is unrealistic for the rules on visit and search discussed hereafter because it would virtually rule out the use of submarines for commerce raiding. The Nuremberg Tribunal, taking into account Allied practice in the Pacific and Allied militarization of merchant shipping, did not dare to convict German Admiral Dönitz for unrestricted submarine warfare.[758]

#### c. Blockades

> Under the traditional law, a belligerent may prevent all enemy imports and exports by declaring a blockade if such a blockade is actually enforced. Today, however, it is accepted that some humanitarian exceptions apply.

756 Ibid., paras 47–52; GC II, Arts 22, 34–35.
757 San Remo Manual, para 45.
758 *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 303–6.

**8.430** A naval blockade is an old-fashioned[759] institution preventing both enemy and neutral vessels as well as aircraft from entering enemy ports.[760] This is lawful even though export goods constitute neither military objectives nor contraband that might be confiscated from neutral merchant ships under the rules discussed below. While the enforcement of such a blockade through acts of violence would be unlawful in land warfare, it is perfectly legal under the law of naval warfare. A blockade must be officially declared and notified to the adversary, and it must be effective to be valid. It must be implemented impartially towards the vessels of all States, and its sole objective may not be to starve the civilian population on land.[761] Today, it is also argued that a blockade is unlawful if the anticipated effect upon the civilian population is excessive in relation to the concrete and direct military advantage anticipated.[762] Furthermore, if there is a shortage of food or other essential items in the blockaded area, the belligerent maintaining the blockade must authorize the passage of relief consignments. However, it may prescribe the route (possibly through land) of such consignments, exercise its right to visit and search and insist on impartial monitoring of the distribution.[763]

**8.431** If a vessel breaches the blockade, it is subject to capture and confiscation.[764] In case it resists capture, it may be attacked after a prior warning,[765] although a civilian vessel breaching a blockade is normally not a military objective under general rules of IHL.

### d. Special rules on perfidy

It is not unlawful for a warship to fly a false flag just before it attacks a ship.

**8.432** Unlike in land warfare, deception and flying a false flag is lawful for a warship, provided that the belligerent shows its own flag before opening fire.[766] Warships may even camouflage themselves as merchant vessels to attract the

759 In 1999, several NATO States considered that a blockade of the Montenegrin port of Bar was not a lawful option and would have raised too much controversy. See Haines, above note 754, 428.
760 See San Remo Manual, paras 93–104.
761 See P I, Arts 49(3) (first sentence) and 54(1). San Remo Manual, para 120(a).
762 San Remo Manual, para 102(b).
763 Ibid., para 103. See also GC IV, Art 23; P I, Art 70.
764 See San Remo Manual, para 98.
765 Ibid., paras 60(e), 67(a) and 98.
766 This is explicitly allowed in P I, Art 39.

confidence of enemy submarine commanders who surface to visit and then attack the submarine.[767]

### e. Exclusion zones?

Free-fire zones are unlawful.

**8.433** It is controversial whether and under what circumstances exclusion zones are lawful.[768] In any event, exclusion zones cannot constitute free-fire zones in which a belligerent would be absolved from its obligation to positively identify legitimate targets. The same rules of the law of naval warfare apply both inside and outside the exclusion zone.[769]

## 8.8.8 Prize law

Economic warfare may be directed at both enemy and neutral civilian merchant ships. Enemy ships may be captured and confiscated, theoretically after a decision by a prize court of the captor. Neutral merchant ships may be captured (and confiscated by a prize court) if it is determined that they carry contraband during a visit and search or by other means. Goods that are ultimately destined for territory under the control of the enemy and that may be susceptible for use in armed conflict may be listed by a belligerent as contraband.

**8.434** The old-fashioned prize law implements the law on naval economic warfare developed during the seventeenth and eighteenth centuries between European maritime powers, which allowed belligerents to target each other's trade but also attempted to protect the trade of neutrals. Neutral ships, however, lost a lot in this interest struggle. The law as it stood before World War I, which allegedly still applies, allows belligerents to capture, confiscate and in certain circumstances destroy enemy merchant vessels. It also permits them to search, visit and deviate neutral merchant vessels, but belligerents can only capture neutral merchant ships if they carry contraband. Confiscation in both cases must be decided by a tribunal of the confiscating State, although the last decision of a prize court appears to have occurred in 1950.[770] Indeed, the tendency during the

767 Ronzitti, above note 744, para 23.

768 See Heintschel von Heinegg, above note 751, 168–9.

769 San Remo Manual, paras 105–7. At least in its conception, the exclusion zone declared by the UK in the 1982 Falkland/Malvinas conflict was therefore an unlawful 'free-fire zone'. See Haines, above note 754, 429, fn 35.

770 Prize Court of Alexandria, Egypt, *The Flying Trader* (2 December 1950), reproduced in (1950) 17 Intl L Rep

two World Wars was increasingly to destroy rather than to capture enemy and neutral merchant ships, in particular through unrestricted submarine warfare.

### a. The right to capture and destroy enemy merchant vessels

**8.435** Enemy merchant vessels may always be captured (that is, command over them may be assumed by the adversary) even without a need to intercept, visit and search them.[771] Ownership, however, passes to the capturing State only after a judgment by a prize court of the capturing State. Goods may also be confiscated if they are enemy goods or even neutral contraband (see hereafter), while other neutral goods must be theoretically returned to the owner or the owner must be indemnified. If there is, according to the circumstances, no chance to bring the ship to a belligerent State's own port or to an allied port, enemy merchant ships may be destroyed but only after the crew and passengers have been brought to safety and the ship's papers have been safeguarded so that a prize court can adjudicate ownership of the ship. Captured crew members of enemy merchant ships have POW status if they 'do not benefit [from] more favourable treatment under…international law'.[772]

### b. The right to visit, search and capture neutral merchant vessels

**8.436** Neutral merchant vessels may be captured if it is determined that they carry contraband by a visit and search or by other means. Contraband are goods susceptible for use in armed conflict that are ultimately destined for territory under the control of the enemy (even if as part of a 'continuous voyage' after unloading in a neutral port).[773] A belligerent must publish a list that defines what constitutes contraband. Free goods (that is, goods not on the contraband list) may neither be captured nor confiscated and must be returned to the owner.

**8.437** Neutral merchant ships may also be captured if they are on a voyage especially undertaken with a view to transporting members of the enemy's armed forces; are operating directly under enemy control, orders, charter, employment or direction; present irregular or fraudulent documents; lack necessary documents or destroy, deface or conceal documents; violate regulations established by a belligerent within the immediate area of naval operations; or are breaching or attempting to breach a blockade.[774]

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440. In 1987, Iran adopted legislation on prizes, but it never established a prize court. See George Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (Kegan Paul 1998) 609–10.

771 San Remo Manual, para 135.

772 GC III, Art 4(A)(5).

773 San Remo Manual, para 148.

774 Ibid., para 146.

**8.438** Diversion is accepted as an alternative to a visit and search if the latter is impossible or too dangerous. Neutral merchant ships, however, are not subject to visit and search if they are accompanied by a neutral warship and certain conditions are fulfilled.[775] In the case of capture, crew and passengers who are neutral nationals must be released and repatriated.

**8.439** With the exception of passenger vessels carrying civilians, neutral merchant ships may be destroyed if (1) all of the conditions for the destruction of an enemy merchant vessel mentioned above are fulfilled and (2) there is 'entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released'.[776] Destruction of a vessel for the mere fact of carrying contraband is only permitted if 'the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo'.[777] Here too, the destruction must be later adjudicated by a prize court.

### 8.8.9 Many traditional customary rules are outdated by technological and economic developments

Many rules of the traditional law of naval warfare no longer correspond to technological developments, the commercial realities of the shipping industry and humanitarian imperatives.

**8.440** Despite efforts made by the San Remo Manual to update the law of naval warfare, many of its aforementioned and other traditional rules are outdated because of technological or commercial developments as well as, in my view, changes in moral perception. Would the world still accept during a conflict between China and the US systematic attacks worldwide by the former on US commercial shipping and neutral merchant vessels carrying contraband for the US? Would it accept the deliberate targeting of Chinese and neutral civilian-manned merchant ships by the US throughout the world? Would it accept in a conflict between Iran and Saudi Arabia that Iran captures or destroys all ships exporting oil from Saudi Arabia after having declared a blockade on Saudi ports? Would a ship registered in Antigua and Barbuda (which has one of the largest merchant fleets worldwide) be recognized as neutral in such a conflict? Even when the goods it transports have no connection to Antigua and Barbuda? How can a ship carrying 22 000 cargo containers be visited and searched

775 Ibid., para 120.
776 Ibid., para 151.
777 Ibid.

on the high seas? To which ports could a belligerent divert such a ship to search it? How can a hospital ship communicate without using a code? Why should a neutral Filipino sailor working as crew on a ship registered in a belligerent State be interned as POW without any individual procedure until the end of active hostilities? How can a submarine visit and search a merchant ship and bring its crew to safety? Why should it be unlawful that an underwater robot or an unmanned seagoing vehicle[778] attacks a warship? All of these questions refer to rules of the traditional law of naval warfare, and most of them have been inspired by concerns expressed by a genuine military naval expert.[779]

## 8.9 THE LAW OF AIR WARFARE

**8.441** Air warfare has evolved considerably in line with technological advances. Initially used for reconnaissance at the end of the nineteenth century and then gradually as a powerful strike force during the twentieth century, air power has more recently been a vital instrument in the 'zero-casualty' wars conducted by the US and its allies, which is a doctrine aimed at eliminating war on land or subordinating it to air strikes. The main examples of this doctrine are the Gulf War in 1991, strikes against the Federal Republic of Yugoslavia in 1999 and, to a certain extent, air strikes in Afghanistan in 2001 to 2002 as well as in Iraq in 2003. Although technological developments, such as electronic means of target recognition and evaluation, 'intelligent' munitions or unmanned aerial vehicles, may promote respect for the traditional principles of IHL, they can also give the individuals who must apply the rules an illusion of diminished responsibility to respect IHL. Nonetheless, in contrast to naval warfare, the problems air warfare poses have far more to do with the traditional concepts of the laws of war on land, in particular target selection, the proportionality rule and precautions in attack, than with the specificities of the air environment.

### 8.9.1 Principles

> The rules on land warfare studied above apply to air attacks against targets on land or air attacks that may otherwise affect civilians or civilian objects on land.

778 In 2016, the US Navy launched Sea Hunter, a ship that can sail without a crew and without remote control for 70 days. See Vincent Bernard, 'Editorial – War and Security at Sea: Warning Shots' (2016) 98 IRRC 383, 387.

779 See Haines, above note 754, 435–40; Steven Haines, 'Who is Shipwrecked?' in Academy Commentary, 776–7. Steven Haines is a retired UK naval commander who has chaired the editorial board of the UK Military Manual, co-authored its chapter on 'Maritime Warfare' and written the Royal Navy's maritime strategic doctrine.

Attacks against targets in the air are subject to the same principles, but the rules are modified in some respects to account for the danger of surprise posed by apparently inoffensive civilian aircraft.

**8.442** Only attacks against targets in the air and the protection of aircraft are governed by a specific IHL on air warfare. Attacks on targets on land as well as those that may otherwise affect civilians or civilian objects on land, both of which have the greatest humanitarian consequences, are governed by the detailed rules regarding war on land outlined above. Indeed, the rules studied previously on the protection of the civilian population against the effects of hostilities have even been mainly developed and discussed today in the context of aerial bombardments. Protocol I explicitly clarifies its application to such circumstances,[780] but it must also be true for customary law for several reasons. First and foremost, modern technology makes attacks on a given target by the air force interchangeable with land-based missiles or artillery. Second, during the 1974 to 1977 Diplomatic Conference that discussed and adopted Protocol I, no State questioned that the rules of Protocol I should cover at least objectives 'on land' regardless of the origin of the attack; the disagreements instead focused exclusively on whether they should apply *only* to such attacks.[781] Third, most discussions on the law of the conduct of hostilities in recent years by States, NGOs, the Prosecutor of the ICTY[782] and authors refer mainly to aerial attacks (including, most recently, by drones), while no post-1960 military manual, document or author claims that different rules apply to attacks not involving aircraft. For instance, the US Department of Defense Report on the Conduct of the 1991 Gulf War[783] mainly discusses targeting in relation to cases that actually consisted of aerial bombardments, but it makes no distinction between those air attacks or other attacks coming from land-based missiles or artillery. As for the standards it applies, it refers exclusively to the law of land warfare, including Article 23(g) of the Hague Regulations, and it applies as well as criticizes certain provisions of Protocol I without differentiating between air and land warfare.

**8.443** However, the law of naval warfare applies when an aircraft flies over the open sea or is engaged in combat with naval forces. As seen above, this body of law is

780 See P I, Art 49(3).

781 See Official Records, above note 587, vol XIV, 13–25, 85, and, in particular, ibid., vol XV, 255.

782 See Online Casebook, Federal Republic of Yugoslavia, NATO Intervention.

783 See Online casebook, United States/United Kingdom, Report on the Conduct of the Persian Gulf War.

largely restated in the San Remo Manual, including by reference to rules specific to aircraft that laid the ground for the restatement of the law on targets in the air over land in the HPCR Manual, such as on the protection of civilian aircraft[784] and in particular civilian airliners,[785] medical aircraft,[786] the determination of the enemy character of an aircraft[787] or the meaning of exclusion as well as no-fly zones.[788] Due to the fact that many features of the air environment are more similar to those at sea than to those on land, there is a certain tendency to solve problems for which the law of air warfare does not foresee a specific solution to by analogy to the law of naval warfare.[789] Thus, a purely aerial blockade is admissible to prevent aircraft from landing in enemy-controlled territory subject to rules similar to those applicable to naval blockades.[790]

**8.444** As to warfare against targets in the air, which is the sole object of this sub-chapter, it is uncontroversial that the same 'humanitarian principles of unchallenged applicability [apply as in land warfare, including] the fundamental prohibition of direct attack upon non-combatants.'[791] In my view, this therefore necessarily also includes the principle of distinction and the prohibition of indiscriminate attacks. 'Whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of air warfare.'[792] One of the realities of the air environment, which has received increased attention since the terrorist attacks of 11 September 2001, is that 'the danger of surprise on the part of apparently inoffensive civil aircraft will probably impose upon the latter special restraints as the price of immunity.'[793]

### 8.9.2 Sources

Except for the rules in the Conventions on medical aircraft that have been revised in important respects by Protocol I, no binding treaty applies to warfare against targets in the air. The applicable rules, however, have been restated in the HPCR Manual on International Law Applicable to Air and Missile Warfare.

784 San Remo Manual, paras 62–4, 71–7, 125–34, 141–5, 153–8.
785 Ibid., para 56.
786 Ibid., paras 174–83.
787 Ibid., paras 112–7.
788 Ibid., paras 105–8.
789 See, e.g., the rules on visit, search and capture outlined in ibid., paras 118–58; see also HPCR Manual, Rules 134–46.
790 See HPCR Manual, Rules 147–59; see also MNs 8.430–8.431.
791 Oppenheim, above note 454, 520.
792 Ibid.
793 Ibid., 530.

**8.445** International instruments are not specific to warfare against targets in the air; at best, they contain rules covering such issues. Due to the continuous and rapid technological progress being made in the area of aviation, the key role played by air forces in present-day warfare and the economic importance of this sector to the armaments industry,[794] it has been impossible to adopt treaty provisions specifically governing air warfare.

**8.446** The legal instruments specifically dealing with the subject of air warfare are thus few in number and limited in effect. The Hague Declaration of 1907[795] prohibited the discharge of projectiles and explosives from balloons or other similar new methods at a time when air technology was not sufficiently advanced to permit the precise targeting of objectives to be destroyed. It is not seen today as prohibiting aerial bombardments. After World War I, the Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (commonly referred to as the Hague Rules)[796] were drafted. Although States never ratified those rules, all of the Hague Rules that are not outdated by technological developments are today considered to be customary law. Certain rules defined in that instrument – such as the distinction between military aircraft and other aircraft as well as the prohibition of bombing targets other than military objectives – remain crucial. Civil aviation is protected in time of peace by conventions banning the capture or destruction of civilian aircraft and defining a number of offences against civilian aircraft that may occur on board or in airports.[797] However, the extent to which these conventions apply in times of war is controversial.

**8.447** Only the protection of medical aircraft has been regulated by the 1949 Conventions in a very conservative way that requires consent by the enemy for protection.[798] Protocol I has relaxed this regime, but it is still very restrictive.[799] Other than this, an international instrument specific to air warfare has not been adopted since 1923, and a binding treaty has never entered into force. Therefore, similar to what the San Remo Manual did for naval warfare, a group of experts tried to restate the law applicable to air warfare in the HPCR Manual,[800] tak-

794 Weapons used by and against aircraft are said to represent 90 per cent of the total trade in war materials. Javier Guisandez Gomez, 'The Law of Air Warfare' (1998) 80 IRRC 347.

795 [Hague] Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (18 October 1907) 1 US Treaty Series 739.

796 Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (Drafted by a Commission of Jurists at the Hague, 1922–1923) [Hague Rules].

797 For the details on these conventions, see the International Civil Aviation Organization's website <http://www.icao.int> accessed 7 August 2018.

798 GC I, Arts 36–37; GC II, Arts 39–40; GC IV, Art 22.

799 P I, Arts 24–31.

800 HPCR Manual.

ing into account new technological developments and the practice of major air forces. The important role played by representatives of major air forces in creating this manual, however, posed more problems than the role of representatives of major navies in drawing up the San Remo Manual because air warfare affects civilians in countries without major air forces much more than naval warfare affects civilians in countries without navies. The HPCR Manual nevertheless reflects a consensus between military and humanitarian experts, even though in many cases it was only possible to codify the least common denominator, in particular in the crucial area of protecting the civilian population on land against air attacks. Nonetheless, it has led to genuine progress in clarifying the law applicable to attacks against targets in the air.

### 8.9.3 Legitimate targets of attack and protected aircraft

#### a. Surrender by military aircraft

It is controversial how military aircraft can surrender.

**8.448** Military aircraft may obviously be attacked, but combatants may no longer be attacked if they surrender. However, there is no accepted mode by which the aircrew of a military aircraft in flight may express their intent to surrender. The only safe course of action is for them to abandon the aircraft and parachute to the ground.

#### b. Medical aircraft

Medical aircraft are protected against attacks. Except with enemy consent, they may neither be used for the search and rescue of military personnel within areas of combat nor fly over areas controlled by enemy forces. If medical aircraft fly over other areas where consent is needed, they do so at their own risk in the absence of such consent. In my view, however, this does not mean that they may be attacked, but only that the enemy may not be aware that they are protected or may suspect that they have lost protection.

**8.449** The Conventions' rules protecting medical aircraft, which were greatly improved upon and developed by Protocol I, are among the very few IHL treaty

rules on aircraft.[801] The HPCR Manual restates these rules as customary law equally binding upon States that are not parties to Protocol I.[802]

**8.450** Under those rules, medical aircraft used exclusively to transport the wounded and sick as well as medical personnel and material may not be attacked. As with all medical units, they lose protection if they commit acts harmful to the enemy outside of their humanitarian function, but only after a warning and after a time limit to redress the situation has remained unheeded. Except with enemy consent, they may not be used for the search and rescue of military personnel within areas of combat, and they are prohibited from flying over enemy-controlled territory. When flying over areas controlled by the enemy with its consent, they must comply with any order to land for inspection.

**8.451** When flying over other areas where consent is needed, such as those not controlled by friendly forces or even contact zones that friendly forces physically control, they must obtain the enemy's prior consent. In the absence of such consent, medical aircraft fly at their own risk. However, in my view, this does not mean that they may be attacked but rather that the enemy may not be aware that they are protected or may even suspect that they have lost protection.

**8.452** Medical aircraft may carry only the wounded, sick or shipwrecked; medical as well as religious personnel; and medical equipment and supplies. They may neither collect nor transmit intelligence information, and they may not possess equipment for this purpose. However, unlike for hospital ships, the mere possession or employment of encryption equipment used solely to facilitate navigation, identification and communication consistent with their humanitarian mission is not forbidden. They may also be equipped with deflective means of defence, such as chaff or flares, and they may also carry light individual weapons necessary to protect the aircraft, the medical personnel and the wounded, sick or shipwrecked on board as well as small arms and ammunition collected from the wounded, sick or shipwrecked that have yet to be turned over to the appropriate authority.

### c. Civilian aircraft

Civilian aircraft are protected against attacks but may be diverted for a visit and search like merchant ships at sea. They lose protection if they become military

801 See GC I, Arts 36–37; GC II, Arts 39–40; GC IV, Art 22; P I, Arts 24–31.
802 See HPCR Manual, Rules 71–87.

objectives. In my opinion, while refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception does not automatically justify an attack, such circumstances are a strong indicator for the existence of other factors that make the aircraft a military objective.

**8.453** The peculiarities of the air environment have also resulted in special rules on the interception, visit and search of civilian aircraft. While these rules are based on those applicable to the sea, they take into account that an aircraft, unlike a ship, cannot be boarded while flying.[803]

**8.454** The Hague Rules defined circumstances in which enemy civilian aircraft lose their protection against attack very broadly due to the more rudimentary means of verification and communication existing at the time of their adoption. They stated in particular that enemy civilian aircraft 'are exposed to being fired at' when flying within the jurisdiction of the enemy; in the immediate vicinity of such jurisdiction and outside that of their own country; in the immediate vicinity of the military land and sea operations of the enemy; or even within the jurisdiction of their State if they do not land at the nearest suitable point when an enemy military aircraft is approaching.[804] The conditions for neutral civilian aircraft losing protection were also formulated very broadly.[805] Today, the HPCR Manual – the rules of which are confirmed by several military manuals but do not provide a lot of precision – lists the circumstances that make enemy and neutral civilian aircraft lose protection.[806] They may also give the erroneous impression that such circumstances justify attacks, while, in my view, they only provide indicators for analysing the decisive criterion, that is, whether the aircraft is a military objective. This interpretation clearly results from the indication in the relevant rules that those circumstances 'may' render the aircraft a military objective. As we will see below, the air environment implies that an attacker has less possibility to verify the true character of an unknown aircraft, and the defender therefore has additional passive precautionary obligations. The possible effective contributions to military action listed in the HPCR Manual that may turn a civilian aircraft into a military objective include: hostile actions in support of the enemy; attacking persons or objects on land or sea; being

803 See ibid., Rules 134–46.

804 See Hague Rules, above note 796, Arts 33–34.

805 Ibid., Arts 30, 35, 50–51.

806 See HPCR Manual, Rules 27 (enemy civilian aircraft); 63 and 68 (civilian airliners); and 174 (neutral civilian aircraft).

used as a means of attack; engaging in electronic warfare; providing targeting information to enemy forces; facilitating the military actions of the enemy's armed forces, such as transporting troops, carrying military materials or refuelling military aircraft; assisting the enemy's intelligence gathering system; refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture; or clearly resisting interception.[807] In my assessment, however, refusal to comply with military orders as such does not justify an attack, but it is a strong indicator of the existence of other factors making the aircraft a military objective.

#### d. A special regime for civilian airliners

> Civilian passenger airliners benefit from enhanced protection compared to other civilian aircraft.

**8.455** As in the San Remo Manual with regard to passenger ships, the HPCR Manual foresees a special protection regime for civilian airliners, which are civilian aircraft engaged in carrying civilian passengers in scheduled or non-scheduled service, because of the enormous risks posed to innocent passengers in areas of armed conflict.[808] Particular precautions must be taken to avoid mistakes in identification. In cases of doubt, civilian airliners must be presumed not to make an effective contribution to military action. Even if a civilian airliner becomes a military objective by making an effective contribution to the enemy's military action, it may be attacked only if the proportionality rule is respected; diversion for landing, inspection and possible capture is not feasible; and no other method is available to exercise military control over the airliner.[809]

### 8.9.4 Particular zones

> Entry of an aircraft into no-fly zones over belligerent territory may be seen as an indicator of hostile intent. Air exclusion zones established over the high seas are not free-fire zones. Warning zones warn aircraft not to approach military units on the ground or at sea.

807 HPCR Manual, Rule 27.
808 Ibid., Rules 58–61.
809 Ibid., Rule 68.

**8.456** No-fly zones are established and enforced by a belligerent within its own or in enemy national airspace. An aircraft entering such a zone is 'liable to be attacked'.[810] However, this does not mean that such a zone is a 'free-fire zone' but only that presence in such a zone may be seen as an indicator of hostile intent. In any case, all feasible precautions must be taken to spare civilians.

**8.457** Air exclusion zones may be established over the high seas as it constitutes international airspace. While their establishment may be seen as a warning, the same rules apply, as in naval warfare, inside and outside such zones.[811]

**8.458** It is furthermore the practice of belligerents to establish warning zones, so-called 'defence bubbles', around military ground units or naval units sailing at sea to keep aircraft at a distance from the force to be protected.[812] While any aircraft entering such a zone is at increased risk of defensive action, it does not become a legitimate target automatically, in particular in the absence of a prior warning.[813]

**8.459** Although a blockade is obviously not a zone, it may have, by analogy with the old-fashioned rules of naval warfare, as a consequence that an aircraft breaching it that resists diversion and capture may be attacked after a prior warning[814] even though it does not constitute a military objective (such as aircraft exporting goods).

### 8.9.5 Precautions in air warfare

As it is more difficult to identify protected aircraft mid-flight than objects in land warfare, the law of air warfare imposes additional and more important passive precautionary obligations, such as requiring the filing of flight plans; prohibiting deviations from those plans and from air traffic routes; and requiring aircraft to avoid areas of military operations, to comply with instructions from military forces and to avoid circumstances under which they may be attacked.

Before an attack, reasonable active precautions to avoid civilian losses must be taken. Even unidentified aircraft may not be attacked if the attacker perceives that they are protected. Warnings prior to an attack or military activities potentially hazardous to protected aircraft are encouraged. In my view, precautions must also cover the risk that an attacked aircraft falls on inhabited areas.

810 Ibid., Rule 110.
811 Ibid., Rule 107.
812 Ibid., Rule 106(b); Yoram Dinstein, 'Air Warfare' (2015) in MPEPLIL, para 65.
813 Dinstein, ibid.
814 HPCR Manual, Rule 156.

**8.460** Due to the danger of surprise and the difficulties of identifying civilian aircraft, the HPCR Manual prescribes several passive precautions against attacks that must be taken by civilian aircraft and corresponding active precautions, namely, measures of verification and warning, that must be taken before attacking medical as well as civilian aircraft.[815]

a. Active precautions

**8.461** The only provision of Protocol I's rules protecting the civilian population against the effects of hostilities that is explicitly applicable to attacks against targets in the air obliges belligerents to 'take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects'.[816] The standard of 'reasonable' is different from and allegedly less far-reaching than[817] the general obligation of belligerents to 'take all feasible precautions' in land warfare and, in particular, than the detailed precautionary measures examined above.[818]

**8.462** It is probably due to the specificities of air-to-air warfare, in particular the vulnerability of all persons located inside an aircraft to targeting and the 'speed of modern aircraft [that] is likely to require rapid decision-making relating to identification of their nature as a lawful target',[819] that the only precautionary obligations mentioned in connection with air-to-air warfare relate to verifying that the target is indeed a military objective.[820] Accordingly, even if the enemy fails to take the necessary passive precautions to identify itself, a belligerent may still not attack an aircraft – or must interrupt the attack – if it perceives that the aircraft is protected. Additionally, the HPCR Manual reasserts that any attack against either enemy or neutral civil passenger airliners that have lost their protection would still be unlawful unless it complies with all the rules on precautionary measures.[821]

**8.463** The HPCR Manual also specifies the warning obligation applicable in air-to-air warfare. It encourages warnings prior to an attack as well as prior to any military activity that is potentially hazardous to civilian aircraft, civilian airliners, aircraft granted safe conduct or medical aircraft.[822] Accordingly, belligerents and neutral States must issue a Notice to Airmen (NOTAM) 'providing

815 Ibid., Rules 37–38, 40–41, 55, 57, 70.
816 P I, Art 57(4).
817 ICRC Commentary APs, para 2230.
818 See P I, Art 57(2)–(3); see also MNs 8.330–8.333.
819 HPCR Manual, 157, para 1 commentary to 'Section III. Specifics of attacks directed at aircraft in the air'.
820 Ibid., Rules 40–41.
821 Ibid., Rule 68(d).
822 Ibid., Rules 37–38, 57, 70, 74(b).

information on military operations hazardous to civilian or other protected aircraft and which are taking place in given areas including on the activation of temporary airspace restrictions.'[823]

**8.464** Lastly, air-to-air operations may endanger civilians and civilian objects on land. Military objectives in the air above land perforce fall on land if they are successfully attacked. It is often denied that precautionary measures must be taken in view of this possibility.[824] However, the text of Article 49(3) of Protocol I clearly makes its provisions applicable to 'air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land'. In any case, the proportionality rule and the principle of necessity are of general application, and precautionary measures resulting from those principles must certainly also be taken in this respect by States that are not parties to Protocol I. The obligations to choose appropriate methods of warfare as well as the appropriate target when a choice exists and to verify whether the proportionality rule is respected are particularly relevant. Those planning and deciding an attack on enemy military aircraft may simply often be unable to foresee where such a moving target will actually be hit, and the crew operating an aircraft or a missile often lack sufficient time to evaluate alternatives and only rarely have sufficient certainty that an alternative attack will actually be successful. This is at least the case in generalized IACs.

### b. Passive precautions

**8.465** The HPCR Manual mentions several passive precautions that should be taken by protected aircraft, such as filing their flight plans with the competent air traffic control service, not to deviate from those plans and from air traffic routes, to avoid areas of military operations and to comply with instructions from military forces as well as with applicable NOTAMs.[825] Additional passive precautions can be deduced from the circumstances in which aircraft lose their protection – circumstances that an enemy civilian aircraft must avoid as passive precautions. The HPCR Manual provides a detailed list of situations under which civilian aircraft 'may' lose their protection.[826] In my opinion, as mentioned above, civilian aircraft may only be attacked – even in the listed situations – if they actually constitute military objectives. Nevertheless, civilian aircraft must avoid, as a passive precaution, circumstances that may give the impression that they lost protection.

823 Ibid., Rule 55, which mentions in detail the information that must be provided in a NOTAM.
824 HPCR Manual, 158, para 4 commentary to 'Section III. Specifics of attacks directed at aircraft in the air'.
825 Ibid., Rules 53–54, 56.
826 Ibid., Rules 27 (enemy civilian aircraft); 63 and 68 (civilian airliners); and 174 (neutral civilian aircraft).

# 9

# IHL AND OTHER BRANCHES OF INTERNATIONAL LAW

**9.01** IHL is not the only branch of international law that provides answers to humanitarian problems arising in armed conflicts. Other branches of international law equally apply during armed conflicts. Today, it is no longer possible to divide international law into the law of war and the law of peace. Indeed, many rules that were initially adopted to tackle peacetime issues also apply during armed conflicts. Any lawyer who gives advice, makes arguments or adjudicates cases concerning humanitarian problems must know all of the relevant rules of international law that apply (and not simply the IHL rule) and must also understand their interplay as well as any related controversies in order to determine the answer international law provides to a given problem.

**9.02** IHRL, ICL and international migration law play a particularly important role in this respect, while the role of maritime safety law is still totally unexplored. The sub-chapter on IHRL will deal with its interplay with IHL as well as the key role IHRL plays in the enforcement and development of IHL. The sub-chapter on international migration law equally provides an opportune occasion to discuss the specific IHL rules dealing with refugees and displaced persons. International law on maintaining and re-establishing international peace and security (*jus ad bellum*) raises a different problem: it must be separated from IHL instead of reconciled with it. While this problem needs a detailed explanation, it also presents an opportunity to discuss a pure IHL question, namely, the applicability and application of IHL to (UN) peace forces who are as such a central instrument to enforce *jus ad bellum*. Finally, the international law of neutrality is a special case because some of its rules are in fact pure IHL rules, while the rest of its legal prescriptions must be distinguished from IHL in my view.

**9.03** This chapter obviously cannot provide a full presentation of these other branches of international law; it will only examine their rules and problems that are necessary to discuss their interplay with IHL.

## 9.1 IHL AND IHRL

### 9.1.1 Traditional differences and substantive similarities

Although IHL and IHRL have a different history, sources and structure for most of their rules and while IHL makes many distinctions unknown in IHRL (in particular between civilians and combatants), the substance of their rules leads in most cases to the same result. The most important differences between the two branches concern the admissibility in IHL to use lethal force against legitimate targets and to intern certain persons without trial and sometimes even without any individual procedure. In those respects, IHRL appears to be more protective than IHL, but its rules may not be realistic in an armed conflict.

**9.04** Traditionally, scholars stressed just how different IHL and IHRL are.[1] IHL of IACs is inevitably the starting point of any comparison because the differences between the two branches are less important in NIACs. While IHL is very old, *international* law only began dealing with the protection of the human rights of all individuals who find themselves under the jurisdiction of a State after World War II. Controversies about universality affect IHRL far more than IHL. On the other hand, due to the philosophical underpinnings of IHRL and given that it applies to everyone everywhere, IHRL has a much greater impact on public opinion and international politics than IHL.

**9.05** While IHL applies only in armed conflicts, IHRL was primarily conceived for peacetime situations, although it also applies in times of armed conflict. In contrast to IHRL, which expresses its protective rules in terms of subjective rights of persons, the protection IHL offers to individuals rather results from objective rules of behaviour addressed to States, non-State armed groups and (through both of them) individuals. International law necessarily regulates IACs, and all rules of IHL are conceived as applying universally. On the other hand, regional human rights rules and mechanisms feature greatly in the protection of those rights, and even today human rights are governed mainly by national (constitutional) law. IHRL only provides a framework and minimum requirements with which domestic rules and conduct must comply. IHRL requires much more domestic legislation than IHL to guarantee the protected rights.

1 For an extreme view, see Henri Meyrowitz, 'Le droit de la guerre et les droits de l'homme' (1972) 88 Revue de droit public et de la science politique en France et à l'étranger 1059.

**9.06** Both branches are now largely codified in international instruments. IHL, however, is codified in a largely coherent international system consisting of a relatively few binding universal instruments. IHRL, conversely, is codified in an impressive number of diverse universal and regional instruments, some of which are binding while others are merely exhortatory. Some encompass the whole range of human rights, while others deal only with specific rights and yet others focus only on matters of implementation. These instruments emerge, develop, are implemented and die in a relatively organic and uncoordinated manner.

**9.07** As for their beneficiaries, IHRL protects all human beings without distinction, whereas the traditional approach of IHL protects enemy nationals who are defined as 'protected persons'. When it comes to protecting persons against the effects of hostilities, IHL is based upon the fundamental distinction between civilians and combatants – a distinction that is irrelevant in IHRL. The latter only admits differences in protection based upon the conduct of the individual in question and not upon their status. Many other distinctions in IHL equally influence the determination of its applicable rules, while they play no role in IHRL where, on the contrary, the principle of equality features prominently.

**9.08** If one translates IHL rules into 'protected rights' and compares them to those enshrined in IHRL, it becomes apparent that IHRL covers virtually all issues of human existence, most of which are not regulated by IHL, such as, for instance, the freedom of opinion, freedom of association and the right to social security. In armed conflicts, IHL only covers some human rights, for example, the rights to life, health and personal freedom, that are particularly endangered by armed conflicts and are not, as such, incompatible with the very nature of armed conflicts. IHL protects these few rights through much more detailed regulations that are better adapted to the specific problems arising in armed conflicts than under IHRL, which formulates the same rights in a much more general and abstract manner.[2] In addition, IHL regulates certain problems that are vitally important to ensure protection in armed conflicts and that cannot meaningfully be translated into human rights, such as who may participate in hostilities and who may use the protective emblem. While the strict separation between *jus ad bellum* and *jus in bello* is essential for IHL, this separation does not exist in IHRL. It may be argued that killing a combatant in an unlawful

2 For example, the detailed precautionary measures prescribed by Art 57 of P I translate the right to life and physical integrity of civilians into detailed rules of conduct for belligerents.

war of aggression, which would be lawful under IHL, would be unlawful under IHRL as it does not pursue a lawful purpose.[3]

**9.09** Ever since its codification, IHL has protected civil and political rights;[4] economic, social and cultural rights;[5] and collective or group rights.[6] It has never distinguished between rules imposing a positive obligation on the State and those requiring the State to abstain from certain conduct. The obligation to collect and care for the wounded and sick has always contained obligations not only to respect but also to protect persons (including from the acts of private actors).[7]

**9.10** However, the differences between IHL and IHRL should not be over-emphasized. Both branches have the same aim to ensure the respect for the lives and dignity of human beings, and the conduct or result required by both branches is identical on most issues. This convergence of substantive protection is even growing because, in particular, IHRL and its implementation mechanisms are increasingly influencing IHL applicable to NIACs. During armed conflicts, both branches prohibit the killing of civilians and detainees, torture, rape and the taking of hostages. They both require the collection of and care for the wounded and sick, the humane treatment of detainees and the respect of judicial guarantees in any trial. Simply, one of them provides more detailed regulations depending on the given situation. Their substantive rules only differ significantly in two respects: on the use of force against persons who are legitimate targets under IHL and on the admissible reasons, legal basis and necessary procedural guarantees for interning enemies.

**9.11** On the first issue, IHRL only permits the use of lethal force in extreme situations and only after warnings and an attempt to arrest the target have been exhausted (where feasible). Under IHRL, the proportionality evaluation takes into account the targeted individual's right to life. In addition, IHRL requires an enquiry to ascertain the circumstances surrounding each violent death. These heightened obligations make it particularly important to determine the applicable rules in two types of situations. The first is where the dividing line between peace and armed conflict is blurred, such as when the threshold of violence is

3 See HRCtee, 'Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (Revised draft prepared by the Rapporteur, 2017) para 71 <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 7 August 2018.

4 For instance, Art 41 of P I protects the right to life of those who are *hors de combat*.

5 For example, Art 12 of GC I protects the right to health of wounded soldiers.

6 Arts 55 and 56 of P I protect, e.g., the right to a healthy environment.

7 See GC I, Art 12; GC II, Art 13(2); GC IV, Art 27.

insufficient for the law of NIACs to apply or along the continuum between peacekeeping and peace-enforcement operations (the former is typically governed by IHRL while IHL usually applies to the latter). The second situation is where IHRL governs certain conduct even in armed conflicts, for instance, law enforcement operations in NIACs or in occupied territory.[8]

**9.12** The second important issue on which IHL and IHRL truly differ is the admissibility of detaining enemies. Under IHL of IACs, POWs may be interned until the end of active hostilities without any judicial control, while civilians may be detained for imperative security reasons pursuant to an individual determination by a competent body, which does not necessarily need to be a fully independent and impartial tribunal in the sense of IHRL. In addition, it is increasingly considered that even IHL of NIACs provides parties with an inherent right to detain enemies. Under IHRL instruments, admissible reasons for depriving anyone of their liberty are explicitly or implicitly limited. Furthermore, it requires a legal basis for any detention and strict observance of detailed procedural guarantees, including, unlike IHL, judicial review by an independent and impartial court.

**9.13** Due to these two differences in particular, it is crucial to determine the relationship between IHL and IHRL, including where they differ on substance. This will be the main focus of this sub-chapter. As an initial matter, however, we must clarify when these regimes apply. Indeed, if only one branch applies, contradiction between the two regimes is impossible, and the question of compatibility thus does not arise. Hopefully, no situation exists in which neither branch applies, although this has frequently been argued in recent years (for instance, in the case of extraterritorial targeting of individuals using drones).

### 9.1.2 When do both apply simultaneously?

It is today generally accepted that IHRL also applies in armed conflicts, while it remains controversial whether and to what extent it applies extraterritorially and whether it addresses non-State armed groups. Many IHRL rules are also subject to possible derogations in situations of emergency, including armed conflicts.

8 ICRC Expert Meeting, 'The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms' (Report prepared and edited by Gloria Gaggioli, ICRC 2013) iii, 6, 14, 16, 59.

**9.14** States wishing to disregard IHL or IHRL first claim that they do not apply. Some objections in this regard are the same for both branches, such as the argument that neither branch binds international organizations and that the conduct in question is only attributable to an international organization or the claim that UN Security Council resolutions prevail over both IHL and IHRL obligations. IHL's scope of application has been discussed elsewhere in this book.[9] Nevertheless, it is important to recall that IHL only applies to conduct that has a sufficient nexus to the conflict.[10] Therefore, even in the midst of an armed conflict, IHRL exclusively governs conduct that lacks the necessary nexus to the conflict.

**9.15** The principal aim of the present discussion is to highlight the reasons why IHRL might not apply because issues regarding the relationship between IHL and IHRL do not arise if it does not apply. For that purpose, the scope of application of IHRL will be mainly discussed here.

### a. Material scope of application

**9.16** Controversies about whether a situation constitutes an IAC, a NIAC or a situation other than an armed conflict obviously impact whether IHL and IHRL can even contradict each other on a certain question. Controversies on which rules of IHL of IACs equally apply in NIACs as customary law or by analogy also determine whether or not IHL and IHRL may contradict each other on a certain issue arising in a NIAC. Due to the increasing convergence of IHL of IACs and NIACs, there is an inevitable but, in my view, highly questionable tendency in scholarly writings, jurisprudence and the views of most States to consider that the relationship between IHL and IHRL is the same in both kinds of conflicts.

**9.17** IHRL protects human beings in all situations. Its applicability during armed conflicts has been reaffirmed time and time again by the UN Security Council, the ICJ, regional human rights courts, the UN General Assembly and the UN Human Rights Council (and its predecessor), including its Special Procedures.[11]

9 See MNs 6.01–6.85.

10 See MNs 6.80–6.85.

11 For a comprehensive overview, see Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel L Rev 310, 314–7, 320–24.

### b. Possible derogations

**9.18** IHL was made for armed conflicts, which are, by definition, situations of necessity. Derogations from IHL based on a state of necessity are therefore not permitted except where specifically foreseen by an IHL rule.[12]

**9.19** IHRL instruments, in contrast, contain derogation clauses allowing a State to derogate from most human rights in situations threatening the life of the nation.[13] Armed conflicts certainly constitute such a situation. In my view, this must even be the case when a NIAC is conducted extraterritorially without really threatening the life of the intervening State as long as the life of the host State is threatened. The European Court of Human Rights held – contrary to the text of the ECHR – that, at least in IACs and in conformity with State practice, an explicit derogation is not necessary.[14] All human right instruments, however, prohibit derogations from so-called 'core' human rights, which comprise at least the right to life as well as prohibitions against torture, slavery and the application of retroactive criminal laws. In contrast to other instruments under which the right to life is non-derogable without exception, the ECHR expressly provides that the right to life is non-derogable except for 'lawful acts of war',[15] which constitutes a reference to IHL. In any case, other IHRL instruments only prohibit 'arbitrary' deprivations of life, which, as discussed later, also constitutes in armed conflicts an implied reference to IHL.

**9.20** To be admissible, derogations must furthermore be necessary and proportionate, and they may not be inconsistent with the derogating State's other international obligations, including its obligations under IHL. IHL therefore constitutes in armed conflicts the minimum threshold below which human rights derogations may not extend.

### c. Geographical scope of application

**9.21** The controversies surrounding IHL's geographical scope of application that we discussed previously in this book[16] have a particular impact on whether IHL and IHRL conflict. The issue of whether IHRL applies extraterritorially is even more controversial than IHL's extraterritorial application, but it is uncontroversial that its extraterritorial application is more limited than that of IHL. For example, an aerial bombardment of an enemy military base on the other side of

12 See GC IV, Art 5; see also MNs 5.055, 8.168–8.170.
13 ECHR, Art 15(2); ICCPR, Art 4; ACHR, Art 27.
14 See Online Casebook, ECHR, Hassan v. UK, paras 99–103; ECHR, Art 15(3).
15 ECHR, Art 15(2).
16 See MNs 6.46–6.53.

the globe is subject to IHL, while only a few people would argue that it is subject to IHRL. Most regional human rights conventions indicate that the States parties must secure the rights listed in those conventions for everyone within their jurisdiction,[17] which includes occupied territory.[18] At the universal level, however, States parties to the ICCPR undertake 'to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant…'.[19] This wording and the negotiating history lean towards understanding territory and jurisdiction as cumulative conditions for the applicability of the ICCPR.[20] Therefore several States, such as the US and Israel, deny that the ICCPR applies extraterritorially. However, the ICJ,[21] the UN Human Rights Committee[22] (which oversees the ICCPR's implementation) and other States[23] contend that the ICCPR applies in all places in which a State party exercises its jurisdiction, including in occupied territory. Indeed, from a teleological point of view, it is the occupying power rather than the territorial State that can violate or protect the rights of individuals in such cases. However, a limitation of the extraterritorial application of certain rights, in particular economic, social and cultural rights, results from the restricted legislative powers of occupying powers under the law of occupation.[24]

**9.22** Given the above, determining whether IHRL applies extraterritorially involves answering one key question: when is a person under a State's jurisdiction? Although the jurisprudence of human rights bodies is evolving and not always coherent, it now suggests that – in addition to territorial control – control over persons (for instance, persons detained by a State's agents) is also sufficient to constitute jurisdiction.[25] Some isolated pronouncements of human rights bodies

17 ACHR, Art 1; ECHR, Art 1.

18 ECtHR, *Loizidou v Turkey* ECHR 1996-VI 2216, para 56; Online Casebook, ECHR, Cyprus v. Turkey: A. European Court of Human Rights, Cyprus v. Turkey, para 77.

19 ICCPR, Art 2(1) (emphasis added).

20 See Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 AJIL 119, 123–4.

21 Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, paras 107–112; Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo, paras 216–7.

22 HRCtee, 'Concluding Observations of the Human Rights Committee: Israel' (1998) UN Doc CCPR/C/79/Add.93, para 10; HRCtee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10.

23 UK Military Manual, para 11.19.

24 In Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 112, the ICJ held that an occupying power was only bound by economic social and cultural rights '[i]n the exercise of the powers available to it on this basis', but it also had 'an obligation not to raise any obstacle to the exercise of such rights in those fields' even where it had no jurisdiction.

25 Online Casebook, ECHR, Hassan v. UK, paras 75–6. For a comprehensive overview of this jurisprudence, see

and certain authors go as far as to conclude that a person is under a State's jurisdiction as soon as the latter can affect their rights.[26] One solution to this question lies in adopting a functional approach that requires a different degree of territorial or personal control for every right or even depending on whether obligation resulting from a right is a negative or positive one as positive obligations necessarily require a higher degree of control.[27] Such a 'sliding scale' approach reconciles the object and purpose of human rights to protect everyone with the practical reality that States should not be bound by guarantees they cannot deliver outside territory they fully control (in particular obligations to protect and to fulfil) as well as concerns about the territorial State's sovereignty. The latter interest may be encroached upon by foreign forces present even with the territorial State's consent if the former protect and fulfil human rights with respect to the general population and not only in relation to their own conduct.

### d. Addressees

**9.23** In contrast to IHL of NIACs, which addresses non-State armed groups in addition to States, it is controversial whether non-State armed groups also have obligations under IHRL. Traditionally, only very few scholars advocated that entities other than States have IHRL obligations.[28] While this claim remains a minority view, it has gained traction in recent years, including for non-State armed groups.[29] It is also reflected in the changing terminology employed by international organs, which previously referred to human rights 'abuses' committed by such groups but now increasingly refer to human rights 'violations'.[30] The Office of the UN High Commissioner for Human Rights recently stated that

ECtHR, *Al-Skeini and others v the United Kingdom* (2011) 53 EHRR 18, paras 130–42.

26 Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 220–24; Draft General Comment No. 36, above note 3, para 66; HRCtee, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (2014) UN Doc CCPR/C/USA/CO/4, para 9.

27 See John Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations' (2006) 39 Vanderbilt J of Transnational L 1447, 1494–507; Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights: Towards a New Merger in International Law* (Martinus Nijhoff 2008) 144–52.

28 August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 38; Andrea Bianchi, 'Globalization of Human Rights: The Role of Non-State Actors' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 179.

29 For legal constructions to bind non-State armed groups, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 271–316 in particular; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law* (OUP 2017).

30 The term 'abuse' was preferred for armed groups as the traditional view held that armed groups could not, strictly speaking, 'violate' human rights. See, e.g., Nigel S. Rodley, 'Can Armed Opposition Groups Violate Human Rights Standards?' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993) 297.

'[i]t is increasingly considered that *under certain circumstances* non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights.'[31] Even the most State-centric body, the UN Security Council, refers to armed groups in a manner that suggests they have human rights obligations.[32] One treaty that is seen by many as an IHRL instrument – the Optional Protocol on Children in Armed Conflict to the Convention on the Rights of the Child – arguably also directly addresses non-State armed groups.[33]

**9.24** However, the precise 'circumstances' under which non-State armed groups have IHRL obligations are not very clear. The practice of certain international bodies suggests that such groups must comply with IHRL when they are de facto authorities due to their control of territory and the governmental functions they exercise therein.[34] Shrouded in similar uncertainty is the question of exactly *which* IHRL norms may bind non-State armed groups.[35] In any case, many of those norms must be reformulated to become meaningful for armed groups.[36] Under one view, a group's IHRL obligations increase with the level of territorial control or governmental functions it exercises.[37] Understandably, it is easier for States to accept that armed groups may be bound by 'negative' obligations to *refrain* from particular conduct (for example, from recruiting children into their armed forces)[38] than by 'positive' obligations (for instance, the provision of education and healthcare in territories under their control) as they view the

31 Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (UN 2011) 24 (emphasis added).

32 See Aristoteles Constantinides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council' (2010) 4 Human Rights & Intl Legal Discourse 89.

33 Seira Yun, 'Breaking Imaginary Barriers: Obligations of Armed Non-State Actors Under General Human Rights Law – The Case of the Optional Protocol to the Convention on the Rights of the Child' (2014) 5 J of Intl Humanitarian Legal Studies 213, demonstrates that Art 4(1) of the Optional Protocol on Children in Armed Conflict (OPAC) to the Convention on the Rights of the Child, which prescribes that armed groups 'should' not engage in certain conduct, was meant to create full legal obligations. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (23 October 2009) (2010) 49 ILM 86 (Kampala Convention), Art 7(1), also addresses non-State armed groups.

34 See Constantinides, above note 32, 101–3.

35 Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell Intl L J 21, 22; Geneva Call and Project Education in Insecurity and Conflict, 'Report: PEIC/Geneva Call Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda' (PEIC 2015) 26.

36 Ronen, ibid., 30–31; Murray, above note 29, 172–202, proposes a gradated application of IHRL obligations to non-state armed groups, and 205–71, tests such approach with respect to the right to fair trial, detention and the right to health.

37 See Ronen, ibid.; Fortin, The Accountability, above note 29, 240–84; Murray, above note 29, 120–54.

38 See UNSC, 'Report of the Secretary-General on Children and Armed Conflict' (2002) UN Doc S/2002/1299, para 3; HRC, 'Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy' (2010) UN Doc A/HRC/15/58, para 16.

latter as functions that properly belong only to government.[39] However, positive IHRL obligations of non-State armed groups controlling territory would be particularly important for inhabitants of such territory because IHL of NIACs – as opposed to IHL of IACs governing military occupation – fails to provide any rules on what measures a non-State armed group must take to administer a territory, legislate or maintain law and order.[40] Nor does IHL of NIACs cover everyday rights of persons living under control of a non-State armed group on issues that lack the requisite nexus to the NIAC.[41]

**9.25** The extent to which and the reasons why individuals can be directly bound by IHL have been discussed elsewhere.[42] Concerning IHRL, different theories, similar to those just discussed for armed groups, have been relied on to support claims that IHRL binds all those who exercise governmental authority or even every organ of society. Some human rights instruments also prescribe duties for individuals.[43] In addition, States are obliged to not only respect human rights; they must also protect the rights of individuals under their jurisdiction from violations by other individuals.[44] This must be implemented through, among other things, legislative measures that bind individuals by definition. Furthermore, some States even allow victims of IHRL violations to bring tort claims against those responsible.[45] Finally, States have specified international legal obligations and best practices for companies working in some fields based upon IHRL.[46] Certain companies have also voluntarily accepted codes of conduct[47] that are often based upon IHRL provisions with some modifications to reflect the specificities of private companies.

39 Geneva Call and Project Education, above note 35, 26.

40 See Geneva Call, *Positive Obligations of Armed Non-State Actors: Legal and Policy Issues* (Report in The *Garance* Series: Issue 1, Geneva Call 2016) 7–12.

41 Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 Netherlands Intl L Rev 161.

42 See MNs 6.72–6.75.

43 Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A(III) (UDHR) Art 29; ACHPR, Arts 27–28.

44 See, e.g., ECtHR, *Kaya v Turkey* (1999) 28 EHRR 1, especially paras 85–101.

45 See US Alien Tort Claims Act of 25 June 1948, 28 USC Section 1350 (2001).

46 Concerning PMSCs, see MNs 10.138–10.140.

47 Concerning PMSCs, see MN 10.139; see generally Organisation for Economic Co-Operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD 2008), and UN, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UN 2011) UN Doc HR/PUB/11/04.

### 9.1.3 How to deal with the divergences between both branches?

When both IHL and IHRL apply to a certain problem in an armed conflict but lead to different results, it is controversial how to determine the applicable law. First, it is not entirely clear when rules can be considered to diverge. Second, when there are divergences, the majority opinion considers that the applicable rule must be found by applying the *lex specialis* principle. However, the meaning of this principle is subject to controversy. In my view, one must determine which conflicting rule constitutes the *lex specialis* in every specific situation, taking into account as well the overall systemic purposes of international law. This results in very similar outcomes to those achieved by applying a more modern approach requiring a systemic integration between different rules of international law.

**9.26** When both IHL and IHRL apply and lead to divergent results, the nature of the relationship between them is a controversial matter in terms of both the terminology used to describe the relationship and the practical outcomes, namely, the rule that must be respected in such a situation. At the centre of these controversies is the *lex specialis* principle, which is being increasingly contested in scholarly writings. This sub-section will first discuss the meaning of the *lex specialis* principle and the alternative solutions to resolving possible contradictions before turning to the factors that blur the debate. It will then suggest solutions that derive from what is, in my view, the correct understanding of the *lex specialis* principle but which do not differ greatly from solutions proposed by those who reject the *lex specialis* concept.

#### a. The *lex specialis* principle

**9.27** Traditionally, the problems of application and interpretation caused by overlapping IHL and IHRL norms are resolved by invoking the maxim *lex specialis derogat legi generali*, which refers to the principle that a more specialized rule prevails over a more general rule. The ICJ, the Inter-American Commission of Human Rights and the ILC have used this term specifically when discussing the relationship between IHL and IHRL.[48] The UN Human Rights

48 For the ICJ, see Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 25; Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 106. For the IACommHR, see Online Casebook, Inter-American Commission on Human Rights, Coard v. United States, paras 38–44; IACommHR, *Decision on Request for Precautionary Measures* (*Detainees at Guantanamo Bay*, *Cuba*) (2002) 41 ILM 532. For the ILC, see ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (Report of the Study Group of the ILC finalized by Martti Koskenniemi, 2006) UN Doc A/CN.4/L.682, paras 104–5.

Committee writes that 'more specific rules of [IHL] may be specially relevant for the purposes of the interpretation of Covenant rights.'[49]

**9.28** The *lex specialis* principle's meaning and its field of application are controversial even among those who use it. Those who claim that it applies only to contradictions between rules in the same treaty or the same branch of international law[50] may be ignored here because, if this were correct, the principle would not help reconcile conflicting IHL and IHRL rules. Some use the *lex specialis* principle as an interpretative rule to only avoid norm conflicts instead of solving them.[51] However, a strict distinction between norm conflict avoidance and norm conflict resolution is artificial, especially in international law. In my assessment, it is doubtful as to whether the principle can resolve contradictions between customary rules if these are – as they should traditionally be – derived from State practice and *opinio juris*, although admittedly it may be used when customary rules are derived from written texts.[52]

**9.29** Furthermore, the relationship between the *lex posterior derogat legi priori* principle (which stipulates that a later conflicting rule prevails over the earlier rule) and the *lex specialis* principle is also contentious. In my view, the *lex specialis* principle is only meaningful if it prevails over the *lex posterior* principle.[53] In any case, it would be difficult to determine the *lex posterior* in regimes – such as IHL and IHRL – that are constantly developing.

**9.30** Finally, and most importantly, the very meaning of the principle is controversial. Some hold that it only concerns more broadly the relationship between two branches of law,[54] concluding that IHL always prevails in armed conflicts.

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49 General Comment No. 31, above note 22, para 11.

50 Nancie Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel L Rev 356, 379–80.

51 Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 89; Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 223–4.

52 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* (OUP 2011) 34, 72.

53 For another scholar supporting this view, see Marko Milanović, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship Between Human Rights and International Humanitarian Law' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 111.

54 This was the approach of the US under the Bush Administration. See 'Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba' (15 April 2002) (2002) 41 ILM 1015, 1020–21; HRCtee, 'Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee' (2008) UN Doc CCPR/C/USA/CO/3/Rev.1/Add.1, para 12. This is also sometimes the approach of Israel (see HRCtee, 'Second Periodic Report: Israel' (2001) UN Doc

For some persons that one could label as 'absolute IHL supremacists', any silence in IHL is deliberate and means that no rule of international law regulates the respective conduct or issue. This approach, however, effectively (and incorrectly) denies that IHRL applies to armed conflicts.

Others, who might be labelled 'moderate IHL supremacists', admit that issues IHL does not regulate (such as the freedom of opinion or the press, or the right to form trade unions) remain governed by IHRL in an armed conflict. However, they contend that IHL must prevail as *lex specialis* as soon as it regulates a given issue, at least in the case of a genuine norm conflict that cannot be avoided by suitably interpreting the rules of both branches.[55] **9.31**

A third approach borrows from IHRL the rule of interpretation according to which, in cases of contradiction between IHRL rules, the most protective rule prevails.[56] This view, however, neglects that the object and purpose of IHL is not only to offer the best possible protection to individuals but also to find a balance between the principles of humanity *and military necessity*. In fact, these 'protection supremacists' adopt a cumulative approach that is discussed hereafter as an alternative to the *lex specialis* principle. **9.32**

What remains is a probably majoritarian view that I would label 'the common contact surface area'[57] approach that seeks to determine the *lex specialis* in every case of application according to logic and the overall systemic purposes of international law. After presenting alternatives to the *lex specialis* principle, I will describe this approach in detail and explain why it leads to the same results as those reached by most scholars who criticize the use of the *lex specialis* principle. **9.33**

### b. Alternatives to the *lex specialis* principle

Although the European Court of Human Rights has avoided using the term *lex specialis*, it finally accepted recently that human rights guarantees 'should be **9.34**

CCPR/C/ISR/2001/2, para 8) and Russia (see ECtHR (former Fifth Section), *Georgia v Russia (II)* (Decision on Admissibility) Application No 38263/08 (13 December 2011) para 69).

55 Heike Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 J of Conflict and Security L 265, 272; Cordula Droege, 'Elective Affinities?: Human Rights and Humanitarian Law' (2008) 90 IRRC 501, 524.

56 See Gloria Gaggioli and Robert Kolb, 'A Right to Life in Armed Conflicts?: The Contribution of the European Court of Human Rights' (2007) 37 IYBHR 115, 122; Online Casebook, Inter-American Commission on Human Rights, Tablada, paras 164–5, contradicting how the Commission actually dealt with the case and its later explanation of the *lex specialis* principle in ibid., paras 166–70, 176–89.

57 These terms were first used by Mary Ellen Walker, who was a LLM Student at the Geneva Academy of International Humanitarian Law and Human Rights in my 2007–2008 IHL course.

accommodated, as far as possible' with applicable provisions of IHL treaties.[58] In addition, scholarly writings increasingly contest the employment of the *lex specialis* principle to discuss the relationship between IHL and IHRL.[59] Although scholars invariably point out that the ICJ avoided the term in its latest relevant case,[60] the ICJ did not provide in that case any alternative suggestions to resolve contradictions between these two branches of law.

**9.35** Some of the principle's critics argue that IHL and IHRL should apply cumulatively.[61] They may indeed base their views upon the practice of international tribunals and upon a textual reading of most UN Security Council resolutions.[62] However, under this approach, IHRL would completely override IHL on crucial issues like the admissible degree of the use of force and the admissible reasons of detention because States would always have to respect the more demanding and restrictive standards of IHRL to comply with their international obligations (unless, of course, they lawfully derogate from their IHRL obligations). This leads to unrealistic results that even proponents of this approach do not suggest and, more importantly, that clearly do not comport with State practice. For example, under the ECHR, POWs could not be interned and combatants could only be attacked if they present an immediate threat to human life.

**9.36** Others seek to solve possible contradictions through systemic integration or interpretation that takes into account other applicable rules of international law.[63] This is indeed what the European Court of Human Rights claimed it did when it 'accommodated' the five exhaustively enumerated reasons justifying a deprivation of liberty in article 5 of the ECHR with IHL.[64] However, it is not possible to add through mere interpretation a *sixth* admissible reason to an exhaustive list. The Court should have solved this problem by applying the relevant IHL provisions as the applicable *lex specialis.* However, in contrast to the ECHR, the same result can be achieved in the other human rights instruments

58 Online Casebook, ECHR, Hassan v. UK, para 104.

59 Prud'homme, above note 50, 378–86; Oberleitner, above note 51, 88, 95, 99, 103–4; Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), above note 52, 115–6, 124; Françoise Hampson and Noam Lubell, '*Amicus Curiae* Submitted by Professor Francoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex' (2014) in ECtHR, *Hassan v UK*, Application No 29750/09, para 18 <https://www1.essex.ac.uk/hrc/documents/practice/amicus-curae.pdf> accessed 8 August 2018.

60 Online Casebook, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo, para 216.

61 Walter Kälin, *Human Rights in Times of Occupation: The Case of Kuwait* (Stämpfli 1994) 27.

62 Gloria Gaggioli, *L'influence mutuelle entre les Droits de l'Homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone 2013) 39–40.

63 See VCLT, Art 31(3)(c). For further references, see D'Aspremont and Tranchez, above note 51, 235–8.

64 Online Casebook, ECHR, Hassan v. UK, para 104.

by merely interpreting the term 'arbitrary' in their prohibitions on deprivations of life and personal liberty[65] in light of the applicable IHL.

Other scholars suggest a flexible set of variables depending on the case to be decided. Instead of necessarily taking a uniform approach to the interaction between the two branches of law, they want to find the solution on a spectrum between situations where a violation of IHRL only exists when IHL is violated, on the one hand, and situations in which the two branches must be blended together, on the other.[66] Indeed, it may be that the relationship between IHL and IHRL varies in actual practice depending on the subject matter or rules in question. It may also correctly describe the approach taken by human rights bodies and decision-makers, but it is too sophisticated to be applied in practice by a soldier who only has split seconds to decide whether to target under IHL or to issue a warning and attempt arrest under IHRL. It furthermore opens the door to abuse, subjectivity and manipulation. **9.37**

Finally, some go one step further and seek to abandon the pretence that the legal order provides only one solution (I would add *any solution*). They prefer to solve the few real conflicts that exist through the political process.[67] However, in my view, this is a surrender of the law as a distinct science. The essence of the rule of law (and at the same time its grand fiction) is that decision-makers apply norms, including when they contradict other norms, according to legal rules and *not* according to policy preferences. **9.38**

### c. Factors blurring the debate

Debates on the law that applies when IHL and IHRL differ are often confused by unresolved controversies concerning questions that have nothing to do with the relationship between IHL and IHRL but rather involve uncertainties pertaining to one of the two branches, definitions and terminology or the understanding of what the term *lex specialis* means. **9.39**

First, one must clarify when two rules actually lead to different outcomes.[68] The most restrictive understanding is that two rules only differ if one rule prescribes **9.40**

65 See ICCPR, Arts 6(1), 9(1); ACHR, Arts 4(1), 7(3); ACHPR, Arts 4, 6.

66 Hampson and Lubell, above note 59, paras 26–30. Their approach seems to develop the 'theory of harmonization' suggested by Prud'homme, above note 50, 386–93.

67 Milanović, above note 59, 98, 124. For a more radical and detailed reasoning promoting this solution on the basis that IHL and IHRL have distinct regulatory purposes, see Ka Lok Yip, 'The Law of Force, the Force of Law – The Legality and Ontology of the Use of Force Against Individuals in Armed Conflict and Occupation' (PhD Thesis, Graduate Institute of International and Development Studies 2017) 147–228.

68 For the arguments that follow, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO*

certain conduct that the other prohibits.[69] If this is correct, the only contradiction between IHL and IHRL that I am aware of concerns the European Court of Human Rights' prohibition against bringing civilians before military courts[70] and an occupying power's IHL obligation to try civilians for security offences *only* before its military courts[71] in situations of military occupation because the establishment of civilian courts by an occupying power is tantamount to annexation.

**9.41** A broader understanding of contradictions, which is preferable in my view, would also cover *potential* conflicts, namely, conduct that IHL does not prohibit or – according to many – even authorizes that is otherwise prohibited by IHRL (for instance, interning enemy combatants without any individual procedure to determine the legality of such internment).[72] Moreover, in my opinion, a rule should equally constitute the *lex specialis* if it provides additional details when compared to another branch's rule. Admittedly, however, systemic interpretation or integration may lead to the same result in such cases.

**9.42** Second, the debate concerning whether and to what extent IHL authorizes certain conduct has important repercussions for debates on the relationship between IHL and IHRL as such authorizations may either contradict IHRL prohibitions or provide the legal basis required by IHRL for legitimate limitations on human rights.[73]

### d. A suggested nuanced and case-by-case determination of the applicable law

**9.43** I have explored elsewhere what the *lex specialis* principle means in general and in the IHL as well as IHRL contexts in particular.[74] In my view, the principle does not indicate an inherent quality of one branch of law. IHL does not always constitute the *lex specialis* in armed conflicts simply because it applies to

*Law Relates to Other Rules of International Law* (5th printing, CUP 2006) 164–200.

69 Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYBIL 401, 426; Hans Kelsen, *Reine Rechtslehre* (2nd edn, Verlag Franz Deuticke 1960) 209.

70 Online Casebook, ECHR, Cyprus v. Turkey: A. European Court of Human Rights, paras 358–9.

71 GC IV, Art 66.

72 ILC, above note 48, paras 24–5; Gaggioli, above note 62, 51; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented System: The Doctrine of *Lex Specialis*' (2005) 74 Nordic J of Intl L 27, 46; Pauwelyn, above note 68, 167–70.

73 See MN 10.013.

74 Marco Sassòli, 'Le droit international humanitaire, une lex specialis par rapport aux droits humains?' in Andreas Auer *et al.* (eds), *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni* (Schulthess 2007) 375.

and was designed for those situations.[75] Rather, IHL constitutes the *lex specialis* on certain questions in an armed conflict, whereas IHRL is the *lex specialis* on others.[76] This is, however, largely a question of terminology. One would reach the same practical results by considering that IHL governs some issues as the *lex specialis* and that IHRL deals with other issues as the *lex generalis*, assuming that one admits that the *lex generalis* may prevail even on issues on which the *lex specialis* contains a rule.

**9.44** In my view, the principle does not even determine, once and for all, the relationship between two rules. Rather, it determines which rule prevails over another in a particular situation.[77] Each case must be analysed individually. Several factors must be weighed to determine which rule is 'special' in relation to a certain problem. Specialty, in the logical sense, implies that the norm that applies to a certain set of facts must give way to the norm that applies to that same set of facts as well as to an additional fact that is present in a given situation. Between two potentially applicable rules, the one that has the larger 'common contact surface area' with the situation applies. A norm that is either more precise or that has a narrower material or personal scope of application constitutes the *lex specialis*.[78] The norm addressing a problem explicitly prevails over the one that treats it implicitly. A norm that provides more details prevails over another's generality,[79] while one that is more restrictive prevails over one that covers a problem fully but in a less exacting manner.[80]

**9.45** A less formal (and less objective) factor that permits determination of the applicable *lex specialis* is the extent to which the solution conforms to the systemic objectives of the law.[81] Characterizing this solution as '*lex specialis*' perhaps constitutes a misuse of language. The systemic order of international law is a normative postulate founded upon value judgments. In particular, when formal

75 Oberleitner, above note 51, 97.

76 Ibid., 95, 101–3; Milanović, above note 59, 116; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 IRRC 737, 752.

77 ILC, above note 48, para 112; Krieger, above note 55, 269, 271; Philip Alston *et al.*, 'The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 EJIL 183, 192; ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May–4 June and 5 July–6 August 2004) UN Doc A/59/10, para 304; Gaggioli, above note 62, 56–8, provides an example.

78 Norberto Bobbio, 'Des critères pour résoudre les antinomies' in Chaim Perelman (ed), *Les antinomies en droit: études* (Bruylant 1965) 244.

79 For examples, see Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Martinus Nijhoff 2003) 124.

80 Concerning the relationship between Arts 13 and 5(4) of the ECHR, see, e.g., ECtHR, *Brannigan and McBride v UK* (1993) Series A No 258, 57, para 76.

81 ILC, above note 48, para 107.

standards do not indicate a clear result, this criterion must nevertheless weigh in.[82]

**9.46** This understanding of the *lex specialis* principle may first of all result in IHL prevailing over an applicable rule of IHRL. Thus, a party to an IAC may intern POWs without a judicial decision or the possibility to engage habeas corpus proceedings.[83] This results not from a text of Convention III that would be more specific than the applicable IHRL guarantees[84] but from the systemic context: POWs are not interned for reasons related to their person or behaviour but merely because they belong to the military potential of the adversary. Second, IHL may prevail because it provides more details than the applicable IHRL rule. Thus, for instance, it clarifies when a deprivation of the life of a combatant in an armed conflict is arbitrary. Third, IHRL may also give meaning to or interpret a rule of IHL. For example, IHRL elucidates the judicial guarantees recognized by civilized peoples that a party to a NIAC must offer persons it wants to try under Common Article 3.[85] Fourth, an IHRL rule may even revise an IHL rule. Thus, the *jus cogens* prohibition against *refoulement* under IHRL prevails over the IHL obligation to repatriate POWs independently of their will.[86] Finally, IHRL deals exclusively with some questions not covered by IHL, including even certain issues that have a link with the armed conflict. For instance, IHL contains no rules protecting rights such as the freedom of expression or of the press.

**9.47** In my view, most people who apply both branches (which is not the case for some IHRL mechanisms) use the 'common contact area' approach even if they refer to this as systemic integration or interpretation instead of a determination of the *lex specialis*. In my assessment, calling this mere interpretation is flawed in cases where one branch contains no term that could be interpreted by taking the other branch into account or when it comes to the application of concurrent customary rules. The practical results of my 'common contact area' approach are very similar but hopefully more predictable than those derived from situating an issue on a spectrum according to a flexible set of variables. To reject the *lex specialis* principle because its applicability and meaning are controversial[87] is

82 Bobbio, above note 78, 240–41; Krieger, above note 55, 280. See also Jenks, above note 69, 450.

83 See MNs 8.091–8.092, 10.296.

84 GC III, Art 21, simply provides that POWs may be interned without specifying a procedure for doing so.

85 See MN 7.30.

86 See MN 8.111.

87 Prud'homme, above note 50, 381–3; Milanović, above note 59, 98, 124. For a more nuanced view, see Andrew Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law' in Academy Commentary, 729.

as justifiable as rejecting the right to self-defence in *jus ad bellum* because its meaning is subject to many controversies. In my opinion, the almost allergic reaction of some to the term *lex specialis* is caused by a fear of joining the ranks of the absolute or moderate IHL supremacists (who use this term) or, more practically, supposedly supporting drone attacks against suspected Al-Qaeda operatives or indefinite detention in Guantánamo Bay. In reality, the US and its supporters justify those drone attacks and detentions using a combination of interpretations about the geographical scope of IHL and its validity as a source of authorization as well as broad conceptions concerning NIACs, legitimate targets of attacks and enemy combatants.[88]

**9.48** In practice for IACs, IHL is generally the more specific regime and corresponds to the overall normative purpose of international law. The situation in occupied territory, however, is more nuanced. When it comes to the use of force in particular, the *lex specialis* must be determined according to whether certain conduct is part of a law enforcement operation or a military operation simply because IHL of military occupation does not contain detailed rules on how an occupying power may fulfil its obligation to restore and maintain law and order.[89]

**9.49** In NIACs, determining the applicable *lex specialis* is more difficult for several reasons. First, IHL rules applicable in such conflicts are often determined by analogy to those applicable to IACs,[90] including with respect to alleged 'authorizations'. However, one may question whether a rule derived from analogies prevails as the *lex specialis* over an applicable IHRL rule. Second, if IHL protections in NIACs are mainly situated in customary law, the question arises as to whether customary IHL of NIACs and customary IHRL in NIACs exist separately or whether, based upon practice and *opinio juris,* only one rule of customary law rule applicable to a certain problem can exist (and therefore no *lex specialis* determination is necessary).

**9.50** Third, it is unclear whether the fact that IHL of NIACs has fewer rules that are less precise necessarily makes IHRL, as interpreted and developed by judicial bodies as well as soft law, the *lex specialis*. Furthermore, does the *lex specialis* change each time either a human rights body clarifies IHRL or an international criminal tribunal clarifies IHL? Fourth, if armed groups are only bound by IHL

88 See MNs 10.064–10.070; 10.263, 10.289, 10.290.

89 ICRC Expert Meeting, 'Occupation and Other Forms of Administration of Foreign Territory' (Report prepared and edited by Tristan Ferraro, ICRC 2012) 109–30.

90 See MNs 7.58–7.63.

while governments must also comply with IHRL, both sides would not have to fight according to the same rules because the government would, in some circumstances, have to apply the more protective *lex specialis* IHRL, while the armed group would only need to abide by the less protective IHL. In my view, this is acceptable because the equality of belligerents is a principle of IHL and not IHRL.[91] The same question arises even if it is accepted that IHRL binds armed groups because its rules for armed groups are not the same as for States.[92]

**9.51** Despite all this, both branches lead to the same result on most issues, even in NIACs. At least according to the majority of commentators who apply IAC rules to NIACs by analogy or as customary law, IHL leads to different and clearly less protective results than IHRL only on two issues: the permissibility of attacks against rebel fighters and the admissibility of their internment. We will discuss these two questions elsewhere in this book.[93]

### 9.1.4 Implementation of one branch by the mechanisms of the other branch

Through different legal constructions, IHRL mechanisms apply IHL and thus replace the non-existing treaty bodies in IHL. Conversely, the ICRC increasingly invokes IHRL outside of armed conflicts but also in armed conflicts when IHRL constitutes the *lex specialis*.

**9.52** IHL and IHRL each have their own distinct enforcement mechanisms. Both branches are applied by distinct epistemic communities that tend to persist in their respective traditional approaches even when dealing with the other branch. In addition, transparency and democratic control play a greater role for IHRL, while criminalization of certain violations and enforcement through (international) criminal tribunals have recently played a much greater role for IHL. This leads to distinct challenges for evidence gathering and standards of proof. At least traditionally, and putting the ICL aspect aside, investigations as well as international and domestic judicial processes are central to IHRL's effective implementation. In contrast, the approach of the preeminent IHL implementation mechanism – the ICRC – focuses on practical results for war victims, action in the field, access, dialogue, cooperation with parties and confidentiality.

91 See Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 J of Intl Humanitarian Legal Studies 5, 20.

92 Murray, above note 29, 178; Fortin, The Application, above note 41, 160–70.

93 See MNs 10.259–10.308.

**9.53** Nevertheless, on both sides of the divide, the implementing mechanisms of one branch increasingly take the other branch into account. In examining the arguments that allow IHRL mechanisms to deal with IHL violations, we have already seen that those mechanisms play an important role in ensuring the respect of IHL but that this development is not without risks.[94] Conversely, the ICRC, which is the main implementing mechanism of IHL, also increasingly refers to IHRL. For a long time, the ICRC has been engaged in activities in situations of internal violence similar to those it performs in IACs. During such situations, however, IHL does not apply. While maintaining its pragmatic, cooperative and victim-oriented approach, the ICRC has therefore implicitly referred to the applicable international standards in IHRL in the past and now does so more explicitly. Even in armed conflicts, the ICRC increasingly refers explicitly to IHRL on issues where IHL either provides no rules or insufficiently detailed rules, such as, for example, on procedural principles and safeguards for internment or administrative detention in NIACs[95] or on the rules applicable to law enforcement in armed conflicts.[96]

## 9.2 IHL AND ICL

ICL and international criminal justice can be seen as enforcement mechanisms of IHL, and they have greatly contributed to the clarification and development of IHL rules. At the same time, IHL prohibitions constitute the basis for any war crime, and IHL treaties contain many rules of ICL.

**9.54** This sub-chapter's purpose is not to provide a crash course on ICL but mainly to show how ICL supports IHL and that IHL also constitutes the basis of ICL with respect to war crimes.

### 9.2.1 Definition and differentiation

**9.55** ICL specialists often define this specific branch of law very broadly as all rules of substance and procedure covering the prosecution and punishment of

94 See MNs 5.107–5.115.

95 Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 377–9, which was later published as 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' as Annex 1 to ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Report prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent, 2007) Doc No 30IC/07/8.4.

96 See ICRC, above note 8.

individuals for violations of international law.[97] War crimes were one of the first categories of international law violations that gave rise to individual criminal responsibility. Under this very broad understanding of ICL, nearly every IHL issue is an ICL issue that may indeed arise – if only as a preliminary question – when establishing individual criminal responsibility for war crimes. For example, the *Tadić* case shows that traditional IHL issues, such as the classification of a conflict as an IAC and the concept of who is a protected civilian benefiting from the full protection of Convention IV, may appear in a war crimes trial.[98] The ICTY and ICTR clarified when violence amounts to an armed conflict, which is a preliminary issue to the application of all IHL. Likewise, the controversial question under IHL whether bridges or radio stations are military objectives by their very nature or only according to their actual use arises in prosecutions for battlefield crimes. The contemporary controversy over whether 'unlawful combatants' held in an IAC are POWs, protected civilians or a third category of persons who are not protected by either Convention III or Convention IV raises fundamental issues in the interpretation of IHL.[99] However, it may also be crucial when prosecuting a person for the war crimes of unlawful confinement or unlawfully depriving a protected person of any of the rights of fair and regular trial in ICL.[100] Finally, prosecuting an occupying power's officials for pillage or unlawful confinement may even require the interpretation of IHL provisions that do not carry criminal sanctions, such as those that restrict an occupying power's legislative powers.

**9.56** On the other hand, we discussed elsewhere that IHL foresees and in many respects regulates individual criminal responsibility in order to ensure its implementation.[101]

**9.57** This book, which is dedicated to IHL as a branch of international law distinct from ICL, does not consider IHL as an auxiliary science of ICL (which it is from an ICL point of view) but rather deals with ICL mainly insofar as it enforces IHL or contributes to the understanding of its rules. It therefore adopts a narrower understanding of IHL and ICL than that set out above. IHL *stricto sensu* defines the rules of conduct in armed conflict and therefore also defines when those rules are violated by a State or an armed group, even if some of

97 Antonio Cassese and Paola Gaeta (eds), *Cassese's International Criminal Law* (3rd edn, OUP 2013) 3, refers to rules of substance as 'the set of rules indicating what acts are prohibited', and Julio Barboza, 'International Criminal Law' (1999) 278 Recueil des Cours 9, 27, includes even those making 'their interpretation…possible'.

98 See MNs 6.13–6.21, 8.149–8.158.

99 See MNs 8.112–8.119.

100 See GC IV, Art 147; ICC Statute, Art 8(2)(a)(vi)–(vii).

101 See MNs 5.204–5.215.

its rules were first codified in an ICL treaty. In contrast, ICL concerning war crimes *stricto sensu* consists of the rules of procedure and substance regarding when and how IHL violations (which are, as defined by IHL, committed only by States or armed groups) can give rise to individual criminal responsibility.

**9.58** Substantive IHL *stricto sensu* is then a major source of ICL on war crimes as it defines prohibited conduct in armed conflicts: 'The substantive [international criminal] law is not autonomous law that happens to be based on international humanitarian law but is accessorial to this body of law. War crimes must thus be interpreted with an eye to the international humanitarian law upon which they are based.'[102] Conversely, IHL provisions on the attribution and criminalization of individual conduct, such as those enumerating grave breaches of the Conventions, are substantively part of ICL even if they are contained in IHL treaties.

### 9.2.2 IHL as a set of substantive prohibitions criminalized by ICL provisions on war crimes

**9.59** ICL provisions on war crimes can be seen as either a source of IHL or evidence that the underlying rules of IHL exist. Technically, the statutes of the ad hoc tribunals are obviously not sources of substantive rules of IHL because the UN Security Council cannot retroactively create IHL. However, the ICC Statute's provisions on war crimes as treaty law may be considered as a source of IHL.

**9.60** According to the notion of IHL adopted in this book, crimes against humanity and genocide are not based upon IHL prohibitions. However, when assessing certain conduct in an armed conflict, one should not forget that it may also constitute genocide, a crime against humanity or a crime of torture or forced disappearance that must be prosecuted according to certain treaties and that may lead to a conviction cumulative to that of a war crime if both crimes comprise at least one materially distinct element not contained in the other crime. Other ICL treaties, such as one criminalizing the taking of hostages,[103] explicitly exclude conduct committed in an armed conflict. The link between IHL and

102 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 404. This is confirmed by Art 21(1)(b) of the ICC Statute, while Art 21(3) appears to give priority to IHRL contrary to the generally held view that IHL provisions are the *lex specialis* where they contradict provisions of IHRL on a specific problem and that in such situation the latter must be interpreted in light of the former.

103 International Convention Against the Taking of Hostages (17 December 1979) 1316 UNTS 205, Art 12.

anti-terrorism law raises particularly difficult legal and policy questions that will be discussed later.[104]

**9.61** War crimes, however, necessarily presuppose that the criminalized conduct also constitutes a violation of IHL for States and (in NIACs) armed groups. In this sense, the ICC Statute may have created IHL rules. This may be the case for attacks on UN peacekeepers,[105] which, in my view, would have been viewed as merely a *jus ad bellum* violation prior to the ICC Statute's adoption. Similarly, the war crime of treacherously killing or wounding a combatant adversary[106] implies that IHL prohibits such conduct in NIACs, even though it is not mentioned in IHL treaties applicable to NIACs.

**9.62** However, the fact that the ICC Statute criminalizes other serious violations of the laws and customs applicable in IACs and NIACs[107] under the chapeau 'within the established framework of international law'[108] presents a countervailing argument against the notion that it has created IHL rules. The majority view holds that this wording confirms that the enumerated crimes are already war crimes (and therefore IHL violations) under customary law and that they must be interpreted in light of the underlying IHL rules.[109] A minority view contends that this phrase instead limits the crimes to violations of existing IHL.[110] An intermediary position asserts that the chapeau means that the listed crimes must be interpreted in light of the underlying IHL rules.[111] In any case, the ICC Statute must be taken into account when interpreting IHL treaties.

104 See MNs 10.048–10.057.

105 ICC Statute, Arts 8(2)(b)(iii) and 8(2)(e)(iii); see also ICRC CIHL Database, Rule 33.

106 ICC Statute, Art 8(2)(e)(ix); see also ICRC CIHL Database, Rule 65.

107 Grave breaches listed in Art 8(2)(a) of the ICC Statute are obviously already prohibited by the GCs as are serious violations of Common Article 3 listed in Art 8(2)(c) of the ICC Statute.

108 See ICC Statute, Arts 8(2)(b) and 8(2)(e).

109 This view was initially expressed in Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 144, 152; see also ICC, *Prosecutor v Ntaganda* (Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06-892 (9 October 2015) para 25.

110 Cassese and Gaeta, above note 97, 80; Gus Waschefort, *International Law and Child Soldiers* (Hart Publishing 2015) 121.

111 Michael Cottier, 'Article 8' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart Publishing 2016) 354, para 180; ICC, *Prosecutor v Lubanga* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2014) para 322.

### 9.2.3 ICL as an implementation mechanism for IHL

#### a. Advantages of enforcing IHL through ICL

**9.63** The regular prosecution of war crimes would have an important preventive effect by deterring violations and making it clear that IHL is 'law' to even those who think in terms of national law. In addition to having a stigmatizing effect, it would also individualize guilt and repression, thus avoiding the vicious circle of atrocities and counter-atrocities against innocent people. By placing responsibility and punishment at the level of the individual, criminal prosecution furthermore shows the abominable crimes of the twentieth century were not committed by nations or ethnic groups but by individuals. By contrast, as long as the responsibility was attributed to States or groups, each violation carried within it the seed of the next war. That is the civilizing and peace-seeking mission of ICL favouring the respect of IHL through criminal prosecutions instead of further war.

**9.64** Unfortunately, most war crimes still go unpunished today. Nevertheless, there has been progress in recent years, mainly in terms of countries adopting national legislation enabling them to prosecute war crimes (in many cases even based upon universal jurisdiction) and more rarely through actual prosecutions of suspected war criminals that have been very infrequently based on universal jurisdiction. The most spectacular progress has been the establishment of international criminal tribunals for certain contexts and then the creation of the ICC with jurisdiction over, among other things, war crimes.

#### b. Risks of seeing IHL through the ICL lens

**9.65** The remarkable rise of ICL in recent years constitutes an invaluable contribution to the credibility of IHL and its effective implementation. It would be wrong and dangerous, however, to view IHL solely from the perspective of criminal law. It is above all during armed conflicts that belligerents, third States and humanitarian organizations must respect IHL and ensure its respect to protect war victims.

**9.66** As is the case for national law, while ex post criminal prosecution of violations is crucial to implementation, it is also an admission of failure. It should not discourage the fundamental work of preventing violations and protecting victims by means other than criminal law. As for national law, action under criminal law is only one of the ways to uphold the social order and common interest.[112] The

112 For the old and new school views on 'défense sociale' in domestic criminal law, see, respectively, Adolphe Prins,

increasing focus of public opinion on the criminal prosecution of IHL violations (which may eventually turn into disappointment and cynicism) may have also reinforced the reluctance of States to use existing fact-finding mechanisms, such as the IHFFC.[113]

**9.67** Although the ICRC stresses that it will not provide information for the purpose of prosecuting perpetrators and even though it has obtained a corresponding immunity from disclosure under the ICC Statute,[114] States and armed groups have also become more reluctant to give the ICRC access to victims of IHL violations in places of detention and in conflict areas. Proposals to develop new mechanisms to implement IHL or to clarify its vague concepts may also meet resistance in military circles because they could facilitate criminal prosecution, although this is not their aim.

**9.68** An exclusive focus on criminal prosecution may also give the false impression that all behaviour in an armed conflict is either a war crime or lawful. That impression heightens feelings of frustration and cynicism about the IHL's effectiveness, which in turn facilitates violations. More importantly, that impression is simply wrong. Indeed, an attack directed at a legitimate military objective that is not expected to cause clearly excessive incidental harm to civilians is not a war crime, even if many civilians die. Except in cases of recklessness, targeting errors are not war crimes. For the protection of the civilian population, it is nevertheless crucial for those launching attacks to take all feasible measures to minimize incidental civilian harm or mistakes,[115] although a violation of that obligation is not a war crime. Similarly, it is critical for war victims that occupying powers respect the existing legislation of the occupied territory and legislate only in the very limited instances admitted by IHL,[116] the ICRC is granted access to protected persons,[117] detainees are allowed to exchange family news,[118] families separated by frontlines are allowed to reunite,[119] (former) parties to a conflict cooperate to clarify the fate of missing persons,[120] mortal remains are identified if possible,[121] humanitarian organizations are given access to persons

*La défense sociale et les transformations du droit pénal* (Misch et Thron 1910) and Marc Ancel, *La défense sociale nouvelle* (3rd edn, Cujas 1981).

113 See MNs 5.196–5.198.

114 See ICC, *Rules of Procedure and Evidence* (ICC 2013) Art 73(4).

115 See MNs 8.330–8.333.

116 See MNs 8.239–8.246.

117 See MNs 5.175–5.176.

118 See MNs 8.100, 8.166.

119 See MNs 8.144–8.145.

120 See MNs 8.271–8.277, 8.282.

121 See MNs 8.276–8.278.

in need,[122] children are provided with appropriate education[123] and civilians in both occupied as well as enemy territory have the opportunity to find employment.[124] Even though IHL prescribes all of these things, violations of such prescriptions are not war crimes. In addition, it is much easier to prove that an IHL violation, even if criminalized by ICL, has been committed by a party to an armed conflict than to determine who is the responsible individual, bring that individual before a court and prove their guilt beyond reasonable doubt.

### 9.2.4 The role of ICL in clarifying IHL

**9.69** If only because of the specificity requirement[125] of criminal law, ICL treaties, in particular the ICC Statute and its Elements of Crimes, have developed and made many IHL rules more precise. International criminal justice has made an even greater contribution in this regard. Any tribunal develops and refines the law that it must apply. In that respect, international tribunals, especially the ICTY, have exceeded all expectations.

**9.70** First, as explained elsewhere, the ICTY has had a crucial role in bringing IHL of NIACs closer to IHL of IACs,[126] which has had positive effects and without a doubt increases in most respects the protection IHL offers to persons affected by NIACs. The substantive field within IHL of NIACs that ICTY jurisprudence has developed the most is the law on the conduct of hostilities, in particular the protection of the civilian population against effects of hostilities. It determined without any regard to actual State practice that the precise precautionary measures to be taken by the attacker and defender listed in Articles 57 and 58 of Protocol I and the prohibition against reprisals in Article 51(6) correspond to customary international law, and it applied those provisions independently of whether the conflict in question constituted an IAC or a NIAC.[127] Similarly, the ICTY applied Articles 51 and 52 of Protocol I (the latter in particular for a definition of military objectives that does not exist in the treaty law of NIACs) to a conflict, the classification of which was left open.[128] Finally, it applied the exact definition of indiscriminate attacks found in Articles 51(4) and (5) of Protocol I to a conflict it explicitly classified as NIAC.[129]

122 See MNs 10.203–10.216.
123 See MNs 8.237, 8.264.
124 See MNs 8.172, 8.264–8.265.
125 Cassese and Gaeta, above note 97, 145–7.
126 See MNs 7.18–7.20.
127 Online Casebook, ICTY, The Prosecutor v. Kupreskic et al., paras 526–34.
128 Online Casebook, ICTY, The Prosecutor v. Strugar: B. Trial Chamber, Judgement, paras 216, 220–26.
129 Online Casebook, ICTY, The Prosecutor v. Martić: A. Rule 61 Decision, paras 8–18.

**9.71** Second, the ICTY also clarified the dividing line between IACs and NIACs.[130] Third, it redefined the concept of 'protected person' central to Convention IV beyond the clear text of Article 4 of that Convention.[131] Fourth, several ICTY and ICTR judgments have clarified IHL's field of application. Geographically, IHL applies in the whole territory of the warring States or State. According to the *Tadić* decision, it applies as soon as there is a resort to armed force between States (IACs) or when there is protracted armed violence within a State (NIACs), and it continues to apply beyond the cessation of hostilities until peace or a peaceful settlement is reached.[132] Various decisions enumerate more precisely the different factors that permit classifying armed violence within a State as a NIAC.[133] While IHL treaties are much more nuanced regarding the end of IHL's application,[134] these decisions have provided very welcome answers to all of the other mentioned issues regarding the question of when IHL applies. In the *Akayesu* decision, the ICTR Appeals Chamber correctly held that IHL of NIACs is addressed to everyone who engages in prohibited conduct with a nexus to the conflict,[135] overturning the Trial Chamber's finding that addressees of IHL were only members of the armed forces of a party or those who otherwise held de facto or de jure authority to support or fulfil the war effort. As for the question of who is protected by IHL of NIACs, the *Akayesu* decision also correctly clarified that all persons who do not or no longer take a direct part in hostilities are protected,[136] while in other previous and subsequent ICTR judgments the erroneous idea appears that only those who do not belong to the 'category of perpetrators' are protected.[137]

**9.72** Fifth, many ICTY judgments provide helpful interpretations of substantive IHL. For example, the ICTY confirmed that everyone who is not a combatant is perforce a civilian.[138] Nationality, male gender and military age were not considered as sufficient security reasons allowing the internment of a civilian.[139] Under another ICTY judgment, acts of violence the primary purpose of which

130 See MNs 6.13–6.21.

131 See MNs 8.156–8.158.

132 Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 70.

133 Online Casebook, ICTY, The Prosecutor v. Tadić: E. ICTY, The Prosecutor v. Ramush Haradinaj et al., paras 49 and 60, quoted in MNs 6.35–6.36.

134 See GC I, Art 5; GC III, Art 5; GC IV, Art 6; P I, Art 3; P II, Art 2(2).

135 See Online Casebook, ICTR, The Prosecutor v. Jean-Paul Akayesu: B. Appeals Chamber, para 444.

136 See Online Casebook, ICTR, The Prosecutor v. Jean-Paul Akayesu: A. Trial Chamber, para 629.

137 See ICTR, *Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13 (27 January 2000) para 280; ICTR, *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) para 101.

138 ICTY, *Prosecutor v Delalić et al.* (Judgment) IT-96-21-T (16 November 1998) para 271. See also MNs 8.113–8.119.

139 *Delalić*, ibid., para 577. See also MN 8.179.

is to spread terror among the civilian population only contravene IHL if, in addition to the terror itself, the attack is also directed at individual civilians or the civilian population or it is otherwise indiscriminate.[140]

## 9.3 IHL AND INTERNATIONAL MIGRATION LAW

IHL rules applicable in armed conflicts to the movement of people, to the treatment of people who have moved and on the protection of anyone affected by an armed conflict, whether or not they have moved, are part of international migration law. IHL is particularly important for persons displaced *within* a State because international refugee law, which is the most developed branch of international migration law, does not apply. IHL also contains rules to ensure that refugees are not treated as enemy aliens or, on the contrary, deprived of protected civilian status because of their de jure nationality. It also imposes limitations on the transfer of certain persons, which are more protective for some categories of protected persons than the *non-refoulement* principle in international refugee law and IHRL.

**9.73** International migration law comprises all rules of international law applicable to the voluntary or involuntary movement of people either across an international border or within a State. The most traditional and well codified branch of international migration law is international refugee law, which covers only refugees defined as a person who, 'owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'[141] As refugee status is afforded only to persons who have moved across a border out of a fear of personal persecution for discriminatory reasons, most migrants are not covered by this definition. However, the UNHCR mandate, which is based upon UN General Assembly resolutions, covers not only refugees and asylum-seekers (persons whose refugee status has not yet been determined) but also individuals who are outside their country of origin and who are unable or unwilling to return there owing to serious threats to their life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

140 See Online Casebook, ICTY, The Prosecutor v. Galić: A. Trial Chamber, Judgement and Opinion, para 135, as reaffirmed and extended to indiscriminate attacks by ibid., B. Appeals Chamber, Judgement, paras 99–102.

141 See Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (Refugee Convention), Art 1(A)(2), as modified by the Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267.

**9.74** Under international refugee law, even refugees do not have a subjective right to be admitted to a third country to seek asylum. However, once they are in another country, refugees and, under IHRL, all migrants have the right not to be returned to a country where they fear persecution.

**9.75** Many rules of international law protect migrants. As human beings, migrants benefit from all rights under IHRL except political rights as well as the right to enter and stay in a given country. If they qualify as refugees, they are protected by international refugee law. Even if they are not refugees, they may be protected by the UNHCR's mandate, rules on stateless persons and some specific but scarcely ratified rules covering all migrants.[142] Migrants affected by an armed conflict are also protected by the normal IHL rules applicable to the IHL category to which they belong (for instance, as a civilian, woman, child or detainee) and by some specific IHL rules applicable to refugees and stateless persons. These IHL rules are therefore also a part of international migration law.

**9.76** This sub-chapter will address the protection of persons fleeing armed conflicts under IHL and international refugee law, protection IHL affords to refugees and stateless persons, IHL applicable to displaced persons, the principle of *non-refoulement* in IHL and the return of refugees as well as displaced persons under IHL.

### 9.3.1 The protection of persons fleeing an armed conflict

**9.77** If belligerents observed IHL protecting civilians, most population movements caused by armed conflicts would be prevented. IHL of NIACs contains a general prohibition against the forced movement of civilians,[143] while IHL of IACs stipulates such a general prohibition only for occupied territories.[144] Recognizing that such population movements may nevertheless occur for various reasons, including for reasons other than an armed conflict, IHL protects both refugees (who cross a border) and displaced persons (who remain within a country) if they are affected by an armed conflict.

#### a. Across a border

**9.78** An armed conflict does not constitute as such persecution leading to refugee status under the universal instruments of international refugee law. It does,

142 See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990) 2220 UNTS 3.

143 P II, Art 17; ICRC CIHL Database, Rule 129(B).

144 GC IV, Art 49; ICRC CIHL Database, Rule 129(A).

however, lead to protection as a refugee under a regional convention in Africa,[145] and persons fleeing an armed conflict fall under the UNHCR's mandate. Such an extension was also recommended by the Cartagena Declaration on Refugees for Central America, Mexico and Panama.[146] In the EU and many other countries, persons who cross a border to flee an armed conflict and who do not qualify as refugees benefit from a special status, which is called 'subsidiary protection' in the EU.[147] Finally, IHL continues to protect such persons according to the usual IHL protection regimes if the country to which they flee is affected by the same or another armed conflict.

### b. Within their country

**9.79** Displaced persons are civilians fleeing within their own country from, for example, an armed conflict. IHL rules applicable to civilians who are not protected persons protect those displaced by an IAC.[148] Persons displaced by a NIAC enjoy the same protection as anyone else who is affected by the conflict. In addition, belligerents lawfully displacing persons must take all possible measures to ensure that those displaced are 'received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.'[149]

**9.80** All rules not specific to displaced persons protect them according to the IHL category to which they belong. Obviously, however, a displaced person who, in contrast to her neighbour belonging to the same IHL category (for instance, persons not directly participating in hostilities in a NIAC), lacks access to food or hygiene due to the displacement must benefit from additional assistance compared to her neighbour.

**9.81** For a long time, it has been controversial whether a specific international instrument protecting displaced persons should be adopted. The wishes of the ICRC, UNHCR and other NGOs to protect or expand their institutional mandates also fuelled this controversy. A specific instrument would provide certain advantages: it would contain all rules on displaced persons in one text and adapt general rules to the specific needs of displaced persons. Such an instrument,

145 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45, Art 1(2).

146 Cartagena Declaration on Refugees (22 November 1984), reproduced in IACommHR, 'Annual Report of the Inter-American Commission for Human Rights' (1984–1985) OAS Doc OEA/Ser.L/V/II.66/Doc.10/Rev.1, 190–93.

147 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (2011) Official J of the EU L337/9, Art 2(f).

148 See MNs 8.130–8.148 and in particular the rules on humanitarian assistance in MNs 10.198–10.216.

149 P II, Art 17(1). ICRC CIHL Database, Rule 131, considers that this rule applies both in IACs and in NIACs and adds that members of the same family may not be separated.

however, would add to classification difficulties and controversies that are so frequent in IHL and might lead to unjustified distinctions (and even tensions) between the displaced and the resident population, which may have the same protection and assistance needs. Africa decided to adopt a specific treaty on displaced persons,[150] while a non-binding instrument, the Guiding Principles on Internal Displacement, was adopted on the universal level.[151] Both instruments apply all relevant IHL and IHRL rules to specific problems faced by displaced persons. Thus, even the Guiding Principles are binding insofar as they provide an authoritative interpretation of existing IHL and IHRL obligations.

### 9.3.2 IHL protection of refugees

**9.82** Persons may flee persecution by a State to the territory of the adverse party in an IAC or to territory occupied by that party. Such refugees are protected civilians because of their formal enemy nationality,[152] but measures of control must not be applied to enemy aliens in a party's own territory 'exclusively on the basis of their nationality "de jure" of an enemy State.'[153] The ICTY's suggestion that a person's actual allegiance should replace the nationality criterion to determine protected civilian status[154] was never meant to deprive someone of protected civilian status just because they have allegiance to the State in whose power they are.

**9.83** Before an IAC breaks out, persons may also flee to the territory of another State that is then later occupied by the State whose persecution they fled. Legally, they would not be protected civilians under the nationality criterion because they often still have the de jure nationality of the occupying power. Although Convention IV does not grant them protected person status, it prescribes that they may 'not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.'[155] If Protocol I applies, such persons are protected civilians if they qualified as refugees under international refugee law or applicable

150 Kampala Convention, above note 33.

151 UN, 'Guiding Principles on Internal Displacement' as annexed to UN Commission of Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted pursuant to Commission Resolution 1997/39' (1998) UN Doc E/CN.4/1998/53/Add.2.

152 See MNs 8.149–8.150, 8.153.

153 GC IV, Art 44.

154 See MNs 8.156–8.158.

155 GC IV, Art 70(2).

domestic law before the outbreak of the IAC.[156] This rule in Protocol I also refers to stateless persons, but it does not add anything because stateless persons by definition can never have the nationality of the power in whose hands they are or fall under the other exclusion clauses from protected civilian status as they are all linked to the nationality of the person concerned.[157]

**9.84** It is worth mentioning here that international refugee law excludes persons from refugee status for different reasons, including if they have committed an international crime.[158] While IHL does not contain such an exclusion clause, it allows States to derogate from some of the rights it affords to protected civilians who are suspected of activities hostile to the security of the State in whose power they are.[159]

### 9.3.3 The principle of *non-refoulement* in IHL

**9.85** The *non-refoulement* principle, which is a central tenant of international refugee law and IHRL, prohibits the expulsion or return of a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[160] International refugee law exempts persons who present a particular danger for the security of the State from this prohibition.[161] However, IHRL, which has expanded the principle to protect all persons and not only refugees, admits no exception. This principle belongs to *jus cogens*,[162] and IHL prescriptions of humane treatment and the prohibition of torture and inhuman and degrading treatment may be interpreted as including this principle.[163] IHL of IACs applies the principle to certain persons,[164] but it also goes further by prohibiting all deportations from occupied territory[165] and requiring that the transferee power receiving transferred POWs or protected civilians (from a party's own territory) is willing and able to respect Conventions

156 P I, Art 73.
157 See MNs 8.149–8.155.
158 See Refugee Convention, above note 141, Art 1(F)(a).
159 See GC IV, Art 5; see also MNs 8.168–8.170.
160 Refugee Convention, above note 141, Art 33(1).
161 Ibid., Art 33(2).
162 See Jean Allain, 'The *Jus Cogens* Nature of Non-refoulement' (2001) 13 Intl J of Refugee L 533.
163 See for GCs, Common Art 3; Updated ICRC Commentary GC I, paras 708–16.
164 GC IV, Art 45(4).
165 See GC IV, Art 49(1), and MNs 8.261–8.262.

III or IV, respectively.[166] Concerning the repatriation of POWs, the *non-refoulement* principle offers better guarantees than IHL and prevails.[167]

### 9.3.4 The return of refugees and displaced persons

**9.86** A party to an IAC must allow refugees and other migrants who are protected civilians to return to their country of origin if they wish and if there are no other countervailing national interests.[168] Refugees and other migrants must be released and repatriated as soon as possible after the close of hostilities if they were interned for imperative security reasons.[169] In NIACs and for persons for whom the question is not explicitly regulated in IHL of IACs, repatriation may be seen as a reparation in the form of *restitutio in integrum* for an unlawful displacement.

**9.87** IHL treaties do not explicitly regulate the question of whether the migrants' State of origin is obliged to accept their return once the adverse party must allow their repatriation. However, such an obligation, which results from IHRL,[170] is considered to be customary law,[171] and it may be seen as resulting from the adversary's corresponding repatriation obligation. If IHL gives a party the right to require that the (former) adversary repatriates its POWs and civilian internees, it may not make the fulfilment of this obligation, which the State of origin cannot waive as it also benefits persons, impossible by allowing that same party to refuse acceptance of their return.

## 9.4 IHL AND THE LAW ON MAINTAINING OR RE-ESTABLISHING INTERNATIONAL PEACE AND SECURITY (*JUS AD BELLUM*)

### 9.4.1 IHL violations as a threat to international peace and security

Violations of IHL constitute threats to international peace and security and therefore allow the UN Security Council to take coercive measures under Chapter VII of the UN Charter, including the deployment of peace forces.

166 For POWs, see GC III, Art 12(2), and MNs 8.098–99. For protected civilians in a party's own territory, see GC IV, Art 45(3).
167 See MN 8.111.
168 See MNs 8.174–8.176.
169 GC IV, Art 133.
170 See, e.g., ICCPR, Art 12(4).
171 ICRC CIHL Database, Rule 132.

**9.88** IACs obviously constitute a breach of international peace. The UN Security Council has also consistently considered that NIACs threaten international peace and security.[172] The Security Council furthermore determined that violations of IHL in themselves threaten international peace and security. Although it has inevitably acted selectively, it has therefore adopted measures to stop IHL violations, including economic sanctions, the establishment of international criminal tribunals and the deployment of UN peace forces that more recently sometimes even received an explicit mandate to protect the civilian population.[173]

### 9.4.2 The separation between *jus ad bellum* and *jus in bello*

> The rules on when force may be used in international relations (*jus ad bellum*) and *jus in bello* (which comprises IHL) must be kept separate. IHL always applies equally to all parties to a conflict independently of the legitimacy of their fighting under *jus ad bellum*. IHL must be interpreted independently of *jus ad bellum* arguments, and neither of the two branches may override the other branch. In my view, UN Security Council resolutions nevertheless prevail over IHL rules if they clearly manifest this intent.

**9.89** IHL developed when the use of force was a lawful form of international relations. Not only were States not prohibited from waging war, they even had the right to go to war or, in other words, they had the *jus ad bellum*. At that time, it did not appear illogical for international law to oblige States who exercised this right by resorting to hostilities to respect certain rules of conduct in war (*jus in bello*). Today, however, a peremptory rule of international law prohibits the use of force between States subject to certain exceptions.[174] The *jus ad bellum* has thus transformed into a *jus contra bellum*. Exceptions to the general prohibition against the use of force are individual as well as collective self-defence,[175] collective security measures pursuant to Security Council resolutions adopted under Chapter VII of the UN Charter[176] and the right of all peoples to self-determination.[177] Due to the latter, neither national liberation wars nor a State using force to support a national liberation movement violate international law.

172 See Online Casebook, ICTY, The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction, para 30.

173 For references, see MN 5.084.

174 UN Charter, Art 2(4).

175 Ibid., Art 51.

176 Ibid., Art 42.

177 UNGA Res 2105 (XX) (1965) recognized the legitimacy of resorting to the use of force to enforce the right of all peoples to self-determination, which is a right recognized by Art 1 of the ICCPR and Art 1 of the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3.

Logically under *jus contra bellum*, at least one side of an IAC violated international law by the sole fact that it has used force, irrespective of how well it respects IHL. As for NIACs, all domestic laws throughout the world prohibit the use of force by citizens against (governmental) law enforcement agencies or between groups of citizens. This can be considered as the *jus contra bellum* of NIACs. The absence of rules in international law on when citizens may use force against their government is nevertheless one of the greatest lacunas in international law.[178]

### a. Reasons for the separation

**9.90** The are several reasons for the separation between *jus ad bellum* and *jus in bello*, some of which are controversial. First, one may view this strict separation as merely a matter of logic. Once the primary rules prohibiting the use of force (that is, *jus ad bellum*) have been violated, the subsidiary rules of *jus in bello* must perforce apply independently from the former without exception because they were developed precisely for such situations. This premise, however, was not always uncontroversial. Some objected, resorting to legal logic and the general principle *ex injuria jus non oritur* ('unlawful acts cannot create rights'), that those who act contrary to the law cannot acquire rights as a result of his or her transgression.[179] Yet, IHL cannot be merely seen as providing rights to States. It also provides objective rules of behaviour that bind States for the benefit of individuals affected by war. In addition, it is impossible to separate rights from obligations in IHL.[180]

**9.91** Despite the aforementioned good reasons that justify IHL's existence even though international law now prohibits IACs, the ILC refused to codify IHL because 'public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.'[181] Indeed, a national legislator adopting rules on how drivers should behave when driving in the prohibited direction on a one-way road would be criticized for undermining the main rule prohibiting such conduct in the first place. One may reply that, even if determining the correct direction for each one-way road was often controversial, such subsidiary rules may nevertheless avoid many accidents. This is precisely the approach of IHL. In many parts

178 For one of the few attempts to fill this gap, see Eliav Lieblich, 'Internal *Jus Ad Bellum*' (2016) 67 Hastings L J 687.

179 See Hersch Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 BYBIL 206, 212 (who himself rebuts this thesis). For a detailed rebuttal, see François Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire' (2002) 84 IRRC 523, 529–33.

180 Bugnion, ibid., 536–7.

181 See ILC, Yearbook…1949, 281.

of the public, a certain scepticism persists, however, towards IHL as it is seen as diverting attention away from the main aim to avoid wars. If it were true that the existence of IHL makes wars more likely, one should seriously rethink the justification for IHL. In my opinion, such a premise is simply not true: no politician, military leader or soldier has ever waged an armed conflict because they trusted that IHL would be respected and the risks therefore somehow limited. Indeed, even an armed conflict in which IHL is perfectly respected provokes unpredictable human suffering, and reality unfortunately shows that no belligerent can confidently count on the respect of IHL.

**9.92** Humanitarian reasons for the separation are even more compelling. People affected by armed conflicts need as much protection against the belligerent fighting in conformity with the *jus ad bellum* as against a belligerent who violated *jus contra bellum*. They are not responsible that 'their' State violated *jus contra bellum*, and they require the same protection as well as assistance regardless of whether they are on the 'right' or the 'wrong' side. Conceptually, this may be justified by the fact that *jus in bello* confers rights not only on States but also on human beings. Rights afforded by international law to individuals, such as the right of a wounded person to be cared for, are not rescinded just because their State acted in contravention of international law.[182]

**9.93** The humanitarian consideration is coupled with a very practical one: most belligerents are convinced that their cause is just. During the conflict, there is nearly never a binding third-party decision on which side violated *jus ad bellum*. Even if there is, the belligerent designated as the aggressor will surely not agree. IHL therefore only has a chance of being respected if it applies independently of the violation of *jus ad bellum* and if both sides must abide by the same rules.

**9.94** IHL must therefore be completely distinguished from *jus ad bellum* and respected independently of any argument arising under it. Any past, present and future theory of just war only concerns *jus ad bellum* and cannot justify (although it is in fact frequently used to imply incorrectly) that those fighting a just war have more rights or fewer obligations under IHL than those fighting an unjust war.

**9.95** The two Latin terms were coined only in the last century,[183] but Emmanuel Kant had already distinguished the two ideas.[184] Earlier, when the doctrine of

182 Quincy Wright, 'The Outlawry of War and the Law of War' (1953) 47 AJIL 365, 373.

183 Robert Kolb, 'Origin of the Twin Terms *Jus ad Bellum/Jus in Bello*' (1997) 37 IRRC 553.

184 Immanuel Kant, *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science*

just war prevailed, Grotius' *temperamenta belli* ('restraints to the waging of war') only addressed those fighting a just war.[185] Later, when war became an accepted tool of international relations, there was no need to distinguish between *jus ad bellum* and *jus in bello*. Rather, the strict separation between the two only became essential with the modern prohibition against the use of force.

**9.96** Although this strict separation has been challenged, more often implicitly or by negligence[186] than explicitly, it is recognized in judicial decisions[187] and in Protocol I.[188]

### b. Consequences of the separation

#### *i. The equality of belligerents before IHL*

**9.97** Under *jus ad bellum*, the parties to an IAC are never equal because one side has necessarily violated that law. Under *jus in bello*, conversely, both sides are always equal because they must comply with exactly the same rules. While aggression is unlawful, the first shot fired by a member of the armed forces of the aggressor State upon a soldier of the State attacked is as lawful under *jus in bello* – and governed by the identical restraints – as the members of the attacked State's armed forces' return fire.

**9.98** Unsurprisingly, the equality of belligerents before IHL is attacked by all those who consider themselves as having a particularly noble cause. Apparently, the official doctrine in the Soviet Union provided that the victim of an aggression (under the Marxist-Leninist doctrine aggression was by definition an attribute of capitalist States) was not bound by IHL.[189] At the Diplomatic Conference that adopted the Additional Protocols, the Democratic Republic of Vietnam explained in detail why an aggressor should be subject to IHL, while the victim of an aggression should be relieved of its IHL obligations.[190]

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*of Right* (W. Hastie translator, Clark 1887) paras 53, 57.

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

186 See Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 105, Section E.

187 See Online Casebook, United States Military Tribunal at Nuremberg, United States v. Wilhelm List, Section 3(v), and Online Casebook, United States Military Tribunal at Nuremberg, The Justice Trial, para (10).

188 P I, preamble, para 5.

189 See the references in Jiří Toman, *L'Union soviétique et le droit des conflits armés* (PhD Thesis, The Graduate Institute of International Studies 1997) 19.

190 'Official Records of Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)' (Federal Political Department of Switzerland 1978) vol IV, 177–88.

### *ii. IHL applies independently of the qualification of the conflict under* jus ad bellum

**9.99** The applicability of IHL in general or some of its sub-regimes (such as the law of military occupation) depends on the actual situation on the ground. The Israeli-Palestinian conflict illustrates the fact that the justification for the violence or for the presence of the parties is irrelevant.

**9.100** The government of Israel denies the de jure applicability of the Convention IV's rules on occupied territory to the Palestinian territory, arguing that the latter did not lawfully belong to another High Contracting Party before 1967, such as Jordan in the case of the West Bank.[191] However, the fact that an armed conflict occurred between Israel and Jordan in 1967 in which Israel gained control over territories over which it previously had no control is what is decisive for the applicability of IHL of military occupation.[192] All other arguments pertain to *jus ad bellum*, such as those based on what the Bible or the Balfour Declaration purportedly promised to the Jewish people, that the 1967 war was fought in self-defence, that Israel had a better right to the West Bank than Jordan or that the annexation of the West Bank by Jordan in 1950 was illegal. Conversely, Palestinian groups also regularly invoke *jus ad bellum* to justify their failure to respect *jus in bello* in their fighting. When they fight Israeli forces without distinguishing themselves from the civilian population or when they deliberately attack civilians (for example by suicide attacks), they invoke their right to resist foreign occupation. Such a right, however, could justify their acts only under *jus ad bellum*, and it would necessarily mean that they must comply with IHL when resisting.

**9.101** The question of whether a legitimate presence bars the applicability of IHL of military occupation arose in the Eritrea–Ethiopia Claims Commission. During the conflict between Ethiopia and Eritrea from 1998 to 2000, Eritrean armed forces moved into and administered territory that Ethiopia had previously administered. Before the Claims Commission, Eritrea argued that IHL of occupation did not apply to its activities there because it was the rightful sovereign of the territory.[193] The Eritrean argument was reinforced by the fact that the Boundary Commission had in the meantime determined the territory

191 For the Israeli position, see Meïr Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 IYBHR 262.

192 See Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, paras 92–5.

193 Ethiopia-Eritrea Claims Commission, *Partial Award: Central Front – Ethiopia's Claim 2* (28 April 2004) para 77, reproduced in (2004) 43 ILM 1275.

in question to be part of Eritrea. The Commission nevertheless rejected this position.[194]

**9.102** For the same reasons, the claim that 'defensive armed reprisals' or other 'measures short of war' do not constitute armed conflicts, if correct, may only have consequences under *jus ad bellum*, while *jus in bello* must fully apply.[195]

### *iii. Arguments under* jus ad bellum *may not be used to interpret IHL*

**9.103** *Jus ad bellum* may not be used to interpret a provision of IHL. Thus, when balancing the anticipated military advantage of an attack upon a military objective with the expected incidental civilian losses, the military commander may only take *jus in bello* advantages into account and not, for example, the liberation of civilians under enemy occupation.

**9.104** Unfortunately, the ICJ could not reach a definitive conclusion as to whether the most typical *jus ad bellum* argument – self-defence – could be used to interpret IHL. In a split decision with the President casting the deciding vote, the Court in my view correctly concluded that the 'use of nuclear weapons would generally be contrary to…the principles and rules of humanitarian law.'[196] Regrettably, it went on to state: 'However…the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake.'[197] If it were lawful to use nuclear weapons for that reason, it would mean the end of IHL as we know it because, in nearly all IACs, at least one side believes it is fighting in self-defence and, in most armed conflicts, at least one side's very survival is at stake. If such a circumstance could justify the (otherwise prohibited) use of nuclear weapons, it should perforce also justify the killing of the wounded or sick or the torture of POWs.

**9.105** The ICJ unfortunately repeated its mistake of conflating *jus ad bellum* with *jus in bello* in its *Wall* advisory opinion concerning the Occupied Palestinian Territory. After mentioning several rules of IHL that it considered the wall violated, the ICJ enquired into whether those violations could be justified by circumstances excluding their unlawfulness, such as self-defence. In a very controversial paragraph, it examined the conditions for self-defence, finding that those conditions were not satisfied because the attacks were not attributable to another

194 Ibid., para 78. See also ibid., paras 27–31.
195 As recognized by Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) 261–7.
196 See Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 105, Section E.
197 Ibid.

State and originated from territory under Israeli control.[198] Instead, it should have simply explained that, according to the separation between *jus ad bellum* and *jus in bello*, self-defence, which belongs to *jus ad bellum*, could not justify violations of IHL (*jus in bello*).

#### *iv. IHL may not render the exercise of* jus ad bellum *impossible*

**9.106** As *jus ad bellum* makes it lawful to use force for certain reasons and purposes, IHL may not make it impossible to achieve those purposes. At any rate, belligerents would not renounce the ability to achieve their lawful purposes just to comply with IHL, and the law may not expect them to do so. While in my view any evaluation of whether incidental civilian losses or damages are excessive must take into account the reverberating effects of an attack,[199] this unfortunately may not make it impossible to conduct an armed conflict in, for example, self-defence. Similarly, if national liberation wars and armed resistance against a technologically overwhelming aggressor or foreign occupier are lawful under *jus ad bellum*, IHL cannot outlaw *every* efficient method to win such a war. Certainly, for instance, it would be preferable for the civilian population's protection if combatants clearly distinguished themselves from the civilian population at all times. However, under such rules, certain belligerents, in particular technologically inferior ones, would simply not have the slightest chance of overcoming the enemy for a cause that is lawful under *jus ad bellum*. Therefore, IHL inevitably had to adapt to make such fighting possible. Thus, Protocol I lowered the distinction requirement to what is possible to comply with in a guerrilla war while maintaining the necessary minimum allowing the enemy to respect the civilian population.[200] Those who criticize this as 'law in the service of terror' want to have *jus in bello* bar the realization of *jus ad bellum*.[201]

### c. Do the UN Charter and UN Security Council resolutions prevail over IHL?

**9.107** According to Article 103 of the UN Charter, obligations under the Charter prevail over obligations contained in any other international agreement. Given the provision's explicit reference to other international agreements, it may be that this priority of obligations does not apply to customary obligations.

198 See Online Casebook, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory: A. ICJ, Legal Consequences of the Construction of a Wall, para 139. For criticism of the ICJ's decision, see Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99 AJIL 52, and Sean D. Murphy, 'Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?' (2005) 99 AJIL 62.

199 See MNs 8.321, 8.323–8.324.

200 See P I, Art 44(3).

201 See Online Casebook, United States, President Rejects Protocol I; Douglas J. Feith, 'Law in the Service of Terror' (1985) 1 The National Interest 36, 47.

However, rules of customary law other than *jus cogens* rules may be derogated from, and a Security Council resolution constitutes in this respect both a *lex specialis* and *lex posterior*.[202]

**9.108** While nothing in the UN Charter contradicts IHL, Article 103 also implies that UN Security Council resolutions adopted under Chapter VII of the UN Charter prevail over any other international obligation because Article 25 of the Charter obliges UN member States to comply with them.[203] UN Security Council Resolutions may, however, contradict IHL.[204] Does this constitute an exception to the separation between *jus ad bellum* and *jus in bello* in the sense that Security Council resolutions prevail over IHL? Those who answer this question negatively contend that IHL is *jus cogens* and even the Security Council itself must comply with *jus cogens* norms.[205] I simply wonder how one could claim in the first place that a rule from which the Council authorized a derogation in a resolution adopted by at least nine members of the Council and not opposed by any permanent member could nevertheless be 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'[206]

**9.109** However, in my view, any derogation from IHL by the UN Security Council must be explicit, and its resolutions must be interpreted whenever possible in a manner compatible with IHL. The Council's mandate to maintain international peace and security is a *jus ad bellum* mandate. Thus, just as a State exercising its *jus ad bellum* by using force in self-defence must comply with IHL, the implementation of measures authorized by the Council must respect IHL except if the Council explicitly authorizes otherwise.[207]

### d. New threats to the separation

#### *i. New concepts of 'just' (or even 'humanitarian') war*

**9.110** Existing and suggested new justifications for the use of force in international relations, such as 'humanitarian intervention' or the 'fight against terrorism', do not necessarily blur the distinction between *jus ad bellum* and *jus in bello*. The separation precisely implies that the same rules of IHL apply, irrespective of

202 Robert Kolb, 'L'article 103 de la Charte des Nations Unies' (2014) 367 Recueil des Cours 9, 213–9.

203 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. US)* (Order on Provisional Measures) [1992] ICJ Rep 114, para 42.

204 For a possible example, see Online Casebook, Iraq, the End of Occupation.

205 In general and for references, see Kolb, L'article 103, above note 202, 217. Specifically for IHL, see Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Pedone 2010) 100–113.

206 See the definition of *jus cogens* in VCLT, Art 53.

207 For an example of wording that is insufficient in my view, see MN 8.245.

the justification for a conflict. In reality, however, the more belligerents are convinced that their cause is just, the more difficult it is for them accept that they have the same obligations and only the same rights as their unjust enemies.[208] They will invoke all kinds of brilliant legal theories to obtain more rights or fewer obligations than their enemies. If scrutinized, such theories invariably blur the distinction between *jus ad bellum* and *jus in bello*. It is thus not astonishing that, during its 1989 invasion of Panama which it called 'Operation Just Cause', the US tried to deny POW status to the captured commander-in-chief of the armed forces of Panama, General Noriega, by arguing that the legitimate (but ousted) president of Panama had requested them to intervene. US courts correctly rejected such blurring between *jus ad bellum* and *jus in bello* and recognized General Noriega's status as a POW, including after he had been sentenced for drug trafficking.[209]

**9.111** A UN authorization of a military intervention makes it lawful under *jus ad bellum* but cannot modify the applicable IHL. Some European NATO member States tried to argue otherwise during the UN-authorized NATO bombardments in 1994 to 1995 against Bosnian Serb artillery positions threatening protected areas in Bosnia and Herzegovina. Those States seriously claimed that their pilots engaged in such bombardments were not combatants, that the Bosnian Serbs had no right to fire upon them and that, if captured, they had to be released immediately. They argued that such pilots were UN experts on mission protected by the 1946 Convention on the Privileges and Immunities of the UN and provided them with identity cards referring to that classification. In *jus in bello*, the idea that those bombed may not attack individuals bombing them and must immediately release those individuals if captured (which would allow those released to continue the bombing) is absurd and will never withstand the test of reality. Unsurprisingly, as soon as two French pilots were actually shot down, France changed its legal position and asked for POW status and treatment.[210]

208 See Adam Roberts, 'The So-Called "Right" of Humanitarian Intervention' (2000) 3 YIHL 3, 3–4.

209 See Online Casebook, United States, United States v. Noriega.

210 For the expert on mission status of NATO pilots in the enforcement of the no-fly zone and during the bombardment of Bosnian Serb positions, see Jeanne Meyer and Brian Bill (eds), *Operational Law Handbook* (International and Operational Law Department, The Judge Advocate General's School 2002) 402. For the French position, see Agence France-Presse, 'Paris admet que ses deux pilotes disparus en Bosnie sont prisonniers' (20 September 1995).

*ii. IACs are perceived as law enforcement actions the international community directs at 'outlaw States'*

**9.112** The growing institutionalization of international relations through the UN, which is for the time being a mere aspiration, could one day concentrate the monopoly over the lawful use of force in the UN's hands. IHL would then return to a state of *temperamenta belli* addressing only those who fight to enforce international law (that is, those fighting on behalf the UN) but could no longer treat their enemies equally. This would fundamentally modify the philosophy of existing IHL.

**9.113** From the perspective of the UN Charter as a collective security system, even IACs between States can no longer be perceived as conflicts between equals. They are often asymmetric not only in terms of the means at the disposal of the two sides but also from a moral point of view. On one side, there is the international community and those who represent it (or at least claim to) as the 'law enforcers', while on the other side there is generally one single 'outlaw' State (for instance, Yugoslavia, Iraq or Libya in recent years). In such an environment, the separation between *jus ad bellum* and *jus in bello* as well as the application of the same IHL rules to both sides becomes less acceptable for those who perceive themselves as enforcing the common interest. At the same time, equal application of IHL corresponds less to reality because the militarily weaker 'outlaw' does not respect IHL but rather resorts to acts prohibited by IHL, such as terrorist attacks or acts of perfidy, as the only chance to prevent complete defeat. This leads to a self-fulfilling prophecy. Similar to the absence of domestic rules on how criminals may resist law enforcement, there could be no more rules on how the 'outlaw' may fight against the law enforcers. The result will be that 'outlaw' States no longer simply violate IHL but will not be even bound by it. As for the 'law enforcers', they can no longer be bound by the full set of rules of IHL, including, for example, combatant status and combatant immunity for the benefit of the members of the armed forces of the 'outlaw'. Nor can the 'law enforcers' tolerate the reluctance of IHL of military occupation towards changes of laws and institutions introduced by an occupying power.[211] At most, they will accept to be bound by a new set of *temperamenta belli*, human rights-like restraints addressed to those who are engaged in international law enforcement – but not to their enemies.[212]

211 See MNs 8.239–8.246.

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

**9.114** While this development may be inevitable, it hopefully will take place in the form of strengthened international institutions that are able and willing to enforce the rule of international law. Indeed, in such an environment, there could be no more equality before the law between those who enforce international law and those against whom it is enforced. In my opinion, however, contemporary reality is not only very far away from the utopia just described, but it is even currently moving away from it. First, the world is still comprised of sovereign States. Even when they violate international law, they cannot yet be perceived as simple criminal gangs that are made up of criminal individuals. In particular, the freedom of choice for combatants and even more so for civilians to join an 'outlaw' State is incomparably lower than for any individual to join a criminal gang at the domestic level. Second, while combatants are incentivized to comply with IHL because they benefit from combatant immunity for acts that conform to IHL, criminals are liable to be punished for any act of violence they commit regardless of whether it conforms to IHL, thereby eliminating an important incentive to comply with IHL. Third, if an armed conflict is labelled as a law enforcement operation, the 'law enforcers' remain bound by IHRL and domestic law, while their enemies are no longer bound by any *jus in bello* on how to fight and instead are only bound by the *jus ad bellum* barring them from fighting. Killing civilians and targeting members of enemy armed forces thus become legal equivalents. Fourth, despite the progress made by international criminal justice in recent years, the possibility to hold individuals who decide to violate *jus ad bellum* responsible is still underdeveloped and depends on the goodwill of States to cooperate. This implies that behaviour contrary to the common interest as well as law and order in the international community cannot yet be dealt with exclusively as individual behaviour but must still be attributed to States with the inevitable collective reaction resulting from such attribution. Fifth, in the absence of an efficient international system of adjudication, bona fide divergences of view on which side is the outlaw and which side is fighting for the common interest in a given conflict may exist.

**9.115** As long as these realities remain unchanged, armed conflicts still have more in common with traditional wars than with domestic law enforcement operations. The law trying to protect those involved in and affected by a social phenomenon should not disappear before the phenomenon to which it applies itself disappears. This law is IHL, including the separation that must be drawn between it and the legitimacy of the cause of the parties involved.

### 9.4.3 Peace forces and IHL

Based on different alternative or cumulative arguments, it is increasingly accepted that UN peace forces and peace forces of regional organizations are bound by IHL if they are engaged in hostilities against a State or a non-State armed group. However, other issues remain controversial, including when such forces can be considered as engaged in an armed conflict, whether IHL of IACs or IHL of NIACs applies, when members of peace forces and their adversaries have combatant status and whether peace forces may be bound by IHL of military occupation. The relationship between IHL and the Convention on the Safety of UN and Associated Personnel is equally subject to controversy. In my view, although admittedly it is difficult to explain why peace forces are bound by IHL and even though they have objective difficulties in complying with some IHL rules, peace forces are bound by the same rules in the same situations as State armed forces. In my opinion, this is a consequence of the separation between *jus ad bellum* and *jus in bello*.

**9.116** 'Peace forces', traditionally called 'peacekeeping forces', are military forces deployed by the UN or a regional organization to maintain or re-establish international peace and security. Given the text of the UN Charter, coercive measures under Chapter VII must be distinguished from the peaceful settlement of disputes under Chapter VI. The latter must always be based on consent and impartiality.

**9.117** The traditional forms of Chapter VI measures for the peaceful settlement of disputes include, for instance, good offices, enquiry, mediation, arbitration and adjudication. Over time, UN practice has added another form, to which some refer to as Chapter 'six and a half', involving the interposition of traditional peacekeeping operations between former belligerents that have concluded a ceasefire. Such traditional peacekeeping is also based on consent and impartiality.

**9.118** From a conceptual point of view, Chapter VII of the UN Charter is a completely different situation as it permits coercive measures in cases of threats to or breaches of international peace and security. In theory, these measures include military sanctions by the UN. In practice, however, the Security Council either authorizes a State or a group of States to use force (and the military forces sent in such a case are not called 'peace forces') or sends so-called hybrid peace operations. The latter are clearly neither peace-enforcement operations foreseen by Article 43 of the Charter nor traditional peacekeeping operations. While hybrid peace operations are also normally based on consent and impartiality,

their mandate also authorizes the use of force against one of the parties to defend not only the individual life of the peacekeepers but also a protected zone or civilians or even the mandate itself. Regional organizations such as the AU may deploy similar forces, although the Security Council must authorize any use of force except, theoretically, if force is only used with the territorial State's consent against armed non-State actors. As noted previously, the deployment of such peace forces is even one of the possible measures to enforce IHL by preventing or stopping violations.[213] If such forces are actually used, IHL should logically apply.

**9.119** In my view, the much-debated controversy about whether, when and why UN (and other) peace forces are bound by which rules of IHL is partly related to the tendency of those who invoke the fact that they are lawfully using force under *jus ad bellum* to deny the full applicability of *jus in bello*.

### a. Does IHL bind peace forces?

**9.120** Certainly, there are technical objections to the applicability of IHL to UN peace forces, and similar arguments may be raised against the applicability of IHL to peace forces of regional organizations. The UN is neither a party to IHL treaties nor could it become a party to those treaties. In addition, IHL treaties contain a number of rules that an international organization can never respect because those rules can only be implemented by a State with territory, legislation and a criminal justice system. For a long time, the UN has insisted that it is only bound by the 'principles and spirit' of IHL while denying that it is bound by its detailed rules. In my view, there are also some doubts as to whether, as the majority opinion contends, it is bound by the same customary IHL applicable to States.[214] More recently, the UN Secretary-General's Bulletin on Observance by UN Forces of IHL includes and summarizes many but not all rules of IHL and instructs UN forces to comply with them when engaged as combatants in armed conflicts.[215] As for its applicability, the Bulletin states ambiguously: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.'[216]

213 See MN 5.089.

214 See MNs 6.63–6.66.

215 UN Secretary-General, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (1999) UN Doc ST/SGB/1999/13.

216 Ibid., Art 1.1.

**9.121** Interestingly enough, during the debates leading to the Bulletin's adoption, UN representatives argued that UN forces – even when involved in actual fighting with the armed forces of a State – could not possibly be labelled as a party to a conflict or as an occupying power and that their opponents could not be referred to as 'the enemy' because UN forces represent the whole of the international community in conformity with international law, including the possible State against whom they were fighting. Similarly, some argue that whether IHL fully applies to UN forces depends on the mandate of such forces, but this is clearly a *jus ad bellum* argument, and we have seen that IHL applies instead according to the facts on the ground.

**9.122** Even if the UN itself is not fully bound by IHL, those acting on its behalf are bound either as individuals by the criminalized rules of IHL or as the organs of contributing States. Even though States contributing to peace operations are parties to IHL treaties, it is controversial whether and when they are addressees of IHL obligations if the UN retains command and control, which it insists upon.[217] As to human rights obligations, the European Court of Human Rights confirmed that, if the UN keeps such control, a contributing State lacks the jurisdiction necessary to be bound by its obligations under the ECHR.[218] Assuming this finding is correct, it is also valid for IHL obligations. However, in my view, the entity that has command and control must be determined separately in each case and for every aspect because everything depends on the facts, namely, on who has effective control.[219] In reality, both the UN and the contributing States exercise command and control: the UN typically keeps political, military and operational control, while contributing States often retain administrative, disciplinary and criminal control. As long as a contributing State controls respect of IHL by its troops through its disciplinary and criminal systems, it should ensure that its IHL obligations are fulfilled when acting for the UN.

**9.123** Finally, under Common Article 1, UN member States must 'ensure' that their forces and organization respect IHL. In addition, they remain responsible for activities they entrust to their organization if delegating those activities aims to circumvent their own obligations.[220] The European Court of Human Rights

217 On this point and for further references, see Lindsey Cameron, *The Privatization of Peace-Keeping: Exploring Limits and Responsibility Under International Law* (CUP 2017) 62.

218 ECtHR, *Behrami and Behrami v France and Saramati v. France, Germany and Norway* (2007) 45 EHRR 85, paras 128–52.

219 Draft Articles on the Responsibility of International Organizations, Art 7, as contained in ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 55. For an approach similar to the one presented here, see Cerone, above note 27, 1508.

220 Draft Articles on the Responsibility of International Organizations, ibid., Art 61.

requires States that entrust a certain task to an international organization to ensure that persons benefit from human rights protection equivalent to what States are bound to offer.[221] In the relevant cases, however, the individual was always present on the territory of the respondent State.

### b. Are peace forces a party to an armed conflict and, if so, does IHL of IACs or IHL of NIACs apply?

**9.124** Even if it is accepted that peace forces are bound by IHL (this is nearly unanimously accepted today), the question arises as to whether the UN (or the contributing States) are parties to the armed conflict in which they intervene. Admittedly, IHL governs any conduct with a nexus (and not just the parties) to the conflict. It is nevertheless important to know who the parties to a conflict are. For contributing States and the UN supporting the armed forces of a host State, the support-based approach may be relevant for determining whether they are a party to an armed conflict.[222] Beyond that, in my opinion, party to a conflict status must be determined, as always, according to the facts on the ground using the usual criteria. An entity or State is a party to a conflict not just if it has a mandate to conduct hostilities, but also if it simply defends itself (beyond self-defence in the criminal law understanding of the term) from an attack by another party.[223] If the peace forces are engaged in hostilities against a State's armed forces, any level of violence is sufficient to make IHL of IACs applicable.[224] If peace forces are involved in hostilities against a non-State armed group, which is the more frequent case, the necessary degree of violence and organization of the group must be fulfilled to make IHL of NIACs applicable.[225] In my view, and although the Secretary-General's Bulletin included many rules of IHL of IACs among the rules peace forces must respect each time they are engaged as combatants in any armed conflict, the usual dividing line between and thresholds of IACs and NIACs apply. In my assessment, therefore, the suggestion that IHL of IACs always applies when (UN) peace forces become parties to an armed conflict must be rejected.[226] States simply will not accept

221 See, e.g., ECtHR, *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para 68; ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, para 155.

222 See MN 6.62.

223 For the difference between the concepts of self-defence by peace forces and self-defence in criminal law, see Cameron, above note 217, 190–239.

224 See MNs 6.06–6.07.

225 See MNs 6.34–6.36.

226 Eric David, 'How Does the Involvement of a Multinational Peacekeeping Force Affect the Classification of a Situation?' (2013) 95 IRRC 659, 664–6; Daphna Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law' in Luigi Condorelli *et al.* (eds), *Les Nations Unies et le droit international humanitaire* (Pedone 1996) 317, 333; Paolo Benvenuti, 'The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping Operations' in European Commission Humanitarian Office (ed), *Law in*

providing combatant immunity to members of a non-State armed group fighting against UN peace forces. The Secretary-General's Bulletin does not include important parts of IHL of IACs, such as combatant status and the law of occupation, because it would otherwise have been unacceptable for States.

### c. Are members of peace forces combatants?

**9.125** If IHL of IACs applies because either peace forces confront armed forces of a State or one considers that IHL of IACs always applies to UN forces, the tricky question arises as to when members of the peace forces and their adversaries are combatants. States contributing to UN peace forces correctly perceive that, if IHL of IACs applies to hostilities between the peace forces and armed forces opposed to them, members of both would be combatants and therefore lawful targets of attacks. This is one of the reasons why the UN and contributing States deny the full applicability of IHL. While one can understand their hope that their forces will not be attacked, do they really think that such attacks are less likely if the applicability of IHL is denied, which inevitably also strips their own forces of any protection by that law? Assuming that IHL of IACs applies, combatant status and targetability in my view must be determined according to the normal rules. Thus, contrary to the position of the UN[227] and the ICC,[228] if the UN becomes a party to a conflict, all peace forces become targetable and not only those units that participate in hostilities for the duration of such participation.[229] However, a real contradiction exists between the wish to deny that UN forces are targetable and IHL only if IHL of IACs applies. If IHL of NIACs applies, even when the UN undertakes to respect most rules of IHL of IACs, this does not turn UN forces or their adversaries into combatants (in the IHL sense of the term). Nothing, therefore, hinders a State or the ICC from prosecuting those who attack them.

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*Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?* (Office for Official Publications of the European Communities 1995) 96; Claude Emanuelli, 'Les forces des Nations Unies et le droit international humanitaire' in Luigi Condorelli *et al.* (eds), ibid., 357; Robert Kolb, *Droit humanitaire et opérations de paix internationales* (2nd edn, Bruylant 2006) 57. For the same position as presented here, see Updated ICRC Commentary GC I, para 413.

227 Secretary-General's Bulletin, above note 215, Art 1.1; Daphna Shraga, 'The Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law: A Decade Later' (2009) 39 IYBHR 357, 358–9.

228 ICC, *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC 02/05-02/09 (8 February 2010) paras 78–83.

229 Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 IRRC 561, 604.

### d. The meaning and impact of the UN Safety Convention

**9.126** The 1994 Convention on the Safety of UN and Associated Personnel further complicates both the issue of when IHL applies to peace forces and whether they as well as their adversaries are combatants.[230] The UN Safety Convention essentially prohibits, criminalizes and obliges all States to prosecute attacks against UN personnel (including UN peace forces). However, as far as an IAC involving UN forces is concerned, this is incompatible with IHL because a combatant cannot be punished under IHL for having attacked another combatant.

**9.127** Article 2 of the Convention, which stipulates that it 'will not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the [UN Charter] in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflicts applies', may be interpreted in two ways.[231] First, it could mean that IHL of IACs (rather than the UN Safety Convention) applies to UN enforcement actions in which its personnel are engaged as combatants against organized armed forces. This may happen because either they have the mandate to do that or the enemy attacks them. Second, Article 2 may also mean that the Convention will not apply only when these conditions are fulfilled and that IHL of IACs additionally applies. Both interpretations, however, lead to unreasonable results. Under the first interpretation, members of an armed group who are confronted by UN forces would be combatants and, if captured, POWs who may not be tried under IHL for attacking UN forces. The second interpretation limits the exclusion clause to hypothetical situations in which peace forces fight against a State and means that members of armed groups targeting members of peace forces would always commit an international crime even when the UN forces are engaged in hostilities against the armed group. Although not supported by the provision's wording, I suggest a third interpretation: the Convention does not apply when IHL of IACs or NIACs applies as long as the UN forces are a party to the conflict, and it is therefore not a crime under the Convention in such a situation to attack members of UN peace forces.[232]

230 Convention on the Safety of UN and Associated Personnel (9 December 1994) 2051 UNTS 363.

231 For a detailed analysis, see Antoine Bouvier, '"Convention on the Safety of United Nations and Associated Personnel": Presentation and Analysis' (1995) 35 IRRC 638, 656–62.

232 For a nuanced discussion and additional references, see Cameron, above note 217, 125–31.

### e. Applicability of IHL of belligerent occupation to a territory administered by peace forces?

**9.128** It is particularly difficult to argue that the rules of IHL on military occupation apply to a UN-led territorial administration. Apart from the general controversies whether the UN or other international organizations are bound by IHL, some object to the mere possibility that UN peace forces could be subject to the obligations of an occupying power.[233] Significantly, the Secretary-General's Bulletin does not mention one rule of IHL on belligerent occupation.[234] Opponents to the applicability of IHL in such a case argue that an occupying power's rights and obligations under IHL flow from the conflict inherent in the relationship between the occupying power and the population under occupation. Therefore, it follows that the same rights and obligations are not relevant to the altruistic nature of a peace operation, which is deployed in conformity with the population's general interest.[235] They argue that peacekeepers are accepted – if not welcomed – by the local population as a protective force and thus do not require the strictures of IHL. However, this rather rosy view of the relationship between peacekeepers and the local population is not always borne out by reality. As the level of altruism or good intentions may be difficult to measure and will invariably change according to one's perspective, it is not a sound basis for determining whether IHL applies to a given conflict. If this was decisive, why should operations carried out by individual States or coalitions claiming their motives are purely altruistic be subject to IHL? In my opinion, denying the applicability of IHL of military occupation to UN peace operations based on the alleged altruistic nature of the operation sometimes disregards reality and always incorrectly uses a *jus ad bellum* argument to decide whether *jus in bello* applies.[236]

**9.129** Another more limited line of argumentation holds that IHL of belligerent occupation cannot apply to transitional international civil administrations because, under their Security Council mandate and subsequent practice, such administrations make changes to local legislation and institutions, which would not be admissible under IHL of military occupation.[237] This argument, however, raises the question as to whether the territory over which the transitional civil

233 Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *Handbook on International Humanitarian Law* (2nd edn, OUP 2008) 272.

234 See Secretary-General's Bulletin, above note 215.

235 Shraga, above note 226, 328; Sylvain Vité, 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales' (2004) 86 IRRC 9, 19.

236 Vité, ibid., 27, replies that the Security Council does not derogate from IHL but creates a situation to which IHL on its own terms does not apply.

237 See MNs 8.239–8.246.

administration is established is in fact an occupied territory for which such changes are not admissible. Arguably, the UN or a regional organization constitutes an occupying force if it has effective control or power over a territory without the territorial State's consent,[238] including even when the territorial State offers no armed resistance.[239] When a sovereign State consents to a foreign power's or the UN's administration of its territory, the rules of IHL on military occupation do not apply. Even when obtained through a threat or use of force, such consent can never be void due to coercion because consent is only void under the law of treaties (which must be applied by analogy to this problem) if it is obtained by a threat or use of force contrary to the UN Charter, which is never the case when the consent has been forced upon a State through a Security Council resolution.[240] However, as long as international law rules governing an international administration that does not qualify as an occupation are lacking and subsidiary to the regulations contained in a UN Security Council resolution establishing the international administration, an international administration should be guided (by analogy) by the rules of belligerent occupation with which it shares a commonality.[241]

## 9.5 THE LAW OF NEUTRALITY AND IHL

The law of neutrality applies only to IACs. Its contemporary relevance, material scope and threshold of application are all controversial. In my view, due to the separation between *jus ad bellum* and *jus in bello*, those controversies should not impact IHL rules (which may also be considered as belonging to the law of neutrality) detailing the obligations of neutral States concerning military personnel belonging to a party to an IAC who are found in neutral territory.

238 Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 63; Michael Hoffman, 'Peace-enforcement Actions and Humanitarian Law: Emerging Rules for "Interventional Armed Conflict"' (2002) 82 IRRC 193, 203–4; Bertrand Levrat, 'Le droit international humanitaire au Timor oriental: entre théorie et pratique' (2001) 83 IRRC 77, 95–6; John Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 EJIL 469, 483–5; Philip Spoerri, 'The Law of Occupation' in Academy Handbook, 191. Adam A. Roberts, 'What is a Military Occupation?' (1984) 55 BYBIL 249, 289–91 (citing to Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens and Sons 1964)), writes that most or all customary or conventional laws of war would apply.

239 GCs, Common Art 2(2).

240 This involves applying Art 52 of the VCLT by analogy, which should be done as I have argued in Marco Sassòli, 'The Concept and the Beginning of Occupation' in Academy Commentary, 1403.

241 Marco Sassòli, 'Droit international pénal et droit pénal interne: le cas des territoires se trouvant sous administration internationale' in Marc Henzelin and Robert Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (LGDJ/Georg/Bruylant 2002) 119, 141–9; Vité, above note 235, 29–33; Michael Kelly *et al.*, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 83 IRRC 101, 115; UN Department of Peace-Keeping Operations, Lessons-Learned Unit, *Comprehensive Report on Lessons-Learned from the United Nations Operation in Somalia: April 1992–March 1995* (Life and Peace Institute 1995) para 57.

> Additionally, in my opinion, every State that is not a party to an IAC must be considered as neutral for those IHL rules.

**9.130** Some consider that the law of neutrality is a branch of the laws of war distinct from IHL that also happens to contain some humanitarian rules.[242] In my assessment, the law of neutrality should be viewed as containing some *jus ad bellum rules* as well as some *jus in bello* rules. Some of the latter rules have a humanitarian purpose and therefore belong to IHL. The law of neutrality also contains, however, many rules that belong to neither *jus ad bellum* nor IHL but instead regulate rights and obligations of neutral States in fields other than humanitarian ones, such as, for example, trade, communications or obligations to intern certain persons, ships and aircraft. This divergence on the correct categorization of the legal branch to which this body of law belongs does not necessarily have an impact on the applicable rules. Rather, it is a manifestation of larger divergences over the law of neutrality, its contemporary relevance and the definition of a neutral State, all of which will be examined below before providing an overview of the IHL rules applicable to neutral States.

### 9.5.1 The concept of neutrality in the law of neutrality and in IHL

**9.131** In traditional international law, neutrality is the status of a State that is not a party to an IAC that entails specific rights and obligations towards the parties to the IAC. Those rights and obligations constitute customary law, many of which were codified in Hague Conventions V and XIII of 1907.[243] Those rights and obligations comprise in particular the right of the neutral State to have its territory respected; the prohibition against the neutral State providing certain forms of assistance; economic and commercial rights of the neutral State to continue trading with the parties to the IAC with the exception of weapons sales by the neutral State (as opposed to private persons on its territory); and the neutral State's obligation to treat parties to an IAC equally in fields that are militarily relevant.[244]

242 Updated ICRC Commentary GC I, para 908.

243 See Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in War on Land (18 October 1907) 205 CTS 299; Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Maritime War (18 October 1907) 205 CTS 395.

244 See Paul Seger, 'The Law of Neutrality' in Academy Handbook, 249, 254–7.

**9.132** The legal status of neutrality exists only during an IAC. It only applies to a NIAC if the government fighting against a non-State armed group or the neutral State have made a recognition of belligerency.[245] The legal status of neutrality in an IAC must also be distinguished from a policy of neutrality pursued in particular by permanently neutral States. There are good reasons to consider that intermediary stages exist between neutrality and belligerency because a State may choose not to be neutral but 'non-belligerent'.[246] Even violations of the many obligations foreseen by the law of neutrality do not necessarily turn a neutral State into a party to the conflict.[247] It may also be that the threshold leading to the application of the law of neutrality is higher than that of an IAC in IHL. Neutrality would then only apply when an 'armed conflict of a certain duration and intensity' exists[248] (and not in each case of mere skirmishes) and that neutrality would not apply to belligerent occupation.[249]

**9.133** The advent of the collective security system under the UN Charter has had a profound impact on the law of neutrality. '[T]he system of collective security, if it worked effectively, simply would leave no room for neutrality' and 'there exists general agreement among scholars that the laws of neutrality do not apply to measures of collective security adopted under Chapter VII of the UN Charter.'[250] Indeed, neutral States assert that they are neither obliged nor even entitled to fulfil their obligations under the law of neutrality in the case of an IAC authorized by the UN Security Council. For other situations, State practice still recognizes neutrality as a legal status,[251] although many argue that it is eroding.[252]

**9.134** In my view, all of the aforementioned features and developments must be strictly separated from the concept of neutrality contained in various IHL rules regardless of whether those rules are found in IHL treaties, customary law or Hague Conventions V and XIII. This is obviously the case for the principle of neutrality applicable to humanitarian action,[253] including the obligation of

245 See MNs 7.39–7.43.

246 See Seger, above note 244, 266; Maurice Torrelli, 'La neutralité en question' (1992) 96 Revue Générale de Droit International Public 5, 14.

247 Yves Sandoz, 'Rights, Powers and Obligations of Neutral Powers Under the Conventions' in Academy Commentary, 94.

248 See Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 555.

249 Seger, above note 244, 253–4.

250 Ibid., 262.

251 See ibid., 252.

252 Torrelli, above note 246, 8.

253 Sandoz, above note 247, 87–8.

medical personnel to remain neutral,[254] as well as for the humanitarian obligations of neutral States and the humanitarian rules protecting their nationals. Although Protocol I uses the terms 'neutral or non-belligerent powers'[255] or 'neutral and other States not Parties to the conflict',[256] the Conventions simply refer to 'neutral power' or 'neutral country'.[257] For IHL purposes, every State that is not a party to the conflict is a neutral State,[258] and its humanitarian obligations start to apply as soon as the low threshold of an IAC is met. Such a differentiated threshold of applicability for the various rules contained in the law of neutrality may mean that the obligation to intern soldiers of a party to the IAC[259] applies only for armed conflicts meeting a higher threshold. However, if a neutral State has recourse to such internment, IHL rules on the treatment of internees necessarily apply even when that threshold is not met.[260] Similarly, in air and naval warfare, neutrals may have a right (and even an obligation) to capture warships entering neutral waters in situations other than distress[261] as well as belligerent military aircraft that have landed on its territory[262] only when an IAC has reached a certain intensity level. However, if they effectuate such capture, they must treat the crew in conformity with Convention III independently of the IAC's level.

**9.135** Similarly, IHL rules of the law of neutrality also fully apply to armed conflicts authorized by the UN Security Council except if the neutral State becomes a party to the IAC or to a new, additional IAC (in which cases it becomes bound by the obligations of a party to an IAC).

**9.136** Although neutrality exists for IHL purposes only in IACs, this does not prevent the parties to a NIAC from agreeing with another State to make arrangements by analogy to those foreseen in IHL of IACs, such as, for example, arrangements to intern captured fighters on the territory of that third State.[263]

254 See MN 8.023.
255 GC III, Art 4(B)(2).
256 P I, Arts 2, 22, 31, 37 and 39.
257 GC I, Arts 4, 8, 10–11 and 37; GC II, Arts 5, 10–11, 17, 32 and 40; GC III, Arts 4, 10–11, 109, 111 and 123; GC IV, Arts 4, 11–12, 24, 36, 132 and 140.
258 Sandoz, above note 247, 93.
259 Hague Convention V, above note 243, Art 11.
260 Ibid., Art 12; GC III, Art 4(B)(2).
261 For details and exceptions, see Hague Convention XIII, above note 243, Arts 12–24.
262 HPCR Manual, Rule 170(c).
263 For an example, see MN 8.107.

### 9.5.2 The difficulty of separating *jus ad bellum* and IHL in the law of neutrality

**9.137** The law of neutrality is different from the other branches of law discussed in this chapter because some of its rules are actually part of IHL, in particular those protecting victims of an armed conflict who are in the power of a neutral State. Although such categorization is not generally accepted, other rules in the law of neutrality, such as those on the inviolability of a neutral State's territory and prohibiting belligerents from moving troops across its territory of a neutral State,[264] belong to *jus ad bellum*. As in other fields, it is important to keep those *jus ad bellum* rules separate from IHL. Thus, a provision stipulating that '[t]he fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act'[265] does not imply that IHL is inapplicable to such resistance.

**9.138** Many obligations of neutral States, such as the obligation to treat belligerents equally or to prevent certain conduct from occurring on their territory, fall neither under *jus ad bellum* nor under *jus in bello* but simply foresee obligations of a neutral State that, if violated, lead to its responsibility without authorizing belligerents to use force against it.

**9.139** Admittedly, however, it is difficult to separate the *jus ad bellum* and *jus in bello* aspects for many rules of the law of neutrality, in particular those discussed elsewhere in this book on naval and aerial warfare.

### 9.5.3 Specific IHL rules applicable to neutral States

**9.140** As previously shown, neutral States may serve as Protecting Powers.[266] Additionally, the specific rules applicable to neutral vessels, aircraft, airspace, waters and ports have already been examined in our discussion of the law of naval and aerial warfare.[267] Accordingly, this sub-section will deal exclusively with the rules protecting persons linked to a party to the conflict who find themselves in the territory of a neutral State that can be found in IHL treaties and in specific provisions of Hague Conventions V and XIII. These rules only concern belligerent military personnel on neutral territory, while IHRL regulates the

264 See Hague Convention V, above note 243, Arts 1–2.
265 Ibid., Art 10.
266 See MNs 5.159–5.160.
267 See MNs 8.419–8.420, 8.422, 8.424–8.427, 8.430, 8.433–8.434, 8.436–8.440 and 8.441–8.465.

treatment of civilians fleeing from an armed conflict and international refugee law governs civilians specifically fleeing persecution during an armed conflict.[268]

### a. Internment of combatants by neutral States

**9.141** The general principle that a neutral State may not provide an advantage to a belligerent obliges neutral States to intern combatants of belligerent States who are in their territory in order to prevent them from joining the fighting. The same obligation applies to certain ships and, by analogy, to certain aircraft. The exact details of this obligation, however, differ according to the reason why the combatants in question are found in neutral territory and whether they were engaged in land, sea or air warfare.

**9.142** In land warfare, a neutral State may, but is not obliged to, admit forces of one party to the conflict fleeing their enemy to its territory. If it receives them, it must intern them to prevent them from joining their own forces by travelling through neutral territory or from otherwise participating in the hostilities.[269] The same interment obligation applies to passengers and crew of belligerent military aircraft who are forced by a neutral State to land or who crash or parachute.[270] Such persons and POWs who are interned on neutral territory based upon a special agreement between belligerents[271] are often referred to as military internees. They benefit, as a minimum, from the treatment prescribed for POWs except for the provisions on Protecting Powers if their diplomatic representative can fulfil that function, financial resources and on the costs of internment as well as possible medical treatment as those costs must be borne by the power on which they depend.[272] The law of neutrality obliges neutral States to accept escaped POWs and POWs brought by troops fleeing into their territory, both of whom regain their freedom. However, if such persons arrive in great numbers and have no practical possibility to join their forces, they may be interned to facilitate their control and maintenance.[273]

**9.143** Deserters are not covered by the above-mentioned obligation to intern members of the armed forces who flee from the enemy into neutral territory except,

268 See MNs 9.073–9.087.

269 Hague Convention V, above note 243, Art 11.

270 HPCR Manual, Rule 170(c).

271 See MNs 8.106–8.107.

272 GC III, Art 4(B)(2).

273 Allied POWs fleeing to Switzerland, which was surrounded by Axis forces during World War II, were interned. See Paul Guggenheim, *Traité de Droit international public* (Librairie de L'Université, Georg & Cie S.A. 1954) vol II, 545, fn 2.

according to one view, if they want to join the army of the other belligerent.[274] Neutral States may never retain the medical and religious personnel of belligerents, including not even in the circumstances a belligerent may do so.[275] A belligerent's wounded and sick soldiers passing through neutral territory do not have to be interned, while any wounded and sick enemies they bring with them must be interned.

**9.144** In naval warfare, neutral States have a right but not a duty to intern, subject to certain exceptions, the crew of warships entering neutral waters in situations other than distress, including if they overstay the normal 24-hour time limit of temporary 'asylum' in neutral ports.[276] This also applies to a captured prize ship brought to a neutral port, the crew of which must be set free, while the crew that captured the prize (that is, the prize crew) must be interned.[277] Belligerent wounded, sick and shipwrecked collected by neutral warships and government ships operated for non-commercial purposes must be interned on the neutral State's territory and treated under the rules of land warfare mentioned above, while it is controversial whether that obligation also exists for those collected by neutral merchant ships. In my view, no such obligation exists concerning shipwrecked persons who manage to make their own way to neutral shores.

### b. Collection and care of the wounded, sick, shipwrecked and dead and the transmission of information on the missing by neutral States

**9.145** Conventions I and II apply to wounded, sick and shipwrecked military personnel of a party to an IAC who reach or otherwise find themselves on the territory of a neutral State, and such personnel must in particular be collected and cared for under those Conventions.[278] Whether they must be interned and how they must then be treated if interned has been discussed above. In addition, a neutral State may allow a belligerent's wounded and sick soldiers to pass through its territory.[279]

**9.146** Dead belligerent military personnel found on the territory of a neutral State must be treated as if they were found on the territory of a party to the conflict.[280] In particular, the neutral State must transmit information on them to

274 Ibid., 545–6. For at least those arriving on neutral territory in a unit, see Lassa Oppenheim, *International Law: A Treatise – Disputes, War and Neutrality* (7th edn edited by Hersch Lauterpacht, Longmans 1952) vol II, 722.
275 Sandoz, above note 247, 97.
276 Hague Convention XIII, above note 243, Arts 12–20, 24.
277 Ibid., Art 21(2). For an explanation on prizes, prize crews and the crew of the prize, see MNs 8.434–8.439.
278 GC I, Art 4; GC II, Art 5.
279 Hague Convention V, above note 243, Art 14.
280 GC I, Art 4; GC II, Art 5.

the power on which they depend and to their families.[281] Beyond that, a neutral State receiving belligerent military personnel must provide the notifications as required under the rules discussed elsewhere in this book,[282] and the rules governing the missing and the handling of remains of dead persons are equally addressed to neutral powers.[283]

### c. Treatment of neutral nationals by parties to an IAC

**9.147** Neutral nationals in the power of a party to an IAC may or may not be protected civilians, depending on whether they are on a party's own or occupied territory and, in the former case, whether their home State has normal diplomatic relations with the party in whose power they are.[284] If they do not qualify as protected persons, IHL contains fewer rules covering them, and IHRL, general international law rules on the treatment of foreigners and some specific rules of the law of neutrality become more important. If such persons are not protected civilians, measures taken against them cannot have their legal basis in IHL. Instead, those measures must be based upon domestic law and must comply with other rules of international law.

**9.148** The law of neutrality includes detailed rules on when a neutral national loses the right to be treated as neutral, namely, the right not to be subject to the security measures, such as internment, applicable to enemy aliens.[285] In my view, losing the right to be treated as neutral neither necessarily turns a neutral national into a protected civilian nor makes them lose protected civilian status. Voluntarily enlisting in the ranks of the armed force of one of the parties to a conflict is one of the explicitly mentioned reasons that results in a loss of neutral status.[286] Such persons turn into combatants and then POWs if they fall into the adverse party's power as nationality is not a criterion for determining POW status.[287]

## 9.6 IHL AND ALL OTHER BRANCHES OF INTERNATIONAL LAW

Most rules of international law outside of IHL equally apply in armed conflicts. Whether those rules or the IHL rule prevail must in my view be determined for

281 See MNs 8.276–8.278.
282 GC III, Art 122(1), and MN 8.100.
283 See MNs 8.268–8.283. P I, Arts 32 and 34(2)–(4), are addressed to every High Contracting Party and not only to the parties to the conflict.
284 See MNs 8.154–8.155.
285 Hague Convention V, above note 243, Arts 16–18.
286 Ibid., Art 17(b).
287 See, however, MN 8.085.

each pair of rules in every situation according to the *lex specialis* principle. The relationship between the rules of Convention II and those of the International Maritime Organization's Maritime Safety Conventions illustrates this approach.

### 9.6.1 General considerations

**9.149** Most other branches of international law also apply during armed conflicts, such as anti-corruption law, diplomatic privileges, protection of intangible cultural property, international child custody laws, environment protection law and investment protection law. Instruments that specify that they do not apply in armed conflicts are rare.[288] Others contain provisions that may allow parties to a particular treaty to modify its operation in armed conflicts, such as those allowing for derogations for reasons of national security in World Trade Organization law.[289] Conversely, IHL sometimes prescribes that other branches of (peacetime) international law continue to regulate certain issues.[290]

**9.150** Importantly, '[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties' between the States parties to an armed conflict or between such a State and a neutral State.[291] The ILC adopted Draft Articles on the Effects of Armed Conflicts on Treaties,[292] which apply the same rules to IACs and NIACs, to deal with such termination or suspension.[293] In my view, those Draft Articles simply apply the general rules on the termination and suspension of treaties, in particular the rules pertaining to the impossibility of performance and a fundamental change of circumstances. According to the ILC, treaties with a subject matter that implies that they continue to operate in armed conflicts include, among others: multilateral law-making treaties; treaties on international criminal justice; treaties of friendship, commerce and navigation as well as agreements concerning private rights; IHRL treaties; treaties relating to the international protection of the environment; treaties relating to international watercourses as well as related installations and facilities; treaties

288 See, e.g., Convention against the Taking of Hostages, above note 103, Art 12.

289 See, e.g., General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187, Art XXI, which incorporated and modified General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194; General Agreement on Trade in Services (15 April 1994) 1869 UNTS 183, Art XIV *bis*.

290 See GC IV, Art 38, and MN 8.171.

291 Draft Articles on the Effects of Armed Conflicts on Treaties, Art 3, as contained in ILC Report, above note 219, 175–8 (emphasis in original).

292 Ibid.

293 Ibid., Art 2(b).

on the peaceful settlement of disputes; and treaties relating to diplomatic and consular relations.[294]

**9.151** In my view, when such other rules of international law apply, the *lex specialis* approach explained above for IHRL[295] must be used to determine their relationship with IHL and, in the case of a conflict, what actually constitutes a contradiction between two rules and if that contradiction exists then the rule that prevails. The following thoughts on the relationship between IHL and international maritime safety law illustrate this approach.

### 9.6.2 International maritime safety law as an example

**9.152** With regard to the shipwrecked, the question arises as to the relationship between the obligations under Convention II and other treaties concluded to improve the safety of shipping under the auspices of the International Maritime Organization (IMO), in particular the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention)[296] and the 1979 International Convention on Maritime Search and Rescue (SAR Convention)[297] that deal with the rescue of persons in distress at sea. Both Conventions are law-making treaties that provide more detailed and far-reaching obligations to rescue persons in distress at sea than Convention II.[298] As law-making treaties, according to the ILC, they presumably continue to apply in armed conflict.[299] Given this background, the rule applicable to every single question must be determined according to the *lex specialis* principle.[300] According to this approach, the more a question is linked to actual hostilities and arises between belligerents rather than between a belligerent and a neutral State, the more Convention II prevails because it was specifically made for such situations and takes the specificities of military necessity into account. Conversely, the more a situation is not linked to hostilities even though it arises during an armed conflict, the more the IMO Conventions prevail, while some provisions of GC II remain the *lex specialis*

294 Ibid., Art 7 and 'Annex: Indicative List of Treaties Referred to in Article 7'.

295 See MNs 9.043–9.051.

296 International Convention for the Safety of Life at Sea (1 November 1974) 1184 UNTS 2.

297 International Convention on Maritime Search and Rescue (27 April 1979) 1405 UNTS 97.

298 Updated ICRC Commentary GC II, para 54.

299 See ILC Draft Articles, above note 291, paras 15–21 commentary to 'Annex: Indicative List of Treaties Referred to in Article 7' as contained in ILC Report, above note 219, 202–4.

300 In my view, the only scholarly article on the issue I am aware of, which is Raul (Pete) Redrozo, 'Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective' (2018) 94 ILS 102, takes an approach that is too mechanical to the issue when it suggests that IHL always constitutes, at least between belligerents, the *lex specialis*.

because they deal with issues not regulated by the IMO Conventions.[301] All of this is particularly important for the civilian shipwrecked in NIACs who are also covered by Article 3 of Convention II. In my opinion, the presumption of the IMO Conventions applying as *lex specialis* and *lex posterior* is even stronger in NIACs, although even there the specificities of actual hostilities must be taken into account, in particular when it comes to members of armed groups. As the IMO Conventions are not addressed to armed groups, only Article 3 of Convention II applies to them.

301 See, e.g., GC II, Arts 15 (on wounded taken aboard a neutral warship) or 19 (on recording and forwarding of information).

# 10

# SELECTED CROSS-CUTTING ISSUES

**10.01** Many contemporary discussions concerning certain practices in armed conflicts and the rules that apply to them do not fit into only one of the protective IHL regimes discussed in Chapter 8. Rather, they are cross-cutting issues that must be solved on the basis of the answers to questions raised in different parts of this book. To give just one example, which is highlighted in the present chapter, whether the targeted killing of an individual by a missile fired from a remotely guided drone is lawful in a certain instance is only very marginally an issue of the means and methods of warfare. It is mainly a question of IHL's scope of application (namely, its material scope concerning whether an armed conflict exists, its geographical scope as to whether IHL applies outside the 'hot' battlefield and whether a sufficient nexus between the armed conflict and the drone attack exists), the relationship between IHRL and IHL, whether the target is legitimate and an issue of proportionality and precautionary measures. Although this chapter will inevitably refer to what has been discussed more thoroughly elsewhere in this book, the following sub-chapters also provide a good occasion for learners to repeat and deepen what they have studied in the previous chapters by combining and applying different rules to some hotly contested questions in IHL. In reality, it is rare that recourse to only one IHL rule or regime can solve a humanitarian problem arising in an armed conflict.

## 10.1 DOES IHL AUTHORIZE CONDUCT OR ONLY PROHIBIT AND PRESCRIBE IT?

It is controversial whether IHL authorizes certain conduct or only prohibits and prescribes it. This debate has many theoretical implications. It also has practical consequences where IHRL or domestic law require a legal basis for certain conduct or when the *lex specialis* between IHRL prohibitions and conduct tolerated by IHL must be determined. In my view, IHL does not confer States the right to adopt certain conduct. Such conduct is rather justified by their sovereignty or the de facto authority of an occupying power. IHL, however, contains some strong permissions that – without prejudice to *jus ad bellum* – explicitly or implicitly permit in cases of armed conflict certain conduct that is normally prohibited. Such strong permissions may constitute the *lex specialis* when

compared with IHRL prohibitions, but they do not necessarily constitute a legal basis required by IHRL. Most IHL rules, however, contain no permissions at all or only weak permissions in the sense that, while certain conduct is not prohibited by IHL, it may well be prohibited, even in armed conflicts, by other rules of international law or domestic law.

**10.02** When Henry Dunant initiated the modern codification of IHL after the battle of Solferino, IHL was regarded as imposing both positive obligations (for instance, collecting and caring for the wounded and sick) and negative obligations (for example, not to attack medical personnel) on States. Existing treaty IHL may still be viewed in the same manner. The rule allowing a Detaining Power to subject POWs to internment[1] may be understood as simply meaning that such deprivation of liberty (which is not based on an individual reason or process) is not prohibited, but that it is subject to all of Convention III's limitations. Belligerents have obviously always considered that they may kill enemy combatants while fighting, destroy military objectives and deprive captured enemies of their liberty. However, the ability to undertake these wartime actions was not seen as being based upon an 'authorization' given by IHL (which IHL could have also refused) but rather upon the authority inherent in the power of States to wage war and the fact that the 'the laws of war' did not prohibit such conduct.

**10.03** More recently, some States (for instance, the US in what it termed for a certain time as the 'war on terror'[2]) and many scholars[3] increasingly argue that IHL equally authorizes States to undertake certain actions in war. Even the ICRC considers that IHL foresees 'an inherent power to detain'.[4] This follows the traditional claim that combatants in an IAC have a right to kill enemy combatants who are not *hors de combat*.[5] All of this raises several germane questions.

1 GC III, Art 21.

2 US Law of War Manual, para 1.3.3.2; Curtis A. Bradley and Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harvard L Rev 2047, 2091–3.

3 Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819, 822 (at a later stage he expressed the opposite view in Ryan Goodman, 'Authorization versus Regulation of Detention in Non-International Armed Conflicts' (2015) 91 ILS 155, 158–60); Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 ILS 60; Dino Kritsiotis, 'War and Armed Conflict: Parameters of Enquiry' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 5, 27.

4 Updated ICRC Commentary GC I, para 728.

5 See, e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd edn, CUP 2016) 42–3; Michael N. Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 EJIL 855.

Why would belligerents need such 'authorizations'? What are the meaning and consequences of such an 'authorization'? Which IHL rules provide for such an 'authorization'?

### 10.1.1 Possible reasons why belligerents need an authorization

**10.04** Belligerents may need authorization under IHL for several reasons. First, this is the case if international law always prohibits conduct that it does not authorize. Second, an authorization is also needed if the Martens Clause implies, as some authors claim, that in the field of IHL every conduct that is not authorized is prohibited.[6] Third, if certain conduct is prohibited by another rule of international law but not by IHL, an IHL 'authorization' is needed as the *lex specialis* applicable in armed conflicts to prevail over the prohibition found elsewhere. The latter reason requiring an authorization under IHL to engage in certain conduct is theoretically distinct from but overlaps in practice with the case that another rule of international or domestic law requires a legal basis (or, in other words, an 'authorization') for certain conduct to be lawful. This principle of legality plays an increasingly important role in domestic laws and in IHRL.

**10.05** The question of whether States need an 'authorization' under international law or whether it is sufficient that they simply do not violate legal prohibitions has haunted international law at least since the famous *Lotus* case before the Permanent Court of International Justice (PCIJ).[7] The Court addressed the issue of whether Turkey had violated international law when it exercised criminal jurisdiction against the captain of the French ship Lotus following a collision with a Turkish ship on the high sea. France argued that Turkey 'should be able to point to some title to jurisdiction recognized by international law', while Turkey asserted that it had jurisdiction 'whenever such jurisdiction does not come into conflict with a principle of international law.'[8] The PCIJ accepted Turkey's position, finding that:

> Restrictions upon the independence of States cannot…be presumed… Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts…outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every

6 See MN 4.52.

7 PCIJ, *The Case of the S.S. 'Lotus' (France v. Turkey)* (Judgment) PCIJ Rep Series A No 10. For a recent example, see 'Declaration of Judge Simma' in ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

8 Lotus Case, ibid., 18.

> State remains free to adopt the principles which it regards as best…It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law…[9]

**10.06** However, many now argue that the PCIJ's restrictive approach in 1927 has been overcome by the increased number of rules of international law[10] and, according to some, its 'constitutional character.'[11] Nevertheless, the ICJ has reaffirmed the PCIJ's approach on several occasions,[12] most prominently in the *Kosovo* advisory opinion in which it even reformulated the question before it (that is, whether a certain act was in accordance with international law) into whether international law prohibited the act.[13] In my view, even still today, except where a measure interferes with the sovereignty of another State and therefore meets with a prohibitory rule protecting that State's sovereignty, a State wishing to plant trees or to adopt legislation regarding money-laundering or divorce does not enquire into whether international law authorizes it to do so but only into whether it prohibits such action. It may also be that with the increased number of rules of international law, including on what were previously considered to be 'internal affairs' of a State, this discussion becomes largely irrelevant. It is also true that prohibitions limiting States' freedom of action must not necessarily be explicit. Rather, such limitations may result from the interpretation of a rule; the use of analogical reasoning; deductions deriving from general principles of law, international law or IHL; 'the overall rationalities of the legal system'; or even 'the general values of the legal system or the social necessities of the time.'[14]

**10.07** In the field of IHL, the famous Martens Clause may be seen as altering this debate because it states that 'in cases not included in the Regulations…, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.'[15] In my opinion, as explained previously, this clause – in light of

9 Ibid., 18–19.

10 See 'Separate Opinion of President Guillaume' in ICJ, *Arrest Warrant of 11 April 200 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 36, para 15; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, OUP 2008) 12.

11 Daniel Thürer, 'The Legality of the Threat or Use of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered' (2012) 61 Revista da Faculdade de Direito da UFMG, Belo Horizonte 213, 223.

12 ICJ, *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 139; ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 22.

13 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 56.

14 Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 222.

15 See MNs 4.51–4.53. Daniel Thürer, 'International Humanitarian Law: Theory, Practice, Context' (2008) 338

State practice – does not imply that a State needs a specific IHL authorization for every act in an armed conflict; instead, it suffices that a certain action does not violate any prohibition contained in a treaty, a customary rule or a general principle (including, for example, elementary principles of humanity).[16]

**10.08** While the debates mentioned up to now are largely theoretical, they are superseded by a very practical requirement of IHRL. Interferences with the right to life and personal freedom – and increasingly other human rights – must have a legal basis.[17] If IHL provides for an authorization to kill or to detain, this could constitute the legal basis required by IHRL. Before discussing this practical question, we must understand what an 'authorization' by IHL could mean.[18]

### 10.1.2 The different meanings of the term 'authorization'

**10.09** The fact that the term 'authorization' may have different meanings and consequences blurs the debate above. First, an authorization could imply a subjective right. However, due to the strict separation between *jus ad bellum* and *jus in bello*, such a right does not mean that the conduct must be tolerated by the adverse party under international law. Even if, for the sake of argument, combatants have a 'right' to kill other combatants and to destroy military objectives, a State that is a victim of aggression may obviously do everything feasible (and compatible with IHL) to hinder the 'right' holder from exercising that right. Even within IHL, the combatants who are attacked by a belligerent exercising its 'right to kill' are not obliged to tolerate being killed, which would be the consequence of a genuine right. A right of passage, for example, implies that a State may not be prevented from exercising the rights it has. Combatants, however, may not be punished for having killed those exercising their 'right' to kill. This is inherent in combatant status. Similarly, if a right to intern existed, those who could be interned under such a right could not resist capture – just as criminals have no right to resist arrest by the police. Combatants, in contrast, may resist

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Recueil des Cours 9, 398–402.

16 See MN 4.52.

17 See, e.g., ICCPR, Arts 6, 9(1); HRCtee, 'General Comment No. 6: Article 6 (The Right to Life)' (1982) UN Doc HRI/GEN/1/Rev.9 (Vol. I), para 3; HRCtee, 'Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (Revised draft prepared by the Rapporteur, 2017) para 17 <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 7 August 2018; HRCtee, 'General Comment No. 35: Article 9 (Liberty and Security of Person)' (2014) UN Doc CCPR/C/GC/35, para 11.

18 The following sections on both issues are based upon the results of the research of my doctoral student, Anne Quintin, for her doctoral thesis entitled *Permissions or Prescriptions: The Nature of International Humanitarian Law*, which will be published in 2019.

capture. Even once interned as POWs, they may try to escape and may only be subject to disciplinary punishment if their escape is unsuccessful.[19]

**10.10** Second, authorization may refer to what has been called 'strong permissions'. In such a case, the legislator has not conferred a right that others would need to respect but nevertheless 'considered [the] normative status [of the conduct] and decided to permit it.'[20] IHL rarely explicitly mentions such strong permissions, such as, for example, that combatants have 'the right to participate directly in hostilities'.[21] Most often, they implicitly result from interpretations (which must follow all of the usual rules of interpretation) of exceptions to prohibitions or conditions that IHL attaches to certain obligations. Thus, IHL protects civilians against attacks 'unless and for such time as they take a direct part in hostilities.'[22] In my view, the reference to 'measures authorized' by IHL treaties[23] must be limited to strong permissions. Strong permissions constitute IHL rules that may (but not always) prevail over rules of IHRL under the *lex specialis* principle discussed previously.[24] In my opinion, whether strong permissions also constitute a legal basis required by IHRL is a question that only arises if IHRL constitutes the *lex specialis* on the issue at hand. If so, this must then be determined according to the normal IHRL requirements for a legal basis, which include rules of international law.[25]

**10.11** Third, the term 'authorization' may also simply mean an absence of prohibitions. IHL undoubtedly contains instances in which violence or treatment unacceptable in peacetime is not prohibited during an armed conflict.[26] Such 'authorizations' may also be called 'weak permissions'[27] by opposition to 'authorizations in the strong sense'[28] discussed above. In such cases, IHL tolerates and regulates such conduct[29] or considers that it is either legally indifferent[30] or irrelevant for IHL (which therefore does not contain any rule on it).[31] The principle of ef-

19 GC III, Arts 91(2), 92(1).
20 Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (Routledge and Kegan Paul 1963) 86.
21 P I, Art 43(2). As explained above, the term 'right' in these rules is misleading.
22 P I, Art 51(3); P II, Art 13(3).
23 See, e.g., GC IV, Art 38.
24 See MNs 9.043–9.051.
25 ECtHR, *Medvedeyev and others v France* (2010) 51 EHRR 39, para 79.
26 Giorgio Balladore Pallieri, *La guerra* (CEDAM 1935) 162–3.
27 Ige F. Dekker and Harry H.G. Post, *On the Foundations and Sources of International Law* (TMC Asser Press 2003) 18.
28 Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Academy Handbook, 666.
29 Declaration of Judge Simma, above note 7, paras 8–9. Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 Leiden J of Intl L 95, 99.
30 Kolb, Theory, above note 14, 224.
31 Balladore Pallieri, above note 26, 163–4.

fectiveness, which is very important for IHL, also supports this understanding of most IHL 'authorizations'.[32] Although IHL applies based upon facts, it does not legitimize those facts. Rather, drafters of IHL treaties started from the idea that States are free to act because it would have been impossible and superfluous from their point of view to enumerate everything a State may do.[33]

**10.12** Another possible categorization of cases in which something is 'legal' distinguishes between a vertical and horizontal understanding of legality.[34] Under the former, an act could be: (1) specifically permitted ('positive legality'), (2) simply not prohibited ('negative legality') or (3) not even regulated ('neutral legality'). Under the horizontal understanding, an act could be legal under (1) one law ('simple legality'), (2) a law that renders the act legal under another law ('compounded legality') or (3) all laws regulating the act ('system-wide legality'). In my view, such distinctions are useful for our understanding, and they largely overlap with the categories suggested here. While the author proposing this distinction argues that the degree of vertical legality has no impact on the degree of horizontal legality,[35] I will argue hereafter that there is such an impact. In any case, this appropriate categorization does not help in deciding whether a certain rule falls into a certain combination of vertical and horizontal forms of legality.

### 10.1.3 Implications of IHL authorizations for IHRL

**10.13** In my view, the question of whether IHL contains 'authorizations' is only of practical relevance because of IHRL and possibly domestic law. For them, strong IHL permissions may first constitute – for certain rules and in certain situations – the *lex specialis* compared with IHRL prohibitions. Second, they may constitute the legal basis necessary under IHRL. In my assessment, both largely lead to the same result. If the latter interpretation is adopted, one must enquire into whether IHL offers a legal basis for certain limitations for human rights in certain situations, which we will do hereafter. Under the first approach, very similar factors will determine whether IHL provides for strong

32 Salvatore Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 105, 107.

33 Kolb, Theory, above note 14, 333–4; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 17–18; Paola Anna Pillitu, *Lo stato di necessità nel diritto internazionale* (Università di Perugia 1981) 359.

34 Ka Lok Yip, *The Law of Force, the Force of Law: The Legality and Ontology of the Use of Force Against Individuals in Armed Conflict and Occupation* (PhD Thesis, Graduate Institute of International and Development Studies 2018) 44–65.

35 Ibid., 44–5.

permissions that prevail as the *lex specialis* over IHRL, including its requirement for a legal basis.

### 10.1.4 To what extent does IHL contain strong permissions?

**10.14** Independently of the general debate on whether international law consists of an authorization framework that must give States permission to act or an obligation framework that leaves residual freedom to States,[36] there are good reasons to consider that IHL is essentially a restrictive regime that includes many prescriptions but only very few strong permissions. Even writers who contend that international law is generally an authorization framework view IHL as an exception.[37] One has to look not only at the definitions of IHL provided in most textbooks and by the ICRC but also at the wording of the overwhelming majority of rules.

**10.15** Nevertheless, it is difficult to deny that certain strong permissions exist under IHL. Many contend that combatant privilege implies a 'right to kill' enemy combatants.[38] Article 43(2) of Protocol I indeed states that 'combatants…have the right to participate directly in hostilities'. Concerning the deprivation of personal freedom of POWs, the case is even clearer. Article 21 of Convention III provides that '[t]he Detaining Power may subject prisoners of war to internment.' No State has legislated to provide a legal basis or procedure to intern POWs, which would be required by most domestic laws and IHRL if IHL itself did not authorize and constitute a sufficient legal basis to intern POWs without any individual assessment.

**10.16** Treaty IHL of NIACs does not contain any similar rules that could be regarded as authorizing deliberate killings or detention without trial. Admittedly, it also does not prohibit such conduct. The only clear strong permission IHL of NIACs contains concerning the use of lethal force is the permission to use force against civilians directly participating in hostilities for the duration of their participation. The authorization to attack members of an armed group with a continuous combat function can, at best, constitute a strong permission under customary IHL because IHL treaty law is silent on the matter.[39]

36 See Kolb, Theory, above note 14, 217–35.

37 Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law' (1953) 30 BYBIL 1, 13, 18.

38 See, e.g., Dinstein, The Conduct of Hostilities, above note 5, 42–3.

39 For a further discussion on this issue, see MNs 10.261–10.263.

**10.17** By contrast, IHL of NIACs only provides weak permissions to deprive members of armed groups of their liberty[40] that cannot therefore prevail as the *lex specialis* over IHRL requirements.[41] However, in the ICRC's view, 'both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC.'[42] A 2015 resolution adopted by the International Conference of the Red Cross and the Red Crescent reinforces this opinion by recognizing in a preambular paragraph that 'under international humanitarian law (IHL) States [but, interestingly, not armed groups] have in all forms of armed conflicts…the power to detain'.[43]

**10.18** In my opinion, there are serious doubts as to whether any human rights body or domestic judge would recognize an inherent authorization to detain in NIACs as a sufficient legal basis for depriving persons of their freedom. For the time being, UK courts and the UN Working Group on Arbitrary Detention share those doubts.[44] The possible legal reasons to justify such authorization – that is, either by analogy to IHL of IACs or through an alleged customary rule – are, in my view, very weak. Indeed, it is extremely doubtful whether reasoning by analogy can provide a sufficient legal basis under IHRL. This is especially true for the ECHR, which exhaustively enumerates the admissible reasons allowing detention and the use of force.[45] Other IHRL treaties, in contrast, offer a slightly greater possibility to allow reasoning by analogy as they simply prohibit 'arbitrary' interferences of the right to life and personal freedom.[46] Second, we will see below that the factual situation is very different in IACs and NIACs in relation to both the lethal use of force and detention because it is much more difficult in NIACs than in IACs to legally and factually determine who is a legitimate target of such action and when the NIAC (which provides the alleged authorization) actually ends.[47] As for the alternative claim that customary

40 Goodman, Authorization, above note 3, 155.

41 For a discussion, see MNs 10.284–10.308.

42 Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye' (2011) 93 IRRC 189, 207.

43 See International Conference of the Red Cross and the Red Crescent (32nd Session), Resolution 1: 'Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty' (8–10 December) Res 32IC/15/R1, preamble, para 1.

44 See Online Casebook, United Kingdom, The Case of Serdar Mohammed (High Court Judgment), confirmed by Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): A. Court of Appeal Judgment; see also UN Working Group on Arbitrary Detention, 'United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court', paras 31 and 96, as annexed to UNGA, 'Report of the Working Group on Arbitrary Detention' (2015) UN Doc A/HRC/30/37. The UK Supreme Court left this question open in Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): B. Supreme Court Judgment, paras 14, 16, 44, 61, 133.

45 See ECHR, Arts 2, 5.

46 ICCPR, Arts 6(1), 9(1); ACHR, Arts 4(1), 7(3); ACHPR, Arts 4, 6.

47 See MNs 10.266–10.267 (on the use of force) and 10.291–10.292 (on detention).

law provides an authorization to detain in NIACs, the specific legislation of States engaged in NIACs that authorizes the detention of fighters shows that no general practice and *opinio juris* exist according to which IHL alone would provide a sufficient legal basis. Anyway, the alleged legal basis provided by IHL is only invoked in extraterritorial NIACs, and even there the majority of States involved in, for instance, the NIAC in Afghanistan did not detain fighters beyond a limited period of time but instead transferred them either to the Afghan authorities or the US (which claims that such an authorization exists) or released them. Despite the above-mentioned resolution, this does not show a sufficiently widespread *opinio juris* supporting the alleged customary legal basis authorizing the detention of fighters in NIACs.[48]

**10.19** As for IHL on military occupation, trials after World War II recognized that Germans accused of war crimes could rely on all 'rights' IHL provides to a lawful belligerent and could expect the inhabitants of territories they occupied in violation of the *jus ad bellum* to comply with their 'obligations' under *jus in bello*.[49] Although several rules of IHL of military occupation indeed mention what an occupying power 'may' or 'can' do,[50] they always follow, however, prohibitions and clarify their scope of application or exceptions to such prohibitions. In my view, facts provide the basis of such 'authorizations' and not IHL, namely, that the authority over the occupied territory has '*in fact* passed into the hands of the occupant.'[51] Based upon the analysis suggested previously,[52] if such authorizations constitute strong permissions, they may prevail, as the *lex specialis*, over IHRL prohibitions applicable to occupied territories.

## 10.2 TERRORISM

Terrorism is not a relevant category for determining whether IHL applies. IHL applies in armed conflicts. Thus, IHL covers acts of terrorism committed by States, armed groups (which may be therefore labelled as 'terrorist groups') or individuals that have the necessary nexus to an armed conflict.

48 See also Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): A. Court of Appeal Judgment, paras 228–30.

49 See Online Casebook, United States Military Tribunal at Nuremberg, United States v. Wilhelm List, Section 3(v); Online Casebook, United States Military Tribunal at Nuremberg, The Justice Trial. For the contrary view, see Bernard D. Meltzer, 'A Note on Some Aspects of the Nuremberg Debate' (1947) 14 University of Chicago L Rev 455, 461, and François De Menthon, 'Opening Address (January 17, 1946)' in Michael R. Marrus (ed), *The Nuremberg War Crimes Trial 1945–46: A Documentary History* (Bedford Books 1997) 89–94.

50 HR, Art 53; GC IV, Arts 49(2), 57(1), 64(1)–(2), 66 and 78(1).

51 HR, Art 43 (emphasis added).

52 See MNs 9.043–9.051. For an example, see MN 8.248 (relating to the jurisdiction of military courts).

IHL protects persons suspected, accused or convicted of acts of terrorism with a nexus to an armed conflict according to the category to which they belong independently of their terroristic act.

IHL normally prohibits terrorist acts committed in armed conflicts. The definition of acts amounting to terrorism, however, is controversial. Western States suggest that this definition should include acts directed at government forces or government property with the purpose of compelling a government to act or to abstain from acting, but IHL does not prohibit such 'act[s] of terrorism' committed in an armed conflict. Therefore, discussions about the definition of terrorism stumble on its relationship with IHL, and it would be important to clarify the relationship between IHL and anti-terrorism law. The latter should not apply in armed conflicts to acts not prohibited by the former.

**10.20** 'Terrorism' and 'armed conflict' are two terms referring to phenomena of collective violence. Armed conflict, which is the older concept, is better defined in the law than terrorism, and, at least legally speaking, the term inherently places the parties to a conflict on an equal footing. Most of those who are engaged in an armed conflict admit as much and acknowledge that their enemies are also so engaged. Conversely, only very few would classify their own behaviour as terrorism, which is a term that describes the actions of others and always refers to unlawful behaviour. Those who claim that certain acts of violence are lawful or at least legitimate under certain circumstances do not try to define a category of 'lawful acts of terrorism' but rather want to exclude such acts from the concept of terrorism. Although many of those engaged in terrorism and, more recently, some of those fighting it view their activities as constituting an armed conflict and claim privileges or 'authorizations' under IHL, they are nevertheless not ready to fully comply with IHL.

**10.21** This sub-chapter first enquires into when terrorism may be considered to fall under the legal concept of armed conflict to which IHL applies. Next, it describes how IHL deals with terrorism when it applies. It then examines how the definition of terrorism and, more broadly, international anti-terrorism law should relate to armed conflicts and thus to IHL.

**10.22** The Cartesian-minded reader will be surprised that this sub-chapter does not begin with discussing the definition of terrorism but rather ends with some thoughts on that subject. However, this structure results from the fact that the most controversial aspect of international anti-terrorism law is precisely the definition of terrorism. All involved in attempts to define terrorism try to

include within the definition their enemies' activities while excluding their own behaviour and that of their friends. Louis Henkin's comment in 1990 that 'terrorism…is not a useful legal concept' may therefore still be correct.[53] After 11 September 2001, however, Henkin's statement is politically incorrect as it appears to offend the memory of thousands of victims of terrorist acts and millions of people afraid of such acts. Moreover, it certainly does not correspond to the attitude of States, which, after all, make international law and use the term fervently in their statements and increasingly in international instruments. At this stage, it is sufficient to stress the different contexts in which the term 'terrorism' is used. As the Inter-American Commission on Human Rights explained in an excellent report, the term has been used – with varying levels of formality – to characterize:

- *actions*, including forms of violence such as highjacking [*sic*] or kidnapping
- *actors*, including persons or organizations
- causes or struggles…
- *situations*, where terrorist violence is a particularly serious or widespread problem in a state or region…[54]

### 10.2.1 When does terrorism constitute an armed conflict to which IHL applies?

IHL only applies to acts of terrorism that either have a sufficient nexus to an IAC or a NIAC or if they trigger such conflicts. **10.23**

#### a. Terrorism as an IAC?

Shortly after the terrorist attacks on the US that occurred on 11 September 2001, the US declared that it was engaged in a 'war on terrorism', which was viewed as one single worldwide IAC against a non-State actor (Al-Qaeda) or, perhaps, also against terrorism itself as a social or criminal phenomenon. This conflict started at some point in the 1990s without the US characterizing it as such at that time, and it will continue until victory. The 'war on terrorism' was seen as an IAC because it had to be conducted on a worldwide basis, and the US claimed to benefit from all authorizations offered by IHL of IACs, although the US argued that terrorists did not benefit from the protections offered by IHL of IACs given that they were not fighting for a State.[55] **10.24**

53 Louis Henkin, 'International Law: Politics, Values and Functions – General Course on Public International Law' (1989) 216 Recueil des Cours 9, 159.

54 See IACommHR, *Report on Terrorism and Human Rights* (2002) OAS Doc No OEA/Ser. L/V/II.116. Doc 5, rev 1 corr., para 12.

55 For a legal explanation of the original US position, see Online Casebook, US, The Schlesinger Report: A. Final

**10.25** However, we know that IACs are defined as armed conflicts between States, and both Al-Qaeda as well as terrorism itself are not States. Therefore, IHL of IACs does not apply to a conflict between the US and these non-State actors and amorphous concepts. We have also seen that once there was an international element to a conflict in a given territory, the entire conflict could not be classified as wholly international, but had, under consistent State practice, to be split off for classification purposes into its components.[56] During the Cold War, a worldwide struggle was never classified in its entirety as an IAC just because some of its manifestations indeed constituted IACs. Finally, although the characterization of national liberation wars as IACs in Protocol I has been criticized as giving legal clearance to terrorism,[57] a national liberation movement must comply with IHL of IACs, the rules of which prohibit most acts that could reasonably be classified as 'terrorism'.

**10.26** More recently, the US has abandoned its classification of the 'war on terrorism' as an IAC and now classifies this conflict as a NIAC.[58] This classification is correct as long as the usual threshold of application of IHL of NIACs is satisfied. Nevertheless, the US still applies by analogy IAC 'authorizations' to kill and to detain to what it now terms as a 'novel type of armed conflict.'[59]

**10.27** IHL of IACs nonetheless covers a few acts of terrorism as well as some rare parts of the 'war on terrorism', in which terrorist acts are directed against the armed forces or other persons seen as representing one State by forces of another State or acting under that State's de facto direction or control.[60] In my opinion, as explained previously in this book, IHL of IACs does not cover attacks by one State directed at a terrorist non-State armed group situated on the territory of another State, even when the territorial State does not consent to such attacks.[61]

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Report of the Independent Panel to Review DoD Detention Operations, August 2004, Appendix C. For a critical assessment of the US position, see Marco Sassòli, 'Use and Abuse of the Laws of War in the "War on Terrorism"' (2004) 22 Law & Inequality: A Journal of Theory and Practice 195, 198–203; Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 EJIL 241, 249; Jordan J. Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 Yale J of Intl L 325; Luisa Vierucci, 'Prisoners of War or Protected Persons qua Unlawful Combatants?: The Judicial Safeguards to which Guantánamo Bay Detainees Are Entitled' (2003) 1 JICJ 284.

56 See MNs 6.42–6.44.

57 See Online Casebook, United States, President Rejects Protocol I; Douglas J. Feith, 'Law in the Service of Terror' (1985) 1 The National Interest 36, 47.

58 See HRC, 'National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1 – United States of America' (2010) UN Doc A/HRC/WG.6/9/USA/1, para 84.

59 See Online Casebook, United States, The Obama Administration's Internment Standards.

60 See MNs 6.08–6.11 and 6.13–6.21.

61 See MNs 6.09–6.11.

### b. Terrorism as a NIAC?

**10.28** Hostilities by and against terrorists that do not qualify as IACs may be NIACs. As we have seen, IHL of NIACs only applies if an armed group, terrorist or not, has a minimum level of organization and if the violence is of a certain intensity. Whether that violence complies with IHL or not (for example, it consists of prohibited terrorist acts) is irrelevant to this determination. Armed groups are always labelled as 'terrorists' by the State(s) against which they fight. This label, however, does not preclude that they are also armed groups for the purposes of IHL. While terrorist acts may be committed in a NIAC and may even trigger a NIAC, they neither necessarily trigger a NIAC nor preclude the applicability of IHL of NIACs. The normal rules and the related controversies related to the classification of NIACs apply.

**10.29** In the framework of its fight against terrorism, the US adopted a very broad concept of 'armed conflict'.[62] Even applying the normal definitions and minimum thresholds under IHL, a sustained armed conflict between one or several States on the one side and a transnational terrorist group such as Al-Qaeda or the 'Islamic State' on the other side may fall under the concept of a NIAC.[63] However, until now, terrorist acts by private groups have not been viewed as creating an armed conflict.[64] The UK stated when it ratified Protocol I that 'the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.'[65] The British and Spanish campaigns against the Irish Republican Army (IRA) and the Euskadi Ta Askatasuna (ETA), respectively, have not been treated as armed conflicts under IHL.[66]

**10.30** Certainly, the law of NIACs may appear in some respects inappropriate for a transnational conflict between a State and a global terrorist armed group given that it was designed for conflicts occurring within a country mainly between

62 See, e.g., US Department of Defense, 'Military Commission Instruction No. 2' (2003), Section 5(C) <https://www.hsdl.org/?view&did=3145> accessed 8 August 2018.

63 See also IACommHR, above note 54, para 73. However, for worthy arguments that the 'war on terror' against Al-Qaeda and its associates beyond Afghanistan was not an armed conflict, see Jelena Pejic, 'Terrorist Acts and Groups: A Role for International Law?' (2004) 75 BYBIL 71, 85–8. See also Noëlle Quénivet, 'The Applicability of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature' in Roberta Arnold and Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (Edis 2005) 31–57.

64 Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2000) 68.

65 Online Casebook, United Kingdom and Australia, Applicability of Protocol I: C. Reservations to Protocol I by the United Kingdom.

66 Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* (Dartmouth Publishing 1992) 318.

the government and rebels and its rules accord much consideration for the concerned State's sovereignty. A higher level of protection should be possible in transnational conflicts than in a conflict occurring in the territory of only one State that is fought between its government and rebel forces. It is possible that a law specific to such transnational armed conflicts could be developed. However, any revision introduces the risk that States will take advantage of the opportunity to weaken rather than strengthen both their obligations and the corresponding rights of war victims. It is also doubtful whether a new law for transnational conflicts against (terrorist) armed groups would be acceptable to States as it should necessarily also give some rights to the non-State actor involved. It is even more doubtful as to whether such a new law would be respected by groups such as Al-Qaeda, the 'Islamic State' or 'Boko Haram'. A new law would also inevitably create a third category of armed conflicts, adding to the existing difficulties in classifying situations under IHL. Finally, if the new law diminished the protection offered in such conflicts, would it apply to both sides or would it abandon the principle of equality of the belligerents before IHL?[67] If the purpose is to do away with equality of belligerents, who believes that those qualified as 'terrorists' would respect that new law?

**10.31** In any case, to apply IHL as it currently stands, a distinction must be made for all acts that form part of the 'war on terrorism' between acts covered by IHL of IACs, covered by IHL of NIACs and not covered by IHL.

### 10.2.2 How does IHL deal with terrorism?

**10.32** IHL applies to acts of terrorism or to terrorist groups that have a nexus with an armed conflict. In such cases, IHL not only prohibits terrorist acts but also protects terrorists as persons affected by an armed conflict.

#### a. The prohibition of terrorist acts in IHL

**10.33** IHL prohibits any act that could reasonably be labelled as 'terrorist' if it is linked with the armed conflict. First, the very term 'terrorism' appears in prohibitions set out in IHL treaties.[68] However, this is not decisive because the context and field of application of such prohibitions show that they were meant to prohibit collective measures taken by mainly State authorities against a civilian population under their control to terrorize them in order to forestall hostile acts.[69]

67 See MNs 9.097–9.098, 10.221–10.232.

68 GC IV, Art 33 (concerning protected civilians in IACs) and P II, Art 4(2)(d) (concerning all persons not or no longer taking a direct part in hostilities in NIACs).

69 Pictet Commentary GC IV, 225–6.

Measures or acts of terrorism are indeed mentioned together with collective punishments that strike the innocent and guilty alike after a hostile act has been committed. This is not the typical situation of terrorist acts, which are seldom directed at persons who are in the hands of those who commit them and are normally not aimed at preventing those targeted from taking action (although the latter point may not be true from the perspective of the terrorists).

**10.34** Most terrorist acts are committed either against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants. In both IACs and NIACs, civilians may not be targeted, and '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'[70] Based upon this latter prohibition, the ICTY convicted General Galić, the commander of the siege of Sarajevo by Bosnian Serb forces from 1992 to 1995, for war crimes.[71] In its judgment, the Trial Chamber defined the offence as comprising the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[72]

**10.35** The Court defined terror as meaning extreme fear and held that provoking such fear had to be the specifically intended result for the offence to apply.[73] The ICTY correctly held that the violation must involve acts of violence directed at civilians. It did not view an attack directed at combatants or military objectives as prohibited even if the attack's primary purpose was to spread terror among the civilian population.[74]

70 P I, Art 51(2); P II, Art 13(2); ICRC CIHL Database, Rules 1–2.

71 See Online Casebook, ICTY, The Prosecutor v. Galić: A. Trial Chamber, Judgement and Opinion, paras 91–137, 208–597.

72 Ibid., para 133.

73 Ibid., paras 136–7.

74 Ibid., para 135. The ICRC Commentary APs, para 1940, is ambiguous on this issue. In my assessment, an attack with the main purpose to terrorize civilians is always unlawful because it is not directed at a military objective, which is defined under P I, Art 51(2), by the definite *military* advantage resulting from its destruction.

**10.36** As noted previously, IHL equally prohibits indiscriminate attacks.[75] Some definitions of terrorism include acts directed at soldiers and government property.[76] In armed conflicts, IHL obviously cannot prohibit a belligerent from attacking enemy combatants or property that constitutes a military objective as this is the very essence of armed conflict. In IACs, Protocol I explicitly grants combatants the right to participate directly in hostilities,[77] and they may not be punished for having so participated. However, IHL provides two interrelated limitations to such a 'licence to kill and destroy'. The right to commit such attacks is limited to combatants, and even then combatants may not resort to perfidy – a prohibition that applies both in IACs and NIACs and includes feigning civilian, non-combatant status to kill, injure or capture enemy combatants.[78] Feigning civilian status is precisely what terrorists do most of the time when they attack combatants.

**10.37** The right of only combatants to participate in hostilities deserves a more thorough discussion because it involves the question of when a 'terrorist' could benefit from such a right. Even if applicable to terrorists, such a right would first be limited to IACs. Protocol I has been accused of giving legal clearance to terrorism[79] by allowing combatants under certain circumstances to distinguish themselves only by carrying arms openly during military engagements and while visible to the enemy in a deployment preceding the launching of an attack.[80] Some authors contend that this relaxation of the distinction requirement 'make[s] it much easier for a "terrorist" to claim combatant status' and that 'terrorists could blend into the civilian population by concealing their arms and identity only immediately preceding their attacks without sacrificing their combatant status.'[81] Terrorist combatants who distinguish themselves as required by Protocol I could not be accused of perfidy in the form of feigning civilian status. However, as they are bound to respect all of IHL's other prohibitions, it is difficult to conceive how an act could be labelled as terrorist if it is neither directed at civilians nor indiscriminate and if the author identifies himself as an attacker while he is visible to the combatants he attacks during and prior to the launching of the attack.

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75 See MN 8.284.
76 See MN 10.049.
77 See P I, Art 43(2).
78 For IACs, see P I, Art 37(1)(c). For all armed conflicts, see ICRC CIHL Database, Rule 65.
79 See MN 10.025.
80 See P I, Art 44(3), and MN 8.069.
81 Gregory M. Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 Wisconsin Intl L J 145, 187.

**10.38** Civilians, in contrast to combatants, do not have the right to directly participate in hostilities. If they nonetheless participate, they may be attacked for the duration of their participation, and they may be punished for participating. Such punishment, however, is based upon national legislation, which IHL does not prohibit because civilians do not benefit from combatant immunity. Direct participation in hostilities by civilians is not a violation of IHL and, contrary to what is affirmed in some military manuals,[82] not a war crime[83] except if it involves an act of perfidy as defined above.

**10.39** However, most terrorist acts committed in armed conflicts occur in NIACs, yet combatant status does not technically exist in NIACs. Therefore, IHL would not prevent a State from trying a rebel who attacked – even without resorting to perfidy – combatants or military objectives for terrorism, murder or any other crime under its domestic legislation. However, labelling such attacks as terrorism would run counter to the need to reward the respect of IHL of NIACs in order to improve its respect.[84]

### b. The protection of 'terrorists' by IHL

**10.40** IHL, if applicable, protects all persons affected by an armed conflict, including those who are suspected, accused or even convicted of terrorist acts.[85] One of the ways to avoid the protection afforded by IHL is to argue that 'terrorists' who have fallen into the power of the enemy are 'unlawful combatants' who are neither protected by Convention III on POWs nor by Convention IV on civilians in IACs and who may be detained in NIACs by analogy to POWs without benefiting from the corresponding protections. In my opinion, as explained previously, such interpretations should be rejected.[86]

82 See the relevant excerpts of the military manuals of Canada, New Zealand and Nigeria as contained in ICRC CIHL Database, 'Practice Relating to Rule 6. Civilians', Loss of Protection from Attack: Section A. Direct participation in hostilities: III. Military Manuals' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter1_rule6> accessed 23 July 2018. See also UN War Crime Commission, *Law Reports of Trials of War Criminals* (1949) vol XV, 111.

83 See IACommHR, above note 54, para 69; Richard B. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) 28 BYBIL 323, 342; Richard B. Baxter, 'The Duty of Obedience to the Belligerent Occupant' (1950) 27 BYBIL 235, 266. For what he refers to as 'unlawful combatants', see Yoram Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 103.

84 See MN 10.252.

85 For an excellent comprehensive overview of the guarantees of IHL (and IHRL) that apply, see IACommHR, above note 54, paras 98–349.

86 See MNs 8.114–8.119.

*i. In NIACs*

**10.41** In my view, as explained above, IHL of NIACs must deal with hostilities with terrorist armed groups that do not represent a State. While this law does not formally distinguish between combatants and civilians, we have seen that fighters are nevertheless increasingly regarded as lawful targets of attacks in the conduct of hostilities under the same circumstances as combatants in IACs.[87] Such fighters may be targeted, like combatants, at all times as long as they have a continuous combat function in a terrorist armed group.

**10.42** However, once in the hands of the enemy, all former fighters (regardless of whether they are classified as unlawful combatants or terrorists) and civilians – whether peaceful or not – benefit from exactly the same protection under IHL of NIACs. In my view, IHL does not constitute a sufficient legal basis for detaining anyone in NIACs.[88] It simply provides guarantees of humane treatment and judicial guarantees during criminal prosecutions. Possible reasons for arrest, detention or internment are entirely governed by domestic legislation and IHRL requiring that no one is deprived of his or her liberty except based on the law.[89]

*ii. In IACs*

**10.43** In contrast to NIACs, a different regime applies in IACs to former combatants than to civilians. The question of whether neither Convention III nor Convention IV protects terrorists classified as 'unlawful combatants' only arises in IACs. In my assessment, as explained previously, all persons, including terrorists, who do not have or have lost combatant status are perforce protected civilians.[90] However, in cases of doubt, a person who has committed a belligerent act, which includes terrorist acts, must be treated as a POW until a tribunal decides otherwise.[91]

**10.44** Even persons who have fallen into the power of the enemy and are determined to be combatants may be prosecuted and sentenced for crimes, including acts of terrorism, and prosecution is even compulsory if such acts constitute war crimes.

87 See MN 8.122.
88 See MNs 10.295–10.301.
89 See MNs 10.016–10.018.
90 See MNs 8.115–8.119.
91 See MNs 8.086–8.088.

**10.45** Protected civilians may not be detained except for two reasons. First, they may be detained under domestic legislation (or security legislation introduced by an occupying power) for the prosecution and punishment of criminal offences, including for having directly participated in hostilities or acts of terrorism.[92] Second, civilians may be interned for imperative security reasons pursuant to an individual decision made according to a regular procedure, which must include a right of appeal, prescribed by the belligerent concerned.[93] This latter reason allows States to intern suspected terrorists who have not yet committed a terrorist act when sufficient indications exist that they will do so.

**10.46** It may appear strange to classify heavily armed 'terrorists' captured in an IAC who do not benefit from combatant and POW status as 'civilians'. In law, borderline cases never correspond to the ideal typical category envisioned by lawmakers but nevertheless fall under its provisions. What matters is that granting terrorists 'civilian status' does not lead to absurd results, which it does not. As 'civilians', unprivileged combatants, including terrorists, may be attacked while they directly participate in hostilities. If arrested, Convention IV does not bar States from punishing them for unlawfully participating in hostilities and even requires punishment for war crimes. In addition, it permits administrative detention for imperative security reasons and allows certain derogations.[94] Convention IV was not drafted by professional do-gooders or professors but by experienced diplomats and military leaders who fully accounted for the security needs of a State confronted with dangerous people.

**10.47** Some may find it shocking that classifying terrorists as civilians provides them with an advantage over captured combatants (that is, POWs) because the former may be only interned following a judicial or individual administrative decision. However, combatants can be easily identified based on objective criteria that they will normally not deny (for instance, their status as a member in the armed forces of a party to an IAC), while a terrorist's membership, past behaviour and the future threat he or she poses can only be determined individually.

### 10.2.3 IHL and the definition of terrorism

#### a. Efforts to define terrorism

**10.48** Terms and their definitions have a symbolic value. Legal definitions, however, serve a specific purpose: they clarify the field of application of the legal rules

92 See MNs 8.171, 8.247–8.251.
93 See MNs 8.177–8.188.
94 See MNs 8.168–8.170 and 8.179–8.180.

that employ those terms. The term 'terrorism' may be used to describe prohibited conduct by States, groups (including armed groups) and individuals as well as to organize national and international reactions to such conduct. In international law, there are currently 19 universal instruments and several regional ones for the prevention and punishment of terrorism.[95] These instruments sidestepped the problem of defining terrorism by enumerating lists of crimes covered by each respective convention. Most regional instruments, in turn, refer to those specific universal instruments for the definition of prohibited acts.

**10.49** A comprehensive international convention on terrorism has been stuck in the drafting stage for more than 20 years due to the main controversies over whether it should exclude 'struggles for liberation and self-determination' as proposed by Organisation of Islamic Cooperation member States and the extent to which acts committed in armed conflicts should be excluded or included. Article 2(1) of the Draft Comprehensive Convention Against International Terrorism (Draft Convention), which is a provision that no longer appears to be subject to major controversies, defines a terrorist offence as:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[96]

**10.50** Most specific conventions on terrorism do not require a specific purpose to make an act prohibited. The 1937 Convention for the Prevention and Punishment of Terrorism, which never entered into force, requires a specific intent to create a state of terror among particular persons or the public.[97] The alternative

95 For a list of these universal instruments, see UN Office of Counter-Terrorism, 'International Legal Instruments' <http://www.un.org/en/counterterrorism/legal-instruments.shtml> accessed 8 August 2018.

96 For the most recent version of this proposed article, see Annex I to UNGA, 'Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996' (2013) UN Doc A/68/37, Art 2(1).

97 Convention for the Prevention and Punishment of Terrorism (16 November 1937) 19 League of Nations Official J 23, Art 1(2).

purpose of compelling a State or an international organization to act or abstain from acting first appears in the 1979 Convention Against the Taking of Hostages,[98] although this purpose could be seen as being specific to the taking of hostages. However, this alternative purpose reappears in the Nuclear Terrorism Convention[99] and the above-mentioned Draft Convention, and it is mentioned by the UN High-Level Panel on Threats, Challenges and Change (UN High-Level Panel)[100] and also endorsed by the UN Secretary-General[101] as well as by the UN Security Council.[102] In 2011, the Appeals Chamber of the Special Tribunal for Lebanon referred alternatively to both of the aforementioned specific purposes when it held that 'a customary rule of international law regarding the international crime of terrorism…has indeed emerged.'[103] Specifically, the Appeals Chamber defined terrorism as criminal acts or threats thereof with 'a transnational element' committed with the specific intent to either 'spread fear among the civilian population' or 'directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it…'[104] More recently in 2017, NATO defined terrorism as '[t]he unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives.'[105]

### b. The need to clarify whether anti-terrorism instruments apply in armed conflicts

**10.51** The more a given convention broadly defines the criminalized acts, the more it is necessary to clarify to what extent the defined crimes apply in armed conflicts. This is particularly the case if the crime in question involves death, injury or damage that is inherent to all armed conflicts with the simple purpose of compelling a State to do or not to do something, which is the purpose of all armed conflicts.

98 International Convention Against the Taking of Hostages (17 December 1979) 1316 UNTS 205, Art 1(1).

99 International Convention for the Suppression of Acts of Nuclear Terrorism (13 April 2005) 2445 UNTS 89, Art 2(1)(b)(iii).

100 See 'A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges and Change', para 164(d), as contained in UNGA, 'Follow-up to the Outcome of the Millennium Summit' (2004) UN Doc A/59/565.

101 UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General' (2005) UN Doc A/59/2005, para 91.

102 UNSC Res 1566 (2004) para 3.

103 Special Tribunal for Lebanon, *Prosecutor v Ayyash et al.* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11–01/I/AC/R176bis (16 February 2011) para 85.

104 Ibid.

105 NATO, 'NATO Glossary of Terms and Definitions' (2017) NATO Doc No AAP-06, 114.

**10.52** The 1979 Convention Against the Taking of Hostages excludes hostage-taking during armed conflicts from its field of application because IHL covers such acts.[106] The League of Arab States, Organisation of Islamic Cooperation and Organisation of African Unity Conventions on terrorism exclude struggles for liberation or self-determination, such as national liberation wars and resistance movements against foreign occupation from their scope of application,[107] and even then only acts committed by those who are on the 'right' side in such conflicts.[108] The 1997 Convention on Terrorist Bombings excludes '[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law.'[109] This exclusion reappears verbatim in both the 2005 Convention on Nuclear Terrorism[110] and the Draft Convention.[111]

**10.53** All other anti-terrorism conventions apply fully during armed conflicts. However, some of them avoid, even indirectly, possible conflicts with IHL. The conventions protecting aviation and maritime navigation exclude aircraft used in military services and warships. The 1999 Convention for the Suppression of the Financing of Terrorism covers, in addition to acts criminalized by existing anti-terrorism conventions, '[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict.'[112] This means that it applies in armed conflicts only to acts committed against civilians, while IHL continues to cover acts against combatants or other persons taking an active part in hostilities. The UN High-Level Panel similarly proposes that, beyond existing instruments, the general definition of terrorism should include only acts directed

106 Convention Against the Taking of Hostages, above note 98, Art 12.

107 See Arab Convention on the Suppression of Terrorism (22 April 1998), Art 2(a), as unofficially translated in Amnesty International, *The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights* (Report) (9 January 2002) AI-Index IOR 51/001/2002, Annex II; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1 July 1999), Art 2(a), Annex to Res No 59/26-P <http://www.refworld.org/docid/3de5e6646.html> accessed 8 August 2018; Organisation of African Unity Convention on Preventing and Combating Terrorism (14 July 1999), Art 3(1), OAU Doc No AHG/Dec. 132 (XXXV) (1999) <https://au.int/en/treaties/oau-convention-prevention-and-combating-terrorism> accessed 8 August 2018.

108 See Arab Convention, ibid., Art 2(a).

109 International Convention for the Suppression of Terrorist Bombings (15 December 1997) 2149 UNTS 256, Art 19(2).

110 Convention for the Suppression of Acts of Nuclear Terrorism, above note 99, Art 4(2).

111 See Draft Comprehensive Convention Against International Terrorism, Art 20(2), annexed as Appendix II to UNGA, 'Letter Dated 3 August 2005 from the Chairman of the Sixth Committee Addressed to the President of the General Assembly' (2005) UN Doc A/59/894 [Draft Convention].

112 International Convention for the Suppression of Financing of Terrorism (9 December 1999) 2178 UNTS 197, Art 2(1)(b).

at civilians and non-combatants,[113] a position that is also endorsed by the UN Secretary-General.[114]

**10.54** The relationship between anti-terrorism law and IHL may be regulated in different ways. First, all acts covered by IHL could be excluded. As shown above, this could be justified by the fact that IHL prohibits and ICL criminalizes most acts in armed conflicts that could conceivably be classified as terrorist acts. Furthermore, IHL regulates the obligation of (and judicial cooperation between) States to repress such crimes.[115] However, if such an exclusion clause were to be adopted, international anti-terrorism law would largely miss its purpose because the most dangerous terrorist groups are currently armed groups engaged in NIACs.

**10.55** Second, the definition of terrorism could also exclude at least acts attributable to States, including acts committed in armed conflicts. The UN Secretary-General suggested that we should 'set aside debates on so-called "State terrorism"' on the basis that '[t]he use of force by States is already thoroughly regulated under international law.'[116] While this is correct for both *jus ad bellum* and *jus in bello*, the crux with such a position for IHL is that it results in treating the two sides of a NIAC differently, which is contrary to the basic IHL principle of the equality of the belligerents.[117] Admittedly, this principle is only valid for IHL, but the idea that an act would be classified as 'terrorism' only when committed by rebels could seriously undermine their willingness to comply with any rules of international law. On the other side of the spectrum, the exclusion of struggles 'against occupation and aggression for liberation and self-determination' from the definition of terrorism by, for example, the Arab, Organisation of Islamic Cooperation and Organisation of African Unity Conventions also violates the equality of belligerents principle.[118] Significantly, the Arab Convention qualifies this exclusion with a counter-exception, providing that it 'shall not apply to any act prejudicing the territorial integrity of any Arab State.'[119] Differentiation according to a cause's justification directly violates the separation between *jus ad bellum* and *jus in bello*. The UN Secretary-General is certainly correct that 'the right to resist occupation…cannot include the right to deliberately kill

113 See Report of the High-Level Panel, above note 100, para 164(d).
114 In Larger Freedom, above note 101, para 91.
115 See GCs, Common Arts 49/50/129/146; P I, Arts 85(1), 88. For further details, see MNs 5.204–5.213.
116 In Larger Freedom, above note 101, para 91.
117 See MNs 9.097–9.098.
118 See note 107 above.
119 Arab Convention, above note 107, Art 2(a).

or maim civilians.'[120] Under the definition of terrorism suggested in the Draft Convention, however, deliberate attacks against the occupying power's soldiers or facilities to compel it to retreat would fall under the definition of terrorism,[121] even though such conduct is the very essence of resistance against occupation and is lawful under IHL if the attackers belong to an organized armed group and distinguish themselves from the civilian population.

**10.56** Third, the most widely adopted wording contained in existing conventions and suggested for the Draft Convention excluding '[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law', may similarly be understood as incompatible with the principle of the equality of belligerents before IHL. Indeed, IHL does not contain a single definition of the term 'armed forces'. In NIACs, Common Article 3 protects '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms'. This term must include members of both governmental and anti-governmental armed forces. Otherwise, the latter either would not be protected at all, or they would be privileged in that they, unlike their opponents, would be protected except while they directly participate in hostilities. Under Protocol II, conversely, insurgents other than parts of the government army engaged in a rebellion are called armed groups and not armed forces.[122] Due to this ambiguity, States could argue that opposing non-State armed groups are covered by anti-terrorism instruments (including when they attack government soldiers or facilities to compel the government to do certain acts), while the members of their forces are not. This, in turn, would weaken the willingness of rebels to comply with IHL and would be contrary to the IHL rule that encourages granting the broadest possible amnesty at the end of a NIAC to rebels who did not violate IHL.[123]

**10.57** For the Draft Convention, a way out of these contradictions would be an additional clause stating that '[n]othing in this Convention makes acts unlawful which are governed by international humanitarian law and which are not unlawful under that law.'[124] Another solution is to exclude activities in armed conflicts from the definition of terrorism with the exception of acts causing the

120 In Larger Freedom, above note 101, para 91.

121 Draft Convention, above note 111, Art 2(1).

122 P II, Art 1(1); ICRC Commentary APs, para 4460.

123 Pejic, Terrorist Acts, above note 63, 75; P II, Art 6(5).

124 See UN Sixth Committee, 'Measures to Eliminate International Terrorism: Proposal to Facilitate Discussion by the Friends of the Chairman of the Working Group on Measures to Eliminate International Terrorism' (2005) UN Doc A/C.6/60/INF/1.

death or serious bodily injury of civilians.[125] Both proposals would make sure that acts committed in an armed conflict that are not contrary to IHL do not fall under the definition of terrorism. However, a majority of States rejected both proposals.[126]

### c. The utility of IHL for defining terrorist acts in peacetime

**10.58** IHL might also be useful to help define terrorist acts themselves, including even for acts committed outside of armed conflicts. Nearly all of those who are fighting armed conflicts are convinced that they are fighting for a just cause. Nevertheless, the international community accepts that, even for those who fight for such a just cause, IHL prohibits certain methods of warfare, including, as shown above, all methods that could reasonably be classified as terrorism. Most terrorists are equally convinced that their cause is just, and it is impossible to convince them of the contrary. Many of those who support terrorists or at least sympathize with them do so because they too believe the cause is just, even if they do not approve of the methods. This blurring between the purposes of violence and the means used is one of the stumbling blocks for the definition of terrorism among States, but it could be circumvented by defining an act occurring in peacetime as terrorism if it would violate IHL in wartime.[127]

**10.59** This approach would strip the currently proposed definition of its subjective elements and avoid most controversies. It would confront terrorists with their own claim that they are acting for a just cause. It would also facilitate cooperation among States in fighting such acts by rejecting any political offence exception to extradition and judicial cooperation (independently of their assessment of the merits of the cause). Indeed, as we have seen, States have undertaken to cooperate in this manner under IHL with respect to war criminals, independently of the cause for which they fight. Finally, such a definition would avoid the need to resolve the debate as to when terrorism constitutes an armed conflict because it would classify acts committed either in an armed conflict or in peacetime

125 See 'Report of the Coordinator on the Results of the Informal Consultations on a Draft Comprehensive Convention on International Terrorism, held from 25 to 29 July 2005', annexed as Appendix I to UN Doc A/59/894, above note 111, 5.

126 For the debate over the definition of terrorism under international law, see Eva Herschinger, 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism' (2013) 25 Terrorism and Political Violence 183; Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 Boston College Intl and Comparative L Rev 23.

127 For example, this idea appears in International Law Association (ILA), 'Report of the Committee on International Terrorism' (1985) 61 ILA Rep of Conferences 313, 315; Michael P. Scharf, 'Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?' (2002) 7 ILSA Journal of Intl and Comparative L 391, 393.

according to the same criteria as a war crime in the former case by applying IHL and as an act of terrorism in the latter case by applying IHL by analogy.

**10.60** However, the difficulty presented by this proposed definition is determining the extent to which IHL can be applied by analogy. Should we only classify acts committed against civilians that would be a war crime if committed by a (privileged) combatant in an IAC as terrorist acts or should the classification include all acts that would be war crimes in armed conflicts? Even under the latter approach, it would still be necessary to determine who can be considered as 'civilian' (as opposed to combatant) outside of an armed conflict because many acts, such as killing an enemy, are war crimes in IHL only if directed at civilians. In addition, if the definition includes all acts that might constitute war crimes, it would be necessary to clarify how attackers must distinguish themselves from the rest of the population in peacetime in order not to feign 'civilian' status because attacks directed against soldiers are only war crimes if made while feigning civilian status.[128] Such difficulties, however, could be overcome with lawyer-like thinking in analogy with IHL.

**10.61** Some object that terrorists could thus rely on the 'combatant's privilege' under which combatants are immune from prosecution for acts of violence that comply with IHL.[129] However, they forget the simple fact that an act is not classified as 'terrorist' does not bar its prosecution under domestic law and mutual assistance in criminal matters under the normal rules of international criminal law. Furthermore, in my opinion, the above proposal does not suggest that IHL should fully apply by analogy in peacetime; rather, it only applies it by analogy for the purpose of defining terrorist acts.

## 10.3 DRONES

IHL only applies to drone attacks that have a nexus to an armed conflict. Such attacks not only raise but also exacerbate many of the usual questions and controversies regarding IHL's field of application, its relationship with other branches of international law and its rules regulating the conduct of hostilities.

In my view, drones do not constitute an unlawful means or method of warfare. Rather, the usual rules of IHL apply to drone attacks, even when the targeted

128 While killing or injuring (soldiers) by feigning civilian status is not a war crime under Art 85(3)(f) of P I, it is a war crime under Arts 8(2)(b)(xi) and 8(2)(e)(ix) of the ICC Statute.

129 See Scharf, above note 127, 396–7; see also Ruth Wedgwood's comment in 'America Fights Back: The Legal Issues Symposium' (2004) 11 Cardozo J of Intl and Comparative L 831, 847–8, when she pleads in favour of applying the laws of war in the 'war on terrorism'.

person is far away from the rest of the hostilities. In such a case, however, IHRL may prevail, which nearly always prohibits deliberate targeted killings. Under IHL, targeted killings through drones may obviously only be directed against legitimate targets and must respect all other rules of IHL, including especially the proportionality rule and the obligation to take precautionary measures to avoid or minimize an attack's incidental effects on civilians. In my opinion, drone attacks can comply with those rules and also provide many advantages over other means and methods of warfare, but they raise delicate questions of accountability in practice when used by secret services.

**10.62** Drones are unmanned aerial vehicles (UAVs) remotely piloted by humans (operators). In armed conflicts, they may be used as intelligence, surveillance, targeting and reconnaissance platforms. When used as platforms for targeting purposes, they provide a clear tactical military advantage: they can swiftly deliver deadly force by a precision-guided missile from the very moment of sighting an intended target.[130] However, they have raised particular concerns under IHL when used – as they increasingly are – as targeting platforms to kill certain individuals, in particular by the US in 'counterterrorism operations', outside the area where an armed conflict is normally fought (for instance, drone strikes by the US in Pakistan) and when they are operated by Central Intelligence Agency (CIA) or PMSC staff rather than members of the armed forces.

### 10.3.1 Targeted killings with drones exacerbate issues relevant to any other attack

#### a. Clear legality when used against combatants in IACs

**10.63** It is unfortunately the essence of an armed conflict that enemy combatants in an IAC may be deliberately killed. We will see that the use of drones to target and kill legitimate targets in an IAC even has many advantages from an IHL point of view when compared with the use of other means.[131]

#### b. General controversies exacerbated by the use of drones in NIACs

**10.64** The real IHL issues relating to targeted killings using drones are linked to the fact that they are used in situations that are, at best, NIACs, often far away from the 'hot battlefield', against persons who may not be legitimate targets under IHL and that their use is surrounded by secrecy.

130 For an overview of the actual use and concerns relating to drones, see Online Casebook, General Assembly, The use of drones in counter-terrorism operations.

131 See MN 10.070.

**10.65** Targeted killings raise many international law questions unrelated to IHL. In *jus ad bellum*, it is controversial when a State may use force against armed groups or individuals on the territory of another State that does not consent to such use of force. Remotely piloted drones, the secrecy surrounding their use and the absence of any risk that the operator is killed or captured may facilitate the use of force in violation of *jus ad bellum*.

**10.66** Targeted killings using drones also raise many IHL questions that are not specific to that platform but for which the use of this tactic is an extreme example. First, it must be determined whether a given attack is even subject to IHL, that is, whether the attack has the necessary nexus to a conflict that satisfies the material threshold for the application of IHL of NIACs.[132] Second, if so, the question remains as to whether IHL of NIACs applies worldwide when legitimate targets are attacked?[133] If it does not apply worldwide, targeted killings by drones outside of the theatre of hostilities are nearly always unlawful under IHRL because warnings are not given in practice prior to drone strikes, and drones are technically unable to arrest rather than kill a target as they should in a law enforcement operations. Third, however, it is not settled (and a majority opinion rejects) that (extraterritorial) jurisdiction, making IHRL applicable, also derives from the mere fact that an act attributable to a State adversely affects the rights of anyone located anywhere in the world.[134] As discussed previously, a sliding scale should apply in my view under which negative obligations resulting from the duty to respect the right to life apply much earlier than other IHRL obligations.[135] Fourth, are there no restraints if neither IHL nor IHRL applies, which is the logical consequence of the majority opinion holding that IHL of NIACs has a limited geographical scope of application and that a person is not under the jurisdiction of a State merely because they are killed by that State? Some try to deduce restraints on the use of force from *jus ad bellum* or, more precisely, from the necessity and proportionality requirements that limit 'naked self-defence'.[136]

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132 See MNs 6.31–6.41, 6.80–6.85.

133 See MNs 6.46–6.53.

134 See MNs 9.021–9.022.

135 See MN 9.022.

136 Kenneth Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a "Legal Geography of War"' (2011) American University – Washington College of Law, WCL Research Paper No. 2011–16, 7 <http://ssrn.com/abstract=1824783> accessed 9 August 2018. This is also done implicitly in the Drone Casualties Report by issued by the US administration in July 2016, which considers that individuals may be 'targetable in the exercise of U.S. national self-defense' without being a belligerent party to an armed conflict. See US Director of National Intelligence, 'Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities' (2016) 1, fn a <https://www.nytimes.com/interactive/2016/07/01/world/document-airstrike-death-toll-executive-order.html?_r=0> accessed 9 August 2018. For a criticism of

**10.67** Fifth, even if IHL applies, it is unsettled whether IHL constitutes the *lex specialis* concerning targeted killings in NIACs,[137] especially if they occur far away from the battlefield, or whether IHRL prevails (if it applies at all).[138] Sixth, IHRL may also prevail in an armed conflict if the target is not a legitimate one under IHL but rather a civilian (including the worst criminal or terrorist) who must be arrested whenever possible.

**10.68** Seventh, even if only IHL applies or if it prevails, it is controversial whether legitimate targets in a NIAC include only persons directly participating in hostilities for the duration of their participation or equally members of an armed group with a continuous combat function or even every member of an armed group.[139] The last two criteria also raise the controversial question as to whether someone is a member of a group, such as the 'Islamic State', only when subject to a military hierarchy or even when simply swearing allegiance and committing acts endorsed by the group. In addition, it has been argued that the attacker must try to capture a legitimate target when it is manifestly possible without posing any additional risk to the attacker.[140] If this is the rule, may an attacker invoke the nature of the platform used to justify that capture is not possible?

**10.69** Eighth, we have seen that it is very difficult to calculate proportionality in attack and that what counts as a military advantage as well as how expected incidental effects upon civilians should be calculated are both controversial.[141] While it may be difficult for a drone operator based 10 000 km away to calculate such proportionality, this difficulty is not greater than that of soldiers launching long-range missiles and artillery or pilots launching aerial bombardments.

**10.70** Ninth, targeted killings with drones, however, have clear advantages compared with other tactics when it comes to precautionary measures for the benefit of civilians.[142] Of course, mechanical or technical failures remain a possibility, but that is also the case for piloted aircraft, and humans themselves make mistakes. On the positive side, a drone can fly over a given target for hours before the attack, leaving enough time for the decision-maker to verify its lawfulness and

this approach, see Geoffrey Corn, 'Self-defense Targeting: Blurring the Line Between the *Jus ad Bellum* and the *Jus in Bello*' in Kenneth Watkin and Andrew Norris (eds), *Non-International Armed Conflict in the Twenty-first Century* (US Naval War College 2012) 57.

137 See MNs 10.259–10.283.

138 See MNs 9.021–9.022.

139 See MNs 8.122, 8.316–8.318, 10.259–10.283.

140 See MN 8.373.

141 See MNs 8.319–8.328.

142 See MNs 8.330–8.333.

ensure that the attack respects the proportionality rule.[143] The attack may then happen at the time and under circumstances that allow for the highest probability of hitting the target with no, or minimal, incidental civilian losses. In addition, certain precautionary measures that could not be taken by a human piloting an aircraft are feasible with drones. In particular, as discussed before, one of the factors that may render an additional precautionary measure unfeasible is the risk it would entail for the pilot. In contrast, a drone operator is often remotely located and hence faces no additional risk, which may even make attacks possible 'on alternative targets that might not otherwise be viable'.[144] Moreover, the operator is not placed in a stressful combat situation and is therefore in a better position to assess a given situation and calmly make a decision. Finally, given that drones record everything, it is much easier to implement criminal responsibility or disciplinary sanctions in the case of violations, assuming, of course, that the attacking party actually wants to sanction violations.

### 10.3.2 Particular issues raised by drones operated by secret services

**10.71** The secrecy surrounding the use of drones makes attribution and criminal accountability more difficult, in particular when the drone operators do not belong to the armed forces but to secret services such as the CIA. Although such operators may benefit from equivalent IHL training and legal advice as members of armed forces, the public will never be able to assess this. What raises more concern is that the CIA, for example, is not subject to the military justice system. If an operator commits a war crime, he or she should be brought before a civilian court, which may not have the necessary IHL expertise or access to evidence. Additionally, in my view, it is doubtful that a civilian court can conduct a trial that respects the accused's rights of defence while preserving the secrecy inherent to secret services.

**10.72** The last issue arising out of the operation of drones by secret services is whether a State may use members of secret services who are civilians to conduct hostilities. We have seen that civilian participation in hostilities does not violate IHL but simply leads to a loss of protection against attacks (of which drone operators based in Colorado may not be overly concerned).[145] However, it may

143 Christopher J. Markham and Michael N. Schmitt, 'Precision Air Warfare and the Law of Armed Conflict' (2013) 89 ILS 669, 689.

144 Ibid.

145 See MN 10.038.

be argued that it is inherent in the system of IHL that a State may only use its armed forces to conduct hostilities.[146]

## 10.4 LETHAL AUTONOMOUS WEAPON SYSTEMS

Lethal Autonomous Weapon Systems may only be deployed if it is – despite their artificial intelligence – predictable that they will be able to respect IHL. It is controversial whether they will ever be as able as humans to comply with IHL. Many people reject this possibility on the basis that targeting decisions involve subjective value judgments.

If Lethal Autonomous Weapon Systems can respect IHL, their use may have many advantages compared with other lethal weapon platforms, but many IHL and ICL rules must be reinterpreted to apply to the humans who produce or deploy such systems. In any case, such systems cannot be fully autonomous for too long because they must constantly be provided with information allowing the system to account for the dynamic nature of the military advantage, which plays an important role in both the definition of military objectives and the application of the proportionality rule.

**10.73** Lethal Autonomous Weapon Systems (LAWS) may be defined as weapon systems 'that can learn or adapt [their] functioning in response to changing circumstances in the environment in which [they are] deployed.'[147] They would use sensors that give them situational awareness to identify both legitimate targets and hopefully civilians as well as civilian objects that may potentially suffer from incidental effects of an attack. Identification would then trigger corresponding action through processors or artificial intelligence that would 'decide…how to respond…and effectors that carry out those "decisions".'[148] One day, LAWS may be able to select and engage targets without ongoing human intervention in an open environment under circumstances that are unstructured and dynamic. However, no weapon system possesses such capabilities at the present time. The absence or presence of human intervention is a relative distinction as is the distinction between humans 'in', 'on' or 'out of the loop', both of which

146 Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies Under Public International Law* (CUP 2013) 91–107.

147 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflict' (Report prepared for the 31st International Conference of the Red Cross and Red Crescent, 2011) Doc No 31IC/11/5.1.2, 39.

148 Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2013) UN Doc A/HRC/23/47, para 39.

are therefore not very helpful.[149] Despite the system's autonomy, humans will inevitably be involved either in overseeing the operation of LAWS or at least in producing and programming the system.

**10.74** Although these systems do not yet exist, there is agreement that they could be developed within 20 years. Many assert that LAWS should be preventively banned without exception specifically because they would not be consistent with IHL as well as ethical imperatives that only permit humans to decide over life or death of other humans.[150] This sub-chapter only deals with IHL as it relates to LAWS and not with the ethical or non-proliferation aspects.

**10.75** In 2013, States parties to the CCW agreed to convene the first informal expert meeting to discuss issues regarding LAWS in 2014, which also met in 2015 and 2016.[151] In 2016, they further agreed to create a Group of Governmental Experts on LAWS in the context of the CCW, which convened for the first time in 2017 and again in 2018.[152] While these discussions should strive to draft a specific Protocol VI to the CCW on LAWS, they are not yet sufficiently focused on this aim. However, several CCW delegations agreed that LAWS may only be used with 'meaningful human control', while other delegations proposed the alternative criterion of 'appropriate level of human judgment.'[153] However, it is unclear what either of these proposed terms would mean in practice. The US, which is among the most technologically advanced States in this field, requires for the time being that LAWS 'be designed to allow commanders and operators to exercise appropriate levels of judgment over the use of force,'[154] which means that it is not permissible for producers to program machines that make final decisions regarding the use of force against targets.

149 Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (Penguin 2009) 124–7.

150 Human Rights Watch and International Human Rights Clinic, Human Rights Program at Harvard Law School, *Losing Humanity: The Case Against Killer Robots* (Human Rights Watch 2012); European Parliament resolution of 27 February 2014 on the use of armed drones (2014/2567(RSP)) (2017) Official J of the EU C285/110, para I(2)(d); Peter Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision Making' (2013) 94 IRRC 687; Online Casebook, Autonomous Weapon Systems: B. Ban autonomous armed robots.

151 For updated information, see The UN Office at Geneva (UNOG), 'Disarmament, The Convention on Certain Conventional Weapons, Background on Lethal Autonomous Weapons Systems in the CCW' <https://www.unog.ch> accessed 9 August 2018.

152 See ibid.

153 'Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)' (2016) UN Doc. CCW/CONF.V/2, paras 15, 38.

154 US Department of Defense, 'Directive 3000.09: Autonomy in Weapon Systems' (2012) para 3(a).

### 10.4.1 Fundamental preliminary assumptions

#### a. Autonomy and predictability

**10.76** Although full autonomy does not yet exist, artificial intelligence may one day allow LAWS to learn and make autonomous decisions that were not pre-programmed. If this implies that it cannot be predicted whether LAWS respect or violate IHL, LAWS would obviously be prohibited. Only humans are addressees of IHL, which prohibits indiscriminate attacks that 'employ a method or means of combat which cannot be directed [by the State or the non-State armed group acting through humans] at a specific military objective'.[155] Realistically, however, no commander of armed forces or an armed group would want to use weapons over which they have no control and that may 'decide' to attack their own forces or join the adversary. In my opinion, therefore, even if fully autonomous weapons are developed in the future, those making or using LAWS will ensure that such weapons will only act in accordance with what they want them to do. It may be that the legitimate controversy over the legality of LAWS boils down to the technical question of whether this is even possible if LAWS have artificial intelligence.

#### b. A technical assumption that may prove to be wrong

**10.77** LAWS may obviously not be used if and for as long as they are incapable of being used in compliance with IHL. Presently, this is not yet feasible outside of very limited and predictable environments. However, while this appears to be the main challenge to using LAWS, it is possible in my view to one day construct LAWS that are capable of obtaining and applying the information necessary to comply with IHL. This is not just a question of distinction, including in NIACs in which no distinguishable categories of civilians and combatants exist.[156] Rather, they must also be able to recognize to the same extent as an average soldier when legitimate human targets surrender or when they are wounded, and if those targets abstain from any act of hostility.[157]

#### c. Must targeting decisions involve subjective judgments?

**10.78** Critics object for reasons of principle that LAWS would violate IHL because '[e]ven if the development of fully autonomous weapons with humanlike cognition became feasible, they would lack certain human qualities, such as emotion,

155 P I, Art 51(4)(b); ICRC CIHL Database, Rules 12(b) and 71.

156 See MNs 3.19–3.20 and 8.120–8.122.

157 Heyns, above note 148, para 67; William H. Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP 2016) 255–7.

compassion, and the ability to understand humans.'[158] In particular, they reject the theoretical possibility that a robot could distinguish between targets and make proportionality evaluations more objectively and reliably than humans on the basis that those rules involve subjective judgments[159] that only humans can make. I do not think that targeting decisions must inherently be subjective. Many individuals in the military apparently disagree because they reject, even outside the discussion on LAWS, very detailed rules on proportionality and precautions as well as on what constitutes direct participation in hostilities. While I agree that 'justice cannot be autonomous,'[160] targeting a person in IHL is not a matter of rendering justice. It does not involve a determination that the person deserves the death penalty but rather exclusively involves a categorization of the person based on their status (as a combatant) or conduct (as a direct participant in hostilities) without any determination of fault or culpability.

**10.79** To highlight the above concerns, abolitionists refer to the following example: '[A] frightened mother may run after her two children and yell at them to stop playing with toy guns near a [human] soldier…[who] could identify with the mother's fear and the children's game and thus recognize their intentions.'[161] First, in my opinion, it is not so clear that a human soldier would always be able to easily identify what was happening in such a situation in some of today's fighting environments, where there are child soldiers, fanaticized mothers and linguistic as well as cultural differences between soldiers and local populations. Second, the soldier must determine the objective risk of harm to him, his comrades and his mission based upon objective indicators and not the intent of the children. Even if mothers incite their children to hate who then cry out in hate and are subjectively willing to kill the soldier, the latter could not use force against them if it is apparent that the pistols are toy guns. Conversely, even if children simply intend to play, a soldier could use force if either the children fire live ammunition as part of their game or even if it is not apparent that they are using toy guns. Third, the example nevertheless shows how difficult it would be to devise an autonomous weapon that can replace a soldier in all circumstances. It is true that 'common sense', which refers to the ability to logically understand the meaning of social situations, is based upon human experience. Although it would be particularly difficult to create a machine with common sense,[162] it

158 Human Rights Watch, above note 150, 29; Heyns, above note 148, para 55.

159 Human Rights Watch, above note 150, 4; Asaro, above note 150, 696–700; Noel E. Sharkey, 'The Evitability of Autonomous Robot Warfare' (2012) 94 IRRC 787, 789–90.

160 Asaro, above note 150, 700.

161 Human Rights Watch, above note 150, 31.

162 Singer, above note 149, 131; Sharkey, above note 159, 789.

could provide an opportunity to create an 'objective common sense' based not upon the life history of one individual but upon that of several persons or, ideally, all of humanity.

**10.80** As for the proportionality rule, several authors and military manuals mention that its application indeed involves a subjective determination.[163] The question, however, is whether this is simply a description of the unfortunate reality while the determination should ideally be as objective as possible, or whether this is a normative proposition and the determination should be subjective. In my view, it would be desirable for both human operators and LAWS if States could agree upon a formula for such a calculation along with indicators and elements that should or should not be taken into account. Modelling and determining indicators for the infinite variety of possible situations will perhaps be an insurmountable difficulty for producers of genuinely autonomous weapons,[164] but this could be overcome by artificial intelligence. Obviously, the proportionality determination must be made on a case-by-case basis, but it does not necessarily need to be 'subjective' in my opinion.[165] Why should a civilian be better protected under the law from incidental effects arising from an attack by one soldier than by another soldier? Why should the subject (in other words, the soldier, her youth, gender, education, values, religion or ethics) matter at all and not only the object (that is, the advantage and the incidental effect upon civilians)? When the ICRC Commentary states that a commander must use 'common sense and good faith',[166] this does not, in my view, mean that the decision must be subjective. Similarly, in my opinion, the ICTY did not require a subjective determination of proportionality in IHL when it found that '[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[167] First, in US tort law for example, the 'reasonable person standard' is regarded as an objective standard and not a subjective one.[168] Second, the explanation of the ICTY is due to the fact that it tries individual human beings and not because a proportionality evaluation requires 'psychological processes in human judgment'.[169]

163 Human Rights Watch, above note 150, 32; Heyns, above note 148, para 70.

164 Philip Alston, 'Interim Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2010) UN Doc A/65/321, para 39; Sharkey, above note 159, 789–90.

165 Human Rights Watch, above note 150, 32; Asaro, above note 150, 701.

166 ICRC Commentary APs, para 2208. See also Heyns, above note 148, para 72.

167 See Online Casebook, ICTY, The Prosecutor v. Galić: A. Trial Chamber, Judgement and Opinion, para 58.

168 Restatement (Second) of Torts (1965) Section 283, comment (c).

169 Human Rights Watch, above note 150, 33.

Admittedly, however, States and military lawyers have so far refused to quantify how the risk of losing one civilian life weighs in comparison to the potential of gaining a certain military advantage as well as when the relationship between the risk and the advantage becomes excessive. They refer instead to reasonableness, but a computer can obviously not be programmed to either just be reasonable or develop its own reasonableness. If States and military lawyers persist in their refusal to provide more precise criteria and indicators, it may be that LAWS may not be used in circumstances where civilians could be incidentally affected.

### 10.4.2 Advantages of autonomous weapon systems

**10.81** If the two technical assumptions and understanding of the objective character of IHL targeting criteria outlined above are correct, an attack executed by LAWS would have many advantages in terms of distinction, proportionality and precautions over an attack directly executed by humans. Only human beings can be inhuman and deliberately choose not to comply with the rules they were instructed to follow. In my assessment, therefore, it seems easier to expect (and to ensure) that a person who devises and constructs an autonomous weapon in a peaceful workplace complies with IHL than a soldier in a hostile environment. A robot cannot hate or fear, and it does not experience hunger or fatigue and has no survival instinct. It can take additional precautionary measures that IHL would never expect humans to take because they are too dangerous. Robots can delay the use of force until the most appropriate moment, that is, when it has been established that both the target and the attack are lawful. Robots do not rape. They can sense more information simultaneously and process it faster than humans. As the weapons actually delivering kinetic force become increasingly quicker and more complex, humans may become simply too overwhelmed by the information they must assess and the decisions they must take. As discussed in relation to the proportionality rule, the development of LAWS may even lead, due to programming needs, to a clarification of many IHL rules that have so far remained vague.

### 10.4.3 Challenges to the interpretation of IHL

**10.82** Most of the arguments against LAWS based on principle compare them to ideal situations – in which armed conflicts would anyway not exist – instead of comparing them with other alternative means and methods of warfare to kill humans. Nevertheless, when applying existing IHL to LAWS, there are

challenges that require agreement on the proper interpretation of IHL by every State using them and between States.

**10.83** First, States must agree that IHL applies to conduct in peacetime that may produce results during armed conflict. The last human intervening in the decision regarding who will be attacked in an armed conflict must be fully subject to IHL, even if he or she acts in peacetime.

**10.84** Second, while a robot could, in my view, possibly obtain the information necessary to evaluate an attack's possible incidental effects on civilians and even conduct the necessary evaluation if objective formulas are agreed upon, this is only one side of the proportionality balancing test. The other side, which requires an assessment of the 'concrete and direct military advantage anticipated'[170] resulting from an attack against a legitimate target, constantly changes according to the plans of the commander and the development of military operations on both sides of a conflict. Thus, even if perfectly programmed, a machine could not apply the proportionality rule by itself but must rather be constantly updated about military operations and plans.

**10.85** Third, the aforementioned challenge also affects the ability of LAWS to evaluate and apply the principle of distinction because the definition of a military objective depends on its 'effective contribution to military action' and the 'definite military advantage' the attack offers 'in the circumstances ruling at the time'.[171] These requirements also imply that LAWS must be aware of a commander's plans and how the overall military operation develops.

**10.86** Fourth, the rule that an attacker must take feasible precautions to avoid or minimize incidental effects upon civilians[172] must refer to what would be feasible for humans using the machine and not to the possibilities of the machine (which may be designed to make certain precautions feasible or to be unable to take them). It may also be the case that a machine is better at taking certain precautions than an average human being while the reverse is true for other precautions. In that case, a consolidated assessment of advantages and disadvantages is permissible in my view to determine whether an autonomous weapon is as good as an average soldier in respecting IHL. This assessment, however, must be made for every attack, which requires creating parameters that allow for a comparison with the performance of humans in attacks. LAWS

170 P I, Art 51(5)(b).
171 Ibid., Art 52(2).
172 See MNs 8.330–8.333.

would therefore have to make this determination in relation to the specific circumstances of each attack and, if necessary, 'decide' that they cannot execute that attack and that human intervention is consequently needed.

**10.87** Fifth, important precautions, such as the obligations to verify the nature of a target or to choose means and methods that avoid or minimize incidental effects on civilians, are addressed only to 'those who plan or decide upon an attack'.[173] Some wonder whether this implies that a human must plan and decide an attack. In my view, all IHL rules are only addressed to humans. This does not, however, preclude human planners and decision-makers from being temporally and geographically removed from the attack as long as they define the parameters according to which the robot attacks and make sure that it has the information necessary to apply such parameters and actually complies with them.

**10.88** Sixth, determining what the obligation to interrupt or suspend an attack when it becomes apparent that it is unlawful[174] implies in terms of LAWS' sensoring capability and ability to change conduct presents a particularly tricky issue. In my view, this obligation implies that LAWS must be constructed to perceive changes in the environment at least as well as humans.

**10.89** Seventh, the question also arises as to who in the chain of producing, programming and deploying LAWS directly participates in hostilities. What exactly constitutes direct participation in hostilities is unfortunately still controversial.[175] According to the ICRC, the direct causation of harm, which it requires as one of the cumulative elements for an act to constitute direct participation in hostilities, 'should be understood as meaning that the harm in question must be brought about in one causal step.'[176] Obviously, only human 'steps' are relevant because the concept of direct participation defines who (and not what) may be targeted. Therefore, if autonomous weapons are used, the last causal human step leading to the harm caused, which constitutes direct participation in hostilities, may be geographically and temporally removed from the harm. The ICRC furthermore considers that the standard of direct causation includes conduct that 'causes harm only in conjunction with other acts.'[177] Thus, a specific act that does not on its own directly cause the harm would still fulfil the requirement of

173 P I, Art 57(2)(a).
174 P I, Art 57(2)(b).
175 See MNs 8.311–8.313.
176 ICRC DPH Guidance, 53.
177 Ibid., 54.

direct causation if it constitutes an integral part of a concrete and coordinated tactical operation that causes such harm. In the case of LAWS, a more expansive interpretation of direct participation would provide that an individual who is the last human being to determine what or who LAWS will target in an undetermined number of future operations directly participates in hostilities if humans intervening at a later stage are no longer capable of making such choice. In my view, this mixes distinct issues, which are the legality of an attack and the status of an attacker. Just as for those who write tactical manuals, such persons do not directly participate in hostilities, although the respect of IHL depends on them and States must make sure that such individuals know and comply with IHL.

### 10.4.4 Reviewing the legality of LAWS during their development

**10.90** We have seen that in the study, development, acquisition or adoption of a new means or method of warfare, it is necessary to determine whether its employment would be prohibited in some or all circumstances.[178] It is obvious that the legality of LAWS must also be assessed before they can be deployed.[179] It may be that 'reviews should take place at the stage of the conception/design of the weapon, and thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.'[180] However, an evaluation of a weapon's legality is only possible once its technical capabilities are known, which is presently not the case for LAWS. Admittedly, if LAWS are developed at great expense, there is a political risk that vested interests will make it nearly impossible to conclude that they are unlawful. The solution may be to accompany the development process with constant reviews. In addition, one must ensure that as much effort is invested in developing the weapon's capacity to respect IHL as its lethal capacity, including the development of safeguards against technical and communication errors.[181] Fortunately, the desire to design LAWS that are accurate and capable of sensing as well as processing as much information as possible is both a military and a humanitarian imperative.

178 See MNs 8.375–8.377.

179 See Alan Backstrom and Ian Henderson, 'New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews' (2012) 94 IRRC 483; Michael N. Schmitt and Jeffrey S. Thurnher, '"Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harvard National Security J 231, 271–6.

180 ICRC, 'A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977' (ICRC 2006) 23.

181 Alston, above note 164, para 40.

### 10.4.5 Problems of responsibility and accountability

**10.91** Only human beings are subject to legal rules. In the case of LAWS too, IHL is addressed to parties to armed conflicts and to humans who devise, produce and program them as well as those who decide upon their use. Some claim that IHL is inadequate to regulate LAWS on the basis that they would be situated somewhere between weapon systems and combatants and that a new category with new rules should therefore be created to regulate them.[182] In my view, the difference between a weapon system and a human being is not quantitative but qualitative. The two are not situated on a sliding scale but on different levels as objects and subjects, respectively. Regardless of how artificial intelligence will work in the future, humans will always be at the starting point. As mentioned above, LAWS must always operate within the limits of its software designed by humans.[183] Indeed, humans are the ones who will decide whether a machine will be created and who will create it. Even if robots are capable of constructing other robots one day, a human, who is bound by IHL, will need to develop the first robot and provide it with instructions on how to construct new robots. Although it is true that 'it is unclear how responsibility could be attributed in relation to 'acts' of autonomous machines that are unpredictable',[184] such situations should never arise as explained above.[185]

**10.92** The responsibility of States (and arguably of armed groups) that deploy LAWS raise different questions than the accountability of human beings. For the former, 'it is only the act of the State [that is, the actions of humans attributable to a State] that matters, independently of any intention'[186] and, in my opinion, of any determination of the responsible person. In other words, the mere fact that a weapon deployed by a State results in a rule violation is per se sufficient to make the State itself responsible.

**10.93** With regard to criminal responsibility, abolitionists argue that it would be unclear who would be held accountable for unlawful actions a robot commits: 'Options include the military commander that deployed it, the programmer, the manufacturer, and the robot itself, but all are unsatisfactory. It would be difficult and arguably unfair to hold the first three actors liable and the actor

182 Hin-Yan Liu, 'Categorization and Legality of Autonomous and Remote Weapons Systems' (2012) 94 IRRC 627, 629.

183 Defense Science Board of the US Department of Defense, 'Task Force Report: The Role of Autonomy in DoD Systems' (2012) 1, 21.

184 Online Casebook, Autonomous Weapon Systems: E. Accountability for the use of AWS.

185 See MN 10.076.

186 ILC Articles on State Responsibility, 36, para 10 commentary to Art 2.

that actually committed the crime — the robot —would not be punishable.'[187] I agree as to the latter for several reasons. First, the law in general, including IHL and ICL, is anthropocentric. Law and punishment exist to guide human action rather than the actions of inanimate objects, even those possessing artificial intelligence. In my view, suggestions that robots could be scrapped or disabled as a kind of punishment are absurd.[188] Second, robots are incapable of having the requisite *mens rea* as they are unable to distinguish right from wrong.

**10.94** As for the first option, it is as fair to hold a commander of a robot accountable as it would be to hold accountable a commander who instructs a pilot to bomb a target saying it is a military headquarters, but which turns out to be a kindergarten. It is obvious that, as with all means and methods of warfare, a commander deploying LAWS must understand how they function. In my view, the responsibility of such a commander is not a case of (nor is it analogous to) command responsibility.[189] Rather, a commander's criminal liability may be a case of direct responsibility, just as that of a soldier firing a mortar believing that it can land only on the targeted tank, but which will kill civilians he knows are following the tank. If LAWS are unpredictable, commanders would be responsible for their own act of deploying them if one can establish the requisite *mens rea*. Criminal lawyers are familiar with this difficulty, which also arises for a surgeon using a medical robot or – for that matter – a medicine. Based on their legal review of LAWS required by Article 36 of Protocol I, States deploying LAWS must give military commanders and operators clear instructions as to when and under what circumstances they may be actually used. The operator does not need to understand the complex programming of the robot[190] but must comprehend the result, that is, what the system is able and unable to do.[191] Whether an assumption of the risk is a sufficient *mens rea* for war crimes rests on the criminal legislation that applies to a given case. The ICTY and several national jurisdictions admit recklessness as a sufficient *mens rea* for criminal responsibility, while the ICC and other national jurisdictions require intent under which a reckless commander could not be held criminally liable.[192] This may imply a need for specific legislation to regulate the deployment of LAWS.

187 Human Rights Watch, above note 150, 4, 40; Asaro, above note 150, 693; Sharkey, above note 159, 790–91; Liu, above note 182, 632.

188 See Human Rights Watch, above note 150, 45, which refers to some who suggest this seriously.

189 As also argued by Human Rights Watch, above note 150, 42–3, and Heyns, above note 148, para 78.

190 As claimed by Heyns, above note 148, para 78.

191 Department of Defense Directive, above note 154, para 4(a)(3)(a); Schmitt and Thurnher, above note 179, 267.

192 Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (Martinus Nijhoff 2008) 217–23; Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 40–57.

**10.95** As for the manufacturer and the programmer, domestic criminal laws often hold criminally responsible those who deliberately, recklessly or negligently construct defective buildings or machines leading to the loss of human life.[193] It is argued that autonomous decision-making capacity breaks the causal chain necessary to allow attribution and responsibility.[194] However, as mentioned above, humans must always define how this autonomy will function, which implies the need to draft specific due diligence standards for both manufacturers and commanders.

**10.96** The further question of whether LAWS can distinguish lawful orders from unlawful ones[195] is equivalent to that of whether they are able to apply rules to a complex situation without human intervention. As noted above, if they cannot, they may not be used. If they can, it will be easy to program them not to follow unlawful orders.[196]

## 10.5 ARMS TRANSFERS AND IHL

Arms transfers may assist in IHL violations and violate the obligation of all States to ensure respect of IHL under Common Article 1. The Arms Trade Treaty prohibits weapons transfers if the transferring State knows that the weapons will be used to commit grave breaches, attacks directed against civilian objects or civilians or other war crimes as defined by international agreements to which it is a party.

Furthermore, a transferring State must make an export assessment of the potential that the arms transferred could be used to commit or facilitate serious IHL violations. Weapons may not be transferred if, despite mitigating measures, there remains an overriding risk that they could be so used.

### 10.5.1 Under general international law and Common Article 1

**10.97** A State transferring weapons prohibited by IHL to a belligerent obviously provides unlawful aid or assistance in the commission of an IHL violation.[197] The

193 See, e.g., Art 229 of the Swiss Criminal Code of 21 December 1937 (Status as of 1 March 2018) incriminating 'any person engaged in the management or execution of construction or demolition work who wilfully disregards the accepted rules of construction.'

194 Liu, above note 182, 650.

195 Heyns, above note 148, para 55.

196 Alston, above note 164, para 34.

197 See ILC Articles on State Responsibility, Art 16.

central issue here, however, is that the overwhelming majority of weapons can be used both in compliance with IHL or in violation of it. The ILC's interpretation of the rule of the law of State responsibility for assisting in unlawful conduct requires that the assisting State not only knew that violations would be committed with the weapons to be transferred but also intended that they would be so used.[198] In IHL, however, the transferring State must also 'ensure respect' for IHL.[199] This due diligence obligation implies an obligation not to provide weapons to a belligerent (either a State or non-State armed group) that it knows will use them to violate IHL regardless of the transferring State's intent. In my view, a transferring State's knowledge that the receiving party has systematically committed violations in the past is sufficient unless particular reasons indicate that the violations have stopped.[200] As noted previously, Common Article 1 can be regarded as a more precise formulation of the general duty of States to cooperate to put an end to IHL violations that constitute serious violations of peremptory rules,[201] which is very relevant if transferred weapons are used to commit such violations. Common Article 1 also implies a due diligence obligation to prevent violations.

### 10.5.2 Under the Arms Trade Treaty

**10.98** The Arms Trade Treaty (ATT) has detailed and operationalized the aforementioned regime, but, in my view, it has not really developed it. This treaty covers weapons exports in particular, including, in my opinion, gifts of weapons, components and ammunition. Each State party must have a national control system and must subject arms exports to an authorization requirement. In certain circumstances, the treaty prohibits transfers, while in others it requires a risk assessment and only prohibits transfers if the assessment leads to an 'overriding risk' of negative consequences. For both rules, assessments of whether the transferred weapons will be used to commit IHL violations play an important role, and the ATT expressly mentions the desire to respect and ensure respect for IHL as one of the principles on which it is based.[202]

198 Ibid., 66, para 1 commentary to Art 16.

199 See MNs 5.145–5.158.

200 For a detailed analysis of the interaction between Art 16 of the Articles on State Responsibility and Common Article 1, see Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese J of Intl L 13.

201 See ILC Articles on State Responsibility, Art 41(1).

202 See ATT, preamble, para 5.

### a. Prohibited transfers

**10.99** The ATT prohibits arms transfers if, among other things, the transferring State 'has knowledge at the time of authorization that the arms…would be used in the commission of…grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.'[203] A State's knowledge cannot be determined based on what a criminal court would require before convicting an individual; access to information must be sufficient.[204] Past conduct is an important clue for assessing the likely future conduct of the receiving State or armed group. We previously examined which violations constitute grave breaches under the Conventions.[205] Protocol I and the ICC Statute are the most important treaties that define other war crimes. In addition to the text of the ATT, there are good reasons to consider that it is sufficient if only the transferring State is a party to the relevant treaty while it is not necessary for the receiving State to also be a party.[206] In this respect, the ATT goes further than the general rules on the responsibility of a State aiding and assisting in violations as those rules require that both the transferring and the receiving State are bound by the rule that is violated.[207]

**10.100** The prohibition against arms transfers that support 'attacks directed against civilian objects or civilians protected as such', which applies for both IACs and NIACs, is the only one that is not limited to applicable treaty obligations. Following ICTY jurisprudence, one could try to interpret this wording to include indiscriminate attacks.[208]

**10.101** Many people also view serious violations of Common Article 3 in NIACs as war crimes defined by a treaty,[209] but, in my view, Common Article 3 defines only IHL violations and not war crimes.

### b. The obligation to undertake a risk assessment

**10.102** Even when a transfer is not prohibited under the aforementioned rules, a transferring State must make an export assessment. A transferring State therefore

203 ATT, Art 6(3).

204 Andrew Clapham *et al.*, *The Arms Trade Treaty: A Commentary* (OUP 2016) 204.

205 See MN 5.206.

206 See Clapham *et al.*, above note 204, 233.

207 See ILC Articles on State Responsibility, Art 16.

208 See Clapham *et al.*, above note 204, 232; ICTY, *Prosecutor v. Galić* (Appeals Judgment) IT-98-29-A (30 November 2006) para 132.

209 See Clapham *et al.*, above note 204, 234–5; Switzerland, 'Interpretative Declaration for the ATT' (30 January 2015) <https://www.newsd.admin.ch/newsd/message/attachments/38166.pdf> accessed 9 August 2018.

must, 'in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State…, assess [, among other things,] the potential that the…arms…could be used to…commit or facilitate a serious violation of international humanitarian law.'[210]

**10.103** Contrary to the prohibition of transfers mentioned above, it is sufficient here that the arms transferred *could* be used to commit or *facilitate* IHL violations, the latter of which includes more remote risks such as artillery facilitating the capture of villages in which women are then raped.

**10.104** Serious IHL violations are interpreted to refer to a party's conduct that would constitute a war crime under either customary or treaty law if committed by an individual.[211] What counts is whether the violation of the underlying rule would constitute a war crime and not whether the ICL conditions for individual criminal responsibility (such as *mens rea*) or the necessary level of evidence are fulfilled. The ICRC has suggested different indicators to assess the risk that transferred arms could be used in violation of IHL, which include the recipient's past conduct; its commitments and preventive as well as repressive measures it has taken concerning IHL violations, in particular the dissemination of IHL; and its authority structures capable of ensuring respect for IHL.[212]

**10.105** 'If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the [mentioned] negative consequences, the exporting State Party shall not authorize the export.'[213] Risk-mitigation measures include training in IHL.[214]

**10.106** Even if the assessment concludes that the arms to be transferred could be used to commit serious IHL violations, a State may nonetheless authorize the transfer if it determines that the positive effect for international peace and security overrides those risks.[215] Although there may be a situation in which a State committing IHL violations could not stop a genocide or an act of aggression without the transferred arms, this amalgam of *jus ad bellum* and *jus in bello* considerations,

210 ATT, Art 7(1)(b)(i),

211 Clapham *et al.*, above note 204, 256–8.

212 ICRC, 'Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – A Practical Guide' (ICRC 2017) 7.

213 ATT, Art 7(3).

214 Clapham *et al.*, above note 204, 274.

215 See, however, the declarations to the contrary made by Switzerland, Liechtenstein and New Zealand when becoming parties to the ATT. See UN Treaty Collection, 'Chapter XXVI: Disarmament – 8. Arms Trade Treaty' (2018).

which effectively uses the ends to justify the means,[216] is regrettable. Such transfers may nevertheless violate a State's obligation to ensure IHL's respect under Common Article 1, which is not subject to such a balancing test.[217]

## 10.6 CYBER WARFARE

The cyberspace is increasingly used for hostile purposes. IHL, although initially developed for hostilities in the physical world involving kinetic violence, applies equally to cyber operations. By analogy to kinetic operations, it is submitted that IHL only applies when a cyber operation is reasonably expected to cause injury or death to persons or damage or destruction to objects. It is controversial whether mere deletion of data also constitutes damage and destruction and whether data can constitute a military objective.

The same criteria for assessing whether a kinetic operation is an attack are also arguably used to determine whether a certain cyber operation constitutes an attack to which the rules on distinction, proportionality and precautions in the conduct of hostilities fully apply. However, it is controversial whether and to what extent those rules also apply to military cyber operations that do not qualify as an attack.

Although experts have tried in the Tallinn Manual to apply existing IHL and other rules of international law to the cyberspace and cyber operations, the concepts of direct participation in hostilities and perfidy, like the concepts of military objectives and attacks, do not fit well into the technical realities of the cyberspace. The cyberspace's interconnected and dual-use nature make the application of the principle of distinction more difficult but not impossible.

**10.107** Information technology increasingly affects all aspects of human life. It is used to control not only data but the physical world too. This is also true in warfare. Although it most often supports kinetic operations, an increasing number of incidents (for example, in Estonia, Georgia and Iran) show that it can also be used by itself to fight an 'enemy'.[218] The objective in such incidents is to either deny the enemy the use of such technology, access it to use its information or take control over what is managed by the technology.

216 Clapham *et al.*, above note 204, 275.

217 See also HRC Res 24/35 (2013) para 3.

218 For a more general overview with additional references, see Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2014) 4–9.

**10.108** Cyber operations are either directed at or sent by a computer through a data stream. Their purpose is to infiltrate a computer system and take advantage of its vulnerabilities to either collect, export, destroy, change or encrypt data or to manipulate processes controlled by the infiltrated system.[219] Such operations may consist of computer network attacks ('operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves') or computer network exploitation ('the ability to gain access to information hosted on information systems and the ability to make use of the system itself') without affecting the functionality of the accessed system.[220] This sub-chapter will only address cyber operations that either trigger an armed conflict or have a nexus to it.

**10.109** While opinions differ about the actual threat level cyber operations represent[221] and although such operations have not yet killed or injured anyone, States have reacted to the potential threat by establishing 'cyber units', cyberspace is now regarded as a new 'theatre of war'[222] and NATO even established a 'Cooperative Cyber Defence Centre of Excellence' in Tallinn, Estonia.

**10.110** As for the law, the ICJ recalled in the context of nuclear weapons that IHL 'applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.'[223] Four consecutive UN Groups of Governmental Experts have examined the existing and potential threats posed by the cybersphere as well as possible cooperative measures to address them. One of them confirmed that international law applies to the cybersphere.[224] Currently, the discussions seem to have stalled because experts from Russia and China do not want to clarify whether IHL applies to cyber-attacks as, according to them, this could justify the hostile use of the cyberspace against military objectives.[225]

**10.111** At present, IHL does not contain permissions, prohibitions or any specific rules regulating cyber operations. Even if the current international atmosphere was

219 Cordula Droege, 'Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians' (2012) 94 IRRC 533, 538.

220 ICRC DPH Guidance, 48.

221 Johann-Christoph Woltag, 'Cyber Warfare' (2015) in MPEPIL, para 1.

222 US Air Force, 'Mission' <https://www.airforce.com/mission> accessed 9 August 2018 (stating that '[t]he mission of the United States Air Force is to fly, fight and win in air, space and cyberspace').

223 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 82.

224 UNGA, 'Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (2013) UN Doc A/68/98, para 19.

225 Elaine Korzak, 'UN GGE on Cybersecurity: The End of an Era?' (*The Diplomat*, 31 July 2017).

not so hostile to further developing IHL, IHL could not yet be adapted to this relatively new phenomenon. However, despite rhetoric linked to the fear that recognition of the applicability of IHL could justify armed conflicts, it is uncontroversial that the general rules of IHL apply to cyber operations.

**10.112** 'Independent' experts drafted two editions of the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual), with the second edition mainly adding a restatement of the peacetime rules applicable to cyber operations.[226] The Tallinn Manual tries to clarify the international law governing cyber warfare, including IHL, by restating 'blackletter' rules of law that experts agreed apply to cyber conflicts. It also includes commentary for each rule that explains its legal basis, how the rule applies in practice in cyber warfare and the different positions regarding its interpretation. The Tallinn Manual, however, does not provide recommendations on how the law should be clarified or developed.

### 10.6.1 Particularities of the cyberspace

**10.113** Compared with the traditional 'physical' real world and 'kinetic' warfare conducted in it, the cyberspace presents several particularities. It does not have any borders or territories. Most of its systems are dual-use and interconnected. An attacker must therefore probably destroy the entire network to disrupt enemy military communications. Cyberspace is easily accessible. The indirect secondary effects of cyber operations on infrastructure controlled by the targeted information systems and the resulting tertiary effects on persons as well as objects affected by the infrastructure's malfunctioning are more relevant than the primary effect of such operations. Finally, the factual attribution of an operation to a State, armed group or person is significantly more difficult than for kinetic operations because the origin of a cyber operation can be easily masked and can often be identified only with the help of the local internet provider in the country of origin or sometimes through a difficult analysis of the malware's code.

### 10.6.2 When do cyber operations trigger the applicability of IHL and constitute an attack under IHL?

**10.114** Theoretically, the following three questions must be distinguished from each other because *jus ad bellum* and *jus in bello* must be kept separate and

226 See Michael N. Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013); see also Michael N. Schmitt (ed), *Tallinn Manual 2.0. on the International Law Applicable to Cyber Operations* (CUP 2017).

possible future developments based upon State practice may be different on each question:

1. whether a cyber operation constitutes an 'armed attack' giving rise to self-defence under *jus ad bellum* or constitutes at least a use of force that is normally prohibited under the UN Charter;
2. when a cyber operation triggers the applicability of IHL; and
3. when a cyber operation constitutes an attack under IHL.

**10.115** However, in both practice and scholarly discussions, the same criteria and questions are discussed in relation to these three issues without an express acknowledgement that they are actually the same.[227]

### a. What constitutes an attack?

**10.116** The issue of which cyber operations linked to armed conflicts constitute 'attacks' within the meaning of IHL is what is most often discussed in *jus in bello*. The Tallinn Manual defines a cyber-attack as 'a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.' It explains that 'it is the use of violence against a target that distinguishes attacks from other military operations' and that '[n]on-violent operations, such as psychological cyber operations or cyber espionage, do not qualify as attacks.'[228] This insistence on violent effects constitutes a desperate attempt to come back to categories of the kinetic world for which IHL was indeed developed. The violent effect, however, does not need to result from the physical impact of an operation.[229] Rather, it is sufficient that it results from intended secondary or tertiary effects, but those effects must cause more than minimal damage. The experts therefore steered away from problematic and over-inclusive definitions of 'attack' that include any operation that interferes with information systems. The governments to which those experts are linked know that fewer rules govern cyber-attacks if IHL does not apply, and they do not wish to limit their cyber capabilities.

**10.117** The intended effects of a cyber operation therefore determine whether it can be qualified as an attack. However, it remains controversial whether the mere

227 Compare Roscini, above note 218, 70–71, 136, 171; Michael N. Schmitt, 'Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflicts' in National Research Council, *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for U.S. Policy* (National Academies Press 2010) 154, 163–4, 174; Heather Harrison Dinnis, *Cyber Warfare and the Laws of War* (CUP 2012) 74, 113, 179.

228 Tallinn Manual 2.0, above note 226, 415.

229 Ibid.

deletion of data counts under this 'effects doctrine' as damage or destruction of objects. Qualifying the deletion of data as an attack could be justified by the wording of the definition of military objectives under IHL under which the military advantage resulting from an object's 'neutralization' (and not only its destruction) is also sufficient to satisfy the definition's second cumulative element.[230] Some scholars try to link this question to the physical world by including the 'destruction of data designed to be immediately convertible into tangible objects, like banking data', into the concept of attacks.[231] Most experts take the view that data is an object if physical reparation is necessary to restore a technological system's functioning,[232] which is, in my view, a desperate attempt to return to kinetic categories. Finally, others contend that it is the extent of the effects that matters. For example, a cyber operation that seeks to obliterate data necessary to run a country's financial markets would qualify as an 'attack' because of the crippling and clearly deleterious effects that would follow for the entire country.[233] The extent of a cyber-attack's effects, however, is a very vague criterion that is difficult to reconcile with the text of the existing treaty law, which refers only to acts of 'violence'.

### b. When is IHL applicable to cyber-attacks?

**10.118** A cyber-attack as defined above that is attributable to one State and directed against another State triggers the applicability of IHL of IACs. If such an attack is launched by an armed group (which is not under the overall control of a State) against a State or another armed group, IHL only applies if the group has a sufficient degree of organization and the amount of violence is sufficiently high.[234] Although determining what qualifies as violence raises the same questions as in IACs, the magnitude or number of attacks must be much higher for IHL of NIACs to apply than for IHL of IACs. It is very difficult to imagine that cyber operations alone could satisfy this threshold,[235] but it is also possible to reach it through a combination of cyber operations and acts of kinetic violence.

230 Knut Dörmann, 'Applicability of the Additional Protocols to Computer Network Attacks' (ICRC 2004) 4; Droege, Get Off My Cloud, above note 219, 558. For the definition of military objectives, see MNs 8.300–8.310.

231 Schmitt, Cyber Operations, above note 227, 164.

232 Tallinn Manual 2.0, above note 226, 417.

233 For a similar approach, see Michael N. Schmitt, 'The Law of Cyber Warfare: Quo Vadis?' (2014) 25 Stanford L and Policy Rev 269, 290–91, 295–6.

234 See MNs 6.34–6.36.

235 Tallinn Manual 2.0, above note 226, 388.

**10.119** Both in IACs and in NIACs, IHL obviously also applies to cyber operations that have the necessary nexus to an armed conflict initially triggered and then conducted mainly through kinetic means. In such situations, IHL clearly does not apply only to attacks as defined above but to all military operations, which raises the question of when a cyber operation may be considered to be a military operation.

### c. IHL applicable to cyber operations other than attacks in an armed conflict

**10.120** IHL rules prohibiting attacks directed at civilians and indiscriminate attacks as well as the proportionality rule apply only to attacks. Although the wording of several IHL provisions seems to indicate so,[236] it is controversial whether the principles of distinction and precaution also apply to military operations other than attacks.[237] If so, one would have to determine when a cyber operation qualifies as a 'military operation'. Whether it originates from the armed forces may be an indicator but is not decisive. Whether a cyber operation is directed at the enemy's military infrastructure is also not determinative as some seem to suggest. Otherwise, IHL would only apply if it is complied with. In any case, IHL clearly neither prohibits espionage, deception and propaganda operations and (probably) all forms of cyber exploitation nor requires such operations to distinguish between civilians and combatants. In my view, there are good reasons for asserting that the principle of distinction applies to all hostile cyber operations and that feasible precautions must be taken in such operations to spare civilians and civilian objects. However, this is only the case if IHL already applies because, for instance, there also exists a cyber-attack as defined above or parallel kinetic hostilities. A cyber operation that merely disrupts the population's access to the Internet without causing any violent effects does not trigger the applicability of IHL. Indeed, it is uncontroversial that IHL is inapplicable to the mere inconveniencing of the enemy.[238] Nevertheless, if IHL applies, 'cyber operations attributable to a belligerent party…designed to harm the adversary…by directly adversely affecting military operations or military capacity…must be regarded as "hostilities" and, therefore, subject to all restrictions

236 P I, Arts 48, 51(1) and 57(1); P II, Art 13(1).

237 See Nils Melzer, 'Cyberwarfare and International Law' (UN Institute for Disarmament Research Resources 2011) 27; Droege, Get Off My Cloud, above note 219, 553–6; Dinnis, above note 227, 196–202. For contrary views, see Michael N. Schmitt, '"Attack" as a Term of Art in International Law: The Cyber Operations Context' in Christian Czosseck *et al*. (eds), *2012 4th International Conference on Cyber Conflict: Proceedings* (NATO CCD COE Publications 2012) 283, 289–91; Roscini, above note 218, 178; ICRC Commentary APs, para 1875; and, implicitly, ICRC CIHL Database, Rule 1.

238 Tallinn Manual 2.0, above note 226, 456–7; Woltag, above note 221, para 10.

imposed by IHL.'[239] Thus, 'cyber operations aiming to disrupt or incapacitate an adversary's computer-controlled radar or weapons systems, logistic supply or communication networks' are subject to the rules on the protection of the civilian population against the effects of hostilities, in particular the proportionality rule and the obligation to take feasible precautionary measures.[240] In my assessment, the view that even a virus infecting a civilian network that only activates once it reaches a targeted military objective violates the principle of distinction goes too far.[241]

### 10.6.3 Computer networks as a military objective

**10.121** We have seen that the wording of the definition of military objectives under IHL is limited to *objects*.[242] In applying this definition to cyber-attacks, the first question that must be answered concerns which parts of an information system can be considered possible targets of an attack: its physical infrastructure only or also the data contained within the system? Opinion is divided on whether data itself can be considered an 'object' as it is intangible,[243] and we noted previously that only tangible objects can be military objectives.[244] If data is not an 'object' by definition, then it cannot be a military objective. However, it is possible that this definition must be reviewed to account for the peculiarities of cyber warfare.[245]

### 10.6.4 Difficulties in applying the principle of distinction, the proportionality rule and precautions

**10.122** The interconnected nature of the Internet and the high dependence of modern societies on computers make it difficult but not impossible to respect the normal rules on the conduct of hostilities in cyber-attacks. Those rules nevertheless apply, despite the fact that Protocol I's text limits their application to the land, air and sea.[246] Indeed, the cyberspace is not a distinct geographical area but another dimension that the drafters of Protocol I could not foresee in 1977, and

239 Melzer, Cyber Warfare, above note 237, 28.

240 Ibid.

241 Heather Harrison Dinnis, 'Attacks and Operations – The Debate Over Computer Network "Attacks"' (paper for the Minerva Centre Conference in Jerusalem, Israel) 8 <http://www.academia.edu/4086617/Attacks_and_Operations_The_debate_over_computer_network_attacks> accessed 22 May 2018.

242 P I, Art 52(2), and MN 8.306.

243 Tallinn Manual 2.0, above note 226, 437.

244 See MN 8.306.

245 Rain Liivoja and Tim McCormack, 'Law in the Virtual Battlespace: The Tallinn Manual and the *Jus in Bello*' (2012) 15 YIHL 45, 53–4.

246 P I, Art 49(3).

the relevant provision simply wanted to clarify to what extent the same rules apply to naval and air warfare.[247]

**10.123** Cyber-attacks can be indiscriminate if, for example, a virus is used that is intended or expected to spread indiscriminately, but malware can also be written to exclusively affect certain systems. Independently of whether cyber operations should be qualified as either a means or method of warfare, if a certain new way of conducting them (such as a computer virus) could be subject to IHL according to what has been discussed above,[248] a State must determine while developing it and before using it whether it could violate IHL in some or all circumstances.[249]

**10.124** The main problem is that both the military and civilians in most countries use the Internet and communication software as well as most of their components. They are dual-use objects and therefore military objectives if they provide an effective contribution to the enemy's military action.[250] In addition, such systems are so resilient that they often have to be shut down completely to interrupt military communications. The principle of distinction also comprises an obligation, at least in IACs, for combatants to distinguish themselves from the civilian population. Scholars debate how those conducting a cyber operation must and can distinguish themselves.[251] They even discuss how participants in a possible cyber '*levée en masse*' can carry their weapons openly.[252] In my view, however, they neglect the fact that only persons and not objects (and therefore not data such as viruses) must distinguish themselves. It is only in the unlikely case that those conducting cyber operations are captured that it would matter whether they distinguished themselves,[253] and even then they (unlike their data) would anyway not be visible to the enemy prior to an attack within the meaning Protocol I's relaxed distinction requirements. However, as discussed below, the prohibition against perfidy provides one limitation to cyber-attacks.

**10.125** Whether a cyber-attack respects the proportionality rule obviously requires foresight into its actual effects due to the interconnectivity of computer networks. Primary, secondary and tertiary effects must be taken into account in light of, among other things, the civilian population's increasing need in modern

247 See MNs 8.297–8.298.
248 See MNs 10.118–10.120.
249 See P I, Art 36; see also MNs 8.375–8.377.
250 See MN 8.307.
251 For references, see Roscini, above note 218, 197.
252 Ibid., 212. David Turns, 'Cyber Warfare and the Notion of Direct Participation in Hostilities' (2012) 17 J of Conflict and Security L 279, 293.
253 Roscini, above note 218, 198.

societies to keep essential electronic services functioning.[254] Here, it is clearer than for the definition of military objective that incidental 'damage' comprises a loss of functionality.[255] The above-mentioned effects influence the active precautionary measures that must be necessarily taken in designing the program *before* the attack due to the automated nature of the processes.[256] They may imply that an attack must be limited to a temporary disabling of the targeted (dual-use) infrastructure.

**10.126** Although passive precautions require that the network used by the military is separated from the one used by civilians, no State does this for financial reasons and to ensure the resilience of its networks.

### 10.6.5 Hacking as direct participation in hostilities

**10.127** Cyber operations constitute direct participation in hostilities if the usual elements are fulfilled,[257] although it is particularly difficult to identify who is involved in such operations. In particular, the launching of a specific cyber-attack as defined above constitutes direct participation,[258] while the design and testing of programs or the general maintenance of information technology services do not. This is especially important because cyber operations are often outsourced or 'patriots' decide to conduct them on their own. Persons whose computers are misused by a botmaster (which takes control over their computer without their knowledge) are clearly not directly participating in hostilities, but their computers are nevertheless valid military objectives. According to the ICRC, 'the interruption of electricity, water…the manipulation of computer networks… may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, they would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities.'[259]

### 10.6.6 Perfidy in cyber operations

**10.128** For a cyber operation to constitute perfidy prohibited by IHL, it is not sufficient that the attacker hides their military identity and makes the enemy believe it is

254 Ibid., 220.
255 Eric T. Jensen, 'Cyber Attacks, Proportionality and Precautions in Attack' (2013) 89 ILS 198, 206–7.
256 Roscini, above note 218, 237.
257 See MNs 8.311–8.313.
258 ICRC DPH Guidance, 48.
259 Ibid., 50.

using a civilian website, data or program. The enemy must not only believe that it is obliged to respect those virtual phenomena under IHL but must also be subsequently killed, injured or captured.

**10.129** In my assessment, there are serious doubts as to whether one may claim that an e-mail claiming to be sent from the UN, a neutral State or the ICRC can be considered as using their respective 'emblems'.[260] Similarly, in my view, an e-mail masqueraded as coming from a civilian source does not constitute an act of perfidy if that civilian source is subsequently attacked[261] because the killing must be committed by persons disguising themselves as civilians and not by their enemy. Finally, in my opinion, it is not perfidious to make military 'websites (or other cyber entities) appear to have civilian status with a view to deceiving the enemy in order to kill or injure.'[262] Indeed, why could a user of a civilian website 'believe that he is entitled to, or obliged to accord, protection' by IHL, which is part of the definition of perfidy?[263]

### 10.6.7 The need for specific rules?

**10.130** Although many of the problems raised by cyber operations can be logically solved under existing rules as shown above, this often results in rules or distinctions that are not fully adequate for the cyber environment, such as the suggestion that IHL applies to an attack merely deleting data only if repairs in the physical world are necessary to make the system operational again. While the Tallinn Manual is extremely helpful, it was unable to introduce new rules where they are needed, and it is often criticized as being produced mainly by experts linked to NATO.

**10.131** The challenges presented by this unique context include the difficulties created by the anonymity on which cyberspace is built; the lack of clarity with regard to IHL's application to cyber operations in the absence of kinetic operations; the controversy about the notion of 'attack'; and the complications in applying conduct of hostilities rules to cyber warfare, in particular the prohibition against indiscriminate attacks and the rules on precautions in attacks.[264]

260 See Roscini, above note 218, 217.

261 See Woltag, above note 221, para 13.

262 Tallinn Manual 2.0, above note 226, 494–5.

263 P I, Art 37(1).

264 See Online Casebook, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015, para 203.

**10.132** Ideally, these challenges should be resolved by developing new treaty rules. The current international atmosphere, however, does not favour new rules in this field unless a catastrophic cyber-attack occurs. In addition, such rules might become outdated before they even enter into force due to the rapid development of technology.[265] Therefore, it is perhaps more realistic to pursue consultations among States about appropriate interpretations of the law that can constantly be adapted to technological developments, which, in turn, will influence State practice and finally lead to customary law. In any case, the majority of cyber operations neither trigger nor are linked to an armed conflict. New rules should therefore be developed in the fields of criminal law and insurance law as well as in the domestic regulation of technology companies. Although clarifying the extent to which such rules apply in an armed conflict will be an important challenge, it is ultimately a question that, in my view, must be solved according to the *lex specialis* principle discussed in the prior chapter.[266]

## 10.7 IHL AND PMSCS

As States and corporations are increasingly using Private Military and Security Companies (PMSCs) in armed conflicts, the UN is attempting to draft a convention on States' obligations in this field. A non-binding Montreux Document accepted by most of the States concerned restates obligations and best practices for contracting States, home States and host States in this regard. The industry has also adopted a code of conduct and a supervisory mechanism, leaving, however, important IHL questions open.

Except for a few tasks, IHL does not prohibit the use of PMSCs, and their staff nearly never fall under IHL's restrictive definition of mercenaries.

From an IHL perspective, the most delicate issue is the delimitation between self-defence and defence of others, on the one hand, and direct participation in hostilities, on the other. Both self-defence and defence of others are lawful for PMSC staff, and neither makes them legitimate targets of attacks. Direct participation, in contrast, makes the staff of PMSCs targetable, and it is also arguably unlawful for States to delegate such participation to PMSCs. In my view, however, the concepts of self-defence and defence of others must be understood very restrictively in armed conflicts.

According to different legal constructions, States are either responsible for violations committed by PMSCs they hire, or, at a minimum, they have due diligence

265 Woltag, above note 221, para 24.
266 See MNs 9.043–9.051.

obligations in this respect. There are also good arguments under various legal vectors to consider that IHL binds PMSCs themselves. This is at least the case for PMSC staff, especially (and without any doubt) when they commit war crimes.

Although different mechanisms that currently exist can be utilized to enforce IHL in relation to PMSCs and their staff, such enforcement encounters considerable obstacles in practice that national legislation and self-regulatory mechanisms can overcome.

### 10.7.1 The facts and the legal dilemmas

**10.133** A growing number of States, businesses and (sometimes) international organizations as well as NGOs use PMSCs in armed conflicts for a large variety of tasks that were traditionally fulfilled by soldiers in the fields of logistics, security, training and intelligence gathering as well as for the protection of persons, objects and transports.[267]

**10.134** There has been a general tendency in recent years to privatize activities that States formerly exclusively performed. This is even true for activities concerning the use of force within and between States, which was a domain previously considered as a core attribute of the Westphalian State. Although this simply constitutes a return to previous realities in history, modern codified IHL, however, was born during a period in which States exercised a nearly complete monopoly over the use of force.

**10.135** This development fits into – and is perhaps situated at the cutting edge of – a larger challenge for international law in the contemporary world: the growing importance of non-State actors in international relations and the difficulty of dealing with them under the traditional categories of international law. They are becoming increasingly important, yet public international law is still mainly addressed to and developed by States, and its implementation mechanisms are best geared towards States. In some recent conflicts, some belligerent States have even employed more PMSC contractors than members of their regular armed forces.[268] PMSCs commit violations of IHL,[269] and it was sometimes

267 For a definition of PMSCs, see 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' as annexed to UNGA, 'Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to Secretary-General' (2008) UN Doc A/63/467, 6, point 9(a).

268 Moshe Schwartz and Joyprada Swain, 'Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis' (US Congressional Research Service 2011) 6.

269 See, e.g., Online Casebook, Private Military Security Companies: A. Blackwater incident: What happened.

claimed that they are not bound by IHL and that they therefore act in a legal black hole.[270] In my assessment, PMSCs and their staff are just as prone to commit violations as State organs or members of non-State armed groups. However, they have been left in many respects up until now in a legal fog. As discussed below, applying existing IHL rules may help lift this fog, but actual enforcement faces even greater obstacles than that against governmental armed forces.

**10.136** As with many other contemporary phenomena, the question arises as to whether international law should combat (or already outlaws) or cover and regulate the rising phenomenon of PMSCs. In my view, PMSCs are, as war is for IHL, a reality, and I will try to apply IHL as it stands to this reality.[271] Here, as elsewhere, the possibilities are to either address those private actors directly by international law or deal with them via well-established subjects of international law, such as States and international organizations and, for ICL, individuals.

### 10.7.2 IHL applicable to PMSCs

**10.137** Treaty and customary IHL regulate the conduct of States and non-State armed groups involved in armed conflicts, both of whom are often the clients of PMSCs. Corporate clients of PMCS and PMSCs are not yet explicit addressees of IHL. However, such companies are made up of individuals, and individuals – as well as legal persons in many domestic legal systems – are addressees of the criminalized rules of IHL. We discussed previously why and to what extent individuals could be bound even by non-criminalized rules of IHL.[272] Most of those arguments apply not only to human beings but also to legal 'persons' under domestic law.

**10.138** The Montreux Document, a soft law instrument that is not binding but constitutes the only inter-State instrument guiding States in the use and tolerance of PMSCs and is accepted by most of the particularly interested States, outlines the international legal obligations of contracting States, territorial States, home States and all other States in relation to PMSCs and their personnel.[273]

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270 Peter W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 Columbia J of Transnational L 521.

271 This sub-chapter is largely based upon – and reproduces in part – the foreword and the conclusion I wrote for the book by Cameron and Chetail, above note 146, on the privatization of war, which presents the results of a research project I supervised that was funded by the Swiss Science Foundation. The aforementioned book also provides references for many statements and opinions contained in this sub-chapter.

272 See MNs 6.73–6.75.

273 Montreux Document, above note 267.

It contains two parts: the first part restates the existing legal obligations under IHL and IHRL, while the second part 'contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs'. The first part essentially encapsulates the varying obligations of different States depending on their relationship with PMSCs,[274] all of which are limited by what is 'within their power' to do. Contracting States must, among other things, 'ensure that PMSCs that they contract [with] and their personnel are aware of their obligations and trained accordingly'.[275] Territorial and home States of PMSCs are obliged to 'disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel'.[276] The Montreux Document further outlines good practices that reflect some of the most effective ways for States to satisfy their due diligence obligations.[277]

**10.139** As far as the obligations of PMSCs themselves are concerned, the International Code of Conduct for Private Security Providers (ICoC) is the only instrument that specifically enumerates these obligations.[278] Initially, more than 700 companies concerned, including nearly all major PMSCs, signed the ICoC, but the number of signatories has now fallen to approximately 100 major PMSCs because smaller PMSCs were not willing to accept the financial burden linked to membership in the International Code of Conduct Association (ICoCA), which monitors the respect of the Code's obligations. This initiative is the product of PMSCs acting in collaboration with the Swiss Federal Department of Foreign Affairs, an NGO (the Geneva Centre for the Democratic Control of Armed Forces) and an academic institution (the Geneva Academy of International Humanitarian Law and Human Rights). ICoCA, which only began to function recently,[279] is a multi-stakeholder oversight and governance mechanism for the private security sector that promotes respect for IHRL and IHL. It promotes, governs and oversees the implementation of the ICoC. The sophisticated supervisory system, however, has a major flaw: a determination that

274 For a commentary, see Marie-Louise Tougas, 'Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2014) 96 IRRC 305.

275 Montreux Document, above note 267, 7, Section A, point 3(a).

276 Ibid., 12–3, Section B, point 9(a), and Section C, point 14(a), respectively.

277 Ibid., 16–27.

278 International Code of Conduct for Private Security Providers (2010).

279 See ICoCA's website <https://www.icoca.ch/> accessed 8 August 2018.

a PMSC violated the ICoC can only occur if the industry representatives in ICoCA agree.

**10.140** To go beyond soft law, the UN Working Group on Mercenaries prepared a draft convention regulating PMSCs that it presented to the Human Rights Council in September 2010.[280] The draft convention included provisions that would require States parties to 'develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs.' It also outlines detailed requirements for such legislation, including licensing, registration and oversight mechanisms. However, the Council did not adopt the draft convention; instead, it passed a resolution establishing 'an open-ended intergovernmental working group' tasked 'to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument.'[281] This open-ended working group met six times from 2011 to 2017.[282] While the failure to adopt the draft convention does not necessarily signal a death knell for a UN convention on PMSCs, the mandate of the 'open-ended intergovernmental working group' could hardly be more loosely defined. Moreover, the draft convention and even the establishment of the intergovernmental group lacked the support of Western States that rely heavily on PMSCs. Nevertheless, in 2017, the Council passed another resolution that established a *new* open-ended intergovernmental working group, which has yet to convene, with a three-year mandate 'to [actually] elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of [PMSCs]'.[283]

### 10.7.3 May States use PMSCs?

**10.141** International law and its implementation mechanisms are obviously still mostly addressed to States. It is therefore appropriate to first enquire into whether and to what extent States may outsource the conduct of armed conflicts to private companies. There are only a few explicit prohibitions on very specific activities.

280 'Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council', as annexed to HRC, 'Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (2010) UN Doc A/HRC/15/25.

281 HRC Res 15/26 (2010).

282 Office of UN High Commissioner for Human Rights, 'Open-ended Intergovernmental Working Group to Elaborate the Content of an International Regulatory Framework, Without Prejudging the Nature Thereof, Relating to the Activities of Private Military and Security Companies' <https://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx> accessed 9 August 2018.

283 HRC Res 36/11 (2017).

Some treaties and arguably also customary international law prohibit States from using mercenaries, but the definition of mercenaries, especially the conditions that they must be recruited to fight and cannot be nationals of a party to the conflict, excludes most PMSC staff.[284]

**10.142** Some implicit prohibitions against outsourcing are also arguable. Good faith prohibits using PMSCs if the specific intent (which would nevertheless be futile in most cases) is to avoid obligations or to implement unlawful actions. A State may not outsource the *decision* to exercise its right to self-defence, but it may outsource the exercise of that right as long as it keeps sufficient control to ensure that the principles of necessity and proportionality are respected. As for the UN and regional organizations, nothing fundamental from a legal point of view prevents them from outsourcing a lawful use of force or, more realistically, to accept PMSC action as part of a State's contribution or to constitute a permanent force made up of PMSCs.[285] IHRL arguably also does not prohibit the outsourcing of law enforcement functions other than the administration of criminal justice, which includes a decision to arrest a person. However, the State must make sure that PMSCs to whom it outsources law enforcement actions respect human rights to the same extent as if such action was taken by the State itself.

**10.143** IHL requires that the responsible officer of a POW camp must belong to the regular armed forces of the Detaining Power, which explicitly excludes PMSCs.[286] Similarly, requisitions in kind and for services in an occupied territory may only be demanded on the authority of the military commander of the occupying power.[287] Finally, the law of naval warfare prohibits private ships, even those granted with a commission to do so, from privateering as well as from intercepting and capturing enemy ships and their cargo.[288] The most crucial issue is obviously whether a State may outsource the conduct of hostilities under IHL to PMSCs. There are serious reasons to deny States this possibility. While IHL does not prohibit civilians from directly participating in hostilities, if a State wants to respect the principle of distinction in good faith, it may not entrust civilians with conduct that constitutes direct participation in hostilities.

284 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989) 2163 UNTS 75, Art 3. On the status of such mercenaries in IHL, see MNs 8.071–8.072.

285 See Lindsey Cameron, *The Privatization of Peacekeeping: Exploring Limits and Responsibility Under International Law* (CUP 2017) 94–119.

286 GC III, Art 39.

287 HR, Art 52.

288 Paris Declaration Respecting Maritime Law (16 April 1856) 115 CTS 1, para 1, which provides that '[p]rivateering is, and remains, abolished'.

This highlights the crucial importance of what constitutes direct participation for the present issue. In addition, a PMSC that is not sufficiently integrated into the State organization could not know the elements to evaluate criteria necessary to engage in attacks, such as the military advantage anticipated from an attack.[289] The latter argument also prevents a State from delegating other decisions to non-State actors, such as whether imperative military necessity or security reasons require or permit certain actions.

### 10.7.4 State responsibility for the conduct of PMSCs

**10.144** The Montreux Document recalls that contracting States retain their IHL obligations even if they contract out certain activities to PMSCs.[290] This raises, however, the question of when a State bears responsibility for (or in relation to) PMSC conduct. A positive answer facilitates enforcement through the well-developed (but still basically non-hierarchical) IHL implementation mechanisms. It also implies that the rules of IHL fully apply, at least to the State concerned, in relation to such conduct.

**10.145** PMSC staff are very rarely State organs under domestic law. Occasionally, however, they are so completely dependent on a State that their conduct is attributable to that State as a de facto organ.[291] A State is furthermore responsible for the conduct of PMSC staff if it delegates to them elements of governmental authority and not just public functions.[292] Arguably, such attribution does not necessarily presuppose a delegation by the concerned State's domestic law. It covers unilateral acts of authority, such as seizure, arrest, detention, interrogation, maintenance of public order and possibly again direct participation in hostilities. A State is also responsible for PMSC conduct that occurs pursuant to its instructions or that is executed under its direction or control.[293] If the ICTY's overall control standard is sufficient,[294] contracting States would very often be responsible for conduct incidental to the execution of the contract by PMSCs. However, if, in line with the ICJ's view, effective control is necessary for such attribution, such control over a PMSC rarely exists and even more rarely can be proven.[295]

289 Cameron and Chetail, above note 146, 91–107.
290 Montreux Document, above note 267, 7, Section A, point 1.
291 Online Casebook, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 391–5.
292 ILC Articles on State Responsibility, Art 5.
293 Ibid., Art 8.
294 See MN 5.049.
295 Online Casebook, The Prosecutor v. Tadić: D. ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras

**10.146** Even when PMSC conduct is not attributable to a State, a State's organs may lack due diligence in relation to PMSC conduct. Both the law of neutrality (if a PMSC is recruiting on a neutral territory staff for a specific conflict) and IHRL provide for variable due diligence obligations. If a PMSC acts in a territory under the jurisdiction of a State or the victim of a violation is subject to a high degree of control by a State, that State is obliged to protect the victim's human rights even against interference by private actors, including a PMSC whose conduct is not attributable to that State. In IHL, occupying powers also have such due diligence obligations,[296] and they also result from the many rules directing States to 'protect' war victims.[297] In addition, the obligation to ensure respect for IHL[298] may imply a general due diligence obligation for States contracting PMSCs, host States of PMSCs and home States in which PMSCs are registered or headquartered.

### 10.7.5 Why and how does IHL bind PMSCs?

**10.147** As the phenomenon of PMSCs goes beyond the traditional notions of the Westphalian system, it is insufficient to show that States engaging PMSCs are often responsible for (or in relation to) IHL violations PMSCs commit. Rather, it is equally important to apply IHL directly to PMSCs for the effective implementation and enforcement of IHL, to create a sense of ownership among their staff and because many PMSCs do not work for States and armed groups, which are the traditional addressees of IHL. This involves not only interpreting IHL rules of conduct in the light of PMSCs tasks and conduct; it also raises an important question as to which means can make IHL binding on PMSCs – a question that has been until recently completely neglected in legal scholarship.

**10.148** Although PMSCs do not work in a legal vacuum, they operate, however, in a very chaotic legal environment made up of very diverse rules that are addressed to various actors and that were not made for PMSCs but nevertheless cover them. While several possible legal reasons justify the applicability of IHL to PMSCs, each one is situation-dependent and often subject to controversies.

**10.149** IHL obviously binds a PMSC if it constitutes an armed group that is a party to a NIAC.[299] It seems obvious that this is also the case whenever the conduct

402–6.

296 HR, Art 43.

297 See, e.g., GC IV, Art 27.

298 See MNs 5.145–5.158.

299 See MNs 6.67–6.71.

of a PMSC can be attributed to a State, although the legal reasoning leading to such equivalence of attribution and obligation is not obvious.[300] The emerging doctrine of corporate complicity would also lead to the PMSC being bound by international law,[301] at least if their violations constitute international crimes and can be attributed to a State. Criminal responsibility of PMSCs and their staff will be discussed below.[302] Whether the PMSC itself is a subject of international law raises the general problem of what constitutes international legal personality and whether companies possess it. This problem, which is very controversial, is treated in international law doctrine with many preconceived ideological as well as philosophical ideas and does not lead to many operational results. Beyond international personality, a PMSC may nonetheless become an addressee of IHL rules through self-regulation either in codes of conduct (such as the ICoC mentioned above) or the provisions of its contract with its client. Common Article 1 may even oblige a State hiring a PMSC to include in the contract a clause requiring the respect IHL.

### 10.7.6 The status of PMSC staff under IHL

**10.150** PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL.[303] As most of them are neither de jure nor de facto members of the armed forces of a party to the conflict, they are therefore not combatants but civilians. This is controversial in scholarly writings. Theoretically, a good argument can be made under the text of IHL treaties that they often fulfil the necessary conditions for combatant status.[304] States, PMSCs and NGO critics, however, do not view them as combatants. A legal explanation for the absence of combatant status is that PMSC staff members do not belong to the contracting State in a fighting function.[305] If they are not combatants, they have no right to directly participate in hostilities, and they lose protection as civilians if and

300 See MN 6.73.

301 International Commission of Jurists, 'Corporate Complicity and Legal Accountability: Facing the Facts and Charting a Legal Path' (International Commission of Jurists 2008) vol I, 9; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale L J 443, 446–8; Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2008) 24 Hastings Intl and Comparative L Rev 339.

302 See MNs 10.156–10.157.

303 See P I, Art 47; see also MNs 8.071–8.072.

304 See P I, Art 43; GC III, Art 4(A)(2); Louise Doswald-Beck, 'Private Military Companies Under International Humanitarian Law' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 115, 121.

305 See MN 8.064.

for such time as they do so. The issue of what constitutes direct participation in hostilities[306] is therefore particularly controversial concerning PMSCs.

### 10.7.7 When do PMSC staff members directly participate in hostilities?

**10.151** As civilians, PMSC staff have no right to directly participate in hostilities and lose protection against attacks if and for such time as they do so. In addition, as mentioned above, one may argue that the use of PMSCs by States for tasks that constitute direct participation in hostilities is contrary to IHL's philosophy. PMSCs and major contracting States often stress that PMSCs have only defensive functions and are engaged only in the defence of others within the criminal law meaning of the term. The differentiation between direct participation in hostilities and self-defence is therefore a crucial question under IHL. However, this differentiation is not always clear to either the PMSC or its staff, and both representatives of the industry and contracting States have had no interest in providing any clarification on this matter because doing so could seriously limit PMSCs' ability to provide security in conflict areas.

**10.152** Under IHL, the execution of defensive functions may nevertheless constitute an attack and therefore direct participation in hostilities.[307] This is uncontroversial if PMSCs defend combatants or military objectives against the adverse party. On the other extreme, it is uncontroversial that the defence of military targets against common criminals or the defence of civilians as well as civilian objects against unlawful attacks does not constitute direct participation in hostilities. Mine-clearing falls under this concept only if it is directed against the other party to the conflict, while training constitutes a direct participation in hostilities only if it is provided in view of a predetermined hostile act. The most crucial, difficult and frequent situation is when PMSC staff guard objects, transports or persons. If those persons and objects are legitimate targets of attack under IHL,[308] guarding or defending them against attacks constitutes direct participation in hostilities and not a defence of others under criminal law. In my view, this is always the case when the attacker is a person belonging to a party to the conflict, even if that person either does not benefit from or has lost combatant status. In my opinion, the unlawful status of the attacker therefore does not give rise to a right to self-defence. If the person attacked is civilian, self-defence under criminal law may justify a use of force, even against combatants. This is also the case with regard to attacks against civilian objects under the

306 See MNs 8.311–8.313.
307 See P I, Art 49(1), and MN 8.295.
308 See MNs 8.299–8.313.

domestic legislation of some countries. The analysis, however, is complicated by the absence of an international law standard for self-defence as well as for the defence of others and by doubts about whether the criminal law defence of self-defence, which avoids a conviction, may be used ex ante as a legal basis for an entire business activity. Additionally, it is important to stress that self-defence may be exercised only against attacks and not to resist arrest or prevent an adversary from gaining control over objects. Indeed, the criteria in IHL to determine when a civilian may be arrested or whether objects may be requisitioned are too complicated to allow PMSC staff to determine when they are fulfilled.

**10.153** In my assessment, self-defence as an exception to the classification of certain conduct as direct participation in hostilities must be construed very narrowly. In addition, PMSC staff providing security for an object will often be unable to know whether it constitutes a military objective (which would exclude self-defence because the attack would not be unlawful) and whether the attackers belong to a party (which would classify resistance against such attackers as direct participation in hostilities when the object defended is a military objective). At the same time, it is difficult for the enemy to distinguish between combatants and PMSC staff who directly participate in hostilities (whom they may attack and who may attack them), on the one hand, and PMSC staff who do not directly participate in hostilities (who may not be attacked and will not attack the enemy), on the other hand. PMSC staff should therefore not be put into ambiguous situations in order to maintain a clear distinction between civilians and combatants and to avoid that such staff lose their protection as civilians.

**10.154** The normal IHL and IHRL rules are applicable when a State provides PMSCs with a mandate to undertake law enforcement tasks, but such law enforcement constitutes direct participation in hostilities if it is directed in a NIAC or during military occupations against armed groups or their members.

### 10.7.8 The main problem is enforcement

**10.155** If implementation is the weakest aspect of international law in general and even more so of IHL specifically in current armed conflicts, it is even more difficult to enforce IHL with regard to non-traditional addressees such as PMSCs because traditional mechanisms were not designed to deal with them. In practice, even where the rules and their applicability are uncontroversial, PMSC staff are often not adequately trained and supervised, and if they commit violations, their prosecution is often hindered by legal or factual obstacles or simply a lack of political will.

**10.156** First, the normal mechanisms for the implementation of State responsibility may be theoretically used when PMSC conduct can be attributed to a State.[309] States, however, only rarely use those mechanisms. Human rights protection mechanisms may therefore be more promising[310] as they may hold a State responsible without being triggered by other States. Injured individuals may also invoke the State's responsibility on the domestic level through domestic law or to the controversial extent international law provides individuals with a right to reparation.[311] In any case, territorial States and home States may and should create enforcement mechanisms that cover both their and a PMSC's obligations under their domestic law, including through registration and licensing systems. The PMSC itself may be criminally responsible in States whose domestic laws provide for corporate criminal responsibility, which is a concept that is still developing in ICL. Anyway, individual PMSC employees are certainly criminally responsible for any war crimes they commit.[312] IHL violations by PMSC staff may constitute torts under private law, but cases brought by the victims may encounter the obstacle of immunities in the contracting State or the territorial State as well as jurisdictional obstacles in other States.

**10.157** Criminal jurisdiction over PMSC staff in third countries is not as clearly regulated as it is for members of armed forces, and it is often not backed up by an efficient law enforcement system. Finally, self-regulatory mechanisms should include credible enforcement possibilities by an independent body and should allow individual victims of violations to trigger them.

## 10.8 GENDER AND IHL

Gender refers not only to the biological differences between men and women but also to the socially constructed differences and the resulting inequality as well as to a person's gender identity and sexual orientation. Apart from the men-oriented language often used in older treaty rules, the traditional feminist criticism was that IHL insufficiently covered and regulated problems affecting women explicitly. IHL's insufficient focus on sexual violence affecting mostly women was seen as a particularly blatant example of this failure. This lack of focus on sexual violence has finally been overcome by very detailed prohibitions, in particular those contained in ICL. Some feminist critics, however, assert

309 See MNs 5.043–5.078.
310 See MNs 5.107–5.115.
311 See MNs 5.059–5.066.
312 See MNs 5.206–5.209.

that this focus on sexual violence and women as victims also reinforces gender-based stereotypes.

Furthermore, critics argue that, even where IHL treats men and women equally, it neglects that they are not equal in society and does not take the particular experiences, needs and aspirations of women into account. Going further, war itself, the distinctions made by IHL and its applicability only to treatment by parties to an armed conflict or having a nexus with the conflict are considered as neglecting the real problems women face in most war-torn societies. Some therefore suggest that on every issue regulated or not regulated in an armed conflict, including on issues such as the means and methods of warfare, the concept of direct participation in hostilities or the use of the protective emblem, a gender perspective should be adopted when drafting, interpreting and applying the rules.

As for lesbian, gay, transgender, bisexual, intersex and queer persons, IHL assumes that all persons are heterosexual and that their gender identity corresponds to their sex assigned at birth. Here too, the silence of IHL is criticized. Existing general rules on protection, however, can and must be interpreted as obliging parties to armed conflicts to take the sexual orientation and gender identity of persons affected by armed conflicts into account, in particular when they are in their power and any discrimination based upon sexual orientation and gender identity is prohibited.

### 10.8.1 The difference between gender and sex

**10.158** 'The term "gender" refers to the culturally expected behaviours of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas "sex" refers to biological and physical characteristics.'[313] The difference may be explained on the basis that gender also comprises 'the excess cultural baggage associated with biological sex'.[314] '[U]sing gender as a category of analysis can open up discussion on the construction of social rules (both formal and informal) that impact upon communities, and how these roles can and do change.'[315] The ICC Statute defines gender in a very cautious and, in the opinion of critics, reductionist way as 'the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning

313 Charlotte Lindsey-Curtet *et al.*, 'Addressing the Needs of Women Affected by Armed Conflict' (ICRC 2004) 7.

314 Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 AJIL 379.

315 Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92 IRRC 31, 34.

different from the above.'[316] The last sentence, unique in an international treaty, is evidence of the divided debate concerning the concept of gender. States (or, as critics would argue, mainly their male heterosexual representatives) wanted to exclude gender identity (that is, the fact that some people, such as transgender persons, do not or no longer identify themselves with their sex assigned at birth) and sexual orientation (namely, gay, lesbians, bisexual and queer persons) from the concept of gender, which is equally often neglected by feminist critics of IHL but which will be covered in this chapter.

**10.159** Previously, we discussed the criticism that the protection IHL offers to women is based upon or even reinforces gender stereotypes about the roles of men and women.[317] Nevertheless, this protection unfortunately corresponds to the actual needs of the majority of women in most armed conflicts in which most cases of rape and sexual violence target women and where women take care of young children. This sub-chapter will examine the feminist criticism of IHL and how IHL ignores both gender identity and sexual orientation but can nevertheless be interpreted as responding to the specific protection needs of such persons against abuses linked to an armed conflict.

### 10.8.2 The feminist criticism of IHL

**10.160** The main traditional feminist criticism of IHL was that it did not explicitly deal with rape and sexual violence.[318] In my view, although admittedly not expressly mentioned by IHL rules, such acts were always prohibited and constituted a war crime as inhumane treatment or 'causing great suffering or serious injury to body or health.'[319] Feminists argue that the reason for IHL's failure to overtly address sexual violence was because it mainly affected women and men made IHL to protect men. It is also true that little attention was paid to the enforcement of such rules. If the protection of women against sexual violence was mentioned, it was to protect their 'honour'[320] and not as a crime against their own integrity, which implied their 'belonging' to certain men. Such criticism was largely successful, in particular in ICL, in which different sexual crimes are defined in painstaking detail.[321] Ad hoc international criminal tribunals have also made important clarifications, including on the issue of consent in a

316 ICC Statute, Art 7(3).
317 See MNs 8.132, 8.134.
318 Christine Chinkin, 'Gender and Armed Conflict' in Academy Handbook, 681–3.
319 GC III, Art 130; GC IV, Art 147.
320 GC IV, Art 27.
321 See ICC Statute, Arts 8(2)(b)(xxii) and 8(2)(e)(vi).

conflict environment.[322] Presently, the ICC's jurisprudence on the issue is still very meagre despite the ICC Statute's clear language as well as the Prosecutor's rhetoric and efforts to take gender aspects into account.

**10.161** Other feminist critics, however, have objected to the above feminist criticism concerning how IHL addresses sexual violence as they consider that it reinforces traditional stereotypes about women as weak victims who must be protected against aggressive masculine sexuality.[323] Indeed, today there are increasing numbers of female combatants and even some women who do not fit into this stereotype as they have been sentenced for war crimes, including rape.[324] Others point out that men too are often victims of sexual violence, which is a phenomenon that receives much less attention than sexual violence affecting women because of, among other reasons, the gender stereotype that men are capable of defending themselves and their reluctance to report such victimization (which is even greater than that of women).[325] In some cases, detaining authorities have even used the gender stereotypes of their male victims to humiliate them,[326] such as when they were forced to parade around naked before female guards, rape each other or wear female underwear.[327]

**10.162** Feminist criticism of IHL goes beyond the claim that it insufficiently addresses sexual offences against women and is often much more fundamental.[328] IHL is criticized for most often specifically mentioning women only because of their reproductive function or the fact that it is they who often take care of young children in reality. It is furthermore argued that IHL assumes men and women are equal in its non-discrimination clauses even though this is not the case in real life and that IHL does not take the particular experiences, needs and aspirations of women into account. Neutral and impartial standards are viewed as being synonymous with male perspectives.[329] Many of these critics are of the opinion that war itself or violence (both of which are regulated by IHL)

322 Chinkin, above note 318, 690–91.

323 Ibid., 697–8.

324 Durham and O'Byrne, above note 315, 37–8, 40–45.

325 Chinkin, above note 318, 698; Durham and O'Byrne, above note 315, 47–9; Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 EJIL 253, 255.

326 Durham and O'Byrne, above note 315, 36.

327 See the leaked ICRC Report that was first published by the Wall Street Journal at ICRC, 'Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation' (ICRC 2004) paras 25, 27 <http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm> accessed 9 August 2018.

328 Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer 2001).

329 Charlesworth, above note 314, 392.

are typical male undertakings, while women emphasize conversations and dialogue.[330] The UN Security Council pays at least lip service to this theory when it promotes the role of women in post-conflict peace-building (which is indeed an important requirement of justice and empowerment) as leading to better chances for peace.[331] This may also be a gender stereotype.[332] Additionally, in my view, IHL often refers to and even requires a responsible command and hierarchy, which may be seen as masculine concepts. It is unclear whether a feminist network without a leader (and women are claimed to be less hierarchy-oriented) could fulfil the organization requirements IHL addresses to an armed group.

**10.163** Feminist critics also assert that IHL assumes war is inevitable,[333] which corresponds to the general criticism previously dealt with[334] that IHL applies to a situation that should not exist and therefore implicitly legitimizes it. IHL is even claimed to prioritize military necessity and therefore to place the security of primarily male combatants over primarily female civilians.[335] I have explained elsewhere that this is not the case.[336]

**10.164** Such criticism also asserts that the IHL further perpetuates the public-private distinction, which is one of the key critiques of feminist theory, in that it protects persons against the State, public agents and armed groups (which is argued as the typical way men are victimized), while it ignores the victimization of women by their husbands and brothers. Feminist theory rejects as a typical male approach the rejoinder that IHL can only deal with conduct that is typical in armed conflicts and that has the necessary nexus to such a conflict. Indeed, it is true that Pakistani women are more fearful of being abused and even killed by their husbands and brothers than by the police, armed forces or non-State armed groups, yet IHL only covers abuse by the latter. It is also true that armed conflicts exacerbate the universally unequal position of men and women in many ways. In my opinion, however, it is doubtful that IHL and its implementation mechanisms could combat such private abuses more effectively than IHRL, which foresees an obligation of the State to exercise due

330 Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 ICLQ 55, 72; Christine Chinkin and Mary Kaldor, *International Law and New Wars* (CUP 2017) 496.

331 See UNSC Res 1325 (2000), UNSC Res 1820 (2008) and UNSC Res 1888 (2009), all of which are on women and peace and security.

332 Durham and O'Byrne, above note 315, 42–3.

333 Gardam, above note 330, 72.

334 See MNs 9.090–9.091.

335 Gardam, above note 330, 72.

336 See MNs 3.15–3.18.

diligence to prevent such abuses by private actors. Feminists, however, criticize that, contrary to the case of the interrogator who tortures, this due diligence obligation does not lead to attribution and direct State responsibility but only to responsibility for a lack of due diligence. Furthermore, in my view, the claim that the distinction between IACs and NIACs has a gendered dimension[337] can only be based upon a misunderstanding of IHL because, in both IACs and NIACs, it deals only with the public dimension and not with the private matters.

**10.165** These broader feminist criticisms lead eminent specialists who should know better to claim that IHL protects combatants better than civilians because the former are mainly men while the latter are mostly women.[338] Legally speaking, this is obviously wrong, but it is unfortunately true in many contemporary armed conflicts that it is preferable to be a combatant rather than a civilian. However, this is due to a lack of respect for the rules of IHL and not the rules themselves.

**10.166** In my view, it is essential to account for the perspectives of both men and women in developing, interpreting and implementing IHL. Fathers who raise small children[339] should benefit from the same 'special protection' provided to mothers under the text of existing IHL treaties. This could also be achieved by interpreting a norm in light of its object and purpose and (hopefully) contemporary circumstances. While such 'gender mainstreaming' is obviously required when dealing with the protection of persons against abuse, it is doubtful in my opinion that a weapon review process must include a gender specialist.[340] I am also not convinced that the plight of girls 'recruited' by armed groups for the purpose of sexual exploitation becomes 'invisible' if such girls are not considered to 'participate in hostilities', which thereby brings them under the provisions prohibiting the use of child soldiers.[341] In my view, considering their rape as a 'participation in hostilities' constitutes an additional insult to such girls. In my assessment as well, the need for a deeper social analysis of the measures required to combat inherent inequalities that existed before the conflict and continue exist after an armed conflict go beyond the limited aim of IHL,[342] and

337 Charlesworth, above note 314, 389, 394.

338 Ibid., 389; Gardam, above note 330, 72.

339 Durham and O'Byrne, above note 315, 51.

340 Expert Meeting on International Humanitarian Law and Gender, 'Report Summary – International Expert Meeting: "Gender Perspectives on International Humanitarian Law"' (4–5 October 2007, Stockholm, Sweden) 8–9 <https://www.icrc.org/eng/assets/files/other/ihl_and_gender.pdf> accessed 9 August 2018.

341 ICC, *Prosecutor v Lubanga* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01-06 (10 July 2016), Dissenting Opinion of Judge Odio Benito, paras 15–22.

342 Durham and O'Byrne, above note 315, 36.

it is unclear whether IHL would have more success engaging with such issues than other branches of international law.

### 10.8.3 IHL does not specifically address LGTBIQ people

**10.167** While not linked to IHL's protective purpose (as is the legally binary distinction between civilians and combatants), IHL rules assume that women and men belong to mutually exclusive binary categories that apply to every human being. It assumes that all persons are heterosexual and that their gender identity corresponds to their sex assigned at birth. Thus, IHL neglects lesbian, gay, transgender, bisexual, intersex and queer (LGTBIQ) persons. For example, certain IHL rules prescribe that male and female detainees must be accommodated separately[343] except if they belong to the same family, and that women may only search for other women.[344] Homosexual and transgender persons face more problems in armed conflicts, in particular abuses by detention authorities and other inmates in cases where they are deprived of liberty, in addition to the ones they already contend with in peacetime. The obligations of a Detaining Power to protect and treat detainees humanely,[345] however, can and must be interpreted as requiring special care when a Detaining Power becomes aware (and its agents must be sensitized to this possibility) of special risks affecting some prisoners.[346] If such prisoners so wish, the Detaining Power may have to accommodate them separately. The concepts of family rights[347] and family links must equally be interpreted, as it must according to the cultural context, by taking the real links a person has into account. This applies to the obligations to allow persons affected by armed conflicts to inform their family about their whereabouts,[348] to facilitate family reunifications[349] and to allow civilian internees to receive visits, especially from 'relatives'.[350]

343 GC III, Arts 25(4), 97(4) and 108(2); GC IV, Arts 76(4), 85(4) and 124(3); P I, Art 75(5); P II, Art 5(2)(a); ICRC CIHL Database, Rule 119.

344 GC IV, Art 97(4).

345 GC III, Art 13; GC IV, Art 27; GCs, Common Art 3(1)(1); P I, Art 75(1); P II, Art 4(1); ICRC CIHL Database, Rule 87.

346 Sexual violence against LGTBIQ detainees occurs much more frequently than for the general population of incarcerated persons. See Gabriel Arkles, 'Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention' (2009) 18 Temple Political and Civil Rights L Rev 515, 526; Tasha Hill, 'Transgender Military Inmates' Legal and Constitutional Rights to Medical Care in Prisons: Serious Medical Need Versus Military Necessity' (2014) 39 Vermont L Rev 426.

347 GC IV, Art 27; HR, Art 46.

348 See MNs 8.100, 8.166, 8.273–8.278.

349 See MNs 8.144–8.145.

350 GC IV, Art 116(1).

**10.168** Non-discrimination clauses in IHL rules do not explicitly mention gender identity and sexual orientation as prohibited grounds for adverse distinction, which raises a criticism similar to the one raised by feminists that women are not expressly mentioned.[351] However, in my view, adverse distinctions based upon such grounds clearly fall under 'other similar criteria' on the basis of which adverse distinctions are prohibited.[352] This conclusion is reinforced by how IHRL bodies have interpreted the same wording in IHRL treaties.[353]

**10.169** The abuse of persons based upon their gender identity or sexual orientation is unfortunately very widespread[354] because homophobia resurfaces in times of armed conflict, LGTBIQ people are scapegoated for political purposes and conflict weakens the effectiveness, if existent, of peacetime protection. Even the UN Security Council has discussed such abuses in the context of the Syrian conflict.[355] Existing IHL without a doubt prohibits these abuses because they inevitably affect one of the categories of persons protected by IHL and are additionally based upon prohibited adverse distinctions. This is, however, only the case if the abuse has a nexus to the armed conflict,[356] which is not necessarily the case when, for example, lesbian or bisexual women are subjected to so-called 'corrective rape' to 'cure' them from their sexual orientation. This reminds us of the general criticism from a gender perspective discussed above that IHL accepts and reinforces the public–private distinction.

**10.170** Finally, in my view, only the application of IHRL can end the criminalization of homosexuality, which is still widespread in many regions and which

351 Human Dignity Trust, 'Criminalizing Homosexuality and LGBT Rights in Times of Armed Conflict, Violence and Natural Disasters' (Human Dignity Trust 2015) 12–15.

352 See GCs, Common Art 3(1)(1); GC I, Art 12(2); GC II, Art 12(2); GC III, Art 16; GC IV, Arts 13, 27; P I, Art 75(1); P II, Art 2(1).

353 See, e.g., HRCtee, *Toonen v Australia* (Views) Communication No 488/1992 (4 April 1994) UN Doc CCPR/C/50/D/488/1992; ECtHR, *Dudgeon v UK* (1981) 4 EHRR 149; IACtHR, *Atala Riffo and Daughters v Chile* (Merits, Reparations and Costs, Judgment) Series C No 239 (24 February 2012); African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Merits) Case No 245/02, Communication 245/02 (15 May 2006).

354 HRC, 'Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the Office of the UN High Commissioner for Human Rights' (2015) UN Doc A/HRC/29/23, para 42; HRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc A/HRC/31/57, para 51; Human Dignity Trust, above note 351, 4–12.

355 See Lucy Prescott, 'Gay Refugees Addresses [*sic*] U.N. Security Council in Historic Meeting on LGBT Rights' (*Newsweek*, 25 August 2015) <http://www.newsweek.com/gay-refugees-addresses-un-security-council-historic-meeting-lgbt-rights-365824> accessed 9 August 2018.

356 See MNs 6.80–6.85.

may be seen as being imported into IHL through its references to national legislation.[357]

## 10.9 THE PROTECTION OF CULTURAL HERITAGE

Tangible and intangible cultural heritage are often affected by armed conflicts by both belligerents attacking them as well as belligerents in whose power they are and who destroy cultural property, change its function or remove it or who do not respect the individuals involved in realizing, taking part in or transmitting intangible cultural heritage.

IHL's general rules protect persons and objects that comprise cultural heritage. Specific rules, contained in particular in a Convention and two Protocols adopted in The Hague under the auspices of UNESCO as well as in the Additional Protocols to the Geneva Conventions, protect cultural property (that is, tangible cultural heritage) according to different categories of such property that are gradated according to each category's importance for a particular people or all of humanity.

In the conduct of hostilities, cultural property may neither be attacked nor used for military purposes. However, both prohibitions may be waived in certain circumstances. Moreover, the proportionality rule and special precautionary measures apply to cultural property.

IHL protects cultural heritage in the power of a party against destruction, change of function and removal the most in occupied territory but much less in NIACs. General IHL rules protect those who realize, participate in expressing or transmit intangible cultural heritage. Gaps in IHL may be filled by the UNESCO convention safeguarding intangible cultural heritage in peacetime and IHRL, which may also be invoked during armed conflict.

**10.171** In armed conflicts, belligerents threaten not only the physical integrity of persons they consider as 'enemies' but also their cultural identity, including by trying to obliterate their tangible and intangible cultural heritage. While IHL treaties mostly refer to cultural 'objects' or 'property', it is preferable to use the term 'cultural heritage' for three reasons. First, it also encompasses intangible aspects of cultural heritage that reflect the cultural and spiritual identity of a given group, such as rituals, traditions, beliefs, knowledge, language, dances, music and theatre. Second, it also allows one to take into account the fact that

357 See the recommendation in Report of the Special Rapporteur on Torture, above note 354, para 69.

tangible cultural property is targeted, destroyed or alienated in armed conflicts mainly because of the relationship those perceived as the enemy have with such property and not because of the tangible material of which it consists nor even its aesthetic value, which, at any rate, only exists because of what human beings perceive.[358] Finally, this terminology also avoids adverse distinctions between cultures in which people express their cultural identity in objects (such as places of worship, castles or monuments) and cultures in which translation into tangible objects plays a less important role.

**10.172** There is no uniform definition of cultural heritage; rather, every applicable instrument defines the components of cultural heritage it protects. Depending on the applicable instrument, this definition is either larger or more restrictive. Some instruments even provide for several different protection regimes according to the importance conferred to various categories of cultural property. It is therefore impossible to describe here each rule's exact scope of protection.[359] For tangible components of cultural heritage, the most important distinction for protection purposes specific to armed conflicts, which is not obvious in view of the wording of the provisions, is between buildings dedicated to religion, art, science and historical monuments (which are protected by the Hague Regulations of 1907); property of great importance to the cultural heritage of every people (which is generally protected by the 1954 Hague Convention on Cultural Property and its Protocols); cultural or spiritual heritage of peoples (which the Additional Protocols to the Geneva Conventions protect); cultural heritage of the greatest importance for humanity (which is granted enhanced protection by the 1999 Protocol II to the Hague Convention on Cultural Property); and centres containing monuments and other immovable cultural property of very great importance (which is given special protection under the 1954 Hague Convention on Cultural Property). The tangible property falling under the last two definitions is formally registered and can therefore be easily identified, which is not the case for the previous three categories. Consequently, before applying any of the rules referred to hereafter to a given object, one should verify whether that object fulfils the requirements for protection of the respective category of property while bearing in mind that an object can fulfil the requirements of different categories.

358 In this respect and in the rest of this sub-chapter, I follow the results of the research of my former doctoral student, Christiane Johannot-Gradis, *Le patrimoine culturel materiel et immatériel: quelle protection en cas de conflit armé?* (LGDJ and Schulthess 2013). See also Christiane Johannot-Gradis, 'Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?' (2015) 97 IRRC 1253. I also thank her for her numerous useful remarks on a first version of this sub-chapter.

359 See the very sophisticated explanations in Johannot-Gradis, Le patrimoine culturel, ibid., 109–16, 123–5, 126–8, 132–4, 201–13, 256–64.

**10.173** The protection of cultural heritage, in particular if it is understood as suggested here, is a cross-cutting issue because it involves protection both during the conduct of hostilities and when it has fallen into the power of a party against the destruction of components, changes to their function and removal. In addition, in both respects, people and objects that are necessary to perform intangible cultural heritage, take part in it or transmit it must also be safeguarded and protected. Before summarizing such protection, its sources must be presented because specific rules exist referring to components of (mainly tangible) cultural heritage as cultural property.

### 10.9.1 Specific rules and instruments protecting cultural heritage

**10.174** Most of the IHL rules presented in this book that protect persons and objects also protect tangible components of cultural heritage and persons realizing, taking part in and transmitting *intangible* cultural heritage. Specific IHL rules, however, protect *tangible* cultural heritage. At the turn of the century, the Hague Regulations stipulated that '[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science,…historic monuments,…provided they are not being used at the time for military purposes' and that 'the besieged' must 'indicate the presence of such buildings…by distinctive…signs.'[360] In occupied territory, institutions dedicated to religion, education, arts and science must be treated as private property.[361] In the Americas, the Roerich Pact, which is entirely dedicated to the protection of artistic and scientific institutions as well as historical monuments in armed conflicts, was concluded in 1935.[362]

**10.175** After World War II, two key instruments were concluded in The Hague under the auspices of UNESCO. In substance, they comprise both 'Hague Law' and 'Geneva Law'. The most important treaty is the 1954 Hague Convention on Cultural Property,[363] which obliges belligerents to safeguard and respect cultural property (including transports of cultural property) that is both in their power (including by taking passive precautions against the effects of hostilities that must often already be taken in peacetime) and in the power of the enemy. Such obligations exist both when conducting hostilities and when controlling such property. It is the party on whose territory the cultural property is situated

360 HR, Art 27.
361 Ibid., Art 56.
362 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (15 April 1935) 167 LNTS 289.
363 HC on Cultural Property.

that determines what falls under the different protected categories, which may then be marked by a distinctive emblem. However, even if a party has not designated an object as cultural property, the enemy must nevertheless attempt to identify it. In addition to this general protection regime, the 1954 Convention also establishes a special protection regime for centres containing monuments and other immovable cultural property of very great importance as well as shelters protecting movable cultural property, but only if it is entered into a special register.[364] This special protection regime, however, has only been rarely used because of the very restrictive conditions attached to the possibility of such registration. This Convention also prescribes that its provisions on the respect of (but not those on safeguarding) cultural property also apply in NIACs.[365] Under the Convention, UNESCO plays a role for its implementation similar to the ICRC's role for the rest of IHL.

**10.176** Protocol I to the Hague Convention on Cultural Property,[366] which in particular deals with cultural property in cases of occupation by mainly forbidding its removal and export as well as cultural property deposited in the case of armed conflict with another State, was also concluded in 1954.

**10.177** In 1999, Protocol II to the 1954 Hague Convention on Cultural Property[367] was also concluded. It fills many gaps of the 1954 Convention by, in particular, establishing enhanced rules of protection during the conduct of hostilities and occupation as well as individual criminal responsibility for violations and by, most importantly, making the 1954 Convention fully applicable in NIACs.[368]

**10.178** Both 1977 Additional Protocols to the Geneva Conventions contain a specific provision for IACs and NIACs that prohibits acts of hostility directed against 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples' and using such cultural property in support of a party's military effort.[369] The mention of 'places of worship' and 'spiritual heritage' constitutes an addition to the rules adopted in the 1954 Hague Convention because it also covers intangible cultural heritage. For IACs, Protocol I additionally prohibits reprisals against cultural property.[370] Both provisions, however, raise a particularly important question concerning their relationship

364 Ibid., Arts 8–11.
365 Ibid., Art 19(1).
366 Protocol I to the HC on Cultural Property.
367 Protocol II to the HC on Cultural Property.
368 Ibid., Art 22(1).
369 P I, Art 53(a)–(b); P II, Art 16.
370 P I, Art 53(c).

with the 1954 Hague Convention and its Protocols. Indeed, they both contain a clause stating that they apply '[w]ithout prejudice to the provisions of the Hague Convention' and, for IACs, to 'other relevant international instruments'. While the 1954 Convention and other international instruments provide much more detailed protection, we will see that they – in contrast to the 1977 Additional Protocols – also provide exceptions to the prohibitions against attacking cultural property or turning them into military objectives. Taken literally, this 'without prejudice' clause in the Additional Protocols could be understood as a saving clause. However, this would lead to the absurd result that cultural heritage is absolutely protected for States that are only parties to the 1977 Additional Protocols, while it would be less strictly protected for States that are parties to the 1977 Additional Protocols and the 1954 Hague Convention as well as other instruments. To avoid this result, the clause must, in my view, be understood as incorporating by reference the 1954 Hague Convention and other rules, including their limitations to protection, into the protection regime established by the 1977 Additional Protocols.[371]

**10.179** General treaties that protect cultural heritage in peacetime[372] must also to be taken into account when determining how cultural heritage is protected in an armed conflict.[373] This is especially the case for the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, which expressly prohibits damaging tangible cultural heritage it covers in an armed conflict. These treaty rules represent in many respects the *lex specialis* that fills in gaps left by the treaties specifically applicable to armed conflicts,[374] which is especially important as far as NIACs are concerned. This is also critical for intangible cultural heritage that only the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003 Intangible Cultural

371 For other opinions, however, see Johannot-Gradis, Le patrimoine, above note 358, 112–4 (possible implicit reference to customary law exceptions to the absolute protection); ICRC Commentary APs, para 4844 (absolute protection at least for P II but much more limited scope of protected heritage).

372 See the instruments accessible at UNESCO, 'Culture: Legal Instruments' <http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html> accessed 9 August 2018. Of particular relevance are the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970) 823 UNTS 231; the Convention Concerning the Protection of the World Cultural and Natural Heritage (16 November 1972) 1037 UNTS 151; and the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions (20 October 2005) 2440 UNTS 311.

373 See MNs 9.149–9.151. For detailed arguments in favour of applying general UNESCO Conventions protecting tangible and intangible cultural heritage and references to pertinent practice of States as well as the UN Security Council, see Johannot-Gradis, Le patrimoine culturel, above note 358, 179–86.

374 To determine the *lex specialis*, the reasoning suggested in MNs 9.043–9.051 for IHRL must be applied.

Heritage Convention) specifically protects, although it was not specifically concluded for times of armed conflict.[375]

### 10.9.2 The protection of cultural heritage against the effects of hostilities

**10.180** Attacks must be directed only at military objectives. Tangible cultural heritage is normally not a military objective, and persons involved in intangible cultural heritage are typically not legitimate targets. To enhance its protection, IHL not only protects tangible cultural heritage from attacks but also prohibits its use in a way that turns it into a military objective.[376] The latter prohibition goes further than for the rest of civilian objects, which may be used for military purposes. Both of these prohibitions may be 'waived' under the 1954 Hague Convention in cases of imperative military necessity,[377] which leaves belligerents with a large margin of discretion. However, Article 6 of Protocol II to the Hague Convention on Cultural Property restricts this latitude by allowing an attack only if the target turned into a military objective by its function and there is no feasible alternative available to obtain a similar military advantage. Article 6 only permits using tangible cultural heritage for purposes that expose it to the risk of an attack if no choice is possible between such use and another feasible method for obtaining a similar military advantage. Only an officer with a rank equivalent at least to a battalion commander may decide to invoke such exceptions, and, in case of an attack, an advance warning must be given. The Protocol also adapts the proportionality rule and the obligation to take active as well as passive precautions to the specificities of tangible cultural heritage.[378] Finally, both the attacker and the defender may waive the special and enhanced protection granted to such property but only under very restrictive circumstances.[379]

### 10.9.3 The protection of cultural heritage in the power of a party

**10.181** The general rules of IHL protect persons who realize, transmit and participate in the expression of intangible cultural heritage from violations of their physical as well as mental integrity and dignity. Those rules, however, do not authorize such persons to specifically perform their cultural functions. IHL only protects the ability of ministers of religion to continue their functions,[380] while it does not

375 Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003) 2368 UNTS 3.
376 HC on Cultural Property, Art 4(1); ICRC CIHL Database, Rules 38(b), 39.
377 HC on Cultural Property, Art 4(2).
378 Protocol II to the HC on Cultural Property, Arts 6(d), 7–8. See also HR, Art 27; ICRC CIHL Database, Rule 38(A).
379 HC on Cultural Property, Art 11; Protocol II to the HC on Cultural Property, Arts 13–14.
380 See GC I, Art 24; P I, Art 15(5); P II, Art 9.

address other actors and creators of intangible cultural heritage. Their functions are nevertheless protected by the cultural rights foreseen by IHRL[381] and the 2003 Intangible Cultural Heritage Convention. As for the participation in the expression of intangible cultural heritage and its transmission to future generations, IHL protects the 'manners and customs' of protected civilians in IACs[382] and, in cases of military occupation, the daily lives, normality and existing legislation of the local population[383] that presumably allow such practices. The legal gaps in NIACs must be filled with IHRL norms, such as cultural rights as well as the freedoms of movement and assembly. The 2003 Intangible Cultural Heritage Convention,[384] the ILO Convention on Indigenous and Tribal Peoples (but only for indigenous peoples)[385] and possible future regulations currently being discussed under the World Intellectual Property Organization's (WIPO) auspices concerning traditional knowledge, traditional cultural expressions and genetic resources[386] also protect the realization, participation and transmission of intangible cultural heritage.

**10.182** As far as tangible components of cultural heritage in the power of a party are concerned, IHL affords, as always, the best protection in occupied territory and less protection in NIACs. Norms prohibiting the destruction of such cultural property through demolition, dismantlement or abandonment by the party in whose power it is must be distinguished from the rules that prohibit such destruction by an attack in the conduct of hostilities because, in the former case, such property cannot possibly constitute a military objective for the destroying party. As this party has control, the object can never contribute to its enemy's military action. The ICC misunderstood this in a much-applauded case on the destruction of cultural property in Timbuktu in Mali by forces that had control over the town.[387] Although less fashionable and specific, such destruction should have been prosecuted as 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the

381 In particular, see ICCPR, Arts 18–19, 27; International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, Art 15 [ICESCR].

382 GC IV, Art 27(1).

383 See MNs 8.235–8.246, 8.264–8.267.

384 Convention for the Safeguarding of the Intangible Cultural Heritage, above note 375.

385 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989) 1650 UNTS 383.

386 In accordance with its mandate, the WIPO Intergovernmental Committee on Intellectually Property and Genetic Resources, Traditional Knowledge and Folklore is presently 'undertaking text-based negotiations' in view of an agreement on an international legal instrument that 'will ensure the effective protection of' these categories of cultural heritage. See WIPO, 'Traditional Knowledge: Intergovernmental Committee (IGC)' <http://www.wipo.int/tk/en/igc/> accessed 27 June 2018.

387 See Online Casebook, Mali, Accountability for the Destruction of Cultural Heritage: B. ICC Trial Judgment in the Case of The Prosecutor against Ahmad Al Faqi Al Mahdi, paras 15–17, 39.

necessities of the conflict'[388] and not as 'intentionally directing attacks against buildings dedicated to religion,…art,…historic monuments,…provided they are not military objectives'.[389]

**10.183** Destruction of cultural property in cases of occupation is prohibited by the general prohibition of destruction of property[390] and specific prohibitions concerning cultural property,[391] while cultural property in NIACs is protected only if it satisfies the high thresholds of Protocol II or the 1954 Hague Convention.[392] Customary law arguably protects all cultural property in both IACs and NIACs against seizure, destruction and degradation.[393] In any case, some of the above-mentioned peacetime instruments, such as the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, and IHRL rules protecting cultural rights may fill in legal gaps that exist, particularly in NIACs.[394]

**10.184** The transformation of the function of cultural heritage by a party who gains control over such property, such as, for instance, converting a castle into a military barracks, poses another threat to cultural heritage in armed conflicts. In cases of occupation, such conversion is outlawed by the prohibition against the appropriation of cultural property,[395] the obligation to safeguard it[396] and the rule prohibiting 'any alteration to or change of cultural property which is intended to conceal or destroy cultural…evidence.'[397] In occupied territories, the occupying power is also prohibited from conducting archaeological excavations except in cases of emergency.[398]

**10.185** Finally, due to the chaos caused by and inherent in any armed conflict, there is also a significant risk that cultural property will be removed, stolen or illicitly exported to third States. IHL always prohibits such action if it constitutes pillage. Mere theft is also prohibited if it affects cultural property recognized as

388 ICC Statute, Art 8(2)(e)(xii).
389 Ibid., Art 8(2)(e)(iv). For a similar criticism, see William Schabas, 'Al Madhi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve J of Intl L 75, 77–83, 88–9.
390 GC IV, Art 53.
391 HR, Art 56; HC on Cultural Property, Art 5; Protocol II to the HC on Cultural Property, Art 9.
392 HC on Cultural Property, Arts 4–5, 19(1); P II, Art 16.
393 ICRC CIHL Database, Rule 40(A).
394 See, e.g., ICCPR, Art 27; ICESCR, above note 381, Art 15.
395 HR, Art 56(2); HC on Cultural Property, Art 4(3).
396 HC on Cultural Property, Art 5(1).
397 Protocol II to the HC on Cultural Property, Art 9(1)(c); ICRC IHL Database, Rule 40(B).
398 Protocol II to the HC on Cultural Property, Art 9(1)(b).

such.[399] An occupying power must also prevent the export of cultural property from an occupied territory.[400] In situations of occupation and NIACs, the 1970 UNESCO Convention on Illicit Transfer of Cultural Property[401] and the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention fill some gaps in this respect[402] by, in particular, providing mechanisms for the return or restitution of cultural property.

## 10.10 THE PROTECTION OF THE ENVIRONMENT

Specific IHL rules protect the natural environment against widespread, long-term and severe damage; deliberate attacks; and incidental effects of attacks under the proportionality rule. IHL also obliges the parties to take precautionary measures to avoid such effects. The customary character of these rules is controversial. In my view, the natural environment also consists of civilian objects that are protected by IHL's general rules protecting such objects. Finally, international environmental law continues to apply in armed conflicts and may constitute in certain respects the applicable *lex specialis*. Nevertheless, many legal uncertainties regarding the protection of the environment should be clarified, but States are presently not ready to provide such clarifications.

**10.186** The protection of the environment in armed conflicts is a cross-cutting issue for several reasons. First, it involves rules on both the conduct of hostilities and the protection of the environment in the power of a party. Second, it is controversial to what extent the general rules of IHL already offer protection to the natural environment. Finally, other branches of international law also protect the environment.

### 10.10.1 Protection through general IHL rules

**10.187** In my view, the natural environment consists of civilian objects because everything that is not a military objective is a civilian object and only objects determined to satisfy the necessary elements turn into military objectives.[403] In IHL terms, therefore, each element of the flora, fauna and stones as well as the

399 HC on Cultural Property, Art 4(3).

400 Protocol I to the HC on Cultural Property, Section I, para 1; Protocol II to the HC on Cultural Property, Art 9(1)(a); ICRC CIHL Database, Rule 41.

401 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, above note 372.

402 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995) 2421 UNTS 457.

403 See MNs 8.299–8.303.

earth's surface, water and air are 'civilian objects'. However, this understanding is controversial because, among other things, some argue that only the ecosystem constitutes 'the natural environment'.[404] If my interpretation is correct, IHL prohibits any attack directed against the natural environment unless a certain part of it constitutes a military objective and that part is attacked. All of the natural environment's component parts furthermore benefit from the proportionality rule and the duty of both an attacker as well a defender to take feasible precautionary measures to avoid or minimize incidental effects on civilian objects.[405] All of this taken together offers a good framework that protects the natural environment during armed conflicts.

**10.188** Objects forming part of the natural environment that are under the control of a party cannot constitute a military objective for that party and may not be destroyed except for reasons of imperative military necessity.[406] The relevant rules, which refer to 'property', should not be understood as referring only to objects that have an owner or only to private owners of property. Although most rules admittedly only refer to the property of the adversary, this is due to the fact that IHL is traditionally not viewed as protecting objects from their own party. In occupied territory, the prohibition against the destruction of property clearly covers all public or private property except if such destruction is rendered absolutely necessary by military operations.[407]

**10.189** Objects indispensable to the survival of the civilian population, which may neither be attacked nor destroyed absent exceptional circumstances,[408] also frequently constitute part of the natural environment.

### 10.10.2 Specific rules on the environment

**10.190** Protocol I prohibits parties to a conflict from 'employ[ing] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.'[409] This provision's wording also clearly covers unintended results that are foreseeable, and the three conditions are cumulative. The necessary duration of 'long-term' has been interpreted as referring to damage lasting for decades, and the prohibition is regarded as

404 See HPCR Manual, 247–8, commentary to Rules 88–89. As here, ICRC CIHL Database, Rule 43(A).
405 See MNs 8.319–8.328 and 8.329–8.337.
406 See HR, Art 23(g); GC IV, Art 147; ICRC CIHL Database, Rules 43(B), 50; ICC Statute, Arts 8(2)(b)(xiii) and 8(2)(e)(xii)
407 GC IV, Art 53.
408 See MNs 8.353–8.354.
409 P I, Art 35(1); ICRC CIHL Database, Rule 45.

being inapplicable to 'battlefield damage incidental to conventional warfare.'[410] If these three conditions are fulfilled, IHL is violated even if the proportionality rule is respected.[411]

**10.191** Article 55 of Protocol I repeats the aforementioned prohibition but adds (as an explanation and not a condition[412]) that the damage 'thereby [be intended or expected] to prejudice the health or survival of the population'. The terminology and the wording of Article 35(3) show that these rules protect more than just the civilian population.[413] Article 55 furthermore prescribes that '[c]are must be taken in warfare to protect the natural environment against widespread, long-term and severe damage,' which implies again the applicability of both the proportionality rule[414] and the obligation to take feasible precautions.[415] Finally, Article 55 prohibits attacks against the natural environment by way of reprisals.

**10.192** The US rejects these provisions and argues that they do not belong to customary law.[416] Although the ICJ seems to agree with that conclusion,[417] the ICRC identifies the existence of customary rules with wording that is very similar to the above treaty provisions. The US appears to take the view, in particular, that IHL only prohibits attacks against the natural environment that are *intended* to produce the result described in the rule. This view may be linked to its desire to ensure that a rule of international law does not develop that outlaws the use of nuclear weapons. It is also argued that customary law only prohibits the *wanton* destruction of the natural environment.[418] Nevertheless, the US agrees that the proportionality rule also protects the natural environment in cases of attacks directed at military objectives.[419]

**10.193** The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)[420] also provides specific protection to the environment. States parties to the ENMOD undertake not

410 ICRC Commentary APs, paras 1454.
411 Dinstein, The Conduct of Hostilities, above note 5, 240. Such an attack, however, does not constitute a war crime under Article 8(2)(b)(iv) of the ICC Statue.
412 Dinstein, ibid., 236.
413 Ibid., 236–7.
414 See also ICC Stature, Art 8(2)(b)(iv); ICRC CIHL Database, Rule 43(B).
415 See ICRC CIHL Database, Rule 44.
416 US Law of War Manual, para 6.10.3.1.
417 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 31.
418 HPCR Manual, 249–50, Rule 88 and commentary.
419 US Law of War Manual, para 6.10.3.1.
420 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (10 December 1976) 1108 UNTS 151.

to 'engage in 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.'[421] Here, in contrast to the relevant provisions of Protocol I, the three factors mentioned above are not cumulative but alternative, and an understanding adopted during the Convention's negotiations clarifies their meaning:

a) 'widespread': encompassing an area on the scale of several hundred square kilometres;
b) 'long-lasting': lasting for a period of months, or approximately a season;
c) 'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets.[422]

**10.194** There are good reasons to consider that these interpretations, in particular the one concerning duration, do not apply to the same terms used in Protocol I because the two treaties have different purposes.[423]

### 10.10.3 Protection through international environmental law

**10.195** Treaties and customary law that protect the natural environment in peacetime continue to apply in times of armed conflict.[424] In my view, however, the relationship of such peacetime rules with a rule of IHL must be assessed according to the *lex specialis* principle discussed previously in the context of the relationship between IHL and IHRL.[425] Given IHL's rudimentary specific protection of the environment and its silence on numerous environmental issues, which cannot be interpreted as a strong permission, application of the *lex specialis* principle leaves much space to international environmental law. In my opinion, it was through such reasoning that the ICRC Customary Law Study was able to apply the precautionary principle emerging in international environmental law (according to which a lack of scientific certainty does not absolve an actor from the obligation to take precautionary measures for the environment's benefit) as part of the customary rule requiring a party to an armed conflict to take

421 Ibid., Art 1(1).
422 'Report of the Conference of the Committee on Disarmament' in UNGA, Official Records of the 31st Session (1976) UN Doc A/31/27, 91–2.
423 ICRC Commentary APs, paras 1454, 1459; Dinstein, The Conduct of Hostilities, above note 5, 243–5.
424 Silja Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten* (Springer 2001). For a more cautious view that is still basically in agreement, see Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, paras 29–30.
425 See MNs 9.043–9.051.

all feasible precautionary measures in military operations for the benefit of the environment.[426]

### 10.10.4 Room for improvement

**10.196** There is a widespread assumption that IHL as it presently stands insufficiently protects the environment. Although the ICRC concluded in 2010 that the protection of the natural environment was one of the four areas in which IHL needed to be developed, States did not want to develop IHL further on this subject.[427] Previously, however, the ICRC elaborated, at the request of the UN General Assembly, guidelines and instructions on environmental protection during armed conflict that are considered to be based upon the existing law.[428] The ILC, which also views the protection of the environment in relation to armed conflict as a subject requiring codification and progressive development, is in the process of drafting principles in this respect.[429]

**10.197** Scholars have identified the following lacunas,[430] which may be partly addressed by the processes mentioned above. First, the definition of impermissible environmental damage is too restrictive and unclear. Second, as seen above, there are legal uncertainties regarding the protection of elements of the environment as civilian objects. Third, the application of the proportionality rule to the environment is as challenging as in all other fields. Even without new rules, a restatement and a nuanced application of international environmental law may allow progress. The idea that States should designate, by agreement or unilaterally, areas of major environmental importance as protected areas is one of the more innovative ideas currently being considered. The rule currently adopted by the ILC concerning such areas, however, repeats the obvious interpretation of the general rules suggested above: 'An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.'[431]

426 ICRC CIHL Database, Rule 44.

427 Jakob Kellenberger (at the time the President of the ICRC), 'Strengthening Legal Protection for Victims of Armed Conflicts – States' (12 May 2011).

428 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict' (1996) 311 IRRC 230.

429 See the last substantive report of the then Special Rapporteur, Marie Jacobsson, in ILC, 'Third Report on the Protection of the Environment in Relation to Armed Conflicts' (2016) UN Doc A/CN.4/700.

430 Michael Bothe *et al.*, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92 IRRC 569.

431 ILC, 'Protection of the Environment in Relation to Armed Conflict: Text of the Draft Principles Provisionally Adopted in 2015 and Technically Revised and Renumbered During the Present Session by the Drafting Committee' (2016) UN Doc A/CN.4/L.870/Rev.1, Draft Principle 12.

## 10.11 HUMANITARIAN ASSISTANCE

Humanitarian assistance must only benefit the civilian population in need and protected persons, while medical assistance may additionally even benefit combatants. Humanitarian assistance must be impartial, humanitarian and undertaken without any adverse distinction. The provision of such assistance never constitutes an unlawful intervention, and it is not contrary to international law in any other way. However, those who provide it without the territorial State's consent have no immunity from prosecution under domestic law.

When the civilian population's basic needs cannot be satisfied either by the population itself or by the party controlling that population, impartial humanitarian organizations or third States may provide humanitarian assistance with the consent of the party controlling the territory where the assistance is to be distributed, all States through which it must pass and, in NIACs according to a majority opinion, the territorial State. While an occupying power is obliged to grant such consent, it is argued that in all other situations consent, at a minimum, may not be arbitrarily withheld. Denial of consent is arbitrary if it, in particular, violates any of the refusing State's obligations under IHL or IHRL.

Under very restrictive conditions, States must allow the free passage of some items of humanitarian assistance for some beneficiaries, but they may control such relief convoys and insist that external parties supervise its distribution.

In every case, a party consenting to the provision of humanitarian assistance may prescribe technical and security specifications, but such specifications may not render the provision of the assistance impossible.

Relief personnel are protected as civilians, but their deployment is subject to consent. It may be argued that the consent of a non-State armed group is sufficient in a NIAC if relief personnel do not have to pass through government-controlled territory.

**10.198** The IHL rules on humanitarian assistance are a cross-cutting issue because they address the obligations of a party towards both persons who are in its power (for example, civilians in occupied territories and persons deprived of their liberty) and persons who are in the power of the adverse party (for instance, the obligation to allow the free passage of relief through to the 'frontlines'). In addition, these obligations impact both the conduct of hostilities and the treatment of persons in the power of a party.

### 10.11.1 The prohibition of starvation as a method of warfare

**10.199** IHL prohibits the 'starvation of civilians as a method of warfare.'[432] Combatants may be starved until they surrender, but they must obviously be fed once they do so. The US asserts that this prohibition only applies if starvation is specifically directed at the civilian population.[433] In my assessment, however, it also covers cases in which starvation is merely an effect. It is uncontroversial that the proportionality rule determines whether IHL is violated if both civilians and combatants are starved.[434]

**10.200** The prohibition of starvation does not cover naval blockades and embargoes that cause starvation as long as their purpose is military in nature and not to starve the civilian population. During sieges, the prohibition implies that the besieging party must either allow civilians to leave the besieged area or allow the free passage of humanitarian relief supplies.[435] The problem, which is discussed below, is that the besieger may insist on measures to ensure that only civilians benefit from the assistance that the besieged party will often not accept.

### 10.11.2 Provision of humanitarian assistance from the outside

**10.201** The main responsibility for providing humanitarian assistance lies with the party in whose power civilians and other protected persons find themselves.[436] However, if their basic needs cannot thus be satisfied, a party in whose power they are, its adversary and third States (in IACs) must allow external actors, namely, humanitarian organizations and neutral States, to provide humanitarian assistance under certain conditions.

#### a. Definition of humanitarian assistance

**10.202** Humanitarian assistance consists of food, water, medical supplies (which may also benefit combatants), 'clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population…and objects necessary for religious worship.'[437] The ICJ held that such assistance must comply, even when

432 P I, Art 54(1); ICRC CIHL Database, Rule 53 (applicable in both IACs and NIACs).

433 US Law of War Manual, para 5.20.1.

434 Ibid., para 5.20.2.

435 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 96.

436 See, e.g., GC IV, Arts 39(2), 55(1), 76(1), 81(1), 89; GC III, Arts 15, 26; P I, Arts 69(1), 70(1); P II, Art 5(1)(b). The denial of food, water or other basic needs may also be qualified as violation of the obligation of humane treatment under Common Art 3 of the GCs (see Updated ICRC Commentary GC I, para 558) and many provisions of IHL mentioned in MNs 8.093–8.095 and 8.159–8.161.

437 For occupied territory, see P I, Art 69(1), which Art 70(1) of P I (applicable only in non-occupied territory) refers to for the list of relevant 'supplies'.

provided by States, with the Red Cross and Red Crescent principles of humanity and impartiality.[438] The principle of humanity requires that the assistance 'endeavours…to prevent and alleviate human suffering wherever it may be found', while the principle of impartiality requires that it 'makes no discrimination as to nationality, race, religious beliefs, class or political opinions [and that] [i]t endeavours only to relieve suffering, giving priority to the most urgent cases of distress.'[439]

### b. The obligation to allow free passage of particular relief consignments

**10.203** Article 23 of Convention IV provides a good starting point to understand IHL rules on humanitarian assistance. In case of an IAC, it requires '[e]ach High Contracting Party', which refers to not only the parties to the IAC but also (bordering) neutral States, to 'allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary' and, more importantly, 'the free passage of all consignments of essential foodstuffs, clothing and tonics'. However, both of these obligations are subject to very restrictive conditions. First, the latter items must be 'intended [only] for children under fifteen, expectant mothers and maternity cases.' Second, for all of the above listed items, the 'Party must be satisfied that there are no serious reasons for fearing' that such items 'may be diverted', 'that the control [of the distribution to the mentioned beneficiaries only, which it may require to be made by the Protecting Power,] may not be effective, or…that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.' The latter condition means that even the passage of fortifiers for baby food may be refused on the basis that the enemy State would otherwise have to provide them and could therefore produce fewer weapons! Third, the party allowing the passage may also 'prescribe the technical arrangements under which such passage is allowed,' but then the 'consignments shall be forwarded as rapidly as possible.' Despite all of the details it provides, this provision allows a party, if it so wishes, to always refuse relief consignments. It therefore means in practice that the transit of humanitarian assistance to enemy-controlled territory depends on the consent of the State that has control over the territory through which the assistance must transit. Nevertheless, Article 23 already

438 See Online Casebook, ICJ, Nicaragua v. United States, para 242.

439 See Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva, Switzerland in 1986, and amended in 1996 and 2005) preamble.

establishes the fundamental principles on humanitarian assistance, which provide that it may only benefit civilians and that States must allow it to benefit even the 'enemy' civilian population, although they may control such assistance and require that its distribution in enemy-controlled territory be controlled and supervised by external actors.

### c. The obligation to consent to humanitarian assistance for the benefit of the population of occupied territories

**10.204** In contrast to other parties to an armed conflict, an occupying power is obliged to consent to external humanitarian assistance for the benefit of the occupied territory's population. Nevertheless, an occupying power's first obligation concerning the basic needs of the local population is not to interfere with its existing supply system.[440] If the basic needs of that population cannot be satisfied under that system, the occupying power must, in the second instance, provide such assistance.[441] Third, however, if the population remains 'inadequately supplied' despite the preceding obligations, the occupying power must 'agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.'[442] If the occupying power consents (as it must), '[a]ll Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection,'[443] which are obligations that apply to neutral States, the occupying power and the occupied power. The latter, however, may once again insist on its right to search and control the relief consignments and to have their distribution controlled.[444]

### d. All other delivery of humanitarian assistance is subject to the consent of the party concerned

**10.205** In all situations other than occupied territories, IHL subjects the delivery of humanitarian assistance to the consent of the party concerned. The wording of the pertinent provisions of the Protocols for both IACs and NIACs is initially promising: 'If the civilian population…is not adequately provided with…supplies [defined above in Article 69], relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken'.[445] In IACs, the civilian population can be located in 'any territory under the control of a Party to the conflict,' while in NIACs the assistance

440 See HR, Art 43; MNs 8.235, 8.239–8.240, 8.244; see also GC IV, Arts 55(2), 57–58, 63.
441 GC IV, Arts 55(1), 56(1); P I, Art 69.
442 GC IV, Art 59(1). See also P I, Art 69.
443 GC IV, Art 59(3).
444 Ibid., Art 59(4).
445 P I, Art 70(1); P II, Art 18(2).

must be 'exclusively' humanitarian and impartial. Both provisions, however, unfortunately add that such assistance is 'subject to the agreement of the parties concerned in such relief actions' in IACs, while it is 'subject to the consent of the High Contracting Party concerned' in NIACs. These restrictions raise the questions of who must consent, whether consent must be given in certain circumstances and what are the consequences of a refusal of consent.

*i. Whose consent is needed?*

**10.206** In IACs, consent is required from a State on whose (non-occupied) territory the assistance must be delivered as well as the adverse and neutral State through the territory of which the assistance must pass or from which the assistance is initiated.[446] In NIACs, the wording of the provision seems to indicate that *only* the territorial State's consent is needed. Under this interpretation, which is followed in Syria and beyond by the ICRC,[447] if the government withholds its consent, the consent of an armed group would be insufficient even though the population living in the territory it controls needs assistance. Many NGOs object to this conclusion to justify their cross-border delivery of humanitarian assistance without the Syrian government's consent. First, they may argue – and the ICRC agrees – that the armed group's consent is necessary for practical reasons to distribute assistance in areas under its control as well as to preserve the perception that the relief action is impartial. Second, they add that such consent is also in practice sufficient if the relief can be delivered 'cross-border' (that is, from the territory of a consenting neighbouring State adjacent to the territory controlled by the armed group). Third, Common Article 3 allows an impartial humanitarian body, such as the ICRC, to offer its services to the parties to a NIAC. The plural use of 'parties' without the reference to 'High Contracting Parties' that appears in other provisions indicates that impartial humanitarian bodies may offer humanitarian assistance to armed rebel groups and that, if they accept the services, the humanitarian body may proceed.[448] The State itself accepted such (cross-border) action by becoming a party to the Conventions. Fourth, to overcome the express wording of Protocol II that requires the consent of the State 'concerned' for relief actions, some authors argue that the territorial State is not 'concerned' if the relief does not need to pass through territory controlled by its government.[449]

446 See Dapo Akande and Emanuela-Chiara Gillard, 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict' (UN Office for the Coordination of Humanitarian Affairs 2016) para 23. Concerning the obligation of neutral States in this regard, see ibid., paras 104–5.

447 ICRC, 'Q&A and Lexicon on Humanitarian Access' (2014) 96 IRRC 359, 369.

448 On this controversial interpretation, see MN 5.176.

449 Bothe/Partsch/Solf Commentary, 801.

*ii. The prohibition against arbitrarily denying consent*

**10.207** As explained above, IHL treaty rules require consent by the party concerned before humanitarian assistance may be delivered. The ICRC Commentary, the customary rule identified by the ICRC and the UN Guiding Principles on Internal Displacement, however, stipulate that consent may not be arbitrarily withheld if the conditions discussed above are fulfilled.[450] Even the UN Security Council recalled 'that arbitrary denial of humanitarian access…can constitute a violation of international humanitarian law.'[451] This interpretation is reasonable because the aforementioned rules would otherwise be superfluous, which would be contrary to the '*effet utile*' principle of interpretation. Indeed, the concerned State's consent would allow the delivery of all goods, including, for example, red paint and computer games, to persons under its jurisdiction, and a rule would not be required to permit this. Consequently, the question then becomes: when is a denial of consent arbitrary?

**10.208** The denial of consent is justified (and therefore not arbitrary) if either the civilian population does not actually need the humanitarian assistance or if the entity offering it is unable to carry out relief actions that are exclusively humanitarian and impartial in character without any adverse distinction.

**10.209** Beyond that, in my view, the focus should not be on defining what is arbitrary[452] because, among other things, it is not very efficient to start a negotiation on humanitarian access with a claim that the negotiating partner has acted arbitrarily. Such a claim may provide a better argument before the UN Security Council or when appealing to third States to ensure the respect of IHL in conformity with their obligations under Common Article 1. Rather, in my opinion, it is preferable to first invoke other international obligations that make it compulsory to accept an offer of assistance. Indeed, denying consent in violation of international obligations must be considered as 'arbitrary', and the fact that IHL subjects relief actions to a State's consent does not absolve that State from complying with its other obligations.

**10.210** Such other obligations under IHL include the very limited obligation to allow passage of certain items under Article 23 of Convention IV mentioned above;

450 Updated ICRC Commentary GC I, para 834; Henckaerts and Doswald-Beck, 197; UN Guiding Principles on Internal Displacement, Principle 25(2), as annexed to UN Economic and Social Council, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng' (1998) UN Doc E/CN.4/1998/53/Add.2. For a similar view taken previously, see ICRC Commentary APs, para 4885.

451 UNSC Res 2139 (2014) preamble, para 10.

452 For the most detailed attempt, see Akande and Gillard, above note 446, paras 48–54. Concerning third States, see ibid., paras 108–19.

the obligation to facilitate medical assistance to the wounded and sick (even for the benefit of combatants) as well as other types of assistance to POWs;[453] the obligation to allow relief societies, subject to certain conditions, to provide relief to POWs and protected civilians;[454] and the prohibition against starving civilians as a method of warfare as outlined above. Beyond IHL, IHRL continues to apply in armed conflicts to persons under the jurisdiction of a State, which is obliged to respect, protect and fulfil the rights to life, food, shelter and health as well as the prohibition against inhuman and degrading treatment. A State that cannot comply with these IHRL obligations by itself violates them if it withholds consent to outside assistance when it is offered.[455] Finally, and perhaps most importantly, the prohibition of discrimination enshrined in both in IHL[456] (referred to as the 'prohibition of adverse distinctions') and IHRL[457] also applies to humanitarian assistance. IHL is therefore violated if, which is often the case, the denial of consent only concerns or affects beneficiaries of a certain race, colour, religion, faith, sex, birth or economic class.

### e. Consequences of refusing consent

**10.211** A party refusing consent when it should be given violates IHL. IHL, however, does not yet allow humanitarian organizations or third States to deliver assistance in spite of a refusal by the party whose consent is needed. States and international organizations delivering aid in such circumstances would violate the principle of territorial integrity with respect to the non-consenting State, but a state of necessity could arguably justify such action in extreme cases if they do not use force.[458] NGOs and individuals delivering humanitarian assistance on the territory of a non-consenting State in my view would violate not international law but rather the domestic law of the non-consenting State.

**10.212** The refusal of consent can only be overcome by a Security Council authorization or, according to some, arguably in extreme cases according to the doctrine of the 'responsibility to protect'.[459] Nevertheless, the ICJ held that '[t]he provision of strictly humanitarian aid to persons or forces in another country,

453 GC I, Arts 12, 15, 18(2), 19, 24–26; GC II, Arts 12, 18, 21, 38; GC III, Arts 15, 25–30, 72–3, 125.

454 GC III, Art 125; GC IV, Art 142.

455 UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3: The Nature of State Parties' Obligations (art. 2, para. 1)' (199), para 10, as reprinted in UN, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2003) UN Doc HRI/GEN/1/Rev.6, 14.

456 See Common Art 3(1)(1) (see also MN 7.29); GC I, Art 12(2); GC II, Art 12(2); GC III, Art 16; GC IV, Art 27(3); P I, Arts 9(1), 75(1); P II, Art 2(1); ICRC CIHL Database, Rule 88.

457 ICCPR, Arts 2(1), 26; ICESCR, above note 381, Art 2(2).

458 Akande and Gillard, above note 446, paras 143–51.

459 Ibid., para 142. Cedric Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal

whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.'[460] Furthermore, personnel delivering such humanitarian assistance without consent do not lose their protection (against attacks) as civilians because the delivery of humanitarian assistance to civilians or even medical assistance to combatants never constitutes direct participation in hostilities. Nonetheless, the territorial State has no obligation to allow or facilitate assistance it did not consent to, and it may punish those involved for having unlawfully entered its territory.

### f. Modalities of humanitarian assistance once consent is given

**10.213** A party that consents to humanitarian assistance must allow and facilitate its delivery.[461] This obligation implies that it must facilitate administrative formalities, but it does not need to grant immunity from local legislation on, for example, the entry of foreigners, transfer of funds, medical practice, hiring of staff, communication equipment or taxes. A State may also insist on its natural role as coordinator of relief activities undertaken by different humanitarian organizations.[462] However, this may not justify depriving humanitarian assistance to some civilians based upon adverse distinctions.

**10.214** A party consenting to humanitarian assistance also keeps a right of control.[463] It may verify the consignments, prescribe technical arrangements or restrict access for reasons of military necessity. The latter may only be done temporarily and for a limited geographical area. Modalities, control measures and restrictions may not result in making humanitarian access impossible. Otherwise, they are substantively equivalent to an arbitrary denial of consent. In my view, they may also not make it impossible to respect the principles of humanity and impartiality, which are preconditions for the right to deliver humanitarian assistance.

**10.215** Provisions requiring State consent to the passage of humanitarian assistance for the benefit of civilians under the control of the adverse party allow a State to make its permission conditional upon local supervision of the distribution by a Protecting Power.[464] If supervision by humanitarian organizations replaces this reference to Protecting Powers, which no longer exist in practice in contemporary armed conflicts, such condition is understandable because the State allowing the

Perspective' (2013) 5 Amsterdam L Forum 5, 11–12; Terry Nardin, 'From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention' (2013) 24 EJIL 67, 80–81.

460 See Online Casebook, ICJ, Nicaragua v. United States, para 242.

461 For this point and those that follow, see Akande and Gillard, above note 446, paras 59–72.

462 See UNGA Res 46/182 (1991) para 4. See also P I, Art 70(5).

463 P I, Art 70(3); ICRC CIHL Database, Rule 55. See also GC III, Art 125; GC IV, Arts 23, 59(4), 142.

464 GC IV, Arts 23(3), 59(3); P I, Art 70(3)(b).

passage of assistance (other than medical aid) does not want such assistance to benefit enemy combatants and fighters. However, it is unrealistic and undermines the efficiency of the entire regime of humanitarian assistance under IHL. No humanitarian organization will ever be able to provide a 100 per cent guarantee that humanitarian assistance it distributes in, for example, a besieged town will not partially benefit fighters or combatants. This is even truer in NIACs where fighters and civilians are intermingled, and fighters often continue to live with their family. Honestly, a humanitarian organization can only promise to fulfil this condition using its best efforts, and a party requiring more in fact denies consent.

#### g. Protection of personnel delivering humanitarian assistance

**10.216** In practice, the delivery of humanitarian assistance requires the presence of relief personnel to assess the needs of the beneficiaries, monitor the relief's distribution and deal with logistical issues. The presence of such personnel is subject to the approval of the State in whose territory they will carry out their duties. After such approval, they must be respected and protected, and the territorial State must facilitate their work. Relief personnel, however, must take into account the territorial State's security requirements, and the latter may terminate their mission if they exceed their mandate or do not comply with the conditions imposed upon them.[465] Regardless of approval, relief personnel remain civilians who may neither be attacked nor ill-treated, but they remain subject to the territorial State's domestic legislation and may be prosecuted under such legislation except if they benefit from the privileges and immunities of an international organization. However, they may never be punished for the mere fact of having cared for the wounded or sick.[466]

## 10.12 NON-STATE ARMED GROUPS

IHL binds non-State armed groups that are parties to a NIAC, although they can neither contribute to the development of their treaty obligations nor, according to the majority opinion, to customary law binding them. The conclusion of ad hoc agreements or unilateral declarations may help overcome this ownership gap. Deeds of Commitment suggested to armed groups by the NGO Geneva Call play a pioneering role in this respect.

In any case, it is important that IHL binding upon non-State armed groups is not unrealistic for them. Realistic rules may be ensured by holding either such

465 P I, Art 71; ICRC CIHL Database, Rule 56.
466 P I, Art 16(1); P II, Art 10(1).

groups or both parties to a NIAC only to a sliding scale of obligations according to the armed group's capacity to respect the rules.

In my view, non-State armed groups should have a say in the drafting of rules applicable to NIACs, and they should be assisted in implementing their obligations, including by training their members. Their respect of IHL should be monitored and rewarded, and they should be encouraged to report on their implementation of IHL. Individual group members are at least responsible for war crimes, and non-State armed groups themselves arguably also bear internationally responsibility for violations. Although IHL explicitly provides otherwise, the fear of States that engaging with non-State armed groups legitimizes them is the main obstacle to the necessary engagement of such groups by humanitarian organizations. In addition, both international and domestic anti-terrorism law may be seen as classifying such engagement as supporting terrorism. Indeed, all non-State armed groups are considered, at least by the State against which they are fighting, to be terrorist organizations. However, criminalizing the delivery of impartial humanitarian services to an armed group involved in a NIAC violates IHL, irrespective of whether or not the group is classified as a terrorist organization.

**10.217** Today, most armed conflicts are NIACs, and most parties to such conflicts are non-State armed groups. Compared to other branches of public international law, IHL addressed non-State armed groups very early on. IHL defines non-State armed groups that are parties to a NIAC as only groups that have a certain degree of organization, and it further requires that they are engaged in a certain level of violence for IHL of NIACs to be applicable.[467] As noted previously, Common Article 3 explicitly addresses non-State armed groups that are parties to a NIAC, and all other rules of IHL of NIACs necessarily address them.[468] We have also discussed why IHL of NIACs binds non-State armed groups and understood that none of the legal explanations are fully satisfactory.[469] We have furthermore seen that non-State armed groups can conclude ad hoc agreements.[470] In case of national liberation movements, a unilateral commitment may even make the whole of IHL of IACs binding between the movement and the State against which it is fighting.[471] Finally, as previously discussed, the majority opinion, in particular that of States, does not take into account the

467 See MNs 6.34–6.36.

468 See MNs 6.67–6.71. For the customary rules that exceptionally bind only States according to the ICRC Customary Law Study, see MNs 7.46–7.47.

469 See MNs 6.67–6.71.

470 See MN 4.22.

471 See MNs 6.27–6.30; P I, Arts 1(4), 96(3); CCW, Art 7(4).

practice and *opinio juris* of non-State armed groups when assessing customary IHL of NIACs, while, in my view, this should be done even though it admittedly raises many conceptual and practical difficulties.[472] What remains to be discussed here is whether non-State armed groups are (and should be) bound by all rules of IHL of NIACs, whether they are actually able to respect those rules and how IHL of NIACs can be implemented by and enforced against non-State armed groups.

### 10.12.1 Are the rules of IHL of NIACs the same for States and non-State armed groups?

**10.218** The rules of IHL of NIACs bind non-State armed groups according to the same thresholds of applicability as States. Those rules are prima facie the same for States and non-State armed groups. However, the questions of whether those rules are and should actually be the same for both States and groups and whether this is realistic deserve a more thorough discussion.

#### a. Are all rules of IHL of NIACs realistic for non-State armed groups?

**10.219** It is legitimate to ask whether it is realistic for non-State armed groups to respect all rules of IHL of NIACs that have developed over the recent years by analogy to IHL of IACs or as customary law. Every existing, claimed and newly suggested rule as well as the interpretations of those rules should be analysed to determine whether an armed group willing to do so can comply with the rule in question without necessarily losing the conflict. While States undertake this reality check for themselves as they are the legislators making the rules, they do not always determine whether such rules are realistic for armed groups. Claiming that unrealistic rules apply will not only result in the violation of such rules; it will also undermine the credibility and protective effect of *other* rules that an armed group can comply with.

**10.220** There are several examples of rules that are unrealistic for armed groups. First, as noted before, the current tendency to apply rules which originated in IHL of IACs to NIACs either by analogy or as customary law (based upon the practice and *opinio juris* of States exclusively) may lead to certain rules that are not entirely realistic for non-State armed groups.[473] Second, the increasing integration of IHRL standards into IHL may lead to a similar result. Third, the combination between raising the minimum age to 18 and an enlargement of the concept

472 See MNs 4.41–4.44.
473 See MNs 7.09–7.12.

of (prohibited) involvement of children with armed groups results in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the whole population on whose behalf they (claim to) fight.[474] Fourth, the usual definition of pillage suggested by those who fight against businesses pillaging natural resources in conflict areas is discriminatory against armed groups.[475]

### b. Are States and non-State armed groups equal before IHL of NIACs?

**10.221** The principle of equality of belligerents is an important principle of IHL.[476] Admittedly, it results from the strict separation between *jus ad bellum* and *jus in bello*. As no international *jus ad bellum* exists for NIACs and domestic law invariably prohibits the use of force by non-State armed groups, one could doubt whether this principle of equality also applies to NIACs. Insurgents and States are obviously not equal in either the domestic law of the States concerned or in branches of international law other than IHL.[477] In addition, as no combatant immunity exists in IHL of NIACs, nothing prevents a State from prosecuting fighters of a non-State armed group under its domestic laws for the mere fact of having participated in hostilities, even if those fighters complied with IHL. Admittedly, IHL also does not prohibit a non-State armed group from prosecuting government soldiers for the mere fact of having participated in hostilities. However, due to the principle of legality, it is much more difficult to imagine that such prosecutions may actually occur, even when one admits that armed groups are not prohibited from conducting trials and legislating. State legislation obviously does not prohibit government soldiers from fighting, and it is unclear why – and appears unfair that – they should be bound by any 'legislation' adopted by the non-State armed group before they fall under its control.

**10.222** Nevertheless, according to the majority opinion on the issue, one could argue that all parties to NIACs must be equal at least when it comes to obligations under IHL.[478] Indeed, Common Article 3 explicitly obliges 'each Party' to a NIAC to respect its provisions.

**10.223** As for possible authorizations resulting from IHL, most rules of IHL of NIACs contain, at best, weak permissions.[479] In my view, even the judicial guar-

474 See MNs 8.139–8.140.

475 See MN 8.165.

476 See MNs 9.097–9.098.

477 See Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques* (Schulthess 2012) 125–252.

478 François Bugnion, '*Jus ad Bellum*, *Jus in Bello* and Non-International Armed Conflict' (2003) 6 YIHL 167.

479 See MNs 10.009–10.012, 10.016–10.018.

antees foreseen by IHL of NIACs merely provide armed groups with a weak permission to conduct trials. Although such trials do not violate IHL as such,[480] States are not obliged to recognize such trials or the sentences resulting from them. If the majority opinion according to which IHL of NIACs implies a strong permission to intern those who fight for the adversary is correct,[481] this authorization would also apply to armed groups according to the principle of equality of belligerents.[482]

**10.224** Armed groups and governments are in a dilemma from a policy perspective. Government forces understandably want their enemies to respect the same rules by which they are bound. On the other hand, the idea that an armed group, which States invariably classify as being composed of criminals and most often as 'terrorists', could be equal to a sovereign State in any respect is heresy for governments obsessed by their Westphalian concept of State sovereignty. As for armed groups themselves, they may appreciate the idea of having the same rights as their opponents, but most of them are much less willing – and to a certain extent even unable – to respect the same obligations.

**10.225** When looking at the reality in the field, most armed groups are perceived – whether rightly or wrongly – as ignoring IHL, both in the sense of not knowing it and of deliberately conducting hostilities in a way contrary to its basic principles, in particular the principle of distinction. Indeed, many armed groups believe that their only chance to overcome militarily and technologically incomparably stronger governmental forces is to attack 'soft targets', such as civilians and the morale of the civilian population, in the hope that they will withdraw their support for the government. The militarily weaker 'outlaw' group views the resort to violations, such as terrorist attacks or acts of perfidy, as its only chance to avoid total defeat. To outlaw armed groups and label them as 'terrorist' is thus sometimes a self-fulfilling prophecy. Of course, as will be explained below, an NGO called Geneva Call has been able to obtain and monitor the respect of commitments by armed groups to comply with rules on certain well-defined issues. Nevertheless, it is much more difficult to convince particular groups to renounce suicide attacks directed against civilians, hostage-taking or the use of human shields as a usual method of warfare.

480 See Online Casebook, Sweden/Syria, Can Armed Groups Issue Judgments?.

481 See MNs 10.017, 10.295–10.297.

482 See Online Casebook, United Kingdom, The Case of Serdar Mohammed (High Court Judgment), para 245; Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): A. Court of Appeal Judgment, para 178.

**10.226** One may object that this bleak picture equally applies to the conduct of many governmental armed forces. The degree and extent to which most armed groups disrespect IHL are nevertheless greater than for most governmental forces. In addition, while it is lawful for governmental forces to target the commanders of an armed group, eliminating them exacerbates the group's inability to comply with many rules as group commanders could ensure their subordinates' compliance.

### c. Introduce a sliding scale of obligations?

**10.227** The unfortunately too many victims of violence and arbitrariness in NIACs worldwide may certainly applaud the breath-taking identification of customary rules applicable to NIACs, the development of some treaty rules and the progressive interpretation of treaty as well as customary law by international criminal tribunals. Governmental forces may be perfectly able to respect rules that are largely the same in both NIACs and IACs. Many armed groups, on the other hand, could not possibly respect the full range of rules applicable in IACs. A sliding scale of obligations could therefore apply. Under this approach, an armed group that is better organized and has more stable control over territory would be obliged to comply with rules in NIACs that are more similar the full panoply of rules contained in IHL of IACs. In the Spanish Civil War, for example, both sides could have respected nearly all of the rules applicable in NIACs because both sides controlled as well as administered territory and fought mainly through regular armies. On the other hand, although control over territory by an armed group is not indispensable for IHL of NIACs to apply, it is doubtful that an armed group forced to hide on government-controlled territory could implement many of the positive obligations foreseen by IHL. It is true that many of those positive obligations only arise if a party undertakes certain activities. Every armed group is materially able to respect the customary prohibition of arbitrary detention, which requires a legal basis for any internment previously established by law, by simply not detaining anyone. However, such a requirement is unrealistic and likely to lead to summary executions of enemies who surrender.

**10.228** The rules that can and therefore must be respected in certain circumstances must obviously be enumerated in detail. It cannot depend on the ability of a given armed group to respect certain rules. Instead, it must be determined generally (that is, for certain categories of armed groups) and *in abstracto*, and it must preserve a humanitarian minimum. Otherwise, a weak armed group would be allowed, for instance, to deliberately target civilians if this constitutes its only realistic means to weaken the government.

**10.229** If one wants to preserve the equality of belligerents before IHL, the rules resulting from such a sliding scale based upon the non-State armed group's compliance capacity would apply to both sides. This may appear as absurd as it would be easier for governmental forces to respect IHL the weaker their enemies are. However, States are also bound by their human rights obligations, which are not the same for States and armed groups even if one considers that IHRL binds armed groups (in particular if they control territory).[483] There is no such thing as a principle of the equality of belligerents before IHRL.

**10.230** The alternative is to abandon the fiction of the equality of belligerents and require the government to fully respect customary and conventional rules of IHL while demanding that armed groups respect those rules only according to their respective capacities. This alternative corresponds to the real expectations of contemporary governmental forces fighting armed groups. Do US soldiers in Afghanistan expect (in the sense that they foresee) that the Taliban will respect the same rules that their commander requires them to respect? Informing governments and their soldiers that their enemies are not bound by the same rules also reduces the risk that violations will be committed under the guise of reciprocity, which is largely outlawed by IHL, for the enemy's perceived IHL violations. The importance of abandoning the equality of belligerents principle, however, should not be overstated. Indeed, most human suffering in NIACs is not caused by violations of rules that may be objectively difficult for some non-State armed groups to respect. Rather, suffering largely results from violations committed by both sides of a conflict of rules that every human being can respect in every situation, namely, the prohibitions against raping, torturing or killing those who are in the power of the enemy or otherwise powerless. Adapting some rules to what a party can actually deliver would simply deprive it of an easy excuse to reject the entire regime.

**10.231** In conclusion, the equality of the belligerents may be a fiction in NIACs. Fictions, however, undermine IHL because this body of law deals with the humanitarian consequences of an (undesirable) reality, and it must take reality into account in all its rules and principles if it wants to actually have any real impact. Abandoning the fiction, however, risks even further decreasing the willingness of government soldiers to comply with IHL and starting a race to the bottom under which non-State armed groups may argue that they are unable to comply with most rules. Controversial cases in which both sides claim to be the

483 See MN 9.024.

government should not pose problems as both sides could then be held to the higher 'State' standard.

**10.232** It must also be emphasized that a sliding scale of obligations already exists for certain rules. Protocol II's threshold of application is much higher than that of Common Article 3.[484] Although this high threshold is often criticized, perhaps it is realistic for armed groups. Indeed, only armed groups that control territory, which is one of the heightened conditions for Protocol II (but not for Common Article 3) to apply, may be able to respect certain rules of Protocol II. In addition, many rules of IHL merely impose obligations of means that must be complied with only when materially possible. Thus, for example, only precautions that are *feasible* must be taken to protect the civilian population from the incidental effects of attacks.[485] Certain rules on the treatment of those interned or detained in a NIAC must only be respected to the extent of the detaining authority's capability.[486] Other rules could be interpreted in a similar way by taking into account the fact that international law can never be interpreted as requiring what is materially impossible.[487] Such standards lead to obligations that differ between government forces and non-State armed groups even if the blackletter rules remain the same.

### 10.12.2 How to generate respect for IHL by non-State armed groups

**10.233** While international law is still largely State-centred, non-State actors play an increasing role in international affairs. Even when international rules apply to non-State actors, often no international forum exists in which individual victims, injured States, third States, intergovernmental organizations or NGOs could invoke the responsibility of a non-State actor and obtain relief.

**10.234** As far as armed conflicts are concerned, it is imperative that the implementation of international law catches up with international reality. Some non-State actors, such as multinational enterprises, may at least theoretically be dealt with by the domestic law of the territorial State in which they are present. In the case of armed groups, however, this is simply not possible. Their existence in itself is a testament to the fact that they operate beyond the practical reach of the territorial State's law enforcement systems. International law and its mechanisms must therefore engage such groups. IHL of NIACs addresses non-State armed

484 See MN 6.40.
485 See P I, Art 57; ICRC CIHL Database, Rules 15–19.
486 See P II, Art 5(2).
487 See ILC Articles on State responsibility, Art 23; VCLT, Art 60.

groups that are parties to NIACs.[488] Nevertheless, its implementation mechanisms remain very limited: IHL treaty law applicable to NIACs only refers to the right of initiative of impartial humanitarian bodies (such as the ICRC) and dissemination.[489] Some IHL treaties, such as the Ottawa Convention on Landmines, only address States. In any case, it is necessary to engage armed groups directly to foster their sense of ownership of IHL rules. Today, this idea has become increasingly accepted as it is no longer covered only by the pioneering work of the NGO Geneva Call (discussed hereafter), the ICRC and an increasing number of academics.[490] In a 2009 report on the protection of civilians in armed conflicts, even the UN Secretary-General identifies '[e]nhancing compliance by non-State armed groups' as one of the five core challenges and devotes 10 out of 78 paragraphs of the report to the need to engage and not only condemn armed groups.[491] He writes: 'In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and sustained dialogue with all parties to conflict, State and non-State.'[492] Each report since 2009 has repeated this point.[493] The Secretary-General's 2017 report recommends that 'Member States must not impede humanitarian actors' efforts to interact with

488 See MNs 6.67–6.71.

489 See GCs, Common Art 3(2); P II, Art 9.

490 See, e.g., Michelle Mack, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (ICRC 2008); Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors* (Geneva Academy of International Humanitarian Law and Human Rights 2011); Geneva Academy of International Humanitarian Law and Human Rights, 'From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms' (ongoing research project started in January 2017) <https://www.geneva-academy.ch> accessed 9 August 2018. See also the various contributions in 'Understanding Armed Groups and the Applicable Law' (2011) 93 IRRC 258, 258–501, and in 'Engaging Armed Groups' (2011) 93 IRRC 578, 578–808; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 513–67; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 286–99; Andrew Clapham, 'Focusing on Armed Non-State Actors' in Academy Handbook, 766; Annyssa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3 Göttingen J of Intl L 175; Annyssa Bellal *et al.*, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 IRRC 47; Olivier Bangarter, 'Reasons Why Armed Groups Chose to Respect International Humanitarian Law or Not' (2011) 93 IRRC 353; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 The J of Intl Humanitarian Legal Studies 5; Ashley Jackson, 'Talking to the Other Side: Humanitarian Engagement with Armed Non-State Actors' (2012) Humanitarian Policy Group Policy Brief 47.

491 See UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2009) UN Doc S/2009/277, paras 38–47.

492 Ibid., para 40.

493 See, e.g., UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2010) UN Doc S/2010/579, paras 52, 55–6; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2015) UN Doc S/2015/453, paras 7, 37, 62; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2016) UN Doc S/2016/447, para 29.

all relevant parties, including non-State armed groups, and to operate in areas under their control.'[494]

**10.235** Similarly, the UN General Assembly stresses that engagement with armed groups is essential in any context to negotiate access and to enhance the protection of civilians. It requires humanitarian actors to treat State and non-State parties to an armed conflict on an equal basis and to respond to the civilian population's needs without consideration of political or other factors.[495]

**10.236** Even the UN Security Council affirmed in a presidential statement that it 'recognizes the need for consistent engagement by humanitarian agencies with all parties to armed conflict for humanitarian purposes, including activities aimed at ensuring respect for international humanitarian law.'[496] Indeed, the Monitoring and Reporting Mechanism it created to combat to combat the six grave violations committed against children in armed conflict regularly engages non-State armed groups.[497]

**10.237** Engagement with such groups by NGOs, the UN and other organizations has different aspects and may be achieved in different ways.

### a. Participation in the process of drafting new rules

**10.238** The development of IHL applicable to NIACs through hard or soft law should involve all stakeholders, including armed groups.[498] Indeed, such groups are as central to NIACs as navies are to naval warfare. No one would suggest revising the law of naval warfare without consulting the world's navies. IHL is, above all, a pragmatic endeavour. Its success depends on its effective application by parties to conflicts. As such, it must be based on a solid understanding of the problems, dilemmas and aspirations of all parties to armed conflicts. In contrast, criminal law does not need to account for the aspirations of the criminals or be realistic for them. This difference is possible because criminal law enforcement is vertical and hierarchical, while IHL is mainly enforced horizontally by the parties to armed conflicts themselves.

494 UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2017) UN Doc S/2017/414, para 53.

495 UNGA Res 46/182 (1991).

496 UNSC, 'Statement by the President of the Security Council' (2013) UN Doc S/PRST/2013/2, 4.

497 See MN 5.085.

498 Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 IRRC 649.

**10.239** States, however, will never allow armed groups to officially sit at the negotiation table. Thus, it is more realistic that the ICRC or an NGO, such as Geneva Call, represents their views and problems during negotiations.[499]

b. Dissemination

**10.240** IHL must be disseminated to individuals who are responsible for applying it. Ideally, dissemination already takes place before an armed conflict breaks out. While it is possible to train governmental forces in view of their possible future involvement in a NIAC, it is politically delicate to engage potential armed groups before they are actually involved in armed conflict. Perhaps the most promising preventive action is to ensure that the whole population has a basic understanding of IHL. Thus, activists, journalists, students, schoolchildren or anyone else who may become a member or supporter of an armed group must understand both the obligations to which everyone's actions are subject and the rights each may claim in armed conflicts. This is precisely why IHL of NIACs requires that it 'shall be disseminated as widely as possible.'[500]

**10.241** During an armed conflict, the question then arises as to how IHL should be disseminated to armed groups while taking their specificities into account. In the case of armed groups, it is sometimes unrealistic to apply the standard procedure of focusing training efforts on the leaders of armed groups because many armed groups do not have a formal training structure. In contrast to members of regular armed forces, members of armed groups often do not receive months of basic training. Instead, they are frequently sent to fight the moment they become members of the group. In addition, leaders of armed groups have, for reasons of secrecy, much less direct contact with their actual fighters in comparison to leaders of regular armed forces. Non-State armed groups also often leave the choice of means and methods of warfare to those actually fighting in the field to a greater extent than commanders of regular forces. Nevertheless, it is still possible to at least suggest some realistic ways in which such people can be trained to respect IHL, and modern means of communication provide some opportunities in this regard.[501] As always, efficient training cannot merely consist of teaching prohibitions; rather, it must demonstrate how real-life

499 See, e.g., ICRC, 'Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups' (ICRC 2015); Geneva Call, 'In Their Words: Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict' (Geneva Call 2017).

500 P II, Art 19. See also ICRC CIHL Database, Rule 142.

501 For tools developed by Geneva Call, see 'Fighter Not Killer' <http://fighternotkiller.org/> accessed 10 August 2018. For those created by the ICRC, see 'Online Training on the Law of Armed Conflict for Non-State Actors' (2017) <https://www.icrc.org/en/document/law-armed-conflict-essentials> accessed 10 August 2018.

situations may be solved while respecting IHL. The training of fighters should show them that IHL contains solutions to situations they will encounter. However, few States would tolerate training that teaches non-State armed groups they combat how to fight a more efficient war. Likewise, many States view the basic message of the principle of distinction with scepticism if it is addressed to fighters of non-State armed groups because it implies that fighters may target members of the State armed forces.

### c. Obtain commitments

**10.242** Although IHL already binds non-State armed groups, it is worthwhile to obtain commitments from them to respect IHL, and such groups indeed commit themselves in a great variety of ways to comply with humanitarian rules.[502] This alone not only helps close the ownership gap but also creates a constituency of leaders and other members who then become advocates of IHL within the group. General commitments to respect IHL – such as declarations to comply with 'the Geneva Conventions and Additional Protocols' – may be sceptically viewed as mere propaganda. Instead, a two-page code of conduct addressing the genuine humanitarian issues that arise for a given armed group in the field is often preferable. The next sections present one NGO, Geneva Call, that has given itself the specific mandate to engage non-State armed groups (which Geneva Call refers to as 'armed non-State actors') to comply with humanitarian rules. The ICRC has obviously engaged with many more armed groups over a much longer time frame.[503] However, as the ICRC needs and mainly engages States to fulfil its humanitarian role, it must often engage armed groups in secret and thus cannot provide them with the opportunity to make solemn and public commitments that have an important impact on their sense of ownership. I can only hope that Geneva Call continues to pursue its different but complementary approach, which makes it a unique organization.

#### *i. The work of Geneva Call*

**10.243** Geneva Call is a Swiss-based NGO that, among other things, obtains concrete commitments by armed groups to respect humanitarian rules (which is a term that includes not only IHL but also some rules of IHRL) and tries to ensure their respect through persuasion and dialogue.[504] It started its work with the ban

502 For a comprehensive database, see Geneva Call, 'Their Words: Directory of Armed Non-State Actor Humanitarian Commitments' <http://theirwords.org/> accessed 10 August 2018.

503 See MNs 5.168–5.174, 5.177–5.180 and 5.188.

504 See Geneva Call's website <http://www.genevacall.org> accessed 10 August 2018. The organization is currently undergoing a major reorientation. What follows is based upon its working methods and approach adopted until 2017.

on anti-personnel landmines because the Ottawa Convention on Landmines neither addresses non-State armed groups nor allows them to undertake to respect it. Since then, Geneva Call has added the protection of children in armed conflict and the prohibition of sexual violence as well as gender discrimination to its work. It plans to add other humanitarian issues to its work programme in the future, such as the provision of medical care and forced displacement. However, it must be careful to ensure that it only accepts commitments the respect of which it can monitor. In addition, Geneva Call contributes to the training of armed groups on humanitarian rules, including through innovative means such as quizzes that can be downloaded on portable phones.[505]

**10.244** Geneva Call's original idea, which is the most relevant one for the present discussion, was to obtain formal 'Deeds of Commitment' from non-State armed groups that are most often signed in Geneva by a group's high-level military and political leaders.[506] Such deeds are the result of serious negotiations that include an armed group's military leaders in which Geneva Call emphasizes not only explaining existing IHL prohibitions but also listening to the group's humanitarian problems and aspirations as well as the challenges it faces. The Deed is then signed in the prestigious 'Alabama Room' in Geneva in the presence of a representative of the Canton (Swiss federated State) of Geneva, in whose archives the Deed is deposited. It is part of Switzerland's humanitarian foreign policy to allow and facilitate the entry of both the leaders of the armed groups willing to sign a Deed of Commitment on its territory and all those attending meetings in Geneva, which are organized every four to five years, that include all signatories of Deeds of Commitment as well as certain other armed groups with which Geneva Call works.

**10.245** When leaders of an armed group return to the battlefield where they fight after the signing ceremony, they have the impression that they are no longer mere criminals (as the government against which they are fighting would argue) but rather serious parties to an armed conflict with obligations under IHL. Such feeling of legitimation through participation in the 'rules of the game' is a social reality, although all Deeds of Commitment stress, as Common Article 3 does,

505 See Fighter Not Killer, above note 501. See also Nicolas Sion and Annyssa Bellal, 'Mobile Technology in the Interest of Law and the Protection of Civilians' (*EJIL: Talk!*, 29 May 2015).

506 See the following Deeds of Commitment available at <https://genevacall.org/how-we-work/deed-of-commitment/> accessed 10 August 2018: *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* (2000); *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* (2010); *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination* (2012).

that they do not affect the group's legal status.[507] Nevertheless, leaders of the group will make sure that their group does not make them lose face by violating their Deeds. Geneva Call assists groups to respect their Deed, monitors its respect, conducts missions of enquiry in cases of alleged violations (which often requires for purely practical reasons the territorial State's consent, which is often refused[508]) and could issue a public statement if the Deed is not respected.

**10.246** Currently, 52 non-State armed groups have signed the Deed of Commitment banning anti-personnel landmines, 26 have signed the Deed protecting children and 24 have signed the Deed prohibiting sexual violence and gender discrimination. Admittedly, the greatest violators are not among the signatories. However, many groups *are* signatories, including some, such as the Kurdish PKK, that are considered to be terrorist organizations by the State against which they are fighting or even by international organizations. At least for the Deed of Commitment on the ban on anti-personnel landmines, such signatory groups have not yet been found to have committed violations, while experience with Deeds of Commitment on other issues is too recent to draw conclusions.

**10.247** Geneva Call contends that Common Article 3, which gives impartial humanitarian bodies a right to offer their services to parties to NIACs, including to non-State armed groups,[509] provides the legal basis for its work. Engaging a non-State armed group therefore does not constitute an interference into the territorial State's internal affairs. A State would in fact violate Common Article 3 if it qualified Geneva Call's engagement as supporting terrorism, even if the armed group party to a NIAC it engaged is labelled as a terrorist group.

*ii. The binding nature of commitments by non-State armed groups*

**10.248** In contrast to ad hoc agreements,[510] IHL does not refer to unilateral commitments.[511] The question thus arises whether and why unilateral commitments are legally binding. If one considers that non-State armed groups have a functional legal personality in the field of IHL,[512] it is tempting to apply by analogy the ILC's *Guiding Principles applicable to unilateral declarations of States capable*

507 See MN 6.68.

508 See Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 93 IRRC 673, 692–701.

509 See MN 5.176.

510 See MN 4.22.

511 However, for the special case of national liberation movements, see P I, Art 96(3); MNs 4.24 and 6.26–6.30.

512 See MN 6.68.

*of creating legal obligations* (Guiding Principles)[513] to their commitments. The problem is that those Guiding Principles base the binding nature of such declarations upon the principle of good faith.[514] States, however, generally do not rely on declarations of non-State armed groups and often reject them. Nevertheless, in my opinion, what is determinative is not whether the adversary actually trusts such declarations but whether it can rely on them. In addition, others, such as the affected population or NGOs, do in fact rely on such declarations. Grotius and Gentili argued centuries ago that good faith is indeed the basis of all law-of-war obligations, including between enemies.[515]

**10.249** The principle of effectiveness may provide another explanation for the binding nature of such commitments. Whenever a non-State armed group can comply with its commitments, it is bound by them.[516] Finally, one may consider that the binding nature of promises constitutes a general principle of law that exists in all legal systems.[517]

**10.250** All aforementioned explanations for the binding nature of commitments require that those committing themselves actually have the will to do so and commit themselves in a field in which they have legal personality.[518] A lack of such intent to commit themselves could render commitments non-binding. This intent to commit themselves towards others is often not present in internal codes of conduct. However, the requisite intent could be derived from the fact that an instrument was elaborated following a suggestion by an intergovernmental organization or NGO or from the fact that external actors or the local population were informed about its contents.

### d. Provide advice

**10.251** Armed groups should also have access to advice on how to comply with IHL. In my view, compliance is much more difficult for them than it is for

513 ILC, Yearbook…2006, vol II, Part Two, 161–6.

514 This is also the majority opinion expressed in scholarly writings. See Robert Kolb, *La bonne foi en droit international public* (PUF 2000) 328–32.

515 Alberico Gentili, *De Jure Belli Libri Tres* (J.C. Rolfe translator, Manau 1585) 145, 191–223; Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (F.W. Kelsy translator, 1625) 792–800.

516 See Denise Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé' (1984–85) 18 Revue belge de droit international 298, 314–18.

517 Thus (for States), see Giorgio Balladore Pallieri, *Diritto internazionale pubblico* (8th edn, Giuffrè 1962) 324; Wilhelm Wengler, *Völkerrecht* (Springer 1964) vol I, 304; Alfred Verdross, *Völkerrecht* (5th edn, Springer 1964) 157; Paul de Visscher, 'Cours général de droit international public' (1972) 136 Recueil des Cours 1, 120. For a critical view, see Kolb, La bonne foi, above note 514, 333.

518 Dionisio Anzilotti, *Corso di diritto internazionale* (Athenaeum 1928) 305.

governments as the latter have formal structures and institutions in place. How does a clandestine, illegal group ensure compliance with IHL? How does it punish members who do not comply?[519] Can it punish or provide a fair trial without legislation?[520] If the international community is serious about ensuring that armed groups respect IHL, it must help groups address these questions assuming that many of them genuinely wish to respect IHL, which may prove to be untrue. However, while it is also often untrue in the case of States, this does not prevent the ICRC from providing them advisory services. Moreover, experience demonstrates that compliance advice often contributes to a party's desire to comply with IHL even if it did not want to do so initially. Geneva Call requires each armed group that signed a Deed of Commitment to establish self-regulation mechanisms (orders and directives, measures for information dissemination and training, disciplinary sanctions in case of non-compliance) to ensure that its commanders and rank-and-file are aware of and abide by the Deed.

#### e. Respect for IHL should be rewarded

**10.252** Furthermore, an armed group's respect for IHL should be rewarded. In an IAC, POW status and combatant immunity incentivize combatants to comply with IHL. A combatant who falls into the power of the enemy becomes a POW and has combatant immunity from prosecution for merely having participated in hostilities. If, however, said combatant commits war crimes, he or she must be punished. In contrast, this incentive to comply with IHL does not exist in NIACs. A fighter in a NIAC who only kills government soldiers will nevertheless be prosecuted for murder once captured by governmental forces. Even that fighter's perfect respect of IHL does not bar his or her prosecution under domestic law. Although this fundamental difference between IACs and NIACs is inherent in the current Westphalian international system, some incentives and rewards should be developed in IHL, ICL, international refugee law and international anti-terrorism law to promote compliance with IHL. This is one of the major reasons why acts committed in an armed conflict that comply with IHL should not fall under any definition of terrorism.[521]

519 Anne-Marie La Rosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 90 IRRC 327.

520 Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-international Armed Conflict' (2007) 89 IRRC 655.

521 See MNs 10.048–10.056.

### f. Self-reporting by armed groups

**10.253** The most traditional and least intrusive mechanism to monitor the respect of international obligations, which is well established in IHRL, consists of requiring States to periodically report to an international monitoring body on their respect and implementation.[522] While such reporting obligations were formerly envisaged for IHL concerning, for example, national measures of implementation, States never accepted them.[523] If non-State armed groups have obligations under IHL, they could also be encouraged to report on their compliance. Geneva Call periodically requests armed groups that have signed a Deed of Commitment to report on their compliance and on the measures taken to implement the Deed. Such reports could either be submitted periodically, following complaints by individuals[524] or by opposing groups affected by violations. The mere responsibility for writing such reports and collecting the necessary data could increase the awareness of IHL among some segments of the armed group and add to their sense of ownership of these laws.

### g. Monitoring respect

**10.254** Commitments, advice and rewards for compliance, however, are insufficient by themselves to promote compliance. The respect of the law also must be monitored, yet mechanisms to engage with armed groups in this regard remain few and far between. Under Common Article 3, the ICRC may offer its services to an armed group, and, if the latter accepts, the ICRC may monitor the group's respect in exactly the same way it monitors the activities of States involved in IACs. Similarly, Geneva Call monitors whether a group's commitments correspond to reality on the ground. However, sovereignty-obsessed States do not always appreciate such activities.

### h. Responsibility for violations

**10.255** As with States, there must be responsibility for violations committed by armed groups. ICL addresses members of armed groups as much as members of armed forces. In international private law, the possibility of construing and sanctioning an IHL violation as a tort must be explored and implemented in domestic civil courts. In this field, the US has been a pioneer with its Alien Tort Claims Act.[525] Furthermore, the UN Security Council has also addressed the inter-

522 For an overview, see Elisabeth Kornblum, 'A Comparison of Self-evaluating State Reporting Mechanisms' (1995) 35 IRRC 39.

523 Ibid., 43; Online Casebook, ICRC, Protection of War Victims, Section 2.2.

524 Such individual complaints procedures against armed groups are suggested by Jann Kleffner, 'Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure' (2002) 15 Leiden J of Intl L 237, 247.

525 28 US Code Annotated Section 1350 (West).

national responsibility of armed groups by imposing sanctions against certain groups.[526] In my assessment, how humanitarian organizations react to IHL violations by armed groups is another area that deserves further exploration. On the one hand, the fact that these organizations want to assist and protect persons who are in the hands of armed groups necessitates that they continue to cooperate with such groups. On the other hand, reacting to violations is crucial, and humanitarian organizations must not sacrifice criticizing violations, at least bilaterally and confidentially, to ensure access.

### i. Obstacles

**10.256** There are three main reasons why States, parts of the public and some academics object to engaging non-State armed groups. First, many object that engagement by international actors encourages armed groups to continue employing violence, which inevitably contributes to human suffering. A world without armed groups would obviously be preferable, just as a world without armed conflicts. However, armed groups and armed conflicts are a reality that will not disappear if the international community ignores them. Rather, the reality in armed conflicts may be improved if it devises methods and mechanisms to engage them.

**10.257** Second, more moderate opponents accept engaging some, but not all, armed groups. In my view, we must attempt to engage all groups and leave it to them to reject such engagement. From a humanitarian point of view, distinctions between 'good' and 'bad' armed groups would mean that those civilians in greatest need of protection would be deprived of it because they are in the hands of a group whose methods or ideology are utterly rejected by the international community. Engaging all groups would also avoid a diplomatic problem. If we refuse, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how could we justify engaging the Revolutionary Armed Forces of Colombia (FARC) to the government of Colombia? The only reasonable limitation to engagement is therefore to require that the group constitutes a genuine armed group engaged in a NIAC.

526 See, e.g., UNSC Res 2424 (2018) and UNSC Res 2293 (2016) (concerning sanctions against armed groups in the Democratic Republic of the Congo); UNSC Res 2253 (2015) (imposing asset freezes, arms embargoes and travel bans on the Islamic State and its members); UNSC Res 1988 (2011) (imposing sanctions against the Taliban); UNSC Res 1989 (2011) (reaffirming sanctions against Al-Qaeda); UNSC Res 1127 (1997), UNSC Res 1173 (1998) and UNSC Res 1221 (1999) (concerning the National Union for the Total Independence of Angola (UNITA)); UNSC Res 942 (1994) (concerning the Republika Srpska); UNSC Res 1171 (1998) (concerning rebels in Sierra Leone); and, to a certain extent, UNSC Res 792 (1992) (concerning the Khmer Rouge).

**10.258** Third, the most recent and important obstacle to engaging armed groups is linked to the fight against terrorism.[527] The US, for instance, has criminalized providing any support to 66 groups currently on its 'terror' list,[528] which includes some armed groups involved in NIACs. Furthermore, the US considers that mere training in IHL qualifies as providing 'support' to armed groups.[529] This view, however, is incompatible with Common Article 3 as it grants impartial humanitarian bodies the right to offer their services to armed groups and, if their offer is accepted, to provide such services to the groups. The criminalization of providing support to terrorist groups by the US and many other States is often justified by UN Security Council resolutions.[530] Under Article 103 of the UN Charter, such resolutions could indeed prevail over Common Article 3.[531] However, in my view, they should be interpreted in conformity with Common Article 3 so that they do not affect the right of initiative of impartial humanitarian bodies.

## 10.13 WHO MAY BE TARGETED IN A NIAC?

In NIACs, government soldiers may be targeted at all times, while civilians may only be targeted while directly participating in hostilities. According to the majority opinion that adopts an *e contrario* interpretation ('interpretation from the contrary') of some treaty rules, members of a non-State armed group – at least when they have a continuous combat function – may also be targeted at all times under customary law or by analogy to combatants in IACs. The majority opinion asserts that such authorization in IHL prevails as the *lex specialis* over IHRL's much more restrictive regime on the use of lethal force. In my opinion, however, the *lex specialis* must be determined in each case according to much more nuanced criteria.

**10.259** As discussed previously, who may be targeted with lethal force in what circumstances in IACs is relatively uncontroversial. Combatants may be targeted at all times until they surrender or are otherwise *hors de combat*. Civilians may be targeted if and for such time as they directly participate in hostilities. The main

527 For concern expressed on the trend criminalizing humanitarian organizations' engagement with non-State armed groups, see UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2012) UN Doc S/2012/376, para 46.

528 This figure is current as of 10 August 2018. See US Department of State, 'Foreign Terrorist Organizations' <http://www.state.gov/j/ct/rls/other/des/123085.htm> accessed 10 August 2018.

529 See 18 US Code Annotated Section 2239B(a)(1) (West); see also Online Casebook, United States of America, Holder v. Humanitarian Law Project.

530 See, in particular, UNSC Res 1373 (2001).

531 See MNs 9.107–9.109.

controversies addressed in more detail in Chapter 8 are who is a combatant,[532] what constitutes direct participation in hostilities[533] and whether the principle of military necessity requires the attacking party to capture rather than kill legitimate targets under certain circumstances.[534] As for civilians who do not or who no longer take a direct part in hostilities, lethal force may only be used in exceptional circumstances under IHRL's much more restrictive conditions, which will be examined below.

**10.260** For NIACs, the rules on targeting are much more difficult to determine. First, it is challenging to identify the IHL rules on who is a legitimate target under which circumstances. Second, it is controversial whether those rules of IHL always prevail over the IHRL rules on the lawful use of force or, alternatively, in which circumstances such rules prevail. Unfortunately, these questions cannot be dealt with in this order because they are interrelated.

### 10.13.1 The treaty rules applicable to NIACs

**10.261** IHL of NIACs prohibits 'violence to life and person, in particular murder' directed against 'persons taking no active part in hostilities,' including those who have ceased their participation in hostilities.[535] Specifically addressing the conduct of hostilities, Article 13 of Protocol II prohibits attacks against 'civilians… unless and for such time as they take a direct part in hostilities'.[536] One could deduce from the failure of these rules to mention 'combatants' that everyone is a civilian in NIACs and that no one may be attacked unless they directly participate in hostilities. First, however, it would then be puzzling why Article 13 uses the term 'civilian' instead of a broader term, such as 'person'.[537] Second, if everyone is a civilian, the principle of distinction, which is a fundamental principle of IHL that also applies to NIACs, would become meaningless and impossible to apply.[538] Third, Common Article 3 confers its protection on 'persons taking

532 See MNs 8.055–8.077.

533 See MNs 8.311–8.313.

534 See MN 8.373.

535 GCs, Common Art 3. On whether this rule also applies to the conduct of hostilities, see MN 7.27.

536 The process of drawing up the ICRC DPH Guidance has clearly demonstrated profound divergences over the question when enemy fighters may be killed in a NIAC. See ICRC, 'Direct Participation in Hostilities Under International Humanitarian Law' (ICRC 2003); ICRC and TMC Asser Institute, 'Second Expert Meeting: Direct Participation in Hostilities Under International Humanitarian Law' (ICRC and TMC Asser Institute 2004); ICRC and TMC Asser Institute, 'Third Expert Meeting on Notion of Direct Participation in Hostilities' (ICRC and TMC Asser Institute 2005) [DPH 2005 Report].

537 University Centre for International Humanitarian Law (now the Geneva Academy of International Humanitarian Law and Human Rights), 'Report of Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation' (September 2005) 34.

538 DPH 2005 Report, above note 536, 64; David Kretzmer, 'Targeted Killing of Suspected Terrorists:

no active part in hostilities, including members of armed forces who have laid down their arms, or are otherwise *hors de combat*'. The latter part of the phrase suggests that it is insufficient for such members of armed forces[539] to no longer take an active part in hostilities to be immune from attack. Rather, they must take additional steps to actively disengage. Fourth, on a more practical level, prohibiting government forces from attacking clearly identified fighters unless (and only while!) the latter engage government forces is militarily unrealistic as it would oblige the latter to react to rather than prevent attacks while facilitating hit-and-run operations by the rebel group. These arguments may explain why the ICRC Commentary to Protocol II asserts that '[t]hose belonging to armed forces or armed groups may be attacked at any time.'[540]

**10.262** There are two ways to conceptualize this conclusion. First, 'direct participation in hostilities' can be understood to encompass the simple fact of becoming a member of an armed group[541] or keeping a fighting function within that group.[542] Second, one may consider that fighters are not 'civilians' and that they therefore do not benefit from protection against attacks unless and for such time as they directly participate in hostilities.[543] Both constructions, however, generate difficult questions in practice. How do government forces determine membership in an armed group while the individual in question does not commit hostile acts? How can membership in the armed group be distinguished from simple affiliation with a party to the conflict for which the group is fighting, such as mere membership in the political, educational or humanitarian wing of a rebel movement? As noted before, to answer these questions and to avoid providing a licence to target enemies that is too broad, the ICRC suggests that only those who have a continuous combat function are members of an armed group for targeting purposes.[544] This book and the present sub-chapter refer to such persons as 'fighters'.

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Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 EJIL 171, 197–8.

539 Under Common Article 3, the term 'armed forces' includes rebel armed groups. See Marco Sassòli, 'Terrorism and War' (2006) 4 JICJ 959, 977.

540 ICRC Commentary APs, para 4789.

541 DPH 2005 Report, above note 536, 48–9.

542 This was the view of the Israeli Supreme Court in Online Casebook, Israel, The Targeted Killings Case, para 39.

543 ICRC DPH Guidance, 27–9.

544 Ibid., 32–5. See MNs 8.314–8.318.

### 10.13.2 Customary IHL

**10.263** Customary IHL is just as ambiguous as treaty provisions on the crucial question of when fighters in NIACs may be attacked. According to the ICRC Customary Law Study, in both IACs and NIACs, '[a]ttacks may only be directed against combatants.'[545] The Commentary, however, explains using rather circular reasoning that the term 'combatant' in NIACs simply 'indicat[es] persons who do not enjoy the protection against attacks accorded to civilians.'[546] It adds that while 'State armed forces may be considered combatants…practice is not clear as to the situation of members of armed opposition groups.'[547] Indeed, the US contends that individuals who are a part of or provide substantial support to Al-Qaeda, the Taliban and their 'associated forces' 'may be attacked…at any time' without any need to directly participate in the hostilities.[548]

### 10.13.3 Reasoning by analogy to IHL of IACs

**10.264** If neither treaties nor customary law answers the question of who may be targeted in a NIAC, it is tempting to reason by analogy to the answers IHL of IACs provides. As we have seen, reasoning by analogy between IACs and NIACs is based upon good theoretical and practical reasons and favoured by humanitarians for issues other than targeting.[549]

**10.265** For the present issue, it is also unrealistic to require a Saudi soldier in Yemen to capture Houthi fighters whenever this is feasible (which is what IHRL would require in the absence of an applicable IHL rule), while allowing an Ethiopian soldier to kill an Eritrean soldier as long as the latter does not surrender or is not *hors de combat*. This introduces an artificial and unrealistic distinction. In addition, the decision of when an enemy may be targeted must be taken by every soldier on the ground in a matter of seconds, and it therefore cannot be left to commanders and courts. Rather, soldiers must receive clear instructions so that they can work under the stress of the fighting and, whenever possible, the same training in view of both IACs and NIACs.

**10.266** On the other hand, strong arguments call into question the appropriateness of such reasoning by analogy. Many NIACs are fought against or between groups

545 ICRC CIHL Database, Rule 1.
546 Henckaerts and Doswald-Beck, 3.
547 Ibid., 12. Similarly, ibid., 17.
548 See Online Casebook, United States, The Obama Administration's Internment Standards.
549 See MNs 7.05, 7.52–7.63.

that are not well structured. It is much more difficult to determine who belongs to an armed group than to identify who belongs to governmental armed forces. Positive IHL of NIACs does not even explicitly prescribe that fighters must distinguish themselves from the civilian population.[550] Persons join and quit armed groups in an informal way, while members of governmental armed forces are formally incorporated and dismissed. As armed groups are inevitably illegal, their members will do their best not to appear as belonging to the group. The claim that fighters may be shot at on sight may therefore put many civilians in danger whether they are sympathizers of the group, members of its 'political wing', belong to the same ethnic group or simply happen to be in the wrong place at the wrong time. In addition, while a clear distinction exists in IACs between law enforcement actions by the police against civilians and conduct of hostilities by combatants against combatants, there is no equivalent clear distinction in NIACs. Insurgency also always constitutes a crime under domestic law.

**10.267** The arguments in favour of a different rule in NIACs obviously mainly apply to the use of force against armed groups. Such arguments could therefore be regarded as requiring a distinction between the use of force against governmental forces vis-à-vis armed groups rather than between IACs and NIACs. The problem is that such a differentiation would be contrary to the principle of equality of the belligerents, which is important to promote the respect of IHL by both sides.[551]

### 10.13.4 IHRL rules on the use of force

**10.268** If IHL fails to provide an answer in all or some cases, it seems normal to apply the applicable rules of IHRL. Human rights treaties prohibit the arbitrary deprivation of life.[552] The ECHR specifies a 'deprivation of life' resulting from the use of force is not arbitrary if it is:

> absolutely necessary:
>
> a) in defence of any person from unlawful violence;
> b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; [or]
> c) in action lawfully taken for the purpose of quelling a riot or insurrection.[553]

550 See MN 7.63.
551 See MNs 9.097–9.098; Bugnion, above note 478, 167.
552 ICCPR, Art 6(1); ACHR, Art 4(1); ACHPR, Art 4.
553 ECHR, Art 2(2).

**10.269** In its case law outside of armed conflicts, the European Court of Human Rights, while finding that it was lawful to kill a person who the authorities genuinely believed was about to detonate a bomb, held that a government violated the right to life by insufficiently planning a law enforcement operation.[554] The *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Basic Principles), which provide an authoritative interpretation of the principles authorities must respect when using force in order not to infringe the right to life, take a similar approach. The Basic Principles limit the use of firearms 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.'[555] The intentional lethal use of firearms is only admissible 'when strictly unavoidable in order to protect life.' In addition, 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.'[556] However, it must be stressed that the Basic Principles are addressed to officers 'who exercise police powers, especially the powers of arrest or detention'. Military authorities are covered by these principles only if they exercise police powers,[557] which means that the rules do not bind military authorities engaged in the conduct of hostilities. If IHRL is to provide an answer as to when a fighter may be killed, it is thus imperative to know when military authorities are or should be exercising police powers in a NIAC. However, this is unclear because a rebellion that amounts to a NIAC always constitutes both a crime and a conduct of hostilities for members of an armed group.

**10.270** The preceding description of the IHRL regime applicable to deliberate killings is based upon the practice of human rights bodies concerning peacetime law enforcement operations. There are very few precedents in armed conflicts. Theoretically, IHRL should apply in the same manner both in and outside of armed conflicts. Additionally, the right to life is not subject to derogations

554 ECtHR, *McCann and others v The United Kingdom* (1996) 21 EHRR 97, paras 200–205.

555 See UN Congress on the Prevention of Crime and Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', Art 9, as reproduced in UN, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (UN 1991) UN Doc A/CONF.144/28/Rev.1, 112–16.

556 Ibid., Art 10.

557 A footnote added to the term 'law enforcement officials' clarifies this by referring to the commentary to Article 1 of the Code of Conduct for Law Enforcement Officials. See ibid., preamble, para 1, fn 133.

except, under the ECHR, in cases of 'lawful acts of war'.[558] The *Tablada* case is a classic case in which a human rights body assessed the right to life in the context of an armed conflict. In that case, a group of fighters attacked an army base in Argentina. The Inter-American Commission on Human Rights held that 'civilians…who attacked the Tablada base…whether singly or as a member of a group thereby…are subject to direct individualized attack to the same extent as combatants' and lose the benefit of the proportionality rule and precautionary measures.[559] It then exclusively applied IHL of IACs to those attackers, finding that only civilian bystanders and attackers who surrendered benefitted from the right to life. The Commission did not address the issue of whether the fighters should have been arrested whenever possible rather than killed.

**10.271** In the *Guerrero* case, the Human Rights Committee found that Colombia arbitrarily deprived persons who were suspected but not proven (even by a subsequent enquiry) to be kidnappers and members of a 'guerrilla organization' of their right to life. The police waited for the suspected kidnappers in an empty house where they had believed the victim of a kidnapping to be held. When the suspected kidnappers arrived, they were shot without warning or an opportunity to surrender even though none of the alleged kidnappers fired a shot but instead simply attempted to flee.[560]

**10.272** The European Court of Human Rights' jurisprudence involving the right to life in the NIAC in Chechnya includes statements that appear to require minimizing risks to life in the planning and execution of even lawful actions against fighters.[561] While the Court did not limit its statements to the protection of the life of civilians, the actual victims were civilians in most cases. In one case, the Court held that – even assuming that the victims of a Russian aerial bombardment were armed – the killing constituted a use of force that was not absolutely necessary because the appropriate care in assessing the situation and in planning the attack had not been taken.[562] The issues that the Court criticized the governmental forces for failing to have assessed[563] show that the mere fact that they had been fighters would have still been insufficient to make it lawful to attack them.

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558 ECHR, Art 15(2). It has been argued that this only refers to IACs. See Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 IRRC 881, 883. In any case, no State has ever tried to derogate based upon this exception.

559 Online Casebook, Inter-American Commission on Human Rights, Tablada, para 178.

560 Online Casebook, Human Rights Committee, Guerrero v. Colombia.

561 Online Casebook, ECHR, Isayeva v. Russia, paras 175–6; Online Casebook, ECHR, Khatsiyeva v. Russia, paras 133–40.

562 Online Casebook, ECHR, Khatsiyeva v. Russia, paras 137–8.

563 Ibid., para 136.

In all other cases in which human rights bodies and the ICJ applied the right to life in NIACs, the persons killed were either *hors de combat* or were not alleged to have been fighters.[564] However, even though governments often kill fighters who are not *hors de combat*, no such case has been brought before an IHRL monitoring body. Some observers conclude that the absence of such case law indicates that such killings do not violate the right to life. They consider that it is 'unthinkable' for a surviving relative of a FARC member to bring a case in the Inter-American system alleging a violation of the right to life.[565]

### 10.13.5 An attempt to apply the *lex specialis* principle

**10.273** The limited body of IHRL case law is thus inconclusive on the question as to what IHRL requires from government authorities when they use force against fighters. As both IHRL and IHL are ambiguous on this issue, it is not easy to apply the *lex specialis* principle.

**10.274** First, however, it must be emphasized that there is a significant amount of common ground between the two branches of law. In a 'battlefield-like' situation, arrest is virtually always impossible without putting the government forces into disproportionate danger. Under IHRL, a fighter presents a great threat to life even if that threat consists of attacks against armed forces. The immediacy of that threat might be based not only on what the targeted fighter is expected to do but also on his or her previous behaviour.[566] Therefore, even under IHRL, lethal force could be used in such situations. On the other hand, both IHL and IHRL equally protect the life of a fighter who surrenders or is otherwise *hors de combat*.

**10.275** It is only where the solutions of the two branches actually contradict each other that the applicable rule must be determined using the *lex specialis* principle. The FARC leader shopping in a supermarket in government-controlled Bogotá during the NIAC in Colombia provided the quintessential example of such a contradiction. Putting the kill or capture debate[567] aside, IHL is regarded as authorizing authorities to shoot to kill the FARC leader because he was a fighter. Under IHRL, in contrast, he must be arrested if possible, and a gradated use of force must be employed. This rule, however, is based upon peacetime precedents, and IHRL is always more flexible according to the situation. In addition,

564 For an overview of these cases, see Nils Melzer, *Targeted Killing in International Law* (OUP 2008), 169–73, 384–92.

565 University Centre, above note 537, 36.

566 DPH 2005 Report, above note 536, 52.

567 See MN 8.373.

like IHL, IHRL 'must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.'[568]

**10.276** A majority of IHL experts contend that the target's 'status' or function determines whether IHL rules on the conduct of hostilities or the IHRL rules on law enforcement operations prevail.[569] If the target is a member of an armed group with a continuous combat function or a civilian directly participating in hostilities, IHL rules on the conduct of hostilities apply. The FARC commander mentioned above may therefore be killed without even trying to arrest him. If the target is a civilian who has not or is no longer participating in hostilities, IHRL rules apply.

**10.277** In my view, however, the answer is more nuanced. Some situations contain more situational specificities that the IHL rule was designed to address, while other situations contain more facts IHRL was developed to deal with. There is a sliding scale[570] between the lone FARC leader mentioned above and a soldier in Franco's rebel forces involved in the battle of the Ebro during the Spanish Civil War. It is impossible and unnecessary to provide a 'one size fits all' answer. Indeed, as explained before, the *lex specialis* principle does not determine priorities between two rules in the abstract but instead offers a solution to a concrete case in which competing rules lead to different results.[571] The ICJ's famous dictum stating that '[t]he test of what constitutes an arbitrary deprivation of life…must be determined by the applicable *lex specialis*, namely the law applicable in armed conflicts',[572] should therefore not be misunderstood. Rather, it must be read in the context of the opinion[573] in which the ICJ had to determine the legality of the use of a certain weapon *in abstracto*.

**10.278** While the answer must be flexible, it is necessary to determine factors that make either the IHL of IACs rule or the IHRL rule prevail. The existence and extent of government control over the place[574] where the killing occurs points

568 William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 EJIL 741, 750.

569 ICRC Expert Meeting, 'The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms' (Report prepared and edited by Gloria Gaggioli, ICRC 2013) 19.

570 See University Centre, above note 537, 38. For the views of several experts, see DPH 2005 Report, above note 536, 51–2.

571 See MNs 9.043–9.044.

572 Online Casebook, ICJ, Nuclear Weapons Advisory Opinion, para 25.

573 Philip Alston *et al.*, 'The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 EJIL 183, 192–3.

574 If the very person targeted is under government control, both branches of law prohibit summary executions.

towards IHRL as the *lex specialis*.[575] For government forces acting on their own territory, control over the place where the attack occurs is not a requirement for IHRL to apply;[576] it is simply a factor making IHRL prevail over IHL. IHL, in contrast, was made to address hostilities against forces on or beyond the frontline (that is, in places that are not under the control of the attacking party), while law enforcement rules concern persons who are under the jurisdiction of those who act. In traditional conflict situations, this corresponds to the question of how remote the situation is from the battlefield,[577] although new types of conflicts are characterized by the absence of frontlines and battlefields. What then constitutes sufficient control for IHRL to prevail as the *lex specialis*? In my view, the mere presence of a solitary rebel or even a group of rebels on a stable part of a State's territory does not yet indicate that the government lacks sufficient control over that place for it to therefore act under IHL as the *lex specialis*. The question is rather one of degree. If a government could arrest individuals or even groups of individuals without being overly concerned about other rebels interfering in that operation, then it has sufficient control over the place for IHRL to prevail as the *lex specialis*.

**10.279** This criterion of governmental control leaves the solution more open in the territory of a State whose government is fighting the rebels that is neither under firm rebel nor governmental control (such as regions of central Peru at the time of the *Sendero Luminoso* insurgency).[578] Here, the impossibility to arrest the fighter,[579] the danger inherent in an attempt to arrest the fighter[580] and the danger the fighter poses to government forces and civilians as well as the immediacy of this danger[581] may lead to the conclusion that IHL is the *lex specialis* in areas where neither side has strong control. These factors are interlinked with the elements of control described above. Additionally, in my view, where neither party has clear geographical control, the higher the degree of certainty that the target is actually a fighter, the easier it is to apply IHL as the *lex specialis*.[582]

575 Doswald-Beck, The Right, above note 558, 897; University Centre, above note 537, 36; Kretzmer, above note 538, 203; Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel L Rev 310, 347.

576 For a State's responsibility for human rights violations committed on a part of the territory of a State that is not under government control, see ECtHR, *Ilaşcu and Others v Moldova and Russia* (2004) 40 EHRR 46, para 333.

577 Droege, The Interplay, above note 575, 347.

578 University Centre, above note 537, 37.

579 Online Casebook, Israel, The Targeted Killings Case, para 40; Doswald-Beck, The Right, above note 558, 891.

580 Online Casebook, Israel, The Targeted Killings Case, para 40.

581 Kretzmer, above note 538, 203.

582 Online Casebook, Human Rights Committee, Guerrero v. Colombia, paras 13.1–13.3; Online Casebook, Israel, The Targeted Killings Case, para 40; Orna Ben-Naftali and Karen Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings' (2003–04) 36 Cornell Intl L J 233, 290.

Attacks are lawful against persons who are actually fighters, while law enforcement is by definition directed against suspects.

**10.280** Even where IHRL prevails as the *lex specialis* in the context of an armed conflict, IHL remains in the background and relaxes the IHRL requirements of proportionality and warning once an attempt to arrest has been made unsuccessfully or is not feasible. By the same token, even when IHL prevails, IHRL remains in the background. Human rights treaty bodies and many scholars argue that IHRL requires an enquiry whenever a person has been deliberately killed.[583] In my opinion, such an obligation in armed conflict should be limited only to possible violations of the applicable IHL or IHRL because it is unrealistic to oblige warring parties to conduct an enquiry every time an enemy fighter is killed on the battlefield.

**10.281** If this flexible approach to determining the applicable *lex specialis* is accepted, the question arises whether it is valid for both members of armed groups and government forces. Although both parties must be equal as far as the applicable IHL is concerned, they are not equal as far as IHRL is concerned.[584] Even if IHRL binds armed groups, it can only impose obligations on them towards persons who are in an area under their control as such groups do not have any jurisdiction over a territory.[585] While law enforcement is a natural alternative for the governmental side, it is not an obvious option for an armed group. As the government has the alternative of law enforcement and applying domestic criminal law, it must therefore plan an operation in such a way so as to maximize the possibility of being able to arrest persons.[586] As for armed groups, however, the question of whether they may legislate to make government action illegal (which would be the necessary starting point for any 'law enforcement' operation) is controversial.[587] Even if they

583 Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone 2013) 474–514; Online Casebook, ECHR, Isayeva v. Russia, paras 209–13; Online Casebook, ECHR, Al-Skeini *et al.* v. UK, paras 164, 168–75. For the killing of persons who the Israeli Supreme Court refers to as civilians directly participating in hostilities, see Online Casebook, Israel, The Targeted Killings Case, para 40. Philip Alston even argued, as the former Special Rapporteur on extrajudicial, summary or arbitrary executions, that such an obligation exists under humanitarian law. See UN Commission on Human Rights, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions – Report of the Special Rapporteur, Philip Alston' (2006) UN Doc E/CN.4/2006/53, paras 25–6.

584 Doswald-Beck, The Right, above note 558, 890.

585 Even Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 84, considers that human rights obligations apply to them only 'to the extent appropriate to the context.'

586 Doswald-Beck, The Right, above note 558, 890; University Centre, above note 537, 35.

587 See Sassòli, Taking Armed Groups Seriously, above note 490, 33–4.

may legislate, it would be unfair to apply such legislation to government soldiers before they are under the control of the armed group.[588]

**10.282** It is therefore reasonable to consider that armed groups using force against government soldiers or other fighters are bound only by IHL and domestic law (which in any case renders any killing by them unlawful), while government forces are bound by both IHL and IHRL (with the latter prevailing in some situations and to a certain extent as the *lex specialis*) as well as obviously by their own domestic law. The fact that rebels do not have IHRL obligations limiting attacks on security forces does not mean, however, that there are no limits on such attacks. While police forces cannot be considered to be civilians in IACs when engaged in law enforcement operations to search for and arrest rebels,[589] attacks upon police units involved in normal peacetime police work (and not in a NIAC) would violate the IHL prohibition against attacking civilians.[590]

**10.283** The most important question raised by such a flexible solution is whether it is practicable in actual armed conflicts. Can every soldier apply it? The answer must consist of precise instructions and rules of engagement for every military and law enforcement operation. Also, international guidelines might be developed to resolve some of these issues based upon discussions between IHL experts, human rights experts, law enforcement practitioners and representatives of the military as well as non-State armed groups.

## 10.14 DETENTION IN NIACS

According to the majority opinion, IHL of NIACs inherently authorizes States to detain members of non-State armed groups without trial. Many argue that this authorization exists in IHL by analogy to the case of POWs in IACs or based upon customary law and that it prevails over the more restrictive limitations IHRL imposes on detention. Nevertheless, the ICRC and widespread State practice require the existence of individual imperative security reasons to justify such internment and that detainees can challenge the legality of their internment before, at a minimum, an impartial administrative body.

In conformity with the text of IHRL treaties as well as the (admittedly not yet settled) practice of most human rights bodies and some national courts, IHRL

588 See MN 10.221.

589 See Online Casebook, Sudan, Report of the UN Commission of Enquiry on Darfur, para 422.

590 'Minimum Immediate Steps for CPN-(Maoist) to Respect International Humanitarian Law and Human Rights Principles' in Nepal Human Rights Commission, *Annual Report 2004* (National Human Rights Commission 2004) 99–103.

prevails in NIACs in my view as the *lex specialis* on the issue of whether and under what procedure fighters may be detained because IHL of NIACs contains no rules on this issue, which is a silence that cannot be interpreted as a strong permission. IHRL requires a legal basis and admissible reasons for any detention as well as the possibility to have a judge determine the lawfulness of an internment. In my assessment, and contrary to the ICRC's stance, IHL of NIACs does not satisfy the legal basis requirement under IHRL to lawfully deprive a person of liberty. The ICRC, however, agrees that an additional legal basis, which domestic laws, international agreements or a UN Security Council resolution can provide, is at least required concerning the admissible reasons for detention and the procedure to challenge the lawfulness of the internment. Nevertheless, in my view, the judicial review procedures required by IHRL in cases where persons are captured on the battlefield must be interpreted in a very flexible way to remain realistic.

**10.284** As previously explained, IHL contains detailed rules on how all persons deprived of their liberty in both IACs and NIACs must be treated. For IACs, IHL also clarifies who may be detained, the reasons why they may be detained and the applicable procedure. POWs may be interned for the mere reason that they are enemy combatants until the end of active hostilities. Protected civilians may be detained pending a criminal trial or to serve a criminal sentence. They may also be interned for imperative security reasons but only after an individual decision (which may be made by an administrative body), and they have a right to appeal and the decision to intern them must be reviewed periodically.[591]

**10.285** Such rules, which provide a legal basis for detention, admissible reasons for detention and a procedure to decide on the admissibility of detention in IACs, do not exist in IHL of NIACs. Here too, as for the admissibility of the use of lethal force, it must be determined whether answers can be found through the interpretation of IHL treaty texts, in customary IHL or by analogy to the above-mentioned rules of IHL of IACs. Alternatively, in the absence of IHL rules, it must be assessed whether IHRL as the *lex specialis*, possibly interpreted in light of IHL and the specificities of NIACs, must provide answers to these issues. All these questions, however, are controversial, and an ICRC initiative to encourage States to provide answers in at least a soft law instrument has stalled. The requirement that the rules of IHL of NIACs must be the same for States and armed groups poses one particular difficulty because States absolutely refuse to admit that non-State armed groups may detain their soldiers and fear

591 See MNs 8.181–8.183.

that regulating the admissibility of detention in IHL of NIACs would imply such an 'authorization'. In practice, all those questions are most relevant concerning soldiers of governmental forces captured by non-State armed groups and concerning fighters of non-State armed groups captured by governmental forces while they are largely irrelevant for the detention of ordinary civilians. By analogy to what the ICRC suggests in relation to the separate question of when a person may be targeted in a NIAC,[592] the detention of fighters should be limited to only persons who have a continuous fighting function in an armed group. Obviously, this does not exclude a State from detaining other persons (for example, non-fighting members of an armed group) for imperative security reasons according to the IHRL rules developed hereafter.

### 10.14.1 The treaty rules applicable to NIACs

**10.286** Common Article 3 prescribes and Article 6 of Protocol II details judicial guarantees that benefit all persons who are tried and sentenced for crimes related to a NIAC. As in IACs and in peacetime, this implies that a State may detain persons in a NIAC pending a criminal trial under its domestic law or to serve a criminal sentence once they are convicted. As noted before, there are good reasons to consider that non-State armed groups may also legislate and establish courts for this purpose, and Protocol II hints that they may do so.[593]

**10.287** However, the open question that is most relevant in practice is whether enemy fighters in a NIAC may also be interned in the same manner as combatants in IACs, that is, without any individual determination or trial. Although Protocol II mentions internment when regulating the treatment of such persons,[594] this cannot suffice as a legal basis capable of authorizing detention in a NIAC (otherwise Convention IV's reference to wounded civilians would provide a legal basis to wound civilians). Nor does Protocol II clarify the permissible grounds for internment or the applicable procedure. I therefore disagree with the ICRC's view that Protocol II's passing references to internment confirm that it is an inherent form of deprivation of liberty in NIACs.[595]

592 ICRC DPH Guidance, 32–6.
593 See MNs 7.35–7.36.
594 P II, Arts 5(1)–(2) and 6(5).
595 Updated ICRC Commentary GC I, para 720.

### 10.14.2 Customary law

**10.288** According to the ICRC Customary Law Study, which is based upon State practice that arguably cannot be divided into practice under IHL and practice under IHRL,[596] customary IHL prohibits the arbitrary deprivation of liberty in both IACs and NIACs.[597] This rule is interpreted using significant references to IHRL. The Study states that laws must previously establish the legal basis for internment and that there is an 'obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention'.[598]

**10.289** As States (and I would add non-State armed groups) regularly intern enemies in NIACs without trying them, the ICRC and many others, including the US and the UK, argue that customary law of NIACs provides for an inherent legal basis for such internment.[599] However, this alleged customary rule is problematic: it neither clarifies the admissible reasons for such internment nor the procedural guarantees benefiting those who may be interned. Therefore, even the ICRC concedes that 'a valid domestic and/or international legal source (depending on the type of NIAC involved), setting out the grounds and process for internment, must exist or be adopted in order to satisfy the principle of legality.'[600] In my opinion, if the State must nevertheless legislate, there is no practical relevance in affirming that an inherent legal basis exists in customary law. Furthermore, as mentioned above, the number of States confronted by NIACs that have adopted specific legislation authorizing internment of fighters demonstrates that no general practice and *opinio juris* exist according to which IHL alone would provide a sufficient legal basis. Even the majority of States involved in extraterritorial NIACs took the view that they could not intern fighters beyond a limited period of time.[601]

596 See 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* (OUP 2011) 72.

597 Henckaerts and Doswald-Beck, 344–52.

598 Ibid., 348–51.

599 For the ICRC, see Pejic, The Protective Scope, above note 42, 207. For the US, see Online Casebook, United States, The Obama Administration's Internment Standards. For the UK, see Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): A. Court of Appeal Judgment, para 174.

600 Pejic, ibid., 207.

601 See MN 10.018.

### 10.14.3 Reasoning by analogy to IHL of IACs

**10.290** If neither IHL treaties nor customary law provide an answer, it must again be assessed whether it is possible to reason by analogy to the rules on internment in IACs. Members of an armed group with a continuous fighting function most closely resemble by analogy POWs in IACs who may be interned without any legal proceedings until the end of active hostilities. This was the initial position of US during the Bush administration.[602] The ICRC Customary Law Study also indicates that it is appropriate to apply by analogy the standards of Convention III to those designated as 'combatants' in NIACs.[603] Even still today, the US asserts that it can detain (for example, in Guantánamo) individuals who are a part of or who provide substantial support to Al-Qaeda, the Taliban and their 'associated forces' in the same manner as POWs in an IAC without giving them the corresponding rights as they are by definition 'unprivileged' combatants (as, indeed, no combatant privilege exists in NIACs).[604] It is only for policy reasons that the US chooses to hold them no longer than necessary and has instituted a periodic review of the necessity to continue their internment.[605] The US further argues that, under the logic of IHL, those who may be targeted (and at the least members of an armed group with a continuous fighting function may be targeted at any time) may also, as a lesser evil, be detained. Although this is correct, in my view, this does not dispense the US from the obligation to prescribe permissible detention grounds and procedures by law. Notably, during the regional consultations held by the ICRC within the framework of its initiative to strengthen the legal protection of detainees in NIACs, it was only in the European consultation (which also included governmental experts from the US, Israel and Canada) that several States insisted on a status-based approach to the permissibility of internment in NIACs – an approach that would make members of an armed group detainable without any further reason.[606]

**10.291** Most arguments for and against such an analogy are similar to those mentioned above in relation to the permissibility of using lethal force against fighters. Some arguments, however, are specific to the internment issue. In favour of

602 Marco Sassòli, 'The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect?' (2011) 104 Proceedings of the Annual Meeting of the American Society of Intl L 277.

603 Henckaerts and Doswald-Beck, 352.

604 See Online Casebook, United States, The Obama Administration's Internment Standards.

605 HRCtee, 'Replies of the United States of America to the List of Issues' (2013) UN Doc CCPR/C/USA/Q/4/Add.1, para 89.

606 ICRC, 'Regional Consultation of Government Experts: Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' (report prepared by Ramin Mahad, ICRC 2013) 16–19.

an analogy to POWs, Article 3 of Convention III encourages parties to NIACs 'to bring into force by special agreements, all or part of the other provisions of the present Convention.' If the parties so agree, they could therefore apply the rules on POWs to fighters, which do not require an individual procedure to decide upon the internment. As special agreements that 'adversely affect' war victims are void under IHL,[607] applying POW status to fighters is therefore not considered as being detrimental to them. Even without a special agreement, a government could still apply POW status to fighters by resuscitating the concept of recognizing the belligerency of an armed group.[608]

**10.292** There are two main arguments against this analogy. First, it is more difficult upon arrest to identify fighters than soldiers of another State's armed forces. A tribunal can make the correct classification, but it will only have its say if the arrested person is not classified as a POW.[609] Second, POWs in IACs must be released and repatriated at the end of active hostilities, but that moment in time is more difficult to determine in a NIAC and even then IHL does not oblige governments to release captured rebels.[610]

**10.293** It is often suggested that even for enemy fighters the analogy should instead be made to the IAC regime established for civilians interned for imperative security reasons.[611] Indeed, in NIACs, no status-based categories (such as POWs and protected civilians) exist. Rather, what counts is each individual's conduct, and the precise nature of that conduct can only be established through an individualized procedure. The ICRC has adopted an 'institutional position' on the procedural principles and safeguards applicable to detention, but it does not claim that its position corresponds to existing legal obligations. It refers to it as a 'legal and policy framework' without clarifying what is law and what qualifies as policy.[612] The ICRC implicitly analogizes to civilian internees given that it requires imperative reasons of security as a permissible ground for internment

607 GC III, Art 6.

608 See Henckaerts and Doswald-Beck, 352, and MN 7.40.

609 GC III, Art 5, prescribes status determination tribunals for detained persons only when the Detaining Power wants to *deny* them POW status.

610 P II, Art 6(5), simply *encourages* the widest possible amnesty.

611 See Marco Sassòli and Laura Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599, 624–7.

612 Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375. In 2007, the ICRC adopted these principles and safeguards as its institutional position. See 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' annexed as Annex 1 to ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Report prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent, 2007) Doc No 30IC/07/8.4.

in a NIAC as well as procedural safeguards that are astonishingly similar to those required by Convention IV if protected civilians are interned – safeguards that are further enriched by guarantees drawn from IHRL.[613] '[T]he practicality of this approach, however, does not make it legally binding.'[614] In particular, those who analogize to the procedural guarantees foreseen by Convention IV for civilian internees have difficulties in explaining how such guarantees constructed by analogy can prevail over the black letter guarantees prescribed in IHRL.

### 10.14.4 The regime under IHRL

**10.294** Under IHRL, a person may only be deprived of liberty 'on such grounds and in accordance with such procedure as are established by law'.[615] On the distinct question of the reasons for which domestic law may authorize detention, most universal and regional IHRL treaties generally prohibit 'arbitrary' arrest or detention.[616] Only Article 5 of the ECHR specifically and exhaustively enumerates the admissible reasons for depriving a person of their liberty. Administrative detention is not listed among those reasons, and it is therefore inadmissible under that provision of the ECHR[617] except if it is 'reasonably…necessary to prevent' an individual from committing a concrete and specific offence. The European Court of Human Rights, however, recently determined that State practice, in conformity with which the ECHR must be interpreted, demonstrates that no State in an IAC has derogated (under Article 15 of the ECHR) from Article 5 to detain POWs under Convention III or civilians under Convention IV.[618] Accordingly, the Court held that it could 'accommodate' Article 5's exhaustive list of permissible reasons for detention with the rules of IHL of IACs that allow the internment of POWs (without any particular reason) and civil internees (for imperative security reasons and subject to procedural guarantees prescribed in Convention IV).[619] As for the ICCPR, the UN Human Rights Committee underlines that '[t]he drafting history…confirms that "arbitrariness", is not [simply] to be equated with "against the law", but must be interpreted more broadly to include inappropriateness, injustice, lack of

613 See Updated ICRC Commentary GC I, paras 721–4.
614 Sassòli and Olson, above note 611, 626.
615 ICCPR, Art 9(1). See also ECHR, Art 5(1); ACHR, Art 7; ACHPR, Art 6.
616 ICCPR, Art 9(1); ACHR, Art 7; ACHPR, Art 6.
617 See Online Casebook, ECHR, Hassan v. UK, para 97.
618 Ibid., paras 101–2. For a convincing criticism, see Yip, above note 34, 91–8.
619 See Online Casebook, ECHR, Hassan v. UK, paras 103–7.

predictability and due process of law.'[620] In addition, the arrest and detention must be reasonable and necessary.[621]

**10.295** Under IHRL, the question therefore arises as to whether IHL of NIACs provides the necessary legal basis to detain fighters. Lower courts in the UK have given a negative answer with forceful and detailed arguments.[622] The UK Supreme Court, however, left the question open, holding that at least UN Security Council resolutions authorizing a State to take 'all necessary measures' to maintain security in a certain area provide a sufficient legal basis.[623] As explained above, the ICRC's view on this question is slightly ambiguous: it argues that IHL provides a legal basis to intern fighters in NIACs, but that an additional domestic or international legal source must exist setting out the grounds and process for internment to satisfy the principle of legality.[624]

**10.296** In favour of the possibility that IHL provides a sufficient legal basis for depriving someone of their liberty, it may be mentioned that Convention III (particularly Article 21) is generally considered as containing a sufficient legal basis for interning POWs. No State provides in its domestic legislation a separate legal basis for the internment of POWs. The former European Commission on Human Rights found that it was not necessary to assess whether Turkey's detention of Cypriot POWs violated Article 5 of the ECHR,[625] even though that provision does not include the detention of POWs in its exhaustive list of reasons permitting detention. Many also argue that Convention IV provides a sufficient legal basis to intern protected civilians for imperative security reasons.[626] The difference, however, is that – contrary to IHL of IACs – IHL of NIACs does not offer any textual argument for the existence of such a legal basis (and on the admissible reasons for such a deprivation of freedom).

620 HRCtee, *Mukong v Cameroon* (Views) Communication No 458/1991 (21 July 1994), as reproduced in Office for the UN High Commissioner for Human Rights, *Selected Decisions of the Human Rights Under the Option Protocol* (UN 2005) vol V, 86.

621 General Comment No. 35, above note 17, paras 12, 18, 38, 66.

622 See Online Casebook, United Kingdom, The Case of Serdar Mohammed (High Court Judgment); Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): A. Court of Appeal Judgment.

623 See Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): B. Supreme Court Judgment.

624 See MNs 10.003, 10.017, 10.289.

625 The European Commission of Human Rights, *Cyprus v Turkey* (Report) Application Nos 6780/4 and 6950/75 (10 July 1976) 4, 108–9, para 313.

626 See Online Casebook, ECHR, Hassan v. UK, paras 104–5. IHL nevertheless requires that occupying powers prescribe a regular procedure. See also MN 8.178.

**10.297** Finally, even when a sufficient legal basis and admissible reason exist, IHRL provides arrested persons with the right to bring proceedings before a court so that it may decide without delay on the lawfulness of the detention and order the detained person's release if the detention is unlawful.[627] While the court does not necessarily need to be a fully independent and impartial tribunal capable of trying a person, it must be judicial in character, and it may only make decisions after adversarial judicial proceedings that provide individual guarantees appropriate to the reasons underlying the internment in question. Such guarantees include a right to legal assistance if a detained person cannot otherwise effectively exercise their right to challenge the detention's lawfulness. This procedure must begin within a few days after the request for review is made.

### 10.14.5 An attempt to apply the *lex specialis* principle

**10.298** Although the two operations are intimately linked, one must first determine whether IHRL or IHL prevails under the *lex specialis* principle before analysing, if IHRL prevails, whether IHL can offer the legal basis, admissible grounds and procedural safeguards for a lawful detention as required by IHRL. The ICRC Customary Law Study renders this analysis nearly theoretical because it interprets the customary IHL prohibition against arbitrary detention as requiring nearly the same conditions as IHRL.

#### a. IHRL normally prevails

**10.299** Rules of IHL of NIACs providing procedural guarantees to arrested persons do not exist while those of IHRL are clear and well developed by jurisprudence with the exception of the permissible scope of derogations. The extraterritorial application of IHRL to persons detained by a State is also less controversial than for other issues. As the IHRL rules on detention are more precise and restrictive, they must therefore prevail. The ICRC Customary Law Study appears to adopt this approach when it interprets the alleged IHL rule prohibiting the arbitrary deprivation of liberty through the lens of IHRL.[628] Moreover, unlike persons targeted in the conduct of hostilities (for whom a flexible approach was advocated above), detainees are clearly under the control of those who detain them. In addition, this result is not very different from the one achieved through applying by analogy the guarantees Convention IV provides to civilians detained in IACs. Indeed, the only difference between the two regimes

627 ICCPR, Art 9(4); ECHR, Art 5(4); ACHR, Art 7(6); and (arguably) ACHPR, 7(1)(a).
628 See Henckaerts and Doswald-Beck, 344–52.

is that IHRL requires an actual court to decide upon the detention, while an administrative body is sufficient under IHL.[629]

**10.300** If, as suggested here, IHRL prevails, the next step is to determine whether IHL can nevertheless offer the necessary legal basis for detaining fighters. I have shown above why this is not the case.[630]

**10.301** IHL, however, must prevail when either an agreement between the parties or a unilateral recognition of belligerency makes the full regime of POWs applicable because that regime provides rules on detention that were specifically made to address the particular situation of armed conflicts. In such cases, although detained fighters are disadvantaged by a lack of access to habeas corpus (although a procedure to determine whether an arrested person is or is not an enemy fighter benefiting from POW status must inevitably exist), they nonetheless benefit from a detailed regime governing their internment and providing them with immunity against prosecution as well as a right to be released at the end of active hostilities.

### b. Internment by armed groups

**10.302** The first objection to applying IHRL as the *lex specialis* on the issue of detention is that it inevitably leads either to unrealistic requirements for armed groups or, if applicable only to the governmental side, to unequal treatment between the parties of a NIAC. The question of whether a non-State actor may establish courts remains controversial.[631] Whether such actors can also satisfy the requirement that any internment has both a legal basis and procedural safeguards established by law is equally contentious. While a State can pass domestic laws to satisfy the requirements for a lawful detention, how can non-State actors establish the necessary legal basis and procedural safeguards by law? Could non-State actors also derogate from IHRL? Parties to armed conflicts intern persons to gain a military advantage by preventing them from continuing to bear arms. If, however, non-State actors cannot legally intern members of government forces under IHRL, they are left with no option other than to either release the captured enemy fighters or to kill them. The former is patently unrealistic, while the latter constitutes a war crime.[632] Rules applicable to armed conflict that make efficient fighting impossible will not be respected, thus undermining any protection the law provides. These considerations may provide

629 See Pictet Commentary GC IV, 260, 369.

630 See MNs 10.295–10.297.

631 Somer, above note 520.

632 ICC Statute, Art 8(2)(e)(x). See also Henckaerts and Doswald-Beck, 161.

some reasons why the application of the *lex specialis* principle should not lead to the same results for non-State armed groups as for States even if it is accepted that IHRL binds armed groups.[633] In my opinion, although armed groups may legislate and establish courts, they are not required to do so. Thus, IHL applicable to both parties of a NIAC first requires, at a minimum, that the reasons for interning someone must be established in the abstract and may not be left to the arbitrary decision of the captor. Second, the captured person must have a possibility to challenge the internment decision before someone other than the captor who is independent of the capturing unit. However, those hearing the appeal do not necessarily need to be independent from the non-State party to the conflict. Indeed, even a State's judicial system only needs to be independent from the State's executive and legislative branches of government and not from the State itself.

### c. Are the IHRL requirements realistic for States?

**10.303** The second main difficulty with my suggestion that IHRL constitutes, at least for the State, the *lex specialis* concerning detention in NIACs (including even for fighters) is whether it is realistic to expect States, who possibly intern thousands of fighters, to bring all internees (at least upon their request) before a court without delay during a NIAC. During such conflicts, it is not only challenging for States to bring such persons before an appropriate court without delay but also to submit sufficient files and evidence to obtain confirmation of the admissibility of detaining them. At least for captures made during active hostilities, it is unrealistic to expect while the fighting goes on that soldiers, who must accept the surrender of enemies, create files that can be used in court, leave the battlefield to testify in court or collect other evidence necessary for the State to oppose the argument by detainees that they neither directly participated in hostilities nor were members of an armed group. If it is unlikely that a habeas corpus procedure will confirm the lawfulness of interning enemy fighters, the obligation to conduct it could result in the release of most fighters arrested by armed forces on the battlefield by an independent and impartial court. This, in turn, could lead to less compliance with the rules in the long-term or, in other words, an increase of summary executions disguised as battlefield killings and the use of secret detention. Considerably lowering the habeas corpus procedure requirements, at least for persons arrested during hostilities, may provide one way out of this dilemma. It is often believed that a human rights court would not show such flexibility, but, in my view, this cannot be assumed. The practical effects of such a reduced habeas corpus procedure would not be very different

633 See MNs 9.023–9.025.

from those resulting from applying by analogy Convention IV's rules on internment procedures.

**10.304** At least for IACs, even the European Court of Human Rights, which is traditionally the human rights treaty body that is most reluctant towards applying IHL, accommodated (in cases of IACs) IHRL's requirements on detention in light of IHL when it interpreted the admissible reasons for an internment, decided whether a derogation is required to make administrative detention admissible and determined the nature of the body hearing a challenge to a detention's legality. Specifically, the Court accepted that it might not be practicable in an IAC for a 'court' to determine the legality of a detention; rather, it found that a 'competent body' as required by Convention IV may be sufficient under the ECHR 'if it provides sufficient guarantees of impartiality and fair procedure to protect against arbitrariness'.[634] Similarly, the Inter-American Commission of Human Rights found that IHL of IACs provides the requisite legal basis as well as permissible reasons to deprive persons of their liberty to make an internment lawful (that is, not arbitrary) and that it may be sufficient under IHRL for a 'quasi-judicial body' to decide upon a habeas corpus petition in an IAC.[635] Until now, however, no human rights body has adopted such a position concerning NIACs, and, in my view, it is unlikely that this will occur because IHL does not provide any hard legal provisions concerning these issues in NIACs. Human rights bodies, however, could adapt IHRL to the realities of a NIAC by, among other things, referring to IHL of IACs, which could play a role in indicating what is realistic in an armed conflict. Such a case-by-case approach should not lead to the same requirements applying to all cases of internment of fighters in a NIAC. When fighters are arrested in their home during a pre-planned operation, the usual habeas corpus procedural requirements remain realistic. When a fighter is captured during hostilities, however, this procedure must be considerably simplified. In such a situation, it is possible that only the bare historical skeleton of habeas corpus remains applicable or, in other words, the requirements that detained persons are informed of the reasons for their detention and are provided with the opportunity, upon their request, to explain the reasons why the detention is unlawful to an independent and impartial person or body that has the necessary jurisdiction to order their release if warranted.[636]

634 See Online Casebook, ECHR, Hassan v. UK, para 106.

635 See Online Casebook, Inter-American Commission on Human Rights, Coard v. United States, para 58.

636 See Online Casebook, United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments): B. Supreme Court Judgment, paras 105–7.

### d. The need for specific rules

**10.305** While the aforementioned solutions are not ideal, it is the best that the existing law can offer. Ideally, specific IHL rules should be adopted, which would then constitute the applicable *lex specialis*, that take IHRL into account. Even the ICRC considers that it is possible to fill some of IHL's procedural gaps by reference to IHRL treaties, instruments of soft law and jurisprudence, all of which may supplement the minimum standards found in IHL.[637] According to the ICRC, the following general principles are then applicable as a 'policy framework' to internment in NIACs: (1) it must be considered an exceptional measure; (2) it may never serve as an alternative to criminal proceedings; (3) it can only be ordered on an individual, case-by-case basis (as mass internment would amount to collective punishment), and it must not be taken on a discriminatory basis; (4) administrative detention must cease as soon as the security reasons leading to the detention no longer exist; and (5) administrative detention must conform to the principle of legality.

**10.306** Concerning the required procedure, the ICRC suggests that internees must: (1) have prompt access to information about the reasons for their detention in a manner that allows them to challenge the lawfulness of the detention; (2) be registered and held in a recognized place of internment; (3) have the lawfulness of their internment or detention reviewed by an independent and impartial body; (4) have the right to legal assistance; (5) have the right to periodic review of the lawfulness of continued detention; and (6) be able to, together with their legal representative, attend all of the aforementioned proceedings.[638]

**10.307** These procedural safeguards are very similar to the legal regime and procedures Convention IV prescribes to intern civilians for imperative security reasons but are also further enriched by some IHRL guarantees. Although these rules lead to a satisfactory regime, it is difficult to claim, in particular for fighters, that they correspond to the law as it currently exists. Even though, as previously shown above, an analogy to the procedures foreseen for POWs is inappropriate with respect to the detention of members of armed groups in a NIAC, there is no reason (other than the desired result) why, under existing law, IHL rules applicable to the detention of *civilians* should apply to the detention of fighters by analogy. However, only if this regime is binding law could it constitute the applicable *lex specialis* (with which the more far-reaching guarantees offered by IHRL treaties would need to be 'accommodated'). Until States accept new

637 Pejic, Procedural Principles, above note 612, 379
638 Ibid., 384–9.

binding IHL procedural guarantees following the current ICRC initiative to strengthen IHL of NIACs as it relates to detention, human rights bodies will therefore likely decide that IHRL provisions on detention prevail on the internment of enemy fighters in NIACs.

**10.308** One can therefore only hope that the ICRC succeeds in convincing States to accept this framework in the current process aimed at strengthening IHL on detention in NIACs. Current reports, however, indicate that States will not accept it as binding IHL.[639] If it remains a 'policy framework' suggested by the ICRC or even becomes part of 'guidelines' reflecting discussions with States, it is doubtful that human rights supervisory bodies will, as the European Court of Human Rights recently did in respect of IHL of IACs treaty rules,[640] 'accommodate' their interpretation of IHRL requirements to this very 'soft' IHL or even recognize that such rules constitute the *lex specialis*. Consequently, it is possible that IHRL (interpreted as flexibly as possible with the realities of NIACs require) will continue to prevail for a long time as the *lex specialis* on the issues of the legal basis, admissible reasons and procedural guarantees for detention in NIACs.

639 See ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report' (report prepared for the 32nd International Conference of the Red Cross and Red Crescent, 2015) Doc No 32IC/15/19.

640 See Online Casebook, ECHR, Hassan v. UK, paras 104–6.

# 11

# CONCLUSION

**11.01** IHL cannot guarantee humanity in armed conflicts. This is true because it is not sufficiently respected, and States are unwilling and unable to accept mechanisms that efficiently enforce it, which would anyway be astonishing for a situation – armed conflicts – that would not exist if international law was already regularly and efficiently enforced. This is also the case because IHL rules cannot protect everyone everywhere at all times. Rather, IHL rules operate based on many distinctions between armed conflicts and other situations of violence that are not covered by IHL, IACs and NIACs, civilians and combatants, military objectives and civilian objects and own and occupied territory. Such binary distinctions are often difficult to apply to the multifaceted realities of contemporary armed conflicts, which only rarely involve the regular armies of well-organized and well-established States. Those distinctions also leave parties and individuals leeway to manipulate (in the absence of compulsory adjudication) IHL, and their consequences are not always obvious from a humanitarian point of view.

**11.02** IHL is, above all, a pragmatic endeavour. Its success depends on its effective application by parties to conflicts. As such, it must be based on a solid understanding of the problems, dilemmas and aspirations of all parties to armed conflicts, States, their militaries, non-State armed groups, humanitarians and victims. Traditionally, however, IHL is seen as only being made by States.

**11.03** IHL, the weakness of its enforcement and the fact that its mode of operation differs from domestic law can only be understood if it is viewed as a (very old) branch of public international law. Those who think that it is qualitatively weaker than other branches of public international law misunderstand those other branches. However, it is true that States are particularly reluctant to accept efficient implementation mechanisms in the field of IHL. This is not surprising because IHL only applies to armed conflicts, which is a situation in which their very existence is often threatened.

**11.04** We have also discussed in this book the many unresolved controversies concerning the interpretation of IHL rules and their interaction with the rules of other branches of international law. Many of those controversies – which fortunately do not concern the core of IHL – are due to the different values that different people from diverse epistemic communities based on idealism or realism give to military necessity and humanity and to the tension between the need to 'protect' IHL from the politicization of other branches and the inescapable truth that it is just one branch of international law, which can no longer be divided into the law of war and the law of peace as the latter now equally applies in armed conflicts.

**11.05** Some controversies, however, are also pursued in bad faith by lawyers who advance every imaginable (and even absurd) argument in favour of their client's (possible future) interests. While this is legitimate in a criminal trial where judges have the last word, it neglects that all of us play a key role in a self-applied system like international law to work together as the implicit and informal 'court' that adjudicates what is right from what is wrong. In IHL, even more so than in other branches of international law, what is wrong and inhumane cannot be legally correct. Conversely, however, IHL also does not prescribe everything that is desirable from a humanitarian point of view. IHL would anyway not be needed in a world governed by the rule of law.

**11.06** Nevertheless, as it stands, IHL protects millions of people in current armed conflicts because, among other reasons, it remains realistic by not hindering parties from engaging in and winning armed conflicts. Instead, other branches of international and domestic law have the important task of preventing conflicts, but they unfortunately sometimes fail and then IHL applies.

**11.07** The inevitably biased perception created by the media, NGOs and international criminal tribunals (which inescapably deal with violations) fuels scepticism of IHL. Although this scepticism may be attractive for the career of some academics and the theoretical satisfaction of some intellectuals, it also constitutes a self-fulfilling prophecy. Few belligerents are ready to be the only idiots who respect rules once they are convinced that no one else respects those rules. To my knowledge, no critic has suggested rules fundamentally different from the existing ones that would both better protect those affected by armed conflicts and have the slightest chance to be accepted by States as well as armed groups on any of IHL's great issues, which are the threshold of application of IHL of IACs and NIACs, the distinction between civilians and combatants or fighters, the balance between humanity and military necessity in attacks directed at

military objectives and, above all, the struggle for better enforcement mechanisms capable of demonstrating that the law works without applying double standards.

**11.08** On a lower level of generality, realistic proposals seek to solve, including by referring to other branches of international law, some of the current lacunas in IHL, such as the conditions under which fighters may be detained or targeted in NIACs, how the treatment of detainees can be monitored, when humanitarian assistance must be accepted by belligerents, how those providing weapons could contribute to the respect of IHL instead of violations and how to increase the ownership of IHL among non-State armed groups. However, States and their lawyers are not yet ready to accept these proposals because of – according to the State concerned – a different mixture of acting in bad faith to hide violations, an obsession over Westphalian State sovereignty and the fear (which is inherent in any branch of law) that new legal rules could one day also limit their State's freedom of action. Even if armed groups could contribute to this debate, as this book suggests they should, I am unfortunately not convinced that most of them would have an attitude that is very different than most States.

**11.09** As for the humanitarians, too many of them prioritize their respective institutional agendas. In many humanitarian organizations, scepticism of IHL reigns even at the highest level and among those acting in conflict areas, which is well hidden behind brilliant speeches about IHL's importance. In addition, their desire to achieve short-term negotiation successes, the result of which can be shown in the media and to donors, all too often prevails over a long-term principled approach upholding the rule of law in the current adverse international environment.

**11.10** Finally, while public opinion is a powerful tool to obtain the respect of IHL, it can be manipulated through obscuring the facts and – in a more subtle way – the applicable rules. The public must therefore be educated in all aspects of IHL, including by fighting against a selective perception of violations. First, the public often believes that those they favour respect IHL while the opposing party systematically violates it. Second, the strict separation between *jus ad bellum* and *jus in bello* is not just relevant for those who studied Latin and want to sharpen their legal mind. Indeed, too many persons who are convinced that the adversary violated *jus ad bellum* believe that it also necessarily violates IHL. They believe that they or the others fighting on their behalf do so for a just cause and therefore cannot possibly violate IHL. Both these perceptions are wrong and undermine the readiness of people thus manipulated to respect

IHL. Education about IHL should therefore also focus on showing that the adverse party makes efforts to respect IHL. States and non-State armed groups could facilitate this by accepting credible fact-finding mechanisms that demonstrate their efforts to respect IHL.

**11.11** For the time being, we therefore must live with the current rules and institutions described in this book along with proposals for new interpretations on some issues and some words of caution on other issues, both of which may be contested in good faith. In the long run, it is difficult make predictions regarding the future of IHL. In particular, it remains to be seen whether IHL must cease to exist (but hopefully not before the phenomenon it regulates, armed conflicts, also disappears) should a World State come into existence because the distinction between lawful acts of war and crime would then fade away. It is also difficult to predict whether it is possible to uphold the rule of international law among sovereign and legally equal States when they are engaged in armed conflicts against each other or non-State armed groups. The latter should no longer be ignored but seen as partners in obtaining a minimum of humanity in an inhumane situation. Finally, it is also unclear whether IHL will become a mere tool that is useful in some but not all humanitarian negotiations without any force of its own absent the backing by a humanitarian organization or a third State in the field itself. Whatever the long-term perspective may be, the study of IHL is still a necessary and worthwhile endeavour as it is not only a toolbox of arguments about what is and what is not acceptable in armed conflicts but also, in my view, an objective legal order, which States, humanitarians and increasingly armed groups accept (at least by paying lip service to it), that stands behind as well as protects those affected by armed conflicts even when no one else does.

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