

**CH 27: THE LAW OF ARMED CONFLICT (INTERNATIONAL HUMANITARIAN LAW)**

**CHAPTER 27**

**THE LAW OF ARMED CONFLICT (INTERNATIONAL HUMANITARIAN LAW)**

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**SUMMARY**

The international law of armed conflict (also known as international humanitarian law, also known as the law of war) regulates the conduct of hostilities—including the use of weaponry—and the protection of victims in situations of both international and non-international armed conflict. Rooted in customary law, often of very great antiquity, since the late nineteenth century it has become one of the most intensively codified areas of international law. The 1949 Geneva Conventions, which form the cornerstone of contemporary humanitarian law, have been ratified by every single State on the face of the planet; yet implementation and enforcement are, if anything, even more problematic in this than in other areas of public international law, which has led to a symbiotic link between international humanitarian and international criminal law. Indeed, it was the creation of international criminal tribunals to deal with the aftermath of appalling atrocities in the former Yugoslavia and Rwanda, in the early 1990s, which sparked a renewal of interest in substantive humanitarian law, leading to its reaffirmation and development. This chapter outlines the scope of application of the law, issues of personal status (combatants and civilians), the conduct of hostilities (methods and means of warfare, including choice of weapons and targeting operations), the protection of victims (sick, wounded, shipwrecked, prisoners of war, and civilians), and various ways of securing the law's implementation and enforcement.

## I. INTRODUCTION

It is a fact of life that armed conflict—the resort to organized force between States or within States—is, and always has been, an integral part of the human condition. Disregarding such indicia as the duration or intensity of the fighting, the number of casualties incurred or whether hostilities are active or ‘frozen’, there are currently some 50 situations in the world where there is either an actual armed conflict or a degree of tension so heightened that there is a real risk of resort to force. Given this state of affairs, coupled with the increase in humanitarian activism, the so-called ‘CNN effect’ of constant televised reporting from conflict zones, and enhanced mechanisms for securing the international legal liability of both governments (under the doctrine of State responsibility) and individuals (under the doctrine of individual criminal responsibility), it is unsurprising that international humanitarian law (IHL) has re-emerged from the shadows of public international law during the last three decades. The well-known aphorism, ‘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’ (Lauterpacht, 1952, p 382), may have been accurate enough 60 years ago, but it is certainly no longer so today. Although the First Gulf War (1991) was the first modern armed conflict of which it could be said that, ‘[d]ecisions were impacted by legal considerations at every level, [the law] proved invaluable in the decision-making process’,<sup>1</sup> the law of war—now more commonly referred to as IHL or, alternatively, the law of armed conflict (LOAC)<sup>2</sup>—is of very much greater antiquity (Green, 2008, pp 26–45).

For much of its existence, the primary purpose of the law of war was to regulate in a technical sense the conduct of hostilities between belligerents. During the Middle Ages in Europe, war was

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<sup>1</sup> General Colin Powell, Chairman of the US Joint Chiefs of Staff, cited in US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O* (1992) 31 ILM 615.

<sup>2</sup> The terms ‘IHL’ and ‘LOAC’ are synonymous and are used interchangeably throughout this chapter. The term ‘law of war’, while still appropriate in an historical context, has been generally abandoned in the contemporary legal discourse.

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regarded as a kind of game played by princes, nobles and knights on horseback; like any game, it had to have a set of rules. The Second Lateran Council's ban on crossbows in 1139, for instance, was formulated not by reason of the pain and suffering which the weapon might cause to anyone unfortunate enough to be struck by one of its bolts, but because, by enabling a man to strike from a distance without himself being struck, the crossbow was considered a disgraceful and ignoble weapon which violated the rules of chivalry (Draper, 1965, pp 18–19).

The 'rules of the game' that constituted the laws of war at this time, however, were of little relevance to the feudal peasants who constituted the foot soldiery of European armies, nor were they believed to be of any application to wars against 'uncivilised enemies' – infidels and 'primitive peoples'. By the time of the Peace of Westphalia (1648), war had become a more public activity, in which increasingly regularised, standing armies fought on behalf of their countries, rather than as a time-limited feudal service obligation to their overlords. This contributed during the eighteenth century to the growth of the concept of reciprocity: captured enemy soldiers, for example, should be well treated because there was a vested interest in having the adverse party accord the same treatment to one's own soldiers who were captured on the battlefield.

The law at this time was almost exclusively customary in nature, encompassing a wide variety of rules and practices that had been mutually observed by warring forces for many centuries. By the mid-nineteenth century and such conflicts as the Crimean (1853–5) and Franco-Austrian (1859) Wars, the exponential growth in human suffering, caused by a combination of developing military technology and inadequate provision for military medical facilities, together with increased reporting of the battlefield (the latter enhanced further by the expansion of war photography in the American Civil War, 1861–5), led to the rise of humanitarianism as a major concern in the regulation of conflicts. This desire to provide for the protection of victims of hostilities in turn encouraged the increasing use of multilateral treaties to codify the existing rules—and develop new ones.

Today IHL is very largely codified in a series of some 58 multilateral treaties. However, the cus-

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tomary laws of war continue to retain considerable significance, in part because of the recognition (as long ago as 1899)<sup>3</sup> that treaties could not cover every eventuality that might arise in an armed conflict; the International Committee of the Red Cross (ICRC) reinforced this with the publication of a major piece of research identifying 161 ‘rules’ of customary international humanitarian law and collating the evidence (examples of State practice and *opinio juris sive necessitatis*) on which they are based (Henckaerts and Doswald-Beck, 2005). Furthermore, the 1949 Geneva Conventions are now so widely accepted—they attained their 196<sup>th</sup> accession (by Palestine) in 2014<sup>4</sup>—that they are considered to have passed in their entirety into customary international law. This enabled them to be applied in arbitration proceedings between Ethiopia and Eritrea relating to their 1998–2000 conflict: Eritrea, having attained independence only five years before the commencement of hostilities, had not at the relevant time become a party to the Geneva Conventions. Nevertheless, it accepted their application *ex post facto* on the basis of their universal acceptance as customary law.<sup>5</sup>

For all their etymological similarity to each other, and notwithstanding the fact that the language of many provisions of humanitarian law relating especially to non-international armed conflicts is clearly influenced by the language of human rights,<sup>6</sup> it is important to emphasize that international humanitarian law and international human rights law are not the same thing at all. If humanitarian law has been characterized by the International Court of Justice (ICJ) as the *lex specialis* applicable in situations of armed conflict and mostly concerned with how belligerent States treat nationals of adverse and neutral parties, human rights law is better viewed as a *lex generalis* broadly applicable in all situations—both peace and

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<sup>3</sup> In the ‘Martens Clause’, Preamble to The Hague Convention II with Respect to the Laws and Customs of War on Land (1899).

<sup>4</sup> The Conventions do not apparently apply to Hong Kong, since in 1997 the UK’s ratification ceased to have effect for that territory upon its reversion to Chinese sovereignty. The Beijing government has not extended its ratification of the Conventions to Hong Kong, although it did so in respect of Macao (in 1999).

<sup>5</sup> Ethiopia-Eritrea Claims Commission, *Partial Awards on the Claims Relating to Prisoners of War* (2003) 42 ILM 1056 and 1083.

<sup>6</sup> This is especially the case in respect of Additional Protocol (AP) II (1977).

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war—and mostly concerned with how States treat their own nationals. In relation to situations of armed conflict, humanitarian law is almost invariably more detailed and comprehensive than the law of human rights.<sup>7</sup> That said, the application of these two bodies of law has become increasingly blurred, largely in consequence of a complaint brought to the European Court of Human Rights (ECtHR) in relation to the bombing of the Federal Republic of Yugoslavia (FRY) by air forces of the North Atlantic Treaty Organisation (NATO) in 1999, and the *lex specialis* doctrine has not been accepted by all commentators (Milanovic, 2011).

The applicants in the *Banković* case sought to argue that the NATO States had violated the right to life of Serbs in the FRY in the conduct of their bombing campaign, specifically in relation to the destruction of the Serbian Radio and Television studios in Belgrade. In dismissing the application, the ECtHR found that FRY nationals were not ‘within the jurisdiction’ of the NATO States in the terms of Article 1 of the European Convention of Human Rights (ECHR) because, *inter alia*, bombing an area from 30,000 feet did not amount to having ‘effective control’ of that area for the purposes of applying human rights obligations.<sup>8</sup> An aerial bombing campaign, however, is distinguished for the purposes of ECHR application from a military occupation: thus, Turkey has been held responsible for the application of the ECHR in the ‘Turkish Republic of Northern Cyprus’ because it has ‘effective control’ over that territory.<sup>9</sup> A subsequent series of decided cases in the UK and the European Court of Human Rights has indicated that human rights law *is* applicable in respect of certain situations that may arise during military operations overseas, most notably where forces are in occupation of territory or have physical custody of individuals (which the House of Lords in *Al-Skeini* likened to

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<sup>7</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, paras 24–5.

<sup>8</sup>*Banković et al v Belgium et al (Dec) [GC]*, no 52207/99, paras 67–81, ECHR 2001-XII; 123 ILR 94. For detailed discussion of this and other cases concerning extraterritorial jurisdiction under the ECHR, see Byron, 2007, pp 869–78.

<sup>9</sup>*Loizidou v Turkey (Preliminary Objections)*, Judgment of 23 March 1995, Ser A, no 310, 20 EHRR 99 paras 56–64. On the applicability of human rights law in territory under belligerent occupation, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136, paras 105–13.

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having extraterritorial ‘effective control’ of a prison).<sup>10</sup> All this is not to say, however, that human rights law regulates *prima facie* the conduct of soldiers during active hostilities on the battlefield; indeed, it would be entirely counterintuitive to reach that conclusion. One of the most basic human rights is the right to life; yet it is precisely this right that may, with certain limitations, lawfully and violently be taken away in armed conflicts. Humanitarian law has evolved highly detailed and technical provisions to govern soldiers’ and civilians’ conduct in such situations, and it continues to be the primary body of law applicable in all situations of armed conflict.

### II. SCOPE OF APPLICATION OF HUMANITARIAN LAW

The international law of armed conflict applies in all armed conflicts, however they are characterized, and applies to all parties in a conflict, irrespective of the legality of the resort to force. There is no doctrinal relationship between *jus ad bellum* and *jus in bello*: the application of the latter in no way depends upon the former, and the legality of a conflict as such has no bearing whatsoever on the use of IHL, although justifications publicly offered by States for their military operations in recent years have increasingly tended to blur the boundaries between these two bodies of international law, especially in the tendency to base actions like drone strikes on the right of individual or collective self-defence under Article 51 of the United Nations Charter (or customary international law) (Turns, 2017). It would thus be quite incorrect to suggest that, for instance, every individual attack (such as an airstrike) undertaken as part of an operation illegal under the *jus ad bellum* is *ipso facto* also illegal under the *jus in bello*, or conversely, that the victim of an act of aggression has the right to attack the civilian population of the aggressor.<sup>11</sup> The question, however, of when and how humanitarian law applies (‘scope of application’) is not as

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<sup>10</sup> *Al-Skeini and others v United Kingdom* [2011] ECHR 1093; [2011] 53 EHRR 18; *Al-Jedda v United Kingdom* [2011] ECHR 1092; [2011] 53 EHRR 23; *Al-Saadoon and Mufdhi v United Kingdom* [2010] ECHR 285; [2010] 51 EHRR 9; see also *Secretary of State for Defence v R (Smith)* [2009] EWCA Civ 441; [2009] 3 WLR 1099; *Smith v Ministry of Defence* [2013] UKSC 41; *Hassan v United Kingdom* [2014] ECHR 936.

<sup>11</sup> Some advocates of the Palestinian cause aver that, because Israel is illegally occupying Palestinian land, it is legitimate to target Israeli civilians: see, eg *The New York Times*, 5 May 2009.

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straightforward as it might initially seem. This is partly because of some uncertainties surrounding the definition of armed conflict itself, and partly because of the different types of armed conflicts that are recognized in the contemporary law.

Traditionally, application of the law of war was triggered by a declaration of war, which had the legal effect of suspending most peacetime legal relations between belligerent States. Although a declaration of war did not invariably precede the actual start of hostilities,<sup>12</sup> it usually followed in due course once hostilities were under way; conversely, although there did not need to be active hostilities in progress at all times after a declaration of war had been issued, the existence of such a declaration was conclusive evidence as to the existence of a formal state of war. The state of war would normally be terminated only by a peace treaty, at which point the international law of peacetime relations would resume and the law of war would no longer be operative.<sup>13</sup> However, as has been suggested in recent years, with some understatement:

Developments in international law since 1945, notably the United Nations (UN) Charter, including its prohibition on the threat or use of force in international relations, may well have made the declaration of war redundant as a formal international legal instrument.<sup>14</sup>

In point of fact, there have been no formal declarations of war since the Soviet declaration of war on Japan in August 1945; the association of such declarations with the appearance of an unlawful use of

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<sup>12</sup> Eg the Japanese surprise attacks on the Imperial Russian Far East Squadron in Port Arthur (1904) and the US Pacific Fleet in Pearl Harbor (1941).

<sup>13</sup> The lack of peace treaties between Israel and its Arab neighbours (with the exception of Egypt and Jordan) could be said to imply that those countries remain in a state of war with each other, as the Armistice Agreements of 1949 did not terminate hostilities, but merely suspended them: Maoz, 2005, pp 36–44. A similar point may be made in relation to the situation between North and South Korea since the armistice agreement suspending hostilities in the Korean War in 1953.

<sup>14</sup> House of Lords Select Committee on the Constitution, Fifteenth Report of Session 2005–6, *Waging war: Parliament's role and responsibility, Volume I: Report* (HL Paper 236-I, 27 July 2006), para 10.

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force under the Charter, or an act of aggression, has led to the procedure becoming defunct. The kind of confusion implicit in British Prime Minister Anthony Eden's statement in 1956, that the UK was not at war with Egypt during the Suez Crisis but merely in a state of armed conflict with that country,<sup>15</sup> is now a thing of the past in international law: the term 'armed conflict' is preferred to the term 'war',<sup>16</sup> as the former is a purely factual description of a situation, without connotations of right and wrong as regards the *jus ad bellum*. It is additionally often perceived to be in a State's interest to refrain from such an unequivocal declaration of hostile intent, as the *status mixtus*—simultaneously observing the law of war for some purposes and the law of peace for others—affords more room to manoeuvre, both diplomatically and politically. This may be the case especially in a 'low-intensity conflict', wherein neither side provokes the other into escalation, resulting in a conflict that is relatively limited and easily contained, from which belligerents may back away without necessarily appearing to have been defeated in a military sense (Green, 2008, pp 91-3). During Indonesia's policy of *Konfrontasi* ('Confrontation') with Malaysia from 1962 to 1966, British troops were actively engaged in armed hostilities against Indonesian forces in North Borneo, but diplomatic and commercial relations between the UK and Indonesia continued throughout the four years over which the Confrontation persisted.<sup>17</sup>

In any event the application of humanitarian law in no way affects the legal status of parties to a given conflict; it depends on neither the legality of the initial resort to force, nor the formal recognition of a state of war or armed conflict by the belligerents. The Geneva Conventions, for example, are expressly stated to apply to 'declared war or any other armed conflict'.<sup>18</sup> In 1982 during the Falklands War, the UK publicly denied that it was at war with Argentina, yet it applied the law of armed

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<sup>15</sup> See *Hansard, HC Debs*, 1 November 1956, vol 558, cols 1639–43. Regarding legal characterization of the Korean War, see Jessup, 1954.

<sup>16</sup> On the official characterization of hostilities between the UK and Iraq in 2003 as 'armed conflict' but not 'war', see *Amin v Brown* [2005] EWHC 1670 (Ch).

<sup>17</sup> See *Hansard, HL Debs*, 14 November 1963, vol 253, cols 153–5.

<sup>18</sup> Geneva Conventions (GC), Common Article 2 (1949).



conflict in all its military operations.<sup>19</sup>

The difficulty lies in the fact that the law of armed conflict nowhere defines precisely what an ‘armed conflict’ is for the purposes of application of the law, despite the use of the phrase in the Geneva Conventions and other treaties that constitute this body of law. The ICRC indicated that, ‘[a]ny difference arising between States and leading to the intervention of members of the armed forces is an [international] armed conflict’ (Pictet, 1952, vol I, p 32), but this is problematic because it implies that even a very limited military operation of only a few hours’ duration and not followed by any other hostilities would have to be considered an armed conflict, a position which is not supported by State practice. Al

though there are court decisions on point from various national jurisdictions (including the UK),<sup>20</sup> these invariably have been concerned with defining ‘war’ in municipal law for such purposes as interpreting liability exclusion clauses in insurance contracts, rather than having anything to do with IHL. In 1995 the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or,

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<sup>19</sup> See, eg *Hansard, HC Debs*, 26 April 1982, vol 22, col 616 (on the treatment of Argentine prisoners of war—the Prime Minister’s statement that they were not prisoners of war because the UK was ‘not at war’ with Argentina was subsequently retracted, and all captured Argentine military personnel were treated in accordance with GCIII); *ibid*, 11 June 1982, vol 25, col 170W (on the treatment and repatriation of Lieutenant-Commander Alfredo Astiz of the Argentine Navy); *ibid*, 14 June 1982, col 611 (on the establishment by the ICRC of a neutralized zone in Port Stanley, in accordance with GCIV Article 15).

<sup>20</sup> Eg *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co* [1939] KB 544.

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in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>21</sup>

The statement in *Tadić* has since come to be widely accepted as a useful formulation of the concept of an armed conflict in customary international law. At least implicit in the formulation is the requirement that hostilities be ‘substantial’, ‘protracted’ and ‘large-scale’.<sup>22</sup> Thus, it is doctrinally possible for a very brief or limited military operation to take place, yet for there to be no armed conflict between the States involved, as in the Entebbe Raid (1976), when Israel mounted a military operation to rescue hostages being detained by hijackers on Ugandan territory. Although Ugandan soldiers did resist the Israelis and there were some exchanges of fire between them, resulting in casualties on both sides and the destruction of several Ugandan Air Force fighters, it was never accepted that there was an armed conflict between Israel and Uganda.<sup>23</sup> Similarly, armed incidents across international borders in connection with the civil war in Syria, such as repeated exchanges of artillery fire between Turkish and Syrian Government forces and the shooting down of a Turkish reconnaissance jet by Syrian anti-aircraft artillery in 2012, and the shooting down of a Russian attack aircraft by a Turkish fighter jet in 2015, have not been treated as constituting an armed conflict between those States. A maritime law enforcement operation involving the use of force might also not qualify as an armed conflict, even if it meets with armed resistance (ICRC, 2016, para 227). Nevertheless, it would surely be wrong to argue that States in such circumstances should actually be free to disregard substantive rules of IHL on the grounds that there is no formal situation of armed conflict; thus, in the last-named incident, the killing of one of the Russian pilots by ground fire attributed to the Free Syrian Army was a violation of customary IHL, at the very least (Henckaerts and Doswald-Beck, 2005,

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<sup>21</sup> *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72 (2 October 1995) 35 ILM 35, para 70.

<sup>22</sup> *Ibid.*

<sup>23</sup> Invocations of international law in the UN debates concerning the Israeli intervention at Entebbe were couched exclusively in terms of the *jus ad bellum*: see *Repertoire of the Practice of the Security Council* (1975-1980), pp. 286-290.

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Rule 48). The ICRC continues to maintain its position with regard to unilateral uses of force and *de minimis* situations such as minor skirmishes (ICRC, 2016, paras 222-223 & 236-244).

Notwithstanding the possibility that military forces might be deployed on active operations absent a state of armed conflict, the military doctrine of many major military powers today requires that their armed forces comply with the spirit and principles of LOAC in all their operations, irrespective of whether they are formally considered to be in a state of armed conflict.<sup>24</sup> It is not necessary for there to be actual fighting at all times in an armed conflict for the law to be applicable. Some of the treaties that constitute LOAC also apply in situations where actual fighting may no longer be taking place: eg prisoners of war continue to benefit from protection under the law until their final release and repatriation,<sup>25</sup> while the law relevant to military occupation and protection of the civilian population continues to apply as long as an occupation subsists, even if other substantive military operations ceased at an earlier date.<sup>26</sup> The Geneva Conventions are silent as to the end of armed conflict, but Convention IV's mention (in Article 6) of 'the general close of military operations' has acquired great practical significance with the modern decline in the practice of concluding treaties of peace (ICRC, 2016, paras 274-284).

Until the mid-twentieth century, international law only recognized armed conflicts between States as being subject to its legal regulation. This was partly because of the dominant concept of State sovereignty over internal affairs and partly because of the then prevalent view that international law was concerned only with the regulation of international relations between States. Possibilities for extending the reach of international law to non-international conflicts were traditionally limited although some did exist, even before 1949 (Moir, 2002, pp 4–18). In that year, Common Article 3 of the Geneva Conventions extended certain basic humanitarian rules of protection to 'armed conflicts not of an international character'; these were supplemented in 1977 by Additional Protocol II. A trend has

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<sup>24</sup> Eg US Department of Defense, Directive 2311.01E, 9 May 2006, *DoD Law of War Program*, para 4.1.

<sup>25</sup> GCIII Article 5.

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also emerged whereby certain rules are extended to all types of armed conflict, irrespective of their classification (Henckaerts and Doswald-Beck, 2005).<sup>27</sup> This trend is particularly apparent in, though not limited to, the treaties regulating weaponry (Turns, 2006).<sup>28</sup> While fulfilment of the trend would have the virtue of simplifying greatly the legal standards and their consistent application in all armed conflicts, however, the distinction between international and non-international conflicts retains its traditional importance in respect of several key legal provisions. ‘Grave breaches’ of the Geneva Conventions, for example, exist and may be punished exclusively in the context of international armed conflicts;<sup>29</sup> the qualifications of combatant and prisoner of war (POW) status do not exist in non-international armed conflicts.

Armed conflicts today, therefore, are normally classified into one of two types: international or non-international. The latter type may be further sub-classified into those conflicts that are internal to the territory of a State, and those that are not so confined but have cross-border, ‘spillover’ or ‘trans-national’ effects (ICRC, 2016, paras 465-482). In addition, a non-international armed conflict may become ‘internationalized’ in certain circumstances by the participation of forces from another State (Byron, 2001) or by a change in the legal personality of one of the parties, eg if a secessionist insurgency becomes recognised as a new State. The *lex lata* essentially restricts the internationalizing effect of interventions to cases where the foreign State is intervening on the side of *insurgents* (or exercising effective control, according to the ICJ – or overall control, according to the ICTY – over them) in an internal conflict, because then the requirement of an international armed conflict, for two or more *States* to be in conflict with each other, is met. On the other hand, situations where a State intervenes in an internal conflict by providing assistance to *government* forces fighting against insur-

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<sup>27</sup> *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72 (2 October 1995), paras 97–127; cf *ibid*, Separate Opinion of Judge Abi-Saab.

<sup>28</sup> Eg UN Convention on Conventional Weapons (1981), Amended Article 1 (2001).

<sup>29</sup> *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72 (2 October 1995), paras 79–84.

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gents are said to remain non-international in nature, because the intervening State is not fighting against the host State, although this position is not unanimously accepted. Thus, the UK technically considered itself to be engaged in a non-international armed conflict in Afghanistan once the Taliban were displaced as the *de facto* government of that country in December 2001.<sup>30</sup> The international law basis for this somewhat counterintuitive position derives exclusively from the practice of the Coalition States operating in Afghanistan and admittedly is supported by a strict interpretation of the wording of Common Article 2 of the Geneva Conventions, but otherwise lacks any doctrinal support in decided case law and is not unproblematic, in that the ‘inviting’ government may actually lack the legitimacy genuinely to invite foreign forces onto the State’s territory. It also takes no account of the UN Security Council’s role in ‘internationalizing’ a previously internal situation. In some contemporary conflicts, a single State intervenes (as with France in Mali, 2012-2014); in others, an international organisation mandates the intervention (as with the African Union Mission in Somalia since 2009); in yet others, an *ad hoc* coalition of interested States collectively intervenes on one side or the other (as with the Saudi-led coalition in Yemen since 2015). The multifaceted complexity of such conflicts as the Syrian Civil War, with its proliferation of multilaterally-engaged State and non-State parties, has led some commentators to adopt an approach focussing on the ‘fragmentation’ of the law, whereby international and non-international armed conflicts exist in parallel to each other in the same geographical and temporal space, but with different bodies of law applicable to different parties to the conflict (Ferraro, 2015; Lubell, 2017).

Under the Geneva Conventions an international armed conflict is defined as ‘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’, and also as ‘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’;<sup>31</sup> thus, such long-running situations as the Israeli occupation of Palestinian

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<sup>30</sup> *GS v Secretary of State for the Home Department* [2009] UKAIT 00010.

<sup>31</sup> Common Article 2.

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Territories since 1967<sup>32</sup> and the Moroccan occupation of Western Sahara since 1975<sup>33</sup> are correctly considered to be international armed conflicts, as is the unopposed Russian occupation of the Crimea since 2014.<sup>34</sup> An armed conflict ‘not of an international character’ simply has to occur ‘in the territory of one of the High Contracting Parties’.<sup>35</sup> The rather formalistic requirement that the conflict be between two or more ‘High Contracting Parties’ was a direct descendant of the stipulation, in the 1899 and 1907 Hague Conventions, that their provisions applied only ‘between contracting Powers, and then only if all the belligerents are parties to the Convention’.<sup>36</sup> These *si omnes* or ‘all-participation’ clauses had to some extent already been discredited by notable abuse by Germany and Japan during World War II, when the Germans refused to apply the 1929 Geneva Convention on the Treatment of Prisoners of War *vis-à-vis* the Soviet Union, ostensibly on the grounds that the latter was not a party to that instrument.<sup>37</sup> Japan, also not a party to the Geneva Convention, punctiliously sent diplomatic notifications to the governments responsible for Allied forces in the Far East, stating that it would nevertheless apply the terms of that Convention, *mutatis mutandis*—and then went on to treat captured Allied nationals with casually systematic cruelty.<sup>38</sup> With both the Geneva Conventions and The Hague Regulations considered as customary international law, however, the ‘all-participation clauses’ are considered redundant today: IHL is truly universal in its application once there is a factual situation of armed conflict.

The scope of application provisions of the two 1977 Additional Protocols, which added to the defi-

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<sup>32</sup> Although Israel disputes the formal applicability *de jure* of GCIV to the occupation of the West Bank, it applies the Convention’s humanitarian provisions on a *de facto* basis (Shamgar, 1971, pp. 262-266)..

<sup>33</sup> See UN Doc. A/RES/34/37, 21 November 1979, para. 5.

<sup>34</sup> See UN Doc. A/68/PV.80, 27 March 2014, 1 & 8

<sup>35</sup> Common Article 3.

<sup>36</sup> The Hague Convention (HC) IV, Article 2 (1907).

<sup>37</sup> *The Trial of German Major War Criminals*, 1946, Judgment, pp 46–8. A 1941 Soviet offer to apply the Geneva Convention *mutatis mutandis* was left unanswered by Germany.

<sup>38</sup> *International Military Tribunal for the Far East*, 1948, Judgment, pp 1096–106.

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nitions of armed conflicts, have been a major reason for some States' unwillingness to sign or ratify those instruments. Article 1(4) of Protocol I extends the Protocol's scope of application to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to 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.

Article 96(3) of the Protocol further provides that an 'authority' representing a people engaged in such an armed conflict may unilaterally undertake to apply the Geneva Conventions and the Protocol by means of a declaration to that effect.

With the stroke of a pen, the Protocol thus made armed struggles that had previously been seen as internal to individual States, matters for international regulation. After 1977, acts of violence committed by non-State actors could be viewed as legitimate acts of war if the persons committing them claimed to be acting in the name of national liberation or self-determination. Naturally enough, those States that are engaged in armed struggles against such groups have opposed the imposition of international regulation for their conflicts against what they often style mere 'criminals' or 'terrorists'. In many cases this has resulted in important military powers either not becoming parties to the Protocol at all,<sup>39</sup> or becoming parties, but with substantial reservations that have the specific effect of negating the expanded scope of application. The Irish Republican Army (IRA), in its long armed struggle against the UK security forces in Northern Ireland during 'the Troubles', sought to claim that it was acting in pursuit of Irish self-determination, to 'liberate' Northern Ireland from 'illegal British occupation', and was thus engaged in an international armed conflict against the UK. This led the IRA to demand prisoner of war (POW) status for its captured operatives. The UK, for its part, consistently

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<sup>39</sup> Eg the USA, Turkey, Israel, India, Pakistan, and Indonesia. On the official US attitude to the Protocol, see President Ronald Reagan, *Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions* (1987) 26 ILM 561.

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denied that there was an armed conflict of any kind in Northern Ireland<sup>40</sup>—and specifically denied the entitlement of captured IRA members to POW status, preferring to regulate their activity under national law and to regard them as nothing more than common criminals (Walker, 1984). Concern about attempts to apply the Protocol to Northern Ireland contributed to the UK's decision to delay ratification of the Protocol: although it signed the instrument in 1977, the UK did not ratify it until 1998. Moreover, upon ratification, the UK was careful to enter the following 'statement of understanding' in respect of Articles 1(4) and 96(3):

It is the understanding of the UK that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.

The UK will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under [Article 96(3)] unless the UK shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which [Article 1(4)] applies.<sup>41</sup>

There has to date been no successful attempt to invoke Article 1(4) as the basis for applying the law of international armed conflict to any situation, although in 1989 the Palestine Liberation Organisation (PLO) notified the Swiss Government (as the depositary of the Geneva Conventions and the Additional Protocols) of its decision to adhere to those instruments. The Swiss Government declined to confirm that the PLO's decision was a valid accession to the instruments, '[d]ue to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine'.<sup>42</sup>

If the expanded definition of international armed conflicts has proved controversial, that of non-

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<sup>40</sup> See, eg *Hansard, HC Debs*, 14 December 1977, vol 941, col 237W.

<sup>41</sup> Roberts & Guelff, 2000, p 510.

<sup>42</sup> *Ibid*, p 362. The State of Palestine, as proclaimed by the PLO in 1988 and granted 'non-member observer State' status at the UN in 2012, acceded to the Geneva Conventions and API in 2014.



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international conflicts has been all but unworkable. The *Tadić* case and subsequent decisions from the ICTY and other international criminal courts and tribunals had established the customary law requirement that in order for a situation to be characterised as a non-international armed conflict, the fighting must have a certain level of intensity and the parties to the conflict must have a sufficient degree of organisation.<sup>43</sup> Article 1 of Protocol II defines non-international armed conflicts to which it applies as:

all armed conflicts which are not covered by Article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Quite apart from the fact that States with internal conflicts on their territories have been unsurprisingly reluctant to submit to international legal regulation of their violent struggles against 'bandits' or 'terrorists', the main problem with the definition of non-international conflicts, which has largely sabotaged attempts to apply the Protocol in practice, is the requirement for the dissident party to be in control of territory. Illogically enough, this requirement is placed at a higher threshold than is required for national liberation movements in Additional Protocol I, which do not have to control any territory in order to have their struggle legally classified as an *international* armed conflict. The requirement that dissident movements be able to carry out 'sustained and concerted military operations' and to implement the Protocol has been a gift to States seeking to deny the Protocol's applicability to their own internal conflicts, as rebel movements are rarely in such a strong position and rare-

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<sup>43</sup> *Prosecutor v Duško Tadić*, Opinion and Judgment, Case No IT-94-1-T (7 May 1997), para 562.

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ly have any incentive to apply international humanitarian law in their operations.<sup>44</sup> In effect, the definition of a non-international armed conflict under Protocol II has a threshold so high as to preclude the vast majority of armed rebellions from being subject to its regulation. To date fewer than half a dozen States, and even fewer insurgent movements, have indicated any willingness to be bound by the Protocol in the conduct of their respective internal conflicts (Moir, 2002, pp 119–32). During the Sri Lankan Civil War (1983-2009), the Liberation Tigers of Tamil Eelam (LTTE) undeniably controlled substantial parts of the north-east of the country and mounted ‘sustained and concerted’ military operations against government forces; yet Sri Lanka is not a party to Protocol II and neither the government nor the LTTE showed any effective application of IHL.<sup>45</sup>

The technicalities of the definitions of international and non-international armed conflicts make it difficult for military personnel to know when to treat irregular opponents as legitimate combatants, civilians directly participating in hostilities, ‘dissident armed forces’ under Protocol II, a national liberation movement under Protocol I, or common criminals engaged in violence and entitled to no specific protections under IHL. This has led to an increase in the importance of governmental determinations as to the classification of armed conflicts in which regular forces are engaged and as to the applicable scope of application of IHL. Unfortunately, as the official US reaction to the events of 11 September 2001 in terms of the treatment of detainees captured in the course of the new ‘Global War on Terror’ showed, such determinations may do more harm than good. The US Administration of George W Bush persisted in viewing the ‘War on Terror’ as an international armed conflict within the LOAC paradigm, albeit one in which captured enemy combatants could be detained until the end of ‘active hostilities’<sup>46</sup> but were not entitled to be treated as POWs under Geneva Convention III.<sup>47</sup>

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<sup>44</sup> Cf Sivakumaran, 2006.

<sup>45</sup> See UN, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (31 March 2011), [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>46</sup> GCIII Article 118.

<sup>47</sup> GCIII Article 5 requires that if there is any doubt as to a detainee’s status under LOAC, s/he shall be treated as a POW until their status is determined by a competent tribunal. Cf President Bush, *Military Order: Detention, Treatment and*

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The US Supreme Court, however, took a radically different view in one of their more celebrated decisions regarding the status and treatment of detainees captured by US forces and held in Guantánamo Bay, Cuba. The plurality of the court held, obiter, that because the conflict between the USA and Al-Qaeda terrorists was neither against a High Contracting Party to the Geneva Conventions, nor in the territory of one such party, it was by default an ‘armed conflict not of an international character’ in the terms of Common Article 3.<sup>48</sup>

It is worth noting that virtually no other State agreed with the US legal approach to this situation and, indeed, the Administration of Barack Obama abandoned such contortions of logic from its first days in office in January 2009. In Israel it has been suggested that such conflicts are better viewed as being in the nature of international armed conflicts, to which the fullest possible extent of IHL should be applied, by reason of the transnational nature of such conflicts—ie the fact that they cross international borders—and the military capabilities of modern terrorist organizations.<sup>49</sup> In the UK, determinations about the existence and characterization of an armed conflict are made as a matter of policy, depending on the facts on the ground and the status of the parties to the conflict.<sup>50</sup> It follows that the UK does not accept that there is a single armed conflict between itself and Al-Qaeda; rather, there were discrete conflicts in theatres such as Iraq (until the withdrawal of British forces in 2009) and Afghanistan (until the termination of British combat operations in 2014). Current operations against the so-called ‘Islamic State’ in Iraq and Syria since 2014 are treated as discrete conflicts. IHL was and is applied by British forces in all such military operations.

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*Trial of Certain Non-Citizens in the War Against Terrorism* (2001) 41 ILM 252; Attorney-General Alberto Gonzales, *Memorandum to the President re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (2002) (reproduced in Greenberg and Datrell, 2005, p 118).

<sup>48</sup> *Hamdan v Rumsfeld* (2006) 548 US 557.

<sup>49</sup> *Public Committee against Torture in Israel v Government of Israel (targeted killings)* HCJ 769/02; (2006) 46 ILM 375.

<sup>50</sup> UK Ministry of Defence, 2004, paras 3.1–13.

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The spectrum of conflict is well illustrated by the case of Iraq since 2003: after an initial phase of international armed conflict (March-April 2003) to which the fullest extent of LOAC applied, there followed a period of belligerent occupation (April 2003–June 2004) during which certain parts of IHL (notably Geneva Convention IV) continued to be applicable. After the formal end of occupation, however, the legal position became substantially less clear in that Coalition forces were operating extraterritorially against non-State actors; this resulted in the haphazard application of an ad hoc hodge-podge of rules cobbled together from the laws relating to both international and non-international armed conflicts, supplemented by a dose of human rights law and overshadowed by the significance of UN Security Council resolutions regarding the rights of foreign forces in Iraq.

Finally, it is worth noting that broadly the same rules apply in all domains of conflict: land, sea, air, outer space, and cyberspace. Although the bulk of the law was formulated with land warfare in mind, the centuries-old customary law of maritime warfare continues to be applicable: it was largely codified in 1907<sup>51</sup> and in the 1930s,<sup>52</sup> and has since been comprehensively restated in the International Institute of Humanitarian Law's *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994). Aerial warfare has been a feature of armed conflicts since 1911, but has to date not been the subject of a specific adopted treaty; although the rules on targeting in API clearly apply to air warfare, it was only in 2009 that the *Manual on International Law Applicable to Air and Missile Warfare* was produced by the Harvard Program on Humanitarian Policy and Conflict Research, containing a comprehensive restatement of the law in such operations.<sup>53</sup> Considerable attention has been devoted to cyber warfare recently, following the cyber operations (attributed to Russia) which were targeted at Estonia in 2007 and Georgia in 2008; this has culminated in another manual produced by an international group of experts under NATO auspices, the *Tallinn Manual on the International Law Applicable to Cyber Warfare*. It should be noted that all these manuals are the work of academic specialists

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<sup>51</sup> The Hague Conventions VI-XI and XIII.

<sup>52</sup> The London Procès-verbal on Submarine Warfare (1936); the Nyon Agreement (1938).

<sup>53</sup> See <http://www.ihlresearch.org/amw/manual/>.

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and legal practitioners working in a personal capacity; this did not matter so much in the cases of the *San Remo* and *Harvard Manuals*, but the extent to which the *Tallinn Manual* in particular will be generally accepted by a convincing number of States as *lex lata* remains very uncertain. In 2017 a UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security, which had been meeting since 2004, collapsed without adopting a final report because certain States (most notably China, Cuba, and Russia) rejected the proposed application of some of the most fundamental norms of international law to cyberspace, including even any express mention of IHL.<sup>54</sup>

### III. THE ACTORS IN HUMANITARIAN LAW

Once the scope of application of IHL has been determined, the crucial feature of the modern law in international armed conflicts is the distinction between combatants and civilians. The former may legitimately participate and be targeted in military operations, while the latter—subject to certain exceptions<sup>55</sup>—may not. Conversely, and as a direct consequence of their status, the former are entitled to certain rights and privileges upon capture, while the latter are not. Therefore, in the planning and execution of military operations, a distinction must always be made between combatants on the one hand, and civilians on the other. This was an easy enough task when battles were fought by organized armies on discrete (mostly rural) battlefields largely denuded of their civilian inhabitants; however, the proliferation of irregular forces in modern warfare, which also is frequently conducted in an urban environment where the civilian population remains present, has made distinction exceedingly difficult in practice.

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<sup>54</sup> See Michael Schmitt & Liis Vihul, 'International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms' (30 June 2017), <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/>.

<sup>55</sup> Principally, if civilians directly participate in hostilities, they lose their protected status and may legitimately be targeted 'for such time' as they do so: see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 IRRC 991.

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Historically, the laws of war did not provide a definition of the concept of a ‘combatant’. Warfare was carried on by soldiers, who generally were easily distinguishable from the civilian population. This was so even before the issue of standardized uniforms to European armies began to become common practice in the late seventeenth century. Although a concept of lawful combatancy was present in the literature by the late eighteenth century (Green, 2008, pp 125–8), and the need to regulate unconventional warfare made an early appearance in Section IV of the *Lieber Code* (1863), there was little controversy in practice before the Franco-Prussian War (1870–71). In that conflict, the swift advance of Prussian forces into French territory led to the definition of two new categories of persons whose proper combatant status was initially a matter of some legal uncertainty: *francs-tireurs* and the *levée en masse*. The latter category (‘mass levy’) had been recognized since its use by the French Republic in 1793<sup>56</sup> and referred to the spontaneous requisitioning of the civilian population of an invaded—but unoccupied—territory, without time for military organization; its members are regarded as combatants, provided they ‘carry arms openly and...respect the laws and customs of war’.<sup>57</sup> They are entitled to POW status upon capture.<sup>58</sup>

The former category (‘free-shooters’), on the other hand, referred to civilians who—whether in occupied territory or not—take up arms on their own initiative to fight, independently of any governmental or military control, against an invading army. In 1870, members of rifle clubs or unofficial paramilitary shooting societies in eastern France formed irregular bands that carried out ambushes and attacks on Prussian lines of communication, isolated military posts and reconnaissance patrols; nominally under the control of the French Ministry of War, they were in fact entirely outside any military discipline, wearing no uniforms and electing their own officers. Prussian practice was to treat captured *francs-tireurs* as non-combatants found illegally participating in hostilities, and to execute them as such. Their activities also often led to reprisal actions being conducted against nearby

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<sup>56</sup> French National Convention, Decree of 23 August 1793.

<sup>57</sup> The Hague Regulations (HR), Article 2 (1907).

<sup>58</sup> GCIII Article 4(A)(6).

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French villages. This pattern of conduct, which was repeated in Belgium and France in World War I, occasioned real legal controversy when, in World War II, the Germans treated members of Resistance movements in occupied territory as *francs-tireurs* not entitled to any protection under the laws of war, while the Allies insisted that their degree of organization and allegiance to their respective Governments-in-Exile entitled them to POW status upon capture. Although one subsequent war crimes trial of German generals found that captured partisans in the Balkans had been correctly subjected to the death penalty as *francs-tireurs*,<sup>59</sup> treaty law since has endorsed the contrary position.

As it was generally understood at the turn of the twentieth century that members of regular armies were combatants who were subject to the rights and duties of the laws of war, the main legal issue became how to define others who might be so entitled. Article 1 of the 1907 Hague Regulations accordingly provides that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

Apart from designating those persons who can lawfully use force (and themselves be attacked) in wartime, the other principal significance of the concept of lawful combatancy is that it entitles a person, on capture, to the benefit of treatment as a POW. In 1949, Article 4 of Geneva Convention III expanded entitlement to POW status to the following principal groups:

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<sup>59</sup> *The Hostages Trial (United States of America v Wilhelm List and Others)* [1949] VIII Law Reports of Trials of War Criminals 38.

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1. members of the regular armed forces,<sup>60</sup> and of militias or volunteer corps forming part of the armed forces, of a party to the conflict;<sup>61</sup>
2. members of other militias or volunteer corps of a party to the conflict, including organized resistance movements, provided that they satisfy the requirements for lawful combatancy listed in Article 1 of The Hague Regulations;
3. authorized persons who accompany the armed forces without actually being members thereof, eg war correspondents,<sup>62</sup> supply contractors, members of military labour units, etc; and
4. participants in a *levée en masse*.

Military medical and religious personnel, on the other hand, are non-combatant members of the armed forces. They may if captured be retained by the Detaining Power in order to assist POWs, and benefit from the protections of the Convention, but are not formally considered POWs.<sup>63</sup>

This comparatively simple regime was supplemented in 1977 by the controversial provisions of Additional Protocol I, which set up a new regime with regard to lawful combatant and POW status; this inevitably is distinctly favourable to the national liberation movements whose conflicts were recognized by the Protocol as being international in nature. Article 43 of the Protocol defines the armed forces, and accordingly lawful combatants, as, 'all organized armed forces, groups and units which are under a command responsible to [a Party to the conflict] for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party'. This shifts the irrelevance of recognition from the existence of a state of armed conflict, as stipulated in Common Article 2

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<sup>60</sup> Including paratroopers, marine commandos or other special forces, as long as they fight in their correct uniform and with the appropriate unit badges: see Parks, 2003.

<sup>61</sup> The criterion of belonging to a State has been used to deny POW status to captured guerrillas: *Prosecutor v Kassem* (1969) 42 ILR 470.

<sup>62</sup> Journalists not formally accredited as war correspondents are treated as civilians: API, Article 79 (1977).

<sup>63</sup> GCIII Article 33.



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of the 1949 Conventions, to the representation of a party to the conflict: a change very much to the benefit of non-State actors, who are seldom if ever legally recognized by the States against which they are fighting. It is not hard to see why certain States continue to object to this formulation.

Lawful combatants, as defined in Article 43, are entitled on capture to POW status,<sup>64</sup> subject to the following:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his 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.<sup>65</sup>

The first sentence relaxes the pre-existing standard in that it does not specify the way in which combatants must distinguish themselves from civilians (as opposed to The Hague Regulations' requirement of a 'fixed, distinctive sign'); it also requires such distinction to have effect only during 'an attack or...a military operation preparatory to an attack' (whereas the Regulations contain no temporal element as regards lawful combatancy). The second sentence, however, goes even further towards accommodating guerrillas, and remains deeply controversial for several States. Its assumption that there are situations in which a combatant cannot distinguish himself from the civilian population is

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<sup>64</sup> API Article 44(1).

<sup>65</sup> Ibid, Article 44(3).

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of limited application<sup>66</sup>, and the interpretation that arms need only be carried openly immediately before opening fire (as opposed to continually while visible to the enemy and moving into an attack position) has received little support in the literature or State practice.<sup>67</sup> States not party to the Protocol continue to be bound only by the stricter standards from The Hague Regulations and Geneva Convention III.

Thus, there are effectively two different legal standards for the determination of lawful combatancy; the undesirability of this situation was plainly demonstrated by the conflict in Afghanistan after 2001. US President Bush's determination that Al-Qaeda and Taliban fighters captured by US forces were 'unlawful combatants' who were not entitled to POW status, could be detained indefinitely without charge and (eventually) prosecuted for war crimes generated enormous controversy in theory and proved unworkable in practice.<sup>68</sup> The detention facility at Guantánamo Bay, Cuba, continues to operate, although the eventual fate of its remaining inmates has still not been determined.

Any 'person who takes part in hostilities' without being a combatant under the terms of the Protocol shall upon capture be presumed to be a POW and therefore entitled to protection under IHL, unless and until a competent tribunal decides otherwise.<sup>69</sup> This provision is in essence the same as that in Article 5 of Geneva Convention III, but its scope of application is more controversial. It applies a presumption of actual POW status (as opposed to Article 5's assertion that a captive of doubtful legal

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<sup>66</sup> The UK considers that such situations can only arise in occupied territory or in respect of national liberation movements: see Roberts & Guelff, 2000, p 510.

<sup>67</sup> For the UK position on this point, see *ibid*.

<sup>68</sup> *Military Order*. In *Rasul v Bush* (2004) 542 US 466 the US Supreme Court held that detainees were entitled to challenge in the US courts the legality of their detention by US forces. In *Hamdan v Rumsfeld* (2006) 548 US 557 the Court held that the Military Commissions established by the Bush Administration for the trial of 'unlawful combatants' did not meet the requirements of the Geneva Conventions. On 4 June 2007 the original charges in the first two substantive cases to be tried by Military Commissions, *United States v Hamdan* and *United States v Khadr*, were both dismissed for lack of jurisdiction on the grounds that the defendants' status under LOAC had not been properly determined: 1 MC 6 & 152.

<sup>69</sup> API Article 45(1).

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status will be treated as if he were a POW until a competent tribunal determines his actual status) to all persons participating in hostilities in armed conflicts covered by the Protocol. The overall effect of Articles 43-45 is to shift the balance of presumptions and entitlements very much in favour of a captive who, prior to the Protocol, would not have had such benefits under traditional LOAC but would have been automatically subject to trial merely for illegally participating in hostilities. Now the Protocol necessitates charges of specific criminal conduct, as opposed to mere participation in hostilities, if any trial is to take place.

Although in mediaeval Europe and until the advent of mass-recruited citizen-armies in the eighteenth century the use of mercenaries was lawful and indeed widespread,<sup>70</sup> the post-1945 decolonization period saw large numbers of demobilized professional soldiers from Western nations enrolling for financial gain in the armies of colonial powers in Africa who were fighting against NLMs claiming self-determination (or, as in the Congo and Nigeria, for secessionist rebellions). Condemnation of mercenarism consequently became widespread and it is not surprising that special provision for it was eventually made in Additional Protocol I, Article 47 of which removes any possibility of mercenaries being regarded as lawful combatants entitled to POW status if captured. The salient features of the definition of a mercenary are that his motivation is the desire for private gain, and that he is neither a national nor a resident of a party to an armed conflict, nor a member of the armed forces thereof. This was subsequently added to by the UN General Assembly's International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which extended the Protocol's definition of a mercenary to include the purpose of 'participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order...or...the territorial integri-

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<sup>70</sup> A unique survivor of this tradition is the Pontifical Swiss Guard, since 1506 the *de facto* military force of the Vatican, which recruits exclusively Catholic Swiss citizens. Mercenaries are not to be confused with the foreign professional soldiers traditionally used in certain armies, eg the British Army's Brigade of Gurkhas and the French Foreign Legion. These units are regularly constituted and subject to the discipline of the armies in which they serve, and are lawful combatants.

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ty of a State'.<sup>71</sup> The Convention offence is committed even if a person recruited as a mercenary does not actually take part in a conflict—a departure from Article 47's requirement that he take a direct part in hostilities.

These provisions have not managed to prevent or deter the repeated use of mercenaries since the early 1990s in conflicts such as those in the former Yugoslavia and Sierra Leone.<sup>72</sup> The issue continues to be pertinent in light of the 'privatization of war' in the first decade of the twenty-first century: since the occupation of Iraq in 2003-4, several States have increasingly outsourced many military services and types of expertise to a growing array of private contractors or 'private military security companies' (PMSCs). These are generally composed of former military personnel who undertake a range of duties from serving as bodyguards for political leaders and diplomats, through the provision of training and advice in the reorganization of State military capabilities in countries from Nigeria to Bulgaria, to actual military missions in countries such as Colombia (where they have piloted aircraft and helicopter gunships engaged in the destruction of coca crops). Their tendency, exhibited in Iraq, to be somewhat 'trigger-happy' has attracted considerable notoriety.<sup>73</sup> US and British PMSCs operate under national regulation<sup>74</sup> but their legal position under LOAC is uncertain. The UN General Assembly has condemned them as one of 'the new modalities of mercenarism',<sup>75</sup> but they could also arguably be assimilated in certain circumstances to 'supply contractors'

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<sup>71</sup> GA Res 44/34 (1989), Article 1(2)(a).

<sup>72</sup> The UN Convention on Mercenaries entered into force in 2001 but still has only 33 States Parties.

<sup>73</sup> In *United States v Slough et al*, three former employees of the PMSC Blackwater Worldwide were convicted of manslaughter, and one of murder, in connection with the killing of 14 unarmed Iraqi civilians in Baghdad, and sentenced to 30 years and life imprisonment, respectively: *The Washington Post*, 13 April 2015.

<sup>74</sup> In the USA, PMSCs are now subject to the Uniform Code of Military Justice: HR 5122, John Warner National Defense Authorization Act for Fiscal Year 2007, Section 552. In the UK, s 370 and Sch 15 to the Armed Forces Act 2006 make civilians accompanying the armed forces in certain circumstances subject to military law.

<sup>75</sup> GA Res 62/145 (4 March 2008).

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who benefit from POW status,<sup>76</sup> and their right to use force in self-defence is lawfully mandated under their contracts of employment. Ultimately, their status under LOAC is most likely to be that of civilians, since they are not part of the armed forces and cannot be regarded as militia; the legal issue is then whether or not their precise function in a given situation involves direct participation in hostilities.

It is a tragic reality of modern warfare, particularly in certain parts of Africa, that child soldiers form a significant part of the combatant forces. This has been notably evident in such cases as the Lord's Resistance Army in Uganda and the Revolutionary United Front in Sierra Leone; in the latter country especially, many of the worst atrocities in the conflict were committed by children (Happold, 2005).<sup>77</sup> Article 77 of Protocol I requires States to 'take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, [to] refrain from recruiting them...'. Measures for the protection of children in armed conflicts are repeatedly called for by the UN Security Council<sup>78</sup> and provided for in legal terms also by the 1989 UN Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict, although these instruments use a higher cut-off age of eighteen years.

### IV. CONDUCT OF HOSTILITIES

The 1907 Hague Regulations, together with certain provisions of 1977 Additional Protocol I, are the modern sources of the law on the conduct of hostilities—a topic often referred to as 'methods and means of warfare'—but their much older genesis lies in the interaction of the customary principles of humanity, chivalry, and military necessity. Nowhere is this truer than in the context of the law of targeting, which is dominated by what the ICJ has termed the two 'cardinal' principles of IHL: the rule of distinction, and the prohibition of the use of weapons causing unnecessary suffering or superflu-

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<sup>76</sup> GCIII Article 4(A)(4).

<sup>77</sup> *Prosecutor v Sesay, Kallon & Gbao*, Trial Chamber Special Court for Sierra Leone, Judgement of 25 February 2009, pp 482–519.

ous injury.<sup>79</sup> The law on the conduct of hostilities also determines the difference between battlefield practices that are forbidden, and those that are permitted, although it should be noted that even if a given practice is allowed under international LOAC, it may well be prohibited under the national law of the belligerents. Thus, while The Hague Regulations do not forbid such classic wartime activities as espionage or sabotage, a spy or saboteur who is captured out of uniform will be tried as such and, under the national laws of many States, may be sentenced to death.<sup>80</sup> Other practices, such as perfidy—‘[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of [LOAC], with intent to betray that confidence’<sup>81</sup>—and denial of quarter,<sup>82</sup> are clearly forbidden under LOAC.

### A. DISTINCTION AND PROPORTIONALITY

Given the importance which attaches to personal status in international armed conflicts, it is logical that the principle of distinction should lie at the heart of the modern LOAC, notably in relation to targeting operations; as such it forms part of customary international law, although it is codified in Article 48 of Additional Protocol I. It requires belligerents at all times to distinguish between combatants and military objectives on the one hand, and civilians and civilian objects on the other, and to attack the former only (subject to certain exceptions which will be detailed later in this section). Basically, anyone who is not a combatant is a civilian, but because in contemporary warfare the two categories are not always clearly distinguishable from each other, the principle of distinction is moderated by a proportionality test. The law recognizes the permissibility of civilian casualties or damage to civilian objects, during an otherwise lawful attack on a military target, by the grim but functional doctrine of ‘collateral damage’: such casu-

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<sup>78</sup> Eg SC Res 1882 (4 August 2009).

<sup>79</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, para 78.

<sup>80</sup> Eg *Ali v Public Prosecutor* [1969] 1 AC 430.

<sup>81</sup> API Article 37(1). Examples of perfidious conduct include feigning: intent to surrender, incapacitation by wounds or sickness, or non-combatant status.

<sup>82</sup> HR Article 23(d).

alties or damage is proportionate if it is not clearly excessive in relation to the concrete and direct military advantage anticipated from the attack.<sup>83</sup> In effect, the law accepts that at least *some* civilian casualties and/or *some* damage to civilian objects will be inevitable in most military operations, however carefully conducted.

In both World Wars it was considered acceptable to attack the enemy civilian population's morale as such, but such practices would be clearly illegal today: Article 51(2) of Protocol I prohibits direct (deliberate) attacks on the civilian population and those which are designed primarily to spread terror among the civilian population. In light of these prohibitions and Article 48's requirement that military operations be directed 'only against military objectives', the key question is: what constitutes a military objective? Article 52(2) of the Protocol 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'. Thus, while certain objects—such as an air force base—are intrinsically military in nature, others—an apartment block, for example—may be located, or used by the enemy, in such a way that they make an effective contribution to military action. On the other hand, blanket determinations of military significance for objects which are not intrinsically military but clearly have some military uses in wartime, such as roads, railways or bridges, are not allowed. The Protocol requires a presumption, in case of doubt as to whether a civilian object is actually being used to make an effective contribution to military action, that it is not in fact being so used;<sup>84</sup> it also requires the commander to take all feasible precautions in planning and launching an attack, to warn the civilian population of an impending attack and to cancel or suspend an attack if it becomes apparent that the object is not a military objective or that the attack cannot be executed without disproportionate civil-

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<sup>83</sup> API Article 57(2).

<sup>84</sup> Certain objects may never be attacked (unless they are being abused by the enemy): eg medical facilities, personnel and transport, and cultural property.

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ian casualties or damage to civilian objects.<sup>85</sup> A particularly important aspect of these provisions is the heavy burden they place on the attacking commander: the law to some extent expects him to place the safety of the civilian population ahead of that of his own troops or his legitimate military objectives: despite widespread condemnation of Israeli operations in the Gaza Strip since 2000, on a number of occasions Israeli military commanders have cancelled planned airstrikes that would have eliminated senior Palestinian militant leaders, when it became apparent that Palestinian civilians were flocking to the area in question in an attempt to shield the target.<sup>86</sup> The obligations of the defending commander to take precautions to protect the civilian population under his control against the effect of attacks, on the other hand, rarely attracts comparable attention.

With so-called ‘dual-use objects’, a case-by-case determination must be made as to whether a definite military advantage would be obtained by attacking that object, not tomorrow or the day after, but today. It would also be reasonable, however, to take into account longer-term military advantages and effects on the civilian population, such as the eventual strategic consequences of an attack, or impairment of the civilian population’s means of survival.<sup>87</sup> The Protocol unhelpfully does not mention dual-use objects as such, but the principles for determining the legality of an attack on such targets are the same as those of general application. The critical issue will generally be whether the anticipated collateral damage (if any) would be proportionate to the military advantage expected. In 1999 NATO treated the Serbian Radio and Television building in Belgrade as a military target, because in addition to its normal function of providing entertainment and information to the civilian population, it also in wartime served as a back-up communications network for the Serbian armed

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<sup>85</sup> API, Article 57.

<sup>86</sup> *The Jerusalem Post*, 19 November 2006.

<sup>87</sup> API Article 56 prohibits attacks on dams, dykes and nuclear electrical generating stations if such attack is likely to release dangerous forces which would cause severe losses to the civilian population. These sorts of considerations are likely to assume enhanced importance in situations of cyber conflict, where the interconnected nature of many networks and the likelihood of unforeseen consequences of a computer network attack could have dire effects on the civilian population.



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forces. As it was located in the middle of Belgrade, the required assessment of collateral damage had to estimate how many civilians were likely to become casualties in the attack, and whether such casualties would be proportionate to the military advantage which would be gained by knocking out a back-up military communications network. In the event, NATO proceeded with the attack in the middle of the night, when the smallest possible number of civilian employees was likely to be present in the building: in the event, 16 civilians died and broadcasting resumed from a back-up transmitter in a secret location within 24 hours. Although it was unfortunate that 16 civilians died, NATO took the required precautions in attack and made a proper assessment of likely collateral damage and proportionality. The circumstances disclosed no prima facie violation of LOAC on NATO's part.<sup>88</sup>

It is important to emphasize that there is no mathematical formula for deciding what would, or would not, be a proportionate level of collateral damage in any given case. Everything depends on the circumstances ruling at the time and the operational context; the decision whether or not to attack a given target is that of the commander, who must base his assessment on the intelligence that is reasonably available to him, in the light of recommendations by his military legal adviser. It is wrong, therefore, to assume that any case of civilians being killed in a military operation ipso facto constitutes a war crime: as long as the target was a military objective or a dual-use object and the attacking force undertook the required precautions in attack to the best of their ability in the circumstances ruling at the time, the relevant rules of IHL have been complied with. By the same token, cases of civilian casualties caused by honest mistakes, such as attacks on the wrong target due to faulty intelligence or misunderstood battle instructions, are not violations of IHL: thus, Colonel Georg Klein of the *Bundeswehr* was cleared by German prosecutors of criminal responsibility for the deaths of 60-180 Afghans in an airstrike that he ordered on two fuel tankers at Kunduz that had been captured by Taliban fighters, because he had feared that they would be used to attack a German camp nearby and it was found that he could not have known, on the basis of the intelligence available to him, that ci-

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<sup>88</sup> See ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000) 39 ILM 1257, paras 71-9.

vilians were in the vicinity of the target.<sup>89</sup> Civilian deaths or damage to civilian objects in armed conflicts is always a tragedy; but it is one that the law factors into its strictures.

## B. WEAPONS

Article 22 of The Hague Regulations lays down a general principle that, ‘The right of belligerents to adopt means of injuring the enemy is not unlimited.’ From this, and from the principle of distinction, flow two specific customary rules affecting the choice of weaponry in armed conflicts:

1. it is forbidden to employ methods or means of warfare that may be expected to cause superfluous injury or unnecessary suffering;<sup>90</sup> and
2. it is forbidden to employ methods or means of warfare that are indiscriminate, ie cannot be directed against a specific military objective.<sup>91</sup>

In addition, there are specific treaty obligations not to use methods and means of warfare that are intended or may be expected to have negative effects on the environment.<sup>92</sup>

The first rule, in particular, has prompted many treaties banning specific weapons. The Hague formula prohibits weapons ‘calculated to cause’ unnecessary suffering, while its more modern counterpart in Protocol I uses the phrase, ‘of a nature to cause’ such injury or suffering. The latter is the better formulation in practice, as it relies less on the intention with which a weapon is used—any weapon can be used in such a way as to cause unnecessary suffering—and more on its intrinsic nature. This is the case with white phosphorus, which is not currently prohibited by LOAC but can certainly have very deleterious burning or asphyxiating effects if used directly against human beings; nevertheless, it is in the armoury of many States, including Russia, Israel, the USA and UK, for use

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<sup>89</sup> *Deutsche Welle*, 19 April 2010.

<sup>90</sup> HR Article 23(e), API Article 35(2).

<sup>91</sup> API Article 51(4).

<sup>92</sup> *Ibid.* Article 55.

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against military objectives because of its obscurant or illuminating effect. Its use as an anti-personnel weapon, to flush out Iraqi insurgents in Fallujah in 2004, was therefore probably a violation of the rule.<sup>93</sup> It is important, however, to remember that suffering is an integral part of war, and therefore the concept of *unnecessary* suffering is inevitably both subjective and relative. The difficulties have been well expressed in the following terms:

The law does not specify the permissible level of disablement. In contemporary military operations, while the killing of enemy combatants is still contemplated, so is wounding them to put them out of action. This may cause them permanent injury. In either case suffering is implicit. But the law does not define unnecessary suffering, and views can differ markedly. Some are horrified by the prospect of blindness, others by the blast injuries caused by mines, and many regard burn injuries as particularly serious, but it is difficult to compare one type of injury with another and say that it necessarily signifies unnecessary suffering....[T]herefore, all that can be done, in very general terms, is to try and balance the military utility of weapons with the wounding and incidental effects that they have.<sup>94</sup>

The ban on indiscriminate weapons is a corollary of the rules on protection of civilians, discussed earlier in this section. It serves to prohibit such practices as area bombardment – treating an entire area as a military target, as was done by the German deployment of V1 and V2 rockets against southern England in World War II, and Iraq’s use of Scud missiles against large areas of the desert in Saudi Arabia and heavily populated Israel in 1991.

In addition to these general principles, treaty provisions exist to ban or restrict the use of the following specified weapons, *inter alia*:

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<sup>93</sup> See *US Defends Use of White Phosphorus Munitions in Iraq* (2006) 100 AJIL 487; cf Israeli Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects*, July 2009, paras 406–30.

<sup>94</sup> UK Ministry of Defence, 2004, para 6.1.2.

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1. explosive bullets or projectiles under 400 grammes weight;
2. dum-dum bullets;
3. poison and poisoned weapons;
4. asphyxiating and poison gases, along with bacteriological and chemical weapons;
5. weapons causing injury by fragments in the human body undetectable by X-ray;
6. anti-personnel landmines and booby-traps;
7. incendiary weapons;
8. blinding laser weapons; and
9. cluster munitions.

The 1977 Environmental Modification Treaty also prohibits the deliberate manipulation of the environment as a method of warfare. Although the deliberate use of weapons that are specifically and unequivocally banned is comparatively rare in contemporary warfare, the Syrian Civil War has seen multiple uses of several chemical weapons (eg nerve agent sarin, chlorine gas and sulfur mustard) since 2013 by various parties to the conflict;<sup>95</sup> in 2017, a particularly deadly nerve gas attack at Khan Shaykhun prompted the US to launch missile strikes against the Syrian Air Force base at Shayrat, in an action implied to be a belligerent reprisal,<sup>96</sup> although it is doubtful that the US was party to an in-

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<sup>95</sup> See, eg, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013*, UN Doc. A/67997-S/2013/553, 16 September 2013; UN Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/27/60, 13 August 2014, paras 115-118; Organization for the Prohibition of Chemical Weapons, *Third Report of the OPCW Fact-Finding Mission in Syria*, S/1230/2014, 18 December 2014.

<sup>96</sup> US Central Command, *Statement from Pentagon Spokesman Capt. Jeff Davis on US strike in Syria*, Release No: 17-135, 7 April 2017.

ternational armed conflict with Syria at the relevant time.

The one type of weapon that is conspicuous by its absence from explicit regulation in LOAC is nuclear weapons, the use of which is not forbidden by any treaty. Whether customary law prohibits the use of nuclear weapons is less obvious: their use has been condemned on many occasions by the UN General Assembly, which in 1994 requested an Advisory Opinion from the ICJ on the subject. The resulting Opinion,<sup>97</sup> which saw the Court split down the middle with seven votes in favour and seven against (one chair on the Court being vacant at the time the Opinion was rendered, due to the death of the previous incumbent), was widely derided as an exercise in evasiveness. The ICJ found that, while there was no specific prohibition or permissive rule in international law regarding the use of nuclear weapons, their use nevertheless would have to comply with ‘the principles and rules’ of IHL—in particular the rules relating to unnecessary suffering, in light of the injuries caused by radiation. In that context, the Court found that it would ‘generally be contrary’ to IHL to use nuclear weapons,<sup>98</sup> an opaque conclusion that has drawn considerable criticism. In fairness to the ICJ, it should be mentioned that its credibility would have suffered irreparable damage had it ruled conclusively either for or against legality: in the former case, non-nuclear States, which constitute a large majority in the world, would have condemned it as out of step with world opinion. But in the latter case, the nuclear weapons States would surely have simply ignored the Advisory Opinion. The UK’s position, for instance, is that none of the rules of Additional Protocol I have any effect on, regulate or prohibit, the use of nuclear weapons.<sup>99</sup> The ICRC, in its *Customary Law Study*, declined to express any position on the matter, ostensibly because it was *sub judice* the ICJ at the time of research for the Study (Henckaerts and Doswald-Beck, 2005, p 255). The most recent efforts to regulate nuclear weapons have centred on arms control: although an attempt by the Marshall Islands at litigation

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<sup>97</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226.

<sup>98</sup> *Ibid*, para 105(2)(E).

<sup>99</sup> Roberts and Guelff, 2000, p 510.

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against nuclear weapons States in the ICJ failed on procedural grounds,<sup>100</sup> the UN General Assembly subsequently adopted by 122 votes a Treaty on the Prohibition of Nuclear Weapons.<sup>101</sup> While the Treaty is certain to achieve the 50 ratifications required for it to enter into force, it seems unlikely that it will ever achieve much more than a moral effect, given that nearly one third of UN Member States (including all the nuclear weapons States) refused even to participate in the vote.

In fact, it is difficult to see how the use of such tremendously destructive weapons could ever be IHL-compliant, given also the inestimable military advantage that their use would create for the party using them. The two sides of the equation would therefore seem to cancel each other out. However, it is conceivable that a tactical nuclear weapon, deployed for instance by a submarine against an enemy surface fleet on the high seas, could be targeted against a purely military objective and be both necessary and proportionate in terms of IHL. Conversely, the use of a nuclear weapon against a civilian population would clearly be unlawful, not because of the nature of the weapon, but because of its deliberate use against civilians. The use of such weapons in a setting where their effects would be indiscriminate—for example, against military installations located near civilian population centres—would violate the ban on indiscriminate weapons generally, rather than any specific rule on nuclear weapons.

The first decade of the twenty first century saw the rise to prominence of unmanned aerial vehicles (UAVs, or ‘drones’) as a ‘weapon of choice’ for technologically advanced States in asymmetric conflicts; the US, in particular, uses them to carry out ‘targeted killings’ of ‘terrorists’ in such lawless territories as Yemen, Syria, Afghanistan and the Tribal Areas of Pakistan. While only a dozen coun-

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<sup>100</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections)*, General List No. 160, Judgment of 5 October 2016.

Identical cases brought by the Marshall Islands in the ICJ against India and Pakistan were dismissed for the same reasons on the same date, and a further case in the US domestic courts was thrown out as non-justiciable: *Republic of the Marshall Islands v. United States of America et al.*, USCA 9<sup>th</sup> Circuit, 31 July 2017.

<sup>101</sup> UN Doc. A/CONF.229/2017/8, 7 July 2017.

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tries are known to have used drones, some 20 more have them in service and around 50 more around the world are believed to possess drone technology; their use has widely been condemned as unlawful, usually because of the civilian casualties that they often cause and the perception that their use against named individuals amounts to ‘extrajudicial execution’ or prohibited assassination.<sup>102</sup> The UK justifies its drone strikes principally by reference to the right of self-defence.<sup>103</sup> However, criticisms and responses alike tend to conflate paradigms of *jus ad bellum*, human rights and humanitarian law. It should be noted that UAVs are not inherently illegal under LOAC; indeed, they are not really even a weapon as such, merely a platform for the delivery of a weapon (ie a missile). They are attractive to commanders as they permit several important military functions (principally intelligence-gathering and the application of lethal force) to be executed with no risk to their own troops, since the UAVs are remotely piloted. However, the real issues in terms of their compliance with LOAC are: (1) whether the persons targeted are in fact combatants; and (2) whether any resulting collateral damage is actually excessive in relation to the corresponding military advantage. In the background lurks the admittedly sinister question of whether fully autonomous battlefield systems will be introduced—killing machines without humans ‘in the loop’ or ‘on the loop’ to apply IHL when they authorize the application of deadly force. No such systems are currently known to exist for use in combat operations, and expert technical opinion is divided as to how far off they are, but unless a pre-emptive ban can be achieved their introduction seems to be only a matter of time.<sup>104</sup> Nevertheless, if and when they are introduced, the legal questions surrounding their compliance with IHL will remain identical; the moral and ethical questions will be much harder to resolve.

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<sup>102</sup> Eg UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – Addendum: Study on targeted killings*, UN Doc A/HRC/14/24/Add.6, 28 May 2010.

<sup>103</sup> Eg UN Doc. S/2015/688, 7 September 2015.

<sup>104</sup> A prominent forum for discussion of issues relating to lethal autonomous weapons is the Review Conference of High Contracting Parties to the 1980 UN Convention on Certain Conventional Weapons: see Fifth Review Conference, *Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)*, UN Doc. CCW/CONF.V/2, 10 June 2016.

## V. PROTECTION OF VICTIMS

For the purposes of legal protection, IHL defines three categories of person as ‘victims’ of armed conflicts, in the sense that they have specific rights as a consequence of their status. These categories are: the wounded and sick (including persons shipwrecked at sea), prisoners of war and civilians. Each is subject to a detailed separate regime of legal protection; in the case of the wounded and sick on land, the treaty in question is the oldest in the canon of contemporary humanitarian law.

### A. THE WOUNDED AND SICK

The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864), which famously resulted from Henri Dunant’s experiences at the Battle of Solferino (1859) and the subsequent foundation of the ICRC (1863), was the first treaty to make specific provision for the protection of soldiers who had become *hors de combat* by virtue of wounds or sickness. The foundation principles of this area of the law, as laid down in the 1864 Convention and expanded in subsequent Geneva Conventions,<sup>105</sup> are:

1. relief must be provided for the wounded and sick without distinction as to status, allegiance or nationality;
2. the inviolability of medical personnel, establishments and units must be respected; and
3. the distinctive protective signs must be recognized and respected.

Enemy wounded may not be attacked,<sup>106</sup> but must be collected and cared for, with the same access to

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<sup>105</sup> GCI (1929); GCI (1949) (wounded and sick on land); GCII (1949) (wounded, sick and shipwrecked at sea).

<sup>106</sup> In 2013 a British marine, Sergeant Alexander Blackman, was convicted by court-martial of the murder of a wounded Taliban fighter in Afghanistan: *BBC News*, 8 November 2013.



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medical treatment as the State's own wounded.<sup>107</sup> The same protection from attack extends to enemy medical transports, units and hospitals, provided they do not forfeit this protection by being used to commit hostile acts; even then, they may be attacked only after due warning.<sup>108</sup> Although attacks on medical units and installations have been a feature of armed conflicts since the advent of air power in the second decade of the 20<sup>th</sup> Century, when the Ottoman Red Crescent Society complained that their field hospitals in Libya had been bombed by Italian aircraft during the Italo-Turkish War (1911-1912), the 'fog of war' often makes it difficult to determine the exact circumstances of such attacks: when a US airstrike in Afghanistan hit a Trauma Centre operated by *Médecins San Frontières* (MSF) at Kunduz in 2015, resulting in more than 250 casualties, the personnel involved apparently thought they were attacking a Taliban-held compound nearby since the hospital was on a No Strike List, while the Afghan National Forces who called in the airstrike claimed that Taliban fighters were present in the hospital, a claim which was hotly denied by MSF. The subsequent investigation concluded that, 'this tragic incident was caused by a combination of human errors, compounded by process and equipment failures', and despite referring to failures to comply with the Rules of Engagement and LOAC, declined to find that any war crime had been committed.<sup>109</sup> Medical personnel may carry weapons for their own defence and that of the wounded and sick in their care; neither they nor those in their care may be the object of reprisals. The Red Cross and its associated protective signs<sup>110</sup> may

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<sup>107</sup> Suggestions that wounded Taliban fighters captured in Afghanistan should not be treated in the same field hospitals as wounded British soldiers would, if implemented, have amounted to a violation of GCI Article 12 or Common Article 3: *The Guardian*, 23 January 2009.

<sup>108</sup> GCI Article 21. The same is true in respect of individual medical personnel.

<sup>109</sup> US Central Command, *Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions* (28 April 2016).

<sup>110</sup> Since 1929 many (though not all) Islamic States have used the Red Crescent as a recognized alternative to the Red Cross—its use originated in the Russo-Turkish War (1877–8), when Ottoman medical units adopted it for protection. Persia used its own (equally recognized) traditional emblem of the Red Lion and Sun from 1922, and reserves the right to use it still, although its use was discontinued after the 1979 Islamic Revolution because of its association with the former Shah's regime. Israel's unrecognized use of the Red Shield of David eventually contributed to the adoption of Additional

be used only for marking the personnel, transports, and establishments of the ICRC, military medical services and other medical bodies (eg national Red Cross societies) specifically authorized to use the emblems. Misuse of any of the emblems will normally constitute a criminal offence under national law, and may additionally amount to the war crime of perfidy.

## B. PRISONERS OF WAR

Since the advent of the Nation-State and regularly conscripted citizen-armies in the late seventeenth century, it has been accepted that soldiers who surrender to the enemy are under the protection of the enemy State and not at the mercy of the individual enemy commander. The sole reason for detaining them was that they should not be able to re-join the enemy's forces and thereby negate the military advantage accrued by their removal from the field, although it was common for prisoners to be 'paroled', whereby they were released on a promise not to re-enlist and resume fighting. The notion of reciprocity as a principle underpinning the law of war also provided an incentive for States to ensure that enemy soldiers taken prisoner should be well treated. Geneva Conventions II (1929) and III (1949) have since ensured that this aspect of IHL is particularly highly regulated, with many technical provisions deriving from the grant of POW status.

An essential aspect of the protection of POWs is that the State which has captured them (the Detaining Power) is responsible in international law for their good treatment.<sup>111</sup> A POW is neither a criminal (although he may be prosecuted for crimes committed before capture)<sup>112</sup> nor a hostage. The Detaining State is under an absolute duty to ensure that POWs are not murdered, tortured, ill-

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Protocol III (2005), which provides for a third, universal protective emblem devoid of potential religious or national symbolism: the Red Crystal.

<sup>111</sup> GCIII Articles 12–13.

<sup>112</sup> Usually, though not invariably, for violations of IHL committed during the conflict in which he was captured. Cf the American trial of General Manuel Noriega for drug trafficking prior to the 1989 US invasion of Panama, *United States v Noriega* (1992) 808 F. Supp. 791 (S.D.Fla), and the British refusal to prosecute Astiz, captured on South Georgia during the Falklands War, for crimes committed during the 'Dirty War' in Argentina in the late 1970s: see Meyer, 1983.

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treated<sup>113</sup> or otherwise abused (eg by exposure to insults and public curiosity).<sup>114</sup> POWs cannot be the object of reprisals and no considerations of military necessity can justify their ill-treatment; thus, it would be unlawful to use them as human shields, ‘to render certain points or areas immune from military operations’.<sup>115</sup> Equally, although the Detaining Power has a legitimate interest in questioning POWs in order to obtain intelligence, they are obliged to provide only their name, rank, date of birth and military number, and it is illegal to coerce them to provide any other information.<sup>116</sup> They must be held in special camps located away from the combat zones; although the Detaining Power may transfer them to the custody of another State Party to the Convention,<sup>117</sup> the State that originally captured them may remain responsible for their good treatment. POWs must be released and repatriated after the cessation of active hostilities,<sup>118</sup> although this requirement is not interpreted as authorizing forcible repatriation of POWs who do not wish to be repatriated: after the 1991 Gulf War many Iraqi POWs chose to remain in Saudi Arabia rather than return to Iraq.

### C. CIVILIANS

The definition of civilians in IHL is a negative one: a civilian is anyone who is not a combatant as

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<sup>113</sup> During the 2003 Gulf War there were instances of Iraqi POWs being beaten by American soldiers: *The Guardian*, 6 January 2004.

<sup>114</sup> In the 2003 Gulf War some Coalition POWs were shown being questioned on Iraqi television, while Western networks also carried footage of blindfolded Iraqi POWs: *The Christian Science Monitor*, 26 March 2003. See also Rogers, 2004, pp 52–3. British practice is not to broadcast such images if they enable any POW to be individually recognized. Broadcasting pictures of the captured Saddam Hussein undergoing medical and dental examination, however, were arguably justified as a factual demonstration of his capture.

<sup>115</sup> GCIII Article 23. Iraq clearly violated this provision in its treatment of Coalition POWs during the 1991 Gulf War: Rowe, 1993, pp 196–7.

<sup>116</sup> GCIII Article 17.

<sup>117</sup> See, eg, arrangements for transfer of British-captured POWs in the 1991 Gulf War to US custody, reprinted in Rowe, 1993, at pp 348–9.

<sup>118</sup> GCIII Article 118.

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defined by Geneva Convention III and, for those States that are party to it, Additional Protocol I. Much of the emphasis of contemporary IHL is on the protection of the civilian population and individual civilians: this is achieved both by safeguarding them in most circumstances from the direct effect of hostilities (as discussed earlier) and by providing for the specific protection of civilians who are in the power of a State of which they are not nationals. Unlike the sick and wounded or POWs, civilians were not previously covered by LOAC; while this was mainly because the nature of warfare prior to the early twentieth century was such that civilians were rarely subjected to direct attack and specific measures of protection were thus not thought necessary, the experience of 'total war' in the various conflicts of the 1930s and 1940s made it clear that development of the law in this direction was urgently required. The result was the entirely innovative Geneva Convention IV (1949).

The Convention protects nationals of one belligerent who find themselves in the power of another belligerent, either through being in the territory of an enemy State or in territory under belligerent occupation. It does not protect nationals of neutral States caught up in a conflict,<sup>119</sup> unless they are in occupied territory, in which case they benefit from the general protections accorded to all civilians in such territory. Thus, British citizens in Kuwait at the time of the Iraqi invasion in 1990 were covered by the Convention but those in Iraq itself were not, since the UK at that time was not a party to any conflict with Iraq and the UK still had diplomatic relations with that State. Only when Coalition military action started in 1991 did British citizens in Iraq come under the protection of the Convention. Civilians in the territory of an enemy State should normally be allowed to leave the State at any time during the conflict, although permission to leave may be refused if their departure would be contrary to the national interests of the State;<sup>120</sup> they may even be interned if absolutely necessary for security reasons,<sup>121</sup> although this would not authorize the mass internment of members of specific ethnic groups. If internment does occur, civilians are entitled to a standard of treatment effectively analo-

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<sup>119</sup> GCIV Article 4(2).

<sup>120</sup> Ibid, Article 35.

<sup>121</sup> Ibid, Article 42.

gous to that accorded POWs. Civilians must not be subjected to reprisals or collective punishments,<sup>122</sup> held hostage<sup>123</sup> or otherwise ill-treated.

#### D. BELLIGERENT OCCUPATION

Similar legal standards govern the treatment of civilians in occupied territory, who additionally must not be deported to any other State (including the Occupying Power).<sup>124</sup> The Occupying Power also has various detailed obligations concerning maintenance of the physical welfare of the civilian population, respect for private property and the administration of law and order (Benvenisti, 1993).<sup>125</sup> While these provisions of the Convention were adopted as a reaction to the systematic abuse of occupied territories by the Axis Powers in World War II, they built upon legal foundations already instituted by The Hague Regulations (1907). The greatest contemporary controversies surrounding their implementation have been in relation to the Israeli occupation of the Palestinian Territories (OPT) since 1967, and the Coalition occupation of Iraq (2003-4).

Although Israel denies the formal applicability of Convention IV to the West Bank on the grounds that it was not legally recognized as ‘the territory of a High Contracting Party’ (ie Jordan) prior to 1967, as required by Article 2 of the Convention, this argument has never been accepted by the international community; in any event, Israel claims to apply the provisions of the Convention on a *de facto* basis.<sup>126</sup> The principal criterion for the applicability of the law of belligerent occupation, as stated in Article 42 of The Hague Regulations, which as customary law is binding on Israel, is that territory be ‘actually placed under the authority of the hostile army...where such authority has been established and can be exercised’. The legal status of the territory prior to occupation is therefore ir-

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<sup>122</sup> Ibid, Article 33.

<sup>123</sup> Ibid, Article 34.

<sup>124</sup> Ibid, Article 49.

<sup>125</sup> Ibid, Articles 50–78.

<sup>126</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Reports 2004*, p 136, paras 90–101.

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relevant: the test for determining the existence of an occupation is the factual one of effective control.<sup>127</sup> By the same token, *de facto* annexation or other changes to the legal status of the occupied territory—as were effected by Israel in East Jerusalem and parts of the Golan Heights in 1967, by Argentina in the Falkland Islands in 1982 and by Iraq in Kuwait in 1990—cannot affect the *de jure* application of the law of belligerent occupation.<sup>128</sup> Those parts of the West Bank that are under the jurisdiction of the Palestinian Authority since the implementation of the Oslo Accords in 1993 are technically no longer under belligerent occupation; neither, since Israel's withdrawal in 2005, is the Gaza Strip, although uncertainty persists in relation to the latter, in light of Israel's continuing control over its borders, coast and airspace (Shany, 2006). Further controversy was caused by the naval blockade which Israel imposed on Gaza in 2009 to prevent weapons from being landed in the territory, where they might be used by Hamas to attack targets in Israel. Although Israel was harshly criticized for its violent enforcement of the blockade on the high seas against a Turkish and international aid flotilla bound for the Gaza coast in 2010, a subsequent UN inquiry found that in the *sui generis* continuing state of *de facto* international armed conflict between Israel and Gaza, the former was entitled under international law to institute the blockade and to enforce it, albeit not in an unreasonable and excessive manner.<sup>129</sup>

The comparatively brief occupation of Iraq gave rise to a different set of concerns under IHL. Although the USA and the UK, as the leading members of the Coalition Provisional Authority (CPA), formally accepted that they were *de jure* Occupying Powers within the meaning of Geneva Convention IV, the situation in Iraq from April 2003 was one of *debellatio*—the total defeat and extinction of authority in the occupied territory, a situation that had not occurred since the unconditional sur-

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<sup>127</sup> Cf *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p 168, paras 172–8.

<sup>128</sup> See, on Israel, SC Res 681 (20 December 1990); on Iraq, SC Res 670 (25 September 1990).

<sup>129</sup> See UN, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011, [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf).

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render of Germany in 1945. Occupying Powers are under an obligation to respect, ‘unless absolutely prevented’, the laws previously in force in the occupied territory,<sup>130</sup> because belligerent occupation in no way grants legal title to the Occupying Power and cannot affect the legal status of the territory under general international law: thus, Iraq continued to be a sovereign State in international law, although its powers of government were temporarily exercised by the CPA. The latter, however, substantively changed Iraqi law on a number of matters, most notably by the wholesale privatization of Iraq’s previous centrally planned economy and opening it up to foreign investment, providing tax incentives for foreign corporations wishing to do business in the country and suspending all trade tariffs. The CPA also amended Iraqi criminal law by providing for the immunity of foreign contractors in Iraqi courts. The CPA’s delegation to the Iraqi Governing Council of the power to create a special civilian court for the trial of officials of Saddam Hussein’s regime was also problematic, as the Occupying Power may only create ‘non-political military courts’ for offences committed against the Occupying Power,<sup>131</sup> or for breaches of the laws and customs of war.<sup>132</sup>

The experience of occupation in Iraq also demonstrated the significance of involvement by the UN Security Council in mandating the occupation regime. The Council gave an *ex post facto* mandate to the CPA<sup>133</sup> which in some respects, as noted in the preceding paragraphs, went further than the traditional law of belligerent occupation would permit (Scheffer, 2003; Kaikobad, 2005; Roberts, 2006).

### VI. THE LAW IN NON-INTERNATIONAL ARMED CONFLICTS

A substantial majority of the armed conflicts that have taken place since 1945 have been non-international in nature, yet none of the substantive LOAC applied to such conflicts before the adoption of Common Article 3 of the Geneva Conventions in 1949 and the concept of liability for war crimes committed in such conflicts was not enunciated until the ICTY’s 1995 decision in *Tadić*. In

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<sup>130</sup> HR Article 43.

<sup>131</sup> GCIV Article 66.

<sup>132</sup> *Ibid*, Article 70.

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that case, the Appeals Chamber opined that, ‘What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’<sup>134</sup> Neither Common Article 3 nor the 1977 Additional Protocol II included any provision for individual criminal responsibility; nor did they purport to regulate methods and means of warfare, but focused exclusively on the protection of victims.

Common Article 3 has been described as ‘a Convention in miniature’ (Pictet, 1952, p 48) and ‘a minimum yardstick’ of humanitarian protection in all armed conflicts, whatever their characterization.<sup>135</sup> It requires that persons taking no part in hostilities, including those who have surrendered or are *hors de combat*, be treated humanely and without adverse discrimination; to that end, it prohibits ‘violence to life and person’, hostage-taking, humiliating and degrading treatment, and ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court...’. Within three decades recognition of the generality and vagueness of these provisions resulted in more detailed provision for fundamental guarantees, treatment of the wounded and sick, and protection of the civilian population in Additional Protocol II.

However, with a mere 15 substantive articles (compared to 84 in Protocol I), and no concept of grave breaches or compulsory enforcement, Protocol II is widely viewed as lacking teeth. It took a horrified Security Council’s response to the Rwandan genocide to secure the Protocol’s enforcement by criminal prosecutions, and even that was on a strictly ad hoc basis.<sup>136</sup> The *Tadić* decision played a seminal role in expanding, and providing some detail on, the rules of customary IHL applicable in non-international armed conflicts; a charge to which the ICRC returned with its 2005 *Study on Cus-*

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<sup>133</sup> SC Res 1483 (22 May 2003), 1511 (16 October 2003) and 1546 (8 June 2004).

<sup>134</sup> *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72 (2 October 1995), para 516.

<sup>135</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, ICJ Reports 1986, p 14, para 218.

<sup>136</sup> SC Res 955 (8 November 1994).



*tomary International Humanitarian Law*. Although these creative approaches have not been uncontroversial, largely due to methodological concerns in the deduction of customary norms of international law (Wilmschurst and Breau, 2007), and the fact that certain States not party to the Protocols have seen the Study in particular as an attempt to import various rules contained in those instruments into customary law ‘by the back door’,<sup>137</sup> they have served the valuable function of ensuring that the question of detailed legal regulation of conduct in non-international armed conflicts does not become a dead letter. Much recent attention has focussed on the legal power to detain individuals captured by States in non-international armed conflicts, which is not mentioned in Protocol II despite wording which assumes the fact of detention taking place in such conflicts by providing for humane treatment of detainees. In *Serdar Mohammed v. Secretary of State for Defence*,<sup>138</sup> the UK Supreme Court held that there is no legal authority to detain under either treaty or customary law in IHL during non-international armed conflicts, although such authority may be inferred from UN Security Council resolutions mandating military operations in situations like Afghanistan (2001-2015), as long detention is required for imperative reasons of security.

As noted in relation to the scope of application of IHL, there is a spectrum of conflict: apart from internal disturbances and tensions—including, in the British interpretation, acts of terrorism—which are not subject to LOAC at all, the lowest level is conflict ‘not of an international character’, which is governed by Common Article 3. If non-State forces have sufficient control of territory to satisfy the requirements of Protocol II, non-international conflicts are governed by the Protocol in addition to Common Article 3; finally, if other States intervene on the side of insurgents against the State party, the conflict may become ‘internationalized’, leading to the application of the Geneva Conventions in full, plus Protocol I if the States concerned are parties thereto.

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<sup>137</sup> See US Departments of State and Defense, *Letter to International Committee of the Red Cross Regarding Customary International Law Study* (2006) 46 ILM 514; also Parks, 2005.

<sup>138</sup> [2017] UKSC 2.

## VII. IMPLEMENTATION AND ENFORCEMENT

Notwithstanding chronic weaknesses in the enforcement of international law generally, there are several methods by which compliance with IHL may be secured. In roughly ascending order of impact and effectiveness, these are:

1. recourse to belligerent reprisals;
2. States' responsibility for violations committed by their armed forces;
3. States' duty to disseminate IHL and provide for its instruction to their armed forces;
4. commanders' duty to supervise conduct and repress violations;
5. States' duty to implement IHL and provide criminal sanctions for its violation in their national legal systems;
6. criminal investigation and, where appropriate, prosecution of individuals accused of violations;  
and
7. external scrutiny and pressure by third parties.

### A. REPRISALS

Belligerent reprisals—not to be confused with armed reprisals under the *jus ad bellum*—are violations of LOAC which may be permitted in response to prior violations by the enemy, as long as they are proportionate to those prior violations and have no other object than securing the cessation of illegal activity by the adverse party (Kalshoven, 1971). Historically they were seen as a not only legitimate, but often quite effective, method of forcing an enemy to comply with the law; however, the extent to which they have survived modern trends in both warfare and law since 1949 is doubtful. The Geneva Conventions prohibit reprisals against any persons protected by those instruments<sup>139</sup> and Protocol I additionally prohibits them against the civilian population and civilian objects general-

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ly.<sup>140</sup> Although these treaty provisions are clear, the extent to which reprisals are prohibited in customary law remains uncertain. Their last documented substantial use in an international armed conflict was during the Iran-Iraq War (1980-88), when each belligerent attacked the other's cities and claimed that they were engaged in limited reprisals to stop similar attacks by the enemy (Henckaerts and Doswald-Beck, 2005, vol I, pp 521-2). The ICRC's *Study on Customary International Humanitarian Law* asserted that reprisals are also prohibited in non-international armed conflicts, a position which is arguably difficult to maintain in the light of State practice and *opinio juris* (Wilmschurst and Breau, 2007, pp 370-72).

The essential problem with reprisals is the risk that, 'far from enforcing the law, [they] can produce an escalating spiral of atrocities completely undermining respect for the law' (Greenwood, 1989, p 36), thereby achieving precisely the opposite effect to what was intended. The British use of poison gas on the Western Front in 1915, for instance, although intended as retaliation for the German use of the weapon in the Second Battle of Ypres, simply resulted in its adoption on all fronts and by all belligerents for the duration of World War I.

Today, while many States expressly reserve the right to take belligerent reprisals, they generally do so with stringent conditions attached and subject to political approval at the highest level.<sup>141</sup>

### B. STATE RESPONSIBILITY

As a general rule of public international law, States are legally responsible, and liable to pay compensation for, violations of LOAC committed by their armed forces. The rule is enunciated with reference to international armed conflicts in Article 3 of The Hague Convention IV (1907), and reparations have been required from defeated enemies in respect of their troops' depredations: for example, Part VIII of the Treaty of Versailles (1919), requiring Germany to pay compensation to the Allied

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<sup>139</sup> GCI Article 46, GCII Article 47, GCIII Article 13 and GCIV Article 33.

<sup>140</sup> API Articles 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4).

<sup>141</sup> UK Ministry of Defence, 2004, paras 16.16–19.

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Powers, was based upon the notion of German responsibility for the tremendous damage inflicted on Allied lives and property during World War I. In 1991, the Security Council confirmed Iraq's legal responsibility for depredations of its troops during the occupation of Kuwait and established a UN Compensation Commission to process claims and allocate compensation for losses resulting therefrom.<sup>142</sup> Following the conclusion of their 1998–2000 conflict in the Horn of Africa, Ethiopia and Eritrea agreed the establishment of a joint Claims Commission to arbitrate all claims for loss or damage, including violations of IHL, which had occurred in the conflict.<sup>143</sup> States have been much more reluctant, however, to accept legal responsibility for the actions of their forces when deployed abroad in multinational peacekeeping, peace support or enforcement operations under UN mandate. Years of litigation were necessary before the Dutch courts would accept partial State responsibility of the Netherlands for the massacre of some 8,000 Bosnian Muslims by Bosnian Serb troops in the UN 'safe haven' of Srebrenica in 1995<sup>144</sup> (after Bosnian Muslim claimants lost in separate litigation aimed at finding that the UN bore legal responsibility for their relatives' deaths<sup>145</sup> and the 'Dutchbat' soldiers were equally found not to be individually criminally responsible for the atrocity);<sup>146</sup> the German courts have refused to find Germany liable at all for the 2009 Kunduz airstrike in Afghanistan (the airstrike was executed by US aircraft on the orders of a German Colonel).<sup>147</sup>

The doctrinal weakness of the State responsibility doctrine in the armed conflict context is that it does not cover responsibility for violations committed by non-State actors: it is easy to hold States to

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<sup>142</sup> SC Res 687 (3 April 1991).

<sup>143</sup> See, eg *Partial Awards on Prisoners of War (Ethiopia's Claim 4)* (2003) 42 ILM 1056; *Eritrea's Claim 17*, *ibid*, 1083.

<sup>144</sup> *The New York Times*, 27 June 2017.

<sup>145</sup> *Mothers of Srebrenica et al v. State of the Netherlands and the United Nations*, Supreme Court of the Netherlands, Case number 10/04437, Judgment of 13 April 2012.

<sup>146</sup> *Mustafić-Mujić and Others v. The Netherlands*, ECHR Third Section, Application no. 49037/15, Decision of 30 August 2016.

<sup>147</sup> *Deutsche Welle*, 6 October 2016.

account for their armed forces' actions in asymmetric conflicts, but their irregular opponents fall outside the framework of State responsibility (unless they win the war and the new government subsequently adopts legal responsibility for their actions, as was done by the State of Israel in respect of the assassination of Count Folke Bernadotte by members of the Stern Gang in 1948).

### **C. DISSEMINATION AND SUPERVISION**

In order to ensure that soldiers are aware of their rights and duties under international law, the Geneva Conventions and Protocol I impose obligations upon States parties to disseminate their provisions to their armed forces, and as widely as possible among the civilian population at large.<sup>148</sup> Most armed forces, therefore, have training programmes which include instruction in LOAC, both internally and by way of attendance at external (often academic) courses. Dissemination is usually undertaken by the military legal advisory services of the armed forces themselves,<sup>149</sup> but in the case of States that lack the relevant in-house military legal expertise, the ICRC plays a crucial and extensive role by providing seminars, training materials, consultancy and other assistance.

Arguably the most crucial aspect of ensuring compliance in the armed forces is military discipline and the role of the commander in the supervision of conduct and repression of violations. Article 43(1) of Protocol I requires that armed forces 'shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'. The key component in this system is the commander, who must ensure that the troops under his command comply with LOAC, and must therefore himself be familiar with his rights and responsibilities. The contemporary law of command responsibility, which in modern terms is based on Article 86(2) of Protocol I, holds the commander liable in a variety of ways, if he:

1. personally sees or hears of illegal acts being committed;
2. receives reports of the illegal conduct of his troops through his subordinates, staff or chain of

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<sup>148</sup> GCI Article 47, GCII Article 48, GCIII Article 127, GCIV Article 144 and API Article 83.

command, yet fails to act to put a stop to their violations; or

3. is so negligent or reckless in the discharge of his command as to amount to a dereliction of duty in that he unaware of the conduct of his troops.<sup>150</sup>

Article 87 requires commanders to prevent and suppress violations of the law and report them to the appropriate authorities; it requires, however, that commanders be ‘aware’ of violations.<sup>151</sup>

In a famous precedent in 1946, the former Commander-in-Chief of Japanese forces in the Philippines was executed as a war criminal despite his lack of knowledge, due to a breakdown in communications and the chain of command, of atrocities committed by troops under his overall command in Manila;<sup>152</sup> the modern doctrine, however, requires that a commander have actual effective control—not merely nominal or titular authority— over troops and actual knowledge of, or information concerning, crimes being committed,<sup>153</sup> a position which arguably gives rise to a concept of the ‘reasonable commander’. Thus the standard of knowledge has shifted from a ‘should have known’ to a ‘knew or had reason to know’ test, a position which is undoubtedly fairer to the individual commander. In addition, the modern doctrine of command responsibility requires the existence of a superior-subordinate relationship and effective control of the commander over his subordinates.<sup>154</sup>

#### D. IMPLEMENTATION AND PROSECUTION

The most dramatic, although not the most effective, way of securing compliance with LOAC is to investigate and punish violations after they have occurred, through either international or national criminal courts. Acceptance of individual criminal responsibility for such crimes has been uncontro-

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<sup>149</sup> The requirement to have such military legal advisory services is itself an obligation of API Article 82.

<sup>150</sup> See *The High Command Trial* [1949] XII Law Reports of Trials of War Criminals 1, 76.

<sup>151</sup> A commander who gives an illegal order or himself commits a criminal act is of course equally liable, but not under the doctrine of command responsibility, which is concerned only with acts of omission.

<sup>152</sup> *Application of Yamashita* (1946) 327 US 1.

<sup>153</sup> *Prosecutor v Hadžihasanović & Kubura*, Judgment, Case No IT-01-47-T, Trial Chamber II, (15 March 2006).

<sup>154</sup> See *The Prosecutor v. Delalić et al.*, Judgment, Case No IT-96-21-T, [1999] 38 ILM 57., .

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versial since the Nuremberg and Tokyo Trials after World War II. On the international level, the creation of the ICTY (1993) and International Criminal Tribunal for Rwanda (1994), followed by the establishment of other specialized criminal tribunals to deal with atrocities in Sierra Leone and Cambodia, among others, heralded a new age of activism in this respect. The first decade of the 21st Century saw the establishment of the world's first permanent International Criminal Court.

For centuries States have asserted the right to prosecute both captured enemy nationals for violations of the laws and customs of war and their own soldiers for similar offences charged under national military or criminal law. Violations of the laws and customs of war, generically described as war crimes, are subject to universal criminal jurisdiction in customary international law; other types of offences specifically relevant, though not limited, to armed conflicts are crimes against humanity and genocide. States will usually have recourse to international war crimes law only when prosecuting foreign nationals; violations committed by their own troops will normally be treated as offences under the ordinary national criminal or military law. Thus, Lieutenant William Calley was charged with four counts of premeditated murder in violation of Article 118 of the US Uniform Code of Military Justice for his role in the massacre of Vietnamese civilians at My Lai in 1968. In respect of war crimes, the Geneva Conventions and Protocol I place all States parties under a duty to investigate and prosecute grave breaches of those instruments, or extradite suspects to another State; they must also enact legislation implementing these offences in their national criminal law.<sup>155</sup> In the UK, as in many other countries, there is special legislation in force to give effect to these obligations.<sup>156</sup> The degree of scrupulousness with which States investigate and prosecute violations committed by their own armed forces varies considerably, but it has certainly been a significant aspect of the response to

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<sup>155</sup> GCI Article 49, GCII Article 50, GCIII Article 129, GCIV Article 146, API Articles 85, 86(1), 88, and 89.

<sup>156</sup> Geneva Conventions Act 1957, Geneva Conventions (Amendment) Act 1995, International Criminal Court Act 2001, Geneva Conventions and United Nations Personnel (Protocols) Act 2009.

violations committed by British forces in Iraq in 2003–4.<sup>157</sup>

Liability for war crimes applies throughout the military hierarchy. As discussed in the previous section, commanders are responsible for the acts of their subordinates; conversely a soldier cannot plead, in defence to a war crimes charge, that he was following superior orders—in the UK as in many other States, soldiers are clearly forbidden to obey illegal orders. This represents a shift from the widely held pre-1944 position that superior orders were an absolute defence to a war crimes charge and a soldier would be liable to court-martial if he refused to obey an order,<sup>158</sup> and is clearly preferable in that otherwise, the vast majority of perpetrators would invariably be able to escape liability for their acts. It is equally no defence to claim that a war crime was committed for reasons of military necessity: allowance for the exigencies of military necessity is already made in many LOAC treaties, so that conduct that would otherwise constitute a violation may be permitted in certain circumstances. But if the rule is an absolute one, such as the prohibition of the wilful killing of protected persons, a plea of military necessity would be rejected.<sup>159</sup>

Prosecutions are an imperfect tool for enforcing LOAC: the difficulties of securing reliable evidence in respect of incidents occurring in combat conditions—leading many cases to be abandoned or dismissed—cannot be underestimated. It is also true that war crimes trials are often derided as ‘victor’s justice’, in the sense that the defeated party does not have a chance to hold its enemies to account for ill-conduct, although this is a much less valid criticism in relation to standing courts established by the international community acting as a whole. Nevertheless, they are often the prism through which consciousness of IHL is embedded in the general public.

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<sup>157</sup> See UK Ministry of Defence, *The Aitken Report – An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008.

<sup>158</sup> Although this would not be the case if the order was manifestly illegal: see *The Llandovery Castle* (1921) 16 AJIL 708.

<sup>159</sup> *The Peleus Trial* [1945] I Law Reports of Trials of War Criminals 1.



## E. EXTERNAL SCRUTINY

The proliferation of media reporting of abuses in armed conflicts since the early 1990s has had the effect of greatly increasing the importance of external scrutiny of States' forces' conduct and pressure for investigations. Sometimes this comes from public opinion, but more frequently it is prompted by reports from non-governmental organizations like Human Rights Watch or international organizations like the UN and its specialized agencies.<sup>160</sup> This sort of external pressure is not mandated by the law, but it can help to generate an independent process of internal scrutiny, which in turn can contribute to increased respect for the law. The Geneva Conventions and Protocol I, however, in any event make provision for monitoring compliance with IHL by the mechanisms of the Protecting Power system and the International Humanitarian Fact-Finding Commission.

The Protecting Power system pre-dates World War II and in its current form is contained in all four 1949 Conventions.<sup>161</sup> It was instituted to enable a belligerent in an international armed conflict to designate another State, the Protecting Power, to represent its interests and those of its nationals *vis-à-vis* enemy belligerents in matters relating to the conflict. The Protecting Power has rights of access to POW and detention camps, may attend trials of POWs and civilians held by the enemy belligerent, and may make representations to the enemy belligerent concerning compliance with LOAC generally. In the Falklands War the UK designated Switzerland, and Argentina designated Brazil, to act as their respective Protecting Powers; but on the whole the system has been underused in contemporary conflicts, usually because one side is reluctant to agree to the other side's nominee. Neither the Iran-Iraq, nor the Second Gulf, Wars saw the appointment of any Protecting Powers. Indeed, since 1949, only four international armed conflicts have seen Protecting Powers designated by both parties (Wylie, 2006, p 13).<sup>162</sup>

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<sup>160</sup> Eg UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48, 25 September 2009; Res A/HRC/RES/S-12/1.B, 16 October 2009.

<sup>161</sup> GCI, GCII, GCIII Article 10; GCIV Article 11.

<sup>162</sup> Since the 2008 conflict between Russia and Georgia, Switzerland has acted as Protecting Power for both States.

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The International Humanitarian Fact-Finding Commission (IHFFC), which became operational in 1991, is mandated by Article 90 of Protocol I to investigate allegations of violations of the Protocol and the Conventions, but it may only act at the invitation of a State that has recognized its competence and only against a State that has indicated the same acceptance (to date 76 of the States parties to the Protocol have done so). Its reports are confidential to the parties concerned and it has no power of enforcement. In 2017 the IHFFC was invited to conduct its first investigation since its establishment in 1991.

Finally, it is pertinent to mention the invaluable role of the ICRC, which not only seeks to provide humanitarian assistance to the victims of armed conflicts, but also is an indefatigable advocate of IHL and, in particular, of the Geneva Conventions and their Additional Protocols. The ICRC operates under very strict limitations as to publicity—its reports on unrestricted inspection visits to POW and detention camps are confidential, although one on ill-treatment of Iraqi detainees held by the Coalition in 2004 was famously leaked to the public—and also depends on the consent of the parties to the conflict for their voluntary co-operation, although the latter must accept any offer by the ICRC to fulfil the humanitarian functions of a Protecting Power where none is appointed. It usually restricts itself to making confidential representations to the parties concerned, to urge them to comply with their obligations under IHL. Nevertheless, it does sometimes issue public reminders to all parties in a conflict to respect IHL, and generally commands unrivalled respect and efficacy in improving compliance with the law in armed conflicts.

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## FURTHER READING

The literature on this area of law has grown exponentially in the last 15 years. What follows is a necessarily selective list of suggestions for further reading in the area; all the works cited either provide insightful general commentary on international humanitarian law, or focus detailed analysis on specific topics within the area.

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