Muggleton on the Law of Non-International Armed Conflict

PAUL MUGGLETON
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with

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Preface

*Muggleton on the Law of Non-International Armed Conflict* started as one of the last contributions that Colonel and Dr Paul Muggleton wished to make to military law and academia. Unfortunately, Paul passed away before he could finalize the research and writing he had started during his long illness.

It would have been around 2010 that Paul spoke to the Asia Pacific Centre for Military Law (APCML) and Defence Legal, Department of Defence, about undertaking a detailed study concerning the law applicable to non-international armed conflict. He was concerned that the conflicts in Afghanistan and Iraq was reshaping the narratives regarding the law applicable to non-international armed conflicts. He wished to study not only that reshaping but also how the practice of law and policy in those conflicts was affecting the manner in which the law was being interpreted. From those concerns grew *Muggleton on the Law of Non-International Armed Conflict*. The APCML and Defence Legal were enthusiastic in their support for his project.

Paul approached a few of us to write specific chapters. Dr Rob McLaughlin accepted Paul’s invitation and agreed to write the chapter on the use of force in non-international armed conflict. Paul settled on writing the other chapters that are contained in this book.

As Paul’s illness grew more severe it became clear that he would not be able to complete the book he had imagined. Dr Rain Liivoja very kindly offered to take on Paul’s work and supervise its editing and up-dating. He has done an excellent job in not only undertaking those tasks but remaining faithful to Paul’s vision. Each of the chapters that Paul started have been revised and updated by others. Our sincere thanks go to Dr Róisín Burke for her contribution to the early iterations of multiple chapters and to Dr Sasha Radin for her work on the chapter concerning ‘when is there a non-international armed conflict.’ Mr Alan de Rochefort-Reynolds assisted Dr Liivoja in editing the chapters on the application of human rights and assisted me with the chapter on detention; we are also sincerely grateful to him for his work. Finally, we thank Mr Luke Chircop for proofreading the entire manuscript.

Paul was a dedicated military officer who inspired many of us to think about the manner in which law, policy and practice intersect in the planning for, and conduct of, military operations. He also had a rigorous mind as demonstrated by the articles he wrote and his SJD work. He combined his military and academic interests by engaging in training, research, writing, and advocacy. That engagement is highlighted by three examples: his commitment and contributions to the work of the International Committee of the Red Cross as a Delegate to the Armed and Security Forces; his efforts as a founding member of the APCML to set the Centre up for success; and the work that this book captures. We at the APCML miss him a great deal. His passion and dedication to training, research, writing and advocacy brought out the best in us.
We hope that *Muggleton on the Law of Non-International Armed Conflict* inspires others to think more deeply about the laws of armed conflict and its application in non-international armed conflict.

Dr Bruce 'Ossie' Oswald csc  
Professor, Melbourne Law School  
Director, Asia Pacific Centre for Military Law
Paul Muggleton graduated from the Royal Military College Duntroon in December 1976 as a Lieutenant in the Royal Australian Armoured Corps (RAAC). After initially serving in the 2nd Cavalry Regiment, he transferred to the Australian Intelligence Corps (AustInt) where he served for eleven years, including a deployment to the Sinai with the Multinational Force and Observers (MFO). During this period, in his own time, Mugo also completed a Bachelor of Laws at the Australian National University. He then undertook Army-sponsored civil schooling and completed a Legal Practice Course, facilitating his transfer to Australian Army Legal Corps (AALC) in December 1989.

In 1995, after completing his posting as the Chief Legal Officer on the Headquarters of the 5th Military District in Perth, Muggo transferred to the Army Legal Reserve and left Australia to work with the International Committee of the Red Cross (ICRC) as a delegate to the Armed and Security Forces in Eastern Europe and the Balkans. For the next three and a half years he was engaged by the ICRC to disseminate the rules of Law of Armed Conflict to armed and security forces in Central and Southeast Europe through the development and delivery of training.

During this time he commenced postgraduate study in International Public Law, leading to the award of a Doctor of Juridical Science from the University Melbourne in 2006 for his thesis titled *A Formulation of the International Crime of Aggression: The Supreme International Crime*.

In 2001, Muggo commenced his long association with the Asia Pacific Centre for Military Law (APCML), initially serving as its Associate Director (Military Node). In 2003-04 he undertook a period of full-time service as the Acting Deputy Director. He undertook another period of full-time service with the APCML in 2006–08, again as the Associate Director. During his time with the APCML Muggo created, taught, administered and worked on many of its courses. He was passionate about blending intellectual vigour, good teaching techniques, and rigorous research so as to contribute to the profession of arms and military law. His aim was always to achieve the very highest standards of military professionalism.

While at the APCML Muggo deployed to Iraq to serve with the Coalition Provisional Authority (CPA) in Baghdad. His report from the General Counsel of the CPA described Muggo as: one of [your] finest officers. He represented Australia and her Army with great distinction and his contributions to the CPA have incalculably improved the quality of our legal actions on behalf of the Iraqi people. LTCOL Muggleton’s enthusiasm was infectious and key to this office’s high esprit. He is a natural leader and has absolutely unlimited potential.
Muggo was promoted to Colonel in 2009. Since 2009, Muggo was a Consultant to the Director of Army Legal Services, providing advisory and training support to the Directorate of Operations and International Law and the Military Law Centre. Sadly, it was at around this time that he was diagnosed with liver cancer. He managed his illness with stoicism, and kept busy and committed through his military legal service to the APCML and Defence Legal. This monograph is a testament to that commitment.
I  INTRODUCTION

There are two legal categorisations of armed conflict under international humanitarian law (‘IHL’): international armed conflict (‘IAC’) and non-international armed conflict (‘NIAC’). IACs are conflicts between two or more states.1 NIACs are conflicts between a state and an armed

1 Article 2 Common to the four Geneva Conventions of 1949 (‘Common Article 2’) provides that the Conventions apply ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS
group or between two or more armed groups. The majority of armed conflicts today are NIACs. There are also situations of violence that do not meet the threshold of IACS or NIACs.

A Why Does the Categorisation Matter?

Conflict characterisation determines the source and content of the law, affecting rights, obligations and prohibitions within a deployment, and subsequently, affects possible criminal liability. Therefore, the categorisation of a situation of violence has consequences both for the purposes of accountability and for the conduct of operations. The legal regimes applicable in peacetime and in armed conflict are different: while peacetime situations are governed mainly by domestic law and international human rights law, armed conflicts are additionally governed by IHL. Operationally, rules on the use of force vary considerably depending on whether the violence amounts to an armed conflict. Furthermore, there are substantive differences in the regulation of IACS and NIACs. For example, the rules for detention depend on the type of the armed conflict; in particular, prisoner-of-war (‘POW’) status does not exist in NIACs. Gaps between the laws governing IACS and NIACs have been narrowed in recent years due to developments in treaty law and customary law (as evidenced by jurisprudence). However, despite this trend, NIAC provisions remain less comprehensive than those governing IACS. In terms of treaty law, around 600 provisions govern IACS whereas NIACs are only subject to Article 3 Common to the Geneva Conventions of 1949 (‘Common Article 3’) and, if deemed applicable, the 28 provisions in Additional Protocol II. Also, the Rome Statute of the International Criminal Court (‘Rome Statute’) applies to both international and non-international armed conflicts.


2 The law applicable in NIACs is found in Article 3 Common to the Four Geneva Conventions of 1949 (‘Common Article 3’) and in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’). Additionally, relevant customary international law applies to both international and non-international armed conflicts.


For IHL treaties applicable to both NIACs and IACS, see Chapter 2 Part I. See also Steven Solomon, ‘Internal Conflicts: Dilemmas and Developments’ (2006) 38 George Washington International Law Review 579, 583–4; International Committee of the Red Cross, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (2007) 89 International Review of the Red Cross 719. The International Committee of the Red Cross considers that 147 of 161 identified customary humanitarian law rules are applicable in both IACS and NIACs. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law (International Committee of the Red Cross, 2005).

5 See, eg, Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [127] (‘Tadić (Jurisdiction)’); Prosecutor v Blaškić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [170] (‘Blaškić (Trial Judgment)’); Prosecutor v Kordić (Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 9 March 1999) [30] (‘Kordić (Motion to Dismiss)’). But see James G Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 International Review of the Red Cross 313, 321. Stewart contends that customary law fills the gap to a degree, but incompletely and with some uncertainty.

6 See also Stewart, above n 5.
distinguishes between war crimes committed in IACs and NIACs. Therefore, the distinction continues to have operational impact and effect criminal liability.

The determination of the relevant legal framework begins with two questions:

- Is there an armed conflict?
- If so, is the armed conflict of an international or non-international character?

B When is there a NIAC?

The determination of when a NIAC exists is often a difficult one to make for both political and legal reasons.

On the legal side, it can be challenging to identify the upper and lower thresholds of a NIAC. A wide spectrum of armed conflict exists today. These conflicts do not all fit neatly into the legal categories of IACs, NIACs and peacetime.8

The line distinguishing between peacetime and armed conflict is often not clear. Problematically, there is no treaty law defining the lowest threshold of a NIAC. Moreover, the two main treaty sources for the regulation of NIACs – Common Article 3 and Additional Protocol II – constitute two separate legal regimes with different thresholds for application.9 Common Article 3, in particular, lacks clear criteria for identifying when it is applicable.10 Furthermore, debate exists as to whether the Rome Statute provisions reflect Common Article 3's threshold or establish an additional type of NIAC.11

In addition, the upper threshold of NIACs – the line between IACs and NIACs – can also be difficult to delineate.12 NIACs may transform into IACs (become internationalised), IACs may become NIACs (become internalised) or NIACs may exist alongside IACs (mixed conflicts).13

Further, debate surrounds how to characterise NIACs in which United Nations-mandated forces participate. Situations of occupation give rise to further discussion as to how the conflict is to

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8 Eran Shamir-Borer, ‘Revisiting Hamdan v Rumsfeld’s Analysis of the Laws of Armed Conflict’ (2007) 21 Emory International Law Review 601, 602; Fionnuala Ni Aolain, ‘Hamdan and Common Article 3: Did the Supreme Court Get It Right?’ (2007) 91 Minnesota Law Review 1523, 1534. Ni Aolain highlights that there is a ‘lack of consensus among states regarding the level of violence, the type of actors, and the specific contexts that give rise to the application of the laws of war’.
9 Although some commentators say that states do not make this distinction in practice. See Pejić, above n 3, 88: ‘In this context, it should be noted that the [icrc’s Customary International Humanitarian Law Study] does not distinguish between the different thresholds of non-international armed conflict … because it was found that in general states did not make this distinction in practice.’
11 Rome Statute arts 8(2)(d) and 8(2)(f).
12 See, eg, Yoram Dinstein, War, Aggression and Self-Defence (Cambridge University Press, 2nd ed, 1994) 6: ‘in practice, the dividing line between inter-State and intra-State wars cannot always be delineated with a few easy strokes.’
13 Tadić (jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [72]: ‘the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.’
be characterised: as an IAC alongside a NIAC or as a single IAC. Finally, the question has to be raised as to whether or not wars of national liberation are IACS or NIACS.14

On a political level, states have historically been reluctant for international law to intrude into areas seen as essentially internal.15 Conversely there have also been attempts by states to broaden the scope of the law’s applicability.16 This context complicates an already difficult technical legal environment.

The aim of what follows – notwithstanding ‘gaps, overlaps and ambiguities’17 – is to provide a certain level of clarity for determining the characterisation of situations of violence, with the focus being on the lower and upper thresholds of a NIAC.

II TYPES OF NON-INTERNATIONAL ARMED CONFLICTS

A Common Article 3

Common Article 3 regulates the majority of NIACs today. It applies to any ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. Common Article 3 governs conflicts between a state and an armed group as well as conflicts between armed groups.18 It is generally considered that Common Article 3 binds states and non-state actors alike.19

Common Article 3 provides minimum standards for humane treatment of persons no longer taking part in hostilities and is considered to reflect customary international law. In addition, a number of conduct of hostilities rules are widely viewed to apply to such conflicts as a matter of customary international law.20 In certain circumstances, other parts of the Geneva Conventions can be made applicable in a NIAC through special agreements between the parties.21

16 ICRC, above n 4.
18 Aolain, above n 8, 1532. There must be at least two parties to the conflict for the application of Common Article 3. However, there can be difficulties in determining whether non-state actors can constitute a ‘party’ for Common Article 3 purposes. See especially Pejić, above n 3, 78, 85–6.
20 For a discussion of such rules, see Chapter 2, Part II.
21 Common Article 3(2) provides that: ‘Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.’ An example of this provision in action is the 22 May 1992 agreement between parties to the conflict in the Former Yugoslavia. The parties agreed to apply the Geneva Conventions to the violence although the complex operational situation was difficult to categorise. See also François Bugnion, ‘Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts’ (2003) 6 Yearbook of International Humanitarian Law 167, 168 n 3.
Common Article 3 has two explicit criteria for its application:

- The existence of an armed conflict;
- That this conflict takes place in the territory of one of the High Contracting Parties.

1 Existence of an Armed Conflict

Common Article 3 does not define what constitutes an armed conflict. The International Committee of the Red Cross' Commentary on the Geneva Conventions to Common Article 3 is often cited for guidance for what criteria indicate the existence of an armed conflict. Strictly speaking, the factors articulated in this Commentary, while useful, are not requirements for the existence of an armed conflict. As a whole, these criteria envision the application of Common Article 3 to conflicts with a higher minimum threshold than is the case today.

In Tadić, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.' Under the Tadić test (generally considered to reflect customary international law), violence must reach a certain level of intensity and the parties must be sufficiently organised in order for Common Article 3 to apply. The Tadić test is designed to differentiate between situations of internal disturbances (governed by domestic law and human rights law) and situations of armed conflict (which are regulated, in

22 The question of what constitutes an armed conflict has been an issue since the time of drafting Common Article 3. See Jean S Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary (International Committee of the Red Cross, 1952-1960) vol 1, 28. Regarding the specific issue of what was meant by the expression 'armed conflict not of an international character', the Commentary reports that it 'arose again and again' at the Conference as the expression was so general, so vague, that many of the delegations feared that it might cover any act committed by force of arms: Jean S Pictet (ed), The Geneva Conventions of 12 August 1948: Commentary (International Committee of the Red Cross, 1952-1960) vol 3, 35. See also Rein Müllerson, 'International Humanitarian Law in Internal Conflicts' (1997) 2 Journal of Conflict & Security Law 109, 110–13.

23 Pictet, 'vol 1' above n 22, 50. See Annex A for a list of the criteria.


25 Tadić (jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70].

26 Subsequent ICTY decisions have verified this interpretation: see, eg, Prosecutor v Kunarac (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23, 12 June 2002) [55] ('Kunarac (Appeals Judgment)'); Prosecutor v Boškoski (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [175] ('Boškoski (Trial Judgment)'). In 2007, the ICRC provided the following guidance: 'In certain cases ... it is unclear whether a group resorting to violence can be considered as a "party to the conflict" within the meaning of common Article 3. Apart from the level of violence involved, the nature of the non-governmental group must also be taken into account when a situation is qualified in legal terms. Where the internal structure of the group is loose or where a clandestine chain of command is at play, the question that arises is whether the group is sufficiently organized to be characterized as a party to an armed conflict. Such determinations must be made on a case-by-case basis. Only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the relevant rules of IHL apply.'
addition, by IHL). Crucially, riots and internal disturbances are excluded from the reach of IHL. As the International Criminal Tribunal for Rwanda (‘ICTR’) held in Akayesu, the term ‘armed conflict’ itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. While this is inspired by the language of article 1(2) of Additional Protocol II, it is considered to apply equally to conflicts governed by Common Article 3.

Despite widespread agreement that a situation of violence must reach a certain level of intensity and that the armed group(s) involved must be sufficiently organised, there is not consensus on the minimum elements required to reach sufficient levels of intensity and organisation. The most detailed set of indications can be found in the ICTY jurisprudence. Signs that the requisite level of intensity has been reached included factors such as the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.

27 Prosecutor v Tadić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 7 May 1997) [562] (‘Tadić (Trial Judgment)’): The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.


29 To date, specific cases of interest are Prosecutor v Milosevic (Decision on Motion for Judgement of Acquittal) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 16 June 2004) [27]–[40] (‘Milosevic’); Prosecutor v Limaj (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-66-T, 30 November 2005) [87] (‘Limaj (Trial Judgment)’); Prosecutor v Haradinaj (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) [49] (‘Haradinaj (Trial Judgment)’); Boksoski (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [185].

30 Limaj (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) [90] (citations omitted). See Boksoski (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [177] for an extensive list of indicators of the level of violence, including the number of civilians fleeing the combat zone and types of weapons used. Other relevant cases are Milosevic (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 16 June 2004) [28]–[31]; Limaj (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-66-T, 30 November 2005) [90], [135]–[143], [150], [166]–[167]; Haradinaj (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) [49].
One of the main contentious areas regarding the intensity requirement is whether or not the hostilities must be protracted. On one end of the spectrum is the view that a situation of very short duration, where the violence is intense and the parties organised, can reach the intensity threshold. On the other end is the view that such a situation would be too short to fulfil the intensity requirement. This view, that the intensity criterion includes a temporal element, seems to dominate ICTY jurisprudence (although even within the ICTY jurisprudence there is not a completely accepted standard). In order to demonstrate that the armed group in question is sufficiently organised, factors to be taken into account include ‘the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms.’ Other factors include the existence of a command structure, the level of logistics, the level of discipline and the ability to speak with one voice. Although the case law of the ICTY is helpful in clarifying the issue of when there is a conflict, difficulties remain in relation to its practical application.

2 Geographic Scope of Common Article 3

Common Article 3 explicitly states that it applies to conflicts ‘in the territory of one of the High Contracting Parties.’ Until the past decade this was interpreted to mean that NIACs were internal conflicts. The conflict with al Qaeda and the Israeli conflict with Hezbollah have challenged this interpretation. In addition, it is recognised that NIACs frequently entail hostilities that spill over into neighbouring states. These situations have generated debate on how the law can best be applied to hostilities that cross borders. Specifically, the question is how these types of hos-
The trend today is to interpret Common Article 3 to apply across borders as well as internally. A number of arguments are put forth to support this approach. One view is that such conflicts remain non-international because, although the violence crosses borders, at least one of the parties to the conflict is an armed group. Therefore, non-international armed conflicts are identified by the parties to the conflict. The fact that Common Article 3 has traditionally applied to only internal armed conflicts has lost its relevance. Significantly, the US Supreme Court held in *Hamdan v Rumsfeld* that a non-international armed conflict exists when there is a ‘conflict’ that is not of an ‘international’ character:

The D. C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a ‘conflict not of an international character.’ That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a non-signatory, so long as the non-signatory ‘accepts and applies’ those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not).

The Court’s literal interpretation meant that Common Article 3 would apply to all conflicts that are not international – not just conflicts geographically internal to a particular state. This interpretation is consistent with the widely held view that Common Article 3 should be granted broad application since it provides minimum humanitarian protections.

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37 According to one commentator, for more than fifty years following the 1949 revision of the Geneva Conventions, scholars, government experts and military practitioners understood Common Articles 2 and 3 to provide the ‘exclusive criteria’ for when the law of war was activated. This was described as ‘an “either/or” law-applicability paradigm: inter-state, or international, armed conflicts triggered the full corpus of the laws of war, whereas intra-state, or internal, armed conflicts triggered the limited humanitarian protection reflected in the terms of Common Article 3.’ Geoffrey S Corn, ‘*Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’ (2007) 40 Vanderbilt Journal of Transnational Law 295, 295.

38 For example, the ICRC maintains that all armed conflicts are governed by either international or non-international law. International Committee for the Red Cross, above n 4. See also Marco Sassoli, ‘Use and Abuse of the Laws of War’ (2004) 22 *Law & Inequality* 195, 196, 199, 200–1. It should be noted here that the issue of whether or not a state may violate a second state’s territorial sovereignty, is distinct from whether or not the law of armed conflict applies. The former is an issue about the resort to force (or *jus ad bellum*) and the latter is about when and where an armed conflict takes place (part of *jus in bello*).

39 Although Common Article 3 has been interpreted to apply to internal armed conflicts until recently, some commentators point out that in fact ‘[i]t could be argued that use of the term “non-international,” instead of internal, was a conscious choice intended to ensure that all armed conflicts were covered.’ John Cerone notes, though, that some have argued that the plain meaning of the language ‘occurring in the territory of one of the High Contracting Parties’ limits Common Article 3 to internal conflicts. Cerone argues that the ICJ decision in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* supported the former reading of Common Article 3 as the Court found that it applied in all conflicts and that the Appeals Chamber in *Tadic* took same view. John Cerone, ‘Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context’ (2007) 40 Israel Law Review 396, 405.


Although viewing Common Article 3 to apply across borders is the dominant interpretation today, other views have been put forth. The Bush Administration's initial view of the conflict with al Qaeda was that it was neither an **IAC** nor a **NIAC**. It was not the former because the conflict did not take place between two states and, therefore, was not governed by Common Article 2 of the **Geneva Conventions**. Nor was the conflict covered by Common Article 3 because it took place across multiple territories. The Administration therefore concluded that the **Geneva Conventions** did not apply. This standpoint was widely criticised and effectively overturned in **Hamdan**.

Others have suggested that conflicts such as that in Lebanon between Hezbollah and Israel are neither international nor non-international because they do not take place between two states, nor do they occur in the territory of a party to the conflict. Those who hold this point of view suggest that perhaps a new type of conflict should be created: a transnational armed conflict. It is unclear what rules would apply to this third type of conflict or what would trigger its application. In any case, this view has increasingly lost momentum. An alternative approach is to view such conflicts as international because they cross a border. A minority take this position, represented by the Israeli Supreme Court's judgment in **Targeted Killings**.

Therefore, today the prevailing view is to apply Common Article 3 extraterritorially as long as the conflict fulfils the criteria for a **NIAC**. The challenge at the moment seems to be how the determination of a **NIAC** is to be made on the facts. As a case in point, whether or not the global armed conflict against al Qaeda and its associates is in fact an armed conflict in the legal sense has generated a great deal of controversy. The US Government considers that it is engaged in a global armed conflict. However, this stance has been criticized. The **ICRC**, for example, takes

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43 Nor did it qualify as a recognised belligerency. The US has not ratified **Additional Protocol I** and therefore is not bound by article 1(4) which applies to national liberation movements.

44 Yoo and Delabunty, above n 42; Bush, above n 42. The US also claimed that human rights law does not apply during armed conflict or extraterritorially. See Milanovic, ‘Lessons’, above n 40, 387.


46 See, eg, Corn, above n 37, 330–1. Corn, for example, believes that the changing nature of warfare ‘necessitates recognition of a hybrid category of armed conflict for purposes of triggering the foundational principles of the law of war’. This trigger will be characterised as ‘transnational armed conflict’ a term used to represent the extraterritorial application of military combat power by the regular armed forces of a state against a transnational non-state armed enemy’: at 297–300.

47 Corn suggests that the foundational principles of the law of war ‘such as necessity, humanity, distinction, and the prohibition against inflicting unnecessary suffering’ would apply: Corn, above n 37, 334.


50 Ibid.
a case-by-case approach to the legal qualification of situations of violence that are seen to be part of a purported global armed conflict against al Qaeda.\footnote{International Committee of the Red Cross, above n 4, 724–5. See also Pejić, above n 3; Shamir-Borer, above n 8, 601.}

A final, and separate, issue pertains to the geographic scope of Common Article 3 within a country. Treaty law is silent on this point. The ICTY found in \textit{Tadić} that IHL should be applied beyond the exact time and place of hostilities to ‘the whole territory under the control of a party, whether or not actual combat takes place there.’\footnote{Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70].} This interpretation has been upheld by a number of subsequent ICTY decisions.\footnote{See, eg, \textit{Blaškić} (Trial Judgment), (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [64]; \textit{Prosecutor v Delalić} (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [185], [194], [209]; \textit{Prosecutor v Aleksovski} (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [43]; \textit{Prosecutor v Kunarac} (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber Judgment, Case No IT-96-23/1-T, 22 February 2001) [568]; \textit{Kunarac} (Appeals Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23, 12 June 2002) [57]; \textit{Prosecutor v Kordić} (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [27] (‘Kordić (Trial Judgment)’); \textit{Limaj} (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-66-T, 30 November 2005) [84].}

\section*{B Additional Protocol II}

\textit{Additional Protocol II} (which, unlike the Common Article 3 that forms part of \textit{Geneva Conventions}, is not universally ratified\footnote{Major states that have not ratified \textit{Additional Protocol II} include India, Indonesia, Iran, Israel, Malaysia, Mexico, Pakistan, Somalia, Sri Lanka, Syria, Thailand and the United States. The reason for non-ratification is largely due to states’ concerns that the \textit{Protocol} would impinge on their sovereignty and could confer legitimacy upon armed non-state groups. Schneider, above n 15.} contains a more comprehensive set guidelines for the protection of those not taking part in hostilities during a NIAC and includes regulations on the conduct of hostilities. Also, \textit{Additional Protocol II} contains clearer, but stricter, conditions for its applicability compared to those found in Common Article 3.\footnote{This was done intentionally. Sandoz, Swinarski and Zimmerman (eds), above n 28, 1351 [4459], 1353 [4470].} The aim of the drafters was to ensure the protection of the victims of conflicts should not ‘depend on an arbitrary decision of the authorities concerned.’\footnote{Ibid 1351 [4458].} To that end, the \textit{Protocol} expressly provides in article 1(2) that it does ‘not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.’ In this respect \textit{Additional Protocol II} makes explicit a condition that is implicit in Common Article 3. However, article 1(1) provides that the Protocol applies to all armed conflicts which are not covered by Article 1 of \textit{Additional Protocol I} and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.\footnote{See also ibid 1351 [4458].}

\footnote{\textit{Tadić} (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70].}
This set of criteria establishes a high threshold of applicability,\footnote{Ibid 1353 [4470]. See also Cullen, ‘Parameters’, above n 10, 199. But some commentators have criticised this high threshold. See, eg, Cullen, ‘Key Developments’, above n 26, 97; Lysaght, above n 19, 21, 24.} which very few conflicts actually reach. Unlike Common Article 3, Additional Protocol II applies only to conflicts between a state and a very highly organised armed group.\footnote{Therefore, in contrast with Common Article 3, Additional Protocol II does not cover the situation where ‘several factions’ confront each other. Sandoz, Swinarski and Zimmerman (eds), above n 28, 1351–2 [4461]–[4462].} Additional Protocol II has thus been deemed applicable to the war in El Salvador,\footnote{Additional Protocol II was formally found to be applicable in the El Salvadorian conflict. Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), The Handbook of International Humanitarian Law (Oxford University Press, 2nd ed, 2008) 45, 55; Marco Sassoli and Antoine A Bouvier, How does Law Protect in War? (International Committee of the Red Cross, 2nd ed, 2006) 916–19.} the first war in Chechnya\footnote{See, eg, Federal Government of Germany, ‘Case No 279 (Russian Action in the Chechen Conflict)’ in Marco Sassoli, Antoine A Bouvier and Anne Quintin (eds), How Does Law Protect in War? (International Committee of the Red Cross, 3rd ed, 2011). Paola Gaeta, ‘The Armed Conflict in Chechnya before the Russian Constitutional Court’ (1996) 7 European Journal of International Law 563, 568.} and in the conflict in Colombia.\footnote{The Colombian Government ratified Additional Protocol II on 14 August 1995. The conflict between the Colombian Government and the Fuerzas Armadas Revolucionarias de Colombia (‘FARC’) that took place after this point is considered to have reached the level of an Additional Protocol II conflict. See, eg, Felicity Szesnat and Annie R Bird, ‘Colombia’ in Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (Oxford University Press, 2012) 203, 227. According to Richard Schneider, the result of Colombia’s ratification was to bring the paramilitary and guerrilla groups under the Protocol’s terms, insofar as the groups are under responsible command and exercise enough control over territory to carry out sustained military operations and to implement the Protocol. Schneider reports that the Colombian President of the time, Ernesto Samper, ‘actually attempted to induce the groups to sign Protocol II independently, thereby provoking interesting speculation about the status of such groups and the interests they represent in Colombia.’ Schneider, above n 15. Regarding whether Additional Protocol II applied to the conflict in Colombia, at least to the situation circa 1999, Carrillo-Suarez accepted that, ‘the question of whether Protocol II applies directly to the conflict under international law is still contested in many circles’, but concluded, after reviewing the application of the Article 1 criteria in Colombia, that as ‘a matter of international law, Protocol II applies by its own terms to the war in Colombia, as it almost certainly has since its ratification and entry into force in early 1996, at the very least.’ Arturo Carrillo-Suarez, ‘Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict’ (1999) 15 American University International Law Review 1, 42, 97.} In this respect, it is important that Additional Protocol II makes it clear that it ‘develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application.’\footnote{Additional Protocol II art 1(1).} This provision was intentionally added, as it was feared by some that Additional Protocol II’s higher threshold would impact on Common Article 3.\footnote{See Cullen, ‘Key Developments’, above n 26, 97; Lysaght, above n 19, 21, 24.; See also Heike Spieker, ‘Twenty-Five Years after the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection’ (2001) 4 Yearbook of International Humanitarian Law 129.} As a consequence, there are \textit{NIACs} where only Common Article 3 would apply (whereas, if Additional Protocol II becomes applicable, Common Article 3 would apply \textit{a fortiori}). Notably, the upper threshold of Additional Protocol II’s applicability is defined in distinction from Additional Protocol I which governs \textit{IACs}.\footnote{See Sandoz, Swinarski and Zimmerman (eds), above n 28, 1351 [4458].}
C Rome Statute

An important development of treaty law applicable in NIACs was the adoption of the Rome Statute on 17 July 1999. The Rome Statute contains provisions on war crimes in NIACs. Article 8(2)(c) extends war crimes to ‘the case of an armed conflict not of an international character’ for ‘serious violations of Article 3 common to the four Geneva Conventions of 1949’. Article 8(2)(d) clarifies that this sub-paragraph applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Article 8(2)(e) then provides for ‘[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character’ and article 8(2)(f) clarifies that this sub-paragraph applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

These thresholds for NIACs are not identical. Article 8(2)(f) includes the additional criterion that the conflict take place ‘in the territory of a State’ and that the conflict be ‘protracted’. Therefore, the question has arisen as to whether two different thresholds of NIACs exist within the Rome Statute.

Moreover, the language of article 8(2)(f) is the same as the test for a NIAC adopted by the ICTY Appeals Chamber in Tadić save for use of the expression ‘protracted armed conflict’ rather than ‘protracted armed violence’. As a result, some consider that this variation in wording indicates that article 8(2)(d) refers to conflicts governed by Common Article 3, and that article 8(2)(f) creates an additional threshold. The definition provided for in article 8(2)(f), they hold, is broader than that found in Additional Protocol II, but stricter than that in Common Article 3. Others, however, maintain that the Rome Statute refers to a single threshold and that this is basically the same threshold as put forth in Tadić. They argue that the Tadić test (which is a reflection of the threshold of applicability of Common Article 3) also uses the term ‘protracted’. The difference in the wording of ‘violence’ or ‘conflict’ is not important. Rather, the discrepancy stems from discussions that took place during the drafting of article 8, but does not reflect...
the final compromise.70 The prevailing view seems to be that the *Rome Statute* creates no new threshold for *NIACs*. However, most commentators acknowledge that the wording of the article contributes to a lack of clarity on the matter.71 In any case, it should be kept in mind, as pointed out by Vité, that even if one holds the view that a third category of *NIAC* has been created for the purposes of the *Rome Statute*, such a third category does not extend beyond the *Rome Statute*.72

**D Conclusion on Lower Threshold of NIACs**

In sum, there are two main types of *NIACs*: those governed by Common Article 3 and relevant customary international law and those to which *Additional Protocol II* applies. Common Article 3 represents the lowest threshold of *NIACs*. In general, it is considered that the parties to the conflict must be sufficiently organised and the intensity of the conflict must reach a certain level. *Additional Protocol II* only applies to a limited number of conflicts that reach a high intensity. It is not clear whether article 8(2)(f) of the *Rome Statute* represents a third, intermediate, threshold but, the majority consider the article to be akin to Common Article 3’s threshold of applicability. However, regardless, the determination that a *NIAC* exists can be factually and politically difficult. Finally, a trend exists to re-interpret Common Article 3 to apply extraterritorially.

**III Delineation between NIACs and IACs**

Distinguishing between *NIACs* and *IACs* can be equally complex. Some *NIACs* transform into *IACs* because the conflict is internationalised through outside state intervention. The intervention of *UN*-mandated forces in a *NIAC* raises further issues. In addition, *IACs* may change to *NIACs* if an *IAC* is internalised. Conflicts may also be mixed – *IACs* existing in parallel with *NIACs* – and situations of occupation raise complex and unresolved issues for conflict characterisation. Finally, although never used, article 1(4) of *Additional Protocol I* forms yet another demarcation between *IACs* and *NIACs*.


71 See, eg, Meron, ‘Humanization’, above n 68, 260–1:

The thresholds of applicability and the qualification of conflicts pose some of the most difficult and controversial questions regarding international humanitarian law … Article 8(2)(f) of the *ICC* statute has further complicated the question … [its wording] draws on the 1995 *ICTY* appellate decision in the *Tadić* case. Article 8(2)(f) should not be considered as creating yet another threshold of applicability, but it may well exacerbate the previous lack of clarity.

72 Vité, above n 66, 83.
A Internationalised Armed Conflicts

Internationalised armed conflicts are NIACs that become internationalised due to direct or indirect intervention by an outside state on behalf of an armed group party to the NIAC.73 Indirect intervention entails the involvement of an outside state by means other than through troops on the ground, such as providing instructions, arms, training or finances to an armed group. Direct intervention involves the outside state’s use of troops on the ground.74 Conflicts where an outside state intervenes on behalf of the state involved in a NIAC do not become internationalised.75

The difficulty is in determining the threshold for when a conflict is internationalised.76 International conflicts are generally conflicts between states. Therefore, the question is what level of outside state involvement is necessary on behalf of an armed group. In Tadić, the ICTY applied a test of ‘overall control’:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.77

This stood in something of a contrast to the views of the International Court of Justice (‘ICJ’) in Military and Paramilitary Activities in and Against Nicaragua (Merits), where that

73 Prosecutor v Tadić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [84] (‘Tadić (Appeals Judgment)’):

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

See also A P V Rogers, Law on the Battlefield (Manchester University Press, 2nd ed, 2004) 220; Stewart, above n 5, 315. Note, though, that the expression ‘internationalised’ can carry differing connotations. This piece uses the term to indicate an international intervention. In comparison, the Handbook of International Humanitarian Law uses the expression ‘internationalised’ to express situations where the law of international armed conflict applies. See Fleck, above n 69, 606.

74 See eg, Cryer, above n 17, 44.

75 According to Greenwood, the ‘character of the conflict will determine whether the relevant body of law is that applicable to international or non-international armed conflicts.’ He argues that when ‘foreign armed forces intervene in an internal conflict on the side of the government forces and become involved in fighting with dissidents’ they are involved in an internal conflict. Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 Yearbook of International Humanitarian Law 1, 8–9, 33. The San Remo NIAC Manual, above n 36, 2, also takes this position:

When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character. Conversely, should a foreign State extend military support to an armed group acting against the government, the conflict will become international in character.

However, see Pejić, above n 3, 90, for the minority view that, ‘third State intervention in a non-international armed conflict, provided it reaches a certain level, internationalises the internal conflict as a whole, regardless of the side on which the third party intervenes.’


Court held that the financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of Nicaraguan rebels (the 'contras') by the US was not enough to engage state responsibility. Rather, '[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'

The ICTY did not apply this 'effective control' test, considering that overall control was sufficient because the question at hand involved an organised armed group (with a hierarchical structure). The way in which the ICTY came to this conclusion has proven controversial and has triggered extensive discussion with regard to whether the judgment has fragmented international law. In particular, it is debated whether the 'overall control' test was appropriately linked with the concept of state responsibility. In any case, for the purposes of conflict characterisation, the general trend is to view the overall control of an armed group as the test for internationalising a NIAC.

This test has been reinforced by subsequent jurisprudence of international tribunals. In Bosnian Genocide, the ICJ acknowledged that, while not suitable for the purposes of attribution, the test of overall control may be the appropriate test for internationalising a NIAC. In Lubanga, the International Criminal Court ('ICC') has recently endorsed the 'overall control' test:

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79 Tadić (Appeals Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [149]. However, per paragraph 112 of the judgment, the effective control test might be necessary for cases of individuals or unorganized groups.

80 Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout' (1998) 92 American Journal of International Law 236, 236. Meron criticizes the ICTY Trial Chamber’s reliance on Nicaragua: In resolving that question, the majority of the trial chamber (Judges Vohrah and Stephen) sought guidance in the ruling of the International Court of Justice in the Nicaragua case. That resort was inappropriate because the Nicaragua case dealt with quite a different question – whether, for legal purposes, the contras either constituted an organ of the United States Government or were acting in its behalf. If so, their acts could be attributed to the United States for purposes of state responsibility.


81 But see Prosecutor v Tadić (Appeals Judgment Separate Opinion of Judge Shahabuddeen) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 150–67. See also Akande, above n 76, 60–2 who lays out three different approaches for how a NIAC can be internationalized and supports Judge Shahabuddin’s Separate Opinion. See also Stewart, above n 5, 326–33. Stewart critiques the ‘overall control test’ as being ‘complex, convoluted and the subject of considerable confusion, principally because the requisite degree of control needed to satisfy the test remains unclear. His main concern is that from a practical perspective the degree of control needed to meet the test’s requirements remains unclear.


83 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep 47, 404[4]–[405]: ‘Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable.'
As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it ‘has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.’ Pre-Trial Chamber I adopted this approach.84

A NIAC may also be internationalised through the direct intervention of an outside state.85 Not a great deal of attention has been devoted to this type of internationalisation in scholarship.86 A question arises with regard to direct intervention as to whether the entire NIAC becomes internationalised or if only the conflict between the two states is international. One interpretation is that by intervening directly, such as the Croatian State did on behalf of the Bosnian Muslims, the intervention effects the direction of the conflict and so the hostilities are part of one conflict.87 Another view is that unless the intervening state has overall control of an armed group party to the conflict, the situation would qualify as an IAC alongside a NIAC.88 For example, in the 2011 conflict in Libya, the NATO forces were in an IAC with the Libyan State.89 Whether or not the rebels were in a separate NIAC with their government or part of the IAC would hinge on whether the NATO countries where seen to have overall control of the rebels.

B UN-Mandated Forces

Whether or not the participation of UN-mandated force would internationalise a NIAC depends in part on the view taken to the issues just discussed. It also hinges on the crucial question of whether the UN forces are considered a party to the conflict. This means first of all, that the UN forces would need to be acting on the side of an armed group against a state. Secondly, it depends on the type of operation in which the UN forces are involved: peacekeeping or peace enforcement.90 The line between peacekeeping and peace enforcement can be difficult to draw. Moreover, even when UN-mandated forces are involved in an enforcement operation,

84 Prosecutor v Lubanga (Judgment) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 Mar 2012) [541] (citations omitted) (emphasis in original). See also [553], [561].
85 Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [72].
86 Cryer, above n 17, 44. See, eg, Blaškić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000); Kordić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001).
87 In Kordić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [108] the Trial Chamber held that because the intervening Croatian troops freed up the Bosnian Muslims to fight the Bosnian Serbs, the Croatian State was part of the same conflict between the Bosnian Serbs and Muslims. See also Naletilić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [191], [194]. But see Cryer, above n 17, 44 who points out that the court does not specify what amount of direct intervention would be sufficient to internationalise the conflict.
88 This position is in keeping with Common Article 2 that an IAC is an armed conflict between two or more states. See, eg, Akande, above n 76, 57; Sivakumaran, above n 70, 223–4.
the point at which they may be said to be a party to the conflict is debated.\textsuperscript{91} In practice, the UN and countries contributing troops under a UN mandate have been hesitant to accept that their forces have become parties to a conflict.\textsuperscript{92} The question, then, is this: is the threshold for determining the existence of an ‘armed conflict’ for UN-mandated operations different to that for non-UN-mandated operations? It has been argued that the threshold for when a UN force becomes a party to an IAC may be higher than the normal threshold of an IAC.\textsuperscript{93}

C Mixed Armed Conflicts

IACs may also exist alongside NIACs.\textsuperscript{94} This could occur if the direct intervention of an outside state does not internationalise the conflict\textsuperscript{95} or simply because an IAC takes place that is distinct from a NIAC.\textsuperscript{96} An oft-cited example of this is Afghanistan in 2002. An IAC existed between the Coalition States and the Taliban (who represented the State of Afghanistan at the time). At the same time, the ongoing NIAC between the Taliban and the Northern Alliance continued alongside the IAC.\textsuperscript{97} This approach emphasises the parties to the conflict and their relationship. Critics state that this view is not practical.\textsuperscript{98} It can be difficult to separate conflicts that are taking

\begin{itemize}
  \item See, eg, Akande, above n 76, 64–9. Akande also discusses the issue of whether the conflict would be between the member states and the other state group or between the UN and the state.
  \item Ibid 34:
    In practice, however, there is a great reluctance to acknowledge that a United Nations force which was not established in order to carry out enforcement action has become a party to an armed conflict even if it has become involved in quite heavy fighting. The consequence is that a higher threshold for determining the existence of armed conflict is applied in such cases than in relation to fighting between states.
    See also Akande, above n 76, 67–9, for a more detailed discussion on the issue.
  \item The two key decisions on this issue are the ICTY's Tadić (jurisdiction) and the ICT's Nicaragua judgment. The ICT differentiated the NIAC taking place between the Nicaraguan government and the Contras, and the IAC between the Nicaraguan government and the US. Nicaragua [1986] ICT Rep 14, 114 [219]; Tadić (jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [72]:
    the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.
  \item Germany took this position during NATO’s intervention into Kosovo in 1999. Germany viewed the conflict between NATO countries and the Federal Republic of Yugoslavia as an IAC occurring alongside the NIAC between the Kosovo National Liberation Army and the Federal Republic of Yugoslavia. See ‘Correspondents’ Reports: A Guide to State Practice Concerning International Humanitarian Law’ (1999) 2 Yearbook of International Humanitarian Law 327, 364. It should be noted that initially there was debate regarding whether the entire conflict would be internationalized if a state party to the conflict had overall control over an armed group or if an IAC (between the two states) would exist alongside a NIAC (between one state and the armed group in question). See James Stewart’s discussion of ‘mixed’ versus ‘global’ conflicts: the ‘rationale for the “mixed” approach is apparently that an act of internationalization only renders international the conflict between the parties belonging to States rather than all conflicts in the territory’. Stewart, above n 5, 333.
  \item See Michael N Schmitt, ‘Iraq (2003 Onwards)’ in Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (Oxford University Press, 2012) 356, 372 for the view that ‘[t]o the extent that the strands of a conflict are demonstrably separate, that is they have not been internationalized through external State support of the rebel forces, an international armed conflict occurs parallel to the non-international one.’
  \item Ibid.
  \item See, eg, Meron, ‘Classification’, above n 80, 236; Akande, above n 76, 63.
\end{itemize}
place in the same region. Furthermore, such an approach can result in different humanitarian rules being applicable to different parts of the same conflict.\footnote{Müllerson, above n 22, 112.} The prevailing view appears to be that mixed conflicts may exist. However, this approach does not always seem to be the one taken. As such, this is an area of law that is not entirely settled.


IACs may also transform into NIACs. There is very little jurisprudence in this area of the law nor does it exist in treaty law. However, it appears that internalisation may occur when an armed group that is supported by an outside state comes into power, yet the conflict with remnants of the former government’s forces continues.\footnote{See, eg, Akande, above n 76, 62–3.} An armed intervention by the outside state would then be by the invitation of the state to fight in its NIAC. For this to occur, it must be clear that the armed group is not a puppet regime. Therefore, one factor that plays a role is the new regime’s independence from the outside state.\footnote{In Afghanistan, for example, once the Loya Jirga convened and the new government of Afghanistan was established in 2002, the IAC transformed into a NIAC. This was recognised by the ICRC on the grounds that the new government was both internationally recognised and accepted internally. See International Development Committee, Letter from the Clerk of the International Development Committee of the House of Commons to Philip Spoerri, Legal Adviser, International Committee of the Red Cross, House of Commons, International Development – Appendices to the Minutes of Evidence, Session 2002-03 (2003) app 8..} International recognition of the new government is a factor as well\footnote{This can be seen in the ongoing Libyan conflict. During 2011, the Libyan National Transitional Council was viewed as the legitimate government of Libya. For discussion of that recognition, see Stefan Talmor, Recognition of the Libyan National Transitional Council (16 June 2011) ASIL Insights <www.asil.org/insights110616.cfm>.} and the rebel group or new government would need to have gained significant territorial control.\footnote{Milanovic and Hadzi-Vidanovic, above n 100, who lay out three factors that play a role in the transition from an IAC to a NIAC.}

**E Situations of Occupation**

Situations of occupation are governed by the law applicable to IACs by virtue of Common Article 2.\footnote{Common Article 2: ‘The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’} However, during occupations multiple armed groups may partake in hostilities. If this is the case, an IAC (based on the occupation) may exist alongside NIACs. A key factor in determining whether a NIAC takes place alongside the IAC is whether the armed group in question ‘belongs to’ the state.\footnote{See Akande, above n 76, 46, for a discussion on the issue.} If the armed group belongs to the state, or fights on behalf of the state, as envisioned under Geneva Convention III article 4(A)(2), then there is a single IAC. Opinions diverge however, when it comes to how the conflict should be characterised when armed groups fight independently of the state. Some consider that the entire conflict constitutes an IAC, regardless...
of whether or not the armed groups act independently. Others take a stricter view of the law, maintaining that only the conflict between the occupying state and the armed group acting on behalf of the occupied state qualifies as an IAC. Any conflict with independent armed groups would constitute a separate NIAC (assuming it fulfilled the necessary criteria).

### F Article 1(4) of Additional Protocol I

Article 1(4) of Additional Protocol I represents another area where the line between IACS and NIACs is not clear. By virtue of this provision, Additional Protocol I applies to:

[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Essentially, article 1(4) addresses circumstances where a non-state armed group may be party to an IAC, even though traditionally only states could be party to an IAC (with the exception of a recognised belligerency):

The three categories of States singled out as subject to national liberation movements: colonial powers, occupying powers, and racist regimes, serve to impose fairly stringent limits on the number of possible candidate States. The latter two terms were actually intended to apply primarily to just two States, Israel and South Africa, respectively. With colonialism now essentially an historic relic and South Africa now subject to majority rule, the Palestinians are now one of the very few groups, if not the only group, able to assert that, it can have a national liberation movement still able to qualify for this preferential treatment …. While their status is further complicated by Israel's refusal to join Additional Protocol I, in point of fact the Israeli government does generally apply principles of international humanitarian law to that conflict ….

The controversial nature of article 1(4) is one of the main reasons why a number of states did not ratify Additional Protocol I. Although unlikely to apply, what article 1(4) of Additional Protocol I does indicate is that the dichotomy between international and NIACs ‘is far from strict’.

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107 See, eg, the Israeli Supreme Court’s view that when an armed conflict occurs within an occupied territory that conflict must be classified as international. Targeted Killings [2006] 2 IsrLR 459, [18]. In support, see Akande, above n 76, 46–7; Antonio Cassese, International Law (Oxford University Press, 2nd ed, 2005) 420–3.


109 This was the case even at the time of drafting. The issue raised was whether such conflicts were truly international or were more appropriately characterised as non-international, given the involvement of non-state armed groups. See Sandoz, Swinarski and Zimmerman (eds), above n 27, 47 [88]–[90].


111 See for example the Michael Matheson remarks on the ‘United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’ (1987) 2 American University Journal of International Law 419, 425; United States Department of State, ‘Letter of Submittal to the President of the US, 13 December 1986, Case No 77’ in Sassoli and Bouvier, above n 60: Certain provisions such as Article 1(4), which gives special status to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,’ would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law.

112 Stewart, above n 5, 318–19.
IV CONCLUSIONS

A Proposals for Future Developments

Although this chapter focuses on what the law is (lex lata) and, for better or worse, not what the law perhaps should be (lex ferenda), certain scholars have suggested models for future development as a response to the perceived deficiencies with the traditional or existing law. Certain suggestions will be examined briefly below as they provide some insight into the nature of the existing legal framework.

Critical commentators focus on two related themes, which are underpinned by policy considerations. For some commentators, that policy has a governmental objective; for example, to equip the Executive to deal more appropriately with the global terrorism challenge. For other commentators, the policy objective is more humanitarian: for example, to induce greater compliance with IHL by providing benefits to fighters in NIACs for such compliance. There is clearly a tension between these two themes.

For Professor Ash, decisions such as those of the majority in Hamdan provide evidence that ‘Article 3 is being distorted’ today ‘in direct contradiction to what the High Contracting Parties anticipated and agreed.’\(^{113}\) He is not so much suggesting a new legal paradigm but a more faithful application of what he sees as the existing paradigm, one which interprets Common Article 3 as was, in his view, intended by the drafters, namely for Common Article 3 only to apply to conflicts internal to a single state.\(^{114}\) For Ash, to apply ‘the same rights and protections’ of the Geneva Conventions ‘to those who intentionally flout and disobey the law of war by engaging in purposeful barbarism destroys the incentive for all future combatants to abide by the Geneva Conventions’ rules and norms’ and, further, ‘such action subverts the authority and legitimacy of international treaties … reducing the incentive of all States to participate in negotiating future agreements.’\(^{115}\)

Stewart ‘calls for a single law of armed conflict by illustrating’ what he describes as the ‘failure of the current regime to deal with conflicts that contain both international and non-international elements, namely internationalised armed conflicts.’\(^{116}\) A principal concern for Stewart is what Meron describes as ‘a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international.’\(^{117}\) Although, in Stewart’s view, decisions such as Tadić are ‘erosing the disparity between the laws applicable in international and non-international armed conflicts’, as pointed out by the Appeals Chamber in Tadić ‘this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.’\(^{118}\)

Peterson talks about the development of a new international law regime, the ‘law of internal armed conflict’ which is resulting from the confluences of ‘the humanitarian pressures on the

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114 Ibid 274.
115 Ibid.
116 Stewart, above n 5, 314.
117 Ibid 323.
118 Ibid.
When is there a Non-International Armed Conflict?

law of war, the escalation of internal armed conflicts, and the growing recognition of universal fundamental human rights’. He consequently distinguishes ‘between the law of war and the law of internal armed conflict’, although he accepts that they are ‘similar because the law of war is the primary source of the law of internal armed conflict.’ The ‘law of internal armed conflict’, however, also draws on human rights law. He concludes, after reviewing the laws of war and human rights law applicable to internal armed conflicts, that the ‘need for an encompassing legal regime to govern internal armed conflict is apparent’ as the ‘law of war and human rights regimes are limited in their application, scope, and enforceability.’

More specifically, Bassiouni suggests adding a Protocol to the Geneva Conventions to give combatant status and POW status to non-state actors who are willing to abide by IHL. He suggests that this Protocol could address new forms of conflict as well as the rights and responsibilities of non-state actors. The underlying policy justification is that greater legitimacy provides an incentive for greater compliance with IHL.

Bugnion also contends that the current rules applicable to NIACs are insufficient to halt the escalation of violence. This is partly because there is no incentive or motivation for those who participate to comply with the laws and customs of war. He suggests that an ideal solution would be ‘the adoption of a new legal regime applicable to non-international armed conflicts which would significantly enhance the protection afforded to victims of such situations and would in particular grant a status to captured combatants’ but concedes that it is doubtful that states are ready for this step. For practical suggestions he examines the option of ad hoc agreements such as the one ‘concluded under the auspices of the ICRC on 22 May 1992 between the three parties involved in the conflict that was ravaging Bosnia and Herzegovina at the time.’

Bugnion also asks ‘should not the international humanitarian law applicable to non-international armed conflicts draw a more precise line between acts of war and war crimes, as does the law applicable to international armed conflicts’ noting that article 6(5) of Additional Protocol II contains the exhortation that: ‘[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty’. He concludes:

One of the principal challenges facing international humanitarian law today is to find means of strengthening the distinction between jus ad bellum and jus in bello in non-international armed conflicts, especially as concerns the status of combatants who have fallen into the hands of the adverse party. This is the price to be paid for the possibility of curbing violence in civil war and of ensuring better protection for its victims.

The old issue of the recognition of belligerency is revived by this proposal and the effect that this has on the status of belligerents.

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120 Ibid 6.
121 Ibid 67.
122 Bassiouni, above n 17, particularly 781–90.
123 Bugnion, above n 21, 191.
124 Ibid 193.
125 Ibid 198.
126 Stewart, above n 5, 348.
B Summary

This chapter has attempted to identify the issues involved in characterising a conflict as non-international. This is essentially a technical analysis involving interpreting existing law as contained in sources such as treaties and the works of scholars.

The following points provide a more practical summary of the main points found in the chapter for when is there a NIAC:

- ‘Internal tensions and disturbances’ expressly mark the lower threshold for Additional Protocol II situations but arguably may also mark the lower threshold for Common Article 3 situations.
- There may be internal disturbances, without there being an armed conflict, when the state uses armed force to maintain order.
- An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state (Tadić formulation).
- The Tadić ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ formulation persuasively clarifies when Common Article 3 applies, although it may remain uncertain whether and to what degree the ‘protracted’ criterion is needed for Article 3 purposes.\(^\text{127}\)
- NIACs may be internationalised when an outside state intervenes indirectly through overall control of an armed group or directly through its troops. The test of ‘overall control’ originates from the ICTY Tadić Appeals Judgment.
- An IAC may become a NIAC when an occupation ends, or when outside states are supporting an opposition group which gains territory, power and recognition, and thus represents the (new) legitimate government. The point at which this transition occurs is often not clear.
- The Additional Protocol II threshold for a NIAC provides for conflict that takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement Additional Protocol II.
- The Additional Protocol II threshold is high and the criteria difficult to meet and essentially applies to state-in-waiting situations. The threshold contemplates situations akin to civil war but may apply in situations that fall short of civil war.
- If Additional Protocol II applies, Common Article 3 applies.
- The term ‘armed conflict not of an international character’ is used in contradistinction to the term ‘international armed conflict’. This is the majority but not the universal view.
- The term ‘armed conflict not of an international character’ includes ‘extraterritorial’ or ‘transnational’ conflicts involving non-state actors. This is the majority but not universal view.

\(^\text{127}\) For example, Cryer, above n 17, 37, when referring to the Tadić formulation requirement that the violence be ‘protracted’ holds that: ‘This may not be necessary for the applicability of common article 3, and applicable only to the application of the laws and customs of war applicable in non-international armed conflict.’
When is there a Non-International Armed Conflict?

- The formulations for when there is an ‘armed conflict not of an international character’ in the Tadić formulation and in article 8(2) of the Rome Statute purposes are substantively the same. (Prevailing view).
- Common Article 3 is not limited to the temporal and geographic place where the hostilities take place. However, the exact scope of its application is not clear.
- A situation of armed conflict may involve both international and NIACs existing in parallel (mixed conflicts). However, a debate exists as to when conflicts should be categorised as mixed or as a single conflict.
- An occupation triggers the law applicable to international armed conflicts. However, a debate exists as to how hostilities involving independent armed groups during occupation should be categorised.
- There may be a higher threshold for determining the existence of armed conflict applied in cases involving UN mandated forces than in fighting between states.
- Article 1(4) of Additional Protocol I extends the definition of an IAC to include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. However, due to its strict requirements and controversial nature, this article is very unlikely to be applicable.
- Conflicts can evolve with the result that their legal characterisation can change.

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I INTRODUCTION

In broadly examining the content of International Humanitarian Law (‘IHL’) in non-international armed conflict (‘NIAC’), this Chapter outlines the various sources of the rules of IHL, including treaty and customary law, with the emphasis on customary law. The field of application of the two key treaty law sources of the rules of IHL in NIAC – Common Article 3 of the Geneva Conventions and Additional Protocol II – was examined extensively in Chapter 1. Their content will also be further examined in Chapters 5 and 6 on the specific topics of use of force and detention.

A Rationale for a Separate IHL Regime

Understanding the differences between an international armed conflict (‘IAC’) and a NIAC is relevant to the application of law within a NIAC.

Kenneth Watkin analyses the nature of international or interstate conflict in terms of the ‘right authority’ principle, that is, the state remains the primary legitimate authority for engaging in public wars: ‘[w]arfare is ultimately conducted as a group activity, which has become a defining principle of the modern concept of combatancy.’ However, he sees a different approach regarding internal situations:

In contrast, states deal with internal threats in an entirely different way. Internal control is both more

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invasive and, to a significant degree, more subtle than the control exercised in interstate relationships. It
does not depend exclusively, or even primarily, on the direct application of force. Rather, emphasis has
been placed on maintaining order through the application of the rule of law.2

This is reflected in a traditional unwillingness of states to apply IHL, developed in the IAC
context, to NIACs. According to Watkin:

There is an ongoing tension between efforts to incorporate humanitarian standards into noninternational
armed conflicts and the view of states that such conflicts involve the legitimate suppression of criminal
activity. Common Article 3 acknowledges that the legal status of the parties is not affected by its provi-
sions, and [article 3(1) of] Additional Protocol II confirms the role of the state in using legitimate means
to maintain or reestablish ‘law and order’ or to defend national unity and territorial integrity.3

The standing legal paradigm for NIACs is that of law enforcement. But this traditional view
may be changing in contemporary situations. David Kretzmer, for example, argues that states
are showing a preference for applying the more permissive IHL than the more restrictive human
rights law (‘HRL’).4

Nonetheless, the history of IHL is predominantly a history of the law applicable to IACs.
Thus, although there is a ‘wealth’ of international humanitarian law treaties, those applicable to
NIAC are less numerous and some of that treaty law, such as Common Article 3 and Additional
Protocol II, more ‘rudimentary’ than for IAC. Yet, the ‘majority of today’s armed conflicts are
non-international’.5

B The Operational Environment

There are also operational differences between IAC and NIAC that may have implications for
the way the content of IHL is interpreted and, consequently, on how its relationship with HRL
is viewed. The differences include that while in IAC the warring parties normally operate from
their own areas of control with there being limited intermingling of opposing forces, in NIAC
the situation frequently involves insurgents operating from civilian locations and within the
civilian population. Further, the local population usually shares the same nationality of the state
forces. Consequently, local population support becomes central in NIAC in a way not present in
IAC where the military defeat of the opposing armed force may be sufficient for mission success.

This operational reality is having an effect on conduct of contemporary operations, as
demonstrated by the current United States counter-insurgency (‘COIN’) operations doctrine.6
This doctrine was developed in the context of COIN operations in Iraq and Afghanistan where
US forces were, and are, acting in support of Iraqi and Afghan forces. The doctrine stresses
restraint in the use of force and the necessity of obtaining the support of the local population.
For example, the doctrine provides for a number of ‘paradoxes’ such as, ‘[s]omtimes, the more

2 Ibid 13 (citations omitted).
3 Ibid 5–6 n 195 (citations omitted).
4 David Kretzmer, ‘Rethinking Application of IHL in Non-International Armed Conflicts’ (2009) 42 Israel Law Review
8, 21.
5 Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, Customary Inter-
national Humanitarian Law (Cambridge University Press, 2005) vol 1, xxviii (‘ICRC Study’).
force is used, the less effective it is.' The doctrine also provides for a proportionality equation that is modified as compared to its counterpart in conventional IACs:

In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. In COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained … In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.8

The special features of COIN operations are also evident in the Tactical Directive issued on 6 July 2009 by General McChrystal, Commander of NATO’s International Security Assistance Force (‘ISAF’) in Afghanistan, to subordinates regarding interaction with local civilians, including the use of force affecting civilians.9 In part, this Directive was prompted by the reaction to past targeting decisions that resulted in ‘collateral damage’ which, although not demonstrably illegal under a traditional IHL paradigm, were seen as unacceptable by Afghan authorities.10 The Directive includes the following:

Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative … [W]e will not win based on the number of Taliban we kill, but on our ability to separate insurgents from the center of gravity – the people … This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of terrain or attribution of enemy forces. We must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people. While this is also a legal and moral issue, it is an overarching operational issue … I recognize that the carefully controlled and disciplined employment of force entails risks to our troops … [b]ut excessive use of force resulting in an alienated population will produce far greater risks.11

It is not being asserted here that this statement itself represents evidence of state practice. It may be battlefield practice and the extracts based on operational objectives rather than perceived legal obligations (opinio juris). But what is apparent is a key distinction between IAC and NIAC situations that, in the context of uncertain and evolving customary law of IHL, may have at least indirect legal implications. As a matter of logic, different operational contexts could give rise to different legal frameworks. This may inform the debate as to what degree the IHL applicable in IAC and NIAC overlap. The battlefield practice may also provide, at least, operational context for legal questions to be examined later in this chapter such as the state of IHL content applicable to NIAC, the role, if any, for HRL in developing IHL, the role, if any, for the application of HRL to specific situations and the general relationship between IHL and HRL.

7 Ibid 1-26 [1-148].
8 Ibid 7-6 [7-32].
C Sources of IHL Applicable in NIAC

Article 38 of the Statute of the International Court of Justice (‘ICJ Statute’) is generally regarded as a complete statement of the sources of international law. Article 38(1) provides for the application of: ‘international conventions’; ‘international custom, as evidence of a general practice accepted as law’; ‘the general principles of law recognized by civilised nations’; and, as subsidiary means, ‘judicial decisions’ and ‘the teachings of the most highly qualified publicists of the various nations’.

By ‘international conventions’, the ICJ Statute refers to treaties, that is to say agreements between states and other subjects of international law that explicitly record their obligations under international law. Treaty-based IHL applicable to NIACs, although sparser than for IACs, includes the following:13

- Common Article 3 of the 1949 Geneva Conventions;14
- Additional Protocol II to the 1949 Geneva Conventions;16
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (‘CCW’), as amended in 2001 to cover NIACs,17 and its additional protocols on:
  - weapons leaving undetectable fragments in the human body (Protocol I),
  - mines, booby-traps and other devices (Protocol II),
  - incendiary weapons (Protocol III),
  - blinding laser weapons (Protocol IV),18 and
  - explosive remnants of war (Protocol V);19

16 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).
19 Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol
• International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (‘Mercenaries Convention’);\textsuperscript{20}
• Chemical Weapons Convention (‘CWC’);\textsuperscript{21}
• Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (‘Ottawa Convention’);\textsuperscript{22}
• Rome Statute of the International Criminal Court;
• Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict;\textsuperscript{23}
• Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.\textsuperscript{24}

This list does not include human rights instruments that may apply in NIACs, as this is an issue that is covered more fully in Chapter 3. Nor does this list incorporate instruments criminalising certain acts both in times of peace and of armed conflict (eg genocide, hostage-taking and human trafficking), as this goes beyond the sphere of IHL applicable in NIAC.

With respect to IHL treaties, it is worth pointing out that while earlier instruments (eg the 1949 Geneva Conventions) make a sharp distinction between rules applicable in IACs and NIACs, more recent agreements (eg the CWC and the Ottawa Convention) tend to prohibit particular means and practices of warfare irrespective of the nature of the conflict. Thus, the amount of treaty law applicable in NIACs is on the increase.

The second source of international law mentioned in the ICJ Statute – ‘international custom, as evidence of a general practice accepted as law’ – refers to rules that have emerged from the conduct of states without explicit agreement between them.\textsuperscript{25} As is discussed more fully below,\textsuperscript{26} custom is said to emerge when two cumulative conditions are present: the practice of states and the belief of states as to the bindingness of such practice for future conduct. While this basic premise is reasonably uncontroversial, the difficulty lies in the nature of the two elements and the kind of evidence that has to be adduced for custom to be proven.

The ‘general principles of law recognized by civilised nations’ form the third principal source of international law.\textsuperscript{27} This appears to include, at the very least, certain principles that are widely accepted in domestic legal systems, such as the principle of good faith or estoppel, as well as principles that are systemic to international law itself, such as the principle of the sovereign equality of states.

In the context of IHL, the question also arises whether certain basic but substantive standards amount to ‘general principles of law’. In Corfu Channel, the International Court of Justice

\textsuperscript{V}, opened for signature 28 November 2003, 2399 UNTS 100 (entered into force 12 November 2006).
\textsuperscript{20} International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001).
\textsuperscript{22} Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999).
\textsuperscript{23} Opened for signature 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).
\textsuperscript{24} Opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002).
\textsuperscript{25} See generally Anthony A D’Amato, The Concept of Custom in International Law (Cornell University Press, 1971).
\textsuperscript{26} See Section II(B) below.
\textsuperscript{27} For a classic general discussion, see Bin Cheng, General Principles of Law: As Applied by International Courts and Tribunals (Stevens & Sons, 1953) 1–26.
Application of International Humanitarian Law

Corfu Channel (UK v Albania) (Merits) [1949] ICJ Rep 4, 22 [215].


Ibid 18–19 (s 10).


Ibid.

See Section I(C) above.

ICRC Study, above n 5, xxix. See also Meron, above n 32, 833 noting that the ‘principal’ reason for the ICRC Study is ‘the desire to remedy the scarcity of rules applicable to noninternational armed conflicts because of the limited number of governing treaties.’

Michael Bothe, ‘Customary International Humanitarian Law: Some Reflections on the ICRC Study’ (2005) 8 Yearbook of International Humanitarian Law 143, 146–8. ‘These paragraphs show the central concern of the Study: it is the non-universality of the Protocols. This is clearly reflected in the normative content which is covered by the Study. It is, subject to a few nuances, inspired by the content of the two Protocols, or more precisely Protocol I. The wealth of detail found in the Geneva Conventions themselves is not covered – because they are universal as a matter of treaty law’: at 146.

‘binds not just States but also armed opposition groups who, as non-state actors, are not parties to IHL conventions … extends … the reach of law’. 38

To date, the biggest (judicial) contribution to clarifying the legal framework of NIACs has been made by international criminal tribunals, when they have applied customary law.

The UN Secretary-General’s 1993 report regarding the establishment of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) advised the tribunal to ‘apply rules of international humanitarian law which are beyond any doubt a part of customary law’. 39 Similarly, the Secretary-General’s report on the establishment of the Special Court for Sierra Leone (‘SCSL’) noted that ‘the international crimes enumerated [in the Statute of the Special Court for Sierra Leone40], are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime’. 41 The reason for this focus on customary law has been the need to comply with the principle of legality or nullum crimen nulla poena sine lege, whereby a defendant may be convicted only on the basis of legal rules that were clearly established and applicable at the time the defendant committed the alleged offence. 42 As a consequence, ‘international criminal tribunals – especially the [ICTY] – have developed a rich jurisprudence elucidating customary principles of humanitarian law’ and the ‘approach taken by these tribunals is necessarily rigorous and, in a sense, conservative’ because of the adherence to the principle of legality. 43

In Galić, the Appeals Chamber had the occasion to explain the role that customary law plays in the practice of the ICTY. It stated that an analysis of the jurisprudence of the [ICTY] demonstrates that the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements … In recent judgements, the Appeals Chamber also had recourse to customary international law because the elements of the crimes or the modes of liability were not defined or not defined sufficiently in conventional law. 44

One of the early cases, Tadić, 45 has been particularly significant in establishing the approach of the ICTY to customary law and, indeed, to many other issues. Christopher Greenwood, writing in 1996, thought that Tadić was a ‘carefully reasoned and innovative’ judgment and

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38 Ibid 1221. Note, that the assertion that IHL binds non-state parties is somewhat contentious.
39 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc S/25704 (3 May 1993) [34] (‘Secretary-General Report Resolution 808’).
41 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915 (4 October 2000) [12] (‘Secretary-General Sierra Leone’).
43 Meron, above n 32, 817.
44 Prosecutor v Galić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [83]–[84] (‘Galić (Appeals Judgment))’.
45 See Prosecutor v Tadić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 15 July 1999).
one ‘likely to have a profound effect upon the development on international humanitarian law, particularly in the field of internal armed conflicts’.\(^{46}\) This prediction has been accurate.

**B** The **ICRC** Customary Law Study

### 1 Background and Scope

In 2005, the International Committee of the Red Cross (‘ICRC’) published a study on *Customary International Humanitarian Law* (‘ICRC Study’; ‘the Study’).\(^{47}\) The Study, which initially appeared in two bound volumes and ran for about 5,000 pages, was subsequently expanded and re-launched in the form of an online database.\(^{48}\) The Study’s objective was ‘to capture the clearest possible “photograph” of customary international law’ at the time of the Study as ‘the formation of customary international law is an ongoing process’\(^{49}\) and, at least in the view of the ICRC, the Study achieved this objective.\(^{50}\)

Part 1 of the Study (volume 1 of the printed edition) restates 161 rules believed to reflect customary IHL. Each rule is accompanied by a commentary explaining why the rule is considered to form a part of custom and with a statement as to whether the rule applies in IACs, NIACs, both or ‘arguably’ in both. Part 2 of the Study (volume 2 of the printed edition) contains the corresponding practice, summarizing for each aspect of IHL the relevant treaty law and state practice (including military manuals, national legislation, national case law from nearly 50 countries) as well as practice of international organisations, international conferences, international judicial and quasi-judicial bodies (including of the International Red Cross and Red Crescent Movement).\(^{51}\)

The rules, commentaries and supporting materials, covering a vast area of international law, are divided into six thematic sections: the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; treatment of civilians and persons *hors de combat*; and, implementation. However, the Study ‘is not exhaustive in nature, nor was it intended to be’.\(^{52}\) According to the Study itself, its aim was not to establish the customary nature of each treaty rule of IHL, particularly those generally accepted as being customary (eg *Geneva Conventions* and 1907 *Hague Regulations*).\(^{53}\) Rather, it was ‘to analyse issues regulated by treaties that have not been universally ratified’.\(^{54}\)

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\(^{48}\) See <www.icrc.org/customary-ihl>.

\(^{49}\) ICRC Study, above n 5, xi (Jakob Kellenberger, ‘Foreward’).

\(^{50}\) Ibid: ‘The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law’.

\(^{51}\) MacLaren and Schwendimann, above n 37, 1225. Thus, as described further below in section IV(B)(3), although the Study made use of the ‘traditional two-element approach of state practice and *opinio juris*’ it also used ‘practice other than state practice’: Eloisa Newalsing, ‘Book Review: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*’ (2008) 21 Leiden Journal of International Law 255, 278.

\(^{52}\) Newalsing, above n 51, 271.

\(^{53}\) Regulations regarding the Laws and Customs of War on Land, annexed to Convention (IV) regarding the Laws and Customs of War on Land, opened for signature 18 October 1907, 205 CTS 277 (entered into force 26 January 1910).

\(^{54}\) MacLaren and Schwendimann, above n 37, 1225.
Moreover, the Study left untouched issues such as the law of naval warfare, the law of neutrality, the law of air warfare, the prohibition of certain weapons (such as weapons of mass destruction), the protection of medical units and transports, and the law of belligerent occupation. However, a number of these areas have been subject to separate examinations. At the same time, some of the omissions – for example overlooking the issue of weapons of mass destruction – have been viewed by commentators as shortcomings of the Study.

The Study accepted – based on the express terms of human rights treaties, human rights treaty bodies and the ICJ – that ‘international human rights law continues to apply during armed conflicts’. However, the Study states that customary human rights law was not examined in detail other than to ‘support, strengthen and clarify analogous principles of international humanitarian law’.

2 Response, Reception and Impact

One commentator has noted that it is ‘in the reactions of states to the Study that we can find affirmation or denial of the existence of a rule of customary international humanitarian law’. To date, there has been only one such response – by the US – which, moreover, did not attempt to be comprehensive but, rather, aimed to raise certain basic methodological concerns and to address specific rules by way of illustration, pending a more complete review. Even so, while the response noted that ‘the Study’s introduction describes what is generally an appropriate approach to assessing State practice’, it went on to assert ‘the Study frequently fails to apply this approach in a rigorous way’. In particular, the response was critical of the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all states, including with respect to a significant number of states that have declined to become a party to those Protocols (including the United States and a number of other states that have been involved in armed conflict since the Protocols entered into force).

Although in some settings ‘silence can generally be taken as consent’ it would at least be premature to infer this from the general lack of state response to the Study as its momentous and

55 Bothe, above n 36, 149–51, 171.
57 See David Turns, ‘Weapons in the ICRC Study on Customary International Humanitarian Law’ (2006) 11 Journal of Conflict & Security Law 201, 234–5. The Study explanation for the omission is based on the treatment of the nuclear weapons issue by the ICJ in its Advisory Opinion in the Nuclear Weapons Case: ‘the Court being the principal judicial organ of the United Nations, the ICRC had to take due note of the Court’s opinion and deemed it not appropriate to engage in a similar exercise at virtually the same time’: ICRC Study, above n 5, 255.
58 ICRC Study, above n 5, xxx–xxxi.
59 Ibid xxxi. See also MacLaren and Schwendimann, above n 37, 1225.
60 Newalsing, above n 51, 274.
62 Ibid 444.
63 Ibid 448.
64 MacLaren and Schwendimann, above n 37, 1231.
voluminous character requires careful and time-consuming analysis. Further, a lack of response by an individual state may simply indicate, for example, that states believe it unnecessary to do so ‘as they are parties to the relevant treaties from which many of the Rules are derived.’ That said, if further state reactions begin to emerge this would provide a significant indication of the acceptability and authority of the Study. There has, however, been a considerable amount of academic commentary on, and criticism of, the Study, including by a number of very eminent scholars, eliciting several rejoinders from Jean-Marie Henckaerts, one of the co-authors of the Study.

The position of commentators can perhaps be summarised as one of general acceptance qualified by specific criticisms. Thus, the study has been described as an ‘enormous achievement’, a ‘stunning piece of work’, ‘vast and impressive’, ‘unique’ owing to ‘the seriousness and breadth of the method used to identify practice’ and an important landmark that no scholar or practitioner can afford to ignore. Many have also broadly agreed with the substance, describing the Study as an ‘impeccable summary statement of the state of the art’ suggesting that ‘[m]ost of its conclusions can be supported wholeheartedly’, that ‘very large parts of it are both right in substance and framed in such a way as to make it accessible in practical legal contexts’, or that ‘[m]ost of the authors’ conclusions are clearly correct, and a great many others are reasonable proposals to be considered in the future development of the law.

At the same time, commentators have recorded a number of concerns, some quite serious. Many of these relate to the methodology of determining the content of customary law in gen-

68 Anderson, above n 66.
69 Cryer, above n 42, 263.
70 Turns, above n 57, 202.
71 Meron, above n 32, 833.
73 Bothe, above n 36, 154.
74 Cryer, above n 42, 263.
75 Anderson, above n 66.
76 Aldrich, above n 66, 523.
eral and others to the application of that methodology with regard to particular rules. Here, however, it seems pertinent to mention two general concerns, namely the ambiguous role of the ICRC and the ostensible over-simplification of the rules.

As regards the former, MacLaren and Schwendimann refer to the ‘fundamental tension’ between the ‘reactive and administrative’ lex lata (the law as it exists) role of the ICRC and its ‘essentially proactive and legislative’ role concerning the lex ferenda (what the law ought to be). They conclude that this has resulted in the ICRC being at ‘half arms-length from the Study.’ That is, although it can be said that the authors had ‘academic freedom’ and, consequently, that the Study is ‘a work of scholarship’, the Study bears the trappings of ICRC endorsement. This perhaps helps to explain certain criticism of the Study to the effect that contributors to the Study, consciously or unconsciously, crafted new rules in the shadow of the law or at least extended the law to hitherto unregulated concerns.

The Study itself recognises the difficulty, on occasion, of identifying the content of customary law and notes that ‘choices had to be made’ and conclusions drawn. Indeed there appears to be a degree of inevitability in policy imperatives influencing judgments made about customary law. As Robert Jennings once pointed out, ‘the whole exercise of identifying general customary law has become immensely complex, and correspondingly uncertain; and in so many areas it is not just a question of enquiry but also of a policy-choice’. This applies equally to the critics of the Study. MacLaren and Schwendimann, for example, note that, prior to the initial US response to the Study being produced, the US and Israel had been foremost among states which had ‘sought to obstruct the crystallization of certain rules as customary’ and that it ‘is now to be expected that their governments and armed forces will disagree with findings in the Study’. But in any event, there appears to be a grain of truth in Dinstein’s observation that a number of the Rules ‘load the dice’ in favour of a particular interpretation in certain contentious areas of IHL.

The other general problem is that the Study ‘tends to over-simplify rules that are complex and nuanced’ and it ‘claim[s] customary law status for some simplified rules that would not have been accepted in the negotiation of [Additional Protocol I] and would not be accepted today by many States’.

There are, however, at least two things to be kept in mind when assessing the rules in light of this criticism. First, as Henckaerts points out, ‘any description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties. It may be difficult, for example, to prove the customary nature of each

77 See Section II(C) below.
78 See Section III below.
79 MacLaren and Schwendimann, above n 37, 1235.
80 Ibid.
81 Ibid 1235–6.
82 Ibid 1236.
83 ICRC Study, above n 5, xvii (Yves Sandoz, ‘Foreword’).
84 Quoted in Newalsing, above n 51, 278.
85 MacLaren and Schwendimann, above n 37, 1233.
86 See along these lines Dinstein, Israel Yearbook, above n 66, 8.
87 Bellinger and Haynes, above n 61, 447.
88 Aldrich, above n 66, 523.
and every detail of corresponding treaty rules. The formation of customary law through practice cannot yield the same amount of detail as complicated negotiations at a diplomatic conference.\textsuperscript{89}

Second, the commentaries contained in the ICRC Study are essential reading. As stated in the amended version of the Study, ‘[t]he commentaries may … contain useful clarifications with respect to the application of the black letter rules’.\textsuperscript{90} This is sometimes overlooked by commentators. Moreover, the commentaries help to get a detailed understanding of the ambit of the debate regarding controversial rules. Indeed, as Cryer points out, ‘what the rule gives, the commentary sometimes takes away’.\textsuperscript{91}

What then has been, and will be, the impact of the Study? Clearly, the Study possesses no formal authority: it does not constitute state practice, it does not even amount to an official statement of the ICRC\textsuperscript{92} (whatever might be the legal effect of such a statement). Rather, the Study ‘can be equated to the “teachings of the most highly qualified publicists” within the meaning of article 38(1)(d) of the ICJ Statute, and as such constitutes a “subsidiary means for the determination of rules of law”’.\textsuperscript{93}

Many commentators agree that the real impact of the Study will depend on how persuasive decision-makers consider the Study.\textsuperscript{94} The ICRC itself has made clear that it will ‘take the outcome of this study into account in its daily work’.\textsuperscript{95} It has been predicted that the Study ‘will almost certainly be absorbed as authoritative by other non-governmental actors, international tribunals, and others’.\textsuperscript{96} Indeed, the Study has already had been referred to in the course of proceedings of international tribunals.\textsuperscript{97} A counsel for a party before the ICJ in the Armed Activities case relied on the Study,\textsuperscript{98} President Meron cited the Study in his decision in the

\textsuperscript{89} Henckaerts, ‘A Response to US Comments’, above n 67, 486. See also Bothe, above n 36, 161 noting that sufficiently uniform practice is relatively easy to find the greater the ‘generality’ of that which is being propounded.

\textsuperscript{90} Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (International Committee of the Red Cross, revised ed, 2009) vol 1, lvii. Rules particularly relevant for this advice include: r 42 (works and installations containing dangerous forces); r 43–44 (protection of the environment); r 84–85 (incendiary weapons); r 94 (slavery and slave trade); r 95 (uncompensated or abusive forced labour); r 98 (enforced disappearance); r 99 (arbitrary deprivation of liberty); r 105 (respect for family life); r 116 (identification of the dead); r 133 (respect for property rights of displaced persons); r 134 (respect for specific needs of women). See Henckaerts, ‘A Response to US Comments’, above n 67, 484 n 43, 486 (noting the need to discuss certain issues in more detail in the commentary).

\textsuperscript{91} Cryer, above n 42, 262.

\textsuperscript{92} Bothe, above n 36, 176.

\textsuperscript{93} Ibid.

\textsuperscript{94} For Bothe the ‘real impact’ of the Study ‘will depend on the authority it has in the eyes of relevant actors’, the relevant actors including military planners and decision-makers and courts. Although he concludes that the Study may not always be treated as conclusive evidence of customary law, this not being the purpose of the Study, ‘those who argue against the results of the Study will have to fight an uphill battle’ due to the Study’s reliance on state practice and opinio juris. Bothe, above n 36, 176–7. For MacLaren and Schwendimann, above n 37, 1239, the Study’s ultimate impact will depend on how convinced persons and entities involved in IHL practice ‘that the Study is thorough and representative on one hand’ and ‘legally accurate on the other’.

\textsuperscript{95} ICRC Study, above n 5, xi (Kellenberger, ‘Foreword’).

\textsuperscript{96} Anderson, above n 66.

\textsuperscript{97} See MacLaren and Schwendimann, above n 37, 1231.

Hadžihasanović case in the ICTY,\(^99\) and Israeli Supreme Court President (emeritus) Barak cited it in Targeted Killings.\(^{100}\)

The Study should, however, not be seen as the final word on custom. As Daniel Bethlehem points out:

the Study has the benefit of momentum that derives from the name, stature and authority of the ICRC. There will no doubt be many who would see it as the Pictet equivalent for customary international law. I believe that it would be a mistake to do so. Crystallising custom is not the same as interpreting a treaty.\(^{101}\)

Therefore perhaps the most significantly impact of the Study, as has been amply born out by the number of commentators writing about it, is that it ‘has provided both the impetus for further study in the area and a basis for debate’.\(^{102}\) As another commentator notes, the Study is ‘an important tool in a worldwide process of discourse on the law that should lead to more insights into the current state and the process of the formation of customary international humanitarian law’.\(^{103}\) Yet, the Study ‘is not just a scientific study as many others’ but rather ‘is itself part of the dynamic dialectic process of the formation of customary international law’.\(^{104}\)

3 Issues Particular to NIAC

In view of the special role of customary law in NIACs mentioned above, it is not surprising that from the perspective of the authors of the ICRC Study, the more important analysis related to NIAC rather than IAC. As Henckaerts explains, the provisions of Additional Protocol I\(^{105}\) were extensive and generally, although not completely, accepted as a reflection of customary international law. Consequently, ‘clarification of the customary status of the provisions of Additional Protocol I was therefore a less pressing need than the clarification of the customary rules applicable in non-international armed conflicts’.\(^{106}\)

Some of the issues arising from the Study’s approach to customary law applicable in NIACs should be mentioned here. Perhaps the most striking is that ‘the entire question of thresholds between low level violence and armed conflicts, between international and non-international armed conflict as well as the problem of mixed conflicts is not addressed’.\(^{107}\) Henckaerts explains the omission by stating that ‘all we could have done was to repeat the various provisions

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\(^{99}\) See Prosecutor v Hadžihasanović (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case IT-01-47-AR73, 11 March 2005) [29]–[46] nn 54–6, 74, 95–6, 99 (‘Hadžihasanović (Rule 98bis Motions)’).

\(^{100}\) Public Committee against Torture in Israel v Government of Israel (2006) [2006] 2 ISRLR 459. See Section III(B)(1) (b) below.


\(^{102}\) Cryer, above n 43, 263.

\(^{103}\) Newalsing, above n 52, 279.

\(^{104}\) Bothe, above n 38, 177.

\(^{105}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’).

\(^{106}\) Henckaerts, ‘Rejoinder to Judge Aldrich’, above n 67, 526.

\(^{107}\) Bothe, above n 36, 176.
in treaty law … and possibly some dicta from case law of the ICTY. But we felt that this was not sufficiently exhaustive to make any statement.\textsuperscript{108}

MacLaren and Schwendimann find the explanation ‘unsatisfying’.\textsuperscript{109} They believe that the Study’s mandate would have permitted it to be addressed and that, practically, its inclusion would not have made the Study unmanageable. In any case they feel that it ‘would surely have been possible to summarize the legal situation in this context in a scientific and progressive way’.\textsuperscript{110} With respect to the sufficiency of case law, Cryer notes that ‘there is a rich jurisprudence from the ICTY on internationalisation of armed conflict, including at appellate level’.\textsuperscript{111}

Bothe also expresses concern that the Study does not address the fact that in treaty law there are several different thresholds for NIAC – Common Article 3 and Additional Protocol II – ‘where the applicable law differs’.\textsuperscript{112} He asks whether such a differentiation also applies in customary law, expressing a personal view that it does.\textsuperscript{113}

In any event, out of the 161 rules identified in the Study, 155 purportedly apply to NIACs.\textsuperscript{114} The ICRC Study asserts that ‘many rules’ of the law of armed conflict applicable to IAC are now applicable to NIAC as a result of the influence of practice in developing rules and obligations beyond those contained in treaty law.\textsuperscript{115} Henckaerts states that the ‘divide between the law on international and non-international armed conflicts … has largely been bridged’,\textsuperscript{116} mentioning specifically the rules concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict.

If this is correct, then it reflects a quite dramatic development in the content of the law applicable to NIAC since the time of the drafting of Additional Protocol II. The ICRC Commentary on the Additional Protocols to the Geneva Conventions (‘Commentary’) reveals that, at the time, the ICRC believed the law regarding NIAC to have been too recent for relevant state practice to exist.\textsuperscript{117}

A number of commentators have criticised the Study’s readiness to apply the rules of IAC to NIAC. The US response, for example, deems the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict to be one of the principal ‘errors’ of the Study, given that there is little evidence in support of those propositions.\textsuperscript{118} Bothe also notes the heated debates from 1974 to 1977 during which a number of states rejected the content of Additional Protocol II closely reflecting Additional Protocol I ‘as an unacceptable infringement of state sovereignty’ with this resulting in a ‘curtailed’ Additional Protocol II.\textsuperscript{119} Given this political background, Bothe states that the Study’s conclusion regarding the greater merging of the rules

\textsuperscript{108} Personal e-mail of 25 April 2005 from Henckaerts to MacLaren and Schwendimann, quoted in above n 37, 1227.
\textsuperscript{109} MacLaren and Schwendimann, above n 37, 1227.
\textsuperscript{110} Ibid.
\textsuperscript{111} Cryer, above n 42, 253 (citations omitted).
\textsuperscript{112} Bothe, above n 36, 175.
\textsuperscript{113} Ibid.
\textsuperscript{114} Newalsing, above n 51, 277.
\textsuperscript{115} ICRC, Study, above n 5, xxix.
\textsuperscript{116} Henckaerts, ‘A Response to US Comments’, above n 67, 487.
\textsuperscript{117} Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols to the Geneva Conventions (Martinus Nijhoff, 1987) 1341–2 [4435].
\textsuperscript{118} For example, see Bellinger and Haynes, above n 61, 454.
\textsuperscript{119} Bothe, above n 36, 153.
of NIAC and IAC is ‘amazing enough that the question whether the conclusions of the Study are really valid must indeed [be] taken seriously’. Although generally supportive of the Study’s methodology and conclusions, Bothe queries the ‘approximation’ of law of NIAC to that of IAC. He states that ‘[t]he way in which this utterly important general conclusion is arrived at is some what difficult to follow throughout the Study’. He notes that there ‘is no general summary of the argument or the like’ and that when the ‘practice is analysed for each specific rule, the Study fails to give a clear answer on some fundamental general problems of this approximation and the remaining differences’. Aldrich is also of the view that the Study too readily applies the rules of IAC to NIAC. He notes that the ‘authors frequently posit their proposed rules as applicable also to non-international armed conflicts’ but, in his view, ‘without much, if any, analysis of the potential political implications for States engaged in such conflicts’. David Turns, when analysing the Study’s approach to weaponry, refers to the Study’s ‘cavalier extension’ of the Rules to NIAC as well as IAC ‘even in cases where State practice is all but absent’.

In response to some of these criticisms, Henckaerts has referred to extensive recent developments in IHL which point towards ‘an application of many areas of humanitarian law to non-international armed conflicts’, including the fact that ‘every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts’. Further, in 2001, article 1 of the CCW was amended so as to extend the scope of application of all existing CCW Protocols to cover NIAC. Also, the situations dealt with by the ICTY, International Criminal Tribunal for Rwanda (‘ICTR’), SCSL and International Criminal Court (‘ICC’) have mainly or exclusively involved NIAC. It was further stated that these developments were ‘sustained by other practice such as military manuals, national legislation and case law, official statements and resolutions of international organizations and conferences’. Henckaerts further points out that where practice was less extensive, the Study cautiously states that a particular rule ‘arguably’ applied to NIAC. Finally, he asserted that some practice arguably contrary to the emergence of a customary rule in fact represented an ‘outright violation’ – violators should not ‘dictate the law or stand in the way of rules emerging’.

Regarding the content of customary law applicable in NIAC, the ICRC Study, according to Judge Meron, will at least be a ‘starting point for all future discussions’. But he also notes that the Study’s comprehensiveness does not mean that its conclusions and ‘formulation of black-letter rules will not be challenged … it is clearly possible to derive more than one formulation of a black-letter rule from a set of evidence concerning state practice’.

120 Ibid 154.
121 Ibid 174.
122 Ibid.
123 Ibid 174.
124 Aldrich, above n 66, 507.
125 ‘Turns, above n 57, 201.
127 Ibid.
128 Ibid.
129 Ibid.
130 Meron, above n 32, 834.
C The San Remo Manual

The Manual on the Law of Non-International Armed Conflict (‘San Remo Manual’), developed and published under the auspices of the San Remo-based International Institute of Humanitarian Law, is conceptually similar to the ICRC Study in that it addresses the content of customary IHL, although with a narrower focus in that it concerns only NIAC. The Manual was first published in 2001 and was revised in 2006. The content of the Manual relies on the expertise of its three eminent authors: Yoram Dinstein, Charles Garraway and Michael Schmitt.

The ICRC Study contains 161 rules and the San Remo Manual 60 rules (as well as eight definitions and two general principles). This difference in size partly results from the San Remo Manual being limited to the rules applicable to NIAC.

Both documents contain a commentary but the drafting style of the San Remo Manual is somewhat different in that it offers guidance on the application of the Rules.

Many of the topics addressed in the Manual and the Study have similar content. For example: the prohibition on terrorising civilians (see the Manual at Rule 2.3.9 and the Study at Rule 2); the prohibition on starvation of the civilian population (see the Manual at Rule 2.3.10 and the Study at Rule 53); and, the protection of journalists (see the Manual at Rule 3.10 and the Study at Rule 3.4). However, there are a number of areas in which the Study and the Manual differ substantively.133

Finally, the Study contains a number of additional rules not expressly included in the Manual. The topics covered by those rules include: communication with the enemy (Study Rules 66–69); compliance with IHL (Study Rules 139–143); enforcement of IHL (Study Rules 144–148) (a number of these rules apply to IAC); individual responsibility (Study Rules 151–155); and war crimes (Rules 156–161).

Due to the international stature of its authors, the San Remo Manual will continue to have a role in any future discussions on the content of IHL applicable to NIAC. Time will tell though whether the ‘epic’ ICRC Study will dominate such future discussions.

D Problems of Methodology

1 Introduction: The Two-Element Theory of Custom

The International Court of Justice has been in a position to elucidate the notion of customary international law on numerous occasions. Its views on the relevant methodology have become the generally accepted starting point for any study of custom. In the Asylum case, the ICJ described custom as ‘constant and uniform usage, accepted as law’.

Two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a

133 Many of those differences are highlighted in Section III below.
134 Asylum (Columbia v Peru) [1950] ICJ Rep 266, 277.
subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.\textsuperscript{135}

Subsequently, the Court has repeatedly confirmed that the substance of customary rules must be ‘looked for primarily in the actual practice and opinio juris of States.’\textsuperscript{136} Even though there arguably is a modern trend to be more ‘relaxed’ with regard to ascertaining the existence of custom, ‘rel[ying] principally on loosely defined opinio juris and/or inference from the widespread ratification of treaties or support for resolutions and other “soft law” instruments,’\textsuperscript{137} the two-element theory of customary international law espoused by the ICJ has been widely adopted, including by the International Law Association’s Statement of Principles Applicable to the Formation of General Customary International Law (‘ILA Statement’)\textsuperscript{138} and the ICRC Study.\textsuperscript{139}

MacLaren and Schwendimann note that ‘State practice (or usus) and opinion (or opinio juris sive necessitates) can … be hard to ascertain in … international [humanitarian] law’.\textsuperscript{140} Moreover, as Meron emphasises, ‘it is clearly possible to derive more than one formulation of a black-letter rule from a set of evidence concerning state practice and opinio juris’.\textsuperscript{141}

Within the two-element framework of customary law, a number of more detailed issues arise regarding whether a particular rule or principle can legitimately and credibly be viewed as being part of customary international law. In outline, these issues include the following:

- Do both elements have to be established by appropriate evidence before a particular rule can be accepted?
- What constitutes valid state practice? Can it include, for example, verbal statements?
- Can any practice other than state practice be properly considered? For example, can resolutions of United Nations bodies be considered, and if so, in what circumstances?
- How widespread and uniform must the practice be? Is the same weight to be given to the practice of different states?
- What is meant by the expression opinio juris sive necessitates?

Those issues will be examined critically in this section, particularly in light of the methodology adopted by and employed in the ICRC Study and the jurisprudence of the ICTY, and the criticisms made of this methodology by states and academic commentators.

\textsuperscript{135} North Sea Continental Shelf (Germany v Denmark) [1969] ICJ Rep 3, 44 [77] (‘North Sea Continental Shelf’).
\textsuperscript{136} Continental Shelf (Libyan Arab Jamahiriya v Malta) [1985] ICJ Rep 13, 29 [27]; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 252 [64] (‘Nuclear Weapons’).
\textsuperscript{137} Meron, above n 32, 817.
\textsuperscript{138} ILA Statement, above n 30, 6 (Introduction).
\textsuperscript{139} ICRC Study, above n 5, xxxi–xxxi. Maurice Mendelson, the Chairman of the Committee on Formation of Customary (General) International Law of the International Law Association which produced the ILA Statement, reviewed the Study’s draft text of the introductory part on the assessment of customary international law. ICRC Study, above n 5, xlvi–xlviii. This results in the Study having an authoritative theoretical underpinning to the methodology adopted. Note, however that, Marsh describes Mendelson’s approach to the formation of customary international law as ‘unorthodox’. Marsh, above n 66, 148. Generally the overall methodology has consequently found favour with commentators. The issue has more been the application of that methodology.
\textsuperscript{140} MacLaren and Schwendimann, above n 37, 1223.
\textsuperscript{141} Meron, above n 32, 833–4.
2 What Qualifies as Practice?

(a) Verbal Acts

In Tadić, the ICTY Appeals Chamber reached a general conclusion regarding the appropriate methodology in determining the content of customary law. The Appeals Chamber stated:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour … In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.  

Thereafter the Appeals Chamber conducted a ‘sweeping review’ to determine state practice and opinio juris regarding the application of customary international law to NIAC. This included:

- statements of the Spanish and British governments with regard to the status of combatants in the Spanish Civil War;
- written instructions given by Mao Tse-tung to the Chinese ‘People’s Liberation Army’;
- a 1964 statement by the prime minister of the Democratic Republic of the Congo with regard to its civil war;
- the agreement of parties to the 1967 conflict in Yemen;
- Nigerian, German, New Zealand, and US military manuals and prosecutions;
- a statement of the rebel army in El Salvador;
- ICRC principles concerning internal conflicts and the record of state compliance with them;
- statements on behalf of the then-twelve members of the European Union with regard to the Liberian conflict and Iraqi human rights abuses;
- US diplomatic and Defense Department statements;
- British government publications;
- a consensus view expressed by various representatives of the international community on the illegality of the domestic use of chemical weapons;
- the criminal codes of the former Yugoslavia and Belgium; and

In Galić, where the Tribunal had to deal with the question whether the prohibition of terror contained in article 51(2) of Additional Protocol I and article 13(2) of Additional Protocol II formed part of customary international law, the Appeals Chamber stated:

Another indication of the customary international law nature of the prohibition of terror at the time of the events alleged in this case can be found in the number of States parties to Additional Protocols I and II

142 Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [99] (‘Tadić (Jurisdiction’).

143 Ibid [100]–[125]; see also Meron, above n 32, 827–8.
by 1992. Also, references to official pronouncements of States and their military manuals further confirm the customary international nature of the prohibition.\textsuperscript{144}

Taking a similarly liberal approach, the ILA Statement suggests that ‘[v]erbal acts, and not only physical acts, of States count as State practice’.\textsuperscript{145} The accompanying commentary explains that ‘there seems to be no inherent qualitative difference between the two sorts of acts’ and notes that making statements is in fact a far more common form of state practice than physical conduct. The ICRC Study largely follows suit by stating that ‘both physical and verbal acts’ (manuals, national legislation, national case law, instructions to armed and security forces, etc) can constitute practice relevant to the creation of customary international law.\textsuperscript{146} Both the ILA Statement and the ICRC Study also state that relevant practice can be that of the executive, legislative and judicial organs of a state, provided that it is disclosed – that is, made public.

But such reliance on ‘verbal acts’ as evidence for state practice in the context of IHL has been seriously criticised. On the issue of the ICTY’s approach to customary international law, Frits Kalshoven writes that the perusal of the long paragraphs in the Tadić Jurisdiction Decision … convinces me that the vast majority of its examples fall far short of the level of practice required to establish what I would be prepared to accept as customary law … In one case only (the ‘Operational Code of Conduct for Nigerian Armed Forces’ …) does the Appeals Chamber show that an order to ‘abide by a set of rules protecting civilians and civilian objects’ was actually enforced by recourse to courts-martial, thus representing a solitary case of State practice.\textsuperscript{147}

Kalshoven appears to view military manuals and the like as examples of opinio juris rather than verbal acts of state practice. Kalshoven is similarly critical of the approach of the Appeals Chamber in Galić:

Again, rare exceptions apart, the evidence reflects opinio juris, not practice. And Article 51(2) of [Additional] Protocol I and Article 13(2) of [Additional] Protocol II may have been accepted by consensus but this signifies no more than that these provisions were accepted as treaty law. In particular the assertion that Article 13(2) at the time of its adoption reflected customary law is too absurd for argument … As in 1995 in the Tadić Jurisdiction Decision, the Appeals Chamber in 2006 in the Galić Judgement in fact has not found custom but principles of the law of armed conflict … these principles are not customary but moral in nature. They stem, in other words, from the mind rather than from actual battlefield practice.\textsuperscript{148}

Although Kalshoven argues that the conclusion that the rules asserted in these two ICTY cases form part of customary international law is based on insufficient state practice, he does not appear to be drawing the further conclusion that the rules asserted do not form part of international law:

My criticism is that in matters relating to internal armed conflict, the Tribunals should not have based their decisions on asserted yet non-existent custom but on principle, a source of law as effective and, indeed, convincing as custom in the promotion and enforcement of the law of armed conflict.\textsuperscript{149}

\textsuperscript{144} Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [89].
\textsuperscript{145} ILA Statement, above n 30, 14–15 (s. 4).
\textsuperscript{146} ICRC Study, above n 5, xxxi.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid 68 (emphasis added).
This approach is based on the content of the Martens Clause as it appeared in the 1899 *Hague Convention II*. The purpose of the Martens Clause was to fill 'loopholes in the body of conventional law'. The 1899 version stated that:

\[\text{[I]}\text{n cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.}\]

By the time of the drafting of *Additional Protocol I* the phrase 'usages of civilized nations' was replaced by the phrase 'established custom'. For *Additional Protocol II*, the Martens-like clause was significantly altered. It read 'that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience'. The reference to custom had been removed. The ICRC *Commentary* explains this change as resulting from a belief by the ICRC at the time that the law regarding NIAC was too recent for there to be relevant state practice.

For Kalshoven, principles of law and customary law are both valid but separate sources of law. The distinction between the two would include that customary law requires evidence of state practice whereas principles of law do not, relying for their norm-creating character on 'their inner force'. Kalshoven accepts though that there is a 'clash of opinions' on his view that there is a separation between principles of law and customary law.

A general criticism by the US of the ICRC *Study* is that it places 'too much emphasis on written materials, such as military manuals' rather than 'operational practice'. This criticism draws support from the view of Karol Wolke, an eminent authority on customary law, that 'custom-generating practice has always consisted of actual acts of physical behavior and not of mere words, which are, at most, only promises of a certain conduct'. Other commentators also note the *Study*’s tendency to rely on military manuals, official statements, public reports or statements by military officials or agencies with respect to how hostilities have been or should be conducted, and so forth. For Aldrich, in relation to the customary status of *Additional Protocol I*, such materials, while helpful, fall short of defining with any precision the extent of contemporary State acceptance of or objection to specific provisions. Aldrich concludes that this material is not sufficient to support the *Study*’s conclusions regarding the content of customary law and in so doing ‘its credibility crumbles’.

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150 *Convention (II) with Respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899.
151 Kalshoven, above n 147, 51.
152 Ibid 50 (emphasis added).
153 Ibid.
154 *Additional Protocol II* preamble.
155 Kalshoven, above n 147, 52.
156 See Sandoz, Swinarski and Zimmermann (eds), above n 117, 1341–2 [4435].
157 Kalshoven, above n 147, 59.
158 Ibid.
159 Bellinger and Haynes, above n 61, 445.
161 Aldrich, above n 66, 507; Anderson, above n 66.
162 Aldrich, above n 66, 507.
163 Ibid.
In response, Henckaerts argues that the Study 'has not looked only at verbal acts of State practice' stating that '[o]fficial reports on the conduct of actual wars have been included to the extent that they were available' and that in addition 'numerous instances of what appear to be verbal acts of State practice do in fact describe practice in actual wars'. Further he pointed out the necessity for verbal acts of states to be described for purposes of establishing the necessary *opinio juris*. He concludes that just as *opinio juris* alone cannot create custom, practice alone cannot create custom either. Both elements are required and were looked for in the Study.

Bothe has found the Study's extensive reliance on verbal practice 'neither surprising nor a weakness' as verbal practice is 'readily available' and that an 'argument that actual physical behaviour counts more than words is flawed'. States should be taken to mean what they say. Dinstein also accepts that practice can consist of verbal as well as physical acts but suggests that not all so-called military manuals are genuine sources of state practice, rather, they could be 'merely a tool used to facilitate instruction and training, and … [have] no binding or even authoritative standing'.

(b) Non-State Practice

Another issue related to the nature of the practice, which has garnered attention particularly with respect to the ICRC Study, is the value of practice other than that by states. The Study took the view that practice of international organisations, including official ICRC statements, can be relevant.

However, Dinstein critically notes that non-governmental organisations ('NGOs') – and he includes the ICRC in that category (the 'most important' and 'unique' NGO) – 'whatever their standing, can never contribute directly through their own practice to the creation of customary norms'.

Henckaerts has responded, first, by asserting generally that the relevant practice is not limited to 'state' practice but to the practice of 'subjects of international law', noting that article 38(1)(b) of the ICJ Statute refers to 'a general practice accepted as law' with there being no 'state' limitation. Second, and more specifically to the ICRC Study, Henckaerts states that ICRC reports and other publications were not used as primary sources of evidence for the customary nature of a rule, but to 'reinforce' state practice. He also points out that not all of the material collected for and reproduced in the Study was actually relied upon in establishing rules of customary law.

Although decisions of international courts and tribunals do not create law they do have an influential role in the area of customary international law. According to the ICRC Study 'a

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165 Ibid.
166 Ibid.
168 ICRC Study, above n 5, xxxv.
170 Henckaerts, 'A Rejoinder to Professor Dinstein', above n 67, 261.
171 Ibid.
finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect.\textsuperscript{173} Further, the \textit{Study} says that such decisions ‘can also contribute to the emergence of a rule of customary law by influencing the subsequent practice of States and international organisations’.\textsuperscript{174}

While this is technically a correct approach to the role of court decisions regarding customary law, Judge Meron notes that the reality may not be so technically correct. He suggests the emergence of an ‘informal \textit{stare decisis} principle’ involving courts and governments relying on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles.\textsuperscript{175} He says that practice ‘thus appears to give judicial decisions greater weight than that accorded by article 38 of the ICJ \textit{Statute}’.\textsuperscript{176}

In any event, the \textit{Study} makes ‘heavy use’\textsuperscript{177} of case law, though opinions differ on the results. Thus, Bothe refers positively to the \textit{Study’s} use of case law from the ICJ, the two ad hoc criminal tribunals and human rights tribunals as a contribution to the ‘dynamic development of customary humanitarian law’.\textsuperscript{178} Cryer, however, believes that ‘at times, the \textit{Study} is perhaps a little over-sanguine in relation to case law, taking some decisions as having a greater authority than their reasoning merits’.\textsuperscript{179} He specifically suggests that the \textit{Study} at times takes the cases ‘too seriously’.\textsuperscript{180} Cryer also suggests that the ‘influence of decisions [of international tribunals] on the study, however, is not entirely consistent’.\textsuperscript{181} Specifically, he refers to a narrow view of \textit{dicta} regarding definitions of armed conflict but ‘a very broad view of the customary law applicable to prohibited weapons in non-international armed conflicts’.\textsuperscript{182}

3 How ‘Dense’ Must the Practice Be?

The \textit{ILA Statement} takes the view that state practice need not be ‘universal’ for a rule of customary law to emerge.\textsuperscript{183} A ‘virtually uniform’ practice that is ‘extensive and representative’ suffices.\textsuperscript{184} The ICRC \textit{Study} follows this approach by noting that practice must be sufficiently ‘dense’, meaning that it is ‘virtually uniform, extensive and representative’.\textsuperscript{185}

The US response criticised the \textit{Study} for failing to ‘articulate or apply any test for determining when state practice is “sufficiently dense”’.\textsuperscript{186} In response, Henckaerts observed that while ‘it is agreed that practice has to be “extensive and virtually uniform” … there is no specific mathematical threshold for how extensive practice has to be’.\textsuperscript{187} This was because the subject matter

\begin{thebibliography}{99}
\bibitem{173} ICRC \textit{Study}, above n 5, xxxiv.
\bibitem{174} Ibid.
\bibitem{175} Meron, above n 32, 820.
\bibitem{176} Ibid.
\bibitem{177} Cryer, above n 42, 240.
\bibitem{178} Bothe, above n 36, 159.
\bibitem{179} Cryer, above n 42, 255.
\bibitem{180} Ibid 256. He uses the treatment in the \textit{Study} of the issue of reprisals as an example, on which see section III(F)1 below.
\bibitem{181} Ibid 253.
\bibitem{182} Ibid 254; citing Turns, above n 57.
\bibitem{183} \textit{ILA Statement}, above n 30, 23 (s 14(i)).
\bibitem{184} Ibid 21–3 (ss 13, 14(i)).
\bibitem{185} ICRC \textit{Study}, above n 5, xxxvi.
\bibitem{186} Bellinger and Haynes, above n 61, 446.
\bibitem{187} Henckaerts, ‘A Response to US Comments’, above n 67, 475.
\end{thebibliography}
determined the density of available practice: ‘Some issues arise more often than others and generate more practice.’ The ILA Statement similarly explains that ‘it is not to be expected, neither is it the case, that a precise number or percentage of States is required’ for a customary rule to emerge; the criterion is ‘in a sense qualitative rather than quantitative.’

Importantly, while there is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law, the practice must ‘include[e] that of States whose interests are specially affected.’ Which states constitute those ‘specially affected’ is said to ‘vary according to circumstances’ with such circumstances including which states may be developing weapons whose legality is in question. Again, this overall approach is said to be qualitative rather than quantitative.

The US response to the ICRC Study asserted that the Study fails to pay due regard to specially affected states and tended to treat as equal the practice of states even though involvement in conflict varied between states.

In his response, Henckaerts qualified the notion of ‘specially affected states’ in the context of humanitarian law. Although accepting that the ICJ has said in certain circumstances at least some weight is to be given to the views of specifically affected states, he wrote:

The statement of the International Court of Justice [in the North Sea Continental Shelf cases] in respect to the need for the practice of ‘specially affected’ states to be included was made in the context of the law of the sea – and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law. Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply. Unlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become ‘specially affected’. Therefore, all states would seem to have a legitimate interest in the development of humanitarian law.

In the contemporary operational environment, characterised by interventions by international forces on behalf of an emerging or emerged government in situations that include non-international armed conflicts, the question can be asked whether the host governments represent ‘specially affected’ states such that the view of those governments regarding issues such as incidental damage, injury and loss of life carry particular weight. This is a dimension of practice yet to be explored by scholars.

It must also be noted that contrary practice can prevent the necessary uniformity from being established or represent a violation. The ICRC Study’s approach to this issue was that contrary practice did not prevent the formation of a rule providing the practice was condemned by other states or denied by the perpetrator itself as not representing official practice. The US response to the ICRC Study included general criticism that ‘inadequate weight’ was given to negative practice among states not parties to relevant treaties.

188 Ibid.
189 ILA Statement, above n 30, 25–6 (comment (d)–(e) to s 14) (emphasis in original).
191 ICRC Study, above n 5, vol 1, xxxviii.
192 Bellinger and Haynes, above n 61, 446.
194 ICRC Study, above n 5, xxxvii.
195 Bellinger and Haynes, above n 61, 445.
Whether that is the case is neither here nor there but this observation highlights the difficulty in evaluating the practice of states parties to a treaty as compared to the practice of states not parties. Dinstein refers directly to a failure in the Study to look for ‘a compromise between Contracting and non-Contracting Parties’ to Additional Protocol I, whereas Henckaerts asserts that the ‘distinction between contracting parties and non-contracting parties was taken into consideration in the assessment of each rule.’

Judge Meron concluded that while the Study involved a ‘traditional’ approach to customary law, in his view, it departed from that approach in one respect, namely, in regard to the ‘paradox’ entailed in that approach that has been described by Richard Baxter. Baxter observed that as the number of states that have ratified a treaty increases, ‘much greater weight is placed, in discerning custom, on the practices of those relatively few states that have not ratified the treaty.’ Judge Meron points out that the Study in fact took ‘into account for the purpose of establishing customary international law the practice of states that are party to an applicable governing treaty, in addition to the practice of nonparty states.’ He believes though this is a legitimate approach as it is ‘hard to see any alternative; consideration only of the practice of non-parties would be either meaningless or at least non representative of state practice – generally.’ The difficulty in this approach though is in distinguishing between compliance by state parties with particular rules out of a treaty obligation or for a reason relevant to customary law obligation.

Addressing what he views as a two-part framework for assessing the sufficiency of state practice – ‘Are the cases of a practice numerous enough that it is possible to speak of an extensive or virtually uniform practice’ and ‘What is the relevance of inconsistent practice?’ – Bothe concludes that the Study ‘correctly deals with both questions.’ Significant for Bothe was the worldwide nature of the research which results in what he calls the Study’s ‘persuasive value.’

4 What Qualifies as Opinio Juris?

One of the problems in ascertaining whether there exists opinio juris to elevate certain practice to the level of a customary law rule, is the difficulty in telling whether a state does something out of a perceived legal obligation or because of policy reasons:

[O]bligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules.

In the context of customary IHL, military manuals provide a striking example of this conundrum. Certainly military manuals can be influential on the development of international law. The highly significant Lieber Code issued by President Lincoln in 1863 as General Order No 100

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196 Dinstein, Israel Yearbook, above n 66, 12.
197 Henckaerts, A Response to US Comments, above n 67, 480.
198 Meron, above n 32, 833.
200 Meron, above n 32, 833.
201 Ibid.
202 Bothe, above n 36, 160.
203 Ibid.
204 Bellinger and Haynes, above n 61, 447.
is an example. 205 Certainly also, military manuals are relied on extensively in the Study. 206 But, as Newalsing points out, ‘certain sources, such as military manuals, are often deemed unsuitable to serve as a source of evidence for the Study, since they are considered to be an expression of policy and not necessarily of what is believed to be the law’. 207 The assertion that statements, including those in military manuals, may reflect policy imperatives rather than assessments of legal obligations, has merit as it matches the reality of manual creation within defence forces. The solution to the resulting problem involves at least a careful and cautious situation-by-situation examination of the relevant statement/manual.

Henckaerts notes that the authors of the Study were aware of the fact and ‘that this distinction was always kept in mind’. 208 Nonetheless, it was considered that teaching manuals authorized for use in training represent a form of state practice. In principle, a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice. 209

For Bothe, the legitimacy of manuals as evidence of state practice depends on the character of the particular manual: does a particular component of the manual relate to a rule of customary law or reflect state policy or a treaty obligation? 210 But he believes that in the field of IHL, where states ‘adopt a certain stance as a matter of policy only, without considering themselves bound to behave in that way, are relatively rare’. 211

5 Can Practice and Opinio Juris Be Separated?

Separate from the difficulty in identifying appropriate evidence of practice and opinio juris is the issue of whether evidence of both practice and opinio juris has to be established in each case.

The ILA Statement notes

[m]any writers … have asserted that customary law comprises two elements, the ‘objective’ or ‘material’ element – State practice – on the one hand, and on the other hand, the ‘subjective’ element, often referred to as opinio juris sive necessitatis (or opinio juris for short). 212

However, it asserts that there have been a ‘number of misconceptions’ regarding the reading of the ICJ cases concerning the necessity of the ‘subjective’ element. 213 Regarding the necessity of establishing opinio juris in each case, the Statement concludes:

[I]t is not always, and probably not even usually, necessary to prove the existence of any sort of subjective element in addition to the objective element, but (a) where it is present, that may be sufficient to establish the existence of a customary rule binding on the State(s) in question; and (b) proof of its absence may

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205 Bothe, above n 36, 157.  
206 ICRC Study, above n 5, xxxiii, citing Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [99]; Bothe, above n 36, 156.  
207 Newalsing, above n 51, 272.  
209 Ibid.  
210 Bothe, above n 36, 157.  
211 Ibid 161–2.  
212 ILA Statement, above n 30, 7–8 (Introduction [10]).  
213 Ibid.
mean that such a rule has not come into existence, either because the practice is not of a sort which ‘counts’ towards the formation of a customary rule, or because persistent objection has prevented a general rule from emerging, or at any rate has prevented its binding the particular objector(s).

While the ICRC Study duly notes the ‘need for the practice to be carried out as of right’, it notes that ‘it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction.’\(^{214}\) The Study concludes that opinio juris has an important role when practice is ambiguous but ‘[w]hen there is sufficiently dense practice, an opinio juris is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an opinio juris.’\(^{216}\) Conversely, opinio juris plays an important role in situations where relevant practice is sparse or ambiguous.\(^{217}\)

The Study also notes that international courts and tribunals occasionally have appeared to look favourably at the existence of a customary rule where that rule is seen as being a ‘desirable one for international peace and security or for the protection of the human person provided that there is no important contrary opinio juris’.\(^{218}\) However, the Study does point out that even if a particular rule is seen as desirable, if there is clear evidence of contrary opinio juris by a number of states, including specially affected states, the existence of the rule will not be proven.\(^{219}\)

The US response to the ICRC Study asserts that ‘the Study tends to merge the practice and opinio juris requirements into a single test’, stating that opinio juris cannot simply be inferred from state practice.\(^{220}\)

Henckaerts rejects the US assertion on this issue:

Although the commentaries on the rules … do not usually set out a separate analysis of practice and opinio juris, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity or policy. When the establishment of opinio juris was difficult, this is discussed in more detail in the commentaries. Hence, the Study did not simply infer opinio juris from practice.\(^{221}\)

For Bothe the Study’s approach to state practice and opinio juris is correct. He says:

The introduction to the Study rightly points out that it is often difficult or even impossible to distinguish between the objective and the subjective elements of practice. It may even be unnecessary. The Study also admits that there are cases where the distinction matters, in particular in cases of behaviour not accompanied by any declaration or explanation, and the behaviour requires some kind of interpretation.\(^{222}\)

Interestingly, Judge Meron notes that the ‘textbook’ enunciation for identifying customary law – state practice and opinio juris – is not even followed by the ICJ itself.\(^{223}\) He observes, for

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214 Ibid 31.
216 Ibid xlii.
217 Ibid; MacLaren and Schwendimann, above n 37, 1223.
218 ICRC Study, above n 5, xliii.
219 Ibid.
220 Bellinger and Haynes, above n 61, 446.
221 Henckaerts, ‘A Response to US Comments’, above n 67, 482.
222 Bothe, above n 36, 161.
223 Meron, above n 32, 819.
example, that the ICJ in *Nicaragua* sought evidence of customary law in treaties rather than examining ‘primary materials establishing state practice and *opinio juris*.’

6 What is the Role of Treaty Law?

The ICRC *Study*, relying on the ICJ *North Sea Continental Shelf* and *Nicaragua* cases, asserts that the degree of ratification of a treaty is relevant to assessing whether its contents constitute customary law. It also relied on the *ILA Statement* regarding this case law and the ways that treaty law can interact with customary law although there can be ‘no presumption’ that applies – ‘in each case it is a question of examining the evidence.’ The *Study* concludes that it ‘takes the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question’.

In the context of criticising the *Study*’s approach to establishing *opinio juris*, the US response to the *Study* states that it was necessary to go beyond ‘mere recitations of existing treaty obligations.’ The response of Henckaerts to this criticism is as follows:

The Study has approached the Additional Protocols, and for that matter any other treaty, in a cautious manner and has not assumed that a rule is customary merely because it is contained in a widely ratified treaty. Second, the conclusion of the Study that many rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in non-international armed conflict is the result of state practice to this effect.

Henckaerts supports the above assertion by reference to there being several rules in *Additional Protocol I* that were not included in the *Study* as it had been concluded that the practice regarding them was not sufficiently uniform to have reached customary status.

Some criticism of the *Study* can also be anticipated given that the area is ‘heavily regulated by treaty’ and ‘States that are not party to treaties concerned may view the attempt to identify customary rules as an attempt to get around the express consent that is required for them to be bound by the related treaty articles.’ It is noted, however, that such an attempt has been denied by the ICRC, indeed it is claimed that the ‘idea of the ICRC … was to build on consent.’

A separate mention has to be made of the *Rome Statute of the International Criminal Court* (*Rome Statute*). The ICTY has looked to the *Rome Statute* for support for propositions that certain rules have obtained a customary character. The ICRC *Study* refers to the provisions of the *Rome Statute* on numerous occasions, particularly in relation to NIACs.

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224 Ibid 819.
225 *ILA Statement*, above n 30, 59.
226 ICRC *Study*, above n 5, xlii.
227 Bellinger and Haynes, above n 61, 447.
230 MacLaren and Schwendimann, above n 37, 1224.
231 François Bugnion, ICRC Director for International Law and Cooperation, quoted in MacLaren and Schwendimann, above n 37, 1224 n 38.
The ICRC Study, without full explanation, is of the view that the elements of the crimes in the Rome Statute reflect customary international law. The Study's Introduction quotes Philippe Kirsch, the first President of the ICC, as observing that there was 'general agreement [during drafting] that the definition of crimes in the [Rome Statute] were to reflect existing customary international law, and not to create new law'.233 Bothe for one does not appear to mind the Study's reliance on the Rome Statute. He states that 'the primary norms' underlying the Rome Statute are part of customary law and that consequently the definition of crimes components of article 8(2) – 'secondary norms' – 'are indeed a valid indication that they constitute customary law'.234 Bothe seems to accept that the definition of crimes contained in the Rome Statute do indeed reflect customary law.

However, other commentators have criticised the Study’s approach to the content of the Rome Statute. According to Cryer, the Study contains some formulations which are more limited than custom.235 He specifically refers to the acceptance of certain formulations contained within the Rome Statute, asserting that those formulations do not in fact reflect customary law.236 He argues that although there was, as President Kirsch stated, a stated intention that the ‘definitions of crimes in the [Rome Statute] were to reflect existing customary international law, and not create new law’ the eventual result was somewhat different.237

In this context, Cryer points to the more nuanced approach towards the Rome Statute adopted by the ICTY. For example, regarding the normative value of the Rome Statute the Trial Chamber stated in Furundžija:

Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.238

7 What is the Role of Persistent Objectors?239

The Study ‘leaves open whether it is legally possible to be a “persistent objector” in relation to customary rules of international humanitarian law’ although it clearly holds that if there is such a doctrine applicable to IHL then the state concerned ‘must have objected to the emergence of a new norm during its formation and continue to object afterwards’ rather than subsequent to the norm’s emergence.240

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234 Bothe, above n 36, 163. ‘The norm making a certain behaviour a crime is a secondary norm. It presupposes a primary norm which prohibits that very behaviour’: at 162.
235 Cryer, above n 42, 252.
236 Ibid 257–62.
237 Ibid 251.
238 Prosecutor v Furundžija (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [227]; Cryer, above n 42, 252.
240 ICRC Study, above n 5, vol 1, xxxix.
III APPLICABILITY OF SPECIFIC RULES IN NON-INTERNATIONAL ARMED CONFLICT

A Generally

There is considerable support for the claim that the core instruments dealing with the law applicable to IACs – notably the Nuremberg Charter, the Hague Regulations and the 1949 Geneva Conventions – form part of customary law.242 There is also overwhelming support for the idea that the lone provision of the 1949 Geneva Conventions dealing with NIACs – Common Article 3 – represents custom.

The ICJ addressed this issue in Nicaragua, where by virtue of a limitation in the US acceptance of the Court’s jurisdiction, it was unable to apply multilateral treaties. Thus, the ICJ had to consider whether the relevant treaty provisions (including those of the Geneva Conventions) were applicable by virtue of being customary law. Importantly for present purposes, the ICJ stated:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick … The Court may therefore find them applicable to the present dispute ….243

The ICTY has consistently held Common Article 3 to be customary law. In Tadić, the Appeals Chamber observed that ‘some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions’.244 In Kunarac, the Appeals Chamber confirmed that Common Article 3 ‘is indeed regarded as being part of customary international law’.245 In Hadžihasanović, the Appeals Chamber found that Common Article 3 had ‘long been accepted as having customary status’.246 In the 2005 judgment in Limaj, Trial Chamber II noted that ‘it is settled jurisprudence that Common Article 3 forms part of customary international law’.247

241 Rome Statute art 8(2)(e) supports the customary law status of some conduct of hostilities rules to NIACs. Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [127], states that customary rules applicable in NIACs include the ‘protection of civilians … from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in inter-national armed conflicts and ban of certain methods of conducting hostilities.’ See also Prosecutor v Blaškić (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T; 3 March 2000), [164], [168] (‘Blaškić (Trial Judgment)’) [170]; Kordić (Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 2 March 1999) [30].
242 Blaškić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T; 3 March 2000) [164], [168].
244 Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [98].
245 Prosecutor v Kunarac (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-96-23/1-A, 12 June 2002) [68] (‘Kunarac (Appeals Judgment)’).
247 Prosecutor v Limaj (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-66-T, 30 November 2005) [176]. See also Prosecutor v Halilovic (Judgment) (International Criminal Tribunal
What, though, of the contents of Additional Protocol II regarding NIACs? Greenwood, writing in 1991, thought that only a limited number of articles of Additional Protocol II (those elaborating on Common Article 3, namely, articles 4(1)–(2) (humane treatment) and article 6(2) (due process)) represented customary international law. Otherwise, he concluded that ‘most of Protocol II has to be regarded as confined to treaty law in the absence of more substantial State practice evidencing an acceptance of its provisions into customary law.’ In a 1995 report regarding the establishment of the ICTR, the UN Secretary-General took a broadly similar view. The Secretary-General noted that the Security Council had elected, to extend the subject matter jurisdiction of the ICTR, in contrast to that of the ICTY, to certain non-customary offences. In particular, he noted that the ICTR Statute covered violations of Additional Protocol II, ‘which, as a whole, has not yet been universally recognized as part of customary international law.’

However, less than nine months later, the ICTY Appeals Chamber held in Tadić that ‘[m]any provisions of [Additional Protocol II] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.’ The Appeals Chamber reviewed the historical ‘stark dichotomy’ between belligerency and insurgency in international law: belligerency applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war) with insurgency applying to ‘armed violence breaking out in the territory of a sovereign State.’ A consequence was that ‘international law treated the two classes of conflict in a markedly different way.’ However, after reviewing practice, including state practice and the practice of the General Assembly, the Appeals Chamber concluded there had been a ‘gradual extension’ of the rules and principles of international wars to NIAC in the area of the protection of civilians or civilian objects from hostilities or, more generally, ‘to protect those who do not (or no longer) take active part in hostilities’ and in the area of the means and methods of warfare.

It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned … If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

for the Former Yugoslavia, Trial Chamber, Case No IT-01-48-T, 16 November 2005) [31] (‘It is … well established that Common Article 3 is part of international customary law…’); Prosecutor v Blagojevic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-60-T, 17 January 2005) [539]; Prosecutor v Naletilic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [228]; Blaškić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [166] (‘Common Article 3 must be considered a rule of customary international law’).


Ibid.


Tadić (jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-T, 2 October 1995) [117].

Ibid [96].

Ibid.

Ibid [119].

Ibid [96]–[97].
The Appeals Chamber held that customary rules governing IACs include protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.\textsuperscript{256}

Commenting on this decision, Greenwood maintained that the rules contained in Additional Protocol II ‘have not generally been regarded as declaratory of customary international law’.\textsuperscript{257} Greenwood also noted that the ‘list of principles and rules identified in the Decision, albeit in broad outline rather than in detail, goes beyond the treaty rules contained in Additional Protocol II … and begins to resemble the main provisions of Additional Protocol I, together with some provisions of the weaponry agreements’.\textsuperscript{258} He found it ‘noteworthy that the Appeals Chamber has gone further than other bodies by determining that there are rules applicable to internal armed conflicts which are not based upon either Common Article 3 or Additional Protocol II’.\textsuperscript{259} However, for Greenwood the Appeals Chamber’s opinion on this matter is \textit{obiter} and he suggests that it ‘is doubtful whether the practice discussed in this part of the Decision really sustains some of the inferences drawn from it’ although he believes that ‘[t]here is likely to be broad agreement that the law of internal conflicts includes principles regarding the protection of the civilian population’.\textsuperscript{260}

Greenwood’s overall conclusion regarding the \textit{Tadić} decision was that although the content of the customary law applicable to internal armed conflicts ‘will undoubtedly be the subject of much argument in future cases, the \textit{Tadić} decision has established that the International Tribunal will apply principles derived from (though possibly not identical in content to) those applicable to the conduct of hostilities in international armed conflicts’.\textsuperscript{261}

\section*{B Basic Principles for the Protection of the Civilian Population}

In 1968, the UN General Assembly adopted Resolution 2444, ‘[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts’, and ‘[a]ffirming’ several principles on the protection of civilian populations against the dangers of indiscriminate warfare.\textsuperscript{262} In 1970, the General Assembly adopted Resolution 2675, where it ‘[a]ffirm[ed]’ a number of further ‘basic principles for the protection of civilian populations in armed conflicts’.\textsuperscript{263}

The ICTY has on multiple occasions relied on these resolutions as an indication of \textit{opinio juris} when finding that the relevant general principles of the protection of civilians formed part of customary law, in particular the protection of civilians from hostilities, especially from

\textsuperscript{256} Ibid [127].
\textsuperscript{257} Greenwood, ‘International Humanitarian Law’, above n 46, 278.
\textsuperscript{258} Ibid.
\textsuperscript{259} Ibid.
\textsuperscript{260} Ibid.
\textsuperscript{261} Ibid 279.
\textsuperscript{262} Respect for Human Rights in Armed Conflict, GA Res 2444 (XXIII), UN GAOR, 23rd sess, 1748 plen mtg (19 December 1968) preamble [1], [1].
\textsuperscript{263} Basic Principles for the Protection of Civilian Populations in Armed Conflicts, GA Res 2675 (XXV), UN GAOR, 25th sess, 1922 plen mtg (9 December 1970).
indiscriminate attacks; the protection of civilian objects, in particular cultural property; and the protection of all those who do not (or no longer) take active part in hostilities.\textsuperscript{264}

1 Principle of Distinction

Bothe describes the principle of distinction – the ‘limitation on targets which may lawfully be attacked’ – as ‘a venerable principle of the laws of war’ and believes that the general rules may be uncontroversial.\textsuperscript{265} Indeed, there is broad agreement that, as a matter of customary law, civilians and civilian objects should not be made the object of attack. Thus, in \textit{Blaškić}, the ICTY Appeals Chamber noted that

Article 51(2) of Additional Protocol I and article 13(2) of Additional Protocol II … both provide that ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.’ The protection of civilians reflects a principle of customary international law that is applicable in internal and international armed conflicts, and the prohibition of an attack on civilians, outlined in the above Protocols, reflects the current status of customary international law. Among the customary rules that have developed is the protection of civilians against indiscriminate attacks.\textsuperscript{266}

In \textit{Hadžihasanović}, the ICTY Appeals Chamber was also satisfied that the conventional prohibition on attacks on civilian objects in non-international armed conflicts has attained the status of customary international law and that this covers ‘wanton destruction of cities, towns or villages not justified by military necessity’ in international and non-international armed conflict.\textsuperscript{267}

However, there remain points of controversy with respect to particular elements or applications of the principle of distinction.

(a) Civilians, Combatants, Fighters

In the ICRC Study, the core of the principle of distinction is contained in Rule 1 (applicable both in IACs and NIACs) which states as follows: ‘[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.’ Rule 3 of the Study defines combatants as ‘[a]ll members of the armed forces of a party to the conflict … except medical and religious personnel’ and Rule 5 states that ‘[c]ivilians are persons who are not members of the armed forces.’

The difficulty with this language lies in the fact that the law applicable to NIACs does not deal with combatant status. However, the commentary to Rule 3 duly notes that ‘[f]or purposes of the principle of distinction … members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other

\textsuperscript{264} \textit{Tadić (Jurisdiction)} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [127]; \textit{Prosecutor v Blaškić} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [158] (‘Blaškić (Appeals Judgment)’).

\textsuperscript{265} Bothe, above n 36, 166.

\textsuperscript{266} \textit{Blaškić (Appeals Judgment)} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [157] (citations omitted).

\textsuperscript{267} \textit{Hadžihasanović (Rule 98bis Motions)} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case IT-01-47-A/873.3, 11 March 2005) [50]: ‘The Appeals Chamber is further satisfied that violations of this provision entail, in customary international law, the individual criminal responsibility of the person breaching the rule.’
hand, exists only in international armed conflicts …’ For Bothe the Study thus ‘avoids the question whether and to what extent the combatant privilege is a precondition of the principle of distinction.’

The San Remo Manual resolves this conundrum somewhat differently. It introduces, in Rule 1.1.2(a), the notion of ‘fighters’ and defines them as ‘members of armed forces and dissident armed forces or other organized armed groups, or [persons] taking an active (direct) part in hostilities’. Rule 1.1.3 defines civilians negatively as ‘all those who are not fighters’. Rule 1.2.2 then states, in relevant part, that ‘a distinction must always be made in the conduct of military operations between fighters and civilians’, with Rule 2.1.1 adding that ‘[a]ttacks must be directed only against fighters or military objectives’ and Rule 2.1.1.1 noting that ‘[a]ttacking the civilian population as such, as well as individual civilians, is forbidden.’

(b) Loss of Protection

There is little doubt that a civilian, upon taking a direct part in hostilities, loses his or her immunity from attack. But there is much debate about the precise conditions under which this occurs, notably in terms of what constitutes direct participation in hostilities (‘DPH’) and the extent of the loss of protection. These issues were the subject of a separate discussion by the ICRC and the Asser Institute, resulting in the publication Interpretive Guidance by the ICRC in 2009. However, the conclusions of the Interpretative Guidance are by no means universally accepted and the core of the debate is also evident from the discussion of DPH in the ICRC Study and the San Remo Manual.

According to article 51(3) Additional Protocol I and article 13(3) Additional Protocol II, civilians are protected against attack ‘unless and for such time as they take a direct part in hostilities’. The ICRC Study repeats this formulation at Rule 6 and suggests that it applies as a matter of customary law in both IACs and NIACs. Under this approach, civilians do not lose protection permanently as a result of having directly taken part in hostilities, but only ‘for such time’ as they take a direct part in hostilities.

In contrast, Rule 2.1.1.2 of the San Remo Manual states that ‘[c]ivilians lose their protection from attack if they take an active (direct) part in hostilities’. Commentary to Rule 1.1.2 on the definition of fighters acknowledges that under article 13(3) Additional Protocol II, the loss of protection occurs only ‘for such time’ as civilians take a direct part in hostilities. However, the Manual takes the view that

this limitation is not confirmed by customary international law. Such an approach would create an imbalance between the government's armed forces on the one hand and members of armed groups on the other, inasmuch as the former remain legitimate targets (under international law) throughout the conflict. Moreover, the proposition is impractical to implement on the ground. Ordinary soldiers would be required to make complex and immediate assessments as to whether an individual's participation in hostilities is ongoing, at a time when the facts available are incomplete or unclear.

268 Bothe, above n 36, 175.
270 San Remo Manual, above n 13, r 1.1.2 [4].
Dinstein – who, it is recalled, is one of the authors of the San Remo Manual – disputes that the ‘for such time’ condition is part of customary law, and alleges that in this respect the Study transcended the lex lata and moves ‘into the realm of the lex ferenda’.271 Bothe notes that, given the controversial nature of this issue, the authors of the Study ‘would have been well advised to arrange their sources more clearly in order to show how they deal with this time element’.272

But on Bothe’s ‘own reading of the sources quoted … the authors [of the Study] have a good case’ regarding the time element forming part of customary international law.273 He also notes that the ‘time limitation of the loss of protection was not controversial during the 1974–1977 Diplomatic Conference’.274 In this context, Henckaerts draws attention to the decision of the Israeli Supreme Court in the Targeted Killings case.275 Whilst generally examining the normative framework applicable to IAC, the Israeli Supreme Court stated that ‘[c]ustomary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives’, and with respect to a customary rule on this point, the Court made reference to Rules 1 and 6 of the ICRC Study.276 Later, and quite specifically, the Court appears to endorse the wording of Rule 6. Having cited article 51(3) Additional Protocol I, which states that ‘[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities’, the Court admits that Israel is not party to Additional Protocol I and its provisions have not been made part of Israeli domestic law.277 But the Court then notes the ‘position of The Red Cross’, as evidenced by Rule 6 of the Study, that ‘it is a principle of customary international law’.278 The Court then says that this ‘position is acceptable to us’.279

Admittedly, Dinstein’s criticism of the ICRC Study was directed at the IAC context. Also, the analysis by the Court was on the basis of the context being an IAC. However, the Study itself asserts that Rule 6 is applicable to both NIAC and IAC and the Supreme Court seems to be endorsing the rule as formulated in the ICRC Study.

(c) Military Objectives

According to article 48 Additional Protocol I, ‘the Parties to the conflict shall at all times distinguish … between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’. There is no corresponding provision in Additional Protocol II. However, the ICRC Study and the San Remo Manual agree that, as a matter of customary international law, the same principle applies in NIACs (Rule 7 of the ICRC Study and Rules 1.2.2, 2.1.1 and 2.1.1.1 of the San Remo Manual).

271 Dinstein, Israel Yearbook, above n 66, 11–12; see also Marsh, above n 66.
272 Bothe, above n 36, 166.
273 Ibid.
276 Ibid.
277 Ibid [30].
278 Ibid.
279 Ibid.
But the definition of military objective has considerable potential for controversy, and indeed different states have different interpretations. These differences have significant practical implications such as which persons and objects may be legitimately targeted.

According to article 52(2) of Additional Protocol I, military objectives are ‘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’. In contrast, the US, not a party to Additional Protocol I, considers military objectives to include ‘[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability’.

However, the ICRC Study (Rule 8) and the San Remo Manual (Rule 1.1.4) regard the definition of military objective contained in article 52(2) Additional Protocol I to be applicable in NIACs. Interestingly, the San Remo Manual, noting the US objections to ‘certain aspects’ of Additional Protocol I, suggests that there is no objection to the definition of military objectives, which is now considered to be customary international law for both international and non-international armed conflict, as confirmed by article 2.6 of the 1996 Amended Protocol II to the Conventional Weapons Convention and by article I(f) of the Second Protocol to the Hague Cultural Property Convention, both of which are applicable in non-international armed conflict.

And while the Manual notes that ‘[i]n international armed conflicts’ the US maintains a broader interpretation of military objectives, ‘this issue is not relevant to non-international armed conflict’.

As a result, Fleck suggests that ‘in non-international armed conflicts the notion of “military objectives” is in effect more limited than in international armed conflicts’. However, he believes that the ‘more convincing view is that in all armed conflicts a similar interpretation of “military objectives” should be applied’.

(d) Indiscriminate Attacks

The ICRC Study at Rule 11, applicable both in IACs and NIACs, and the San Remo Manual at Rule 2.1.1.3 stipulate that indiscriminate attacks are prohibited.

There are some differences in how such attacks are defined. According to Rule 2.1.1.3 of the Manual, ‘[i]ndiscriminate attacks are those that are not specifically directed against fighters or military objectives’. Rule 12 of the Study, on the other hand, lists three types of indiscriminate attacks:

(a) which are not directed at a specific military objective;

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280 Bothe, above n 36, 167.
282 San Remo Manual, above n 13, r 1.1.4 [1].
(b) which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Yet Rule 2.2.1.1 of the Manual provides separately that:

Weapons that are indiscriminate by nature are forbidden. An indiscriminate weapon is one incapable of being specifically directed against fighters or military objectives or which has effects on civilians and civilian objects that are uncontrollable.

As a result, the scope of the prohibition appears to be very similar. Even though the Manual does not explicitly refer to indiscriminate ‘methods’ of combat, as a matter of logic, and, as implied by the commentary in the Manual, the use of inherently indiscriminate methods would amount to an indiscriminate attack and be prohibited accordingly.

2 Principle of Proportionality

In Galić, the ICTY Trial Chamber examined the offence of attacking civilians, recalling that article 51(2) Additional Protocol I ‘explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities’ and the ‘prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction’.286 The Trial Chamber went on to find that an aspect of the principle of distinction was the prohibition against indiscriminate attacks, with such attacks including attacks that breach the principle of proportionality:

[T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts. … One type of indiscriminate attack violates the principle of proportionality.287

In a footnote, the Trial Chamber explained further that the principle of proportionality, ‘inherent to both the principles of humanity and military necessity upon which the law of conduct of hostilities is based’, may be inferred, inter alia, from articles 15 and 22 of the Lieber Code and from article 24 of the 1924 Hague Air Warfare Rules, and it has been codified in articles 51(5)(b) and 57(2)(a)(iii) and (b) of Additional Protocol I.288

The Trial Chamber then went on to formulate the proportionality test:

Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives [sic]
or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. If such casualties are expected to result, the attack should not be pursued.\footnote{Ibid [58] (citations omitted). In Kupreškić, the Trial Chamber dealt with the principle of proportionality as it is incorporated into the principle of precaution. The Trial Chamber stated that in ‘the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken … so that civilians are not needlessly injured through carelessness. Prosecutor v Kupreškić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [524] (‘Kupreškić’). Further, the Trial Chamber stated that this principle ‘has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.’}

Here, the Trial Chamber borrowed directly the language of article 51(5)(b) of Additional Protocol I, though making the Freudian slip of speaking about ‘civilian objectives’ rather than ‘civilian objects’.

In Galić the ICTY followed the approach of article 51(5)(b) Additional Protocol I whereby attacks causing disproportionate damage to civilians or civilian objects are regarded a type of indiscriminate attack. This involves a category error: indiscriminate attacks are attacks that are not even directed at military objectives, whereas disproportionate attacks are so directed but cause intolerably high collateral damage. The ICRC Study and the San Remo Manual have avoided this error and clearly address disproportionate attacks, as a distinct phenomenon.

Rule 14 of the ICRC Study, applicable both in IACS and NIACS, provides:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

Rule 2.1.1.4 of the San Remo Manual states that:

An attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is recognised that incidental injury to civilians and collateral damage to civilian objects may occur as a result of a lawful attack against fighters or military objectives.

Importantly, the San Remo Manual highlights that the principle of proportionality, viewed from a military perspective, has a permissive as well as restrictive dimension. Kretzmer explains:

While the principle of proportionality may be phrased in a positive manner, so that it appears as a principle geared towards the protection of civilians – foreseen collateral damage to civilians will be unlawful unless it meets the test of proportionality – in fact the principle allows what amounts to intentional killing and wounding of civilians.\footnote{Kretzmer, above n 4, 28.}

Despite the apparent unanimity between the Study and the Manual on the principle of proportionality forming part customary international law, commentators have expressed doubts about the applicability of the principle in NIACS. For example, Kalshoven, after concluding that the basic principle of distinction applies in internal conflicts, states that ‘[o]n the other hand, a technically precise rule of proportionality (controversial even in the case of international armed conflict) obviously cannot be held applicable in an internal armed conflict.’\footnote{Kalshoven, ‘The Respective Roles’, above n 147, 69.}

Indeed, Additional Protocol II does not include an express reference to proportionality. However, the ICRC Commentary on Additional Protocol II suggests that the requirement to...
provide general protection for the civilian population is based on ‘general principles’ which
apply ‘irrespective of whether the conflict is an international or internal one’ and include ‘the
principle of distinction and the principle of proportionality’.
Likewise, the ICRC Study, citing the Commentary and certain practice, including military manuals, contends that the principle of proportionality ‘is inherent in the principle of humanity which was explicitly made applicable to the Protocol’. Kretzmer notes, however, that this line of reasoning is based on an ‘assumption of the Study’ that ‘the principle protects potential victims of armed conflict’. But given that the principle also permits a certain amount collateral damage, the traditional requirements for establishing practice should not be ‘relaxed’ for reason of the principle being of a ‘humanitarian’ nature.

It is also noteworthy that article 8(2)(b)(iv) of the Rome Statute provides that ‘[i]ntentionally
launching an attack in the knowledge that such attack will cause incidental loss of life or injury
to civilians or damage to civilian objects … which would be clearly excessive in relation to the
concrete and direct overall military advantage anticipated’ constitutes a war crime in IACs. There
are two points to note about this.

First, the language requires the collateral damage to be clearly excessive in relation to the
concrete and direct overall military advantage anticipated to constitute an offence. The intro-
duction of the words ‘clearly’ and ‘overall’ has the effect of establishing a higher threshold than
Additional Protocol I. The commentary to Rule 156 of the ICRC Study, which includes a detailed
listing of the war crimes, also uses the qualifier ‘clearly’. The result is that the ICRC Study itself
contains two different tests for proportionality.

It would appear that both have their supporters. For Cryer the addition of the qualifier ‘clearly’ into the commentary of Rule 156 is significant as it ‘raises the threshold and introduces greater uncertainty into the law in this area’. He notes that its earlier inclusion in the Rome Statute was controversial. Cryer questions why in such circumstances the approach of the ICTY on this issue, namely, to accept the customary nature of the Additional Protocol I formulation, is ‘passed over in favour of the Rome Statute’. Rogers argues on the other hand that, notwithstanding the ICTY jurisprudence that was cited above, the higher threshold established in the Rome Statute more accurately reflects customary law than the formulation found in Additional Protocol I (and, by extension, in the ICRC Study and the San Remo Manual).

The second point is that the Rome Statute does not expressly provide for an equivalent
offence in NIACs. It may be possible to argue, along the lines of the ICTY in Galić, that an attack
that causes excessive collateral damages amounts to an indiscriminate attack. However, even
launching an indiscriminate attack in a NIAC is not explicitly deemed an offence in the Rome
Statute; though such an offence could, again using arguments developed in the ICTY jurispru-
dence, be regarded as tantamount to an attack directed against civilians. The result of this would be, then, that a disproportionate attack in a NIAC would have to be prosecuted as ‘[i]ntentionally
directing attacks against the civilian population as such or against individual civilians not taking

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292 Sandoz, Swinarski and Zimmermann (eds), above n 117, 1449–50 [4772].
293 ICRC Study, above n 5, 48 (r 14).
294 Kretzmer, above n 4, 28.
295 Cryer, above n 42, 260.
296 Ibid.
direct part in hostilities' mentioned in article 8(2)(b)(i) of the *Rome Statute*. However, this might stretch that provision beyond its breaking point.

### C Fundamental Guarantees of Persons not Taking Part in Hostilities

In *Hamdan v Rumsfeld* the US Supreme Court found that Common Article 3 applied to the conflict with al Qaeda. This Article required judicial guarantees to be applied. In determining the content of those guarantees, the plurality of the US Supreme Court turned to article 75 of *Additional Protocol I* and found that the fundamental guarantees there are ‘indisputably part of the customary international law’. For Schmitt, the reasoning of the plurality on this issue was ‘somewhat counterintuitive’ as *Additional Protocol I* applied to IACs and *Additional Protocol II* has a number of judicial guarantee provisions relevant to Common Article 3.

An example of a rule that is in itself uncontroversial but is open to diverging interpretations is the prohibition on cruel, humiliating and degrading treatment. These prohibitions are encapsulated in Common Article 3. Although the US Supreme Court in *Hamdan* accepted that Common Article 3 constitutes customary international law applicable to IAC and NIAC, the US interprets this provision in accordance with relevant Constitutional amendments and domestic case law. The result is that for the US the relevant international law prohibition is heavily proscribed.

In *Blaškić*, the ICTY Appeals Chamber considered that ‘the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognized in customary international law’. In *Kunarac*, the Appeals Chamber addressed the extent to which the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*‘Torture Convention’; ‘CAT’*) reflected customary law. It found as follows:

The definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law ... Consequently, the requirement set out by the Torture Convention that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only when those acts are committed by a public official ... or any other person acting in a non-private capacity.

The Appeals Chamber left open the issue of whether the public official requirement is a requirement under the customary international law in relation to an individual’s criminal responsibility for torture outside the framework of the *Torture Convention*.

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300 *Blaškić (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [143].

301 *Kunarac (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-96-23/1-A, 12 June 2002) [145]–[148]; Meron, above n 32, 828.


303 *Kunarac (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-96-23/1-A, 12 June 2002) [146].

304 Ibid [149].
D Specifically Protected Persons and Objects

1 Hospital and Safety Zones

Rule 35 of the ICRC Study, applicable in both IACS and NIACS, states that ‘[d]irecting an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited’. In contrast, Rule 4.2.5 of the San Remo Manual stipulates as follows:

Parties to the hostilities may designate protected zones by agreement. Attacking such zones or otherwise making them the object of military operations is forbidden. Protected zones must be demilitarised.

Dinstein criticises Rule 35 of the ICRC Study because the text does not ‘even imply that the establishment of a protected zone cannot be affected without the prior consent of the other side’. Support for this requirement is said to be provided by the ICRC Commentary to the Geneva Conventions. Aldrich also has concerns with Rule 35 including its stated application to NIAC. In his view, practice does not support this conclusion: ‘[h]ow the authors can assert that such a rule [Rule 35] is applicable also in non-international armed conflicts, in which States have shown themselves most reluctant to conclude agreements with rebels, is very difficult to understand.’

In his response, Henckaerts rejected a requirement for the zones to be established by agreement because ‘wounded and sick’ are in principle protected from attack anyway. He argued that an agreement may assist this protection but it is not a ‘necessary condition’. However, he did not address the specific concern of Aldrich regarding the application of the Rule to NIAC.

2 Relief Personnel and Provision of Relief

Rule 31 of the ICRC Study, applicable in both IACS and NIACS, provides that ‘[h]umanitarian relief personnel must be respected and protected’. Rule 55, also applicable in both IACS and NIACS, stipulates that ‘[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.

Rule 3.3 of the San Remo Manual provides that ‘[a]ttacking United Nations or humanitarian assistance personnel is forbidden, unless they are taking an active (direct) part in hostilities’. Rule 5.1 states that ‘[h]umanitarian assistance should be allowed and facilitated by those engaged in military operations whenever essential needs in an emergency are not being met.’

As outlined above, a general criticism by the US of the ICRC Study was the oversimplification of rules. By way of illustration, the US response to the Study examined Rules 31 and 55 on humanitarian relief. The US response criticised the brevity and generality of the rules as well as the absence of a requirement for ‘consent from the parties’ and for loss of protection provisions (for misuse of the humanitarian role).

305 Dinstein, Israel Yearbook, above n 66, 12.
306 Ibid.
307 Aldrich, above n 66, 512.
308 Henckaerts, ‘A Rejoinder to Professor Dinstein’, above n 67, 268.
310 Bellinger and Haynes, above n 61, 448–53.
The US response notes that provisions of both Additional Protocol I and Additional Protocol II, as well as other humanitarian instruments, contain qualifications regarding the protection of humanitarian personnel. It asserts that the Study "fails to adduce a depth of operational State practice to support" Rule 31 as drafted. The US response also criticises what it sees as a lack of "sufficient attention to detail and context." An example given was that of peacekeeping implementation agreements in Bosnia and Herzegovina in which "each side undertook to provide security assurances to the ICRC." The US response sees this as a grant of consent in advance for the ICRC presence rather than providing evidence that consent to an ICRC presence was not relevant.

The US response also questioned the application of the Rule to NIAC. It states that the Study "provides very thin practice to support the extension ... citing only two military manuals of States Parties to [Additional Protocol II] and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was "barbarous"." Dinstein and Aldrich have also expressed concern with the absence of a requirement for prior consent for the humanitarian relief operations provided for in Rule 55.

Henckaerts' response to the above criticism was to raise a drafting challenge, together with a suggestion that the Commentary should be used as a companion to the Rules. The response included the following:

"The issue of consent to receive such personnel and missions is openly discussed in the commentary and there was no intention to go beyond the content of the Additional Protocols. The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts. It was problematic to use the term 'consent from the parties', including consent from armed opposition groups, in a rule that would cover both international and non-international armed conflicts. It is also clear that, by reading these rules together with Rule 6, humanitarian relief personnel lose their protection when they take a direct part in hostilities."

3 Objects Indispensable to the Survival of the Civilian Population

Rule 54 of the ICRC Study, applicable in both IACs and NIACs, states that "[a]ttacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited." Aldrich is concerned that Rule 54 "appears to promise more restraint than it will generally be feasible to show." He is concerned that the Rule, while based on Article 54(2) of Additional Protocol I, ignores the limitations provided in that article and "by so doing, states a simple, sweeping, and unworkable prohibition." Anderson accepts Aldrich's criticism on this issue.

311 Ibid 448.
312 Ibid 451.
313 Ibid.
314 Ibid.
315 Ibid 454.
316 Dinstein, Israel Yearbook, above n 66, 12; Aldrich, above n 66, 517.
317 Henckaerts, 'A Response to US Comments', above n 67, 483, See also Henckaerts, 'A Rejoinder to Professor Dinstein', above n 67, 268–9, and Henckaerts, 'A Rejoinder to Judge Aldrich', above n 67, 527.
318 Aldrich, above n 66, 516.
319 Ibid 517.
pointing out that ‘the formulation of the rule in the Study admits no exceptions – and it is therefore vastly more restrictive than the equivalent rule in Protocol I, article 54, from which it is derived, which qualifies the rule with several important layers of exceptions’.320

Henckaerts’ rejoinder highlights the role of the commentaries in clarifying the black letter rules. Specifically the commentary to Rule 54 is referred to noting it indicates that there are exceptions to the Rule and that the Rule should be read in that light.321

4 Works and Installations Containing Dangerous Forces

Rule 42 of the ICRC Study, applicable in both IACs and NIACs, provides as follows:

Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or near their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population.

In contrast, Rule 4.2.3 of the San Remo Manual states that:

Attacking dams, dykes, or nuclear electrical generating stations is forbidden if the attack might cause the release of water or radioactivity and, as a result, excessive collateral damage to civilian objects and incidental injury to civilians.

The commentary to Rule 42 in the ICRC Study notes that by including ‘other installations’ the Rule goes beyond the terms of the Additional Protocols, which limits the protection to dams, dykes and nuclear electrical generating stations. It states that other installations could include chemical plants and petroleum refineries.322 Aldrich, however, calls this addition ‘absurd’.323

In a rejoinder, Henckaerts noted that other rules required feasible precautions to avoid/ minimise incidental loss and damage and for loss, injury, or damage not to be excessive in relation to the concrete and direct military advantage anticipated in the attack. Consequently, it is argued, it

seems reasonable … to suggest that Rule 42 … should also apply to chemical plants and petroleum refineries, whereby the dangerous forces could be chemical substances that can pollute soil and water and cause severe losses or injuries among the civilian population and damage to civilian objects.324

5 The Environment

Rule 43 of the ICRC Study, applicable in both IACs and NIACs, provides as follows:

The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

320 Anderson, above n 66.
322 ICRC Study, above n 5, 141–2 (r 42).
323 Aldrich, above n 66, 514.
C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

Rule 4.2.4 of the San Remo Manual states that '[d]amage to the natural environment during military operations must not be excessive in relation to the military advantage anticipated from those operations'.

Aldrich criticises the formulation of Rule 43 of the ICRC Study ‘as a wish list that is unnecessary’. Regarding A (no part of the natural environment may be attacked, unless it is a military objective) he states it adds nothing to the existing law. Regarding B (destruction of any part of the natural environment is prohibited, unless required by imperative military necessity), Aldrich, who had a significant involvement in the drafting of Additional Protocol I, states that it is ‘new, but I think it would be unacceptable to many States’ as damage to forests, for example, is a normal consequence of combat. Regarding C, which contains a form of the proportionality principle, according to Aldrich it ‘appears to equate the environment to civilians for purposes of proportionality, for which I know of neither a need nor a precedent in existing law’.

The response by Henckaerts to the above criticism stresses that ‘law and practice have considerably evolved since 1977’ with the protection of the environment having become ‘a major international concern’. For Henckaerts, the practice in Volume II of the ICRC Study is sufficient to support the Rule reflecting developments in the law.

The ICRC Study contains two further rules on the environment which are claimed to be applicable in IACs, and arguably applicable in NIACs. Rule 44 states:

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.

Rule 45 states:

The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.

For Bothe, Rule 44 relies less on actual practice, which he describes as ‘scarce’, but on the logic of the proposition given developments in environmental law generally. Rule 45 (as well as Rule 43, cited earlier) contains what Bothe calls an ‘interesting variation’ of the principle of distinction, equating the environment to the ‘civilian world’.

The criticism of the Rule 45 formulation comes from both ends of the spectrum. Bothe states that the position that this ‘restrictive’ formulation constitutes customary law is ‘regrettable from the point of view of environmental concerns’.

325 Aldrich, above n 66, 515.
328 Ibid.
329 Bothe, above n 36, 167.
330 Ibid.
331 Ibid 168.
The US response bluntly states that the Study has 'offered insufficient support for the conclusion that Rule 45 is a rule of customary international law with regard to conventional or nuclear weapons' either in IAC or NIAC. This conclusion follows more detailed questioning of the Study's methodology regarding this Rule. The practice relied on with respect to this particular rule is simply a number of manuals which 'are applicable in or have been applied in' NIACs, some domestic legislation criminalising 'ecocide' and a 'few condemnations'. Moreover, according to the US response, the Study has failed to assess the practice of specially affected states such as France and the US which 'repeatedly have declared that articles 35(3) and 55 of [Additional Protocol I], from which the Study derives the first sentence of Rule 45, do not reflect customary international law. The response also points out that in 1996 the ICJ held that article 35(3) constrained those states party to Additional Protocol I 'thus indicating that the Article is not customary international law'.

In addition, Rule 45 raises concerns about the readiness of the Study to apply rules of IAC to NIAC. While the Study concludes that Rule 45 may possibly apply to NIAC, it does not note that a proposal by Australia to include a provision like article 35(3) of Additional Protocol I in Additional Protocol II failed. According to the US response to the Study this undercuts the argument that Rule 45 applies as a matter of customary international law to NIAC.

Henckaerts' response to the US criticism regarding Rule 45 seems to agree at least as concerns nuclear weapons:

Nevertheless, with respect to Rule 45 on widespread, long-term and severe damage to the environment, the Study notes that France, the United Kingdom and the United States have persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law. With regard to conventional weapons, however, the rule has come into existence but may not actually have much meaning, as the threshold of the cumulative conditions of long-term, widespread and severe damage is very high.

Indeed, the Study itself notes that the US has been a persistent objector to the first part of Rule 45 (in relation to conventional and nuclear weapons) and France and the UK (parties to Additional Protocol I), as well as the US, have been persistent objectors with regard to the application of the first part of the Rule to nuclear weapons.

The Study's approach to Rule 45 has some academic support. Aldrich believes that the proposed Rule, as it applies to conventional weapons, 'may have an adequate basis to be considered customary law, but only if the very high level of damage required by Articles 35, paragraph 3 and 55 of Protocol I is kept in mind'. This positive view, however, can be contrasted with that of Marsh who questions the Study's methodology regarding this Rule, arguing traditional approaches to the formation of customary international law have been marginalised and verbal

332 Bellinger and Haynes, above n 61, 460. Professor Dinstein supports the criticism of the US on this point. See Dinstein, *Israel Yearbook*, above n 66, 14.
333 ICRC Study, above n 5, 357 (r 45).
334 Bellinger and Haynes, above n 61, 455.
335 Ibid 458.
336 Ibid 460.
337 Henckaerts, 'A Response to US Comments', above n 67, 482. See also ICRC Study, above n 5, 154 (r 45).
339 Aldrich, above n 66, 516.
practice of ‘unclear and dubious’ weight being overemphasised, with the result that the Study produced a flawed rule.\textsuperscript{340}

E Means and Methods of Warfare

1 Prohibition of Unnecessary Suffering

Many of the prohibitions of specific means and methods of warfare are grounded either in the general principle of distinction (ruling out the use of means and methods that are inherently indiscriminate) or in the prohibition of unnecessary suffering.

The latter rule is regarded part of the law applicable in NIACs by both the ICRC Study and the San Remo Manual. According to Rule 70 of the Study, ‘[t]he use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited’. Rule 1.2.3 of the Manual stipulates that ‘[u]sing means or methods of combat that are of a nature to cause superfluous injury or unnecessary suffering to fighters is forbidden.’

Even though in the Manual the prohibition is limited to ‘fighters’, using means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering to civilians would be prohibited under the principle of distinction.

2 Specific Means

In \textit{Tadić}, the ICTY Appeals Chamber noted, with reference to General Assembly Resolution 2444, the evolution of a general principle to the effect that ‘the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited’.\textsuperscript{341} The Appeals Chamber went on to cite ‘a more general principle’, laid down in the so-called \textit{Turku Declaration of Minimum Humanitarian Standards}, whereby ‘[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances’.\textsuperscript{342}

On the basis of the sources just cited, the ICTY Appeals Chamber in \textit{Tadić} postulated that elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife. … This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts.\textsuperscript{343}

The ICRC Study relies on these views to support ‘a very broad view of the customary law applicable to prohibited weapons in non-international armed conflicts’\textsuperscript{344} This is, as Cryer
critically points out, despite the fact that the Tadić statements regarding weapons were 'unquestionably obiter' as weapon offences were not involved.\textsuperscript{345}

The rules regarding weapons in the ICRC Study have indeed produced particularly vigorous responses. As noted by Newalsing:

After the publication of the study, much of the debate reflected in publications and held among military practitioners and legal advisers attending international conferences focused on practical issues such as weapons, since the Study draws conclusions on issues related to weapons whose customary nature is subject to debate.\textsuperscript{346}

The key methodological issue at the core of this debate was 'how the ICRC dealt with the relation between treaty rules and rules of customary international humanitarian law and how they have been formulated.'\textsuperscript{347} Also, central to the debate is the methodology employed in the Study to extrapolate the rules regarding weaponry in IAC to NIAC.

Turns accuses the Study of adopting a 'breezy manner' concerning the extrapolation of rules for IAC regarding weaponry to NIAC. He finds that the Study's approach, when concluding that a particular weaponry rule applied also in NIAC, relies on two propositions:

(1) 'States generally do not have a different set of military weapons for international and non-international armed conflicts' – the implication being that if a certain weapon is unlawful in the one type of conflict, it must be unlawful in the other; and (2) 'No State has claimed that X may lawfully be used in either international or non-international armed conflicts' – that is to say, lack of State practice or claims to the contrary.\textsuperscript{348}

Turns rejects both propositions. The first he says may be 'true as a matter of fact, but an extension of the prohibition on a particular weapon can hardly be said to follow as a matter of law.'\textsuperscript{349} The second also is flawed in Turns' view. For him '[p]ositive affirmation of the existence of a customary rule ... demands strict proof' rather than an extrapolation of 'the existence of a rule from a lack of State practice to the contrary.'\textsuperscript{350}

(a) Poison

According to Rule 72 of the ICRC Study, '[t]he use of poison or poisoned weapons is prohibited' both in IACs and NIACs. According to Rule 2.2.2(a) of the San Remo Manual, the use of 'poison and poisoned weapons' is 'absolutely forbidden'.

David Turns, although accepting the ban on poison or poisoned weapons in IAC is one of the 'oldest and least disputable' of prohibitions, queries the Study's conclusion that the prohibition, based on practice, applies in NIAC.\textsuperscript{351} He notes that the Rome Statute criminalises the use of such weapons only in IAC, not NIAC.\textsuperscript{352} Further, he describes the 'evidence cited for the extension of the rule to non-international armed conflict' as 'patchy'.\textsuperscript{353}

345 Ibid.
346 Newalsing, above n 51, 275.
347 Ibid 275.
348 Turns, above n 57, 210.
349 Ibid.
350 Ibid.
351 Ibid 218.
352 See art 8(2)(b) (xvii) ('Employing poison or poisoned weapons').
353 Turns, above n 57, 220.
(b) Riot Control Agents

According to Rule 75 of the ICRC Study, ‘[t]he use of riot-control agents as a method of warfare is prohibited’ both in IACs and NIACs, as opposed to domestic riot control. According to Rule 2.2.2(c) of the San Remo Manual, the use of ‘[g]as, and other chemical weapons, including riot control agents when such agents are used as a method of warfare’ is ‘absolutely forbidden.’

According to Bothe, the Study ‘convincingly shows that the use of riot control agents “as a means of warfare” is prohibited by customary law’ with reference in the Commentary to the distinction between use in warfare and use in law enforcement situation whilst noting the Study ‘does not address the difficult question of where this distinction lies.’

Aldrich notes that although its commentary mentions that the US maintains a limited use of riot-control agents is permissible in warfare as it would not constitute a means of warfare, the Study expresses no view on the issue.

(c) Herbicides

Rule 76 of the ICRC Study, applicable both in IACs and NIACs, states as follows:

The use of herbicides as a method of warfare is prohibited if they:

a) are of a nature to be prohibited chemical weapons;

b) are of a nature to be prohibited biological weapons;

c) are aimed at vegetation that is not a military objective;

d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or

e) would cause widespread, long-term and severe damage to the natural environment.

In the San Remo Manual, the use of herbicides appears to be covered by the absolute prohibition of chemical weapons (Rule 2.2.2(c)). Comment 7 to Rule 2.2.2 explains as follows:

As far as herbicides are concerned, the Chemical Weapons Convention refers to them only in its pre-amble and there is no operative clause prohibition. This is due to a ‘package deal’ with the United States, which had used herbicides extensively during the war in Viet Nam. However, the United States has in the meantime renounced the right to use herbicides, except ‘for control of vegetation within US bases and installations or around their immediate defensive perimeters.’ Given this a background, it is a fair conclusion that the prohibition of herbicides currently constitutes customary international law in both international and non-international armed conflicts, subject to the rather limited American reservation.

According to Bothe, Rule 76 of the ICRC Study addresses the use of herbicides as a means of warfare in ‘a very cautious’ but not ‘very clear’ manner. For Bothe (a) and (b) of Rule 76 ‘beg the question’, what are weapons of nature to be ‘prohibited’ chemical and biological weapons?

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354 Bothe, above n 36, 169.
355 Aldrich, above n 66, 519.
356 Bothe, above n 36, 169.
357 Ibid.
Further, he believes that (c) to (e) ‘are superfluous’. He notes also the ‘important’ point that the *Commentary* limits the restrictions to substances harmful to human and animals and not to plants.

Aldrich is concerned that the words ‘expected to cause’ in articles 51 and 57 in *Additional Protocol I* are not used in Rule 76; for Aldrich ‘foreseeability is important’ in this area.

Turns is particularly critical of Rule 76. He concludes that it ‘represents the *Study* at its poorest’. He argues that there is ‘very little hard evidence’ cited in the *Study* to support the Rule noting that justification for the Rule is provided in part by ‘no fewer than seven other of its own Rules’. This he claims is a case of the *Study* ‘relying on itself, rather than on actual State practice, for the elaboration and substantiation of the Rule’.

(d) Expanding Bullets

Rule 77 of the ICRC *Study*, applicable both in IACs and NIACs, provides that ‘[t]he use of bullets which expand or flatten easily in the human body is prohibited’. The *San Remo Manual*, on the other hand, contains no such prohibition, which the commentary explains in the following way:

> While there is no doubt that the prohibition [of expanding bullets] represents customary international law in international armed conflicts, recent State practice indicates that hollow-point and similar bullets are widely used against terrorists, hostage-takers, etc, because of the need to stop them instantaneously and minimize the risk of their exploding themselves or otherwise harming their victims. In light of such State practice, it is doubtful whether this age-old prohibition can be regarded as applicable in non-international armed conflicts.

Unsurprisingly, Dinstein objects to the inclusion of the prohibition in the ICRC *Study* on similar grounds. He scolds the authors of the *Study* disregarding the official position of Israel that expanding bullets could be used for domestic law enforcement purposes and ‘in the fight against terrorists and “suicide bombers”’. However, Henckaerts points out that the commentary to the *Study* in fact provides for the law enforcement situation. Regarding the terrorist/suicide bomber reference, he indicates that the question is ‘one of context – does this take place in armed conflict or not?’ If yes, then the Henckaerts’ position would be that the Rule applies.

Aldrich has a narrower concern with Rule 77. He believes that there is doubt as to the long-term viability of the Rule in its application to NIAC due to the widespread use of expanding bullets by law enforcement agencies coupled with the ‘inevitable’ involvement of law enforcement agencies in NIAC.

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358 Ibid.
359 Ibid 170.
360 Aldrich, above n 66, 519.
361 Turns, above n 57, 225.
362 Ibid.
363 Ibid.
364 *San Remo Manual*, above n 13, r 2.2.2, [12].
366 Henckaerts, ‘A Rejoinder to Professor Dinstein’, above n 67, 270.
367 Aldrich, above n 66, 520.
(e) Exploding Bullets

Rule 78 of the ICRC Study, applicable both in IACs and NIACs, provides that ‘[t]he anti-personnel use of bullets which explode within the human body is prohibited’. According to Rule 2.2.2(d) of the San Remo Manual, the use of ‘[e]xploding anti-personnel bullets’ is ‘absolutely forbidden’.

Bellinger and Haynes conclude, after quite detailed analysis, that ‘the assertion that Rule 78 represents customary international law applicable in international and non-international armed conflict is not tenable’.368 This follows from intermediate conclusions that ‘[v]irtually none of the evidence of practice cited in support of Rule 78 represents operational practice; the Study ignores contrary practice; and the Study provides little evidence of relevant opinio juris’.369

They indicate US support for a narrower version of the rule, accepting that ‘anti-personnel bullets designed specifically to explode with the human body clearly are illegal’.370 The US position is that high-explosive projectiles ‘designed primarily for anti-matériel purposes (not designed to explode in the human body), which may be employed for anti-matériel and anti-personnel purposes’ are not illegal.371 To Bellinger and Haynes the Study appears to adopt an ‘effects-based’ test that does not distinguish between projectiles designed to explode within the human body and ‘those designed for other, lawful purposes’.372

More specifically, the US response argues that there has in fact ‘been considerable State practice involving the anti-personnel use of exploding bullets’373 including that which is contained in US legal reviews, and argues that the Study fails to refer to this contrary practice.374

Regarding the application of Rule 78 to NIACs, the US response to the ICRC Study says that the assertion is supported by ‘scant evidence’.375 The Study notes it relies in part on an aspect of the St Petersburg Declaration relating to Explosive Projectiles (1868) but the US response indicates this Declaration applies only to IACs.376 It also states that no ‘official contrary practice was found with respect to either international or non-international armed conflict’,377 however, the US response notes the Study ‘fails to account for the military manual of the UK … which prohibits the use of exploding bullets directed solely at personnel only in international conflicts’.378 The evidence in support of the assertion that the rule applies also to NIACs is stated to include the content of the UN Secretary-General’s Bulletin on observance of IHL by UN forces379 but the authority of this publication as relevant practice is unclear.

Henckaerts’ response suggests a continuing disagreement on this issue:

As to the formulation of Rule 78 on exploding bullets, the wording was carefully chosen and clearly is not a literal transcription of the St. Petersburg Declaration, thereby reflecting the evolution of state practice. On the other hand, the wording that only projectiles ‘designed’ or ‘specifically designed’ to explode within

368 Bellinger and Haynes, above n 61, 465.
369 Ibid.
370 Ibid 460.
371 Ibid 460–1.
372 Ibid 461.
373 Ibid 462.
374 Ibid 463.
375 Ibid 465.
376 Ibid.
377 ICRC Study, above n 5, 275 (r 78).
378 Bellinger and Haynes, above n 61, 465 (emphasis in original).
379 ICRC Study, above n 5, 273 (r 78).
the human body are prohibited was not used, because this requires proof of the intent of the designer of
the projectile. Instead the formulation used in Rule 78 is based on the understanding that projectiles that
foreseeably detonate within the human body in their normal use do so as a result of their design, though
perhaps not through specific intent, and that it is the explosion of projectiles within the human body
which states have sought to prevent through practice in this field.\textsuperscript{380}

(f) \textit{Blinding Lasers, Undetectable Fragments and Booby Traps}

The ICRC Study deems it prohibited, both in IACs and NIACs, to use ‘weapons the primary effect
of which is to injure by fragments which are not detectable by X-rays in the human body’ (Rule
79) and ‘laser weapons that are specifically designed, as their sole combat function or as one
of their combat functions, to cause permanent blindness to unenhanced vision is prohibited’
(Rule 86).

In a broadly similar fashion, the San Remo Manual deems it ‘absolutely forbidden’ to use
‘[w]eapons that mainly injure by fragments which escape detection by x-rays’ and ‘[l]aser weap-
ons designed to cause permanent blindness’ (Rules 2.2.2(e)–(f)).

According to Rule 80 of the ICRC Study, applicable both in IACs and NIACs, ‘[t]he use of
booby-traps which are in any way attached to or associated with objects or persons entitled to
special protection under international humanitarian law or with objects that are likely to attract
civilians is prohibited’ (Rule 80). As regards the San Remo Manual, Rule 2.2.3.1 stipulates that:

\begin{quote}
It is forbidden to use booby-traps in connection with objects entitled to special protection or with certain
other objects likely to attract civilians. It is also prohibited to use booby traps in any city, town, village, or
other area containing a concentration of civilians in which combat between ground forces is not taking
place or does not appear imminent, unless they are placed on or in the close vicinity of a military objective
or measures are taken to protect civilians from their effects.
\end{quote}

Bothe argues that the prohibitions of non-detectable fragments, booby traps and blinding
laser weapons could not have been considered ‘with any certainty’ part of customary interna-
tional law at the time of the adoption of the CCW Protocols.\textsuperscript{381} But he concludes that it is ‘quite
possible’ that the relevant treaty provisions have crystallised as customary law – although the
‘practice quoted is not abundant ... there is also no contrary practice’.\textsuperscript{382}

Turns, however, is not as convinced that the relevant treaty law has crystallised as customary
law. Turns notes that the customary prohibition of non-detectable fragments is based on a ‘very
recent treaty’ (the CCW) and is proffered without ‘any meaningful State practice’,\textsuperscript{383} though he
accepts that this prohibition may be an example of ‘instant custom’.\textsuperscript{384}

(g) \textit{Landmines}

The ICRC Study stipulates that, ‘[w]hen landmines are used, particular care must be taken’ –
both in IACs and NIACs – ‘to minimize their indiscriminate effects’ (Rule 81) and that a party to

\begin{small}
\begin{footnotes}
\item[380] Henckaerts, ‘A Response to U.S. Comments’, above n 67, 484.
\item[381] Bothe, above n 36, 170.
\item[382] Ibid 170.
\item[383] Ibid n 57, 226.
\item[384] Ibid 227.
\end{footnotes}
\end{small}
a conflict using landmines ‘must record their placement, as far as possible’ (Rule 82) and ‘must remove or otherwise render them harmless to civilians, or facilitate their removal’ ‘[a]t the end of active hostilities’ (Rule 83).

Rule 2.2.3.2 of the San Remo Manual states more generally that ‘[a]ll feasible precautions must be taken to protect civilians from the effects of land mines, especially anti-personnel land mines.’

Turns expresses some concern with the ICRC Study’s treatment of landmines. He suggests that Rule 81 should have included the word ‘potentially’ prior to ‘indiscriminate effects’ as the Rule as drafted ‘implies that landmines always have indiscriminate effects’. More substantively, he questions the ‘necessity and utility’ of the Rule given other Rules such as the prohibition on indiscriminate attacks.

(h) Incendiary Weapons

Rule 84 of the ICRC Study, applicable both in IACs and NIACs, and Rule 2.2.3.3 of the San Remo Manual state in almost identical terms that, in the use of incendiary weapons, ‘particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects.’

This rule is more limited than the provisions of the relevant Protocol (Protocol III) of the CCW. Thus, it was not accepted in the drafting of these documents that the detailed rules of Protocol III regarding an attack by incendiary weapons against military objective located within a concentration of civilians or against plant cover would constitute custom. This approach is supported, for example, by Bothe who contends that Protocol III provides an ‘imperfect point of crystallisation of customary law’.

Rule 85 of the ICRC Study, also applicable both in IACs and NIACs, goes further however, by providing that ‘[t]he anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat’.

Aldrich queries, first, what is meant by the expression ‘less harmful’ and takes the view that that the commentary is not explicit on this point. He concludes that the rule is flawed as combatants do not usually have a choice of weapons. Second, he takes the view that the rule is not soundly based in the practice of States and concludes that it ‘can only be seen as an effort to propose a new rule of law’.

In a rejoinder, Henckaerts accepts the lack of choice available to combatants but indicates this is reflected in the phrase ‘unless it is not feasible’. He also argues that some military manuals such as the 2004 UK Joint Service Manual of the Law of Armed Conflict support the Rule.

The UK Manual notes at paragraphs 6.12 and 6.12.1, citing article 2(2) of CCW Protocol III, that it is prohibited ‘in all circumstances to make any military objective located within a concentration of

385 Ibid 230 (emphasis in original).
386 Ibid.
387 Bothe, above n 36, 170.
388 Aldrich, above n 66, 521.
389 Ibid.
390 Ibid.
392 Ibid.
civilians the object of attack by air-delivered incendiary weapons. Subject to that, the use of incendiary weapons, including incendiary bombs, napalm, and flamethrowers, against military objectives is not prohibited under customary or treaty law. Although these weapons can cause severe injury to personnel, their use is lawful provided the military necessity for their use outweighs the injury and suffering which their use may cause.

Turns takes the view that the test for lawfulness of incendiary weapon use in the Study is ‘conceivably lower and more rigid than the statement in the UK Manual, as it does not take account of the possible application of the doctrine of military necessity’.

More generally, W Hays Parks argues that there are at least two errors with Rule 85. First, the Rule suggests that ‘combatants are limited to rendering enemy combatants hors de combat (that is, merely wounding) rather than killing them’. He suggests simply that there is no such requirement in treaty law or state practice. Second, the requirement to seek ‘a less harmful weapon’ is supported neither by State practice nor the materials in the Study.

(i) Non-Conventional Weapons

In Tadić, the ICTY Appeals Chamber mentions chemical weapons as an example for a means of warfare regarding which rules applicable to NIACs have come to extend to NIACs. The Appeals Chamber then refers to reactions of various states to the alleged use of chemical weapons by Iraq against the Kurds, and concludes that:

It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals – a matter on which this Chamber obviously cannot and does not express any opinion – there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

Both the ICRC Study (Rules 73 and 74) and the San Remo Manual (Rules 2.2.2(b) and (c)) take the view that the use of biological and chemical weapons in NIACs is prohibited. Neither document enunciates a rule with respect to nuclear weapons, but both note that in the Nuclear Weapons opinion the ICJ held that ‘[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the … use of nuclear weapons as such’ but that any ‘use of nuclear weapons should … be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law’. The commentary of the San Remo Manual ventures somewhat further by observing that since nuclear weapons are not prohibited by nature, there are still certain circumstances in which the le-

393 Turns, above n 57, 232–3.
395 Ibid.
396 Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No TT-94-1, 2 October 1995) [120].
397 Ibid [120]–[123].
398 Ibid [124].
gality of their use cannot be excluded. For instance, the release of a tactical ‘clean’ bomb against a military formation in the middle of the desert would not necessarily be in breach of the law of armed conflict. 400

3 Specific Methods

(a) Perfidy

In Tadić, the ICTY Appeals Chamber held as follows:

State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. … With regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. 401

Rule 65 of the ICRC Study, applicable in both IACS and NIACS, states that ‘[k]illing, injuring or capturing an adversary by resort to perfidy is prohibited.’ Rule 2.3.6 of the San Remo Manual provides that ‘[d]isplaying the white flag falsely, or pretending to surrender, be wounded, or otherwise have a protected status is forbidden if the intent in doing so is to kill or wound an adversary.’

Thus, there seems to be general support for the proposition that perfidy is prohibited in NIACS. However, it is questionable whether perfidiously capturing an adversary is proscribed in NIACS as a matter of custom – this modality of perfidy was introduced with respect to IACS only by Additional Protocol I and is mentioned in the Rome Statute neither with respect to IACS nor NIACS. 402

Greenwood raises a specific concern with the ‘suggestion that feigning civilian status in an internal conflict constitutes perfidy’ noting that there is limited state practice in support. 403

(b) Terrorising Civilians

According to Rule 2 of the ICRC Study, applicable both in IACS and NIACS, ‘[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.’ Rule 2.3.9 of the San Remo Manual provides that ‘[a]cts or threats of violence intended primarily to spread terror among civilians are forbidden, even if this is done for military purposes.’ In Galić, the ICTY Appeals Chamber found that the prohibition of terror contained in article 51(2) of Additional Protocol I and article 13(2) of Additional Protocol II formed part of customary international law. 404 However, as was discussed in Section II(B)(1) above, Kalshoven is very critical of this conclusion.

400 San Remo Manual, above n 13, r 2.2.2 [14].
401 Tadić (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [125].
402 With respect to IACS, see art 8(2)(b)(xi) (‘Killing or wounding treacherously individuals belonging to the hostile nation or army’), and, with respect to NIACS, art 8(2)(e)(ix) (‘Killing or wounding treacherously a combatant adversary’).
403 Greenwood, ‘IHL and the Tadić Case’, above n 47, 278.
404 Galić (Appeals Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [86]. It also found that customary law provided that a breach of that prohibition gave rise to individual criminal responsibility.
F  Other Points of Substantive Law

1  Reprisals

In *Kuprešić*, the ICTY found that the prohibition on reprisals targeting the civilian population outside of occupied territories as contained in article 51(6) of *Additional Protocol I* was part of customary law both in *IAC* and *NIAC*.

This decision has been strongly criticised. Cryer refers to Greenwood’s concerns that the Trial Chamber ‘cited virtually no State practice at all and what it did cite does not support the conclusions it drew’ and Kalshoven’s criticism that the methodology regarding practice and the Martens Clause used by the Trial Chamber was ‘founded on quicksand’. He further notes that the *UK Joint Service Manual* takes the view that on this point ‘the court’s reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment.’ Jean-François Quéguiner also concludes that practice tends ‘to invalidate the ICTY’s dictum’.

Regarding reprisals in *NIACS*, Rule 148 of the *ICRC Study* states as follows:

Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited.

Cryer notes that although the *Study* does not ‘follow the *Kuprešić* decision slavishly’ it does indicate, using evidence including the *Kuprešić* case, that ‘there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals’. Cryer is concerned that the *Study* notes the *Kuprešić* case but not the academic criticism of that case.

The *San Remo Manual* does not mention reprisals.

2  Child Soldiers

The SCSL Appeals Chamber has determined that the prohibition on child recruitment has ‘crystallised as customary international law’. The Appeals Chamber held that ‘[t]he widespread recognition and acceptance of the norm prohibiting child recruitment in *Additional Protocol*...’

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405  *Kuprešić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [527]–[536].
410  Ibid 256. For a review of the law concerning reprisals including the academic criticism of the approach taken by the ICTY, see Quéguiner, above n 408, 161–87.
411  *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) (Special Court for Sierra Leone Appeals Chamber, Case No SCSL-2004-14-AR72(e), 31 May 2004) [17].
II and the [Convention on the Rights of the Child] provides compelling evidence that the conventional norm entered customary international law well before 1996.\footnote{Ibid [20]. See also Meron, above n 32, 832 n 114.}

Rule 136 of the ICRC Study states that ‘[c]hildren must not be recruited into armed forces or armed groups’ and Rule 137 stipulates that ‘[c]hildren must not be allowed to take part in hostilities’. Both rules are deemed applicable in IACs as well as NIACs.

Rule 3.5(b) of the San Remo Manual states that ‘[c]hildren under the age of 18 may not participate actively in hostilities’.

Newalsing notes that Rule 137 which prohibits the participation of children in hostilities makes ‘no mention of age in the rule itself’.\footnote{Newalsing, above n 51, 274.} The commentary to Rule 137 states that there is not, as yet, a uniform practice regarding the minimum age for participation in hostilities although ‘there is agreement that it should not be below 15 years of age’. Newalsing suggests greater clarity in the formulation of the rule: ‘this is an important piece of information that could have been made clear in the rule’.\footnote{Ibid.}

\section*{IV CONCLUSIONS}

The gap between the content of IHL applicable in IACs and NIACs has narrowed significantly in recent years. This is attested to both by the jurisprudence of international tribunals as well as academic works such as the ICRC Study and the San Remo Manual.

That said, the Appeals Chamber in Tadić noted two limitations on the process of narrowing the dichotomy between the law of IACs and the law of NIACs, namely:

(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and

(ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.\footnote{Tadić (Jurisdiction), (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [126].}

It is critical to bear in mind an important factor, which is noted by Bothe in the following terms:

The rules for NIAC cannot ever be exactly the same as those regulating IAC. Why are these situations inherently different? Because IAC has, at its core, some notion that both parties to the conflict have a right to bear arms against one another and have the right to use violence against one another … But can the underlying presumption, that both sides have a right to bear arms, ever be applicable in NIAC?\footnote{Henckaerts, ‘A Response to US Comments’, above n 67, 485.}

Seen in this light, it is hardly a surprise that, as MacLaren and Schwendimann state, ‘it remains from a customary law perspective unclear whether members of armed opposition groups are to be considered combatants or civilians for various purposes.’\footnote{MacLaren and Schwendimann, above n 37, 1229.}

Also, although a particular rule or principle applicable in IAC may be seen as applicable also in NIAC, its detailed content may vary. For example, according to the ICRC Study the principle of
distinction applies in NIAC as a matter of customary law. However ‘the principle of distinction is characterized by a high level of abstraction and generalization with other provisions in [Additional Protocol I] providing more detailed rules of application’. According to Jean-François Quéguiner, the principle varies in its detailed application to NIAC. For example, he notes that Rules 21, 23 and 24 of the ICRC Study only ‘arguably apply to NIAC’. Consequently, Quéguiner states, ‘[a]lthough the gap between the two legal regimes is becoming narrower with respect to the principle of distinction, it is by no means completely closed.’

418 Quéguiner, above n 408, 161.
419 Ibid 168–9.
The Application of Human Rights Law to Non-International Armed Conflict

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I INTRODUCTION

The purpose of this Chapter is to identify and explore a number of issues concerning the application of human rights law (‘HRL’) to non-international armed conflicts (‘NIAC’). Specifically, Chapter 3 examines to what extent HRL applies in conflict (Section II) and whether HRL applies extraterritorially (Section III). Consideration of these matters is preceded by a few general observations about human rights law (Section I). On the basis of the discussion of HRL in this Chapter and the IHL applicable in NIACs in Chapter 2, the next Chapter, Chapter 4, will examine the overall legal framework within a NIAC and the nature of the relationship between international humanitarian law (‘IHL’) and HRL.

A Nature of Human Rights Law

Over a period of twenty or so years there has been a transition from perceiving HRL as a mere negative obligation to refrain from interfering with certain recognised rights to more ‘sophisticated and nuanced’ — and burdensome — obligations.1 Skogly, relying in part on the terms of the European Union’s Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, states that a ‘common understanding of three levels of obligations [regarding human rights] has emerged: the obligation to respect, to protect, and to fulfil’.2 These obligations are onerous, with the third being ‘by far the most controversial’.3 It has been said the ‘the obligation to fulfil requires states to take such measures that are necessary for the full realisation of rights in other states’ where the necessary level of control is present.4

Human rights instruments impose obligations on states rather than on individuals or non-state actors. As a group of experts gathered by Chatham House and the International Committee of the Red Cross (‘ICRC’) to consider detention in NIAC stated, when looking at the differences between IHL and HRL, ‘[f]inally, while IHL imposes obligations on all parties to a conflict, including non-State actors, [international human rights law] – in the current state of international law – can only be said to be directly binding on States’.5 A consequence is that HRL does not provide for individual criminal responsibility for human rights violations.

Notwithstanding the above, there are scholars who disagree with the view that HRL does not apply to non-state actors. For example, Sassòli and Olson suggest that it is ‘controversial’ whether...
er human rights law applies to non-state actors. However, in any case, they point out that there are practical problems with the reach of human rights law regarding non-state actors. They ask:

A second concern stems from the differences between state and non-state actors, which have equal obligations under humanitarian law but not under human rights. Even if the question of whether non-state actors are bound by human rights were settled, how is the non-state actor to meet the obligation of judicial review?

Succinctly, the issue of the appropriate field of application marks a significant difference between HRL and IHL.

B Sources of Human Rights Law

As compared to IHL, the situation regarding the sources of HRL is somewhat different and arguably more complex.

First, the significance of domestic law in the human rights context should be underlined. Many national legal systems contain HRL rules – whether on the level of the constitution or statute – which interact in various ways with international law rules. These rules are applied by domestic courts, sometimes with reference to the corresponding rules of international law.

When it comes to international law itself, what was said in Chapter 2 about the sources of the law applies in principle here as well. Regarding treaty law, HRL treaties (quite unlike in the IHL context) fall into two broad groups: those that aim to be universal and those that are distinctly regional. As regards the universal human right treaties, the following should be mentioned:

- International Covenant on Civil and Political Rights (‘ICCPR’);
- International Covenant on Economic, Social and Cultural Rights (‘ICESCR’);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’);
- Convention on the Rights of the Child (‘CROC’).

The following regional agreements should be mentioned:

- American Declaration of the Rights and Duties of Man (‘ADHR’);
- American Convention on Human Rights (‘ACHR’);

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7 Ibid 622.
8 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).
10 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’).
12 Opened for signature 4 November 1950, CETS No 5 (entered into force 3 September 1953) (‘ECHR’).
13 Inter-American Commission on Human Rights, OAS Res XXX, 9th conf, 2 May 1948.
14 Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) (‘ACHR’).
• Arab Charter on Human Rights.16

Most judicial and scholarly discussion regarding the application of HRL in situations of conflict involve the capstone or overarching instruments such as the ICCPR, the ECHR and the ACHR. As Lubell says, '[d]iscussion of the relationship between human rights law and IHL tends to focus on civil and political rights, in particular those dealing with use of force and deprivation of liberty.'17 Certainly the use of force and the deprivation of liberty are the areas of most relevance to the military component of operational situations.

Generally, when assessing its application and content, recourse must be had to the treaty law and explanatory jurisprudence, not to customary law. There is no equivalent in the HRL arena of the ICRC’s Customary International Humanitarian Law Study (‘ICRC Study’) or the San Remo Manual. As Lubell points out, the ‘recognition of certain elements of human rights law as part of customary international law might … advance the argument of human rights obligations extending beyond the territory of the State.’18 Concerning the content of such customary law, reference is made to the 2012 US Army Operational Law Handbook which states the view that US forces operating extraterritorially would be bound by customary human rights law.19 The Handbook also provides its assessment of the content of that customary law in broad terms.20 Cerone also refers to customary HRL again relying on the content of the Operational Law Handbook.21 Although an extremely comprehensive and helpful publication, the Handbook’s status as a reflection of US practice is questionable given US comments about the Handbook when critically assessing the use of the Handbook in the ICRC Study.22 In any case, Lubell concludes: Considering the period of time and amount of effort involved in the ICRC study on IHL, it is unfortunately unlikely that an equally comprehensive study on customary international human rights law will be available in the very near future.23

C Impact of Treaty Bodies

A feature of the development of HRL is the parallel establishment of international bodies that are concerned with the implementation of a particular treaty. The ICCPR establishes the United Nations Human Rights Committee (‘HRC’).24 The Committee reviews periodic reports sub-

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18 Ibid 741.
20 Ibid 45–54.
22 John B Bellinger III and William J Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 International Review of the Red Cross 433, 456. It is stated: ‘The US Army JAG Corps Operational Law Handbook, which the Study cites for the proposition that the United States believes that the provision in Rule 45 is binding, is simply an instructional publication and is not and was not intended to be an authoritative statement of US policy and practice.’
23 Lubell, above n 17, 741.
24 See ICCPR art 28.
mitted by states and, also, with respect to states parties to First Optional Protocol,\(^{25}\) accepts individual ‘communications’ and expresses its ‘views’ on them. The HRC also publishes ‘general comments’ on thematic issues, which contain its interpretation of the content of human rights provisions on those issues.

The Inter-American Court and Commission are bound by, and interpret, the ACHR.\(^{26}\) The Commission has further competence to apply the ADHR and the Charter of the Organization of American States.\(^{27}\) The European Court of Human Rights (‘ECtHR’) issues judgments in cases brought against the states parties to the ECHR either by individuals or by other states parties. Some of these treaty bodies, like the HRC or the Inter-American Commission, are not judicial bodies but provide comments that are a form of institutional jurisprudence.\(^{28}\) However, the ECtHR, Inter-American Court of Human Rights (‘IACtHR’) and the African Court on Human and People’s Rights can issues binding judgments in individual cases.

This arrangement of having several treaty bodies interpreting human rights instruments has several important implications. First, there is a growing body of HRL-focused jurisprudence that is pushing envelopes as traditional shackles are being thrown off. However, the impact of that jurisprudence (and commentary) is affected by a number of features of those institutions. Given the differing status of the findings of the different treaty bodies their views have different ‘normative pull’, resulting in jurisprudence that is eclectic in terms of its authority.

Second, the treaty bodies are specialised human rights institutions. They examine questions put before them from the perspective of the respective HRL treaty relevant to their creation, rather than holistically or comprehensively. For example, although the ECtHR has developed extensive jurisprudence regarding the application and content of the ECHR in situations of conflict, the Court has consistently failed to account directly for IHL in any of its case law.\(^{29}\) Moreover, there may be shortcomings in the technical ability of an institution to analyse areas of law outside its constitutive field. For example, under article 28(2) of the ICCPR, membership of the HRC ‘shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights.’ Expertise in the related but distinct body of IHL is not required. The ICCPR, however, does provide for ‘consideration being given to the usefulness of the participation of some persons having legal experience.’\(^{30}\) This could result in IHL expertise being made available to the Committee when required but it does not make it an institutional certainty.


\(^{27}\) Opened for signature 2 May 1948, 119 UNTS 3 (entered into force 13 December 1951).


\(^{29}\) This aspect is examined further below.

\(^{30}\) ICCPR art 28(2).
The third implication flows largely from the first two: the application of somewhat different treaties often in completely dissimilar contexts by treaty bodies that have different approaches and preoccupations inevitably leads to practice that is not totally coherent. As Section III demonstrates, a particular difficulty in this respect surrounds determination of whether HRL applies extraterritorially. Indeed, ‘the jurisprudence in this area is not conclusive, … different approaches have been taken by different international institutions, and … even the same institution may not appear to be consistent in its application of extraterritorial obligations.’

II APPLICATION OF HUMAN RIGHTS LAW TO CONFLICT

A Applicability of Human Rights Law in Times of Armed Conflicts

Less than thirty years ago, Jean Pictet, one of the most eminent IHL experts of the 20th century, expressed the traditional view that IHL and HRL are mutually exclusive: ‘humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime.’ Over the last few decades, a definitive paradigm shift has occurred. One of the clearest early indications of this development was the adoption of Additional Protocol I to the 1949 Geneva Conventions (‘Additional Protocol I’), which contains article 75 dealing with ‘fundamental guarantees.’ This provision, clearly inspired by human rights law, reads like a human rights treaty in miniature. Articles 4 through 6 of Additional Protocol II to the 1949 Geneva Conventions (‘Additional Protocol II’) serve as the counterpart for NIACs. Currently, notwithstanding the disputes about the potential extraterritorial application of HRL and the precise nature of the HRL-IHL relationship, there appears to be broad acceptance that HRL continues to apply in armed conflict.

Perhaps the most authoritative statements to this effect have been made by the International Court of Justice (‘ICJ’) in two advisory opinions and one contentious case. In the Nuclear Weapons Advisory Opinion, the ICJ specifically examined the application of the ICCPR to conflict situations, addressing the argument that the ICCPR ‘was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict’ – namely, IHL. The ICJ rejected this argument by observing that

31 Skogly, above n 1, 75–6.
32 Jean Pictet, Humanitarian Law and Protection of War Victims (Sijthoff, 1975), 15.
33 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’).
35 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).
36 Doswald-Beck and Vité, above n 34, 121.
37 See Section III below.
38 See Chapter 4.
the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.\(^{40}\)

Although aspects of the Nuclear Weapons Advisory Opinion have been criticised as being unclear, what is clear is that the Court did not accept the view that the protection of human rights was limited to peacetime or that questions relating to the unlawful loss of life in hostilities were governed only by IHL with there being no place for HRL.

In the Wall Advisory Opinion, the ICJ recalled its views Nuclear Weapons and reiterated that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR].\(^{41}\) More recently, in Armed Activities, the ICJ without hesitation examined the conduct of Ugandan armed forces in the context of an occupation in the light of HRL,\(^{42}\) even though IHL was applicable as well.

The HRC has applied the ICCPR to armed conflict in its views in individual cases\(^{43}\) as well as in concluding observations on country reports.\(^{44}\) In its General Comment No 31, the Committee stated that 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable'.\(^{45}\) The ECtHR has applied the ECHR both in the context of IAC\(^{46}\) and NIAC.\(^{47}\) The ECtHR has also applied the ECHR to the particular circumstances of

\(^{40}\) Ibid 240 [25].

\(^{41}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, 178 [106] (‘Wall’).

\(^{42}\) Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168 (‘Armed Activities’).


\(^{46}\) See, eg, Isayeva v Russia (Admissibility) (European Court of Human Rights, First Section, Application No 31821/96, 16 November 2004); Isayeva v Turkey (Judgment) (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) (‘Isa (Judgment)’); Banković v Belgium (Admissibility) [2001] II Eur Court HR 333 (‘Banković’).

\(^{47}\) See, eg, Isayeva v Russia (Judgment) (European Court of Human Rights, First Section, Application Nos 57947/00, 57948/00, 57949/00, 24 February 2005); Isayeva v Russia (Judgment) (European Court of Human Rights, First Section, Application No 57950/00, 19 December 2002) [172]–[178]; Ergi v Turkey (Judgment) (European Court of Human Rights, Chamber, Application No 23818/94, 28 July 1998) [79]–[81]; Özkan v Turkey (Judgment) [2005] Eur Court HR 131.
occupation. The Inter-American Commission has produced several reports, and the IACHR handed down several judgments, dealing with situations of conflict. The IACHR has also issued two advisory opinions relating to emergency situations more generally.

The relevance of human rights in conflict situations has also been recognised in United Nations General Assembly and United Nations Security Council resolutions as well as Secretary-General’s reports. Droge concludes that international jurisprudence and state practice has now accepted the application of human rights in times of armed conflict, both international and non-international. Specifically regarding state practice, Droge assesses that ‘by and large, states have not objected to the interpretation of international bodies, with the exception of some states who contest the application of human rights in times of armed conflict.’ Those states include the US and Israel. According to Hampson, however, those states are against the ‘overwhelming weight of international opinion and state practice.

However, Sassoli and Olsen point out that although some states do not agree that HRL applies in armed conflict, on the narrower issue of the application of HRL on their own territory no state has specifically said such law does not apply. Michael J Dennis, although he considers that HRL treaties do not apply extraterritorially, supports this narrower observation stating that ‘[t]he majority of states do appear to accept the view that the provisions of the international human rights treaties may continue to apply domestically’ during a NIAC.

A separate question is the effect of objections by states to the application of HRL to conflict situations. Could such objections give rise to the persistent objector principle? This is a possibility but only if the relevant issue is the formation of customary international law. It would not be relevant to other issues such as treaty interpretation. For example, according to Droge ‘if seen as a reservation to the application of a given treaty to situations of armed conflict’ it is doubtful whether such an objection ‘would be compatible with the object and purpose of human rights treaties, especially if the objection is not formulated as a formal reservation.’ The point for here, though, is that the persistent objector doctrine is not relevant to the issue of whether,

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48 See, eg, Cyprus v Turkey (I) (Admissibility) (1975) 2 Eur Comm HR 125; Loizidou v Turkey (Preliminary Objections) (European Court of Human Rights, Grand Chamber, Application No 15318/89, 23 March 1995) (‘Loizidou (Preliminary Objections)’); Cyprus v Turkey (II) (Admissibility) (European Commission of Human Rights, Application No 25781/94, 28 June 1996); Loizidou v Turkey (Judgment (Merits) (European Court of Human Rights, Grand Chamber, Application No 15318/89, 18 December 1996) (‘Loizidou (Merits)’); Cyprus v Turkey (II) (Merits) [2001] IV Eur Court HR 1.

49 See, eg, Abella v Argentina (Judgment) (Inter-American Commission on Human Rights, Case No 11.137, 18 November 1997) (‘Abella’); Coard v United States (Inter-American Commission on Human Rights Case No 10.951, 29 September 1999) [37] (‘Coard’).

50 See, eg, Las Palmeras v Colombia (Preliminary Objections) (Inter-American Court of Human Rights, Application No ., 4 February 2000); Bámaca Velásquez v Guatemala (Inter-American Court of Human Rights, Case No 11.329, 25 November 2000) [209].


52 For an overview, see Droge, above n 26, 314–5.

53 Ibid 324.

54 Ibid 323. Footnote 56 provides references to the legal positions of Israel and the US.

55 Hampson, above n 28, 551.

56 Sassoli and Olson, above n 6, 603.

57 Dennis, ‘Non-Application’, above n 28, 455.

58 Droge, above n 26, 324.
as a matter of treaty interpretation, states holding the view that HRL does not apply in conflict could rely on the doctrine to support their position.

B Derogation from Human Rights Obligations in Armed Conflict

A number of human rights treaties – notably the ICCPR, ECHR, ACHR and Arab Charter of Human Rights – allow states parties to ‘derogate’ from some of their treaty obligations under certain circumstances. The structure of the derogation provisions is very similar. First, they define the circumstances under which derogations can be made. Second, they stipulate for certain underogable rights. Third, they put in place a mechanism whereby the international organisation administering the instrument must be notified of the derogation.

As regards the circumstances for derogation, the ICCPR provides that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The corresponding provisions in the ECHR, ACHR and Arab Charter of Human Rights are similarly formulated.

The first notable feature is the ‘trigger’, which is substantially the same: derogation is possible in the event of a formally declared public emergency that threatens the life of the nation or, in the case of the ACHR article 27(1), ‘the independence or security of a State Party’. The European Commission on Human Rights (‘ECmHR’) has interpreted the requirement to mean ‘an excep-

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60 See ICCPR art 4; ECHR art 15.

61 ICCPR art 4(1).

62 ECHR art 15 (1): ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’ Per ACHR art 27(1): ‘In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. ArabCHR art 4(1): ‘In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.’
tional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.\textsuperscript{63}

It is possible to envisage a situation in which the requirements for derogation have been met in that there is a public emergency arising out of the use of violence, but that violence does not amount to an armed conflict. This is particularly relevant in situations that IHL categorises as riots and internal disturbance that fall below the threshold of a NIAC.

On the other hand, it is also possible to envisage a situation where a state is technically engaged in an armed conflict but that does not amount to threatening the life of the nation. For example, the conflict over the Falklands/Malvinas between Argentina and the UK hardly constituted a sufficient emergency in those states to derogate from their respective human rights obligation. Or, as Peter Rowe suggests, ‘it is difficult to accept that the occupation of the territory [of another State] will show a suitable emergency in the territory of the occupying State.’\textsuperscript{64}

No derogations relating to armed conflicts have been made.\textsuperscript{65} That is because the language of the ICCPR does not allow a derogation to be made simply on the basis of extraterritorial action. The need for a derogation provision arises most acutely in circumstances where humanitarian law does not yet enter into picture to qualify the human rights established in the relevant documents.

Although there is merit in this argument, in \textit{Al-Jedda} the House of Lords gave a different explanation,\textsuperscript{66} in the context of the ECHR, for the absence of derogation practice extraterritorially. Lord Bingham states:

One solution, discussed in argument, is that a state member of the Council of Europe, facing this dilemma, should exercise its power of derogation under article 15 of the Convention, which permits derogation from article 5. However, such power may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state’s other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.\textsuperscript{67}

\textsuperscript{63} Lawless v Ireland (No 3) [1961] 1 Eur Court HR 15, 27 [28]. See also Human Rights Committee, \textit{General Comment No 29: Article 4 States of Emergency}, 72nd sess, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3] (‘\textit{General Comment No 29}’); Denmark, Norway, Sweden and the Netherlands v Greece (Commission Report) (European Commission of Human Rights, Plenary, Application Nos 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969) [153], where the Commission stated that the public emergency must have the following four characteristics (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.’

\textsuperscript{64} Peter Rowe, \textit{The Impact of Human Rights Law on Armed Forces} (Cambridge University Press, 2005) 119 (citations omitted).


\textsuperscript{66} R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58 (‘Al-Jedda’).

\textsuperscript{67} Ibid [38].
Lord Bingham is arguing that the reason state parties have not derogated when acting extraterritorially is not that the relevant HRL instrument does not apply extraterritorially. He is highlighting that derogation provisions are inapplicable on the facts of international peace operations where the state party is not the state facing the emergency. Importantly, even if the situation is one where derogation is permissible, the measures of derogation are not discretionary. First, all the treaties mentioned impose a proportionality requirement whereby measures of derogation are permitted only to the extent they are 'strictly required by the exigencies of the situation'. This, the ECtHR has clarified, raises higher than the usual proportionality requirement in balancing human rights, and amounts to a test of indispensability. Second, derogations cannot be made if they would be inconsistent with other obligations of international law. Third, treaties explicitly recognise a certain set of core rights from which derogation is not possible.

C Minimum Humanitarian Standards

There clearly emerges a certain core of human rights that is not derogable under all of the treaties mentioned. This factor, and other considerations, have led to efforts to specify a certain level of 'minimum humanitarian standards' which must be guaranteed in all circumstances. Notable examples to formulate such standards include the 1984 *Siracusa Principles* (developed by the UN Commission on Human Rights), the 1984 *Paris Declaration* (developed by the ILA) and the 1990 *Turku Declaration*.

D Conclusion

The dominant view is that HRL can apply in conflict alongside IHL. That limited derogations can be made from human rights obligations during armed conflict provides further support to the general applicability of human rights law in armed conflict. In 1971 Gerard Draper wrote that human rights 'do not dissolve in time of war or public emergency affecting the life of the nation, but are subject to a controlled and limited derogation from specific Human Rights to be justified by the extent of that emergency.' In 2004, Watkin suggested that the use of force in armed conflict is increasingly assessed through both HRL and IHL. There is some state prac-

68 See Droege, above n 26, 318.
69 *Handyside v United Kingdom* (1976) 1 EHRR 737, [48]. Cf *General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add.11, [4]–[5].
tice – notably that of the US and Israel – which maintains, however, that when IHL is applicable ‘human rights law is automatically not applicable.’

Perhaps the more controversial and uncertain questions involve what is the precise nature of the interaction between IHL and HRL in conflict situations and whether HRL also applies extraterritorially.

Finally, it can be argued that the fact that many HRL rights can be derogated from in times of emergency reduces the impact of HRL obligations in armed conflict. However, as has been pointed out, there are several important limitations to such derogations.

III APPLICATION OF HUMAN RIGHTS LAW EXTRATERRITORIALLY

A Introduction

According to Lubell,

[the] problem of extraterritorial obligations is primarily of relevance to international armed conflict, since it is in such situations that a State is likely to be operating outside its borders and that questions are raised as to whether human rights obligations can extend to actions of State forces outside the State's recognised borders, even after accepting that human rights law has not disappeared with the outbreak of conflict.

However, as the San Remo Manual makes clear, the same issues can arise in a NIAC situation. The Manual contends that 'when a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character.'

The issue of the extraterritorial application of human rights treaties is particularly significant regarding the conduct of contemporary operations such as those in Iraq, after June 2004, and in Afghanistan after June 2002. In each case, other states intervened on behalf of the sovereign host/territorial state in circumstances in which, for periods at least, the conflict threshold was reached. In such circumstances, the laws applicable in NIAC would not only govern the operations of Iraq and Afghanistan but also the conduct of those states intervening in their support.
The issue for this Section is the content of the legal framework concerning a NIAC when states are operating beyond their own territory. That this framework includes IHL is relatively uncontroversial. According to Cerone there ‘seems to be a general consensus supporting the proposition’ that humanitarian law can apply outside a state’s territory. This conclusion is ‘facilitated by the fact that the bulk of the law of armed conflict was designed to apply in an interstate context, presupposing that States would be acting on each other’s territory.’\textsuperscript{81} Indeed, states have an obligation ‘to respect and to ensure respect’ for IHL ‘in all circumstances.’\textsuperscript{82}

The position regarding the application of HRL extraterritorially (and to NIAC situations) is far less settled. There are philosophical and technical issues of treaty interpretation in play regarding the extraterritorial application of the principal human rights instruments. One of the philosophical issues is whether human rights instruments are limited to being a compact between the state and its own nationals. The US Operational Law Handbook reflects on the ‘traditional view’ of HRL. It states:

> Human rights law … regulates the relationship between States and individuals within their territory and under their jurisdiction. This reflects the original focus of [human rights law] — to protect individuals from the harmful acts of their own governments.\textsuperscript{83}

The key technical issue of treaty interpretation is whether the field of application articles of HRL instruments – generally variously worded to protect rights of those within the contracting states’ ‘territory’ and/or ‘jurisdiction’ – have a territorial limitation.\textsuperscript{84}

Whether a particular HRL instrument applies extraterritorially for a particular state party requires international and domestic aspects to be examined. The international aspect is of general application and concerns treaty interpretation, principally, how is the relevant field of application article to be interpreted? The domestic aspect regarding the issue of whether a particular HRL instrument binds a particular state centres on whether the relevant state party has a ‘monist’ or ‘dualist’ constitutional character for treaty making. That is, for that particular state party, is the relevant HRL instrument self-executing or does it require domestic implementing legislation to be domestically binding?

Consequently, whether a particular state party is bound extraterritorially by a particular HRL instrument depends on a number of factors:

- The drafting of the field of application article of the HRL instrument in question;

\textsuperscript{81} Cerone, above n 21, 18.


\textsuperscript{83} United States Army Judge Advocate General’s Legal Center and School, above n 19, 46.

\textsuperscript{84} In addition to the provisions cited in the following sections, see, eg, ACHR art 1(1): ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’; CAT art 2(1): ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.’
The accepted interpretation of that article regarding its extraterritorial application, including, if it is accepted that the instrument applies extraterritorially, in what circumstances does it apply; and,

• The domestic constitutional character of the relevant state party regarding its implementation of treaties.

B International Covenant on Civil and Political Rights

1 Overview

Article 2(1) of the ICCPR provides that:
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …. (emphasis added)

The first question regarding the application of the ICCPR extraterritorially is whether the ‘and’ linking ‘territory’ and ‘jurisdiction’ is to be read conjunctively (meaning both conditions must be present) or disjunctively (one but not both must be present). If interpreted conjunctively, the ICCPR will not apply extraterritorially and that ends the analysis of this issue. If interpreted disjunctively, a second query is thereby raised, namely, in what circumstances is an individual within the ‘jurisdiction’ of the state party?

2 International Court of Justice

The ICJ directly addressed the issue of the application of a number of HRL instruments, including the ICCPR in the Wall advisory opinion. The ICJ concluded that the ICCPR ‘is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’.85 In supporting a disjunctive interpretation of article 2(1), the ICJ relied on the practice of the HRC and the preparatory work (the travaux préparatoires) for the ICCPR. Specifically, the ICJ found:

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this …

The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.86

The ICJ also dealt with the extraterritorial application of the ICCPR in Armed Activities.87 This case concerned events in the eastern Congo in the period 1994 to 1997. Uganda, for its part, claimed that from early 1994 through to approximately May 1997 the Congolese authorities pro-

86 Ibid 179 [109].
vided military and logistical support to anti-Ugandan insurgents. The ICJ eventually concluded that Uganda, through its military actions, had violated the sovereignty and also the territorial integrity of the Democratic Republic of the Congo (‘DRC’) and that Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging.\footnote{Ibid [165].}

The ICJ found that Uganda was the Occupying Power during the relevant time period in a part of the DRC (Ituri Province).\footnote{Ibid [178].} Concerning Uganda’s resulting legal obligations the Court found that:

As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.\footnote{Ibid (emphasis added).}

The Court appears to view HRL as being ‘incorporated into the law of occupation through Article 43’s reference to the “laws in force in the country”’.\footnote{Cerone, above n 21, 28.} The DRC in this case was a party to the ICCPR. Although not central to this Chapter, the Court’s finding that the occupying Power had a duty to secure respect for HRL on the basis of its obligations under article 43 of the 1907 Hague Regulations\footnote{Regulations regarding the Laws and Customs of War on Land, annexed to Convention (IV) regarding the Laws and Customs of War on Land, opened for signature 18 October 1907, 205 CTS 277 (entered into force 26 January 1910).} is questioned.\footnote{Dennis, ‘Non-Application’, above n 28, 494. Dennis also queries whether in fact the DRC had taken sufficient steps to incorporate the relevant human rights treaties into domestic law: at 496.} Article 43 provides for a duty to restore and ensure public order and safety as far as possible and a duty to respect laws in force in the occupied territory, which could include HRL treaties, but there is no express duty to also secure respect for such laws.

3 United Nations Human Rights Committee

The HRC has repeatedly addressed the question of the extraterritorial jurisdiction of the ICCPR when dealing with individual communications and with country reports, and has also recorded its views in a general comment.

As regards individual communications, Lopez Burgos v Uruguay is particularly noteworthy,\footnote{Human Rights Committee, Views: Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) (Lopez Burgos v Uruguay) (‘Burgos’). A companion case concerned the abduction by Uruguay’s security forces of a Uruguayan citizen from Brazil, and it was decided in exactly the same fashion. Human Rights Committee, Views: Communication No 56/1979, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) (Celiberti de Casariego v Uruguay).} even though this case involved an extraterritorial abduction rather than a conflict situation. The author of the communication claimed that her husband was kidnapped on 13 July 1976 in Buenos Aires by members of the ‘Uruguayan security and intelligence forces’ who were aided by Argentine para-military groups and was secretly detained in Buenos Aires for about two weeks. On 26 July 1976, Mr Lopez Burgos, together with several other Uruguayan nationals, allegedly was illegally and clandestinely transported to Uruguay where he was detained incomunicado by the special security forces at a secret prison for three months. During his
detention of approximately four months both in Argentina and Uruguay, he was continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment.95

The HRC found the ICCPR applied in these circumstances as follows:

Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it … In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.96

The basis for jurisdiction in this case would appear to be the ability to affect the rights of an individual.

One member of the HRC, Professor Christian Tomuschat, appended his individual view in this case. Although not disagreeing with the Committee’s application of the ICCPR in this case, he was concerned with how broadly the Committee’s test for jurisdiction could be interpreted. He states that:

the arguments … for affirming the applicability of the Covenant also with regard to those events, which have taken place outside Uruguay need to be clarified and expanded. Indeed, the … sentence … according to which article 2(1) of the Covenant does not imply that a State party ‘cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State’, is too broadly framed and might therefore give rise to misleading conclusions. 97

For Tomuschat the wording of article 2(1) was to avoid the ‘absurd results’ which would occur if the ICCPR’s protections were not extended, in limited circumstances, to conduct beyond national boundaries. He states:

To construe the words ‘within its territory’ pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, ‘to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles.98

Tomuschat therefore appears not to support the extraterritorial application of the ICCPR to situations such as occupation. However, notwithstanding this somewhat narrow view of the reach of the ICCPR he also holds the view that it was not the drafters’ intention to effectively grant a license to state party authorities for actions with extraterritorial implications. To wit,

95 Burgos, UN Doc ccpr/c/13/d/52/1979, [2.1]–[2.2].
96 Ibid [12.3].
97 Ibid appendix X.
98 Ibid.
never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.\(^9\)

In *Montero v Uruguay*,\(^{100}\) the Committee had to deal with the confiscation of a passport of a Uruguayan citizen by the Uruguayan consulate in Germany. The Committee found the *Covenant* to be applicable:

The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is ‘subject to the jurisdiction’ of Uruguay for that purpose. Moreover, a passport is a means of enabling him ‘to leave any country including his own’, as required by article 12(2) of the *Covenant*. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, it imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.\(^{101}\)

There has been a certain amount of to-and-fro between the HRC and states parties over the extraterritorial application of the *ICCPR*.

Thus, in 1995, in response to a question on the point, the United States argued that

The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a party’s territory. Article 2 of the Covenant expressly stated that each State party undertook to respect and ensure the rights recognized ‘to all individuals within its territory and subject to its jurisdiction’. That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words ‘within its territory’ had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party’s territory.\(^{102}\)

In 2006, during the examination of its second and third periodic reports to the HRC, the US maintained this position.\(^{103}\)

In 2003, the Netherlands disputed the applicability of the *ICCPR* to the extraterritorial conduct of Dutch soldiers:

The Government disagrees with the Committee’s suggestion that the provisions of the International Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica. … Article 2 of the Covenant clearly states that each State Party undertakes to respect and to ensure to all individuals ‘within its territory and subject to its jurisdiction’ the rights recognized in the Covenant, including the right to life enshrined in article 6. It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of that provision.\(^{104}\)

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99 Ibid.
101 Ibid [5].
In 2003, HRC addressed the specific situation of occupation in the context of Israel and the Occupied Palestinian Territories:

Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.105

In 2008, the United Kingdom, in response to a Committee request for the views of the UK regarding the applicability of the ICCPR outside UK territory, stated that:

[T]his obligation, as the language of article 2 of the ICCPR makes very clear, is essentially an obligation that States Parties owe territorially, ie to those individuals who are within their own territory and subject to the jurisdiction of the United Kingdom ...106

The UK’s position was that the ICCPR would have extraterritorial ‘effect outside that territory in “very exceptional cases”’.107 In response, the Committee criticised the UK position suggesting that the ‘State party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control’.108 The HRC argued that obligations arise in all territories under the de facto effective control of the contracting party.

There is also state practice that directly supports the HRC view of extraterritoriality. The HRC has acknowledged ‘Italy’s position “that the guarantees of the Covenant apply to the acts of Italian troops or police officers who are stationed abroad, whether in the context of peace or armed conflict”’. Furthermore, ‘[o]ther states, such as Germany and Poland, have expressed themselves to similar effect.’109

In General Comment No 31 the Committee stated its view regarding the extraterritorial application of the ICCPR:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party … 110

106 Human Rights Committee, United Kingdom Sixth Periodic Report, UN Doc CCPR/GBR/6 (18 May 2007), [59(a)].
107 Ibid [59(b)]. The UK separately argued before the HRC concerning Iraq and Afghanistan and the Torture Convention that ‘obligations of the Convention Against Torture, such as those in Article 2 and 16 to prevent torture and other acts of cruel, inhuman or degrading treatment could only be fully implemented by the sovereign government of the territory in question’ in this case Iraq and Afghanistan.
110 General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, [10].
4 Discussion

A critical issue in the interpretation of ICCPR article 2(1) is whether the conditions of territory and jurisdiction need to be read conjunctively or disjunctively. As we have seen, both the ICJ and HRC clearly read it disjunctively whereas some states have indicated to the HRC – in no uncertain terms – that they disagree and read it conjunctively. There appears to be academic support for both approaches.111

As a problem of treaty interpretation, the starting point for resolving this issue are certain provisions in the Vienna Convention on the Law of Treaties (‘VCLT’) that are reflective of customary law, namely articles 31 and 32.112 Article 31(1) provides: ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ In summary, article 32 provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 leaves ‘the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’.

Dennis and Surena take a textual interpretation by arguing that the plain and ordinary meaning of article 2(1) is conjunctive – ‘that to enjoy the protections of the ICCPR, a person must be both within the territory of a state party and subject to the jurisdiction of that state party.’113 However, it is fairly common for courts to interpret ‘and’ to mean ‘or’, or ‘or’ to mean ‘and’, in the texts of legal instruments if the context and the purpose of the instrument so requires.114 Indeed, for Rodley, the plain meaning endorsed by Dennis and Surena is ‘manifestly inconsistent with the context and object and purpose of the treaty.’115 Rodley emphasises the teleological approach by underlining that object and purpose of the ICCPR as it emerges from the preamble, which includes the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’, ‘the inherent dignity of the human person’ and also the Charter of the United Nations obligation ‘to promote universal respect for, and observance of, human rights and freedoms’. However, with respect, it is not the inevitable or only conclusion from the preamble extracts that the state parties view the ICCPR as applying extraterritorially to both nationals of the state party and to non-nationals.

In giving effect to the ‘terms of the treaty in their context’, VCLT article 31(3)(b) stipulates that ‘[t]here shall be taken into account, together with the context … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’ Consequently, many commentators attempt to bolster their arguments with reference to state practice. Thus, Dennis and Surena refer to the views of the US, UK and Netherlands before

113 Dennis and Surena, above n 111, 719; see also Dennis, ‘Non-Application’, above n 28, 461.
114 See Milanović, Extraterritorial Application, above n 76, 223–4 (with further references).
115 Rodley, above n 109, 630–1.
the HRC in support of the claim that the ICCPR has no extraterritorial application, while Rodley refers to the positions of Italy, Germany and Poland to advance the argument that it does.\textsuperscript{116}

For Dennis and Surena a further argument is that ‘there has not been a single case of a state party seeking to exercise its power of derogation under Art 4 of the ICCPR in relation to military operations outside its territory, whether unilateral, alliance-based or UN mandated.’\textsuperscript{117} They note that ‘[a]ll derogations under Art 4 of the ICCPR have been lodged with respect to the suspension of … domestic laws.’\textsuperscript{118} The importance of this point is that it supports, in Dennis and Surena’s assessment, the view that ‘the ICCPR was intended to apply within a state’s territory only.’\textsuperscript{119} However, as was discussed earlier,\textsuperscript{120} it is doubtful whether engagement in military operations overseas is sufficient for the possibility of derogation to be activated.

In a separate article Dennis also relies on the practice of the UN Security Council to argue that HRL instruments do not apply extraterritorially. The practice included Resolution 1483 concerning Iraq in which the Security Council, acting under Chapter VII of the Charter, called upon ‘all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’. Dennis notes that this resolution and the subsequent Resolution 1511 and Resolution 1546 made no mention of ‘any obligation on the part of states to comply with international human rights instruments.’\textsuperscript{121} It is uncertain though whether this drafting reflects any more than the political reality that the US would have needed to support the Iraq resolutions and the long-held view of the US is that human rights instruments such as the ICCPR do not apply extraterritorially.

In sum, a textual, systematic and teleological interpretation in accordance with VCLT article 31 does not appear to conclusively resolve the problem and ambiguity remains regarding the meaning of article 2(1).\textsuperscript{122} Thus, it is appropriate to turn to supplementary means of interpretation mentioned in article 31, in particular the preparatory materials.

A 1950 draft text of article 2 of the ICCPR, then under consideration by the Commission on Human Rights, would have required that each state ensure Covenant rights to everyone ‘within its jurisdiction’. The US representative, Eleanor Roosevelt, successfully proposed (8:2 in favour with 5 abstentions) that the phrase ‘within its territory’ be added.\textsuperscript{123} The reasoning included the following:

The United States [is] afraid that without [the proposed] addition the draft Covenant might be construed as obligating the contracting state … to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States.\textsuperscript{124}

\textsuperscript{116} Ibid 632.
\textsuperscript{117} Dennis and Surena, above n 111, 728.
\textsuperscript{118} Ibid 728–9 (emphasis altered). See also Dennis, ‘Non-Application’, above n 28, 477.
\textsuperscript{119} Dennis and Surena, above n 111, 729.
\textsuperscript{120} See Section II(B) above.
\textsuperscript{121} Dennis, ‘Non-Application’, above n 28, 456–7.
\textsuperscript{122} But see Rodley, above n 109, 653 who contends that the conditions for turning to supplementary means are not met since there is nothing ‘ambiguous’ or ‘obscure’ about the interpretation of the Human Right Committee or Court.
\textsuperscript{123} Dennis and Surena, above n 111, 726.
Subsequent attempts to remove the additional phrase were unsuccessful.\textsuperscript{125} For Dennis and Surena this aspect of the preparatory work for the \textit{ICCPR} clarifies any ambiguity concerning the ordinary meaning of article 2(1) – ie, to enjoy the protections of the \textit{ICCPR}, a person must be both within the territory of a state party and subject to the jurisdiction of that state party.\textsuperscript{126}

Rodley accepts that the words ‘within the territory’ were included at the insistence of the US driven by concerns regarding the application of the treaty to situations such as occupation, but downplays the importance of the preparatory work in this case. In Rodley’s view ‘[e]ven if this background … were to be an admissible consideration, it is hardly conclusive in the light of the general focus in the drafting debates on situations of absence of effective control, rather than the exercise of effective control.’\textsuperscript{127}

Droege also downplays the import of the preparatory work stating that the ‘\textit{travaux préparatoires} are but one among several methods of interpretation.’\textsuperscript{128} Droege further points out the drafting history of the \textit{ICCPR} ‘provides a number of contradictory conclusions as to the meaning of the application clause in Article 2(1) of the Covenant.’\textsuperscript{129} Indeed, the \textit{ICJ} in \textit{Wall} used the preparatory work for the \textit{ICCPR} to come to a different conclusion to that of Dennis and Surena. In the \textit{Wall} Advisory Opinion the \textit{ICJ} relied on the Human Rights Committee’s \textit{Summary Record of the Hundred and Ninety-Fourth Meeting}\textsuperscript{130} and the General Assembly’s \textit{Annotations on the Text of the Draft International Covenant on Human Rights}\textsuperscript{131} to support a conclusion that the \textit{ICCPR} applied extraterritorially.\textsuperscript{132} The \textit{Annotations} refer to discussions regarding article 2 of the Draft \textit{ICCPR}. At paragraph 4 it reports that:

There was some discussion on the desirability of retaining the words ‘within its territory’. It was thought that a State should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory. For example, States parties would have to recognize the right of their nationals to join associations within their territories even while they were abroad. There might also be a contradiction between the obligation laid down in paragraph 1 and that laid down in some of the other articles, particularly article 12, paragraph 2 (b), which provided that anyone should be free to enter his own country.\textsuperscript{133}

The use of this record to conclude drafters’ intent that the \textit{ICCPR} generally apply extraterritorially to non-nationals is not entirely persuasive. This record would indicate consideration of quite narrow issues in the context of nationals of the contracting state outside that state’s territory rather than indicating a broad view of the general application of the rights and obligations of \textit{ICCPR} to individuals other than contracting state nationals extraterritorially. Also,
as pointed out by Dennis and Surena, the ICJ ‘oddly fails to discuss the relevant portions’ of the *travaux*,\(^{134}\) namely those concerning the US intervention.\(^{135}\)

Dennis strongly criticises the approach of the HRC on this issue. He interprets the approach of the HRC to be that the ICCPR applies to ‘every act of a state which affects persons outside the territory of a state, even where the state exercised no effective territorial control.’ He finds this approach to be ‘extraordinary.’ He argues that ‘[e]ven assuming that Article 2 of the ICCPR could be read as a disjunctive conjunction, the Committee’s test improperly focuses on the activity of the state, rather than on the requirement that the victim should be subject to its jurisdiction.’\(^{136}\)

5 Conclusions

The HRC has consistently interpreted the ICCPR to apply extraterritorially in contexts including occupation and peacekeeping operations, with the ICJ supporting the position of the HRC.\(^{137}\)

The HRC also is of the view that the circumstances that result in a person being within the power or effective control of the state party are irrelevant. Specifically, the ICCPR could apply in international peacekeeping or peace enforcement operations.\(^{138}\)

Cerone queries whether the Committee test for the extraterritorial application of the ICCPR – ‘conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant’ – is broader than the ICJ’s ‘acts done … in the exercise of its jurisdiction’ test in the *Wall* opinion.\(^{139}\)

The framework for the extraterritorial application of instruments such as the ICCPR is provided by the terms of the treaty itself, the approach to the issue of ‘jurisdiction’ and the content of individual state parties’ domestic constitutions and legislation. On the first two issues, neither an application of the rules of treaty interpretation nor a review of the views of scholars or the approach of international bodies and state practice provides a conclusive answer to the issue of the extraterritorial application of the key HRL instruments. Arguably, though, there is a ‘majority’ view that supports extraterritoriality.

Specifically regarding the interpretation of the ICCPR application article, article 2(1), it is considered that either a disjunctive or conjunctive interpretation is reasonably open. A review of the ICCPR preparatory work does not conclusively decide the outcome, although it is considered that those who support a disjunctive interpretation have not decisively countered the arguments of Dennis which focus on US interventions during the drafting of the ICCPR.

Regarding case law, according to Hampson the cases have addressed three situations: occupation, detention outside national territory and other fields. With the first two she concludes that HRL is generally seen as applicable.\(^{140}\) However, she concludes that there is no agreement

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\(^{134}\) Dennis and Surena, above n 111, 726.

\(^{135}\) It has been further suggested that the first cases on these provisions dealt with instances ‘when state agents had taken unlawful action against citizens of that state living abroad’: Dennis, ‘Application’, above n 65, 122–3.

\(^{136}\) Dennis, ‘Non-Application’, above n 28, 471.

\(^{137}\) Droege, above n 26, 326.

\(^{138}\) General Comment No 31, UN Doc CCR/C/21/Rev.1/Add.13, [10]. For examples, see Cerone, above n 21, 24 nn 56–7; Droege, above n 26, 326 n 61.

\(^{139}\) Cerone, above n 21, 25.

\(^{140}\) Hampson, above n 28, 567–70.
regarding the third category, with this category covering situations such as harm to an individual in a building targeted by a state party.\footnote{\textit{Ibid} 570.}

What is the test for Hampson's third category? Is it control over territory or rather control over the effects said to constitute a violation of \textit{HRL}?\footnote{\textit{Ibid} 570–1.} Hampson notes the inconsistency in the case law and speculates that the reasons for this inconsistency include difficulties with judges coming to terms with applying \textit{IHL} as a basis for analysis, a concern that findings of extraterritorial application will result in states not engaging in such operations and a further increase in an 'already impossible caseload.'\footnote{\textit{Ibid} 571.} Hampson's personal submission is 'that the appropriate test is not control over territory but control over the effects said to constitute a violation, subject to a foreseeable victim being foreseeably affected by the act.'\footnote{\textit{Ibid} 570.} It is not clear, however, whether this submission is to the current state of the law (\textit{lex lata}) or what the law should be (\textit{lex ferenda}).

Adam Roberts, however, highlights that it is not the case that the extraterritorial application of \textit{HRL} instruments is free from doubt. He observes that the 'overall question of whether human rights treaties apply extraterritorially is still contested.'\footnote{\textit{Ibid} 593; Dennis, 'Application,' above n 65, 141.} He refers to Dennis' conclusion in a general survey of the subject to the effect that '[t]he obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict.'\footnote{\textit{Roberts, above n 145, 594.}}

But in response to the Dennis proposition that both the \textit{ICCPR} requirements of territory and jurisdiction must be met, Roberts says that it 'remains unconvincing to argue that human rights law cannot apply at all to situations that arise.'\footnote{\textit{Roberts, above n 145, 594.}} Roberts takes a situational approach to the application of the \textit{ICCPR} referring to the specific case of occupation. He argues that a clearer distinction than Dennis offers needs to be drawn between armed conflict (where the application of human rights law is more problematic) and occupation; and also a further distinction between occupation in general and the holding of certain specific persons by outside forces. In the latter situation the application of human rights law may be particularly appropriate.\footnote{\textit{Ibid}.}

Even the apparently clear view of the extraterritorial application of the \textit{ICCPR} by the \textit{ICJ} is not free from controversy. The \textit{ICJ}'s advisory opinion in \textit{Wall} concluded that the \textit{ICCPR} 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'\footnote{\textit{Wall [2004] ICJ Rep} 136, 180 [111].} Consequently it further concluded that in the occupied territories Israel, a party to the \textit{ICCPR}, was bound by its terms. However, these conclusions have been controversial, with Roberts stating that this 'forthright conclusion, like other parts of this advisory opinion, appears to be weakened by some shaky legal reasoning' and referring to the criticisms of the opinion as being 'serious.'\footnote{\textit{Roberts, above n 145, 597.}} How persuasive will the \textit{ICJ}'s view therefore be?
Regarding state practice, again the situation is inconclusive. Droege assesses that ‘while most states accept the jurisprudence of the Human Rights Committee [regarding the extraterritorial affect of the ICCPR], a small number of states have contested it,’ including the Netherlands, the US, the UK and Israel.\(^\text{151}\) Droege notes though that the national courts of Israel and the UK have taken a different view to the governments of those states.\(^\text{152}\) Rodley specifically adds Germany, Poland and Italy to the list of countries, which support the extraterritorial application of the ICCPR.

Finally, on the issue of whether the rights contained in HRL instruments must be applied as a package or whether they can be tailored to situations, the cases (not the scholars) support a view that rights can be tailored in the special situations of extradition/detention but in situations of jurisdiction based on a territorial 'control' test, the full range of rights must be able to be protected. It is noted, however, that even those indicating a tailored approach provide little guidance as to precisely which rights apply in particular situations and, further, how this approach plays out in the context of the relationship between HRL and IHL.

Dennis and Surena conclude that the ‘positions of both the Human Rights Committee and the ICJ concerning the scope of application of the ICCPR appear to be at odds with the approach taken by European courts concerning the scope of application of Art 1 ECHR’\(^\text{153}\) and that their conclusions ‘appear weak.’\(^\text{154}\) They rely on a number of grounds in support, including the view of certain scholars of the plain and ordinary meaning of article 2(1), the views of the HRC member Tomuschat in the López Burgos v Uruguay case, state practice and the case law of the ECtHR and the UK House of Lords.\(^\text{155}\)

It is significant that, although there is inconsistency in European case law, with certain European cases supporting a broad view of ‘jurisdiction’, in the view of the UK House of Lords in Al-Jedda, the leading ECtHR case is that of Banković.\(^\text{156}\) In that case, the Grand Chamber showed ‘great caution in applying the ECHR to a state’s actions outside of its territory.’\(^\text{157}\) In any event, as Greenwood points out ‘[d]ecisions of the European Court are, of course, of no more than persuasive value elsewhere.’\(^\text{158}\)

### C International Covenant on Economic, Social and Cultural Rights

The ICESCR does not contain a field of application provision like article 2(1) of the ICCPR. However, its article 2 provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international

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\(^\text{151}\) Droege, above n 26, 326. For references to country positions see n 64. For a review of the UK government’s position regarding the extraterritorial application of the Convention Against Torture in Iraq and Afghanistan see Dennis, ‘Non-Application’, above n 28, 457–8.

\(^\text{152}\) Droege, above n 26, 326.

\(^\text{153}\) Dennis and Surena, above n 111, 723.

\(^\text{154}\) Ibid 724.

\(^\text{155}\) Ibid.

\(^\text{156}\) See, eg, Al-Jedda [2007] UKHL 58, [150] (Brown LJ).


assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In the Wall opinion, the ICJ found that the ICESCR applied extraterritorially:

The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights, which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction ... Israel replied in a further report of 19 October 2001 that it has ‘consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction’ (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is ‘based on the well-established distinction between human rights and humanitarian law under international law’ ... [T]he Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.  

Cerone argues that by statements such as ‘it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction’ the Court ‘seems to require the exercise of territorial jurisdiction, which implies control over territory and not just over individuals.’ This is an important point regarding the limitations on circumstances in which extraterritorial jurisdiction will be found.

ICESCR rights include – among other rights – education, health, social security, food and employment. IHL also covers these rights to a degree, although HRL may cover them in greater detail. Lubell accepts that ICESCR rights do apply in occupied territory but assesses that there are difficulties regarding issues such as ‘the level of fulfilment’. This later point raises the question of the practical ability of state authorities to meet the range of rights contained in the ICESCR extraterritorially.

D Convention on the Rights of the Child

Article 2(1) of CROC provides that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction’ (emphasis added). In Wall, the ICJ took note of this provision and proceeded to hold that the ‘Convention is therefore applicable within the Occupied Palestinian Territory.’ For Cerone, this simple statement results in it being ‘unclear what standard the Court applied in finding the Convention applicable.’
The ADHR does not contain a clause limiting its applicability. This means that the Inter-American Commission has not been forced into the straightjacket of the terms 'jurisdiction' and has been in a position to decide on the applicability of the Declaration more in light of its object and purpose. Moreover, the preamble of the ADHR reiterates that 'the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality'. This suggests a conceptual move away from the theory, alluded to earlier, that human rights are essentially designed to protect persons from the acts of their own governments.

Two notable cases entailing extraterritorial application of the ADHR arose before the Inter-American Commission out of the US military action in Grenada. Disabled Peoples' International v United States involved deaths resulting from alleged bombardment of a mental hospital.\textsuperscript{165} Coard v United States was concerned with the arrest, detention, and treatment while in detention, of 17 persons.\textsuperscript{166} In that case, the Commission found that US obligations under the ADHR were engaged, stating that:

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.\textsuperscript{167}

In support of these views, the Commission relied on its treatment of the issue in previous cases and cited the observation of Judge Meron that '[w]here agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues.'\textsuperscript{168}

Perhaps the best known case, decided on the same day as Coard, is Alejandre v Cuba.\textsuperscript{169} Here, the Commission dealt with a complaint according to which on 24 February 1996, a MiG-29 military aircraft belonging to the Cuban Air Force downed two unarmed civilian light airplanes belonging to the organisation 'Brothers to the Rescue' in international airspace, killing four persons. The Commission found the ADHR to be applicable. First, it repeated what it has said in Coard about 'authority and control.'\textsuperscript{170} It then went on to say:

The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence ratiome loci, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights

\textsuperscript{165} Disabled Peoples' International v United States (Admissibility) (Inter-American Commission on Human Rights Case No. 9213, 22 September 1987). See also Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [89].
\textsuperscript{166} Coard (Inter-American Commission on Human Rights Case No 10.951, 29 September 1999).
\textsuperscript{167} Ibid [37].
\textsuperscript{168} Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 American Journal of International Law 78, 81.
\textsuperscript{169} Alejandre v Cuba (Inter-American Commission on Human Rights, Case No 11.589 29 September 1999).
\textsuperscript{170} Ibid [23].
continues – in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the “Brothers to the Rescue” organization under their authority.\(^{171}\)

In sum, the Commission has established a ‘relatively low threshold for the extraterritorial application of Inter-American human rights law’\(^{172}\) which is not based on territorial control or control over the person but, ostensibly, on the basis of control over the infliction of the alleged violation.\(^{173}\) According to Cerone it would indeed be ‘hard to imagine a situation where human rights violations intentionally perpetrated by a state agent would fail to meet this test.’\(^{174}\) This approach can be contrasted to the ‘more cautious’\(^{175}\) approach of the ECtHR discussed next.

**F European Convention on Human Rights**

1 **Overview**\(^{176}\)

Article 1 of the ECtHR provides that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (emphasis added). The ECtHR has established a number of tests for determining whether individuals are within the jurisdiction of the relevant state for purposes of the ECtHR. One test is where the state exercises effective control of territory beyond its borders. Another test is that state agents carry out functions against individuals outside the state’s territorial borders.

But first, it is useful to clear up a small confusion about a group of cases that is often also dealt with under heading of extraterritoriality. This concerns the situation where acts within the jurisdiction can lead to consequences outside the jurisdiction that are incompatible with the Convention. This may conveniently be referred to as the Söring line of cases after the first case to have dealt with the problem. In Söring v UK, the issue was whether the extradition of an individual from an ECtHR state party to a non-state party that would result in inhumane treatment there would fall under the Convention. This was not a jurisdictional issue for the purposes of the ECtHR. Mr Söring was detained by the UK authorities on British soil, which means that he clearly fell within the scope of the Convention while so detained. Undoubtedly his release to the US authorities would have ended the applicability of the ECtHR. Thus, strictly speaking, the problem was not about him being treated in violation of the Convention after extradition. The question was whether a state could relinquish jurisdiction where this would lead to treatment that would be prohibited while within the jurisdiction. It is notable in this sense that the Court discussed the gist of the matter as a problem about the scope of article 3 (prohibition of inhu-

\(^{171}\) Ibid [35].

\(^{172}\) Cerone, above n 21, 31.

\(^{173}\) Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [91] (contrasting Bourgos): ‘what determines whether an applicant is within the jurisdiction of a State is the relationship between the individual, agents of the State and the act said to constitute the violation. If the State controls the infliction of the alleged violation and if it was or should have been foreseen that the applicant would be a victim of the act, the applicant is within the jurisdiction.’

\(^{174}\) Cerone, above n 21, 32.

\(^{175}\) Ibid.

mane treatment) and not the extent of article 1 (jurisdiction). The Court itself has underlined this point in its subsequent judgments. The dispute was about the precise implications of a right guaranteed under the ECHR, not whether there was an obligation on the part of the state to guarantee that right to a given person in abstract.

2 Early Case Law

Thus, when dealing with the control by Turkey of Northern Cyprus, the Commission in the 1975 admissibility decision of Cyprus v Turkey (I) articulated something of an explanation as to the meaning of the phrase ‘within their jurisdiction’:

this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text [‘relevant de leur juridiction’], and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.

This statement left the nature of the authority to be exercised somewhat open. In the subsequent case law, two broad streams of authority developed: territorial authority and personal authority. There is room for debate whether these are discreet categories or parts of a broader principle, but it is nonetheless convenient to address them separately.

(a) Effective Control over an Area

The more straightforward, and seemingly also the better established, modality of control is control over territory. It was carved out by the Commission and the Court in a series of cases dealing with Northern Cyprus. This doctrine is mostly associated with the case of Loizidou v Turkey, where it was clearly pronounced for the first time. The case itself concerned the denial of access by Turkish troops to private property in Northern Cyprus, allegedly breaching the right to the ‘peaceful enjoyment’ of private property under Article 1 of Protocol I of the Convention. In the preliminary objections phase, the Grand Chamber found that Turkey, an ECHR contracting party, had exercised ‘jurisdiction’ in northern Cyprus

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and

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177 Söring v United Kingdom (Judgment) (European Court of Human Rights, Plenary, Application No 14038/88, 7 July 1989) [81]–[91].
178 Banković [2001] XII Eur Court HR 333, [68]; Iliașcu v Moldova (Judgment) [2004] VII Eur Court HR 179, 264 [317] (summarising Söring): ‘A State’s responsibility may … be engaged of account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.’
179 Cyprus v Turkey (I) (Admissibility) (1975) 2 Eur Comm HR 125, 136 [8].
180 Cf R (Al-Skeini and others) v Secretary of State for Defence [2005] EWCA Civ 1609, [190] (Sedley LJ): ‘Here I would accept that while ECA [‘effective control authority’ over territory] and SAA [‘state agent authority’ over a person] have proved useful exegetic tools in analysing the decisions of the ECtHR, they do not represent discrete jurisprudential classes each of which attracts state liability. The single criterion is effective control.’
freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\(^{181}\)

This finding was notwithstanding the establishment of the Turkish Republic of Northern Cyprus (‘TRNC’).\(^{182}\)

In this connection the respondent Government have acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the ‘TRNC’. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property. It follows that such acts are capable of falling within Turkish ‘jurisdiction’ within the meaning of Article 1 of the Convention. Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase.\(^{183}\)

The approach constructing the applicability of the ECHR on ‘effective control of an area’ was followed by the Commission and the Court in their subsequent decisions and judgments concerning Northern Cyprus.\(^{184}\)

Occasionally, the Court has used the language of responsibility\(^{185}\) in dealing with jurisdictional questions:

Having effective overall control over northern Cyprus, its [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.

This has lead to a certain amount of confusion.\(^{186}\) However, the responsibility dimension may be relevant in two senses. First, the general test of attributability in state responsibility appears to be perfectly usable in establishing the existence (or absence) of effective control. Effective control over an area can be exercised by the organs of a state (in particular, its armed forces), in which case the acts of such organs would be clearly attributable to the state. Consequently, there would be effective control by that state through its organs. However, there seems little reason to limit this analysis to organs proper. If a state is responsible for the acts of de facto organs or other entities factually under its control, it could also exercise effective control over a territory through them. Thus, if a state has effective control over the ‘authorities’ in a foreign territory, and those ‘authorities’ in turn have effective control over a certain area, the state must be seen as having effective control over the area. Thus, whether or not a state has effective control over a foreign territory may need to be determined by applying the state responsibility criteria.

On another level, state responsibility enters the picture once jurisdiction has been established. In such circumstances, the question may be whether a state is responsible only for those entities which it controls as its own organs or whether it is also compelled to apply similar standards to third parties. Thus, in a Cyprus-like situations, Turkey would seem to be firstly

\(^{181}\) Loizidou (Preliminary Objections) (European Court of Human Rights, Grand Chamber, Application No 15318/89, 23 March 1995) [62].

\(^{182}\) Ibid [18].

\(^{183}\) Ibid [63]–[64].

\(^{184}\) Cyprus v Turkey (II) (Admissibility) (European Commission of Human Rights, Application No 25781/94, 28 June 1996) [14]–[17]; Loizidou (Merits) (European Court of Human Rights, Grand Chamber, Application No 15318/89, 18 December 1996) [52]; Cyprus v Turkey (II) (Merits) [2001] IV Eur Court HR 1, 25 [77].

\(^{185}\) Cyprus v Turkey (II) (Merits) [2001] IV Eur Court HR 1, 25 [77].

\(^{186}\) R (Al-Skeini and others) v Secretary of State for Defence [2004] EWHC 2911 (Admin), [187].
responsibly for the acts of its armed forces (as its de jure organs), the local authorities (as its de facto organs), as well as having a positive obligation to secure the enjoyment of the rights for those within the jurisdiction.

(b) State Agent Authority

In some circumstances the European Court and Commission have found that persons have been brought within the jurisdiction of a state party through the acts of their agents operating abroad. The first of these circumstances was recognised even before the Cyprus situation was brought before the court. Namely, the Commission accepted that the acts of diplomatic and consular agents fall within the jurisdiction of the state. It held in several cases that such agents have certain duties towards the nationals of the sending state in the country to which they are accredited and that any alleged neglect of these duties would be within the jurisdiction of the state.187 Furthermore, W M v Denmark, which concerned potential obligations towards a non-national seeking protection in an embassy, the Commission found that ‘authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property.’188 Hence, the Commission made it quite clear that the basis for jurisdiction in such circumstances was not the individual’s physical presence in the embassy (based on some theory of quasi-territoriality) but authority exercised by state agents over the person.

The second situation recognised as creating jurisdiction extraterritorially is where authorised agents have physical custody over an individual abroad. The jurisdictional link with the respective state party was regarded as existing on this basis in a number of cases that might be described as ‘extraordinary rendition’, specifically Freda v Italy,189 Barbie v France,190 Reinette v France,191 and Sánchez Ramirez v France.192 Importantly, the critical factor in these ap-

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187 See X v Federal Republic of Germany (Admissibility) (1965) 8 Eur Comm HR 158, where the applicant complained of ‘unwarranted intrigues’ against him conducted by German Consular officers with the Moroccan authorities. The Commission found that ‘in certain respects, the nationals of a Contracting State are within its “jurisdiction” even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention’: at 168. See also X v United Kingdom (Admissibility) (European Commission of Human Rights, Plenary, Application No 7547/76, 15 December 1977) in which the applicant alleged failure of the British consular authorities to do all in their power to help the applicant.

188 W M v Denmark (European Commission of Human Rights, Application No 17392/90, 14 October 1992) [1]. In this case, an East German national was, with the consent of the ambassador, removed from the premises of the Danish embassy by DDR police. However, the application was declared inadmissible on other grounds.

189 Freda v Italy (Admissibility) (1980) 21 Eur Comm HR 254, 256 [3]. The applicant, who was sought by Italy for the purposes of a murder trial, was arrested in Costa Rica by the local authorities. Shortly thereafter, he was taken to the airport, handed over to officers of the Italian police, who, in turn, made him enter an Italian Air Force aircraft. The applicant was flown to Roma and served an arrest warrant upon arrival. He complained about the illegality of his arrest – he was not served a warrant immediately and was not informed of the reasons of his arrest. The Commission ended up declaring the application manifestly ill-founded as it could not establish a violation.

190 Altmann (Barbie) v France (Admissibility) (1984) 37 Eur Comm HR 230. The case involved Bolivian authorities handing the applicant, Klaus Barbie, over to the French authorities.


192 Sánchez Ramirez v France (Admissibility) (1996) 86-B Eur Comm HR 155 (applicant, popularly known as Carlos the Jackal, handed over by Sudan to France). See also Stocké v Germany (Commission Report) (European Commission of Human Rights, Plenary, Application No 11755/85, 12 October 1989) which concerned the luring of a German
pears to be the moment when the person was taken into custody by the state agents, not where he or she was detained.\textsuperscript{193}

An important case that further illustrates personal authority and control is one where, although jurisdiction was not found, the Commission indicated under what circumstances jurisdiction might exist. This is the case of Hess v United Kingdom\textsuperscript{194} relating to the conditions of the continued incarceration of Rudolf Hess, a war criminal convicted at Nuremberg. He was held at the Spandau prison, located in the British sector of Berlin. The Commission observed that a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory … The Commission is of the opinion that there is in principle, from a legal point of view, no reason why the acts of British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.\textsuperscript{195}

In the particular case, however, the authority over the prison was exercised \textit{jointly} by the four allied powers – France, \textit{UK}, US and the USSR. Hence, the prison was not within the jurisdiction of the \textit{UK}.\textsuperscript{196}

The third situation is where a state exercises some governmental authority on the territory of another state, either by the latter’s explicit consent or by virtue of acquiescence.\textsuperscript{197}
If the case law considered so far has not been the model of consistency and clear principle, \textit{Banković v Belgium} further complicated the state of the law.\footnote{See \textit{Banković} [2001] XII Eur Court HR 333. NATO countries included in the application were: Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom.} The case arose out of the NATO air campaign (Operation Allied Force) against the Federal Republic of Yugoslavia (‘FRY’). On 23 April 1999, a missile launched from an aircraft of the NATO forces hit a building of the \textit{Radio Televizije Srbije} in Belgrade. Several persons were killed or wounded in the air strike. An application alleging, \textit{inter alia}, a violation of the right to life was brought on the victims’ behalf against 16 NATO member states that were also states parties to the \textit{ECHR}.\footnote{Ibid [1]–[11].}

In an admissibility decision handed down in 2001, the Grand Chamber found there was no jurisdictional link between the victims in this case and the states parties to the \textit{ECHR}. Consequently, the application was declared inadmissible.\footnote{Ibid [82]. Specifically the Grand Chamber found: ‘The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States …’} Essentially the court found that the ‘effective control over an area’ test espoused in \textit{Loizidou} had not been met by the state in question, since aerial supremacy cannot be equated to territorial control, and rejected the applicants’ submission that different degrees of control entailed different obligations. More polemically, however, the Court buttresses its view by explaining, in general, the conditions for the extraterritorial application of the \textit{Convention}.

By drawing on general international law, the Court began by emphasising the essentially territorial nature of jurisdiction:

\begin{quote}
Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case …\footnote{\textit{Banković} [2001] XII Eur Court HR 333, [61].}
\end{quote}

The court relied on the lack of derogations with respect to extraterritorial engagements\footnote{Ibid [62]: The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (\textit{inter alia}, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention. The existing derogations were lodged by Turkey and the United Kingdom in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively).} and the preparatory works\footnote{Ibid [63]: Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the \textit{travaux préparatoires} which demonstrate that the Expert Intergovernmental Committee replaced the words ‘all persons residing within their territories’ with a reference to persons ‘within their jurisdiction’} in support of this territorial approach.
Then, as a corollary of the previous point, the Court noted the exceptional nature of extra-territorial jurisdiction:

In sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.\textsuperscript{204}

Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.\textsuperscript{205}

The Court then added that the Convention was essentially regional:

The Court’s obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role … In short, the Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.\textsuperscript{206}

The Court seemed to add two conditions to the extraterritorial applicability of the ECHR that cannot be found in earlier case law: the requirement that the state ‘exercises all or some of the public powers’ of another state and that of the situation falling within the ‘legal space’ of the states parties. Moreover, it expressly rejected the proposition ‘implicit in the Inter-American Commission’s Alejandre decision, that a contracting state’s “jurisdiction” would follow the State’s conduct.’\textsuperscript{207}

4 Öcalan and Issa

However, a number of later cases demonstrate that some of the jurisprudence survived the very restrictive Banković decision.

The first of these is Issa v Turkey, decided in 2004.\textsuperscript{208} The case involved the activities of Turkish forces during a military campaign in northern Iraq in April 1995. The applicants complained of the alleged unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq.\textsuperscript{209}

\begin{itemize}
  \item with a view to expanding the Convention’s application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States.
  \item \textsuperscript{204} Ibid [71].
  \item \textsuperscript{205} Ibid [73].
  \item \textsuperscript{206} Ibid [80].
  \item \textsuperscript{207} Cerone, above n 21, 35.
  \item \textsuperscript{208} Issa (Judgment) (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004).
  \item \textsuperscript{209} Ibid [4]–[12].
\end{itemize}
The Court in this case, although it eventually found the victims were not within the 'jurisdiction' of Turkey, seemed to broaden the circumstances in which 'jurisdiction' could be found. The Court began by reiterating the 'primarily territorial' jurisdictional competence of states, but noted that the Convention 'is not necessarily restricted to the national territory' of the states parties. It then went on to reiterate the 'effective control of an area' test:

In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there (‘extra-territorial act’) may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention. According to the relevant principles of international law, a State’s responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory … It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.

The Court went on to mention that 'state agent authority' test:

Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.

It then went on to apply the tests to the case at hand:

The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (espace juridique) of the Contracting States.

But on the facts, the Court was not convinced that overall control of an area existed:

However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one, which obtained in northern Cyprus in the Loizidou v. Turkey and Cyprus v. Turkey cases.

The Court also set a high standard for the evidential proof required:

The essential question to be examined in the instant case is whether at the relevant time Turkish troops conducted operations in the area where the killings took place … The reasonableness of that assertion must be tested in the light of the documentary and other evidence which the parties have submitted to the Court, having regard to the standard of proof which it habitually employs when ascertaining whether there is a basis in fact for an allegation of unlawful killing, namely proof ‘beyond reasonable doubt’ …

211 Issa (Judgment) (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) [68].
212 Ibid [68]–[70].
213 Ibid [71].
214 Ibid [74].
215 Ibid [75].
216 Ibid [76].
In Issa the Court seemed to be refer to negative obligations, that is, an obligation not to ‘perpetrate’ violations.\textsuperscript{217} Indeed, ‘[a]ccountability in such situations stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.\textsuperscript{218}

Interestingly, the fact that the alleged violations patently took place outside the \textit{espace juridique} did not seem to detain the court. In this case, the \textit{ECtHR} supported its position by applying the reasoning of the \textit{HRC} in Lopez Burgos. According to Cerone, this is hard to reconcile with the approach in \textit{Banković} in which case the Court ‘distanced itself’ from that reasoning.\textsuperscript{219}

The 2005 judgment in \textit{Öcalan v Turkey} suggests that the state agent control test, as applied to physical custody, was alive and well even outside the ‘legal space’ of the \textit{ECHR}. In this case, the applicant was arrested by members of the Turkish Security Forces inside a Turkish registered aircraft in the international zone of Nairobi Airport.\textsuperscript{220} The Court noted:

\begin{quote}
It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the ‘jurisdiction’ of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.\textsuperscript{221}
\end{quote}

\section*{5 Al-Skeini}

In 2004, a number of cases were brought before British courts relating to Iraqi nationals who had been killed in British military options. It was claimed that Article 2 of \textit{ECHR} had been breached both as a result of the deaths and the failure to undertake an independent enquiry into those death. In one instance, involving a death in custody of the British forces, it was also alleged that Article 3 of the Convention had been breached.

The proceedings before the British courts in \textit{Al-Skeini} testified to the confusion of the European case law as regards the jurisdictional test of Article 1. In the House of Lords, Lord Rodger of Earlsferry stated:

\begin{quote}
What is meant by ‘within their jurisdiction’ in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights ... The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts, which have to try to follow the jurisprudence of the European Court.\textsuperscript{222}
\end{quote}

The approach taken by Lord Brown of Eaton-Under-Heywood in \textit{Al-Skeini} was to distinguish \textit{Banković} and \textit{Issa}, and to apply the approach that the Grand Chamber adopted in the former. He also noted that \textit{Issa} was not a judgment of the Grand Chamber (although three of its

\begin{flushright}
\textsuperscript{217} Cerone, above n 21, 51 n 167.  \\
\textsuperscript{218} Issa (Judgment) (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) [71].  \\
\textsuperscript{219} Cerone, above n 21, 40.  \\
\textsuperscript{220} Öcalan v Turkey [2005] IV Eur Court HR 131.  \\
\textsuperscript{221} Ibid 164 [91].  \\
\textsuperscript{222} Al-Skeini v Secretary of State for Defence [2007] UKHL 26, [65], [67].
\end{flushright}
seven judges had been members of the Grand Chamber in *Banković*). Lord Brown rejected a wide interpretation of *Issa* by pointing out the statements at paragraph 71 in *Issa* regarding jurisdiction are *obiter*. He concluded regarding interpreting jurisdiction to apply to those subject to a state’s ‘authority and control’:

It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of ‘authority and control’ irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?

Lord Brown did appear to accept that in certain cases the full package of rights may not apply. After reviewing the extradition/detention cases he states that this ‘line of cases clearly constitutes one category of “exceptional” cases expressly contemplated by *Banković* as having “special justification” for extraterritorial jurisdiction under article 1’ although he concluded that ‘[n]one of the cases appear in any way helpful to the first five appellants’ in *Al-Skeini*. However, it is not entirely clear from the judgment why this is the case. Is not jurisdiction in the extradition/detention cases founded on a factual ability of the agents of the state to affect a particular right only, the right to liberty, in relation to a particular person rather than all rights for all persons in the area? Is it not also the case on the facts in *Banković* and *Al-Skeini* that agents of the state were able to affect a particular right, the right to life, of particular persons?

Eventually the case came before the European Court. On 7 July 2011, the Grand Chamber found that the deaths of five individuals caused by British forces in Basra City in 2003 were within the jurisdiction of the *UK*. In a critical paragraph of *Al-Skeini v UK*, the Grand Chamber first described the situation at the material time as follows:

[F]ollowing the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq.

The Court then went on to say:

In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

Thus, the judgment backtracked to some extent on *Banković*, and appeared to create a half-way house between the effective aerial control and state agent authority tests.

223 Ibid [124].
224 Ibid [127].
225 Ibid [120] (Brown LJ).
227 *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 172 [149].
228 Ibid.
229 Ibid.
G Domestic Constitutions

1 Canada

In *Amnesty International Canada v Chief of Defence Force*, the appellants sought judicial review with respect to decisions transferring detainees captured by Canadian Forces (‘CF’) in Afghanistan to Afghan authorities. Canadian Forces personnel were deployed as part of the NATO-led International Security and Assistance Force (‘ISAF’). Under a number of arrangements with the Afghan Minister of Defence, insurgents detained by Canadian Forces were transferred to a detention facility operated by Afghan authorities.

One question (Question 1) on appeal to the Canadian Full Federal Court was ‘did the Canadian Charter apply during armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or to their transfer to Afghan authorities to be dealt with by the authorities?’ The Court decided that it did not. In answering this question relevant for the Court was the jurisprudence of the ECtHR in *Bankovic*:

> [T]he key question in Question 1 is whether the CF has “effective control” over territory in Afghanistan so that the Charter should be given territorial application over Afghan territory and Afghan people.

Although the CF authorities have command and control over the CF detention facilities at Kandahar Airfields, Kandahar Airfields is a facility shared by Canada and several International Security and Assistance Force (ISAF) countries participating in security and infrastructure operations in Afghanistan. This ‘control’ of the detention facilities by the CF cannot be considered “effective” within the meaning of … *Bankovic v Belgium* decision …

The CF are not an occupying force – they are in Afghanistan at the request and with the consent of the governing authority. That authority has not acquiesced to the extension of Canadian law over its nationals.

2 Israel

In the *Targeted Killings* case, the Israeli Supreme Court, sitting as the High Court of Justice, addressed a number of issues concerning human rights law, including its application extraterritorially.

As part of the security activity intended to confront terrorist attacks, the State of Israel employs what it calls ‘the policy of targeted frustration’ of terrorism. Under this policy, the security forces act in order to kill members of terrorist organisations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second *intifada*, such preventative strikes had been performed across Judea, Samaria and the Gaza Strip. The Petitioners’ position is that the targeted killings policy is totally illegal and contradictory to international law, Israeli law and basic principles of human morality. They argue it violates the human rights recognised in Israeli and international law — both the rights of those targeted and the rights of innocent passers-by caught in the targeted zone.

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231 Ibid [24]–[26].
232 *Public Committee against Torture in Israel v Government of Israel* [2006] 2 IsrLR 459 (‘*Targeted Killings*’).
233 Ibid 464–5 [2]–[3].
Regarding the general normative framework, including the application of the *lex specialis* principle, President Barak on behalf of the Court said:

The normative arrangements that apply to the armed conflict between Israel and the terrorist organisations in the territories are complex. They mainly focus on the rules of international law concerning an international armed conflict … These laws include the laws of belligerent occupation. But they are not limited to them alone … From the humanitarian viewpoint, they are a part of international humanitarian law. This humanitarian law is a special law (*lex specialis*) that applies in an armed conflict. When this law has a lacuna, it can be filled by means of international human rights law …

While the Court referred to the protection of human rights outside of Israel, this was often a reference to human rights protected by *IHL*. The Court did not, for example, make a finding concerning the application of the *ICCPR* to Israeli authorities outside of Israel although it did indicate that *HRL* can fill a lacuna in *IHL*. Also, when examining the issue of civilians taking a direct part in hostilities the Court referred to the human rights notion of arrest and trial rather than use of force: ‘one must choose the means whose harm to the human rights of the harmed person is smallest’. It is said though that this results from the ‘domestic law’ of Israel although the similar provision under the *ECHR* dealt with in the *McCann v United Kingdom* case before the *ECtHR* was referred to with approval.

**H Concluding Remarks**

1 Overview

As detailed above, for state parties to *HRL* instruments a number of issues need to be analysed regarding the extraterritorial affect of the instrument depending on the instrument in question. For example, with the *ICCPR* the field of application article, article 2(1), needs to be examined and a view taken as to whether the requirement of ‘territory and jurisdiction’ is to be interpreted disjunctively or conjunctively. Assuming a disjunctive interpretation, that is, state party obligations arise if an individual is within the territory or within the jurisdiction of the state party, then the meaning of ‘jurisdiction’ needs to be examined. In what circumstances is an individual said to be within the ‘jurisdiction’ extraterritorially of a state party? Here the jurisprudence of the *ECtHR* and the Inter-American Human Rights Commission and Court are helpful as their relevant *HRL* instruments have field of application articles limited to the ‘jurisdiction’ element. Jurisprudence of national courts, which have examined the ‘jurisdiction’ element, is also helpful.

In summary, the review of the jurisprudence above regarding the ‘jurisdiction’ element identified three possible situations in which an individual may be found to be within the ‘jurisdiction’ extraterritorially of a state party. They are, according to Hampson:

- Territorial control (by the state party);
- Control over the person of the applicant (by agents of the state party);

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234 Ibid 477 [18].
235 *McCann v United Kingdom (Judgment)* (European Court of Human Rights, Grand Chamber, Application No 18984/91, 27 September 1995).
236 *Targeted Killings* [2006] 2 IsrLR 459, 500–2 [40].
• Control over the infliction of the alleged victim (by the state party).\textsuperscript{237}

The operational contexts that are addressed under these three criteria are occupation, conduct of IAC and NIAC and detention/extradition etc of individuals.

2 Divisibility of Human Rights

A key issue regarding the extraterritorial application of HRL instruments is the range of rights (for the individual) and obligations (for the state party) that apply in particular operational situations. This has two aspects. One concerns the threshold issue of ‘jurisdiction’. Can an individual be within the ‘jurisdiction’ of a state party even if only some of the relevant instrument’s rights can be protected or does the state have to be in a position to provide for all of the rights for jurisdiction to arise? The second aspect concerns the practical implementation of instrument obligations. Does the practical implementation of those obligations have variable content? That is, do the obligations vary, for example, depending on the level of control of a situation by a state party? Different views have been taken by courts and scholars and these views are difficult to reconcile.

Indeed, Kretzmer, ‘would say that we’re dealing with a package here that when the convention applies, the state must secure all of the rights which are provided’.\textsuperscript{238} In comparison, Justice Sedly of the UK Court of Appeal in \textit{Al-Skeini}, when addressing the issue of the lack of effective control of UK forces in Basra in Iraq and the resulting difficulty in securing for individuals all the rights under the ECHR, stated that ‘it is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing.’\textsuperscript{239} For Justice Sedley, HRL rights are not a package, they are divisible depending on the operational situation. However, the UK House of Lords expressly rejected this view subsequently, relying on the approach of the Grand Chamber of the ECtHR in \textit{Bankovic}.

Lord Rodger of Earlsferry, who sat in the House of Lords during \textit{Al-Skeini}, held that:

In effect, the applicants were arguing that it was not an answer to say that, because a state was unable to guarantee everything, it was required to guarantee nothing – to adopt the words of Sedley LJ … The European Court quite specifically rejected that line of argument. The court held … that the obligation in article 1 could not be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.’ In other words, the whole package of rights applies and must be secured where a contracting state has jurisdiction.\textsuperscript{240}

Per Lord Brown Eaton-Under-Heywood:

There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric “control and authority”, going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. \textit{Bankovic} (and later \textit{Assanidze}) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be ‘divided and tailored’.\textsuperscript{241}

\textsuperscript{237} Hampson and Salama, \textit{UN Doc E/CN.4/Sub.2/2005/14}, [82] referring to ‘jurisdiction’ as reflected in case law being ‘examined in the light of three criteria’.

\textsuperscript{238} Chatham House, above n 126, 53 (David Kretzmer).

\textsuperscript{239} \textit{Al-Skeini v Secretary of State for Defence} [2007] QB 140, 301 [197].

\textsuperscript{240} \textit{Al-Skeini} [2007] UKHL 26, [79].

\textsuperscript{241} Ibid [128].
Similarly, the ECtHR held in Banković that:

In the first place, the applicants suggest a specific application of the 'effective control' criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation … the Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in Section I of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants’ approach does not explain the application of the words 'within their jurisdiction' in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949.242

Some scholars support the notion of the divisibility of human rights obligations. According to Droege, 'human rights obligations are flexible: with varying degrees of control, the state has varying obligations, going from the duty to respect to the duties to protect and fulfil human rights.’ Drog 243 According to Cerone, normally the full range of rights contained in the relevant treaty apply, however, 'this may not be the case when the State is operating abroad.’ Cer 244 The question is whether the level of obligation depends on the level of control. For example, in an occupation situation as the occupying power progressively 'cedes' control the scope of obligations decrease, with greater obligations being borne by the authorities representing the occupied.245

Lubell, when examining situations other than occupation, states:

While in these situations the scope of relevant human rights obligations might be narrower than in an occupied territory, it could nevertheless be argued that State agents are bound to respect human rights obligations that they have the power to affect.246

There is also some support from the cases of the notion that rights are divisible. After examining cases such as the early European Commission of Human Rights case of W M v Denmark, Cerone concludes the range of applicable rights may be limited by the scope of the state's authority or control in the circumstances and may have a 'variable scope.’ Cer 247

3 Practicability of Extraterritorial Application

One line of argument employed by Dennis and Surena is to question the practicability of applying ICCPR provisions – with the implication being that it was not intended they apply extraterritorially. In the context of occupation they ask:

Moreover, if the provisions of the ICCPR apply extraterritorially during times of military occupation, is the occupant obligated to ensure the full range of Covenant rights in the occupied territory, as the Human Rights Committee and the ICJ appear to have assumed? For example, was the United Kingdom, as an
occupying power in southern Iraq, responsible for the reform of local traditions and practices concerning Sharia law and the treatment of women and children, if it deemed those laws to be incompatible with the rights recognized in the ICCPR?248

Further they argue that it is not possible to adopt essentially a sliding scale of rights. They state that the ‘relevant general clauses of the ICCPR (Art 2), like Art 1 of the ECHR, do not suggest that the positive obligations they confer could be divided on the basis of the level of control’.249 Their general conclusion is that the ‘obligations assumed by states under the ICCPR were never intended to apply extraterritorially during periods of armed conflict’ and would result in ‘confusion rather than clarity’.250

Rodley’s response is to accept that the HRC looks to the ‘tests of power and effective control’ to determine whether the ICCPR applies, that this will result in practical challenges but that overall it is appropriate. He states that for the authors this ‘is likely to produce confusion rather than clarity’.251

It is certainly true that it will require a fact-based analysis and a consideration of what special rules of international humanitarian law will need to be relied on to help interpret the human rights provisions of the Covenant (for example, killings of members of the opposing armed forces). It may be that a variable or sliding scale approach to power and effective control will be relevant to identifying the applicable rule. But the alternative leaves much unclear too. There are lots of uncertainties in the law of armed conflict.

4 Towards a Functional Test?

The key issue here is whether, aside from the extradition/detention situation, state obligations depend on the level of control of the area or on the ability to affect the rights of an individual. Christopher Greenwood asks, in the context of the ECHR, whether the instrument ‘is not rendered applicable to an individual simply because that individual is affected by acts attributable to a State Party to that Convention’.252

The approach of the tribunals to the issue as seen above has varied. After reviewing European case law, Cerone found that in ‘formulating the question of whether extraterritorial conduct of the state has fallen within the scope of article 1’ the Court had ‘variously referred to individuals, acts, matters, or property being within the jurisdiction of the particular state’. He concludes from this that:

It seems then that individuals may come within the jurisdiction of a state’s jurisdiction to various degrees. For example, where a state brings an individual into its jurisdiction through a particular act, without having control generally over that individual or over the territory within which that individual may be found, it would seem then that the individual is within the jurisdiction of that state only for the purpose of that act.253

248 Dennis and Surena, above n 11, 725.
249 Ibid 725.
250 Ibid 731.
251 Rodley, above n 109, 631.
253 Cerone, above n 21, 44.
According to Cerone, aside from Banković, European case law seems to limit obligations extraterritorially to the obligation to refrain from violating rights with the ‘scope of application’ being ‘variable’. He notes that the applicant in W M v Denmark argued that the Danish Ambassador who had summoned the DDR police was subsequently responsible for violations by those police. The Commission found no such responsibility with Cerone interpreting this to mean that ‘the Commission was of the view that the Danish Ambassador was under no positive obligation in these circumstances to protect the applicant from the DDR authorities.’

In Ilaşcu, ECtHR found that Moldova’s “jurisdiction” had a more limited scope by virtue of the fact that it did not have effective control over part of its territory. In Cerone’s view, as the European institutions ‘have linked their findings of “jurisdiction” to the scope of a state’s authority and control over people or territory, it may thus be argued that the range of rights states are bound to respect is dependent upon the level of that State’s control.

F Implications

1 ‘Monist’ and ‘Dualist’ Domestic Constitutions

As outlined above, whether a particular state party is bound extraterritorially by a particular HRL instrument depends on a number of factors. Specifically, with the ICCPR there are three factors. First, the approach taken to whether article 2(1) is disjunctive or conjunctive. Second, if a disjunctive interpretation is taken, the approach to the notion of ‘jurisdiction’. Third, whether for that particular state party international treaties are ‘self-executing’ or require specific domestic legislation incorporating the international obligations into domestic law to have domestic force. That is, whether the international obligations bind domestic courts without any specific act of incorporation or without such a specific act the treaty obligation cannot be applicable domestically. This can result in the characterisation of states as either ‘monist’ or ‘dualist’.

It is highlighted that this analysis concerns the issue of the relationship between domestic and international law. Regardless of this relationship under a particular state’s domestic constitution, a state’s international obligations remain. The basic principle of international law pacta sunt servanda is incorporated into the VCLT which provides at article 26 that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Consequently, a state, for example, could not rely on its own domestic legislation to limit the scope of its international obligations.

Which states are ‘monist’ and which are ‘dualist’? David Sloss states as follows:

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255 Ibid 50 n 161. In this case the authority of Moldova was limited by the Russian influence. Regarding Moldova’s obligations under the European Convention in such circumstances the Court found: ‘such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered only in the light of the Contracting State’s positive obligations towards persons within its territory.’ Ilaşcu v Moldova and Russia, [2004] VII Eur Court HR 179, [333].
256 Cerone, above n 21, 44.
258 Ibid 31–4. Brownlie points out that there is some criticism of this categorisation as ‘the two systems do not come into conflict as system since they work in different spheres.’ The argument is that ‘[e]ach is supreme in its own field.’
259 Ibid 35.
Australia, Canada, India, Israel, and the United Kingdom are traditional dualist states; treaties never have the force of law within their domestic legal systems. Germany, the Netherlands, Poland, Russia, South Africa, and the United States are hybrid monist states; in these states, at least some treaties do have the force of law within the domestic legal system. Brownlie, however, indicates that this ‘whole subject resists generalization, and the practice of states reflects the characteristics of the individual constitution.’ Each state party must therefore be examined individually. As an example, the case of Australia will be examined below.

2 The Example of Australia

Australia has ratified a number of the key HRL instruments including the ICCPR. Concerning Australia’s HRL obligations there are two related issues. One is the enforceability of international obligations in Australian courts. The other is the extraterritorial application of ICCPR obligations under Australian law.

Specifically regarding the ICCPR, because Australia is a dualist state, rights in the Covenant have no direct domestic operation unless the ICCPR is incorporated into Australian law. Although the ICCPR is included in the Australian Human Rights Commission Act 1986 (Cth) and the Australian Human Rights Commission may receive complaints about alleged breaches of the ICCPR, the ICCPR has not been incorporated into the Australian law as such so is not directly enforceable in Australian courts.

The ICCPR and other HRL instruments that Australia has ratified may have an indirect effect in Australian courts even if the parent treaty is not incorporated into Australian law. Australian case law indicates that treaties may be used to:

- Resolve uncertainty or ambiguity in the common law;
- Support review of earlier decisions and possibly their overruling; and
- Assist in the determination of community values and standards relevant to the development of the common law.

However, even if instruments such as the ICCPR have been incorporated in Australian law, a second relevant issue arises. Under general Australian law and under s 21(1)(b) of the Acts Inter-

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261 Brownlie, above n 257, 51.
263 The seminal case in this area is Mabo v State of Queensland [No 2] (1992) 175 CLR 1, [42] (Brennan J).
pertation Act 1901 (Cth) there is essentially a presumption against extraterritorial application.\textsuperscript{265} The policy underpinning this approach is stated by Justin Gleeson SC as follows:

A starting point is what is often described as the general rule … that the legislature of a country does not normally intend to deal with persons or matters over which, according to the comity of nations, jurisdiction properly belongs to some other sovereign or state.\textsuperscript{266}

Although no Australian court has explicitly examined the issue of Australia’s extraterritorial obligations under the ICCPR it has not been Australian practice to apply the ICCPR de jure to off-shore military deployments but to apply it as a matter of policy as a reflection of best practice.\textsuperscript{267}

As stated by Adam Roberts (in the context of occupation): ‘[t]he implementation of human rights law may be advocated as a matter of legal obligation, or as a matter of choice irrespective of whether, as a matter of law, the occupant is required to implement it.’\textsuperscript{268}

IV SUMMARY

In summary, the key conclusions for this chapter are as follows:

- The interaction between IHL and HRL, if any, depends on the approach taken to a number of intermediate issues, namely: the application of HRL in conflict; the extraterritorial application of HRL; the role of domestic constitutions; and, the analytical framework for examining the relationship between IHL and HRL.
- The dominant but not universal view is that HRL applies in conflict as well as in peacetime.
- The extraterritorial application of HRL instruments can vary depending on the field of application article in the relevant instrument and how it is interpreted.
- Concerning the ICCPR – the most widely ratified HRL instrument potentially affecting the conduct of military operations – its application extraterritorially depends on whether article 2(1) (‘territory’ and ‘jurisdiction’) is interpreted disjunctively or conjunctively.
- Both interpretations of ICCPR article 2(1) are reasonably open on a treaty interpretation basis, although there is significant support — including the support of the ICJ — for a disjunctive interpretation.
- If a disjunctive interpretation is taken of the ICCPR, ECtHR jurisprudence provides some guidance for the notion of ‘jurisdiction’ of HRL. The jurisprudence provides limited universal guidance though regarding the relationship between IHL and HRL in conflict situations due to the ECtHR’s purely HRL-based analysis.
- The value of decisions and comments of bodies such as the HRC and the ECtHR are affected by the nature of the institutions. For example, ECtHR is not bound even by its own its decisions – there is no stare decisis rule in the ECtHR system.\textsuperscript{269}

\textsuperscript{265} Acts Interpretation Act 1901 (Cth) s 21(1)(b) states: ‘In any Act … references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.’


\textsuperscript{268} Roberts, above n 145, 594.

\textsuperscript{269} For example, the ECtHR is not bound even by its own its decisions – there is no stare decisis rule in the Convention system. Francesco Messineo, ‘The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct
The following points can also be made:

- The operational context for NIAC involves broadly, law enforcement and conflict aspects, with this context influencing the applicable legal framework.
- States, scholars, human rights bodies and international tribunals have differing views as to the application of HRL, including its extraterritorial application, to NIAC.
- Currently there is no unifying, authoritative intellectual or institutional force in this area. Consequently, the answers to questions such as what HRL applies in conflict and extraterritorially and what is the relationship, if any, between IHL and HRL remains open to state and/or regional interpretation.
- ‘It [is] not just the question of whether human rights apply in certain situations, but how they apply.’\(^{270}\)

\(^{270}\) Chatham House, above n 126, 85 (Elizabeth Wilmshurst).
The Relationship between International Humanitarian Law and Human Rights Law in Non-International Armed Conflict

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I INTRODUCTION

Although traditionally it could be said that the law designed for conflict, international humanitarian law (‘IHL’) and human rights law (‘HRL’), were distinct legal areas, today HRL impacts on the conduct of contemporary non-international armed conflict (‘NIAC’), including those involving external interventions, either de jure, that is, as a matter of law, or de facto, as a consequence of state policy or international expectations. The degree and nature of that impact, though, is both uncertain and varied. It depends on factors such as: the international instruments the relevant state or states (e.g. the territorial state or intervening state(s)) are party to and if such instruments are self-executing; whether they have been incorporated into the relevant municipal law; the interpretation and application of those instruments by states, scholars and international institutions (such as courts) to NIAC situations as well as extraterritorially; and, the relationship, if any, between IHL and HRL.

That relationship, whatever its form and content, is highly relevant to the NIAC project. As stated by Kenneth Watkin, the ‘type of conflict most often referred to as one where human rights law and humanitarian law interact is non-international armed conflict.’

The operational context is relevant to this analysis — most significantly, whether the situation is one of international armed conflict (‘IAC’) or NIAC. It is contended that the operational context, including the evolving nature of state’s military doctrine for NIAC situations, has the potential to affect the content of the applicable IHL and, consequently, its relationship with HRL.

As agreed by the group of experts gathered by Chatham House and the International Committee of the Red Cross (‘ICRC’) in 2008 to discuss detention during NIACs, IHL, HRL and each state’s domestic law were each relevant but the ‘interplay between these bodies of law is not always easy to articulate, and can be complex to implement operationally.’

In the context of conflict, HRL must be discussed within the framework of its relationship with IHL. Before examining this relationship in detail in Part VI, this introductory section summarises the differing nature of individual aspects of IHL and HRL.

In broad terms, IHL focuses on conduct concerning persons and military operations and addresses authorisations, duties and prohibitions for states and individuals. HRL is an inherently rights-based system focused on the relationship between an individual and a state. A further

broad point of distinction is that HRL is fundamentally a civil, rather than criminal, system. Consequently, IHL has an individual criminal liability component whereas HRL treaties do not. These broad differences, and others, result in commentators such as Shany seeing two relevant legal paradigms, one being a ‘law and order’ paradigm based on HRL and the other an ‘armed conflict’ paradigm based on the ‘more aggressive humanitarian law’.

Thus, although it can be said that IHL and HRL ‘share a common ideal, protection of the dignity and integrity of the person’ there are differences in their philosophical underpinnings and content regarding what is included and what is omitted under each legal regime. For Watkin, ‘[e]ven though human rights law and the law governing armed conflict share respect for human values, the frameworks within which they traditionally operate are significantly different.’ Judge Theodor Meron has noted that:

Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law.

For Françoise Hampson and Ibrahim Salama, the ‘striking features’ of HRL when compared to IHL include its relative youth, the development of machinery for monitoring and/or enforcing the norms and the development of mechanisms with jurisdiction over all member states of the United Nations, not only states party to particular treaties. Hampson also highlights a number of significant differences between IHL and HRL. They include the starting point for IHL being the combatant’s right to kill and the starting point for HRL being the prohibition on arbitrary killing. For Cerone, the differences between IHL and HRL include, ‘the subjects of obligations, the institutions competent to determine violations, the period of application, the scope of beneficiaries, the locus of application, the range of rights protected, and the sources of obligations.’

These differences should not surprise. As David Kretzmer notes, ‘different personalities were involved in the projects of IHL and [human rights law] and represented different State interests’. Significantly, he points out that during their development ‘no serious consideration was given to the relationship between the two branches of law’.

6 Watkin, above n 1, 10.
8 Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [44].
9 Ibid [45].
In summary, specific points of distinction between *IHL* and *HRL* include:

- **Field of Application**: *IHL* requires a ‘conflict’ to apply. Arguably, *HRL* applies in all operational contexts from benign peacetime to internal tensions and disturbances to *IAC* and *NIAC*.
- **Geographical Scope**: As stated by Lord Rodger of Earlsferry in UK House of Lords case of *Al-Skeini*:

  While the Geneva Conventions on the Protection of War Victims 1949 apply ‘in all circumstances’, the geographical scope of the rights under the European Convention is more limited: under article 1, the States Parties are bound to ‘secure to everyone within their jurisdiction the rights and freedoms defined in Section 1’ of the Convention.\(^{12}\)

- **Relationships**: *HRL* is primarily concerned with the relationship between a state and citizens within its jurisdiction and/or territory. *IHL* is not generally concerned with a state and its own citizens. Kretzmer has thus noted the assumption ‘still accepted and promoted by some states and a few writers’ that

  [the law of armed conflict] regulates the conduct of States involved in an armed conflict toward combatants and civilians of the enemy … It is generally not concerned with the relationship between the authorities of a State and its citizens or subjects. *HRL*, on the other hand is concerned, in the language of the *ICCPR*, solely with the relationship between a State and ‘individuals in its territory and subject to its jurisdiction’.\(^{13}\)

- **Parties Bound**: Under *HRL* ‘only conduct attributable to the state can constitute an internationally wrongful act under these treaties and only the state can be held responsible on the international plane for violations.’\(^{14}\) Under *IHL* the concept of individual responsibility and liability is central (as well are certain state obligations). The application of *HRL* to non-state actors has been described as ‘more problematic’ than for *IHL* and, in any case, even if they can be seen as applicable to non-state actors the human rights machinery is normally only invoked against states.\(^{15}\)

- **Status of Individuals**: The status of an individual under *IHL* determines the level of protection. According to Kretzmer once a conflict exists ‘the principle of distinction applies, thus implying the legitimacy of using force against members of armed groups without specific justification in each case.’ However, ‘[l]egitimizing use of lethal force against a person merely because of his/her status is anathema to human rights law.’\(^{16}\)

- **Scope of Beneficiaries**: Within *IHL* the field of beneficiaries is not generally limited (although there are limits in the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (‘*Fourth Geneva Convention*’) to ‘protected persons’ as defined\(^{17}\)). *HRL* Instruments, however, typically limit ‘the scope of beneficiaries (ie, those whose rights the

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\(^{12}\) *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26, [63].

\(^{13}\) Kretzmer, above n 11, 14.

\(^{14}\) Cerone, above n 10, 20.


\(^{16}\) Kretzmer, above n 11, 17–18.

state is obliged to respect and ensure) to those within a state’s territory or subject to its jurisdiction.¹⁸

- **Content – Concept:** HRL instruments are about rights resulting in implied obligations for state parties. IHL is about rights, authorisations, duties and prohibitions.

- **Content – Use of Force:** There are a number of points of distinction between IHL and HRL regarding the use of force. They include the concepts of proportionality, the notion of protection being based on status and, significantly, the place of an arrest or detention option to the use of lethal force.

- **Content – Detention:** There is a good deal of overlap between IHL and HRL regarding detention, however, a clear point of distinction is that HRL requires detained persons to be brought promptly before a judicial officer.¹⁹

- **Content – Investigations:** Regarding the need for an investigation when killings occur, ‘under a human rights regime, the death of a person at the hands of the authorities should be a highly exceptional case … In an armed conflict situation causing the death of combatants (or fighters) is the very object of each Party.’²⁰ Consequently, HRL requires an independent and effective investigation in each case whereas IHL does not.

However, if HRL does not apply in conflict or does not apply outside national territory, the differences between IHL and HRL relevant to how, if at all, they interact will be of ‘academic’ rather than ‘practical’ significance. ²¹

### II Overview of the Relationship

#### A The Relationship is an Increasingly Significant Issue

Cordula Droege describes the traditional situation regarding IHL and HRL as being that they were ‘distinct’ bodies of law. However, she notes that the situation is changing with there now being ‘an infinite number of points of contact between the two bodies of law, raising increasingly complicated and detailed questions.’²²

Certainly the points of contact have increased between IHL and HRL in more recent times. Adam Roberts reviewed the history and connection between IHL and HRL noting that ‘the relation between human rights law and the laws of war began to attract international attention in the late 1960s and early 1970s.’²³ François Hampson, writing in 2008, notes the relationship between IHL and HRL has been a matter of academic debate for 20 years with the debate being fuelled by three pronouncements on the relationship by the International Court of Justice (‘ICJ’).²⁴

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¹⁸ Cerone, above n 10, 23.

¹⁹ See, eg, the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(3) (‘ICCPR’).

²⁰ Kretzmer, above n 11, 36.

²¹ Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [54].

²² Droege, above n 5, 310–11.


The points of contact between IHL and HRL of course increase if HRL is seen to apply in conflict and extraterritorially (see Chapter 3). According to David Kretzmer, the points of contact are also affected by developments in the areas of application of IHL (or law of armed conflict (‘LOAC’)). For Kretzmer, ‘[a]s long as LOAC was restricted to international armed conflicts, there was no necessary conflict or overlap with IHL.‘ He states, ‘indeed the original assumption was that these two fields deal with different sets of relationships.’ However, in situations of non-international armed conflict there is overlap and possibly conflict. For him, the neat distinction between IHL applying between states and HRL applying between a state and individuals can no longer be maintained when IHL is applied to NIAC.

Another aspect of the history of IHL, according to Kretzmer, affects the role of HRL in NIAC. He asserts that the assumption behind the application of Common Article 3 of the 1949 Geneva Conventions to NIAC in 1949 was that ‘unless elements of IHL were introduced into the context of such conflicts, what the Parties, including the State involved, would be entitled or forbidden to do would be entirely dependent on the domestic legal system.’ That is, in 1949 there was an ‘international legal vacuum’ which needed to be filled by IHL. He notes also that a low threshold for application of IHL in NIAC was favored. However, he argues that with the development of HRL this rationale needs a ‘rethink’.

Interestingly, Kretzmer supports this position with a particular view of IHL. That view is that IHL does not only talk about protection of potential victims, it also permits measures ‘clearly incompatible with a human rights regime.’ He argues that, perhaps ironically, a result of this aspect of IHL has been a shift away from states being reluctant to apply IHL to NIAC as a limitation on their freedom of action to a preference for the conflict model over the ‘constraints of a law-enforcement model of law.’ Kretzmer refers, by way of example, to the argument by Israeli military lawyers in 2000 that the violence in the West Bank and Gaza was ‘an armed conflict short of war.’ He argues that the policy behind this approach is that it permits ‘resorting the norms of armed conflict relating to hostilities without affording enemy fighters the status of combatants’ nor ‘[POW] if apprehended’ with this being ‘exactly the situation in all non-international armed conflicts.’

Judge Meron has another perspective regarding recent historical developments affecting the relationship between IHL and HRL. He identifies a trend towards the ‘humanisation’ of IHL, with this trend being informed by HRL. What he sees a ‘major impetus’ for this process being ‘the changing character of war itself from primarily international to mostly domestic’ is particularly relevant to the point being made in this section. According to Judge Meron the increase in such conflicts has had normative or rule making implications:

The current changing nature of conflicts from international to internal is closely related to the normative
developments. Internal conflicts have necessitated both new norms and reinterpretation of existing norms. The change in direction toward intrastate or mixed conflicts – the context of contemporary atrocities – has drawn humanitarian law in the direction of human rights law.35

According to Kenneth Watkin, the contemporary situations in which IHL and HRL may apply simultaneously include ‘internal armed conflict and states of emergency, belligerent occupation, and global terrorism.’36 In a similar vein, Droege notes that:

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts.37

Therefore, the relationship between IHL and HRL is increasingly significant as a result of the increase in the occurrence of NIACs and in the increased application of IHL to such situations.

B The Relationship is Controversial and Uncertain

There is a far from settled debate about the general and detailed content of any relationship between IHL and HRL. This is aside from the threshold issues of whether HRL applies in conflict or extraterritorially. Certain commentators, as Dietrich Schindler reports, ‘believe that humanitarian law is merely a subdivision of human rights’ law.38 Louise Doswald-Beck comments that ‘[i]nternational humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict’ tracing this trend to the United Nations Human Rights Conference held in Tehran in 1968.39 Pictet, however, asserts ‘the two systems are interrelated … conversely … they are distinct and should remain so.’40

A report of one group of experts gathered by Chatham House and the ICRC to consider detention in NIAC highlights the reality that the area is unsettled and that this has practical implications. The report states:

[T]here is the outstanding question of the exact interplay between IHL and IHLR in situations of armed conflict. The prevailing view is that IHLR continues to apply during armed conflict and is particularly relevant when addressing the issue of detention in NIAC. However, when giving concrete substance to interplay with IHL in practice, the different cultures of the two regimes need to be taken into account: ‘IHL’ is not equal to ‘IHLR during armed conflict’. The two bodies of law – while similar in some of their purposes and on many points of substance – are designed to address very different contexts. Finally, while IHL imposes obligations on all parties to a conflict, including non-State actors, IHLR – in the current state of international law – can only be said to be directly binding on States.41

35 Ibid 243–4
36 Watkin, above n 1, 2.
37 Droege, above n 5, 310.
40 Jean Pictet, Humanitarian Law and the Protection of War Victims (Sijthoff, 1975) 14.
41 Chatham House and International Committee of the Red Cross, above n 2, 861.
Michael Dennis points out that even amongst human rights bodies there is no unanimity regarding the relationship between IHL and HRL. He draws attention to the observation of Robert Goldman, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, that ‘[h]uman rights treaty bodies have no common approach on how human rights law relates to rules of international humanitarian law.’ That this issue is unsettled should not surprise. Although many argue IHL and HRL both now apply in conflict, and therefore interact in some form, ‘they were not necessarily meant to do so originally.’ Further, the HRL instruments themselves provide limited guidance regarding the nature of the relationship with IHL.

There are a number of complicating factors in determining the IHL-HRL relationship. One is that the applicable IHL is itself not fully settled, particularly in the context of NIAC. Lubell highlights a number of such areas of uncertainty:

The IHL and human rights law relationship in this situation is unclear, largely due to lack of clarity within IHL itself. The way forward here may well have to be through progress in the debate on the status of individuals during non-international armed conflicts, the issue of the direct participation of civilians in hostilities, and the consequences of losing protection.

A second complicating factor is the nature of the contemporary operational environments and the field of application of IHL. According to Watkin:

Attacks by non-state actors challenge the view of a neat division of armed conflict into the two spheres of international and noninternational. Identification of the boundaries of noninternational armed conflict has never been easy. While international humanitarian law is generally interpreted to have limited impact in situations that do not reach a level above ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence;’ the dividing line between the operation of that law and human rights law is not always clear or absolute.

A third complicating factor is the nature of HRL and the suitability of its fit with conflict situations. Yuval Shany highlights the design features of HRL in the context of conflict:

[The different points of departures of human rights law and IHL derive not only from differences in the ideological inclinations of their forebears, but also from structural reasons relating to the typical factual and institutional conditions that they are designed to govern. IHL governs situations of massive violence employed by collectives, often under conditions of uncertainty … and resource constraints. In such a factual environment, it is difficult, if not impossible, to engage in the same rigorous rights-based analysis that human rights law requires at times of peace.

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44 Droge, above n 5, 311.
46 Watkin, above n 1, 5 (citations omitted).
47 Shany, above n 4.
C Where the Relationship Matters – Detention and the Use of Force

As reported by Judge Meron, in the Furundzija case the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) emphasised that the general principle of respect for human dignity was the ‘basic underpinning’ of both human rights and humanitarian law.\(^4\) If indeed HRL and IHL share such a common understanding, then is the discussion about the relationship between IHL and HRL of more theoretical than practical importance? According to Sassòli and Olsen, IHL and HRL often provide the same or a similar result. They state concerning detention:

In non-international armed conflicts, too, both branches mostly lead to the same results. The treatment of persons detained or otherwise in the power of a state is prescribed in a very similar way. The judicial guarantees for persons under going trial are likewise very similar, but they are better developed in human rights.\(^4\)

However for Sassòli and Olsen there are at least two areas of operational significance where the provisions of IHL and HRL are different:

(O)n two questions, which are crucial in practice, not only is the relationship between the two branches unclear but also the answer of humanitarian law alone. First, may a member of an armed group, according to humanitarian law applicable to international armed conflict, be attacked (and therefore be killed) as long as he or she does not surrender or is not otherwise hors de combat, or is this, as in human rights, admissible only exceptionally and when an arrest is not feasible? Second, may a captured member of an armed force or group be detained similarly to a prisoner of war in international armed conflicts, until the end of active hostilities, and without any individual decision, or must the captured person, as prescribed by human rights, have an opportunity to challenge his or her detention before a judge?\(^4\)

Consequently, regarding whether in a NIAC an arrest option must be first considered before potentially lethal force is used or a detained person must be brought before a judicial officer, the relationship between IHL and HRL has significance as each body of law provides a different solution. This issue is examined in more detail below.

D The Broad Options

How then can IHL and HRL be reconciled. Is there conflict and tension or synergy? Can general conclusions be drawn or does the relationship depend on the specific norm and context in which it plays out?

Assuming that IHL and HRL can apply in the same operational setting, there are a number of options concerning their relationship. They include that one regime dominates or supplants the other. One commentator reviewing the history of the relationship says that in ‘addressing conflict with humanitarian law concepts, human rights law has largely deferred to humanitarian

\(^4\) Meron, above n 7, 266–7. The ICTY said: ‘The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender’: *Prosecutor v Furundzija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [185].


\(^4\) Ibid 601.
law’ with this deference being ‘acknowledged in the drafting of the International Covenant on Civil and Political Rights’ ([ICCPR]).\(^51\) In article 6 of that Covenant ‘lawful acts of war’ are not prohibited: ‘to the extent that in present international law “lawful acts of war” are recognized, such lawful acts are deemed not to be prohibited by Article 6.’\(^52\) Other commentators, particularly in more recent years, argue that the default paradigm in a NIAC situation is in fact the law and order or HRL-based legal paradigm rather than the conflict or IHL-based legal paradigm (based on an argument that HRL provides for greater protection of individuals). Another option though, at least in the NIAC context, is that the two legal paradigms are ‘competing’ with HRL having stronger accountability mechanisms and constraining the authorities to a greater degree than IHL.\(^53\) With this option, the victor in the competition is yet to be resolved. These options will be examined further below against a particular analytical framework.

E The Analytical Framework

The HRL bias or focus of HRL bodies and advocacy character of some scholarship is another complicating factor from the perspective of determining a technically correct and comprehensive analytical framework for the nature of the IHL-HRL relationship. Cordula Droege, for example, notes the frequent claim IHL and HRL are ‘complementary and mutually reinforcing’ but argues such a ‘concept of complementarity is … of a policy rather than a legal nature.’\(^54\) For Droege the IHL-HRL relationship requires legal methods of interpretation to be applied and supports a notion of legal complementarity that is in conformity with the Vienna Convention on the Law of Treaties (‘VCLT’)\(^55\) and the concept of lex specialis.\(^56\) Although this analytical framework was adopted by the ICJ, its terms were not made clear and, in any case, international bodies examining the issue of the application of HRL to conflict have not necessarily followed the ICJ’s lead.

III THE LEX SPECIALIS APPROACH\(^57\)

A Introduction

Human rights obligations and humanitarian law should not always be presumed to be clashing, and the latter is not to be simplistically considered lex specialis with relation to the former.\(^58\)

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\(^51\) Meron, above n 7, 240.
\(^52\) Meron, above n 7, 240 quoting the Report of the Secretary General on Respect for Human Rights in Armed Conflicts, 25th sess, UN Doc A/8052 (18 September 1970) 104.
\(^53\) Shany, above n 4.
\(^54\) Droege, above n 5, 337.
\(^55\) Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
\(^56\) Droege, above n 5, 337.
Notwithstanding uncertainties regarding the precise relationship between IHL and HRL, IHL instruments themselves concede a role for HRL. For example, in the preamble to Additional Protocol II\textsuperscript{59} states parties recall ‘furthermore that international instruments relating to human rights offer a basic protection to the human person’. The ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions describes the reference as follows:

This paragraph establishes the link between Protocol II and the international instruments on human rights. The paragraph is based on a proposal made by the experts which was then included in the ICRC draft.

The term ‘international instruments relating to human rights’ means the instruments adopted by the United Nations, ie, on the one hand, the Universal Declaration of Human Rights and the Covenants derived from it, in particular the Covenant on Civil and Political Rights, and on the other, the instruments concerning specific aspects of the protection of human rights, such as the Convention on genocide and the Convention on the elimination of racial discrimination, which are often invoked in situations of non-international armed conflict, and also the recent Convention on torture, to mention only a few of the most important ones. Regional instruments relating to human rights also fall under this term. It is the first time that the term is explicitly used in a treaty on humanitarian law.\textsuperscript{60}

The ICJ has placed the \textit{lex specialis} principle at the heart of the analytical framework for the IHL–HRL relationship but, as noted above, the ‘ICJ’s understanding of the \textit{lex specialis} concept is not entirely clear’\textsuperscript{61} Is a body of law the \textit{lex specialis} simply because it is more detailed for example? At the Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation (‘Right to Life Expert Meeting’) held in 2005 one expert ‘sought to clarify what exactly the \textit{lex specialis} concept means under general international law’\textsuperscript{62} In the view of this expert, there can only be a \textit{lex specialis} where there is a body of law with provisions which are more detailed, more specific and, most importantly, clearer than the provisions in the law generally. However another expert disagreed. For this expert ‘a \textit{lex specialis} need not necessarily be more detailed, more sophisticated or clearer than the rules that could be found in the \textit{lex generalis}; the \textit{lex specialis} need only to designed for the given situation.’\textsuperscript{63}

This is an important issue for the purposes of this Chapter. Scholars who support a role for HRL in conflict often argue on the basis that HRL, including its case law, sometimes provides more specific guidance than IHL; that HRL is clearer as it avoids, for example, issues surrounding what triggers its application and status issues. The counterargument, though, rests on IHL being specifically designed for situations of conflict. Two issues therefore arise. First, from a technical legal perspective what is the nature of the \textit{lex specialis} principle? Second, how is to be applied to the IHL–HRL context?

\textsuperscript{59} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).

\textsuperscript{60} Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff, 1987) 1339–40 [4427]–[4428] (citations omitted).

\textsuperscript{61} University Centre for International Humanitarian Law, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation (2005) 19.

\textsuperscript{62} Ibid 20.

\textsuperscript{63} Ibid.
Regarding the first issue, an authoritative reference is the Report of the Study Group on the International Law Commission on the Fragmentation of International Law (‘ILC Report’). Before describing the principle itself the Report makes two preliminary points. First, the VCLT is the starting point for treaty interpretation. Specifically ‘[w]hen seeking to determine the relationship between two or more norms to each other, the norms should be interpreted in accordance with or analogously to the [VCLT]’ particularly the articles concerning treaty interpretation, that is, articles 31 through 33. Second, where possible the norms should be ‘harmonised’: That is, ‘when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations’.

For Sassòli and Olson the lex specialis principle ‘seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently’. For them, the rationale is that the ‘special’ rule should be preferred as ‘it is closer to the particular subject matter and takes better account of the uniqueness of the context’.

According to the ILC Report the ‘rationale of the principle’ is:

That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law.

The ILC Report sets out further positions:

- **Meaning of the Maxim:** Regarding the full maxim itself – lex specialis derogat legi generali – the ILC Report describes it as a generally accepted technique of interpretation and conflict resolution in international law and it ‘suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific’.

- **‘Special’ or ‘Specific’:** Highlighted here is the fact that the ILC Report uses the terms ‘specific’ and ‘special’ interchangeably with the term ‘special’ being used more frequently. This indicates that the level of detail or specificity in a particular norm may not be the crucial factor. Rather, which is the ‘special’ norm is the relevant consideration. This approach is reinforced by the ILC Report indicating that the lex specialis principle is a technique of interpretation, which sits with other techniques of interpretation. According to the Report, which norm dominates is to be determined ‘contextually’.

- **Functions of the Principle:** The ILC Report states that ‘[m]ost of international law is disposi-
tive’. According to the Report ‘[t]his means that special law may be used to apply, clarify,
update or modify, as well as set aside, general law.\textsuperscript{74} Therefore, from a technical perspective, all options regarding the IHL-HRL relationship are potentially open.

- **The Principle of Harmonisation**: The *lex specialis* principle is applied in light of other principles of interpretation including the principle of harmonisation. That principle is to the effect that ‘when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.’\textsuperscript{75}

- **The Effect of the Lex Specialis Principle on the General Law**: According to the ILC Report:

  The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization … continue to give direction for the interpretation and application of the special law and will become fully applicable in situations not provided for by the latter.\textsuperscript{76}

- **The Role of General Law – Gap-Filling**: The scope of special laws is by definition narrower than that of general laws. Thus, it will frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.

- **Examples of ‘Special’ Laws**: The ILC Report states that ‘sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a “special regime”.’ Examples are including ‘law of the sea’, ‘humanitarian law’, ‘human rights law’, ‘environmental law’ and ‘trade law’.\textsuperscript{77} According to the Report, both IHL and HRL are ‘special’ laws. What then is the ‘general’ law? Is it ‘general international law’ the expression used in the ILC Report,\textsuperscript{78} rather than IHL and HRL being the *lex specialis* or *lex generalis* vis-à-vis each other?

- **Review of ICJ Approach**: The ICJ’s approach to the *lex specialis* principle and the relationship between IHL and HRL can be reviewed in light of the ILC Report. Neither the ILC nor the ICJ describes HRL as *lex generalis*. The ILC refers to both IHL and HRL as being ‘special’ laws. The ICJ refers to IHL being the *lex specialis* in conflict, apparently on the basis it was designed for the conflict context. Consequently, rather than analysing the IHL and HRL relationship based on a *lex specialis* and *lex generalis* paradigm, perhaps a more technically correct examination is based on there being possibly two legal norms (one IHL and one HRL) in play on the same issue. The relationship between IHL and HRL is then based on principles such as that of harmonisation. However, the ICJ has determined the IHL is the *lex specialis* during situations of conflict so, if the two norms cannot be harmonised, then the IHL norm prevails.

**B International Court of Justice**

The ICJ in the Nuclear Weapons Advisory Opinion decided that the international law interpretation and conflict resolution technique represented by the maxim *lex specialis derogat legi generali* provided the framework for the HRL and IHL relationship. After stating that ‘the right not arbitrarily to be deprived of one’s life applies also in hostilities’ the ICJ said as follows:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable

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\textsuperscript{74} Ibid 178 [251(8)].
\textsuperscript{75} Ibid 178 [251 (4)].
\textsuperscript{76} Ibid 178 [251 (9)].
\textsuperscript{77} Ibid 178 [251 (12)].
\textsuperscript{78} Ibid 178 [251 (14)].
lex specialis, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.79

The ICJ analysis regarding the relationship between IHL and HRL in conflict situations was not comprehensive. There is doubt, therefore, as to what the relationship is in practice regarding the two regimes. Lubell, for example, argues that although the ICJ, ‘in its Nuclear Weapons Advisory Opinion, did state the applicability of human rights law, the use of the term lex specialis might have been construed as support for a claim that whereas human rights law then does not disappear, it nevertheless is in effect displaced by international humanitarian law’.80

There is also a question as to whether the Court’s reasoning in the Nuclear Weapons Advisory Opinion can be generalised with regard to human rights law since the opinion was specifically directed toward the right to life. If not, Frowein argues that human rights treaties in general would not have to be interpreted in light of international humanitarian law.81

In the Wall Advisory Opinion the ICJ again looked at the issue. It referred to a number of possible options for the interaction between IHL and HRL with the lex specialis principle determining the details of the interaction. It stated:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.82

The ICJ recalled and applied the above in the contentious Armed Activities case.83

Lubell, as noted above, suggested possible uncertainty regarding the Nuclear Weapons Advisory Opinion. However, he states that the Wall Advisory Opinion, together with the views of UN human rights bodies, ‘have clarified that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict.’84 The opinion also applies the lex specialis principle beyond the right to life situation indicating a more comprehensive application.

There has been criticism of the ICJ’s treatment of the IHL-HRL relationship and the lex specialis principle. For example, after noting that the ICJ asserted in Wall Advisory Opinion that, while IHL constitutes the lex specialis in armed conflict, only some rights are governed exclusively by IHL, while others are governed exclusively by HRL and still others by both bodies of law, some experts at the Right to Life Expert Meeting ‘characterized this analysis as utterly unhelpful’.85

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79 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 240 [35].
80 Lubell, above n 45, 737–8.
81 Watkin, above n 1, 32 n 235.
82 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, 178 [106].
84 Lubell, above n 45, 738.
85 University Centre for International Humanitarian Law, above n 62, 19.
It was reported that ‘[a]ll of the experts were of the opinion that the ICJ’s understanding of the *lex specialis* concept is not entirely clear.’\(^6\)

In light of the ICJ’s very broad treatment of the options for the IHL-HRL relationship, Cordula Droege attempted to place specific rights against each of the three stated options:

[R]ights that are exclusively matters of humanitarian law, for instance, are those of prisoners of war. Rights which are typically a matter of human rights law are such rights as freedom of expression or the right to assembly. Rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to life, a number of economic and social rights, and rights of persons deprived of liberty.\(^7\)

In sum, although in two advisory opinions and one contentious case the ICJ has addressed the issues of the application of HRL to conflict, the application of HRL extraterritorially and the relationship between IHL and HRL, some view its treatment as somewhat ‘abstract’\(^8\) and ‘unhelpful’.\(^9\) Certainly the ICJ has not been comprehensive, particularly regarding the nature of the relationship between IHL and HRL and the rights that may be applicable, resulting in space being left for competing positions to be taken.

**C Human Rights Committee**

Therefore, assuming that HRL applies in conflict, in theory the *lex specialis* principle provides the analytical framework for determining the relationship between IHL and HRL. Note, though, that this is the approach of the ICJ but not the Human Rights Committee (‘HRC’). The HRC has not fully embraced the principle. Although the HRC did refer to the essence of the principle in *General Comment 31* it was more in the context of highlighting the role of HRL in conflict. The Committee stated:

As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.\(^9\)

The approach of the HRC to the ICJ’s use of the *lex specialis* principle in the context of the IHL-HRL relationship was noted in the report of the Right to Life Experts Meeting. The report states that ‘the HRC has never explicitly affirmed the *lex specialis* nature of IHL in armed conflict, although it referred to the complementary character of IHL in its *General Comment 31*.\(^9\)

**D European Court of Human Rights**

According to Hampson the practice of human rights bodies such as the ECtHR in dealing with NIAC where there has been no derogation is to ‘use human rights law in its entirety’.\(^9\) Conse-
sequently, the ECtHR has ‘never referred to LOAC/IHL’, although, ‘in certain cases, it is possible to
detect that there is an awareness of the type of analysis that would be conducted under LOAC/
IHL’.93 Hampson speculates though that this is ad hoc depending on who the judge is or who
in the Secretariat is responsible for the case.94

Part of the explanation for the treatment of IHL by the European Court of Human Rights
(‘ECtHR’) is the drafting of the European Convention on Human Rights (‘ECHR’) itself,95 which
distinguishes it from the ICCPR. Regarding the use of force, the ICCPR makes provision for
protection from ‘arbitrary’ killing and provides for no derogation.96 ‘Arbitrary’ is not defined
and, as indicated by the ICJ, in determining whether a killing has been arbitrary, recourse can
be made to IHL. However, ‘the position is more complicated’ under the ECHR.97 This results
from article 2 of the ECHR not accounting for situations of conflict. Article 2 lists the permitted
grounds for opening fire. Article 15 is the derogation article and it does account for conflict.
It provides that there can be no derogation in relation to article 2 ‘except in respect of deaths
resulting from lawful acts of war’.98 Hampson indicates that this means that the ECtHR cannot
use IHL as the framework of analysis for finding an overt violation of human rights law only
‘if the state had derogated, or by saying that IHL was relevant as a matter of law’.99 However, no
state has ever derogated from article 2.100

The above analysis indicates that unless a state derogates in a conflict situation, the ECtHR
has difficulty in expressly taking account of IHL. In ‘the recent Chechen cases of Isayeva and
others, for example, the European Court dealt with a non-international armed conflict, but
discussed only violations of human rights, not IHL.’101 A consequence of this approach is that
the ECtHR has not overtly dealt at all with the lex specialis principle in the context of the rela-
tionship between IHL and HRL.

William Abresch asks whether, after the Chechen cases, the ECtHR has made a mistake in
disregarding humanitarian law:

Construing humanitarian law as a lex specialis to human rights law has lent some unity and coherence
to the otherwise fragmented standards governing armed conflicts. Does the ECtHR’s approach return us
to confusion and conflicting legal requirements? The answer would be yes if the ECtHR were to directly
apply human rights law to the conduct of hostilities in international armed conflicts … For the ECtHR
to simply invent a new set of rules would be to flout the express intention of states … But if we understand
the ECtHR’s jurisprudence on the conduct of hostilities to be limited to internal armed conflicts, it is much
harder to argue that the ECtHR has overreached.102

Abresch’s distinction between international armed conflict and NIAC reflects the greater role
for treaty law in IAC. With the more recent developments regarding the application of rules of

94 Ibid.
95 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950,
CETS No 5 (entered into force 3 September 1953).
96 ICCPR arts 4, 6(1).
97 Hampson, above n 24, 564.
98 Ibid.
99 Ibid.
100 Ibid.
101 Lubell, above n 45, 742 (citations omitted).
102 William Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in
IAC to NIAC on the basis of customary law, the claim that the ECtHR has overreached both in IAC and NIAC is stronger.

Gaggioli and Kolb are critical of the approach of the ECtHR to the issue. They note that the Court ‘has been far from applying IHL as lex specialis in cases of an armed conflict’; rather, it has ‘resisted any explicit reference to IHL’.103 They critically conclude that this results in ‘a global and coherent construction of the protective rules in times of armed conflict’ being precluded with ‘fragmentation’ being favored.104

Does approaching situations like those in Chechnya and in the Turkish campaigns against the PKK from the perspective of HRL rather than IHL cause any substantive difficulties? Kretzmer notes that in the cases concerning these campaigns it has been argued that the ECtHR ‘reached conclusions that appear to be largely consistent with the norms of IHL’.105 However, Hampson sees the non-application of IHL by the ECtHR as potentially problematic. For example, she argues ‘there is a real risk that the state will be found responsible for a killing in breach of human rights law which would not have been unlawful under IHL’.106

Why then was the ECtHR drafted as it was? Kretzmer, relying on the work of Brian Simpson, concludes that the provision in article 15 ‘was not subject to serious analysis and consideration’; it was dealt with in an ‘amateurish fashion’.107

E Inter-American Commission and Court of Human Rights

According to Droege, the Inter-American Commission is the only human rights body that ‘has expressly assigned itself the competence to apply humanitarian law’.108 In this regard there is a distinction between the approach of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (‘IACtHR’). Hampson indicates that the Inter-American Commission has ‘shown a willingness to explicitly apply the rules of LOAC/IHL’ whereas the Court has taken a less direct approach.109 She indicates that the IACtHR has ruled that ‘the relevant provisions of the Geneva Conventions may be taken into consideration when interpreting the American Convention’, however, ‘the Commission and Court can only find a violation of [HRL] and not of LOAC/IHL’.110

104 Ibid 126.
105 Kretzmer, above n 11, 30.
106 Hampson, above n 24, 563–4 (citations omitted). Hampson also refers to the results of the treatment of IHL by the European Commission of Human Rights based on the terms of the ECtHR. Following the Turkish invasion and occupation of Cyprus four cases were brought by Cyprus against Turkey. The first three were heard by the Commission with the fourth by the ECtHR. No notice of derogation had been lodged. In Cyprus v Turkey (1976) Commission determined that the detention of POWs during an international armed conflict was a violation of the Convention. Hampson argues ‘that such as a result is absurd’ and ‘the only way to avoid an absurd result would be by applying IHL, but under the ECtHR that would require states to derogate’: at 565–6.
107 Kretzmer, above n 11, 17.
108 Droege, above n 5, 322.
110 Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [71].
Arguably the most important pronouncement regarding the IHL-HRL issue in the Inter-American system has been the report of the Commission in Abella v Argentina. This case concerns events that took place on 23–24 January 1989, at the barracks of the General Belgrano Mechanized Infantry Regiment No 3, located at La Tablada, Buenos Aires province, and the consequences ensuing from those events for the 49 persons on whose behalf a complaint was filed with the Commission. On 23 January 1989, 42 armed persons launched an attack on the barracks. The attack precipitated combat of approximately 30 hours duration between the attackers and Argentine military personnel that resulted in the deaths of 29 attackers and several state agents. The Commission deemed IHL applicable to the situation:

The Commission concludes … that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.

But the Commission also indicated that HRL was applicable as well:

The American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity. These human rights treaties apply both in peacetime, and during situations of armed conflict. Although one of their purposes is to prevent warfare, none of these human rights instruments was designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare.

In contrast, international humanitarian law generally does not apply in peacetime, and its fundamental purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities. It is understandable therefore that the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.

It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other. Indeed, the authors of one of the authoritative commentaries on the two 1977 Protocols Additional to the 1949 Geneva Conventions state in this regard:

Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law …

Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.

In the Abella case, the Commission made direct use of IHL and in particular of article 3 common to the four Geneva Conventions of 1949, stating that human rights law did not give enough tools to analyse the case in hand. The Commission repeated this approach in the Las...
Palmeras case,\(^{115}\) declaring that Colombia had violated Common Article 3. The Inter-American Court though was not pleased with this outcome and ruled that neither the Commission nor the Court had the mandate to make direct pronouncements on violations of IHL.\(^{116}\)

Concerning the approach of the Commission, the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism appointed by the UN High Commissioner for Human Rights stated:

The Inter-American Commission on Human Rights has recognized that the test for evaluating the observance of a particular human right in a situation of armed conflict may be distinct from that applicable in peacetime. Accordingly, the Commission has looked to rules and standards of international humanitarian law as sources of authoritative guidance or as the lex specialis in interpreting and applying the American Convention or American Declaration of the Rights and Duties of Man to resolve claimed violations of these instruments in combat situations.\(^{117}\)

The report described this approach as ‘consistent with the view of ICJ concerning the relationship between international humanitarian and human rights law in situations of armed conflict’.\(^{118}\)

F Scholars

The review above indicates that the tribunals and human rights bodies have not clearly and comprehensively addressed the application of the lex specialis principle in this area nor the nature of the IHL-HRL relationship. Not surprisingly, then, scholars have taken a range of approaches on the issues. They have variously addressed issues such as: which set of norms is the lex specialis — is it context driven or based on the level of detail of the respective rules; how are omissions to be addressed — do they represent a ‘gap’ or deliberate silence reflecting the special context; and, if a set of norms is determined to be lex specialis what is the role of the lex generalis or other relevant sets of norms?

Regarding the application of the lex specialis principle, Sassòli and Olson take an approach similar to that of the ILC Report above. They state:

Once the lex specialis is determined, the lex generalis still remains present in the background. It must be taken into account when interpreting the lex specialis; an interpretation of the lex specialis that creates a conflict with the lex generalis must be avoided as far as possible and an attempt made instead to harmonize the two norms.\(^{119}\)

But which is the lex specialis? The ICJ could be seen as supporting the position that IHL is the lex specialis in conflict situations. However, for Sassòli and Olsen, in some cases HRL can be the lex specialis rather than IHL. They state:

The International Court of Justice … and various human rights bodies have explored the extent to which humanitarian law is the lex specialis compared with human rights. What has provoked less jurisprudence is that on some issues human rights constitute the lex specialis.\(^{120}\)

\(^{115}\) Las Palmeras (Inter-American Court of Human Rights, Case No 11.237, 4 February 2000) [43].

\(^{116}\) Lubell, above n 45, 742.


\(^{118}\) Ibid [31].

\(^{119}\) Sassòli and Olson, above n 49, 605 (citations omitted).

\(^{120}\) Ibid 600.
The approach on this issue can be seen as being consistent with the approach taken above after reviewing the ILC Report. That is, both IHL and HRL can be seen as *lex specialis* rather than one being the *lex specialis* and the other the *lex generalis*. The question is when does each apply? This does not resolve another practical problem in this area though. As Sassòli and Olsen point out, one of the problems with applying the *lex specialis* rule in practice is that ‘even if the *lex specialis* principle were to provide clear answers for cases in which the two branches of law respond to the same question with different rules (and it does not), it could only operate if the answer provided by each of the branches were clear.’

Thus, the content of IHL is not clear in the two areas highlighted targeting members of armed groups and detention in NIAC. They further highlight that guidance is limited in finding a solution since the HRL cases have not addressed the issues in the context of NIAC.

Droege distinguishes two aspects regarding the *lex specialis* principle. She interprets the ILC Report to mean that the *lex specialis* principle has two roles. One is as more specific interpretation of the general law and the other is as an exception to the general law. As a consequence, she concludes:

> While complementarity can often provide solutions for harmonizing different norms, it has its limits. When there is a genuine conflict of norms, one of the norms must prevail. In such situations, the *lex specialis* principle, in its narrow sense, ie as a means to solve conflict of norms, is useful to provide answers.

For Gaggioli and Kolb a key issue, and a cause of uncertainty, is the level at which the *lex specialis* rule operates. That is, ‘is it at the level of the branches as a whole (IHL versus HRL) or is it at the level of single (conflicting) norms on a case-by-case basis’? They assess that the ICJ sees the first level as applying but point out that there are problems with this as the ICJ clearly sees the simultaneous application of HRL and IHL. They posit that in fact the ICJ may not have used the *lex specialis* principle in the sense of the ‘special’ derogating from the ‘general’ in a conflict of norms situations but in ‘a somewhat larger and improper sense’, namely that ‘to designate the fact that IHL is a body of law specifically dealing with armed conflicts which may thus, in areas of common concern to both branches of the law, complement the general protection offered by IHL’.

If the level at which the *lex specialis* principle is applied is that of the individual norm, what makes a particular norm rule ‘special’? Gaggioli and Kolb refer to a number of possibilities: the precision and clarity of the rule; its adaptation to the particular circumstances; and the degree of protection it offers. On the later, however, it is possible the less protective rule may have been intended to derogate from the more general rule.

How, then, is the ICJ approach to apply to the doctrine and the relationship between IHL and HRL? Hampson accepts that the ‘ICJ may not have used the most appropriate formulation’ for the *lex specialis* principle but ‘it is clear in general terms what the Court meant.’ According
to Hampson it ‘appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL’.130 But as pointed out by Hampson this ‘does not in fact explain how the lex specialis doctrine should work in practice’.131

For Hampson there are a number of possibilities for the relationship between IHL and HRL based on the lex specialis principle. In stating those possibilities Hampson does not identify HRL as the lex generalis but, rather, bases her analysis on the ICJ’s approach:

There are various possibilities. It could be that once IHL is applicable, it is the sole legal basis on which a human rights body can base its decision … That would, in effect, mean that IHL displaces the applicability of human rights law, which is contrary to the express ruling of the ICJ that human rights law remains applicable.132

Another possibility is that IHL prevails where it contains an express provision, which addresses a similar field to that of a human rights norm … Whilst superficially both plausible and attractive, there are two difficulties with this solution. First, while some rules of human rights law would be significantly affected by IHL, notably the prohibition of arbitrary killing and the prohibition of arbitrary detention, others would be totally, or almost totally, unaffected. There is virtually nothing in IHL, at least not in treaty law, on the right to demonstrate or on freedom of expression. Both, however, may be significantly affected during conflict.133

A possible third solution is that the lex specialis would depend upon the precise issue at stake. For example, IHL would be regarded as the lex specialis, but where it provided for a fair trial without specifying what that entailed, human rights law would be the law applied to determine the prerequisites of a fair trial. It is one thing for human rights law to be used as guidance, but quite another for it to be regarded as the legally binding rule to which precedence should be given … The suggestion is that, with regard to those aspects of the right not otherwise covered by IHL, human rights law would prevail.134

For Roberts ‘the relation between human rights law and the laws of war is not a simple confrontation between the lex generalis of human rights and the lex specialis of the laws of war’ rather the relationship is ‘extraordinarily complex’.135 He notes that this in part results from gaps in IHL and the greater detail in HRL which results in HRL being able to ‘provide procedures for assisting in the implementation of key provisions’ of IHL.136

IV OPTIONS FOR INTERACTION

A Introduction

As revealed above, the understanding and application of the lex specialis principle in the context of its treatment by the ICJ has been varied. Consequently, a wide range of options for the interaction, if any, between IHL and HRL have been proposed by scholars or indicated in the cases. Some are based on the lex specialis principle while others are not.

130 Ibid.
131 Ibid.
132 Ibid 559–60 (citations omitted).
133 Ibid 560.
134 Ibid 561.
135 Roberts, above n 23, 594.
136 Ibid.
The NIAC situation poses particular problems in this area. Even if the *lex specialis* principle is the guide, the paucity of treaty law applicable to NIAC and the controversy regarding aspects of the content of customary law makes it is harder to argue IHL is *lex specialis* during NIAC in all aspects. Also, as John Cerone points out the ‘situation becomes more complex … when a state is engaged in a non-international armed conflict taking place outside of that state’s territory’.137

Concerning the IHL–HRL relationship specifically in the NIAC situation, ‘[v]arious possible solutions can be put forward, though none of them appear wholly satisfactory’.138 According to Lubell, they include: HRL prevails in NIAC; HRL standards prevail in ‘domestic situations of a certain scale’ (raises threshold for NIAC); and rather than relying on the *lex specialis* principle decide relationship based on the degree of state control over a particular situation.139

Various options for the IHL–HRL relationship are examined below. It is emphasised that the options are not all mutually exclusive. A number can apply together. At times the options are separated as they represent different aspects of the issue but, at other times, the separation more reflects how the option has been articulated by scholars and courts.

B Normative Influence

On one level at least there is undoubtedly some interaction between IHL and HRL. HRL is increasingly influencing the content of IHL. Prior to the 1950s, IHL and HRL ‘developed separately and were unrelated’,140 but at least since the two *Protocols of 1977 Additional to the Geneva Conventions* there has been greater convergence with them becoming increasingly ‘intertwined’.141 It has even been said that through the two *Protocols*, ‘[t]he world of humanitarian law paid tribute to the world of human rights law’.142

As discussed above, according to Judge Meron one theme that has emerged in international law has been the ‘humanisation’ of IHL – ‘a process driven to a large extent by human rights and the principles of humanity’.143 In his terminology ‘humanisation’ means that development in the content of IHL is increasingly influenced by human rights law:144

Common Article 3 is supremely important because it clarifies that rights are granted to the protected persons themselves and introduces into international humanitarian law an analogy to *jus cogens*, which is central to human rights law.145

Human rights law influenced the provisions of the Geneva Conventions and Additional Protocols. Par-

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137 Cerone, above n 10, 8.
138 Lubell, above n 45, 749.
139 Ibid 749–50.
140 Schindler, above n 38, 935.
141 Ibid 938.
142 Doswald-Beck and Vité, above n 39, 94–119. Prior to the *Additional Protocols*, Common Article 3, applicable to NIACs, contained classic human rights protections. For example, included were the humane treatment of those not taking a part in hostilities, the protection from violence to life and person and outrages upon person dignity as well as certain judicial guarantees. Thereafter, for example, *Additional Protocol I* art 71 and *Additional Protocol II* preamble expressly refer to applicable human rights instruments. Several provisions of each Protocol draw on human rights language, such as *Additional Protocol I* article 75 and *Additional Protocol II* art 6. See Schindler, above n 38, 937–8.
143 Meron, above n 7, 239.
144 Ibid 246.
145 Ibid 252.
allelism of content was attained on such matters as the right to life; the prohibition of torture and cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or detention; discrimination on grounds of race, sex, language, or religion; and due process of law. This parallelism and growing convergence enriches humanitarian law, as it does international human rights.\textsuperscript{146}

C Aid to Interpretation

An aspect of the relationship between HRL and IHL closely related to the influence and limited overlap aspect discussed above is that each body of law is being used to interpret provisions in the other legal regime.

Regarding HRL being used to interpret IHL, Judge Meron contends that the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda affords a wealth of material showing how criminal tribunals applying humanitarian law are informed by human rights law.\textsuperscript{147} A specific example of ICTY jurisprudence in this area is the Appeals Chamber decision in the Čelebići case. The Appeals Chamber used HRL to support a conclusion regarding the application of a provision of IHL to both IAC and NIAC. Regarding the application of Common Article 3 the Appeals Chamber said:

Common Article 3 may thus be considered as the ‘minimum yardstick’ of rules of international humanitarian law or similar substance applicable to both internal and international armed conflicts … This interpretation is further confirmed by a consideration of other branches of international law, and more particularly of human rights law … The universal and regional human rights instruments and the Geneva Conventions share a common ‘core’ of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.\textsuperscript{148}

Yuval Shany refers to a reinterpreting of ‘traditional IHL norms and concept in ways that correspond to human rights principles.’\textsuperscript{149} Specifically, in the Targeted Killing case\textsuperscript{150} ‘President Barak opined that the principle of proportionality – a key IHL principle – should be re-conceptualized so as to incorporate inter alia the duty to opt for the least harmful measure even with relation to enemy combatants.’\textsuperscript{151} The ICRC Interpretative Guidance on Direct Participation in Hostilities under International Humanitarian Law comes to a similar conclusion based on an IHL-based view of the notion of the principles of humanity and military necessity.\textsuperscript{152}

Louise Doswald-Beck provides a number of examples where HRL can more fully indicate the content of IHL. One example is that IHL provides that persons cannot be convicted and sentenced unless they have had a ‘fair trial.’\textsuperscript{153} Doswald-Beck asks though ‘how do we define

\textsuperscript{146} Ibid 266.
\textsuperscript{147} Ibid 244.
\textsuperscript{148} Prosecutor v Delalic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT–96–21-A, 20 February 2001) [147]–[149].
\textsuperscript{149} Shany, above n 4.
\textsuperscript{150} Public Committee against Torture in Israel v Government of Israel [2006] 2 ISR LR 459 (‘Targeted Killings’).
\textsuperscript{151} Shany, above n 4.
\textsuperscript{152} International Committee of the Red Cross, Interpretative Guidance on Direct Participation in Hostilities under International Humanitarian Law (2009) 77.
\textsuperscript{153} Additional Protocol II art 6.
what constitutes a “fair trial”? She concludes that there ‘are some indications in Protocol II, but there are a lot more indications in human rights law’.  

Another example is the IHL requirement to ‘respect for their person, honour and convictions and religious practices’. Again Doswald-Beck asks what is meant by this expression, concluding that ‘there’s a lot more material, in addition to classical humanitarian law, to be found in human rights law and which is considered to be non-derogable’.

Regarding the other side of the coin, IHL aiding the interpretation of HRL provisions, John Cerone notes as follows:

In situations where these branches of international law overlap, the ICJ, the IACHR, and the Human Rights Committee have all concluded that the application of human rights law in times of armed conflict or occupation must be informed by the standards of humanitarian law.

How far though can this process go? It is limited by the different fundamental natures of the two regimes. Yuval Shany describes the ‘different points of departures of human rights law and IHL’ which are derived not only from differences ‘in the ideological inclinations of their forefathers, but also from structural reasons relating to the typical factual and institutional conditions that they are designed to govern’. Consequently, practical differences result:

[T]he laws of war appear to be more receptive to notions of collective responsibility (e.g. targeting and detaining combatants on the basis of their group affiliation; the imposition of collective movement restrictions, such as siege and curfew, on enemy populations) and confer broad discretion on military decision makers.

D IHL Excludes HRL

1 Direct Exclusion

The question here is not whether HRL helps explain IHL provisions but whether HRL requirements can apply in conflict or occupation in addition to IHL rules.

The issue of the extraterritorial application of HRL instruments was examined in Chapter 3 Part III above. If the view is taken that particular HRL instruments do not apply extraterritorially, then the issue of its relationship with IHL does not arise. For example, Michael Dennis argues that HRL instruments do not apply extraterritorially in times of conflict. He further argues, however, that even assuming that they did, they would not replace IHL. He states:

The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the lex specialis of international humanitarian law.

155 Additional Protocol II art 4(1).
156 Chatham House, above n 155, 51 (Louise Doswald-Beck).
157 Cerone, above n 10, 7 (citations omitted).
158 Shany, above n 4.
159 Ibid.
In Dennis’s view the ICJ appears to ‘recognize that the lex specialis of international humanitarian law may exclude the general application of certain provisions of human rights instruments during periods of armed conflict and military occupation’. He notes that the ICJ, although raising three categories of rights based on various forms of IHL and HRL, with the first category being that IHL applied exclusively, did not split the various rights into the three categories. Perhaps resulting from his view that HRL instruments generally do not apply extraterritorially, Dennis also did not attempt to place rights into the various categories.

Kretzmer raises a subtle implication of the lex specialis principle in terms of the affect of HRL on IHL provisions in the context particularly of the right to life under the ICCPR: ‘[t]o the extent that IHL is less protective of certain rights, such as the right to life, than the applicable human rights regime, its application as lex specialis narrows protection of these rights.’ Kretzmer seems to be saying that in such situations the application of the lex specialis principle would not permit supplementing IHL protections with HRL protections.

2 Indirect Exclusion: The Issue of Silence

One issue in determining the relationship between IHL and HRL is how to deal with areas in which IHL is silent. For example, Additional Protocol II does not provide for the right to liberty of movement or the right of freedom of expression and association. Are these ‘gaps’ which can legitimately be filled by HRL? Gaggioli and Kolb point out that there can be a conflict of norms ‘if one of the two branches of the law does not contain a norm on a subject matter whereas the other does, but only if the absence of the regulation corresponds to an intentional omission ie a “qualified silence.”’

Michael Dennis is of the view that the adoption of Additional Protocol II (which deliberately includes certain rights contained in the ICCPR, but not others) indicates that states intended for there be a different legal regime for conflict situations. For example, Dennis holds that IHL contains, as a result of a deliberate effort by states, rights that apply in armed conflict (eg protection of persons deprived of their liberty (article 5 Additional Protocol II)) but ‘[o]n the other hand, states did not include other specific guarantees provided for in the ICCPR within either Protocol, such as the right to liberty of movement and freedom of expression and association.’ He supports this view with the following statement from Dietrich Schindler: ‘[t]he adoption of the two 1977 Protocols Additional to the Geneva Conventions is a proof that a separate set of rules for armed conflict is in fact what states want.’

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161 Dennis, ‘Non-Application’, above n 42, 485.
162 Ibid.
163 Kretzmer, above n 11, 18.
164 Dennis, ‘Non-Application’, above n 42, 498.
165 Gaggioli and Kolb, above n 104, 122.
166 Dennis, ‘Non-Application’, above n 42, 498. Additional Protocol II art 5 concerns protections for persons whose liberty has been restricted; Additional Protocol I art 75(3) expands on ICCPR art 9(2) rights concerning information as to reasons for detention.
167 Dennis, ‘Non-Application’, above n 42, 498. Cf International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973). Commentary 134 (No. CDDH/3, 1973): The system of protection set up by international which humanitarian law … differs from that provided by instruments on human rights. Nevertheless, the view was held that some basic provisions of the ICCPR – particularly those from which no derogation may be made even in time of public emergency which threatens the life of the nation – should be applicable in the context of armed conflict.
This approach would indicate that the mere fact that IHL was silent regarding a particular norm that HRL expressly addresses would not be enough to argue that HRL can then fill the gap, that is, effectively to expand the field covered by legal regulation. Whether the silence in IHL indicates a genuine gap or is a natural and perhaps deliberate result of law-makers accounting for the conflict context would need to be considered on a case-by-case basis.

E Simultaneous Application of IHL and HRL

IHL Requires the Application of HRL

In the specific situation of occupation it can be argued that IHL requires the occupying power at least to ‘respect’ HRL instruments applicable to the occupied territory by virtue of article 43 of the 1907 Hague Regulations.\(^{168}\) Article 43 provides that an occupying power ‘shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.\(^{169}\)

Complementarity and Overlap/Convergence

Chaloka Beyani refers to ‘the complementarity underlying the interplay between international humanitarian law applicable in internal armed conflicts and the relevant accompanying aspects of international human rights law’.\(^{170}\) But how does this ‘complementarity’ manifest itself? For Beyani, one area is in the scope for the application of breaches of IHL being brought before HRL institutions:

There is also complementarity arising from the use of human rights bodies as fora for claims by individuals related to breaches of international humanitarian law by states. Both the Inter-American Commission and the European Court for Human Rights have entertained such claims and that opens up the possibility for states to use these as non-punitive systems of accountability where states are themselves in breach of international humanitarian law relating to internal armed conflicts … This possibility exists under the African Charter … \(^{171}\)

IHL and HRL also complement each in that some substantive norms overlap. Adam Roberts notes that there is direct overlap between Additional Protocol I\(^{172}\) and HRL. Roberts highlights that article 72 specifies that the provisions outlined in that section of the Protocol are additional not only to the rules in the Fourth Geneva Convention, but also ‘to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’.\(^{173}\) Further, article 75 on fundamental guarantees ‘is directly derived from the 1966 International Covenant on Civil and Political Rights’.\(^{174}\) Roberts makes similar observa-


\(^{169}\) Regulations regarding the Laws and Customs of War on Land, annexed to Convention (IV) regarding the Laws and Customs of War on Land, opened for signature 18 October 1907, 205 CTS 277 (entered into force 26 January 1910).

\(^{170}\) Chatham House, above n 155, 55 (Chaloka Beyani).

\(^{171}\) Ibid 58.

\(^{172}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’).

\(^{173}\) Roberts, above n 23, 591.

\(^{174}\) Ibid.
tions about the 1977 Additional Protocol II on non-international armed conflict, stating that article 6 on penal prosecutions 'is similarly derived from the same 1966 Covenant'.

The ICRC also reports as follows:

Since humanitarian law applies precisely to the exceptional situations which constitute armed conflicts, the content of human rights law that States must respect in all circumstances (ie the hard core) tends to converge with the fundamental and legal guarantees provided by humanitarian law, eg the prohibition of torture and summary executions.

The overlap is not seamless. Roberts for example refers 'to an element of tension between human rights law and the law on occupations,' particularly those provisions relating to individual liberty and political freedoms, assessing that the detention provisions of article 78 of the Fourth Geneva Convention are more 'draconian' than the detention provisions of article 9 of the ICCPR. He observes, though, that for occupations:

The tension between these two approaches is mitigated by the fact that, in time of public emergency threatening the life of the nation, states may derogate from certain obligations under the Covenant, whereas the Convention has to be considered the lex specialis ...

Cordula Droege also raises the issue of the limits of this process of complementarity. She contends that as IHL and HRL are based on the same principles and values they can 'complement' in certain cases, meaning, 'influence and reinforce' each other. However, if there is a 'genuine conflict of norms' and the norms cannot be harmonised, complementarity does not provide the solution. One norm must prevail with the lex specialis principle providing the framework.

3 Parallel Application

The 'parallel' operation of IHL and HRL has been addressed curially and by scholars in a number of contexts, including: occupation; NIAC and individuals being detained; and, 'counter-terrorism' operations.

But what is meant by 'parallel' operation? A variety of approaches is reflected in the views of the participants in the Right to Life Experts Meeting. The report of that meeting canvasses the various views of experts:

One expert described the state of the law as one in which both IHL and HRL apply in parallel in situations of occupation, NIAC and with respect to targeted killings. Given the parallel applicability of IHL and HRL in these contexts, according to this expert, the HRL and the law enforcement model constitute the default legal regime ... Another expert felt that the Court's holding here dictated some sort of parallel applicability of IHL and HRL, and that the Court merely chose to use the terminology of lex specialis. For this expert, the Court clearly did not hold that IHL, where applicable, utterly displaces HRL ... Other experts, accepting the

175 Ibid.
177 Roberts, above n 23, 593.
178 Ibid.
179 Droege, above n 5, 337.
180 Ibid 340.
181 Gaggioli and Kolb, above n 104, 118.
parallel applicability of IHL and HRL in armed conflict in general, nevertheless felt that, with respect to the right to life, HRL was clearly subordinate to and displaced by the IHL rules on the conduct of hostilities.\footnote{182}{University Centre for International Humanitarian Law, above n 62, 19.}

Thus, although the experts agreed there was some form of parallel operation for IHL and HRL, the form of that relationship ranged from HRL being the default regime to IHL prevailing but not entirely displacing HRL to IHL, at least regarding the right to life, being displaced by IHL.

In the context of the law of occupation the Israel Supreme Court (sitting as the High Court of Justice) in Targeted Killings examined the parallel application of IHL and HRL by deciding that where there is a lacuna in IHL that HRL can fill the ‘gap’:

This law constitutes a part of the laws of the conduct of war (\textit{ius in bello}). From the humanitarian viewpoint, they are a part of international humanitarian law. This humanitarian law is a special law (\textit{lex specialis}) that applies in an armed conflict. When this law has a lacuna, it can be filled by means of international human rights law… \footnote{183}{Targeted Killings [2006] 2 IsrLR 459, 476–7 [18].}

Assuming the parallel application of IHL and HRL, how does this affect ultimate decision-making by those engaged in the conduct of operations? One participant in the Right to Life Experts Meeting highlighted that whether IHL was seen as displacing HRL or whether they were seen as operating together had significant practical implications:

Given the parallel applicability of IHL and HRL in NIAC, one expert felt that the rules on targeting depended upon how one worked out the interrelationship between these two areas of law. In the opinion of this expert, it was clear that there is a category of rebel fighters and that, under the IHL of NIAC, these rebel fighters could be targeted on sight on the basis of their membership alone. Nevertheless, the applicability of HRL in NIAC changes this result. Where the State exercises sufficient control over an area to allow it to reasonably arrest such rebel fighters, the State is under an obligation to do this.\footnote{184}{University Centre for International Humanitarian Law, above n 62, 40.}

For this expert HRL was the default legal regime, at least where the state is operating in its own territory or territory in which it effectively exercises authority.\footnote{185}{Ibid.}

Looking at the implications of the parallel application of IHL and HRL, Olsen emphasised the effect on the parties involved:

\[\text{If IHL is not used to interpret an IHL rule, but instead HRL is applied} \ldots \text{‘[parallel] to’ IHL} \ldots \text{IHL would apply to parties to the conflict, both state and non-state actors, and HRL would continue to apply to state actors, as it was traditionally designed to do. This avoids the problematic application to non-state actors, and, yet, mandates states to continue to meet their international legal obligations} \ldots \text{it must not be forgotten that non-state actors remain bound by domestic law.}\footnote{186}{Laura M Olson, ‘Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-international Armed Conflict’ (2009) 40 Case Western Reserve International Law Journal 437, 454.}

Judge Meron sees the parallel application of IHL and HRL as a consequence of IHL being interpreted through a prism which includes HRL. He sees this trend in a positive light:

This parallelism and growing convergence enriches humanitarian law, as it does international human rights. For example, the reference in Common Article 3 to a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples’ with regard to trials in
noninternational armed conflicts, and the requirement in article 84 of the Third Geneva Convention that a prisoner of war must be tried by a court that offers ‘essential guarantees of independence and impartiality as generally recognized,’ should inevitably be interpreted and applied by drawing on human rights.\(^{187}\)

For Lubell, the relationship between IHL and HRL is affected by whether the situation is one of IAC or NIAC. If NIAC, the relative sparsity of applicable IHL treaty law increases the role for HRL:

\[\text{T}he\ \text{fact\ that\ IHL\ treaty\ law\ dealing\ with\ non-international\ armed\ conflicts\ is\ comparatively\ sparse\ also\ points\ towards\ use\ of\ human\ rights\ law\ to\ assist\ in\ the\ regulation\ of\ conduct\ during\ such\ conflicts.\ Indeed, the few existing treaty rules can be compared and likened to non-derogable human rights, and where IHL treaties are silent, human rights law might be offered as an answer.}\(^{188}\)

\[\text{Lubell\ does\ note\ developments\ in\ the\ content\ of\ customary\ IHL\ in\ NIAC\ but\ argues\ that\ this\ development,\ coupled\ with\ what\ is\ seen\ as\ a\ lack\ of\ clarity\ with\ certain\ IHL\ rules}\ (eg\ rules\ regarding\ civilians\ acting\ as\ a\ group\ participating\ in\ hostilities\ against\ state\ forces)\(^{189}\),\ complicates\ the\ IHL-HRL\ relationship:\]

\[\text{T}he\ \text{increased\ number\ of\ IHL\ rules\ applicable\ might\ also\ indicate\ a\ potential\ increase\ in\ the\ possible\ clashes\ with\ human\ rights\ law,\ which\ has\ also\ developed\ over\ the\ years …\ The\ risk\ of\ a\ clash\ is\ heightened\ when\ dealing\ with\ situations\ for\ which\ the\ IHL\ rules\ remain\ unclear.}\(^{190}\)

The UK Al-Jedda case is also relevant here.\(^{191}\) Although it involved the relationship between a United Nations Security Council Resolution and HRL, the way the House of Lords dealt with the issue helps inform the IHL and IHLR discussion. Al-Jedda does stand for the proposition that rather than displacing HRL completely, HRL is qualified by Security Council resolutions.\(^{192}\) This is the view of Baroness Hale and Lord Carswell\(^{193}\) and accords with at least one statement of Lord Bingham in Al-Jedda. Lord Bingham stated as follows:

Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [United Nations Security Council Resolution] 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.\(^{194}\)

What though if IHL and HRL provisions are incompatible? Cordula Droege asserts that there are ‘some few instances where human rights and humanitarian law are incompatible’.\(^{195}\) For Droege, such instances are greater the closer one gets to the battlefield (eg the conduct of hostilities) and that reliance must then be placed on the \textit{lex specialis} principle. One instance is the

\begin{itemize}
  \item \(187\) Meron, above n 7, 266.
  \item \(188\) Lubell, above n 45, 746.
  \item \(189\) Ibid 747–8.
  \item \(190\) Ibid 747.
  \item \(191\) R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58 (‘Al-Jedda’).
  \item \(192\) Ibid [39].
  \item \(193\) Ibid [136].
  \item \(194\) Ibid [39].
  \item \(195\) Droege, above n 5, 344.
\end{itemize}
right to life.\textsuperscript{196} For example, the principle of proportionality in \textit{IHL} is different to that in \textit{HRL}. In \textit{IHL} it depends on a balance between incidental loss for civilians and the military benefit from the attack anticipated whereas ‘human rights law requires the use of force be proportionate to the aim to protect life’.\textsuperscript{197} Similar considerations lead Shaney to conclude that:

The considerable political capital and legal efforts invested in jockeying between the two competing paradigms casts doubt on the increasingly common narrative of the growing merger between human rights law and humanitarian law and the irrelevance of distinguishing between the two.\textsuperscript{198}

Again the range of approaches regarding the relationship between \textit{IHL} and \textit{HRL} is varied in part due to the different approaches that have been taken to the nature and role of the \textit{lex specialis} principle as used by the \textit{ICJ}. According to Gaggioli and Kolb the view of \textit{IHL} as \textit{lex specialis} challenges the principle of parallel application.\textsuperscript{199}

\section*{F HRL as the Default Regime in NIACs}

It has been posited that the ‘default’ regime, at least for situations such as ‘calm’ occupations and \textit{NIAC}, is the law enforcement or \textit{HRL} regime.\textsuperscript{200} For example, at the Right to Life Experts Meeting one participant posited that given ‘the parallel applicability of \textit{IHL} and \textit{HRL} in these contexts … \textit{HRL} and the law enforcement model constitute the default legal regime’ in the context of the right to life.\textsuperscript{201}

Kretzmer also suggests in the case of a \textit{NIAC} that the law enforcement or \textit{HRL}-based regime should have primacy due to the usually internal nature of such situation. Internal conflicts go directly to the relationship between a state and its nationals. Kretzmer states:

\begin{quote}
[W]hat about non-international armed conflicts? My argument is that in these conflicts, the primary regime is international human right law as when we are talking about an internal conflict a state’s first and foremost values are its human rights obligations.\textsuperscript{202}
\end{quote}

Similarly Lubell draws a distinction between the right to life and the \textit{lex specialis} principle based on the context of \textit{IAC} and \textit{NIAC} situations. He says ‘[i]n international armed conflicts, the reasoning behind use of the relevant \textit{IHL} rules as \textit{lex specialis} when faced with a potential violation of the human rights law obligation to protect the right to life is fairly obvious’.\textsuperscript{203} However this is not so in \textit{NIAC} situations in which the ‘dividing line between combatant and civilian might not always be one hundred per cent clear … neither on the ground nor in the law’.\textsuperscript{204} Are such situations ‘[r]elinquishing the standards of law enforcement and human rights law, in favor of \textit{IHL} [potentially leading] to greater complications rather than providing a solution’?\textsuperscript{205} He examines a number of solutions to this problem, ‘none of which appear wholly satisfactory’.

\begin{flushleft}
\textsuperscript{196} Ibid 345.  
\textsuperscript{197} Ibid.  
\textsuperscript{198} Shany, above n 4.  
\textsuperscript{199} Gaggioli and Kolb, above n 104, 118.  
\textsuperscript{200} University Centre for International Humanitarian Law, above n 62, 18–19.  
\textsuperscript{201} Ibid 19.  
\textsuperscript{202} Chatham House, above n 155, 55 (David Kretzmer). See also Kretzmer, above n 11, 38.  
\textsuperscript{203} Lubell, above n 45,748.  
\textsuperscript{204} Ibid 749.  
\textsuperscript{205} Ibid.
\end{flushleft}
One which he describes as ‘tempting’ is to ‘say that human rights law standards should be the ones to prevail during non-international armed conflicts’. He concludes that due to situations such as high intensity NIACs ‘[t]his argument is, however, unlikely to get very far’.

HRL has its limits though as a default regime in conflict. Sassòli and Olson examined the lex specialis principle in the use of lethal force and detention contexts. They believe there is an argument that HRL, rather than IHL, is the lex specialis on occasion. For example, regarding detention, the procedural regulation in NIAC situations under HRL is arguably more specific than under IHL. However, Sassòli and Olson conclude that:

[R]eliance solely on human rights to compensate for the lack of procedural regulation of internment in non-international armed conflict may offer only a minimal solution, for unless supplemented by customary law it clarifies the obligations of states only if the state is party to the human rights treaty, and it is limited by any derogation made … So perhaps the solution is not either to apply human rights or to draw an analogy with the humanitarian law of international armed conflict, but to harmonize appropriately both approaches.

Notably, that the extent to which HRL instruments apply extraterritorially is ‘controversial’ is also relevant for Sassòli and Olson on this point.

G Situational Application of IHL and HRL

A final option regarding the relationship between IHL and HRL is to view the relationship as depending on the operational situation.

Kretzmer talks of three possible approaches to the IHL-HRL relationship:

- What he calls the ‘classic, traditional or purist approach towards international humanitarian law’. That is, apply IHL rather than ‘wishy-washy’ HRL.
- The ‘totally opposing standpoint’ that since human rights are universal they ‘should therefore apply in all situations, at all times, and certainly on the battlefield’. The issue then becomes how to combine human rights law with the lex specialis IHL.
- The ‘approach of distinguishing between different situations in armed conflict where, in certain situations, we would rely on international humanitarian law, and in other situations, we import supplementary human rights law’.

He favours the third, situation-based option, where distance from the actual battlefield and degree of control by state authorities are relevant and related factors:

The question is what system should apply when we have different norms. Here, I suggest the following division: when we are talking about the battlefield ‘proper’ in the classic sense, there is no effective control and international humanitarian law rules prevail. As soon as we start removing ourselves from the

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206 Ibid.
207 Ibid.
208 Sassòli and Olson, above n 49, 626 (citations omitted) (emphasis in original).
209 Ibid.
210 Chatham House, above n 155, 51 (David Kretzmer).
211 Ibid 51–2.
212 Ibid 52.
battlefield, we are going to start having international humanitarian law supplemented by international human rights law ...\textsuperscript{213}

This ‘nuanced’ approach accords with Eyal Benvenisti’s 1993 study concerning occupations. Benvenisti saw the relationship between \textit{IHL} and \textit{HRL} as situational stating:

In the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community. Thus, as hostilities subside, and security interests can permit, the occupant could be expected to restore civil and political rights.\textsuperscript{214}

Cordula Droege also supports an \textit{IHL-HRL} relationship based on proximity to the battlefield and level of control:

As a general rule, humanitarian law is the law most appropriate for the conduct of hostilities, because its norms on the use of force are based on the assumption that military operations are ongoing and that the armed forces have no definite control over the situation. Conversely, where the situation is remote from the battlefield and the state authorities have enough control over a situation to be able to carry out law enforcement operations, human rights law provides the most appropriate framework.\textsuperscript{215}

Gaggioli and Kolb also support a situation-based structure. They firstly suggest that it can be argued that ‘the restrictions on the freedom to use lethal force and the amount of positive measures of prevention required from governments explain that it can be doubted whether such a model is applicable in times of armed conflict’.\textsuperscript{216} However they believe that this absolute formulation ‘seems excessively simplifying’ as the ‘law enforcement model does not completely disappear in times of armed conflict’ certainly not for the \textit{ECtHR} which applies the rules of the law enforcement model to ‘warfare relationships’ in conflict.\textsuperscript{217} For Gaggioli and Kolb, the law enforcement model accompanies the armed conflict model but each will apply ‘in the sets of circumstances when it is appropriate’. Situations related to the battlefield itself indicate application of the conflict model, however, away from the battlefield where arrest may be an option may be available.\textsuperscript{218}

Sassòli and Olson, when examining the appropriate ‘level’ to apply the \textit{lex specialis} principle and which regime – \textit{IHL} or \textit{HRL} – is favored by the principle, contend that this is not simply answered by the general context (for instance, by answering the question is it one of conflict or not?), but by the specific operational situation. Consequently they argue:

For government forces acting on their own territory, control over the place where the attack takes place is not a requirement for human rights to apply, but simply a factor causing human rights to prevail over humanitarian law. The latter was designed to regulate hostilities against forces on or beyond the front line – that is, in a place not under the control of those who attack them, whereas law enforcement concerns persons under the jurisdiction of the enforcers.\textsuperscript{219}

\textsuperscript{213} Ibid 55.
\textsuperscript{215} Droege, above n 5, 347.
\textsuperscript{216} Gaggioli and Kolb, above n 104, 159.
\textsuperscript{217} Ibid.
\textsuperscript{218} Ibid 160.
\textsuperscript{219} Sassòli and Olson, above n 49, 614 (citations omitted).
Although the overall approach by Sassòli and Olson is not inconsistent with the approach to the *lex specialis* principle in the ILC Report, it does raise other theoretical and practical issues. On the theoretical level, what degree of ‘control’ is sufficient? Is it the high degree of *Banković* and *Al-Skeini* or does it depend on circumstances such as the availability of an arrest option or the taking of a detainee before a judicial officer? For Sassòli and Olson it is the later with the question being one of ‘degree’.\(^{220}\)

However, the situation-based approach is not universally accepted. Other experts argue that once the threshold of armed conflict is reached ‘there was no legal basis in *IHL* to claim that parties had … to operate against each other under a law enforcement paradigm’.\(^{221}\)

**H Concluding Remarks**

The approach by courts and scholars to the issue of the relationship between *IHL* and *HRL* in the context of the *lex specialis* principle has not been consistent and it is not clear. Consequently, a range of options have been proposed.

The contemporary conflict environment itself complicates the *IHL*-*HRL* relationship. According to Kenneth Watkin the reason that the law enforcement paradigm (*HRL*) and armed conflict paradigm (*IHL*) ‘overlap’ is due in part to the practical difficulties in categorising a situation as conflict or otherwise. He says the result is that ‘it cannot easily be delineated which of the two normative frameworks governs’.\(^{222}\) This is particularly the case with *NIAC* situations where the startpoint regime is that of law enforcement.

A further complicating factor in this area is that support for particular options seems to be motivated by the objective of providing a practical solution to a complex issue — but this may be at the cost of legal correctness. For example, for Sassòli and Olsen the best solution to practical problems such as detention is to view *IHL* and *HRL* as complementing each other. Specifically, in the context of detention procedures they say this means that *IAC* rules apply in *NIAC* but *HRL* can provide further detail if required to be consistent with the *lex specialis* principle. However they accept that the ‘practicality of this approach, does not make it legally binding’.\(^{223}\) Consequently they conclude:

To sum up, unfortunately no ideal, straightforward solution exists. While the application of human rights is more satisfactory under the formal *lex specialis* principle, it is unrealistic, particularly for the non-state armed group. Moreover, the content of the applicable human rights is controversial. To apply by analogy the regulation provided for civilians by the humanitarian law of international armed conflicts may therefore correspond better to the overall systemic purposes of both branches. In practice, the only difference between the two approaches is that the humanitarian law approach is satisfied by an administrative review, while the human rights approach stipulates judicial review.\(^{224}\)

Lubell also sees practical benefit in one of the options suggested, namely, the application of *HRL* in situations where the level of control is sufficient, however he concludes ‘the legal basis under *IHL* for making such a claim is unclear’.\(^{225}\)

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220 Ibid.
221 Gaggioli and Kolb, above n 104, 359 n 255.
222 Watkin, above n 1, 2.
223 Sassòli and Olson, above n 49, 626.
225 Lubell, above n 45, 750.
It is considered, however, that aside from the legal difficulties with the situation-based option advocated by some scholars, its practicability can be over-stated. For example, the approach requires military planners and operators engaged in military operations to distinguish, on a case-by-case basis, which legal framework applies when law-makers, courts and scholars have struggled to provide consistent or clear guidance on the subject. Is this approach really practical, or indeed, appropriate?

V FURTHER OBSERVATIONS

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts …226

A The Gap Between IHL and HRL – Does it Matter?

Part I of Chapter 2 details the differences between IHL and HRL. In outline they include: the primary focus – HRL is primarily concerned with the way a state treats those within its jurisdiction whereas IHL aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities; the subjects of obligations; the institutions competent to determine violations; the period of application; the scope of beneficiaries; the locus of application; the range of rights protected; and the sources of obligations.227

As outlined above, though, there is a view that the gap between the law and order paradigm and the armed conflict paradigm ‘is not as deep and ascertainable as one may have imagined’.228 It is argued that this results in part from the growing convergence between the two paradigms as HRL is being used as a ‘gap-filler’ for IHL.229 Gaggioli and Kolb, for example, talk of the differences between IHL and HRL seeming ‘relative’ and ‘rather of means than of result’.230

However, there are at least two arguments that favor retaining a gap between the application of IHL and HRL. The first concerns the fact that IHL and HRL may overlap but the enforcement mechanisms are very different. As stated by Kretzmer:

In some cases, we are talking about the same norms – the classic example is the prohibition on torture. Some non-lawyers here may ask what difference it makes if we are saying that it is a norm of international human rights law and a norm of international humanitarian law. Well, it can make quite a big difference, especially for the competence of judicial bodies involved such as criminal jurisdiction for grave violations …231

The second concerns significant rule areas where the content of the two paradigms, although perhaps converging over time, remain at this time distinct. The areas include:

226 Droege, above n 5, 310.
227 Shany, above n 4.
228 Ibid. Although Shany was drawing this conclusion in the context of counter-terrorism operations the point has more general application.
229 Ibid. Also Meron, above n 7, talks about the ‘humanisation’ of IHL due to the influence of HRL.
230 Gaggioli and Kolb, above n 104, 137.
231 Chatham House, above n 155, 55 (David Kretzmer).
• Use of force and the arrest option;
• Use of force and the conduct of operations;
• Detention and habeas corpus; and
• An obligation to investigate.

B How to Approach Grey Areas

How then should the content of the applicable law be approached for issues such as the use of force in the ‘grey’ areas, that is, in the areas where there is legitimate doubts as to what legal framework applies? Should the default setting favor, for example, protection?

In Targeted Killings, President Barack addressed this aspect in the context of the proper interpretation of the ‘direct’ participation term:

And what is the law with regard to the area between these two extremes? On the one hand, the desire to protect innocent civilians leads in difficult cases to give a narrow interpretation of the term ‘taking a direct part in hostilities.’ Professor Cassese states:

‘The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the need to avoid killing innocent civilians’ …

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent citizens leads, in difficult cases to giving a broad interpretation of the ‘direct’ character of the hostilities, as thereby civilians are encouraged to distance themselves from the hostilities as much as possible. As Prof Schmitt writes:

‘Gray areas should be interpreted liberally, ie, in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants.’

The approach taken by President Barack, on behalf of the Court, was to lay down a decision-making framework that including a human rights notion of choosing means ‘whose violation of the victim’s human rights is the least’.

C Conclusions

The initial issue for decision is the applicability of HRL to conflict situations. However, even assuming HRL applies in conflict (and extraterritorially) areas of uncertainty and controversy remain. Although accepting that a number of scholars recognised the relationship between IHL and HRL, Adam Roberts also noted that the relationship was not a ‘simple one’, quoting the 1971 words of G I A D Draper that ‘the precise relation between the law of war and the regimes of Human Rights has not yet been elaborated’.

Key friction points are the use of force, specifically the arrest option and the requirement to investigate, and detention, specifically the process requirements.

232 Targeted Killings [2006] 2 ISRLR 459, 496 [34].
233 Ibid 501 [40].
234 Roberts, above n 23, 592.
D The Place of HRL in NIAC

[T]he rules provided in the ICRC study and the rules given by the ECHR … are quite different and by no means parallel those in Protocol I. As a practical matter, ‘the customary humanitarian law of internal armed conflicts’ and ‘the human rights law of internal armed conflicts’ are competing projects.235

1 Framework for Analysis

The framework for the analysis in the various parts of Chapter 4 has been to examine cumulatively a number of intermediate issues required for answering the ultimate question of how international human rights law and international humanitarian law interact, if at all, in situations of non-international armed conflict, including those situations involving international interventions. The conclusion is that there is no international consensus regarding the applicable international legal architecture with institutions and scholars holding different views.

Even if a particular legal framework were to be accepted, the detailed content of that framework lacks clarity. According to Lubell:

In some areas the joint applicability works well and the two bodies of law favourably reinforce each other. However, the relationship is still evolving … The difficulties and risks encountered in non-international armed conflict call for further examination and perhaps for new approaches, and progress here will be linked to the ongoing debates on individual status under IHL during such conflicts.236

This state of uncertainty and differing — at times competing — positions is influenced by a number of factors. One is that the international law framework provided by the ICJ which includes the lex specialis principle lacks clarity. Consequently, as Droege states, ‘this broad principle allows manipulation of the law in a manner that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of IHL and IHLR’.237

Another feature is the differing allegiances and mandates of the various actors. As noted by Hampson when reflecting on historical developments regarding applicability of HRL to conflict, in the 1970s those who argued that HRL was for peacetime and not conflict tended to have an IHL background whereas those who considered HRL was applicable in all circumstances tended to have a human rights background.238 Also, the reality is that the mechanisms for monitoring and/or enforcing human rights, for example, the ECHR and the Human Rights Council (‘HRC’), have focused HRL mandates which may affect their willingness and capacity to consider other relevant components of the international law framework. This directly affects the broader persuasive value of the jurisprudence and commentary of these bodies.

Regarding the HRC, it is not a court. It cannot issue binding legal decisions. It cannot award damages.239 Dennis and Surena point out that the UK, when responding to a direction from the HRC to accede to the Optional Protocol allowing individual communications to the HRC, stated:

The government reviewed its position with regard to individual petition to the United Nations Human

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235 Abresch, above n 103, 749.
236 Lubell, above n 45, 753–754.
237 Droege, above n 5, 339.
238 Hampson and Salama, UN Doc E/CN.4/Sub.2/2005/14, [52].
239 Under the Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘First Optional Protocol’) arts 5(1) and 5(4), the Human Rights Committee must consider communications received from individuals and ‘forward its views to the
Rights Treaty Bodies in 2004, and concluded that the practical value to the individual citizen is unclear. The UN monitoring committees which receive individual petitions from citizens are not courts and cannot award damages, or produce a legal ruling on the meaning of the law.\(^\text{240}\)

Regarding the ECtHR, Gaggioli and Kolb note the regional nature of its case law, and conclude, therefore, that it cannot ‘as such, give rise to universal HRL standards’. They also argue, however, that ECtHR case law ‘is particularly relevant due to the fact that most of the other HRL bodies are inspired by European case law’.\(^\text{241}\)

Finally, when dealing with the work of scholars writing in this area (a supplementary means of interpretation) there can be difficulty in distinguishing between analysis as to the lex lata and advocacy for a particular lex ferenda.

2 Comparing and Contrasting IHL and HRL

On one view, IHL and HRL are generally complementary legal regimes. However, on another view, and particularly regarding the ‘friction points’ identified above, they are effectively competing regimes. Consequently, the advantages and disadvantages of one or the other prevailing in the context of conflict, particularly NIAC, merits examination.

The advantages of IHL prevailing include: IHL best accords with the lex specialis maxim as stated by ICJ; there is a built-in feasibility/practicability regarding conflict; it binds all parties including non-state actors; it provides for individual liability and universal jurisdiction; protection is not limited by factors such as being within ‘jurisdiction’; it unquestionably applies in conflict and extraterritorially. The disadvantages of IHL prevailing include: a relatively permissive regime arguably providing less protection vis-à-vis HRL; difficulties in determining application thresholds; relatively sparser accountability mechanisms.

The advantages of HRL prevailing include: arguably an increase in the level of protection for individuals (at least those within ‘jurisdiction’); addresses the traditional (although possibly not current) reluctance of states to accept the application of IHL to NIAC; applies in all situations so avoids issues of thresholds; strong accountability mechanisms. The disadvantages of HRL prevailing include: a limited application to parties – it does not bind non-state actors; enforcement is limited to civil actions against states; there is some doubt as to its applicability to conflict and extraterritorially; there are suitability and practicability issues in context of conflict situations.

3 A Fundamental Issue – The Suitability of HRL for Conflict

A number of human rights bodies and scholars support the application of HRL to conflict situations in a variety of forms: to the exclusion of IHL; as a complement to IHL; and, as the default regime, particularly in NIAC situations. However, a theme amongst even some scholars who support a role for HRL in conflict is the suitability or practicability of HRL for such situations.

State Party concerned and to the individual’. One hundred and fifteen states are party to the First Optional Protocol while the ICCPR has 168 states parties.


\(^{241}\) Gaggioli and Kolb, above n 104, 115–16.
This is a separate issue to the technical, legal issue of whether HRL applies in conflict as a matter of law and, if so, in what circumstances.

A notable example of the questioning of the suitability of HRL for conflict situations is that of Colin Powell during his tenure as US Secretary of State. When arguing against legal advice by the then White House General Counsel that the Geneva Conventions did not apply to the conflict in Afghanistan in the ‘war on terror’ he suggested that a benefit of applying IHL to the situation was that the ‘Geneva Conventions are a more flexible and suitable legal framework than other laws that would arguably apply (customary international human rights, human rights conventions)’.

The suitability and practicability of HRL in conflict is questioned on a number of levels and grounds. One level is structural, including the range of parties bound and enforcement mechanisms. For example HRL binds and is enforced against states and not non-state actors. For example, in Isayeva v Russia (II) the ECtHR examined the actions of Russian authorities in conducting operations against a significant group of Chechen fighters who had entered the village of Katyr-Yurt early on the morning of 4 February 2000, from the perspective of State responsibility not individual criminal liability. The Court did not examine the actions of the Chechen fighters.

Another level for questioning the suitability of HRL for conflict situations is at the overarching level of legal theory. David Kennedy asks fundamental questions about human rights. Questions such as does human rights discourage a focus on collective responsibility and other ‘emancipatory projects’? Or are rights just a ‘social construction’ that tell ‘us nothing about whether they are useful or not’? For Kennedy ‘human rights vocabulary expresses relentless suspicion of the state’ but ‘places the state at the centre of the emancipatory promise’. For Kennedy this approach excludes other ‘alternative communal forms’.

Kennedy raises the possibility that human rights express the ideology, ethics, aesthetic sensibility and political practice of a particular 18th–20th century Western liberalism. One cost of this ‘would be the loss of more diverse and local experiences and conceptions of emancipation’. He also expresses concern with the ‘absoluteness’ of human rights rules and the ‘vagueness’ of their standards. These are raised under the umbrella concern of whether human rights promises more than it can deliver. He posits that there is a ‘gap between law in the books and law in action’.

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243 Isayeva v Russia (Judgment) (European Court of Human Rights, First Section, Application Nos 57947/00, 57948/00, 57949/00, 24 February 2005).

244 Ibid [12]–[15].


246 Ibid 106.

247 Ibid 113.

248 Ibid 114.

249 Ibid 117.
Concerns with suitability of HRL are also at the level of practical, operational application. Specific concerns include: its limited area of application – it at least requires ‘jurisdiction’; its narrow and limited enforcement mechanisms; the onerous nature of its accountability mechanisms; its inherently narrow focus on individual rights failing to provide for other legitimate interests, for example, a state’s requirement to have the authority to conduct necessary military activities.

Does HRL promise more in theory than it can deliver in practice? For example, one argument for the application of HRL as the default regime is that because it applies in all situations of violence it avoids the threshold application issues inherent in IHL (eg is there a conflict; is there an IAC or NIAC?). However, when determining the criteria for a shift from the law enforcement HRL-based model to a conflict model, criteria such as the following are suggested: the use of force is directed against combatants or civilians directly participating in hostilities; the state is deprived of sufficient control over the person to enable an arrest; the degree of violence is high. Save for the arrest option criterion, this analysis is similar to the analysis required to determine when there is a conflict rather than situations of internal tensions and disturbances. As Gaggioli and Kolb suggest, the ‘question remains when there is a shift from the “law enforcement model” to the “conduct of hostilities” model.’ The type of problem associated with determining the threshold for application of IHL is not therefore fully avoided by viewing HRL as applicable in conflict.

Regarding the issue of practicability of applying HRL to conflict situations, Sassòli and Olson who advocate a mixed, situation-based paradigm, concede that ‘the main problem with our solution is whether it is practicable in actual armed conflicts’. They ask if the ‘permissible conduct varies, depending on the specific situation, how can a soldier know which rules to apply?’ They argue though that the ‘problem can be solved only by precise instructions and rules of engagement for each and every operation and sortie’. The operational viability of this conclusion though has been questioned above.

Kenneth Watkin also sees structural and practical problems with the strict application of HRL to conflict:

The human rights framework does operate in accordance with certain traditional limits that may bear on the role it can play in governing armed conflict. For example, the fact that human rights law is designed to function in peacetime, contains no rules governing the methods and means of warfare, and applies only to one party to a conflict led at least one human rights nongovernmental organization to look to international humanitarian law to provide a ‘methodological basis for dealing with the problematic issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties’.

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250 For example, in the *Abella* case, the the Inter-American Commission on Human Rights, which unlike the ECHR has shown a willingness to use IHL, refused to assess the petitioners’ motives for taking up arms because ‘as a rule, its jurisdiction does not extend to the conduct of private actors which is not imputable to the State’: *Abella* (Inter-American Commission on Human Rights, Case No 11.137, 18 November 1997) [175].

251 Gaggioli and Kolb, above n 104, 161.

252 Ibid 160.

253 Sassòli and Olson, above n 49, 616.

Does the contemporary attempt then to ‘fit’ the HRL law enforcement paradigm into the armed conflict paradigm, a possibility not perhaps considered by the drafters of the relevant HRL instruments, result in ‘normative overreaching’? Yuval Shany suggests as follows:

Although human rights law has an important role to play even in the course of a full-scale armed conflict … an attempt to alter the basic attributes of the ‘armed conflict’ paradigm through the application of human rights law may result in problematic normative-overreaching … such an attempt may lead to a law-application exercise divorced from the actual conditions and needs of warfare and is likely to attract limited support from important constituencies.255

4 Policy Decision v Legal Obligation

It is possible to implement HRL as ‘a matter of legal obligation, or as a matter of choice’ irrespective of the legal obligation.256 This for example, had been the past257 practice of the Australian Defence Force (‘ADF’). For the International Force for East Timor (‘INTERFET’) deployment to East Timor in 1999, although it was considered that the situation was not one of conflict nor was it assessed that the ADF was bound as a matter of law by HRL instruments such as the ICCPR, IHL and HRL were applied where appropriate for policy reasons:

[C]onsistent with ADF policy, the principles of the law of armed conflict were applied, where relevant, by way of guidelines. The same approach was taken with respect to international human rights law. The rationale behind the ADF approach has consistently been that the key international humanitarian and human rights law instruments usually reflect best practice and that compliance with them, where relevant, is the appropriate expectation for force standards. Maintenance of the legitimacy of a peace operation is considered a key to mission success.258

Certainly the application of HRL to situations in which IHL applies has been encouraged in more recent years as a matter of UN policy. Adam Roberts notes that starting in 1968, the UN Security Council ‘has urged the observance of human rights law in armed conflicts and military occupations generally’.259

Kenneth Watkin also sees benefits in applying HRL as a source of guidance, subject to necessary adjustments for the conflict context, highlighting the well-developed HRL accountability mechanisms:

That highly developed system of accountability has much to offer in terms of limiting the impact of some forms of violence, especially when compared to the still evolving accountability framework under international humanitarian law. The pressure to apply human rights principles arises in particular during situations more closely associated with governance than direct combat with an enemy force. However, the successful recourse to human rights law in armed conflict is likely to require an adjustment in the application of those accountability principles.260

255 Shany, above n 4.
256 Roberts, above n 23, 594. Professor Roberts was addressing the situation of occupation but his comments have more general application.
257 No comment is made on contemporary practice.
259 Roberts, above n 23, 595.
260 Watkin, above n 1, 2.
E  IHL – Is There a Need to Review Developments in IHL?

The key issue for Chapter 2 was the application of IHL to NIAC. The key conclusion was that there was a clear trend towards the application of the IHL rules of IAC to NIAC but, concerning how far the process had gone and the content of certain specific rules, there was an ongoing debate. That analysis was conducted from, essentially, an IHL perspective with HRL having a limited impact. This approach perhaps reflects, or at least matches, that of the ICRC Customary International Humanitarian Law Study.

The key issue for Chapter 3 and this Chapter has been the application of HRL to NIAC with this issue being intrinsically linked with the relationship between IHL and HRL. Two aspects of the context for this analysis are highlighted. The first is that historically IHL and HRL developed separately with limited consideration of how, if at all, they interact. The second is that the operational environment for IAC has significant differences from that of NIAC with those differences having the potential to affect both the current legal framework, and, the desirable future framework for NIAC.

The purpose of this section is to revisit the application of IHL to NIAC in light of the journey undertaken in Chapter 2 in light of the analysis in Chapter 3 and this chapter.

In a situation in which the law is uncertain, evolving and where different actors are supporting different positions, there is merit in examining the ultimate objectives of the process. For example, regarding the ICRC Study, it has been said ‘that the motivation behind the Study is that of securing greater compliance with international humanitarian law: an excellent objective’. This highlights the protective dimension of IHL. However, IHL, at least as developed for IAC, has a permissive dimension resulting from an intent to balance military needs and humanity.

More specifically regarding the IHL applicable to NIAC, John Cerone has argued that initially the application of IHL to NIAC emphasised the rules providing protection. However, more recently — and more controversially — he argues that IHL rules providing for authorisations have been interpreted as applying in NIAC:

There has been a substantial degree of convergence between the law of international armed conflict and the law of non-international armed conflict. A result of this convergence has been that individuals involved in a non-international armed conflict can now benefit from many of the protections once available only in the context of inter-state conflicts … some have relied on this convergence to extend to non-international armed conflicts not only the prohibitions of the law of international armed conflict, but also authorizations.

Similarly, for Kretzmer the original intention behind the application of IHL to NIAC was to ‘enhance the protection granted to potential victims of such conflicts’. However he argues ‘given the dramatic development of HRL, categorization of a situation as one of armed conflict, rather than internal unrest, may serve to weaken the protection offered to potential victims rather than to strengthen it’. This view is based on a conclusion that HRL provides greater protection than

262 For example, the structure of Common Article 3 is to provide for prohibitions not authorisations. Cerone, above n 10, 10.
263 Cerone, above n 10, 16–17.
264 Kretzmer, above n 11, 39.
IHL. Consequently, Kretzmer suggests that in fact state authorities now see operational benefits in applying a conflict, IHL-based, model rather than a law enforcement, HLR-based, model:

Given the glaring disparity in the legitimacy of lethal force between a human rights regime and an armed conflict situation, one can appreciate why a State involved in severe internal unrest might be interested in characterizing the situation as one of armed conflict. Such characterization could allow the State to target those it regards as responsible for the conflict as ‘combatants’ or ‘fighters,’ rather than treating them as suspected criminals who should be subject to the criminal process.265

It can be argued though that this approach depends on a particular view of the content of IHL applicable to NIAC. That is, it strikes essentially the same balance between military needs and humanity in NIAC as it does in IAC. Therefore, the reception, including any criticism, of the ICRC Study’s approach to the application of the customary IHL rules of IAC to NIAC is relevant to this assessment.

The points of criticism of the ICRC Study were addressed in detail in Chapter 2 but included: rules being based on ‘insufficient state practice or opinio juris’;266 the conflating of the lex lata and lex ferenda;267 and, the too ready application of the customary rules of IAC to NIAC. Regarding this later point, William Abresch says:

In order to arrive at a customary humanitarian law of internal armed conflicts, the ICRC study typically infers that military manuals and declarations by states are (a) intended as statements of international law, rather than domestic law or policy, and (b) apply to internal armed conflicts unless explicitly limited to international armed conflicts. These assumptions appear unwarranted. When … states are reluctant to acknowledge the applicability of treaty-based humanitarian law, it is difficult to credit that they consider themselves bound under customary humanitarian law.268

Regarding military manuals and NIAC, Judge Meron notes that ‘[m]ost military manuals do not explicitly distinguish between rules applicable in noninternational conflicts and in international conflicts (although they often indicate the relevant provisions of the Geneva Conventions and Additional Protocols).’269 However, it can be questioned whether this will remain the case given the significant adjustments in military doctrine for counter-insurgency operations, at least in the US and allied countries, prompted by contemporary operations being conducted within a NIAC framework in Iraq and Afghanistan.

More broadly, Justice Meron when assessing contemporary approaches to the assessment of state practice and opinio juris for purposes of the determining the content of customary IHL refers to a tendency of judges, scholars, governments and nongovernmental organisations to often ‘accept a rather large gap between practice and the norms concerned without questioning their binding character.’270 He assesses that:

In many cases, gradual and partial compliance has been accepted as fulfilling the requirements for the formation of customary law, and contrary practice downplayed. Courts and tribunals have frequently ignored operational or battlefield practice. Without formally abandoning the dual requirements (practice

265 Ibid 25.
267 Turns, above n 263, 236.
268 Abresch, above n 103, 749–50.
269 Meron, above n 7, 261.
270 Ibid 244.
and *opinio juris*) for the formation of customary international law, they have tended to weigh statements both as evidence of practice and as articulations of *opinio juris* … Formally, however, courts and tribunals have followed the law of war language of practice and custom, even when it stretches the traditional meaning of customary law.\(^{271}\)

More specifically, Kretzmer notes that although the ICRC *Study* indicates the principle of proportionality is part of customary IHL, *Additional Protocol II*, whilst including the principle of distinction, ‘makes no reference to the principle of proportionality’. He argues that ‘the assumption of the *Study* is, it would seem, that this principle protects potential victims of armed conflict. That assumption is not necessarily valid, since all depends on what the alternative rule is.’\(^{272}\) He argues that an alternate rule under the law enforcement model may be provide greater protection as it would not permit the use of lethal force in the IHL proportionality situation. Consequently, he states:

Thus, it would seem that rather than providing enhanced protection in non-international armed conflicts for civilians, introduction of the proportionality principle might well weaken the protection that they would enjoy under a human rights regime.\(^{273}\)

Kretzmer seeks greater protection from the direction of the HRL paradigm than that provided by IHL rules. However, an alternate approach is to interpret the content of IHL applicable to NIAC to provide greater protection than provided by the IHL rules applicable to IAC. This approach is supported in part by the continuing uncertain nature of the content of customary IHL applicable to NIAC and the nature of the criticism of this aspect of the ICRC *Study*. It is also supported to a degree by the contemporary practice of states concerning military operations conducted in Iraq and Afghanistan.

Two aspects of the practice of states involved in operations in Iraq and Afghanistan are highlighted. First, the reaction of the representatives of the ‘specially affected’ States of Iraq and Afghanistan themselves to the civilian casualties resulting from Coalition targeting. Second, the doctrinal and operational adjustments being made by Coalition forces regarding targeting within counter-insurgency operations being conducted in a NIAC environment. Could not these developments affect the content of the current, or least evolving, customary IHL of NIAC resulting in a more nuanced and restrained approach in NIAC to issues such as the principle of proportionality?\(^{274}\) More broadly could not this approach be applied to issues such as detention processing? As noted above, we are already seeing some evidence of interpretations of specific aspects of IHL which do not rely on HRL but which perhaps modify the traditional view of military necessity and humanity to result, for example, in consideration of an arrest option in certain conflict situations.\(^{275}\)

The above, if nothing else, suggests a cautious approach should be taken to any conclusions regarding the application of the IHL rules of IAC to NIAC.

\(^{271}\) Ibid.

\(^{272}\) Kretzmer, above n 11, 28 (emphasis in original).

\(^{273}\) Ibid 29.

\(^{274}\) It is beyond the scope of this paper to examine this possibility in detail but one option could be that for NIAC the principle of proportionality itself is more constraining on the use of force or it provides for the prohibitive aspect of the current IAC rule – a breach results in criminal liability – but is silent on the permissive aspect.

VI SUMMARY

In summary, the key conclusions for this Chapter are as follows:

First, the relationship between IHL and HRL in conflict at the international law level is governed by the lex specialis principle but there are uncertainties, and possibly misunderstandings, concerning the nature of that principle and how it is applied to the IHL-HRL relationship.

Second, ‘[t]heir interplay, however, is only slowly being tested in practice’ with one result being that ‘situations that might create tension and synergy’\textsuperscript{276} are still being revealed. Consequently, a number of options regarding the interplay between IHL and HRL are being advocated by various institutions and scholars.

\textsuperscript{276} Droege, above n 5, 355.
I Introduction

Determining the legal regime governing the use of force in any situation of internal conflict is fundamentally beholden to the legal threshold between mere riot or civil unrest and non-international armed conflict (‘NIAC’). As has been noted in Chapter 1, the concept of internal armed conflict as a legally distinct form of armed conflict is not new, although historically the priority was often upon determining when a situation of internal unrest crossed a threshold which enlivened the ‘standard’ laws of war.

Since 1949, while law and practice has continued to entrench a legal distinction between NIAC and international armed conflict (‘IAC’), the issue of the lower threshold – between civil disturbance which does not reach the level of NIAC and NIAC itself – has become significantly more nuanced as a legal concept and significantly more important as a political and operational threshold. Indeed, there are at least three ‘legal’ definitions of the threshold between NIAC and less-than-NIAC, as opposed to the much cleaner single threshold between IAC and mere international tension. The bivalent concept of ‘internationalised internal armed conflict’, which is (perhaps) better understood in terms of concurrent NIAC and IAC contexts within the same
operational zone (as with Libya recently) than as a status mixtus\(^1\) between IAC and NIAC, offers challenges but they are not insurmountable.

In any conflict context, exploring – and coming to a clear conclusion on – the legal characterisation (less-than-NIAC, NIAC or IAC) is the fundamental issue in use of force analysis. Of these thresholds, the starkest in terms of consequences for use of force is that between less-than-NIAC and NIAC. In essence, where the situation is less-than-NIAC, then law of armed conflict (‘LOAC’) powers, obligations and limitations do not apply de jure. The applicable legal regime is the regular ‘peacetime’ or ‘law enforcement’ regime of criminal law, powers of search, seizure, detention and arrest, the full suite of human rights law checks and balances, and limitations on use of lethal force to situations of individual and unit self-defence as well as the defence of others. Where an internal unrest context spills across the threshold into NIAC, this triggers a radically different set of use of force powers, obligations and limitations: targeting operations in accordance with LOAC, detention operations which differentiate between mere criminality and direct participant in hostilities (‘DPH’) criminality and the availability of certain means and methods which are perfectly legitimate in a law enforcement context, but prohibited in a LOAC context.

II THEMATIC TENSIONS IN THE LEGAL DEBATE CONCERNING USE OF FORCE IN NIAC

The general tenor of legal debate concerning detailed legal rules on use of force in NIAC contexts is heavily influenced by two broader, but intricately linked, thematic tensions concerning the place of NIAC LOAC within LOAC more generally. It is essential that any consideration of the law relating to use of force in a NIAC context recognise the influence and implications of these tensions, as the perspective of the analyst on these two thematic challenges will more often than not drive their interpretive choices. In essence, these thematic challenges are to harmonise and humanise. The second thematic trend – to humanise – is addressed in Chapter 4, and centres upon the extent to which international human rights law de jure, and de facto, now permeates the NIAC regime. Elements of this debate will be noted in this Chapter only as is necessary to deal with specific use of force issues.

The first thematic tension is the push for harmonisation of IAC and NIAC LOAC. Perhaps the most striking and effective example of this thematic trend is the International Committee of the Red Cross’ Customary International Humanitarian Law study (‘ICRC Study’) itself which, as a number of commentators have noted, proceeds upon the assumption that much of IAC LOAC is directly transferable to, and obligatory in, NIAC contexts. For example, in relation to the final stages of the NIAC between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (‘LTTE’), the UN Panel of Experts was in no doubt that the targeting law regime associated most generally with IAC was also applicable, in detail, within this NIAC, citing the ICRC Study

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\(^1\) In a 1943 article, Georg Schwarzenberger took the traditional, naturalist distinction between the law of war and the law of peace in international law to task, arguing that state practice evidenced a third paradigm of status mixtus: see Georg Schwarzenberger, ‘Jus Pacis Ac Belli’ (1943) 37 American Journal of International Law 460. Phillip Jessup, in a 1947 piece in Foreign Affairs, noted that there really ought to be a paradigm covering lesser uses of force than war, and he included self-defence in that lesser uses of force category: Phillip Jessup, ‘Force under a Modern Law of Nations’ (1947) 25 Foreign Affairs 90. In a 1954 editorial comment in the American Journal of International Law, Jessup specifically asked whether international law should recognise an intermediate status between peace and war; Phillip Jessup, ‘Should International Law Recognise an Intermediate Status between Peace and War?’ (1954) 48 American Journal of International Law 98.
Use of Force

rules on targeting as being, ‘in [the Panel’s view], beyond dispute as rules of customary international humanitarian law’ applicable in NIAC contexts.2 The harmonisation trend is highly seductive. It promises, for example, application of the same sets of rules regardless of the context, allowing for stable planning, conduct, and scrutiny against a single code.3 It is also highly attractive in terms of independent assessment and accountability endeavours. This program is evident on many levels. The International Criminal Tribunal for the Former Yugoslavia’s (‘ICTY’) assertion in Tadic to the effect that the legal distinction between IAC and NIAC is now almost irrelevant is oft-cited.4 However, this trend is evident more broadly in jurisprudence and commentary. As Liesbeth Zegveld has argued, it is now ‘common practice for international bodies to read substantive norms of Protocol I and the Geneva Conventions into Common Article 3 and Protocol II’.5 The trend is also evident in detailed analyses of specific LOAC issues: Robin Geiss and Michael Siegrist, for example, have asserted that, in the context of a NIAC:

Protection of military objectives that cannot so readily be concealed may be sought by the use of human shields, thereby manipulating the enemy’s proportionality assessment, in addition to violating the precautionary principle laid out in article 58 of Additional Protocol I and part of customary [international humanitarian law] applicable in both international and non-international armed conflict.

The reference point is clearly Additional Protocol I,7 and the equally clear assumption is that the detailed targeting law provisions of Additional Protocol I are reflected in broad LOAC customary international law and, thus, apply in NIAC contexts. Perhaps the most seductive allure of this trend is the very fact that it appears to promise a diminished, or even dissolved, need to tie ourselves in knots negotiating how NIAC and IAC can share a battlespace in order to establish which LOAC applies. If the hard core of means and methods LOAC is the same for both contexts, then the characterisation distinction becomes significantly less operationally important.

To some extent this thematic trend towards harmonisation in LOAC use of force rules is indeed reflected in state practice, as will be discussed below in relation to targeting operations. But it is not universally so, and this trend is still opposed in some quarters. The US response

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3 Emily Crawford, ‘Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict’ (2007) 20 Leiden Journal of International Law 441 is a strong, reasoned example that is indicative of the pervasive nature of the thematic trend for harmonisation.
4 Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 2 October 1995) [97]–[98].
6 Robin Geiss and Michael Siegrist, ‘Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?’ (2011) 93 International Review of the Red Cross 11, 19–20. See also the authors’ discussion of the proportionality principle and proportionality assessments: at 29–32. The authors cite as evidence of US acceptance of this point an official Collateral Damage Methodology document gained under the freedom of information process: ‘Declaration of Jonathan Manes’, Submission in AlAulaqi v Obama, No 10-cv-1469 (JDB), D DC, 8 October 2010. I respectfully disagree with this assessment: the document discloses a methodology and does not discuss the applicable law beyond generic terms. However, I do think it fair to say that the conclusion is correct – the US does appear to apply the detail of their interpretation of targeting law under IAC LOAC customary international law within NIAC contexts.
7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’).
to the ICRC Study – particularly the reaction to assertions ‘that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions’ – is indicative of this critique.\(^8\) There is a principled reaction to this pervasive trend which aims, as its central purpose, to retain some legal distinction, and indeed operational differentiation, between IAC and NIAC law of armed conflict. NIAC and IAC are different, and aspects of the applicable law reflect – and need to reflect – these differences.\(^9\)

This is perhaps most clearly evidenced in the issue of ‘status’ and its associated consequences for detention operations in NIAC. The drive to harmonise runs a significant risk of undermining one of the key legal, political and operational distinctions between NIAC and IAC – the capacity to treat ‘the enemy’ as a criminal. In IAC, combatant status brings with it an immunity from prosecution for acts done in legitimate operations against the adversary, so long as they were compliant with LOAC. In NIAC, a combatant directly participating in hostilities (‘CDPH’) or fighter member of an organised armed group (‘OAG’) who carries out operations against a military adversary, even where they do so in complete accord with the rules governing combatant conduct, is still liable to prosecution for those acts.\(^10\) There is no CDPH or OAG ‘combatant immunity’ attaching to what would otherwise be LOAC compliant conduct against the adversary in a NIAC; the acts are criminal acts and the perpetrator enjoys no immunity from prosecution in respect of them. Maintaining this criminal characterisation of the adversary is of fundamental sovereign importance for many states who are engaged in a NIAC within their territory and any trend to harmonise (which could, for example, lead to calls for fighter members of OAGs to be accorded de jure prisoner of war (‘POW’) status) will likely be resisted.\(^11\) As a matter of either reality or perception, halting the informal, but nevertheless fundamental, LOAC ‘status creep’ for OAGs is an important point of principle for many states and commentators.

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8 For example, see John B Bellinger III and William J Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 International Review of the Red Cross 443, 448. Further, ‘the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts’: at 447.

9 See, for example, Jelena Pejic, ‘Status of Armed Conflicts’ in Elisabeth Wilmshurst and Susan Breau (eds), Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge University Press, 2002) 77.

10 Thus, for example, a CDPH or a fighter member of an OAG who shoots either a combatant member of the state military force, or a combatant member the military force of an intervening state, has committed an unlawful killing even if it was in all other respects LOAC compliant, whereas the killing of the CDPH or fighter member of an OAG by a combatant member of either state military force in parallel circumstances, is not an unlawful killing since it is excused (permitted) in accordance with LOAC.

11 As James Stewart has noted, the idea that rebels have expanded ‘entitlements or liabilities’ that alter ‘the humanitarian law applicable between State and internationalised insurgent’ is anathema for many: James G Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalised Armed Conflict’ (2003) 85 International Review of the Red Cross 313, 343.
III THE LEGAL STATUS OF THE USE OF FORCE BY ACTORS IN A NIAC

A State Military Forces: Combatant Immunity for Use of Force in Compliance with LOAC

The primary issue one confronts in assessing the status of use of force by state military forces engaged in a NIAC is whether the definition of ‘combatant’ applies in NIAC LOAC. This question presages a series of significant legal implications, for in general LOAC combatant status carries not only obligations but also certain rights and protections. The most critical – in terms of assigning legal character to each perpetrated use of force – is combatant immunity from prosecution for acts of killing, injuring, destruction or damage which would otherwise be transgressions of applicable criminal law. This question can be complicated by the variety of contextual permutations available: state forces fighting a NIAC against rebels within the territory of the state with no interventions by third parties on either side; state forces of a third party supporting the state forces of the state within whose territory the NIAC is being fought, against the rebels (e.g. ISAF in Afghanistan); state forces of a third party supporting the rebels against the state forces of the state within whose territory the NIAC is being fought (e.g. US support to Nicaraguan contras); and, state forces of a third party who intervene in a NIAC but whom are formally allied with neither (e.g. NATO in Libya). It is my contention that whilst this variety of contextual nuances should not be discounted, they do not fundamentally alter the core legal attribute of any state force engaged in any of these contexts: their sovereign character. Consequently, when thinking about the status of use of force by state military forces engaged in a NIAC, contextual nuance (whilst important in many other respects) is not a differentiating attribute which governs the applicable law. The primary attribute is sovereign status. There is one exception to this rule, the levee en masse, but it is an IAC focused and heavily caveated option only available in the immediate stages of response to an invasion. At any rate, it can be safely set aside at this point as it is a uniquely IAC-based legal concept and status.

Consequently the central question in terms of legally characterising culpability in a particular use of force situation is whether ‘combatant immunity’ operates in a NIAC context. The key feature of combatant immunity in IAC LOAC is that a member of a state military force who uses force which kills, injures, destroys or damages will be immune from prosecution and criminal sanction under any applicable national legal regime (for example, own state law, host state law, enemy state law or third state law) or international legal regime (e.g. the Rome Statute of the International Criminal Court (‘Rome Statute’)) so long as the conduct and/or the consequence

12 This is the essence of the US Supreme Court’s decision in The Schooner Exchange v. McFaddon, 11 US (7 Cranch) 116 (1812). ‘She [a public armed ship] constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity’: at 144. It is also the underpinning precept in the Corfu Channel (United Kingdom v Albania) [1949] ICJ Rep 35.

13 Setting aside the live question as to whether interventions in circumstances akin to the NATO operation in Libya are actually situations of a concurrent NIAC (Libyan State forces against rebels) and IAC (NATO state forces against, inter alia, Libyan State forces).


were permissible under LOAC. This essence is clearly reflected in the rule that a legitimate combatant who falls into the hands of his or her opponent must not be prosecuted for conduct which was within the bounds of LOAC. Ken Watkin argues that 'it is logical to conclude that the concept of combatant immunity would apply to the armed forces of the state tasked with using force in a non-international armed conflict'. As Ian Henderson notes, given the silence of the treaties on this point, the argument for a corresponding combatant immunity for state military forces in NIAC contexts is primarily one of logic rather than textual analysis. But the strength of this conclusion is well buttressed by state practice, which is clearly that state military forces engaged in a NIAC are legally characterised as, and hold the status of, ‘combatants’ along the same lines as in IAC. This is entirely coherent with placing the sovereign nature, sovereign discipline and sovereign legal character of state military forces at the very centre of the issue of combatant status. LOAC is most particular as to who may access this status, going so far as to establish both the conditions under which, and the formal process by which, state non-military forces (such as formed police units) are to be assimilated as state military forces to gain combatant status.

One example indicative of state practice is the recent prosecution of several Australian Defence Force members in relation to a civilian casualty incident in Afghanistan in February 2009. The incident took place within an expressly NIAC context. The Chief Judge Advocate’s ultimate dismissal of the charges was fundamentally based on a finding that a World War II precedent on immunity of military members from suit for an alleged breach of a duty of care to civilians applied in this NIAC context and was dispositive of the law. Another example is the Columbian record in prosecuting military members for use of force in the context of the NIAC against FARC, involving targeting rules of engagement for which the reference point is clearly Additional Protocol I.

16 See Regulations regarding the Laws and Customs of War on Land, annexed to Convention (IV) regarding the Laws and Customs of War on Land, opened for signature 18 October 1907, 205 CTS 277 (entered into force 26 January 1910) art 1; Additional Protocol I art 43(2).
17 Of note, this is where the status of members of a levere en masse as legitimate combatants under LOAC is probably most complicated – determining whether an otherwise lawful act under LOAC, when perpetrated by a member of a levere en masse (eg killing an enemy combatant), retains its immunity from criminal sanction.
20 See Transcript of Proceedings (Pre-Trial Directions Hearing) (Australian Defence Force Judge Advocate, CIVCAS 12 February 2009, Chief Judge Advocate Westwood, 20 May 2011) 15. ‘In summary, having regard to the restrictions on the soldier, sailor or airman’s ability to choose to refrain from inherently dangerous conduct, his or her positive obligation to conduct operations against the enemy and the life and death ramifications of hesitation, I can see no basis on which to distinguish the approach taken by the High Court in Shaw Savill. For the same reasons that it is opposed alike to reason and policy to concede a tortious liability, it is in my view contrary to reason and policy to impose a criminal duty. If it were to be imposed clear words would be needed by the parliament’: at 25. The reference is to Shaw Savill & Albion Company Ltd v The Commonwealth (1940) 66 CLR 344. A case in Denmark involving targeting in Afghanistan (a NIAC for Denmark) is ongoing – see ‘Afghan Civilian Death Trial Refused Key Evidence’, The Copenhagen Post (online), 3 December 2012 <http://cphpost.dk/news/international/afghan-civilian-death-trial-refused-key-evidence>.
in Additional Protocol I (or parallel customary international law) apply also in NIAC carries with it an implicit but clearly operative assumption that conduct in accordance with those rules is by definition lawful and free from the application of criminal sanction. Thus the concept of combatant immunity does have legal resonance in NIAC contexts, even if a modicum of uncertainty as to the precise operation of the concept remains; for example, is the immunity based in law or, rather, in a shared tendency to prosecutorial discretion? In my view, state practice indicates that combatant immunity for state forces in NIACs exists as a matter of law and is based in an implicit determination that this aspect of LOAC crosses the IAC-NIAC divide.

B Law Enforcement During a NIAC

Although it is certainly the case that law enforcement operations are conducted within the context of IACs, it is within NIAC contexts that military forces more commonly take on law enforcement roles and tasks. It is within the NIAC context that the issue of state military forces engaging in both LOAC-based and law enforcement-based operations is thus most acute. I believe this is for four reasons.

First, the characterisation line between less-than-NIAC law enforcement and NIAC contexts involving simultaneous law enforcement operations is much more permeable than the NIAC-IAC threshold and the international tension-IAC threshold. This means that the issue is in constant and conscious focus as the implications of nuance are particularly acute in the use of force sphere. Second, NIACs are, by definition, centrally concerned with either responding to significant breaches of the law within the state in turmoil or an inability of the state to extend or maintain its sovereign writ to enforce the law in a part of its territory. That is, such situations are fundamentally a law enforcement context while also being a LOAC context. Third, for state military forces, the domestic ‘rebel’ adversary retains his/her character as a criminal, regardless of the fact that (provided the context is a NIAC) they may be pursued using lethal LOAC-based authorisations as equally as with routine law enforcement powers. Finally, there is a significant element in the ‘humanisation’ drive which quite explicitly seeks to moderate the ‘harshness’ of LOAC by making law enforcement options a compulsory first consideration. This is perhaps best illustrated in the controversial, yet widely debated (and thus not merely fanciful), assertion in the ICRC’s Interpretive Guidance that a law enforcement-based ‘capture’ option should be explored prior to adopting a LOAC-based ‘kill’ option when seeking to neutralize certain CDPH.

What is vital, however, is that neither this contextual ambivalence and regime mixing of law enforcement and NIAC LOAC nor the thematic trend attempting to make consideration of law enforcement options a compulsory precondition to utilizing LOAC options obscures the fact that when state military forces engage in operations in a NIAC context, they must distinguish clearly between their LOAC-based operations and their law enforcement-based operations. Different legal regimes (and indeed rules of engagement) apply to each. Thus drug barons in Afghanistan (that is, criminal gang leaders who are not fighter members of an OAG, but who may provide funds to an OAG) are criminals, not targetable members of an OAG. As a consequence, they can


23 International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) 82.
be arrested in accordance with routine criminal law procedures, but not lethally targeted under LOAC. If a drug baron is killed during an arrest operation, the killing must be analysed in terms of the criminal law paradigm of imminent threat to life and self-defence, not in terms of LOAC targetability status criteria.24

In terms of the legitimisation and assessment of use of force – the distinction between NIAC and less-than-NIAC – the key legal issue is the authority for (and protection available in) the individual instance of a use of force and, most particularly, a use of lethal force. LOAC (the armed conflict and combatant focused paradigm) is the appropriate assessment scheme where a) the context is NIAC, b) the user of force is a combatant and c) the target is a fighter member of an OAG. Outside of this situation, however, it is own state or host state municipal law which must govern the assessment – both where military forces are being used to support policing operations in a less-than-NIAC context and where military forces are conducting law enforcement operations (such as against drug barons) in parallel with, but distinct from, NIAC LOAC-based operations. This critical need to clearly understand actor, object and context in terms of assigning the appropriate legal status to an incident of use of force taking place in a broadly NIAC context is determinative of a range of associated issues. One such issue, for example, is whether the use of force is a defence against ‘attack’ under LOAC25 or an exercise of the right of self-defence in line with the applicable municipal criminal law concept of individual self-defence/defence of others. Given that the LOAC approach assimilates attack and defence against attack, and requires that the same rules be followed in both situations, all of the limitations in attack under LOAC (eg no use of riot control agents (‘RCA’); no use of flattening or expanding bullets) also apply to defence from attack. If, however, the use of force is to be assessed against the law of self-defence under applicable municipal law, then different assessment criteria come into play. For example, proportionality and imminence/immediacy are assessed differently in criminal law and LOAC; and use of RCA and flattening or expanding rounds by military forces in support of law enforcement operations is permissible in non-LOAC governed situations.

C Fighter Members of Organised Armed Groups

It is quite clear that criminality is the default status of an OAG member’s use of force in a NIAC context.26 Apart from an ad hoc decision made by either the state, or the OAG if it is the eventual victor, to decline to prosecute or to retrospectively validate such conduct, there are only two narrow exceptions to this general sheen of criminality. The first is the situation countenanced in article 1(4) of Additional Protocol I whereby civil wars or rebellions characterised by ‘peoples… fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ are to be considered as IACs, and thus governed by the full range of IAC LOAC. The consequence for the OAG is not only that they must comply

25 Additional Protocol I art 49(1): “Attacks” means acts of violence against the adversary, whether in offence or in defence.
with IAC LOAC, but also, that they can expect and demand the adversary state to conduct the conflict in accordance with IAC LOAC. This includes treating captured OAG combatants as POWs who are not to be prosecuted for acts that are LOAC compliant, regardless of the fact that they are also breaches of the state’s criminal laws.

The second exception – although superficially similar – is fundamentally different. However, there is a live question as to whether it remains extant. The customary international law doctrine of belligerency and its attendant status of ‘belligerency’ for the benefiting rebel group brought what would now be characterised as IAC LOAC rules into play within what would otherwise be generally characterised as a NIAC context.27 The essence of the doctrine of belligerency was that where an insurgent party was recognised to hold the legal status of ‘belligerent’ this would ‘secure for the recognized [that is, the state], as well as for the other contender, some rights under international law’.28 Amongst these was the right to have the state conduct its operations against the belligerent in accordance with the normal laws of war on land and at sea. As Fred Nielsen recorded in his 1936 assessment of the operation of the law of blockade, contraband and visit and search in relation to belligerent status, ‘I believe it is generally recognized that rules and principles of that law become operative, as regards rights and obligations of both parties to a civil conflict, and others, when the insurgents attain the so-called status of belligerency’.29 Norman Padelford, discussing the analyses of Nielsen and Robert Wilson, was in no doubt that, according to usage and the general statements of publicists, ‘the international rules for the conduct of warfare on land are supposed to be employed when the parent has recognized the belligerency of the rebels’.30

For all its similarity with a situation of trans-substantiation perpetrated via article 1(4) of Additional Protocol I, belligerency differs from that newer option in three important respects. First, there is a serious question as to whether the doctrine, and thus its attendant status, has survived codification in the post-1945 progressive development of LOAC. Certainly, the doctrine of belligerency differs sufficiently from the scope of article 1(4) of Additional Protocol I in that it is capable of independent description, definition and existence and, thus, may not have simply been extinguished by the updated treatment of the rebellion context evident in Common Article 3, article 1(4) of Additional Protocol I, and Additional Protocol II.31 It is far from a merely academic question: a determination to the effect that the doctrine remains afoot would have immediate and fundamental operational consequences in (for example) Afghanistan in terms of the potential change in status it could afford certain OAGs (and their captured fighters). This

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28 Wilson, above n 27, 143.

29 Nielsen, above n 27, 146.

30 ‘Discussion’, above n 27, 156.

31 See, for example, Yair M Lootsteen, ‘The Concept of Belligerency in International Law’ (2000) 166 Military Law Review 109, whose view is that the doctrine has fallen into desuetude, with the last occasion on which it was seriously considered being the Spanish Civil War.
change would have significant effects on operational concerns such as detention (for reasons detailed below).

The second element of difference is defining the trigger for application. The trigger in Additional Protocol I is clear in law, if difficult in practice:

ARTICLE 1

(3) This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

(4) The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 1(4) provides for the removal of the category of conflict that it describes from the realm of NIAC, and its re-definition as IAC. The consequence is that the full panoply of IAC LOAC applies as a matter of course, by treaty and customary international law, because the conflict is now considered to be an IAC by definition. Recognition of the context as one fitting within the Additional Protocol I article 1(4) scope clearly requires some states to say something on the nature of the conflict. But this serves as evidence rather than as the requirement of the test, for the test is fundamentally grounded in the extent to which the facts on the ground meet the required definition in the specified instruments. In belligerency, however, it was fundamentally a state prerogative – either of the imperilled state, or third states – to generate the necessary recognition. The test was thus generally considered to be two-stepped, although there remains some debate as to the precise requirements of each step. First, the insurgent group was expected to fulfil some preliminary level of organisation and control, although the degree remains contentious. Wilson described the two ‘extremes’ as being either that:

(1) The belligerent must be attributed with analogies of ‘statehood’ – ‘when the regime to be recognized fulfils the basic conditions as to territory, free communication, organization of government and forces, and political objectives consistent with moral principles’;

(2) Recognition was simply a matter of ‘political policy’ for the recognizing state, implying some degree of organization and capability (‘capacity to be a responsible person’), and not merely (quoting President Grant) a ‘gratuitous demonstration of moral support to the rebellion’, but not necessarily implying the full requirements of quasi-statehood.32

The second requirement was that a state – either the imperilled or parent state, or a third state – must accord recognition of belligerency status upon the insurgent. There remains debate as to whether this recognition could be ‘inferred by conduct’, or needed to be explicit. Wilson was of the view that by the end of the 19th century, the law permitted that conduct by the parent/imperilled state (such as the declaration of a blockade) could afford sufficient indirect evidence

32 Wilson, above n 27, 139. See also Nielsen, above n 27, 146. Lootsteen, above n 31, 109 cites the first step as requiring that ‘[c]ertain conditions of fact’ arise including: ‘the existence of civil war within a state, beyond the scope of mere local unrest; occupation by insurgents of a substantial part of the territory of the state; a measure of orderly administration by that group in the area it controls; and observance of the laws of war by the rebel forces, acting under responsible authority’. 
of recognition of belligerency status, but that recognition by a third state would require an explicit statement to that effect.\footnote{Wilson, above n 27, 141–2.}

The third area of difference is whether the doctrine actually incorporated a specific change of status for the \textit{OAG} (from criminal, to a more recognised combatant status) or for its acts (from criminality, to legitimacy under \textit{LOAC}). The \textit{Lieber Code}, itself established in the fulcrum of a civil war, is not clear:

\textbf{ARTICLE 151}

The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own …

\textbf{ARTICLE 154}

Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty …

\textbf{ARTICLE 157}

Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason …\footnote{Instructions for the Government of Armies of the United States in the Field, General Order No 100, 24 April 1863. The Union did treat Confederate soldiers as \textit{POW}s.} 

At a minimum, the combined implication of these provisions is that while partisan forces associated with the military of a state were entitled to combatant immunity and \textit{POW} status, those who were equivalently organised, but who had no link to a legitimating sovereignty, remained rebels nonetheless. The clear implication (particularly in article 157) appears to be that such armed rebels, who resist the state’s forces, are not immune from prosecution for their acts, regardless of whether those acts were otherwise in coherence with \textit{LOAC}. This is of particular importance when assessing the criminality of a use of force by \textit{OAG} fighter members. Did the doctrine only require that the state must conduct its fight against the rebels in accordance with what would now be characterised as the rules of \textit{IAC LOAC}, but without altering the criminal status of the \textit{OAG} and its acts? Or did the doctrine go one step further and actually alter the status of the rebels (the \textit{OAG}) and, as a consequence of that change in status, the state now had to fight those rebels according to the ‘standard’ rules of \textit{LOAC} applicable on an inter-state basis? Some disagreement on this core issue remained as late as 1937; Philip Jessup, in the 1937 American Society of International Law discussion on belligerency and insurgency took issue with Padelford on just this point:

I should be much obliged if [Professor Padelford] would elaborate his point that international law prevents a State from treating as traitors or persons guilty of treason those in insurrection against it after their belligerency has been recognized. I was not aware that international law so restrained the State in the treatment of its nationals, particularly on land, in the course of a civil war or rebellion.

To which Padelford responded:

With regard to the matter of refraining from treating insurgents as traitors after the recognition of bellig-
erency, that principle has been stated unanimously by writers on the subject, that once belligerency has been recognized the parent government is expected to treat captured rebels as prisoners of war and to apply the rules for the conduct of international warfare to the contest.35

Lootsteen, however, is adamant that the weight of academic analysis on the issue since 1937 has established that where belligerency status was accorded, ‘captured members of the rebel armed forces, as well as soldiers of the incumbent government, were entitled to prisoner of war status’.36 Where does this leave us? First, it is possible, but increasingly unlikely, that the doctrine of belligerency has survived the post-1945 codification of LOAC. Second, even if the doctrine – and status – of belligerency does remain extant, there is still some debate as to what this means for the legitimacy of use of force by those rebels accorded the status. It certainly meant that both parties were expected to comply with the international law of war in their conduct of operations. But there is some disagreement as to whether this brought with it an equivalent of combatant immunity for the rebel belligerent’s LOAC compliant acts, although there appears to be a trend towards accepting that it did. The consequence is that if the customary international law doctrine of belligerency remains extant, it might offer significant legal status and succour for some OAGs in terms of making available to them a form of combatant immunity for LOAC compliant use of force. I fear that this is too many ifs, with too few precedents, and none of them current. Additionally, it would go significantly against the grain of current state practice in those very situations where it would be most patently available if it did indeed linger as a legal option.

IV MEANS AND METHODS ISSUES

It is readily apparent from the discussion in Chapter 2 that some (for example) weapons law applies, by force of the relevant treaty, within NIAC contexts. Thus there is no ‘opt out’ for use of certain RCA as a means or method of warfare in NIAC. For example, the Chemical Weapons Convention (‘CWC’) makes no distinction between IAC and NIAC, declaring only that ‘each State Party undertakes not to use riot control agents as a method of warfare’.37 The more vexed question is to determine what LOAC found in expressly IAC focused treaties is now considered to apply to NIAC by means of customary international law.

A The Application of Treaty-Based IAC LOAC to NIAC via the Operation of Customary International Law

Determining which aspects of LOAC apply equally to IAC and NIAC contexts – such as with the CWC, where no distinction is made between IAC and NIAC – is generally relatively straightforward. Determining specifically which aspects of IAC LOAC apply to use of force in NIAC contexts is exponentially more contentious. Indeed, this question lies at the very core of the harmonisation project. In my view, it is impossible to offer any meaningful generalisation or to establish any theoretical model for establishing which aspects of IAC LOAC could now be said to also apply within NIAC contexts. This leaves us in the legally sound (albeit labour-intensive) position of

35 ’Discussion’, above n 27, 161.
36 Lootsteen, above n 31, 110.
needing to address each claimed incident of harmonisation on a case-by-case basis by reference to actual state practice. This is a major study in and of itself, and the issue cannot be done justice in this chapter. It must suffice, consequently, to outline two situations where it might be said that this crossover of clearly IAC LOAC into the NIAC context appears to be evidenced in state practice relating to use of force in NIAC contexts.

B Targeting

The first example is targeting law, for most states codified in Additional Protocol I, but still primarily an incident of customary international law for other states. It is clearly arguable that recent state practice tends towards applying the fundamentals of IAC targeting law to NIAC targeting operations. Targeting operations conducted in NIAC contexts are now very widely considered to be governed by the same rules as for IAC as encapsulated in customary international law and, for many states, as expressed in detail in Additional Protocol I. In Afghanistan (clearly a NIAC for many of the ISAF contributing states) there is no doubt that the detailed targeting requirements of Additional Protocol I (relevant to IAC) or their customary international law equivalent, are applied as the default legal regime governing use of force in targeting operations. The United Nations Assistance Mission in Afghanistan and Afghanistan Independent Human Rights Commission (‘NAMA-AIHRC’) Annual Report 2010: Protection of Civilians in Armed Conflict (March 2011), for example, is explicit in its referencing of articles 48, 51, 52 and 57 of Additional Protocol I:

Customary rules of international humanitarian law also apply to the warring parties in Afghanistan. International judicial bodies have stated that several rules in the Geneva Conventions and the Additional Protocols are part of customary international law. The most relevant principles are the following:

- Distinction: ‘[the Parties]…shall at all times distinguish between the civilian population and combatants’ and ‘between civilian objects and military objectives.’
- Proportionality: ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’
- Precautions in attack: ‘In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects’ and that all feasible precautions must be taken with the ‘view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.’

38 In its detailed analysis on the law applicable to (for example) aerial attacks in the context of the NIAC in Afghanistan, NAMA-AIHRC assert that:

In the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects. Armed forces must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. They must also take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Under international humanitarian law, parties must do everything feasible to assess whether any attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Finally, the warring parties must give effective advance warning of attacks which may affect the civilian population.  

It is absolutely clear that the point of reference is Additional Protocol I. The US Army Judge Advocate General Corps’ 2012 Operational Law Handbook describes the concepts of distinction and proportionality, but cited and described in terms of Additional Protocol I language, as examples of customary international law LOAC provisions applicable across NIAC and IAC. A combined reading of Chapters Five (LOAC) and Eight (targeting) of the US Navy, Marine Corps, and Coast Guard Commander’s Handbook on the Law of Naval Operations similarly makes it clear that US practice is to apply the same law of targeting in both IAC and NIAC contexts. It is clear on any reading of successive Commander ISAF Tactical Memoranda on reducing collateral damage in Afghanistan (a NIAC) that the reference point is the law of targeting as reflected in Additional Protocol I and parallel customary international law.  

But this issue is further complicated. As the Bellinger and Haynes response to the ICRC Study importantly points out, such statements in military manuals do not necessarily reflect state practice. The question, therefore, is whether the application of IAC LOAC targeting rules in NIAC contexts is done as a matter of policy or as an incident of law. The US position is that it applies the same LOAC provisions in both forms of conflict (and indeed outside of armed conflict, but that is not relevant with respect to targeting law) as a matter of policy: a US Department of Defence directive requires that ‘members of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations’. However, as with much customary international law in the LOAC field, at some point in time – in the absence of contrary practice or statements – such ‘policy’ decisions do take on the veneer of legal obligation, and it is arguable that this is now the case, on this issue at least, for the US.

There are also other indications that perhaps this US practice of harmonisation between IAC and NIAC LOAC in relation to targeting law has moved from the realm of discretionary policy choice into legal obligation. In his 2010 address to American Society of International Law on ‘The Obama Administration and International Law’, Legal Adviser Harold Koh asserted that ‘a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide

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43 US Department of Defence, Directive Series 2311.01E (2011) [4.1].
targets with legal process before the state may use lethal force.\textsuperscript{44} Leaving aside the ‘third paradigm’ issue,\textsuperscript{45} statements such as this support the view that targeting in NIAC contexts is now considered by the US to be governed by an equivalent IAC targeting law, rather than by some other set of rules which is much less defined or much more permissive. The first indication lies in the very need to assert a third paradigm for use of lethal force rather than accepting the US Supreme Court’s grant to the US of a global Common Article 3 NIAC against al Qaeda and its affiliates,\textsuperscript{46} which was an open door to interpreting a different set of targeting criteria into play. The second is the US assurance that such strikes are nevertheless subject to the same rigorous targeting assessment processes as for IAC contexts – a clear indication that there is no other detailed process that is considered available or acceptable in either IAC or NIAC contexts (or indeed in the third context of ‘national self-defence’ targeting):

In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

First, the principle of \textit{distinction}, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and

Second, the principle of \textit{proportionality}, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.\textsuperscript{47}

The reference point is clearly the IAC LOAC customary international law equivalent of \textit{Additional Protocol I}. More broadly, during recent United Nations Security Council sanctioned no-fly zone enforcement and humanitarian protection operations in Libya, it is clear that NATO forces followed, and appeared to consider themselves bound to follow, IAC targeting rules.\textsuperscript{48} Admittedly, this particular case study is complicated by the possibility that NATO was engaged in a concurrent IAC whilst a NIAC was afoot between Libyan forces and Libyan rebels. In many ways, however, this supports the view that IAC LOAC on targeting has now become the governing legal regime for targeting operations in all LOAC contexts – there was no reference to any alternative scheme as a context-dependant option.

C Flattening and Expanding Bullets

The second example of an aspect of IAC LOAC which is directly concerned with use of force, and which now appears to be considered applicable in NIAC contexts, is drawn from weapons

\begin{itemize}
  \item \textsuperscript{44} Harold Hongju Koh, ‘The Obama Administration and International Law’ (Speech delivered at the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010) <http://www.state.gov/s/l/releases/remarks/139119.htm>.
  \item \textsuperscript{45} Certainly, the fundamental analysis informing this justification for extra-judicial targeted strikes, on a national self-defense basis outside of either a LOAC context or an immediate criminal law ‘self-defense’ context, is highly contested; but this is a separate matter.
  \item \textsuperscript{46} \textit{Hamdan v Rumsfeld}, 548 US 557 (2006).
  \item \textsuperscript{47} Koh, above n 44. See also, Geoffrey S Corn, ‘Self-defense Targeting: Blurring the Line between the \textit{Jus ad Bellum} and the \textit{Jus in Bello}’ (2011) 88 International Law Studies 57, 59.
  \item \textsuperscript{48} See, for example, the NATO Legal Adviser’s two letters to Judge Kirsch of the UN International Commission of Inquiry on Libya, dated 23 January 2012 and 15 February 2012 <http://usnwc.libguides.com/content.php?pid=3245028&sid=2803607>. This example is complicated, however, by the UN Commission’s explicit finding that NATO’s participation in the Libyan conflict was as a party to an IAC – a finding that NATO remained silent upon.
\end{itemize}
law. In many respects, it is not surprising that weapons law is so readily assimilated from IAC into NIAC contexts: it is difficult to see how a weapon that is considered to inflict unnecessary suffering upon its victims if deployed in an IAC context might be said to cause less unnecessary suffering, or less legally condemnable unnecessary suffering, when deployed in a NIAC context. The consignment of rebels below the belligerency status threshold into a legal void (certainly, at least, in terms of the inhumanely permissive use of force options this consignment made available to their affronted sovereign) is now thankfully a thing of the past and so it cannot be said that the law is tolerant of higher levels of suffering are in NIAC contexts upon that basis.49

The prohibition on flattening and expanding bullets offers an example although it is important to recognise that this particular prohibition has lost some of its logical probity as ammunition types of this nature have advanced since 1898 and are now in fact the ammunition type of choice in many policing contexts. The original prohibition was expressly negotiated to apply in situations of war between two of the states contracting parties – that is, what would now be considered IAC. Reflecting these IAC origins, the incorporation of this prohibition into the Rome Statute in 1998 (art 8(2)(b)(xix)) provided jurisdiction in IAC, but not NIAC, contexts. In 2010, at the Kampala Review Conference, a series of amendments to the Rome Statute were adopted, including a new equivalent offence of employing flattening or expanding rounds in a NIAC.50 In the Resolution accompanying the amendment, the states parties affirmed that they:

Consid[ed] that the crimes referred to in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law …51

This particular aspect of IAC LOAC weapons law has, consequently, certainly made the transition from an IAC-focused treaty (and customary international law) obligation into a broader customary international law obligation applicable in both IAC and NIAC contexts. It is only through such case-by-case analyses that any meaningful assessment of whether a particular means or method aspect of IAC LOAC has become applicable in NIAC as a matter of law: general statements as to harmonisation do not advance us very far.

V CONCLUSION

In terms of articulating tangible and fundamental consequences when assessing the level of harmonization between IAC and NIAC LOAC, use of force offers an unparalleled touchstone for analysis. In part this is because the LOAC applicable to use of force in an IAC situation is more

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49 For example, as late as 1867 and 1868, a learned British scholar of martial law noted that a state of rebellion could support a suspension of the ‘normal’ rules, permitting actions as draconian as arbitrary detention and, in some situations, summary execution. See W F Finlason, Commentaries upon Martial Law, with Special Reference to its Regulation and Restraint: With an Introduction, Containing Comments upon the Charge of the Lord Chief Justice in the Jamaica Case (Stevens & Sons, 1867); W F Finlason, Review of the Authorities as to the Repression of Riot or Rebellion, with Special Reference to Criminal or Civil Liability (Stevens & Sons, 1868).

50 See ICC Review Conference, Amendments to Article 8 of the Rome Statute, 12th plen mtg, ICC Doc No RC/Res.5 (10 June 2010). The amendment – now Art 8(2)(e)(xv) – creates an offence, within a non-international armed conflict, of ‘[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions’.

51 Ibid preamble.
highly developed (but perhaps not necessarily more nuanced) than that applicable in a NIAC context, and the seductive allure of analogy is difficult to resist when seeking detail and clarity on this most fundamental of issues. Nowhere are the consequences of this inquiry – in terms of both physical and legal hazard – more pronounced for the user of force who must actually comply with the law, than in the specific rules that validate or criminalize their conduct. Only by engaging with the detailed scope of the harmonization trend in a workmanlike, case-by-case, rule-by-rule basis can we provide the particularized and contextually sound level of guidance and advice that users of force should be entitled to receive. In LOAC, interpretation and application carries with it the constant and immediate shadow of hazard and harm; consequently, unless and until the IAC – NIAC LOAC harmonization process is utter and complete, there will always be nuances and curiosities regarding NIAC LOAC use of force rules that must be distinguished from their IAC LOAC counterparts, and interpreted and applied within their often highly complicated NIAC contexts. It is thus important that we devote time to seeking clarity in terms of the rules governing intentional infliction of death, injury and destruction applicable in a NIAC. Simply reading the IAC LOAC rules on use of force across into NIAC LOAC as a full and comprehensive response is seductive, widely practiced, and in many cases entirely logical and legitimate. But not in all cases. And it is in those few situations where NIAC-specific LOAC clarity can help us to illuminate the sometimes contextually uncertain line between a LOAC-excused use of force, and a murder charge.
Detention in Non-International Armed Conflict

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I INTRODUCTION

A Purpose and Outline of the Chapter

A report produced in 2011 by the International Committee of the Red Cross (‘ICRC’) for the 31st International Conference of the Red Cross and Red Crescent noted that

[while international humanitarian law contains detailed rules on conditions of detention in international armed conflicts, this is not the case in conflicts not of an international character, especially those governed by Article 3 common to the Geneva Conventions, the minimum norm applicable in all non-international armed conflicts.]

With respect to detention that is not related to criminal proceedings but is merely a by-product of a non-international armed conflict (‘NIAC’), the legal situation is complicated even further. As noted in the report of the Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict convened in 2008 by Chatham House and ICRC (‘Expert Meeting’),

there is no explicit legal basis for this type of deprivation of liberty in any branch of international law. At the same time, in reality both States and non-State armed groups detain individuals for security reasons in NIAC and do so outside the framework of criminal proceedings. The legal basis for internment, the grounds and procedural safeguards applicable are questions of urgent concern to both policy and operational military personnel, the academic community, international think tanks, NGO’s and others.

These observations highlight some of the key issues that are addressed in this Chapter. First, the Chapter examines the legal authority to detain in NIACS (Section II). Then it considers the procedural safeguards afforded to detainees (Section III) and the principles governing their human treatment while in detention (Section IV) in NIAC.

Many contemporary NIACs are not ‘traditional’ (i.e., exclusively internal) but involve external intervention by multinational forces (‘MNF’). While this distinction does not indicate a separate category of NIAC that would be covered by a different set of rules, different legal and practical issues do arise depending on the type of NIAC. In particular, in a NIAC involving an international intervention, a tension may emerge between the domestic and international obligations of the intervening states on the one hand and the sovereignty of the host state on the other hand. This relates, for instance, to the transfer or handover of detainees from an intervening state to a host state, an issue that is addressed in some detail below (Section V(A)).

The chapter concludes with a review of law-based and policy-based options for developing the current regulatory framework of detention in NIACs (Section V).

B Termination and Approach

This chapter deals with ‘detainees’ and ‘detention’. But, as a non-paper produced by the Danish government in support of the 2007 Copenhagen Conference on the Handling of Detainees in International Military Operations (‘Copenhagen Non-Paper’) points out, [1] there is no legal definition of ‘detention’ in the Geneva Conventions. In international armed conflict, prisoners of war gain their status when they have ‘fallen into the power of the enemy’ and civilian protected persons are those who ‘at a given moment and in any matter whatsoever, find themselves … in hands of the Party to the conflict or the Occupying [Power]’ …

The United Nations-sponsored Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (‘Body of Principles’) defines a ‘detained person’ as ‘any person deprived of personal liberty except as a result of conviction for an offence’ and ‘detention’ as the condition of such a person. But, according to a report of the UN Working Group on Arbitrary Detention, this definition ‘has no general scope, as commonly thought, beyond the Body of Principles itself’. Moreover, this document was not specifically designed to deal with situations of armed conflict.

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3 Thus, one can accordingly speak of ‘traditional NIACs’ and ‘multinational-forces-NIACs’.
4 Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 862.
6 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (9 December 1988) annex 1 (‘Use of Terms’). With respect to juveniles, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, GA Res 45/113, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) annex 1 art 11(b) states as follows:

   The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

The report of the 31st Red Cross Conference mentioned earlier uses the word ‘detention’ to refer to ‘the deprivation of liberty of a person for reasons related to an armed conflict’.

The report explains that there are ‘two main forms of long-term detention in armed conflicts’, namely:

- ‘internment’ or ‘administrative detention for security reasons’, which is the ‘detention of a person believed to pose a serious threat to the detaining authority’s security, without the intention of bringing criminal charges against such person’; and
- ‘detention for the purposes of criminal proceedings’, which entails ‘deprivation of liberty to which a criminal suspect may be subjected, lasting until acquittal or final conviction on appeal’.

The terms ‘internment’ and ‘administrative detention’ are often used interchangeably to signify deprivation of liberty unrelated to criminal proceedings:

- The 2008 Expert Meeting equated to ‘administrative detention’ to ‘internment’ which it understood as ‘the deprivation of liberty in armed conflict for security reasons – ie outside criminal proceedings – ordered by the executive’;
- Jelena Pejić, an ICRC Legal Adviser and an influential commentator in this area, similarly states that ‘[i]nternment or administrative detention is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee/administrative detainee’;
- Ashley Deeks refers to ‘administrative detention’ which arises in ‘situations in which states engaged in armed conflict may detain persons without necessarily bringing criminal charges against them’;
- The International Commission of Jurists, which in its Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism examined the issue of administrative detention in the context of both peace and conflict, defined ‘administrative detention’ as ‘detention without charge’. In the Commission’s view, administrative detention included ‘administrative internment’, which also refers to the internment of civilians in armed conflict. It stated that ‘assigned residence’, which is a deprivation of liberty, is also encapsulated in the term ‘administrative detention’. Regarding the support for a particular definition, it concluded that, ‘[g]enerally, international norms do not provide a definition of administrative detention, but use expressions such as “persons arrested or imprisoned without charge”’.
While commentators such as Lieutenant Colonel Chris Jenks have suggested that there should be a ‘convergence of modalities’ for the different types of detainees, the focus of this chapter will be on persons in administrative rather than criminal detention. The word ‘detainee’ will thus be used throughout this Chapter to refer to administrative detainees.

This chapter looks at detention from the viewpoint of both government forces and non-state actors. However, the bulk of case law and scholarly commentary addresses the actions of government forces, which reflects, in part, the technical reality that human rights law (‘HRL’) instruments (a key component for determining rights and obligations and ‘best practice’) bind states rather than non-state actors. This is not to say HRL does not affect non-state actors by way of legal analogy or through the influence of aspirational best practice. The effect though is less direct than for state actors.

II LEGAL AUTHORITY TO DETAIN

A Outline

As noted by the 2008 Expert Meeting, ‘both States and non-State armed groups detain individuals for security reasons in NIAC and do so outside the framework of criminal proceedings’ but there ‘is no explicit legal basis for this type of deprivation of liberty in any branch of international law’.19

Yet, as Pejić points out, detention would need to comply with the ‘principle of legality’, which ‘[i]n the context of internment/administrative detention … means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law’. This Section deals largely with the substantive aspect of the matter while the procedural aspect is addressed in Section III below.

This section first considers the legal principles governing detention under general HRL and the international humanitarian law (‘IHL’) applicable in international armed conflict (‘IAC’) (Subsection B). It then considers the possible legal authority of states to detain in NIACS (Subsection C) and the substantive grounds for such detention (Subsection D). It then reflects on the effect of United Nations Security Council (‘UNSC’) resolutions on the legal framework discussed (Subsection E) and, finally, it addresses the possible authority of non-state actors to detain in NIACS (Subsection F).

B General Legal Framework

1 Human Rights Law

When detention takes place outside the scope of an armed conflict, rules governing detention and the handling of detainees may be found in relevant human rights law such as the International Covenant

20 Pejić, above n 12, 383.
on Cultural and Political Rights (ICCPR), the UN Convention on Torture and from a regional perspective, the European Convention on Human Rights (etc) …

All of the general human rights treaties provide, in one form or another, for the ‘right to liberty and security of person’; all of them also provide for the basis on which that right may be limited and the procedural safeguards pertaining thereto. Limiting the present enquiry to the former aspect only, there is a noticeable difference between the various instruments.

- The European Convention on Human Rights (‘ECHR’) is the only general HRL treaty that purports to exhaustively list the circumstances where a person may be detained. This list does not mention security detention in an armed conflict.
- American Declaration of the Rights and Duties of Man (‘ADHR’), American Convention on Human Rights (‘ACHR’), African Charter on Human and Peoples’ Rights (‘AfrCHPR’) and International Covenant on Civil and Political Rights (‘ICCPR’) require the grounds of the deprivation of liberty to be established beforehand by law, and the ACHR and ICCPR further require a person not be subjected to ‘arbitrary’ arrest, detention or imprisonment.

21 Government of Denmark, above n 5, 6.
22 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, CETS No 5 (entered into force 3 September 1953) (‘ECHR’). Article 5(1) states:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

23 Al-Jedda v United Kingdom [2011] IV Eur Court HR 305, [100] (‘Al-Jedda’). See also Lawless v Ireland (No 3) (European Court of Human Rights, Chamber, Application No 332/57, 1 July 1961) [13]–[14]; Guzzardi v Italy (European Court of Human Rights, Plenary, Application No 7367/76, 6 November 1980) [102]; Jėčius v Lithuania [2000] IX Eur Court HR 235, 251 [47]–[52].
24 Inter-American Commission on Human Rights, OAS Res XXX, 9th conf, 2 May 1948. (‘ADHR’)
27 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).
28 ADHR art 25(1): ‘No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.’ ACHR art 7:

(1) Every person has the right to personal liberty and security.

(2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

(3) No one shall be subject to arbitrary arrest or imprisonment.

AfrCHPR art 6: ‘Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.’ ICCPR art 9(1): ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’
• The *Arab Charter of Human Rights* emphasizes the procedural aspect.\(^{29}\)

Much of the focus of international case law and academic discussion in this context had been on the meaning of ‘arbitrary’ detention. In the case of *Mukong v Cameroon*, the Human Rights Committee (‘HRC’) stated that:

The drafting history of [ICCPR article 9(1)], confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriate, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.\(^{30}\)

Oswald provides a framework for assessing the prohibition against arbitrary detention as follows:

First, the arbitrary nature of detention is to be measured against what is reasonable and necessary in all the circumstances. The test for reasonableness and necessity relates to matters such as the appropriateness of detention, injustice, lack of predictability and due process, and extends to encompass the questions of whether there are other less intrusive means of dealing with the situation and whether the detention is intended to prevent the flight of the detainee, interference with evidence, or the recurrence of crime. Second, in order for detention to be lawful, it must be lawful in terms of the domestic law where the detention has taken place. It may be appropriate, in certain circumstances, to measure that domestic law against international law.\(^{31}\)

2 International Humanitarian Law of International Armed Conflict

In IAC, IHL provides a clear legal basis for the detention of enemy combatants as prisoners of war. The relevant part of article 21(1) of the *Geneva Convention Relative to the Treatment of Prisoners of War* (‘Third Geneva Convention’) provides:\(^{32}\)

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter.

The *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (‘Fourth Geneva Convention’)\(^{33}\) contains several provisions relating to the internment of protected persons, who, for the purposes of the Convention, are ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party

\(^{29}\) Opened for signature 22 May 2004, 12 International Human Rights Reports 893 (entered into force 15 March 2008) (‘Arbchr’). Arbchr art 14(2): ‘No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedures as is established thereby.’ Per article 14(1): ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant. Subsection 6 provides further that ‘anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.


\(^{31}\) Oswald, above n 8, 103–4.

\(^{32}\) Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘Third Geneva Convention’).

\(^{33}\) Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘Fourth Geneva Convention’).
to the conflict or Occupying Power of which they are not nationals\(^{34}\) and are not covered by the other 1949 Geneva Conventions.

- Article 27(4) of the *Fourth Geneva Convention* provides generally that ‘parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war’.\(^{35}\)
- Article 42(1) of the *Fourth Geneva Convention* provides, with respect to aliens in the territory of a party to the conflict, that ‘[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary’.\(^{36}\)
- Article 78(1) of the *Fourth Geneva Convention* provides, with respect to occupied territory, that if an ‘Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment’.

Thus, in the IHL arena, the key justification for detention or internment is that of ‘absolutely necessary’ or ‘imperative’ for reasons of security, although it is argued that ‘existing standards do not tell us what kinds of security threats merit noncriminal detention’.\(^{37}\)

**C Authority to Detain in NIAC**

As noted above, treaty law applicable in NIAC does not provide an explicit legal basis for detention. Indeed:

When comparing the treaty-based provisions regulating internment in both branches of law, human rights are more elaborate than the sparse treaty-based humanitarian law rules applicable to non-international armed conflict … As humanitarian law applicable to non-international armed conflict is silent on the procedural regulation of internment, it would seem clear that in accordance with the *lex specialis* principle as a maxim of logic, human rights should step into fill the gap. The ICRC Study appears to adopt this approach when it interprets the humanitarian law rule prohibiting the arbitrary deprivation of liberty through the lens of human rights.\(^{38}\)

However, the difficulty with this approach is that ‘[g]enerally, under IHRL, the question is not whether security detention is permitted, but on what grounds, pursuant to what procedures,'

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\(^{34}\) Ibid arts 4(1), 4(4).
\(^{36}\) See also Government of Denmark, above n 5, 9: ‘assigned residence or internment are only permitted if necessary for imperative reasons of security and must be made according to a regular procedure prescribed by the Occupying Power’.
and under what conditions such detention would be acceptable.\footnote{Douglass Cassel, ‘International Human Rights Law and Security Detention’ (Scholarly Works Paper No 650, Notre Dame Law School, 2009) 388.} In other words, while HRI certainly restricts the possibility of detaining individuals, it does not authorise it. Rather, it requires a legal basis for detention and the lack of arbitrariness.

Leaving aside the ADHR and AfrCHPR which do not contain a provision on derogation, none of the HRI instruments mentioned above preclude derogation with respect to the right to liberty and security of person, meaning that derogation is possible under the conditions discussed in Chapter 3.\footnote{See ACHR art 27; ECHR art 15; ICCPR art 4.} There are, however, two problems with derogation. The first (discussed in Chapter 3) is that it is unclear whether the intervention of a state as part of a MNF in a NIAC on the territory of another state is a sufficient public emergency for a derogation to be permissible. Second, even if derogation is possible, it cannot displace obligations arising from other sources of international law. The prohibition of arbitrary detention is arguably part of customary IHL applicable in NIACs.

Thus there still remains the question as to what would be the source of the legal authority to detain in a NIAC. During the 2008 Expert Meeting, several possible sources for such authority were mentioned.\footnote{Chatham House and International Committee of the Red Cross, ‘Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict (2008) 6–10.} Leaving aside HRI, which, as already been noted, does not entail an authorisation to detain, these possible sources are the following: IHL, self-defence, domestic law, UNSC Resolutions, bilateral agreements and national standard operating procedures.

1 International Humanitarian Law

The 2008 Expert Meeting reportedly reached a consensus regarding there being an “authorisation” inherent in IHL to intern people in NIAC.\footnote{Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 863.} Given that such an authorisation has no treaty basis, it would have to be of a customary law nature or amount to a principle of international law.

One way of arguing this point is to look at the rules governing the use of force in IHL. If there is authority under IHL to kill an individual there must a fortiori be authority to detain that individual. As Goodman notes, ‘it would be absurd to accept an interpretation of IHL that results in a state’s possessing the legal authority to kill actor X on purpose but lacking the legal authority to detain actor X’.\footnote{Ryan Goodman, ‘The Detention of Civilians in Armed Conflict’ (2009) 103 American Journal of International Law 48, 55. However, Goodman notes that ‘[t]here may be an exception to this rule if (1) an individual’s mere membership in the armed forces renders her a legitimate military target, and (2) mere membership is insufficient and an additional inquiry into the nature and scale of the individual’s contribution is required for detention’: at 55–6 n 41.} But this argument only goes so far: under the IHL applicable in IACs, there are persons that a state may detain but may not kill – thus a reference to the rules on the use of force explain only a part of a states’ authority to detain.

In Serdar Mohammed v Ministry of Defence,\footnote{Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB) (‘Serdar’).} the United Kingdom Court of Appeal reached a similar conclusion. Despite acknowledging the logical force of the a fortiori argument, the Court held that it did not found states’ power to detain combatants in NIAC. Serdar, an Afghan national and combatant detained by the UK contingent of the International Security Assistance Force (‘ISAF’), brought civil action against the Ministry of Defence alleging that his 110-day
detention was unlawful because the *European Convention for the Protection of Human Rights* (‘ECHR’) operated extraterritorially; extended to him; and, his detention violated article 5(1).

The court quickly rejected the Respondents’ argument that the UK-ISAF relationship meant liability could only accrue to the UN or ISAF and held that the ECHR applied extraterritorially to Serdar. However, the Ministry had argued in the alternate that if the ECHR applied, article 5(1) was not breached because prolonged detention was authorised under Afghan and/or UNSCR 1890 and/or international humanitarian law. The court considered that neither UN Security Council Resolutions nor UK and Afghan domestic law sustained the Respondents’ contentions.

Regarding *IHL*, the Ministry argued that (a) the purposes and structure of the international regime implicitly empowered detention, (b) the power to detain was established in customary international law or (c) the *a fortiori* argument: that the ability to detain is an essential corollary of the power to kill and the absence of such power would implicitly incentivise killing. Evidence of divergent state practice and absence of *opinio juris*, led the Court to hold that no customary law of *IHL* grounded NIAC detention. Nor did bilateral or multilateral treaties expressly provide for detention. Further, the Court’s preferred reading of the *IHL* regime as inherently prohibitive and concerned with not extending powers to non-state actors led them to reject an implicit structural basis for detention flowing from *Common Article 3 or Additional Protocol II*. Regarding the *a fortiori* contention, while appreciative of the Ministry’s argument – that empowering a state to kill but not detain the same individual is illogical and potentially perverse – the court refused to extend the powers attendant to the power to kill beyond the power to capture an individual.

Seizing on the manner in which the Ministry argued the point – by reference to individuals posing an *imminent* threat, the court then further narrows the power to kill to apply only to those individual that ‘represent an *imminent* threat’. At best, then, the power to detain could only emanate from the power to kill to the extent that the person posed an immediate threat. However, for the justices, once the individual is detained, an imminent threat is neutered, entailing that the ‘kill but not capture’ argument loses its power to found detention. Therefore, for the Court of Appeal the power to kill only accrues to imminent threats and, thus, cannot sustain detention in NIAC because once an individual is detained they no longer pose an imminent threat. Although this conclusion is controversial, the UK Supreme Court did not engage a reprisal of the argument in *Rahmatullah (No 2) v Ministry of Defence*, a related appeal involving Serdar.

Another observation that Goodman makes is that

*IHL* is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accord-
ingly, if states have authority to engage in particular practices in an international armed conflict ... they a fortiori possess the authority to undertake those practices in non-international conflict. Simply put, whatever is permitted in international armed conflict is permitted in non-international armed conflict.\textsuperscript{55}

2 Self-Defence

The Expert Meeting had difficulty with this possible legal justification for internment in \textit{NIAC}. Its \textit{Report} states that:

While some States have invoked the \textit{jus ad bellum} concept of self-defence as a legal basis for internment, there was general consensus that such invocation is troublesome – if not outright invalid – under international law. For almost all experts it was clear that self-defence in its \textit{jus ad bellum} sense does not constitute a legal basis for internment in \textit{NIAC}.\textsuperscript{56}

3 Domestic Law

Participants of the Expert Meeting agreed, subject to a number of outstanding questions, that the interning state’s domestic law ‘providing explicitly for the possibility of internment and spelling out permissible grounds and procedures governing it could constitute a legal basis for internment in a \textit{NIAC} required under international law.’\textsuperscript{57} The discussion as to the possibility, in a \textit{MNF-NIAC} context, of the host state’s law authorising detention was reportedly not conclusive.\textsuperscript{58}

4 Security Council Resolutions

Participants of the Expert Meeting ‘agreed that a United Nations Security Council Resolution ... under Chapter VII of the \textit{Charter} could possibly constitute a legal basis for internment when the measure of internment and the permissible grounds for it are explicitly mentioned in the resolution.’\textsuperscript{59}

Agreement, however, was not reached on whether the usual Chapter VII resolution terminology such a ‘all necessary measures’ was sufficiently certain to constitute a legal basis for internment by multinational forces taking part in an armed conflict.\textsuperscript{60} The 2007 Copenhagen Non-Paper also noted that there can be questions as to whether the relevant Security Council resolution for an international deployment which uses an expressions such as ‘take all necessary measures’, provides a clear enough basis for authority to detain.\textsuperscript{61} Yet the only example where the Security Council resolution has contained explicit wording as regards the grounds of detention was \textit{UNSC Resolution 1546} and the letters attached to it in relation to the \textit{MNF} in Iraq.\textsuperscript{62}

However, in \textit{Behrami and Saramati}, the Grand Chamber of the European Court of Human Rights (‘\textit{ECtHR}’) appeared to accept that NATO’s Kosovo Force (‘\textit{KFOR}’) had a mandate to de-
tain pursuant to Security Council Resolution 1244, which authorised a multinational force in Kosovo to ‘use all necessary means’ to fulfil its tasks provided for in that Resolution. This has led Christopher Greenwood to argue that Security Council resolutions applicable to Afghanistan – such as Resolution 1707 which authorised ISAF to ‘take all necessary measures to fulfil its mandate’ – impliedly authorised ISAF to detain persons who threatened the achievement of its mandate. But in Serdar the Court of Appeals qualifies the extent of this mandate, holding that the ‘authorisation to “take all necessary measures” … [did not confer] a necessary implication that this authorisation was intended to give ISAF a power to continue to hold individuals in detention … after they had been arrested and therefore ceased to be an imminent threat.’ Further, the Court considered that the legal power of UK forces to detain was bounded by ECHR article 5.

5 Bilateral Agreements

Some experts have argued that a legal basis for internment may be provided for in bilateral agreements concluded with a host state. The bilateral agreements could take the form of a Status of Forces Agreement (‘SOFA’). Other experts challenged the legal option itself as well as SOFA as a source of law. However, although it was ‘accepted that, in common with bilateral agreements, a SOFA could not be used to circumvent States’ international obligations, and that although a SOFA is not an ideal legal vehicle for internment in NIAC ‘it may have some utility as long as its provisions regarding internment are in accordance with international law.’ For a SOFA to ‘constitute an adequate legal basis for internment, the grounds and the procedure must not only be made explicit, but must also conform to the relevant IHL and IHRL.’

6 National Standard Operating Procedures

It was agreed that national standard operating procedures (‘SOP’) are not ‘a source of law and therefore cannot provide the lawful authority or legal basis for internment’; such documents would need to rely on another source of legal authority.

A practical outcome of the preceding legal uncertainty regarding the basis for detention is that in a multi-national intervention different countries may have different bases underpinning their approach to detention. For example, in Afghanistan for a period Canadian Forces detained

64 SC Res 1244, UN Doc S/RES/1244, [7].
67 Serdar [2014] EWHC 1369 (QB) [218]–[223].
68 Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 869.
69 Ibid.
70 Ibid 870.
under an IHL paradigm, Afghanistan forces under Afghanistan law and UK forces under a law enforcement paradigm.\footnote{University of Wollongong Centre for Transnational Crime Prevention, above n 18 (Chatham House Rule).}

D Grounds for Detention

1 Generally

Assuming that customary IHL or general principles of international law authorise detention in NIAC, there still remains the question regarding the bases of such detention: under what circumstances is it permissible to detain in a NIAC?\footnote{Cf Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 864: ‘[i]f there is an inherent authorization to intern under IHL the question arises as to what are the permissible grounds for internment in NIAC.’} The idea that the IHL of IACs can at least to some degree be applied by analogy does not immediately resolve this issue: as mentioned earlier, combatants can be detained as prisoners of war under the Third Geneva Convention simply on the basis of their status whereas civilians could be detained under the Fourth Geneva Convention only under certain specified conditions.

The majority of opinion appears to support the latter approach:

- The Report of the 2008 Expert Meeting states that:

  The most recurrent ground invoked for internment in NIAC – and probably the only permissible ground – is that of ‘imperative reasons of security’. The term is borrowed from the text of [Fourth Geneva Convention article 78] – where it constitutes the ground for internment in situations of occupation; other legal provisions in different bodies of law are phrased in similar terms to reflect the same concept.\footnote{Ibid.}

- Sassòli and Olson note that the regime of the Fourth Geneva Convention rather than that of the Third Geneva Convention better matches the reality of NIAC.\footnote{Sassòli and Olson, above n 38, 623.}

- Goodman asserts that ‘the Fourth Geneva Convention does generally contain the most closely analogous rules concerning the detention of civilians’ and that ‘international authorities have applied the same principle’ contained in the Fourth Geneva Convention that focuses not on status but on ‘whether an individual poses a security threat’ in NIACs.\footnote{Goodman, above n 43, 50, 53.}

A further complication arises, however, from the ostensible use of two standards in the Fourth Geneva Convention in establishing the grounds for detention. Article 42(1) provides that aliens in the territory of a party to the conflict can be detained ‘only if the security of the Detaining Power makes it absolutely necessary’ whereas under article 78(1) persons in an occupied territory can be interned when ‘the Occupying Power considers it necessary, for imperative reasons of security’. The Commentary to article 78 notes that

[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security …\footnote{Pictet (ed), above n 35, vol 4, 367.}
In this light, Deeks notes that article 78 ‘sets a higher standard than article 43 for a state to detain a person.’

2 Absolute Necessity and Exceptional Nature of Detention

The ICRC Commentary on article 42 describes the authority as follows:

Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage … On the other hand, the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.

This paragraph mentions several factors that have later been endorsed by jurisprudence and commentators.

Some guidance regarding unlawful detention under IHL was provided by the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in the Delalić case. In that case, the ICTY interpreted article 42 of the Fourth Geneva Convention as permitting internment only if there are ‘serious and legitimate reasons’ to think that the interned persons may seriously prejudice the security of the detaining power by means such as sabotage or espionage. In Kordić the ICTY further commented that ‘the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful.’

The Trial Chamber in Delalić described the power to intern or assign residence in the following terms:

For these reasons, the relevant norms of international humanitarian law have been developed such that only absolute necessity, based on the requirements of State security, can justify recourse to these measures, and only then if security cannot be safeguarded by other, less severe, means.

According to Stewart, and relying on cases such as Delalić, in defining the term “serious security threat”, international criminal decisions have suggested that “the party must have good

77 Deeks, above n 13, 407.
78 Pictet (ed), above n 35, vol 4, 258 (citations omitted, emphasis added).
79 Prosecutor v Delalić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [576] (‘Delalić (Trial Judgment)).
80 Prosecutor v Kordić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2A, 17 December 2004) [70] (citations omitted) (‘Kordić (Appeals Judgment)’).
81 Delalić (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [571] (emphasis added).
reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security”.

To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. The fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures.

3 Margin of Appreciation

The ICRC Commentary adds:

It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.

The difficulty in defining ‘security’ was recognised by the ICTY in the Trial Chamber in the case of Delalic. In that case, the Trial Chamber acknowledged that the ‘expression does not appear susceptible to a more concrete definition’.

Further, Stewart argues that ‘in determining whether such “reasonable grounds” exist, international war crimes jurisprudence has rightly afforded a wide margin of deference to a state’s own subjective appreciation of both security and risk.

The ICTY Trial Chamber in Kordić expressed similar sentiments: ‘if internment is permitted only in cases of absolute necessity, it is, to a large extent, up to the Party exercising this right to determine the activities that are prejudicial to the external or internal security of the State.

Thus, states may detain a civilian without finding that the individual directly participated in hostilities. What, then, constitutes indirect participation that would justify detention? Political ‘affiliation’ or ‘sympathy’ is not sufficient. The individual himself or herself must also pose a security threat. The state has ‘significant latitude’ in making the requisite determination but in any case the state ‘needs to establish not only that an individual’s conduct amounts to indirect participation, but also that detention is the only means available – that detention is “absolutely necessary” – to defend against the threat posed by the conduct.’

83 Delalic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [577] (emphasis added).
84 Pictet (ed), above n 35, vol 4, 257.
85 Delalic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [574].
86 Stewart, above n 82, 22.
87 Prosecutor v Kordić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [284].
88 Goodman, above n 43, 53.
89 Ibid 54.
90 Fourth Geneva Convention art 42: ‘The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.’
91 Goodman, above n 43, 55.
Arbitrariness

Cassel, after listing what he believes is a ‘consensus’ of norms applicable in war and peace in HRL instruments – norms he believes may represent customary law – concludes there is a notable gap in current HRL. It is

the absence of a standard for the extent or quality of evidence needed to justify a security detention. The requirement that the detention not be ‘arbitrary’ means that there must be some reason or evidentiary basis for the detention. But how much? Should the legal standard be ‘reasonable suspicion’? Or ‘some evidence’? Or ‘probable cause’? Something else? What about the evidentiary basis? If a ‘some evidence’ standard is too low, how much more should be required? And should the standard be the same for the initial arrest and the subsequent, possibly prolonged detention? Bellinger and Padmanabhan note that ‘human rights law provides limited guidance on who is subject to security detention’ inasmuch as the ‘only substantive restriction on security detention in the ICCPR is that such detention should not be “arbitrary”’ and cite the views of the HRC committee to the effect that arbitrariness ‘is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and illegality’. They then conclude that ‘[i]n practical terms, all that is required is that detention be reasonably necessary for a legitimate government purpose, such as security’.

Detention for Intelligence-Gathering Purposes

There appears to be broad agreement that detention for intelligence-gathering purposes alone is not compatible with IHL:

- Goodman notes that individuals who are interned must pose the security threat and ‘[i]t would not constitute a valid security rationale, for example, to detain solely for intelligence-gathering purposes someone who has no meaningful connection to hostilities yet possesses information about enemy fighters’.
- For Pejić, ‘it is clear … that internment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified’.
- A joint report of UN Special Rapporteurs concerning Guantánamo Bay noted that ‘[t]he indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions’.
- In Hamdi v Rumsfeld, the plurality of the US Supreme Court said: ‘[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized’.

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92 Cassel, above n 39, 388 (citations omitted).
94 Bellinger and Padmanabhan, above n 37, 220.
95 Goodman, above n 43, 55.
96 Pejić, above n 12, 380.
6 Group Detention

ICRC Commentary to article 78 of the Fourth Geneva Convention notes with respect to intern-
ment by an occupying power that ‘there can be no question of taking collective measures: each
case must be decided separately’.

In this context, Pejić also draws attention to the prohibition of collective punishments. She argues
that a ‘State’s en bloc, non-individual detention of a whole category of persons could
in no way be considered a proportional response’. According to Pejić, ‘[i]n non-international
armed conflicts and other situations of violence this principle must, if anything, be even more
stringently observed, particularly as human rights jurisprudence rejects the notion of indefinite
detention’.

E Effect of Security Council Resolutions

Security Council resolutions as a potential source of an authority to detain were discussed
above. However, Council resolutions can potentially have even more profound effects.

1 Attribution

In Behrami and Saramati, the Grand Chamber of the ECtHR found that the actions of members
of national contingents contributing to KFOR were imputed to the UN rather than to the troop
contributing nation: ‘KFOR was exercising lawfully delegated Chapter VII powers of the UNSC
so that the impugned action was, in principle, “attributable” to the UN’.

Consequently, and in light of the fact that the UN has a legal personality separate from that of its member states
and that the UN is not a contracting party to the ECHR, the Grand Chamber declared the case
inadmissible as ‘incompatible ratione personae with the provisions of the Convention’.

The Court was able to reach their conclusion by treating the UN Charter as overriding rights
and powers flowing from other legal instruments, including the ECHR. This was done without
discussion of the relationship between the ECHR and Charter. The court appears to presume
Charter supremacy, entailing that courts established outside the Charter system lack jurisdic-
tion to decide questions of UN liability under treaties that the UN is not party to. As Forowicz
argues, this approach may simply reflect possible curial interest in avoiding commentary on
international issues or interference with the functioning of the UN. Further, this approach
departed from ICTY reasoning in Tadic – that Court held that it was not empowered to act as
a constitutional tribunal for UN acts but the tribunal had review powers ‘where there might
be a manifest contradiction with the Principles and Purposes of the Charter’.

Thus, states

100 Pejić, above n 12, 381.
101 Ibid 382.
102 Ibid.
103 Behrami and Saramati (European Court of Human Rights, Grand Chamber, Application Nos 71412/01, 78166/01,
2 May 2007) [141].
104 Ibid [152].
105 Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights (Oxford University
Press, 2010) 98.
106 Tadic [20]–[22].
were ‘effectively excused’ from responsibility under the ECHR when conducting UN-related acts and the Security Council was immune from jurisdiction. Crucially, this departed from the Bosphorus approach under which the acts of member states are attributed to the UN where they are the implementation of binding acts from the UN. However, despite these issues, the ECtHR followed and expanded the Behrami line of reasoning in subsequent cases.

But later courts have not clearly articulated the limits of Behrami and tension remains between the Behrami and Bosphorus lines of reasoning. Beric v Bosnia and Herzegovina and Nada v Switzerland demonstrate the potential breadth of action beyond the jurisdiction of non-UN courts under a Behrami approach. In Beric, the Court held that the removal of applicants from political party positions by the High Representative was attributable to the UN but the ECtHR lacked jurisdiction to review the claim as it involved UN-attributed action.

One result is that a potential return to a Bosphorus-esque approach may be discernable in the ECtHR jurisprudence. In Al-Jedda, the Court distinguished Behrami, finding that attribution of MNF action to the UN via Security Council Resolutions was not possible under either the ‘effective control’ or ‘ultimate authority and control’ tests. While the employment of both tests retains a potential source for future confusion, it is notable that the court refused to attribute the act to the UN simply because the act was undertaken on behalf of the UN. The ECtHR refined this approach in Al-Skeini v United Kingdom in holding that the mere recognition of member-state’s role in providing security in Security Council Resolution 1483 (authorising a multinational force under unified command to take all necessary measures to contribute to the maintentance of security and stability in Iraq) was insufficient to attribute the states’ acts to the UN. A crucial implication from the recent case law is that the context of the state’s action matters: a state cannot simply assume that responsibility or liability for actions carried out by its forces under the auspices of an international organisation automatically transfer to that international organisation. More is needed.

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108 See Kasumaj v Greece (European Court of Human Rights, First Section, Application No 6974/05, 5 July 2007) where the European Court of Human Rights held that Kasumaj’s complaint that the quartering of Greek KFOR soldiers on his land without compensation violated ECHR arts 6(11), 13 was in principle attributable to the UN via KFOR but that the claim was incompatible ratione personae because the UN maintained separate legal personality from its member states and is not party to the ECHR (2–3). The Court further held itself incompetent to review the acts of states carried out on behalf of the UN. The same conclusion was reached in another quartering case, Gajic v Germany (European Court of Human Rights, Fifth Section, Application No 31446/02, 28 August 2007) 6. The Bhramei approach was applied subsequently in Blagojevic v Netherlands (European Court of Human Rights, Third Section, Application No 49032/07, 9 June 2009) [36]. The potential breadth of this reasoning is demonstrated by Beric v Bosnia and Herzegovina (European Court of Human Rights, Fourth Section, Application No 36357/04 16 October 2007) which held that the removal of applicants from political party positions by the High Representative was attributable to the UN but the European Court of Human Rights was not competent to review the claim as it involved UN-attributed action.
109 Beric v Bosnia and Herzegovina (European Court of Human Rights, Fourth Section, Application No 36357/04 16 October 2007); Nada v Switzerland (European Court of Human Rights, Grand Chamber, Application No 10993/08, 12 September 2012).
110 Al-Jedda v United Kingdom (2011) 35 EHR 23, [84]–[85].
111 Ibid [84].
112 Ibid [80].
113 Al-Skeini v United Kingdom (European Court of Human Rights, Grand Chamber, Application No55721/07, 7 July 2011) [149].
In *Nada*, the ECtHR confirmed this approach.\(^{114}\) As that Court made clear, in contrast with *Behrami*, the proper approach is to look to the internal act, whether it is attributable to the state in question, in order to ascertain justiciability. As such, measures taken by UN member states to implement Security Council Resolutions under Chapter VII were not attributable to the UN because the Resolution required states to act on their own, rather than through an entity whose conduct it directly attribute to the UN.\(^{115}\)

However, *Behrami* has also received treatment in domestic courts. Writing the lead judgment in *Serdar Mohammed*,\(^{116}\) Leggatt J was not prepared to depart from the reasoning of *Behrami*. Applying (like the ECtHR in *Al-Jedda*) both the effective control and ultimate authority and control tests, Leggatt J found that ISAF’s conduct could be attributed to the UN through the Security Council.\(^{117}\) As a result, his Honour opines that ‘I would expect the [ECtHR] to hold that the detention was not attributable to the respondent state, applying the same analysis as it did in the *Behrami* and *Saramati* cases.’\(^{118}\) While left unstated, application of the *Behrami* approach would lead to an absence of jurisdiction. Crucially, in obiter the decision anticipates expansions to *Behrami*. First, even if Serdar’s detention occurred outside the authority conferred by the Security Council Resolutions, the same conclusion would arise by operation of the rule reflected in article 8 of the *Draft Articles on the Responsibility of International Organisations*. Second, provided that the command structure is referable to UN control, it is immaterial that the presence of a state’s forces in the area predates UN mandate.\(^{119}\)

While the present state of law evinces a shift towards a more malleable conception of attribution, opening individual states to liability in a broader range of instances, the inability of non-UN courts to adjudicate UN responsibility for acts retains relevance. For example the Supreme Court of the Netherlands did not dismiss the possibility that the UN may be liable for failures to act in accordance with human rights law during the events in Srebrenica but that the Court lacked jurisdiction to determine this.\(^{120}\)

2 Precedence of Obligations under the Charter

Another question relates to the combined effects of articles 25 and 103 of the *Charter of the United Nations*. Under the terms of article 25, UN member states ‘agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’. Pursuant to article 103, ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. It was accepted in *Al-Jedda*, for instance, that articles 25 and 103 are also relevant to authorisations made by the Security Council.\(^{121}\) Hence the question arises whether Security Council action authorising detention displaces the right

\(^{114}\) *Nada v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 10593/08, 12 September 2012) [120]–[121].

\(^{115}\) Ibid [120].

\(^{116}\) *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

\(^{117}\) Ibid [178].

\(^{118}\) Ibid.

\(^{119}\) Ibid.

\(^{120}\) *Netherlands v Mustafic* [2013] Supreme Court of the Netherlands 12/0324, [13.17]–[13.18]

\(^{121}\) See *Al-Jedda* [2011] IV Eur Court HR 305, [90].
to liberty under human rights treaties. If that is the case, a Security Council resolution would not merely provide a legal basis for detention that would have to be assessed in light of applicable human rights law, but that such human rights law would not be applicable to begin with.

However, the operation and implications of the operation of Charter articles 25 and 103 remain contested and there has been little direct ICJ treatment. Robert Kolb for example, considers that article 103 applies to both the primary law of the Charter (its provisions) and secondary obligations derived from the Charter. As such, obligations flowing from UN Security Council resolutions pursuant to Chapter VII have precedence over obligations arising from other instruments (except the Charter). Therefore, under this reading, the Security Council has extensive capacity to qualify or over-ride obligations arising from other instruments and sources. Conversely, Antonios Tzanakopoulos considers that article 103 does not establish an absolute law of hierarchy, rather, it merely establishes that the Charter may set aside or qualify obligations under other treaties. Fundamentally, the absolute precedence of the UN Charter is predicated on circular logic: ‘the UN Charter is accepted as a constitutional document of the international community, and thus Article 103 is a hierarchy rule, establishing the primacy of that constitution over everything else. The UN Charter in turn is a constitution because it includes a rule establishing its primacy.’

Taking into account the Vienna Convention on the Law of Treaties and the ILC Report on Fragmentation in International Law, for Tzanakopoulos the better reading is that article 103 should only be considered a conflict, not hierarchy rule. This links to the situation that some domestic courts have been reluctant to accept that article 103 grants primary to UNSC Resolutions over fundamental human rights guarantees. Alternately, Samuel points out that whether UNSC Resolutions prevail over customary international law obligations is far from clear.

While the interaction between Charter obligations like UNSC Resolutions and other international obligations remain unresolved, recent case law, particularly from the ECHR and courts of the EU, indicates that there are bounds on the ability of UNSC Resolutions to alter HRL obligations. In Kadi I, the European Court of Justice noted that the EU must respect the UN Charter but rejected the idea that measures taken by the EU to implement Security Council resolutions could not be reviewed by EU courts. To the contrary, the Court took the view that it must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which … are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

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123 Robert Kolb, The Elgar Companion to the International Court of Justice (Elgar, 2014) 35.
125 Ibid 64.
127 Samuel, above n 122, 220; Liivoja, above n 126.
129 Ibid [326].
The Court held that an EU regulation, which gave effect to a Security Council resolution and provided a basis for the freezing of Mr Kadi’s assets without judicial review, constituted an unjustified restriction of his right to property and had to be annulled.\(^{130}\) In *Kadi II*, the Court reaffirmed that EU measures to implement sanctions imposed by the Security Council are subject to the scrutiny of the EU courts. \(^{131}\)

In *Al-Jedda*, the ECtHR held that there was a presumption that the Security Council does not intend to place obligations on member-states that breach fundamental human rights norms. \(^{132}\) However, the Court did not find it necessary to decide on the consequences of a conflict of obligations in the case at hand:

The Court does not consider that the language used in this Resolution [1546] indicates unambiguously that the Security Council intended to place member States within the Multinational Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution. … In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multinational Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law. \(^{133}\)

In *Nada*, the ECtHR rejected the the Swiss Federal Supreme Court’s conclusion that the UN Charter operated to give supremacy to Security Council Resolutions over instruments like the ECHR. \(^{134}\) Thus, *Nada* affirmed the presumption of Security Council Resolutions’ correlation with HRL. Where the Security Council seeks to oust HRL, the Court held that states parties to ECHR are not permitted to simply rely on the binding nature of Resolutions when formulating national responses but must seek to harmonise the implementation of Resolutions with their obligations under the ECHR so that there is no conflict. ‘[T]he UN Charter does not impose on States a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, but instead left them a free choice among the various possible models for transposition of those resolutions into their domestic legal order’. \(^{135}\)

Domestic courts have also drawn parallels between human rights guarantees under domestic constitutional law and international law where the presence of domestic law was decisive. *Abdelrazik v Canada* \(^{136}\) involved the Canadian Government denying the petitioner’s return from Sudan after he was listed as an al-Qaida associate pursuant to UNSCR 1267 (which required a travel ban). Zinn J found that the Government’s failure to allow Abdelrazik to enter Canada contravened the Canadian Human Rights article 6 because the Resolution did not align with fundamental requirements of natural justice. Despite that UN Charter article 25 (alongside article 103), UNSC Resolution 1267 denied ‘basic legal remedies and was untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that

\(^{130}\) Ibid [370]–[372].

\(^{131}\) *Commission and Others v Kadi* [2013] ECR I-518 (‘*Kadi II*’) [97].

\(^{132}\) *Al-Jedda* [2011] IV Eur Court HR 305 [102].

\(^{133}\) Ibid [105].

\(^{134}\) *Nada v Switzerland* [2012] ECHR 1691 (‘*Nada*’). Cf. *Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (Case No 1A 45/2007; ILDC 461 (CH 2007); BGE 133 II 450).

\(^{135}\) *Nada* [2012] ECHR 1691. [176].

\(^{136}\) *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267.
recognises the principles of natural justice or that provides for basic procedural fairness'.\textsuperscript{137} As such, it could not found legally defensible action by Canadian authorities. The inference that can be drawn from the reasoning is that the ability of Security Council Resolutions to oust certain human rights protections codified in other instruments is limited.

\textit{Kadi II} and \textit{Abdelrazak} can support at least two separate implications with different breadth of operation. First, on a narrow reading, the cases suggest that Security Council Resolutions may not displace human rights obligations that are protected by both the domestic law of the state hearing the claim and an international instrument. Second, more expansively, the cases may indicate that there are certain human rights so fundamental that Security Council resolutions cannot depart from them. One difficulty with this reading is that the cases (a) do not articulate what rights these may be; (b) the cases deal with an absence of judicial review. Another difficulty is that the broader reading is not reconcilable with \textit{Al-Jedda} as decided by the \textit{ECtHR}.

In short, there is a trend toward a less deferential approach to the power of UN Charter arts 25, 103 in regards to Security Council Resolutions that qualify HRL. This marks a departure from \textit{Behrami} where the Court simply skirted the issue of conflict between HRL and Security Council Resolutions. Beginning with \textit{Al-Jedda} but extended in \textit{Nada} and \textit{Kadi II}, the decisions of the \textit{ECtHR} suggest that there are limits to the ability of Security Council Resolutions to abrogate HRL guarantees located in other international instruments.

\section*{F Authority of Non-State Actors to Detain}

The application of HRL to conflict situations is further complicated by another practical problem, namely that state and non-state actors appear to have different obligations under HRL. The application of human rights would seem to make it impossible for one party to an armed conflict – the non-state actor – to intern legally.\textsuperscript{138}

Regarding the authority to intern by non-state actors, Sassòli and Olson ask:

While human rights themselves set at least two procedural requirements, neither they nor humanitarian law applicable to non-international armed conflict provide a specific legal basis for internment. A state can do so in its domestic law, but how is the non-state actor to establish that legal basis?\textsuperscript{139}

The Expert Meeting Report concludes that as ‘a party to an armed conflict a non-State armed group also has an inherent authorization to intern’ with this being a ‘direct consequence of the principle of equality of rights and obligations of the parties under IHL’ which ‘has to be the starting point of the discussion.’\textsuperscript{140} Although it may be true as the Report states that ‘as equality of belligerents provides an incentive for non-State actors to respect IHL, it would be unhelpful to depart from this principle in the context of internment,’\textsuperscript{141} the legal authority of this conclusion regarding an inherent authorisation for non-state actors to detain on the basis of the equality of belligerents is questionable. As discussed in Chapter 1, states have historically been reluctant to

\begin{footnotesize}
\begin{enumerate}
\item[Ibid 51.]
\item[Sassòli and Olson, above n 38, 622.]
\item[Ibid 622.]
\item[Chatham House and International Committee of the Red Cross, 'Expert Meeting', above n 2, 870.]
\item[Ibid.]
\end{enumerate}
\end{footnotesize}
have international law intrude into areas seen as essentially internal.\textsuperscript{142} Consequently, although the equality of belligerents is generally accepted in an IAC, recognition of such equality in NIAC is much less well accepted.\textsuperscript{143}

In any case, as pointed out in the Report, regardless of whether under international law a non-state actor can be penalized for internment under IHL in a NIAC such behaviour can certainly be penalized under the domestic law of the relevant state. Also the domestic law or UNSC resolution options examined above for a legal basis for internment by states have ‘never included a direct legal basis for a non-State actor to intern (or otherwise deprive of liberty for that matter) any person in a NIAC’.\textsuperscript{144}

Conversely, Sivakumaran advances a pragmatic, context-based formulation. For Sivakumaran, non-state actors’ power to detain is not found explicitly in the law of IHL or IAC – although these may provide implicit basis, for example, from the practice of armed conflict and logic of IHL that parties to a conflict may capture and subsequently intern persons considered to pose a serious security threat, as explicated by the Expert Meeting.\textsuperscript{145} Nor have states intended to extend their explicit powers to detain in IAC to non-state actors. However, ‘[a]lthough it has been queried “how a non-State actor can exercise the inherent right to intern”, it is submitted that it is not so much about a right to intern as it is about the need to regulate the existing practice of parties to non-international armed conflicts’.\textsuperscript{146} In other words, as internment is a regular feature of non-state groups in NIAC, argument about the presence of an ‘inherent right’ to detain is of limited value. Instead of arising through the principle of equality of party rights under IHL, ‘authority’ flows from the institutions of the non-state armed group. ‘Insofar as the modalities of internment, in particular the procedural protections that accompany interment, are concerned, state legislation would govern detention by state armed forces, while legislation of the non-state armed group may suffice for the purposes of non-state armed group detention’.\textsuperscript{147} This, then, shifts the focus to the qualities of the non-state group’s ‘legislation’ that authorises the detention. While acknowledging that ‘concerns of legitimacy and legality may arise over courts or other mechanisms of non-state armed groups’,\textsuperscript{148} the authority of non-state actors to detain in this context hinges on ‘that “any rules or guidelines regarding internment must be formulated in a way that would allow them to be implemented in a realistic way in the different types of [non-international armed conflicts, by both States and non-State actors”’.\textsuperscript{149} Crucially, Sivakumaran, citing Namibia and Loizidou v Turkey, sees no necessary inconsistency in recognising certain acts as having legal effect even if those acts emanate from an unrecognised or unlawful entity.\textsuperscript{150} Similarly, no issue is taken with the acceptability of parallel application of multiple

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\textsuperscript{143} See François Bugnion, ‘Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts’ (2003) 6 Yearbook of International Humanitarian Law 167.

\textsuperscript{144} Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 870.

\textsuperscript{145} Sandesh Sivakumaran, The Law of Non-International Armed Conflict (Oxford University Press, 2012) 301.

\textsuperscript{146} Ibid 303.

\textsuperscript{147} Ibid.

\textsuperscript{148} Ibid 304.

\textsuperscript{149} Ibid.

\textsuperscript{150} Ibid 560.
systems of law or where non-state actors exercise factual control, that they cannot change the legal order in that territory. Further, the outputs of insurgent authorities could be considered law within the meaning of Additional Protocol II. The upshot is that for Sivakumaran, the legal basis of non-state actors to detain is created by the legitimacy of the non-state actor and its institutions rather than flowing directly from IAC or IHL provisions.

III PROcedural Safeguards and Review Mechanisms

Rather than being locked in sterile arguments over whether humanitarian law is the lex specialis for armed conflict, a more constructive approach is to examine the way to ensure the proper balance between security/military needs and individual liberty in the light of modern standards.

A particular humanitarian concern related to detention is the lack of procedural safeguards for persons subject to internment in non-international armed conflicts. In contrast to the Fourth Geneva Convention rules governing international armed conflicts, there are no international humanitarian law treaty provisions on procedural safeguards for internment in non-international armed conflicts. This means, inter alia, that in practice internees are not adequately informed of the reason(s) why they are being detained, and that there is no established process for challenging the lawfulness of detention and/or ensuring release if the reasons for detention do not or no longer exist. In some cases, internees are prohibited from having contact with the outside world and are uncertain as to when they will be released.

However, even if this view is accepted practical difficulties again arise in applying HRL to conflict situations. Sassòli and Olson ask ‘whether it is realistic to expect states and non-state actors, possibly interning thousands of people, to bring all internees before a judge without delay during armed conflict’. Further, ‘an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative body as prescribed in article 43 of Geneva Convention IV.’

The Appeals Judgment in Delalić indicated that there were two ways the accused commits the offence of unlawful confinement of civilians: first, where he has the authority to release civilian detainees and fails to exercise that power; second, where (i) he has no reasonable grounds to believe that the detainees do not pose a real risk to the security of the state; or (ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).

151 Ibid 561; see also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff, 1987) 1399.
152 Sivakumaran, above n 145, 562.
155 International Committee of the Red Cross, above n 1, 10.
156 Sassòli and Olson, above n 38, 622.
157 Kordić (Appeals Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [70].
158 Prosecutor v Delalic (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [378] (citations omitted).
According to Pejić, detention would be ‘arbitrary’ if the reasons for it no longer exist.\(^{159}\)

\section*{A Introduction}

Pejić uses the terms ‘interment’ and ‘administrative detention’ and contends that both ‘are insufficiently elaborated from the point of view of protection of the rights of persons affected’. Then, relying on both IHL and HRL, she argues for a set of procedures and safeguards to be implemented based not just on legal obligation but also on policy.\(^{160}\) Pejić thereafter puts forward five recommended general principles applicable to internment/administrative detention principles\(^{161}\) and eleven procedural safeguards.\(^{162}\) Pejić distinguishes between legal sources for detention and procedural safeguards.\(^{163}\)

Deeks points out that detention in NIAC is governed almost exclusively by domestic law. He refers to the set of procedural principles proposed by Pejić as applying to all cases of administrative detention – whether that detention occurs during armed conflict (either international or non-international) or outside of armed conflict – and suggests that it is a response to the ‘dearth of rules in non-international armed conflict’.\(^{164}\) Deeks describes the suggestions by Pejić as ‘relatively ambitious’. For example, he highlights that Pejić’s paper urges administrative detainees be provided with legal representation but he suggests that while this might be “desirable”, in battlefield conditions the requirement would be ‘very difficult to meet’.\(^{165}\)

One of the inevitable results of an approach that relies on law and policy is that it is often difficult to distinguish between practice that results from legal obligation, either IHL or HRL, and practice that results from policy objectives.

\(^{159}\) Pejić, above n 12, 382–3.
\(^{160}\) Ibid 375. Pejić excludes POWs interned in an IAC from her definitions of internment and administrative detention as they are subject to a specific treaty regime: at 376.
\(^{161}\) Ibid 380–3. The principles are: (a) internment/administrative detention is an exceptional measure; (b) internment/administrative detention is not an alternative to criminal proceedings; (c) internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind; (d) internment/administrative detention must cease as soon as the reasons for it cease to exist; (e) internment/administrative detention must conform to the principle of legality.
\(^{162}\) Ibid 384–91. The procedural safeguards are: (a) right to information about the reasons for internment/administrative detention; (b) right to be registered and held in a recognised place of internment/administrative detention; (c) for foreign nationals in internment/administrative detention, the national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned; and, (d) review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body; (e) an internee/administrative detainee should be allowed to have legal assistance; (f) an internee/administrative detainee has the right to periodical review of the lawfulness of continued detention; (g) an internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person; (h) an internee/administrative detainee must be allowed to have contacts with – to correspond with and be visited by – members of his or her family; (i) an internee/administrative detainee has the right to the medical care and attention required by his or her condition; (j) an internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention; and, (k) access to persons interned/administratively detained (ICRC access).
\(^{163}\) Ibid 377–84.
\(^{164}\) Deeks, above n 13, 405.
\(^{165}\) Ibid.
B Commencement of Detention

When does ‘detention’ or ‘internment’ start? Does it start from the moment of capture and does it include short-term deprivation of liberty without intent to hold a person for any significant length of time?

Can ‘internment’ be distinguished from ‘detention’ in terms of time of commencement? That is, although the 2008 Expert Meeting expressed uncertainty as to when ‘internment’ commenced – specially mentioning uncertainty as to whether the 96-hour detention system introduced by ISAF in Afghanistan constituted ‘internment’ – detention could well have commenced earlier.\(^{166}\)

The experts at the 2008 Expert Meeting ‘agreed that for the purposes of the discussion in internment is meant to indicate the period of deprivation of liberty from the moment a decision to intern (ie to detain for security reasons) is taken until the person is released.’\(^{167}\)

The Non-Paper produced in support of the 11–12 October 2007 Copenhagen Conference on ‘The Handling of Detainees in International Military Operations’ states:

Articles 12 and 13 of Geneva Convention III indicate the decisive moment of responsibility is when the State has a person in its ‘custody.’ The use of the term in Article 12 seems to be to apportion responsibility between transferring and detaining States. There is no clear definition of ‘custody’ either, but it may be argued that it requires some qualified control of the person in question. Such a definition, however, may lead to a gap in the protection of the individual in the period between ‘capture’ and ‘custody.’\(^{168}\)

Under human rights law the legal test is different as the relevant question to ask is when a person is within the jurisdiction of a State.\(^{169}\)

Although ‘detention’ may not have a settled definition, a common theme to detention is noticeable – ‘a deprivation of liberty’. Regarding ‘deprivation of liberty’, a review of European case law to article 5 of the ECHR\(^{170}\) enables the conclusion that a distinction can be drawn between a ‘deprivation of liberty’ and merely a ‘restriction on freedom of movement’. According to Lawrence Gostin and Lance Gable:

Despite the possible differences in scope between liberty and security, the European Court construes Article 5 to apply only to cases of formal detention and it appears to see detention mainly as a relatively long period of confinement within an institution. The European Court distinguishes detention, which triggers Article 5 safeguards, from a mere restriction of movement, which receives decidedly less protection in other parts of the ECHR. In examining detention determinations, the European Court considers all of the circumstances of the case, including the type, duration, effects, and manner of the restraint. Detention is a matter of ‘degree or intensity’ (not ‘nature or substance’), with more severe restrictions rising to the level of ‘detention.’\(^{171}\)

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\(^{166}\) Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 860 n 3.

\(^{167}\) Ibid.

\(^{168}\) Government of Denmark, above n 5, 7–8.

\(^{169}\) Ibid 8.

\(^{170}\) Article 5 provides that ‘[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:’

The significance of the nuanced approach to the ‘deprivation of liberty’ is found in the effect that the fact of detention has on the rights and obligations that are raised as a result. Does the full array apply immediately once a person’s is not free to remove themselves or is more required?

US cases regarding border/customs-related situations provide some guidance as to the nature of ‘detention’ and similar situations but which fall short of constituting ‘detention’. In United States v Hongla-Yamche, the United States District Court, District of Massachusetts, dealt with issues including whether Hongla-Yamche had standing to seek relief for the US Customs Service’s alleged violation of the Vienna Convention on Consular Relations, and, second, if so, did the Customs examination of Hongla-Yamche trigger the consular notification provision of the Convention. A key fact was that a secondary examination of Hongla-Yamche lasted about one hour.

In Hongla-Yamche the Court decided:

the amount of time Hongla-Yamche was detained does not tip the scale in favor of finding that the Customs search constituted detention … the secondary examination lasted approximately one hour.

Placed within the context of the examination as a whole, there is nothing to indicate that the duration of the examination was not routine. The length of the examination is reasonable given the number of fulvous figurines that Hongla-Yamche possessed … The duration of the encounter is never a singly determinative factor (citation omitted) and the duration in this case was not extraordinary.

Based on the foregoing, this Court finds that the secondary Customs examination of Hongla-Yamche did not constitute detention for purposes of triggering the consular notification provision of Article 36.

C Procedural Safeguards

1 Giving Reasons for Detention

The Expert Meeting Report states that while international law is ‘clear on the right of an internee to prompt information about the reasons for his or her internment’ so that its lawfulness can be challenged, international law does not shed much light on the practical details of that obligation: what information must be released at what time, by whom and to whom? The Report indicates that participants ‘accepted that under IHL an internee’s right to full disclosure of all available information can be restricted for reasons of military necessity; and that it can probably be restricted under HRL in the light of special circumstances such as the existence of an armed conflict’.

The Geneva Conventions do not expressly require reasons for detention to be given although it could be seen as implied by the presence of review and appeal mechanisms. How can one review/appeal a detention decision without being informed of the reasons for that detention? Additional Protocol I article 75(3) does provide expressly for reasons: ‘[a]ny person arrested,
detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.'\(^{176}\)

The Report of the Expert Meeting states that article 75(3) Additional Protocol I is applicable in IAC and 'arguably as a matter of customary law in NIAC.'\(^{177}\) The US Supreme Court in *Hamdan* also found that article 75 was part of customary law applicable in all conflicts.\(^{178}\)

Although limited to the penal prosecutions context, Additional Protocol II article 6(2)(a) provides that: 'the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him …'\(^{179}\)

HRL instruments provide for the giving of reasons, and when those reasons are to be given, but in the context of criminal proceedings:

- **ICCPR** article 9(2): '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.'
- **ICCPR** article 14(3)(a): '[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … [t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him …'
- **Body of Principles** Principle 10: '[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.'

2 **Registration**

As highlighted by Pejić, at least in IAC situations IHL has extensive provisions regarding registration and the passing of information to national authorities and to the next of kin of detainees. See for example *Fourth Geneva Convention* articles 136, 143, 106, 107, 137, 138.\(^{180}\) Article 43 of the *Fourth Geneva Convention* also requires the detaining state to give notice to the protecting power of those protected persons it has interned.\(^{181}\) In NIAC though, Common Article 3 and Additional Protocol II are silent on the issue of registration.

HRL instruments provide for registration and notification\(^{182}\) although in the criminal context. They include:

- **Body of Principles** Principle 12(1):
  
  There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody.

\(^{176}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’).

\(^{177}\) Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 875.


\(^{179}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).

\(^{180}\) Pejić, above n 12, 385.

\(^{181}\) *Fourth Geneva Convention* art 43.

\(^{182}\) Pejić, above n 12, 384.
• **Body of Principles** Principle 16(1):

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

The ICRC’s *Customary International Humanitarian Law Study* (‘ICRC Study’) at Rule 123 asserts that customary international law, applicable in IAC and NIAC, includes the requirement that the personal details of persons deprived of their liberty must be recorded.\(^{183}\)

### 3 Legal Assistance

According to a Background Paper to the 2004 Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict under IHL in IAC there is ‘no indication that persons held in detention are entitled to a lawyer to help them contest the lawfulness/need for continued detention.’\(^{184}\) The grounds of detention in NIAC ‘are not regulated by international humanitarian law … only national law is relevant, as well as international human rights law.’\(^{185}\)

The *Geneva Conventions and Additional Protocols* do not provide for legal representation in other than IAC and for other than criminal matters. However ‘human rights law does not limit the right of access to a lawyer to criminal proceedings but extends it to all detainees. This general right to access is included in Principles 17 and 18 of the [Body of Principles].’\(^{186}\)

The Report of the Expert Meeting notes that while the ICRC position paper on the subject\(^{187}\) posits that an internee should be allowed to have legal assistance it admits ‘the legal and practical controversy’ regarding the proposal.\(^{188}\)

The *Report* summarises the results of the discussion as follows:

Internees should be provided with legal assistance in internment whenever feasible. When available, it should not be restricted without serious justification based on imperative reasons of security. Creative efforts should be made to address resource problems. The presence of a legal representative can also be part of a solution to the problem of how to handle classified information in internment review proceedings.\(^{189}\)

### 4 External Communication

Two aspects of communication between the detainee and the exterior are highlighted. They are communication with the ICRC (and other such impartial organisations) and communication with the detainee’s family.

Regarding communication with the ICRC, the key IHL provisions are:

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\(^{183}\) ICRC *Study*, above n 38, 439 (r 123).

\(^{184}\) University Centre for International Humanitarian Law, *Lawfulness of Detention*, above n 154, 3 (Louise Doswald-Beck ‘Background Paper’).

\(^{185}\) Ibid.

\(^{186}\) Ibid 8.

\(^{187}\) The position paper is Pejić, above n 12, 375–91.

\(^{188}\) Chatham House and International Committee of the Red Cross, ‘Expert Meeting’, above n 2, 871.

\(^{189}\) Ibid 877.
• **Fourth Geneva Convention** article 143. In IAC this provision establishes an obligation for the detaining authority to provide access to detainees subject to certain conditions. Article 143 includes the following:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted ... The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives ...

• **Common Article 3.** In NIAC there is no treaty-based right of access by organisations such as the ICRC, rather there is an ability for them to offer their services. The relevant part of Common Article 3 provides that 'an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.'

Although in NIAC there is no IHL treaty based right of access to detention facilities the ICRC's right of access in these situations is widely recognised.190

Regarding communication between detainees and family members (and others) in IAC articles 106, 107 and 116 of the **Fourth Geneva Convention** are relevant. These articles encourage the facilitation of such communication. The articles provide in part:

**ARTICLE 106**

As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health ....

**ARTICLE 107**

Internees shall be allowed to send and receive letters and cards ...

**ARTICLE 116**

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible ....

For Pejić the **Fourth Geneva Convention** provisions give rise to a 'general presumption' that 'family contacts – correspondence and visits – must be allowed within a reasonable time frame in all but very exceptional circumstances.'191

The communication provisions are subject to the derogation provision at **Fourth Geneva Convention** article 5. Article 5 provides in part:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

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190 Pejić, above n 12, 391.
191 Ibid 390 (citations omitted).
Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity …

The ICRC Commentary refers to article 5 as being ‘an important and regrettable concession to State expediency’.192 Regarding the limits of the derogation provision the Commentary states:

The rights referred to are not very extensive in the case of protected persons under detention; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross.

The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions – for example, the provision in Article 37 that they are to be humanely treated when they are confined pending proceedings or subject to a sentence involving loss of liberty, or the stipulation in Article 38 that they shall receive medical attention, if their state of health so requires.193

In NIAC, Additional Protocol II article 5(2)(b) provides as follows:

Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: … they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary.

Regarding the content of customary law, the ICRC Study identified the following rules concerning communication with the exterior:

**RULE 124**

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [Applicable in IAC]

B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [Applicable in NIAC]

**RULE 125**

Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [Applicable in IAC and NIAC]

**RULE 126**

Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [Applicable in IAC and NIAC].

192 Pictet (ed), above n 35, vol 4, 58.
193 Ibid 56.
Regarding HRL instruments, Principle 19 of the Body of Principles is noted. It provides that:

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

D Review

[It is surprising that the Geneva Conventions provisions governing non-international armed conflict are silent on the availability of review procedures. Common Article 3, Article 75 of Additional Protocol I, and Additional Protocol II, while all contemplating detention of enemy fighters, do not require states to employ any particular set of procedures to determine who is subject to detention.]

According to Cassel, additional gaps in current HRL include ‘the need for explicit requirements for periodic administrative and judicial review; and the lack of clarity, uniformity, and certainty in existing [HRL] requirements.’

IHL for IAC, including situations of occupation, have detailed rules for the processing of internees. These rules include review and appeal mechanisms. They do not, though, include a requirement to involve a judicial officer. HRL, however, does require the involvement of a judicial officer. The issue of the relationship between IHL and HRL in relation to the rules concerning the processing of detainees therefore arises.

1 The Problem with Inadequate Review Mechanisms

Two review periods are relevant in the detention arena. The first is the review to determine initial status and the second is a review to determine the continuing justification for detention.

Based on US experience, Bellinger and Padmanabhan report as follows on the problems with inadequate review mechanisms:

Detainees were screened by the US military after capture on the battlefield and later at a centralized detention facility to ensure that only belligerents were subject to further detention … But there was no formalized process of executive branch review outside the theater of operations, or any external check on that determination, including no right to legal representation or judicial review … As a consequence, only about one-third of the detainees initially brought to Guantanamo Bay were linked to Al Qaeda … Subsequent judicial review demonstrated a large percentage of detainees were held without adequate evidence of their participation in the conflict … (explaining that in three-fourths of Guantanamo habeas cases, the Court has ordered the detainee released).

194 Bellinger and Padmanabhan, above n 37, 222.
195 Cassel, above n 39, 385.
196 Fourth Geneva Convention art 78.
197 For example, ICCPR art 9(3) provides, that ‘anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release …’ ICCPR art 9(4) provides that ‘[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’
198 Bellinger and Padmanabhan, above n 37, 223 n 112.
2 Review under IHL in IAC

Detention review mechanisms in the *Third Geneva Convention* are limited. Article 5 provides for situations where a detainee has committed ‘a belligerent act’ but there is doubt as to whether the detainee has prisoner of war (‘POW’) status. Article 5 provides further that the detainee should ‘enjoy the protection’ of the *Third Geneva Convention* until his status is determined otherwise ‘by a competent tribunal.’ Article 5 does not have a further right to seek review.

Unlike the *Third Geneva Convention*, the *Fourth Geneva Convention* does provide for procedural aspects. Article 43 and article 78 [assigned residence or internment during occupation] are the key articles:

**ARTICLE 43**

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

**ARTICLE 78**

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

The *Fourth Geneva Convention* therefore provides for an initial review/appeal and periodic review/appeal (at least twice-yearly) by an ‘appropriate court or administrative board.’

Regarding the initial review under the *Fourth Geneva Convention* article 43, Bellinger and Padmanabhan point out that it is not automatic but once requested must be prompt.

One reality of the protections offered by the *Fourth Geneva Convention* is highlighted. Article 4 defines ‘protected’ persons in a restricted manner. It states that:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

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199 *Third Geneva Convention* art 5: ‘[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.’

200 Bellinger and Padmanabhan, above n 37, 225.

201 Deeks, above n 13, 409.
Bellinger and Padmanabhan suggest that in contemporary operations ‘it is unlikely that non-state fighters would qualify for protected person status as a matter of law, although the procedural requirements are a valuable touchstone for legal development.’

Additional Protocol I provides for no express right of review for non-protected persons detained for non-criminal purposes however article 75(3) provides as follows:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

3 Review under IHL in NIAC

Additional Protocol II and Common Article 3 have no express review/challenging procedures to detention.

The ICRC Study proposes at Rule 99 that the arbitrary deprivation of liberty is prohibited in both IAC and NIAC but contains no express provision for detention review mechanisms in NIAC. The Commentary however does address the issue of detention review but this falls short of asserting a legal obligation. The Commentary states:

Since the adoption of the Geneva Conventions, there has been a significant development in international human rights law relating to the procedures required to prevent arbitrary deprivation of liberty. Human rights law establishes (i) an obligation to inform a person who is arrested of the reasons for arrest, (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge, and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (so-called writ of habeas corpus). Although obligations (i) and (ii) are not listed as non-derogable in the relevant human rights treaties, human rights case law has held that they may never be dispensed with altogether.

4 Review under HRL in NIAC

The issue of review under HRL instruments relies in part on specific provisions such as ICCPR article 9(4) which provides: ‘[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful’. This is the right to ‘habeas corpus’.

The right to ‘habeas corpus’ is also reflected in the Body of Principles with these Principles seen as ‘applying at all times’. Principle 32(1) provides:

202 Bellinger and Padmanabhan, above n 37, 225.
203 Although Deeks is critical of the ICRC Study on this point. See Deeks, above n 13, 415 n 36:

The ICRC study on customary international humanitarian law, in a proffered rule prohibiting arbitrary detention, cites practice in this area … Some of that practice, however, appears to reflect a predictable decision by states to incorporate their obligations under article 75 of Additional Protocol I into their military manuals. In other cases, it is not clear that the practice the ICRC cites occurred in armed conflict.

204 ICRC Study, above n 38, 349.
205 University Centre for International Humanitarian Law, Lawfulness of Detention, above n 154, 6 (Louise Doswald-Beck, ’Background Paper’). For a review of the relevant provisions of the ICCPR and regional human right instru-
A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

The right of review under HRL instruments, in addition to relying in part on specific provisions such as ICCPR article 9(4), relies on the general right to liberty. Pejić for example states: The right of a person to challenge the lawfulness of his or her detention in non-international armed conflicts and in other situations of violence is a key component of the right to liberty of person under human rights law.

The Report of the Expert Meeting is noted. The Meeting asked whether HRL would provide in armed conflict ‘apart from IHL, internment review … the right to habeas corpus as a second legal avenue for challenging the lawfulness of internment.’ The Report does not indicate that a particular view prevailed on this issue.

For Bellinger and Padmanabhan the procedural requirements in HRL instruments for administrative detention ‘are somewhat similar to the procedural requirements found in human rights law governing administrative detention.’ These include, for example the giving of notice for the reasons for detention. However, they point out a key difference in IHL and HRL review, namely, that a challenge to detention under HRL must promptly occur in front of ‘a judicial body, presumably with counsel, and include appeal to a higher-level court.’ They conclude that:

These general similarities have led to a consensus among scholars regarding the need to provide detainees notice of the reasons for their detention, the opportunity to rebut those reasons in front of independent decision makers, and the right to appeal adverse judgments.

In the US domestic arena, in the case of Rasul v Bush the majority decision found that the internees at Guantanamo had the right to petition for habeas corpus in the United States. The reasons for this decision included: that the writ of habeas corpus serves as a means of reviewing the legality of the Executive detention; it applies in wartime as well as peacetime; it is not limited to US nationals; it should be served against the person who holds him in what is alleged to be unlawful custody; it can include persons held overseas in ‘exempt jurisdictions’ and ‘all other dominions under the sovereign’s control.’
The Nature of Review Mechanisms under IHL

Article 5 tribunals are expected to be 'fair, competent, and impartial' but article 5 proscribes no procedures that would meet this expectation. Consequently, as summarised by Bellinger and Padmanabhan:

Military, civilian, and administrative tribunals all potentially meet the article's requirements. Panels of military officers, a single military legal officer, and courts are used by different states to conduct Article 5 reviews. The article also includes no requirements concerning counsel or appeal. Whereas some states provide legal representation at hearings at the taxpayer’s expense, others provide only assistance from military officers (as occurs with CSRTs) or no assistance at all. States differ, too, concerning the right to appeal, with some allowing appeals only to military officials, and others to higher-level courts.

Fourth Geneva Convention article 43 also provides for review. It requires the review of the internment of a person 'as soon as possible by an appropriate court or administrative board designated by the Detainee power for that purpose.' Such a review must happen periodically but no less than twice yearly. The authoritative commentary to article 43 states that the alternative of using courts or administrative boards 'provides sufficient flexibility to take into account the different usage in different States'.

The State may act either through the courts or through administrative channels. The existence of these alternatives provides sufficient flexibility to take into account the usage in different States. The Article lays down that where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.

Also under Fourth Geneva Convention article 78, 'the occupying power’s initial review process must offer the detainee the right to appeal a decision upholding the detention.' The Expert Meeting Report states that the 'body that initially and then periodically reviews an internment decision must be independent and impartial.' It is pointed out though that under IHL in situations of international armed conflict and occupation, the interning power has a choice as to whether the review body is to be a court or an administrative board. IHL in NIAC, however, 'does not provide explicit guidance on the matter.'

Practical as well as technical legal considerations have a role in this area. HRL procedures regarding review are demanding and, in an operational environment, could create 'new difficulties,' including the issue of classified material, particularly if the numbers of detainees are

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214 Bellinger and Padmanabhan, above n 37, 224 n 119.
215 The US Combatant Status Review Tribunals was created by Army Regulation 190-8. See ibid 223.
216 Ibid 224 (citations omitted).
217 Ibid 225.
219 Ibid.
220 Deeks, above n 13, 410.
221 Chatham House and International Committee of the Red Cross, 'Expert Meeting', above n 2, 877. For a discussion of the advantages and disadvantages of the administrative and judicial review options see Chatham House and International Committee of the Red Cross, Procedural Safeguards, above n 41, 15–17.
222 Chatham House and International Committee of the Red Cross, 'Expert Meeting', above n 2, 878.
significant. Consequently it has been suggested that in conflict situations administrative rather than judicial review is ‘more realistic’.

6 The Components of Review Mechanisms

Regarding gaps in the current state of the law regarding review procedures, Bellinger and Padmanabhan recommend that, in addition to the scope of the right of notice and review, there be legal development regarding three other procedural questions related to reviews. They are:

- What procedural minimums are to apply? Standard of proof, evidentiary restrictions, obligation to share information with detainee.
- Whether reviews are a one-time determination eg status or more frequent e.g. to determine an individual’s level of ‘dangerousness’.
- The role of geography in determining the extent of process. The closer to the battlefield the less substantial the process offered.

E Obligation to Investigate

Investigations of allegations of ill-treatment of detainees is another area in which state practice in contemporary operations is developing a field of practice but it is uncertain whether the practice reflects a legal obligation or a desirable policy objective.

Case law regarding an obligation to investigate in armed conflict is HRL-based and principally addresses the use of force. The human rights framework emphasises strict accountability and the use of review processes associated with the rule of law. Although the requirement to conduct an investigation anytime someone is killed is not expressly required by HRL instruments, case law is to the effect that a general prohibition on arbitrary killing would be ineffective in practice if there was no ‘effective, independent investigation’ conducted ‘into deaths arising out of clashes involving the security forces.’ An element of this is the key requirement that an ‘effective’ investigation be conducted ‘almost automatically from a use of force.’

At the 2005 Experts Meeting on the Right to Life, the experts had differing views regarding an obligation to investigate cases involving killings. It was reported (in the context of occupation):

One expert noted that the obligation to investigate, which is clearly required under HRL, is not so clearly required under IHL. … Where the armed conflict model governs, States do not agree that they must investigate every instance in which their soldiers open fire. Another expert noted that this was only clearly the case with respect to IAC. Yet another expert felt that such an obligation could be implied from the general

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223 Bellinger and Padmanabhan, above n 37, 226–7.
224 Ibid 227.
225 Ibid.
229 Watkin, above n 227, 19.
obligation on the State to ensure that its forces comply with IHL, at least with respect to the use of force in occupied territory, and arguably even where hostilities have resumed or broken out.\footnote{University Centre for International Humanitarian Law, \textit{Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation} (2005) 34.}

A key 	extsc{ecthr} case in this area is \textit{Isayeva v Russia} (‘\textit{Isayeva I}’).\footnote{\textit{Isayeva v Russia} (Judgment) (European Court of Human Rights, First Section, Application Nos 57947/00, 57948/00, 57949/00, 24 February 2005) (‘\textit{Isayeva I}’).} It finds there is an obligation to investigate: ‘[t]he obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force’ and then gives guidance as to the obligations content: variable content; authorities must act on own motion; independence; effective evidence collection; promptness; openness.\footnote{Ibid [208]–[213].}

IHL does not have a direct counterpart to the HRL requirement to investigate. According to Kretzmer, a series of decisions by the 	extsc{ecthr} and the 	extsc{hrc} suggest that in each case where a person has been killed by law enforcement authorities an independent and objective inquiry must take place. However, ‘[n]o such rule applies in cases of armed conflict’.\footnote{David Kretzmer, ‘Rethinking the Application of IHL in Non-International Armed Conflicts’ (2009) 42 \textit{Israel Law Review} 8, 26.}

This is not to say IHL lacks accountability mechanisms. For example, it includes the principle of criminal responsibility, which is being applied in NIAC as well as IAC situations.\footnote{See, for example, \textit{Prosecutor v Tadic} (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT–94-1-A, 15 July 1999); \textit{Rome Statue of the International Criminal Court}, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘\textit{Rome Statute}’); SC Res 955, \textsc{un sc or}, 49th sess, 3453rd mtg, un Doc s/1994/955 (8 November 1994) annex (‘\textit{Statute of the International Tribunal for Rwanda}’).} However, within the IHL normative framework ‘there is no body like the “European Commission of Human Rights or the Human Rights Committee, capable of making objective determinations of fact.”’\footnote{Watkin, above n 227, 23 n 175 citing \textit{Abella v Argentina} (Judgment) (Inter-American Commission on Human Rights, Case No 11.175, 18 November 1997).}

Is this then a situation in which the absence of detailed regulation of investigations in IHL corresponds to an intentional omission ie a ‘qualified silence’,\footnote{Gaggioli and Kolb, above n 228, 122.} or is this a situation in which the simultaneous operations of HRL creates obligations complementary to IHL?\footnote{Ibid 149–58. The authors refer to two obligations – the obligation to submit military reports and the obligation to investigate.} Gaggioli and Kolb support the latter:

The \textit{lex specialis} rule in its derogatory sense has no room in this context, since there is no true conflict between the rule of HRL and of IHL. There are simply no rules on these aspects in IHL. Nothing allows concluding that the silence of IHL is a qualified one i.e. that there is an absence of rules voluntarily excluding any regulation. Thus, to the extent HRL imposes on States further obligations not contradicted by IHL, these obligations would apply.\footnote{Ibid 152.}
With respect to Gaggioli and Kolb, their conclusion that nothing allows a conclusion that the silence of IHL regarding rules to submit reports (and investigate deaths for example) is qualified is not beyond challenge. It could be argued that the very conflict context for which IHL has been developed can itself reasonably lead to a conclusion that certain HRL-like obligations were seen as inappropriate and therefore not included.

In any case, Gaggioli and Kolb raise the perennial issue of the practicability of applying HRL rules in the context of conflict. They ask whether such obligations could not be seen as ‘excessive and unrealistic’.

Kenneth Watkin also raises the issue of practicability of this HRL in conflict:

The significance of this challenge emerges when an attempt is made to establish criteria for instituting a supervisory framework on the use of force in armed conflict. The human rights approach of automatically investigating every use of force by agents of the state is not feasible. Moreover, any system requiring that the state automatically investigate each use of force or account for all armaments that are expended is clearly not always practical. What, then, are the correct criteria?

Gaggioli and Kolb ask whether such obligations could not be seen as ‘excessive and unrealistic’.

Droege also accepts the reality of conflict and the impracticality of full HRL compliant investigations in each case. However, apparently for policy reasons rather than resulting from legal necessity, Droege suggests the following:

[1] In suspicious circumstances, especially in cases of targeted killing of individuals, an investigation should at least be conducted when there is reasonable doubt as to whether the killing was lawful. While the modalities for investigations in situations of armed conflict will have to be further developed, it is clear that they must comply with the requirements of independence and impartiality … Also, investigations can only be conducted if practically possible under the prevailing security situation and will have to take into account the reality of armed conflict, but all this does not preclude the investigation as such.

The legal analysis and practical difficulties identified above concerning investigations into use of force incidents could be applied to detention related allegations.

F Obligation to Make Reparations

There is also an emerging state practice to make reparations payments for war damage in contemporary operations. But, again, does this practice result from a legal obligation or from what is seen as an appropriate policy response to a field situation?

Regarding an obligation for reparations under IHL, Droege concludes that there is no individual right for reparations for IHL violations but points out that ‘[n]othing in international law… precludes the right to a remedy and to reparation’ and suggests:

it is clear that while the simple statement that there is no individual right to reparation for violations on international humanitarian law is not adequate any more in the light of evolving law and practice, there

239 Ibid 155.
240 Watkin, above n 227, 33.
241 Gaggioli and Kolb, above n 228, 155.
243 Ibid 353.
remain many uncertainties as to the way in which widespread reparations resulting from armed conflict can be adequately ensured.²⁴⁴

For reparations under HRL, Dennis refers to the position of Italy and the victims of the NATO bombing of Radio Television Serbia who brought a separate suit against Italy in the ECtHR in Markham v. Italy for violations of article 6 of the ECtHR (right to a fair trial). The Court found that there was no current right for reparation for illegal war damage under Italian law and that, further, that there was no obligation under international law to introduce such a right. Further it said that finding that:

Article 6 of the Convention afforded a right of access to a court to bring an action against the State for unlawful acts even in cases where the breach of the civil right resulted from acts of international policy, including peacemaking and peacekeeping operations, would undermine the efforts being made to encourage governments to cooperate in international operations of that kind.²⁴⁵

The Grand Chamber of the ECtHR eventually found that ‘it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a “right” to reparation under the law of tort existed in such circumstances.’²⁴⁶ It is noted though the Court assessed the state of the law prior to 2004 so made no decision on whether case law since then had given rise to such a right.²⁴⁷

IV TREATMENT OF DETAINES

A The Application of IHL to the Treatment of Detainees

The IHL treaty framework for dealing with the treatment of detainees is founded primarily on the application of common article 3 of the Four Geneva Conventions, the provisions in Geneva Convention IV dealing with internment of civilians, and the provisions in Additional Protocols I and II concerning fundamental guarantees.²⁴⁸

1 Overview

Another issue is the content of the rules applying to detention. On that issue a distinction must be drawn between rules concerning treatment and rules concerning process. Cordula Droege states that ‘[g]enerally speaking, for the protection of persons in the hands of the authorities, there is usually no contradiction between the norms.’²⁴⁹ As they complement, rather than contradict, each other the lex specialis principle is not needed.

²⁴⁶ Markovic [2006] XIV Eur Court HR 235, 276 [111]; Dennis, above n 245, 481 n 111.
²⁴⁷ Markovic [2006] XIV Eur Court HR 235, 276 [111].
²⁴⁸ Oswald, above n 8, 158 (footnotes omitted) referring to Fourth Geneva Convention pt III, Additional Protocol I art 75 and Additional Protocol II art 5.
²⁴⁹ Droege, above n 242, 348.
In IAC, the key relevant articles are Fourth Geneva Convention articles 43\textsuperscript{250} and 78,\textsuperscript{251} article 75 in Additional Protocol I and articles 5 and 6 in Additional Protocol II\textsuperscript{252} although, according to Pejić, these articles insufficiently elaborate the procedural rights of detainees or the legal framework for determining how those procedures are to be organised.\textsuperscript{253}

For NIAC, Common Article 3 provides for minimum standards that reflect a human rights influence. Paragraph 2 of the preamble to Additional Protocol II also provides for a HRL link.

Regarding the IHL legal framework for the treatment of detainees to the treaty law must be added the content of customary international law. For Ambassador Winkler of the Copenhagen Process though, a key question is how far can customary law be ‘stretched.’ In his view it can be stretched to a large degree but there are still ‘gaps.’\textsuperscript{254}

2 Specific treatment provisions: IAC and NIAC

Emily Crawford has conducted a detailed review of IHL treaty provisions related to treatment of detainees. She points out that treaty law regarding persons deprived of their liberty in NIAC consists of 29 articles (28 in Additional Protocol II and Common Article 3). Although accepting that the full scope of the Third Geneva Convention regarding POW has not been duplicated in NIAC treaty law, her thesis is that:

\textquoteright[F]unctional equivalents to most of the key provisions regarding POW rights and privileges can be found in Common Article 3 and Protocol II. Furthermore, where these two instruments fall short … the protections of international human rights law may apply to fill the lacunae. The cumulative effect is that there is a more complete set of rights and protections who participate in armed conflict that the ‘bare bones’ of [Common Article 3] and [Additional Protocol II] would suggest. There is certainly enough that the extension of, at the very least, POW treatment, if not status, should not be too controversial a development.\textsuperscript{255}

The set of substantive IHL rules reviewed by Emily Crawford are as follows:

- Humane treatment: Third Geneva Convention article 13, Common Article 3, Additional Protocol II article 4(1). ‘It can … be argued that “human treatment” as outlined in [Third Geneva Convention] article 13 and “humane treatment” as provided for in both [Common Article 3] and [Additional Protocol II] should be considered equivalent in scope.’\textsuperscript{256}

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\textsuperscript{250} Fourth Geneva Convention art 43:
Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

\textsuperscript{251} Fourth Geneva Convention art 78: ‘[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.’

\textsuperscript{252} Oswald, above n 8, 158.

\textsuperscript{253} Pejić, above n 12, 377.

\textsuperscript{254} University of Wollongong Centre for Transnational Crime Prevention, above n 18 (Winkler).

\textsuperscript{255} Emily Crawford, The Treatment of Combatants and Insurgents under the Law of Armed Conflict (Oxford University Press, 2010) 80 (emphasis in original).

\textsuperscript{256} Ibid 82.
• Prohibitions on Threats to the Life or Health: *Third Geneva Convention* article 13, Common Article 3(1)(a), *Additional Protocol II* article 4(2)(a).257

• Medical and scientific experimentation and mutilation: *Third Geneva Convention* article 13, *Additional Protocol II* articles 4(2)(a) and 5(2)(e). Also “it can be argued that the rubric of “humane treatment” [in Common Article 3] would encompass a prohibition on unnecessary medical procedures and scientific experimentation.”258

• Protection against acts of violence and intimidation and against insults and public curiosity: *Third Geneva Convention* article 13, Common Article 3, *Additional Protocol II* articles 4(2)(h) and 5(2)(e). The terminology in Common Article 3 and *Additional Protocol II* is rather ‘violence to life and person’ and “outrages on personal dignity, in particular humiliating and degrading treatment.” Does this terminology in Common Article 3 and *Additional Protocol II* ‘incorporate a prohibition against acts of intimidation, insults and curiosity?’ Crawford concludes that ‘it is reasonable to suggest that such a provision would encompass “insults and public curiosity”’ 259

• Protection and respect for detainees’ person and honour: *Third Geneva Convention* article 14, Common Article 3, *Additional Protocol II* article 5(2)(e). Crawford argues that the constituent elements of respect for the physical and moral integrity of the person under [the *Third Geneva Convention*] are duplicated in the [Common Article 3] and [*Additional Protocol II*] protections regarding protection from violence to life or person, humane treatment, non-discrimination, protection from medical or scientific experimentation or mutilation, and the prohibition on outrages on personal dignity … 260

• Prohibition on corporal punishment: *Third Geneva Convention* article 13, *Additional Protocol II* article 4(2)(a). Crawford argues that although not expressly prohibited by Common Article 3, corporal punishment would be prohibited by the humane treatment requirement.261

• Reprisals: *Third Geneva Convention* article 13, *Fourth Geneva Convention* article 33. Common Article 3 and *Additional Protocol II* do not expressly provide for reprisals but the *Commentary* to Common Article 3 indicates that reprisals are implicitly prohibited by Common Article 3 with ICTY case law inferring that *Additional Protocol II* article 4 contains a prohibition on reprisals against civilians.262


• Conditions of captivity – safe and hygienic detention facilities: *Third Geneva Convention* articles 22–31 (safe location of camps; provisions of quarters, food and clothing; healthful and hygienic camps), *Additional Protocol II* article 5(1)(b) (safe from dangers of conflict;

258 Ibid 84 (footnote omitted).
259 Ibid 86.
260 Ibid 87.
261 Ibid 87–8.
263 Ibid 89–91.
provision of food and water; health and hygiene safeguards),\textsuperscript{264} article 5(2)(d)–(e) (benefits of medical examination and physical and mental health and integrity protection).\textsuperscript{265}

- **Conditions of captivity – working conditions:** *Third Geneva Convention* articles 49–57, *Additional Protocol II* article 4(f) (prohibition on slavery), article 5(1)(e) (working conditions equal to civilian population).\textsuperscript{266} Common Article 3 is silent on the issue of working conditions.

- **Detainee communication and correspondence with the exterior:** *Third Geneva Convention* articles 63 (receipt of funds from exterior) and 70–77 (right to send capture card, notification of detention, conditions of sending and receipt personal correspondence and relief shipments), *Additional Protocol II* article 5(2)(b) (send and receive cards)\textsuperscript{267}, article 5(1)(e) (individual and collective relief).\textsuperscript{268} Common Article 3 only provides for an offer of services by external agencies such as the ICRC.

- **Access by the ICRC:** *Third Geneva Convention* article 123 (the ICRC and establishment of a central POW agency), article 125 (operation of relief etc societies assisting POW), article 126 (obligatory visits by Protecting Powers and ICRC). In NIAC, in contrast, the ICRC has no right of visit although Common Article 3 provides that an ‘impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ *Additional Protocol II* article 18 has a similar offer of service provision.\textsuperscript{269} State practice indicates that the ICRC offer of services is frequently accepted.\textsuperscript{270}

- **Judicial guarantees:** *Third Geneva Convention* article 86 (punishment only once for same act or charge), article 99 (legality principle, coercion prohibited, right to present defence with legal assistance), article 100 (information regarding death sentence), article 101 (execution of death sentence), article 102 (nature of courts), article 103 (judicial investigations), article 104 (notification of Protecting Power of judicial proceedings), article 105 (right of

\textsuperscript{264} Additional Protocol II art 5(1)(b):

\[T]\he persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict …

\textsuperscript{265} Additional Protocol II art 5(2):

Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: … (c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict … (d) they shall have the benefit of medical examinations; (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission.

\textsuperscript{266} Additional Protocol II art 5(1)(e):

‘[p]ersons whose liberty has been restricted] shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.’

\textsuperscript{267} Additional Protocol II art 5(2)(b):

Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: … they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary …

\textsuperscript{268} Additional Protocol II art 5(1)(c): ‘Persons whose liberty has been restricted … shall be allowed to receive individual or collective relief …’

\textsuperscript{269} Additional Protocol II art 18(1): ‘Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict.’

\textsuperscript{270} Crawford, above n 255, 98.
representation), Article 106 (right of appeal/petition), Article 107 (notification of sentences to Protecting Powers), Common Article 3, Additional Protocol II article 6(2) (judicial guarantees).

- Termination of captivity: Third Geneva Convention article 118 (release and repatriation), Additional Protocol II article 5(4), article 6(5). The NIAC provisions regarding termination of captivity are limited and indirect. Additional Protocol II article 5(4) provides only that if ‘it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding’ with article 6(5) encouraging amnesties: ‘[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’

Although arguing for a deal of substantive overlap between the IHL treatment related provisions in IAC and NIAC, Emily Crawford notes there are ‘gaps’ in Additional Protocol II and Common Article 3. They include: provision regarding the recording of personal details of detainees at the commencement of captivity; detail concerning some conditions of captivity including access to educational and recreational activities, contact with the exterior and questions of camp discipline; some judicial guarantees – the right to public trial, the right to examine witnesses, the right to an interpreter. She posits though that these IHL gaps in NIAC coverage may be filled by HRL. She concludes that, save for the issue of combatant immunity, the development of non-international conflicts and IHRL has effectively resulted in a convergence between the protections and guarantees afforded combatants and POWs in both international and non-international armed conflicts. This convergence offers a more complete set of rules regarding the treatment of persons deprived of their liberty in non-international armed conflicts and renders the continued distinction

271 Common Article 3: ‘the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: … (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

272 Third Geneva Convention art 118: ‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

273 Crawford, above n 255, 116–17. For a review of the provisions of HRL instruments that affect the treatment of detainees see 129–52. The aspects examined are as follows: Non-discrimination – ICCPR article 2(1); humane treatment – ICCPR article 10; prohibition on murder – ICCPR article 6(1); prohibition on cruel, inhuman and degrading treatment or punishment – ICCPR article 7; prohibition on medical and scientific experimentation – ICCPR article 7; special regard for women – Convention on the Elimination of All Forms of Discrimination against Women; recording identification details of persons deprived of their liberty – no express provisions in HRL instruments; detention in healthful and sanitary facilities, including access to medical facilities – no express provisions in HRL instruments; detainee discipline – see HRL provisions prohibiting cruel, inhuman and degrading treatment and punishment; working conditions – ICCPR article 8(3) prohibits forced or compulsory labour; religious, intellectual and physical activities – ICCPR article 18; contact with exterior including access to relief agencies – no express provisions in HRL instruments; in instruments ensure access for ICRC; trial by independent, impartial and regularly constituted court – ICCPR article 14(1); prohibition on double jeopardy – ICCPR article 8(4); individual criminal responsibility and prohibition on collective punishment – ICCPR article 15(1); legality principle – ICCPR article 15(1); prohibition on compelling accused to testify or confess – ICCPR article 14(3)(g); right and means of defence – ICCPR article 14(3)(b) and (d); trial without undue delay – ICCPR article 9(3); right to a fair hearing – ICCPR article 14(1); presumption of innocence – ICCPR article 14(3); information on charges laid – ICCPR article 14(3)(a); right to examine witnesses – ICCPR article 14(3)(c); assistance of interpreters – ICCPR article 14(3)(f); right to present at one’s own trial – ICCPR article 14(3)(d); right to a public trial – ICCPR article 14(1); right of appeal – ICCPR article 14(5); termination of captivity – release and repatriation – no express provisions in HRL instruments.
between the law relating to participants in international and non-international armed conflicts almost meaningless.\(^{274}\)

B The Application of HRL to the Treatment of Detainees

1 The IHL and HRL relationship

The legal authority to apply HRL to the IHL framework finds justification in the terms of the preamble to Additional Protocol II which provides as follows: 

\[
[r]ecalling furthermore that in international instruments relating to human rights offer a basic protection to the human person\]

with the Commentary to Additional Protocol II explaining that such international instruments include ‘in particular the Covenant on Civil and Political Rights’ as well as the Convention on genocide and the Convention on the elimination of racial discrimination, ‘which are often invoked in situations of non-international armed conflict’ and the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’; ‘Torture Convention’)\(^{275}\), as well as regional human rights instruments.\(^{276}\)

A HRL link is also provided in the IAC context by Additional Protocol I article 72 which provides that regarding the provisions of the section on the treatment of persons in the power of a party to the conflict the rules are in addition to the rules contained in the Fourth Geneva Convention ‘as well as to other applicable rules of international law relating to the protection of fundamental human rights during armed conflict.’\(^{277}\)

HRL instruments also provide a link to IHL. ICCPR article 4(1) expressly provides for application of ‘other provisions of international law’ even under derogation. According to the Human Rights Committee this would include IHL: ‘[f]urthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law.’\(^{278}\)

2 The categories of treatment related HRL instruments

Oswald reviewed the various HRL instruments related to the treatment of detainees resulting in the identification of at least three categories.\(^{279}\) They are as follows:

- The treaties that are universal in nature and that consider the treatment of detainees in a more general sense. They include the ICCPR and the Convention on the Rights of the Child.\(^{280}\)
- Treaties that focus specifically on the treatment of detainees including the CAT; the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treat-

274 Ibid 152.
275 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’).
276 Sandoz, Swinarski and Zimmermann, above n 151, 1339–40 [4428].
277 Pejić, above n 12, 378.
278 Human Rights Committee, General Comment No 29: Article 4 Derogations during a State of Emergency, 72nd sess, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [9] (‘General Comment No 29’).
279 Oswald, above n 8, 157–8.
280 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CROC’).
ment or Punishment;\textsuperscript{281} and the International Convention for the Protection of All Persons from Enforced Disappearance.\textsuperscript{282}

A number of legal instruments that provide useful guidance as to standards of treatment for detainees. These include:

- **Universal Declaration of Human Rights (‘UDHR’);\textsuperscript{283}**
- **Body of Principles;**
- **Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman And Degrading Treatment Or Punishment;\textsuperscript{284}**
- **Code of Conduct for Law Enforcement Officials;\textsuperscript{285}**
- **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;\textsuperscript{286}**
- **Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power;\textsuperscript{287}**
- **Declaration on the Protection of Women and Children in Emergency and Armed Conflict;\textsuperscript{288}**
- **Declaration on the Rights of Disabled Persons;\textsuperscript{289}** and
- **Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.\textsuperscript{290}**

3 Derogations from Human Rights Instruments

Can the treatment provisions of HRI instruments be derogated from? For example, under the ICCPR article 4(1) there is provision to derogate from rights in times of public emergency.\textsuperscript{291} NIAC would be one such emergency that would permit derogation.\textsuperscript{292} ICCPR article 4(2) provides for certain rights that are made non-derogable but they do not include article 10(1) – ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ However, the Human Rights Committee in *General Comment* 29 stated:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately

\textsuperscript{281} Opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).
\textsuperscript{282} Opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010). For the purpose of this Chapter it is useful to refer to its provisions on the basis that they establish higher standards of norms than existing instruments.
\textsuperscript{283} GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
\textsuperscript{284} GA Res 37/194, UN GAOR, 37th sess, 11th plen mtg, UN Doc A/RES/37/194 (18 December 1982).
\textsuperscript{285} GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Doc A/RES/34/169 (17 December 1979).
\textsuperscript{286} UN Doc A/CONF.144/28/REV.1 (7 September 1990).
\textsuperscript{287} GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985).
\textsuperscript{288} GA Res 3318 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/RES/3318 (XXIX) (14 December 1974).
\textsuperscript{289} GA Res 3447 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/RES/3447 (XXX) (14 December 1975).
\textsuperscript{291} ICCPR art 4(1):

- In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
\textsuperscript{292} Pejić, above n 12, 379.
mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.293

Regarding ICCPR article 10, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, Rodley concludes that this principle (also contained in other HRI instruments) ‘enunciates a rule of general international law’ with the result that it is binding on all states not just those party to the relevant instruments.294

C Medical Care and Attention

Regarding the provision of medical care and attention in IAC, relevant articles include: Third Geneva Convention article 13; Fourth Geneva Convention articles 81, 91 and 92; and Additional Protocol I article 11. They provide in part:

- **Third Geneva Convention** article 13:
  
  Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

- **Fourth Geneva Convention** article 81:
  
  Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health…

- **Fourth Geneva Convention** article 91:
  
  Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

- **Fourth Geneva Convention** article 92:
  
  Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

- **Additional Protocol I** article 11(1):
  
  The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to

293 Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add.2, [13(a)].
subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

In NIAC, Additional Protocol II article 5(1)(b) provides as follows:

the persons [deprived of their liberty] referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict …

Regarding HRL instruments, Principles 24 and 26 of the Body of Principles are noted. They provide:

PRINCIPLE 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

PRINCIPLE 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Regarding the content of customary international law, the ICRC Study identified the following rule concerning medical attention and other requirements:

RULE 118

Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [Applicable in IAC and NIAC]

More generally, Pejić asserts that the right to medical attention is linked to the obligation to treat humanely. She states:

The right to medical care and attention is a component of the essential obligation that all persons deprived of their liberty must be treated humanely. Medical care and attention serve among other things to prevent ill-treatment and also to refute the admissibility of evidence against a person that has been obtained by torture or other forms of ill-treatment.295

D Torture, Cruel, Inhuman and Degrading Treatment

For all the sophistication and moderation of these precedents, there is one thing one misses in the ECtHR case law and in the text-books that summarize it. No one spends much time reflecting on the meaning of the predicates that are incorporated in the Article 3 standard – ‘inhuman’ and ‘degrading’ – and explaining how the Court is guided by their meanings in generating its principles, presumptions and benchmarks. The Court simply announces its finding that certain practices are inhuman or

295 Pejić, above n 12, 390.
degrading while others are not. Or announces a principle that it is going to use in determining what is degrading or what is inhuman.\textsuperscript{296}

1 Introduction

For Oswald, the prohibition on torture and ill-treatment, including cruel, inhuman or degrading treatment or punishment of any kind, is a fundamental prohibition relevant to the treatment of detainees, with the prohibition of torture itself being recognised as a \textit{jus cogens} norm.\textsuperscript{297}

A number of HRL and IHL instruments provide for the prohibition on torture and other forms of ill-treatment but with some differences in the terminology used in the different instruments. For example, Waldron notes that ‘cruel’ is present in article 7 of the ICCPR but not present in article 3 of the ECHR and that in the ECHR ‘degrading’ was added. Waldron points out that no one knows why this occurred.\textsuperscript{298}

Below the terms torture and cruel, inhuman and degrading treatment are examined as are other terms related to the treatment of detainees. As well as aiming to provide clarity regarding the content of these terms the objective of the following is to highlight the criminal liability risk that arises regarding the treatment of detainees.

2 Threshold Issue: A Minimum Level of Severity

Article 3 of ECHR provides that ‘[n]one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ The ECHR in Ireland v United Kingdom found that to come within the scope of article 3 the ill-treatment in question had to reach a certain level of severity but essentially

\textit{[i]}ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.\textsuperscript{299}

3 Torture

The ‘most expansive definition of torture in a widely adopted treaty instrument is that found in article 1 of the CAT’,\textsuperscript{300} which defines torture as follows:

\textsuperscript{298} Waldron, above n 296, 22
\textsuperscript{299} Ireland v United Kingdom (Judgment) (European Court of Human Rights, Plenary, Application No 5310/71, 18 January 1978) [162].
\textsuperscript{300} Oswald, above n 8, 164.
Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Oswald refers to the detailed analysis of the definition of torture by Manfred Nowak and Elizabeth McArthur in their Commentary on the Torture Convention and by way of summary makes the following points regarding that definition:

Torture can arise as a matter of conduct or omission; the purpose of inflicting severe pain and suffering will amount to torture if it is carried out for reasons such as ‘extracting a confession; obtaining from the victim or a third person information; punishment, intimidation and coercion; [or] discrimination’; but, pain and suffering will not amount to torture if it arises from carrying out a detention. Finally, it should also be noted that the phrase ‘public official or other person acting in an official capacity’ in article 1 CAT is State-centric in focus but has been interpreted to extend to non-State actors as well.

Does the CAT definition of torture reflect customary law? According to Boas, Bischoff and Reid the definition of torture applied by the International Criminal Tribunal for Rwanda and ICTY is taken directly from the CAT. However, they note that the Appeals Chamber in Kunarac found that the ‘public official requirement’ was not a requirement of customary international law of liability for torture outside the CAT. Regarding the severity requirement they point out that consistently the ICTY has found that this requirement for torture is ‘fact dependent’; that is, it is to be judged on a case-by-case basis. They point out though in Brdanin the Appeals Chamber rejected the notion raised in the ultimately withdrawn so-called Bybee memorandum standard of physical pain ‘of an intensity akin to that which accompanies physical injury such as death or organ failure’. In Brdanin, the Trial Chamber found:

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.

In the Celebici case the ICTY non-exhaustively listed acts constituting torture:

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1. Torture is defined in the Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 3452 (XXX), UN GAOR, 30th sess, 2433 plen mtg, UN Doc A/RES/3452 (XXX) (9 December 1975) art 1.
2. Nowak and McArthur, above n 297, 66–79.
3. Oswald, above n 8, 164 (citations omitted).
5. Prosecutor v Kunarac (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23-/1A, 12 June 2002) [148] (‘Kunarac (Appeals Judgment’). See also Boas, Bischoff and Reid, above n 304, 79.
7. Prosecutor v Brdanin (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 1 September 2004) [484] (citations omitted).
Finally, it should also be noted that the Special Rapporteur on Torture, in his 1986 report, provided a
detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe
enough to constitute the offence of torture, including: beating; extraction of nails, teeth, etc; burns; electric
shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration
of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of
food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and
sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or
kill relatives; total abandonment; and simulated executions. From the foregoing discussion it can be seen
that the most characteristic cases of torture involve positive acts. However, omissions may also provide
the requisite material element ...

Boas, Bischoff and Reid, relying on the ICTY jurisprudence, highlight other acts found to
constitute torture including: telling a detainee they will be killed; severe physical abuse in the
course of interrogation; acts designed to cause psychological torment such as falsely informing
a prisoner his father has been killed. They also articulate acts found not to constitute torture:
simple interrogation; minor contempt for the physical integrity of the prisoner; imprisonment;
solitary confinement; and deprivation of food. There must be severe treatment but a ‘prohibited purpose’ must also be present. The CAT lists five purposes: punishment; coercion; intimidation; obtaining information or a confession; or discrimination directed at the victim or a third person.

4 Cruel, Inhuman and Degrading Treatment/Punishment

The UK’s Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention
highlights the unsettled nature of the terms cruel, inhuman and degrading (‘CID’) treatment and punishment:

Personnel will be aware of concerns about torture and cruel, inhuman or degrading treatment or pun
ishment (‘CIDT’). There is an absolute prohibition of torture in international law and a clear definition of
what constitutes torture. There is also an absolute prohibition on CIDT, but there is no agreed or exhaustive
definition of what constitutes CIDT. Although it is legitimate to differentiate between torture and CIDT, individual instances of mistreatment that might in isolation constitute CIDT could amount to torture in circumstances in which eg they are prolonged, or coincide with other measures.

Regarding CID, article 16 of the CAT provides:

308 Delalic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [467]–[468].
309 Boas, Bischoff and Reid, above n 304, 82–3.
310 Ibid 83. See CAT art 1:
For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering,
whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him
or a third person information or a confession, punishing him for an act he or a third person has committed
or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason
based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or
with the consent or acquiescence of a public official or other person acting in an official capacity. It does
not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
311 Government of the United Kingdom, Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (2010) [5].
Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

Oswald refers to there being considerable commentary on article 16 and highlights the following:

‘cruel and inhuman treatment or punishment … can be defined as the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent of a public official or other person acting in an official capacity.’\(^{312}\) It also encompasses the excessive use of force by law enforcement personnel.\(^{313}\) Degrading treatment or punishment is defined as ‘the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim.’\(^{314}\)

Johan van der Vyver points out what the words do not mean. According to van der Vyver ‘inhuman or degrading treatment’ is not a ‘catch-all concept that encapsulates almost every conceivable manifestation of unbecoming conduct.’\(^{315}\)

Oswald suggests it is also relevant in defining CID to consider ‘the broader interpretation given to cruel, inhuman or degrading treatment or punishment for the purposes of principle 6 in the Body of Principles’\(^{316}\) which states that:

The term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Boas, Bischoff and Reid report that ICTY jurisprudence indicates that conduct held to constitute cruel or inhuman treatment includes the use of human shields; forced labour; detention in deplorable conditions;\(^{317}\) and the shelling or bombardment of civilians or civilian objects when it results in injury to persons.\(^{318}\)

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312 Nowak and McArthur, above n 297, 558.
313 Ibid.
314 Oswald, above n 8, 165.
316 Oswald, above n 8, 166.
317 Prosecutor v Limaj (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-66-T, 30 November 2005) [288]–[289] (citations omitted):
   it clearly emerges from the evidence that food and water were not provided regularly, and that there were no cleaning, washing or sanitary facilities. Both the cowshed and the storage room were not adequately ventilated and at times were overcrowded, especially the storage room. Even though the detainees were allowed outside the storage room once in a while to be able to have some fresh air, the atmosphere and conditions in the room remained deplorable. There were no sleeping facilities either in the storage room or the cowshed, which was exacerbated by overcrowding particularly in the storage room. Detainees in the cowshed were typically chained to the wall or tied to other detainees. No medical care was provided, although readily available … the Chamber finds that the deplorable conditions of detention in both the storage room and the cowshed at the Llapushnik/Lapusnik prison camp, were such as to cause serious mental and physical suffering to the detainees, and constituted a serious attack upon the dignity of the detainees.
318 Boas, Bischoff and Reid, above n 304, 272–3.
Waldron refers to a dictionary definition to help define ‘cruel’ and ‘degrading’:

Cruel. Of persons (also transf and fig of things): Disposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted … Of actions, etc: Proceeding from or showing indifference to or pleasure in another's distress. 319

Degrading: ‘[t]o reduce from a higher to a lower rank, to depose from … a position of honour or estimation’. 320

The word ‘dignity’ has traditionally had a hierarchical reference: one talked, for example, about the dignity of a king or the dignity of a general. I have argued elsewhere that the modern notion of human dignity does not cut loose from the idea of rank; instead it involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility. 321

Waldron asks whether these terms are synonymous and concludes that they are not. He suggests degradation and inhumanity focus on human dignity whereas cruelty does not. ‘Degradation’ is victim-oriented rather than perpetrator-oriented. 322 He suggests you can be cruel to an animal but asks whether you can degrade an animal. 323

For Waldron there is an objective aspect to ‘degradation’ – ‘degradation focuses in the first instance on what objectively happens to the person in relation to some objective standard of dignity. If anyone’s conscious reaction is emphasized it is the reasonable on-looker, not the victim’. 324 Reliance is placed on Burke v General Medical Council [2005] QB 424 at paragraph 178. 325

Treatment is capable of being ‘degrading’ within the meaning of article 3, whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient may be, treatment which has the effect on those who witness it of degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.

In Naletilic, the ICTY Trial Chamber determined the following regarding inhuman and cruel treatment:

Inhuman treatment is defined as a) an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a protected person. Cruel treatment is constituted by a) an intentional act or omission, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a person taking no active part in the hostilities. The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of ‘wilfully causing great suffering or serious injury to body or health’. 326

319 Waldron, above n 296, 26.
320 Ibid 35.
321 Ibid 36.
322 Ibid 35.
324 Ibid 40.
326 Prosecutor v Naletilic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [246]. See also Boas, Bischoff and Reid, above n 304, 272.
The ICTR in \textit{Prosecutor v Musema}, defined degrading and humiliating treatment as ‘[s]ubjecting victims to treatment designed to subvert their self-regard.’\footnote{Prosecutor v Musema (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-13-T, 27 January 2000) [285]. See also Waldron, above n 296, 39 n 131.}

The ICTY Trial Chamber in \textit{Kordic} addressed the definition of ‘cruel’ treatment:

As the offence of ‘violence to life and person’, the offence of ‘cruel treatment’ is prohibited in Common Article 3 of the Geneva Conventions. The \textit{Celebici} Trial Chamber found that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, that is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.

The \textit{Celebici} Trial Chamber went on to conclude that ‘cruel treatment’ is ‘equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.’\footnote{Kordic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [265] (citations omitted).}

\section{The Distinction between Torture and CID Treatment}

In \textit{Ireland v United Kingdom}, in determining whether the five interrogation techniques being reviewed also constituted torture, the \textit{ECHR} had to distinguish between torture and cruel inhuman or degrading treatment. The Court found that ‘this distinction derives principally from a difference in the intensity of the suffering inflicted.’\footnote{Ireland v United Kingdom (Judgment) (European Court of Human Rights, Plenary, Application No 5310/71, 18 January 1978) [167].}

Further:

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.\footnote{Ibid.}

Waldron raises possible quantitative and qualitative difference between torture and CID. He refers to the \textit{ECHR} and scholars distinguishing between the terms:

[B]ut only in a crude quantitative way, marked by differences in the intensity of the suffering that was inflicted. Degrading treatment is painful, painful enough to get over the minimum threshold of Article 3, but not as painful as inhuman treatment; inhuman treatment is very painful, but not as painful as torture; torture is the most painful of all and so needs a special stigma attached to it; etc. The only qualitative distinction toyed with at this stage was that the basis of the distinction between torture and inhuman treatment might be the purposive element in torture.\footnote{Waldron, above n 296, 20 (citations omitted).}

There is a problem though with a quantitative distinction, that is, one based on intensity:

One might even argue that there are circumstances in which cruel, inhuman, or degrading treatment not rising to the level of torture is worse than torture. Some forms of torture, such as waterboarding, last only

\footnotetext{\textsuperscript{327}}{Prosecutor v Musema (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-13-T, 27 January 2000) [285]. See also Waldron, above n 296, 39 n 131.} \footnotetext{\textsuperscript{328}}{Kordic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [265] (citations omitted).} \footnotetext{\textsuperscript{329}}{Ireland v United Kingdom (Judgment) (European Court of Human Rights, Plenary, Application No 5310/71, 18 January 1978) [167].} \footnotetext{\textsuperscript{330}}{Ibid.} \footnotetext{\textsuperscript{331}}{Waldron, above n 296, 20 (citations omitted).}
for seconds. When ill treatment less severe than torture is extended for months and years, one could argue that such treatment is worse than very brief torture.\textsuperscript{332}

Is the \textit{nature of the prohibition} regarding on one hand ‘torture’ and on the other, \textit{CID}, also different? Yuval Shany suggests as follows:

\textit{P}olicy considerations might support the proposition that the absolute bar against torture should not necessarily carry over to less severe forms of cruel, inhuman, or degrading punishment and treatment prohibited by international law.\textsuperscript{333}

\section{The Rome Statute\textsuperscript{334} and Torture and CID}

\subsection{Torture}

The \textit{Rome Statue of the International Criminal Court (‘Rome Statute’)} has a number of crimes against humanity and war crimes that are related to torture. The \textit{Rome Statute} at article 7(2)(e) provides that:

\textit{Torture} means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

Under the \textit{Rome Statute}, torture is a grave breach of the \textit{Geneva Conventions} (article 8(2)(a)(i)) and a serious violation of Common Article 3 (article 8(2)(c)(i)). Although not binding upon the International Criminal Court, the \textit{Elements of War Crimes under the Rome Statute of the International Criminal Court} set out the elements that ‘are to be used as an interpretive aid’ in applying the \textit{Rome Statute}.\textsuperscript{335} Relevant elements regarding article 8(2)(a)(ii) ‘War Crime of Torture’ are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.\textsuperscript{336}

Relevant definitions include ‘war crimes’ which, for the purposes of the Statute mean ‘Grave breaches of the \textit{Geneva Conventions} of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant \textit{Geneva Convention}.’

The crime of torture or inhuman treatment is derived from articles 50, 51, 130, 147 of the \textit{1949 Geneva Conventions}.\textsuperscript{337}

\begin{itemize}
\item \textsuperscript{333}Yuval Shany, ‘The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?’ (2007) 56 \textit{Catholic University Law Review} 837.
\item \textsuperscript{334}For an analysis of the crimes encapsulated in the Rome Statute see William A Schabas, \textit{The International Criminal Court: A Commentary on the Rome Statute} (Oxford University Press, 2010).
\item \textsuperscript{335}Knut Dörmann, \textit{Elements of War Crimes under the Rome Statute of the International Criminal Court} (Cambridge University Press, 2003) 8.
\item \textsuperscript{336}Ibid 44.
\item \textsuperscript{337}Ibid 47.
\end{itemize}
While the *Rome Statue* definition of torture is wider than that found in the *CAT*, the severity of punishment requirement under the *Rome Statute* is the same as that for the *CAT*.338 However the public official requirement is not included. At the *Rome Statute* Preparatory Commission (‘PrepCom’) one of the decisions to be made was whether the *CAT* definition which includes the public official requirement and a purposive test should also be applied in the war crimes provisions at article 8. Dörmann reports that a compromise solution was reached reflecting the jurisprudence of international tribunals. That is, the public official requirement was not included but the purposive element was included.339 Hence one element for article 8(2)(a)(ii) (war crime of torture) is that the ‘perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.’340 Part of the explanation for not including the official capacity requirement was to avoid the impression that non-state actors were not covered.341

(b) *Inhuman treatment*

*Rome Statute* article 8.2(a)(ii) provides that ‘inhuman’ treatment is a grave breach of the *Geneva Conventions*.

The PrepCom adopted the same element regarding the severity required to establish this war crime as for torture. That is, Element 1 provides that the ‘perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.’342 It is the purposive test, present for torture, that distinguishes the two offences.343 Dörmann says this is different to the approach taken by the ad hoc tribunals. He also notes that the PrepCom decided not to include serious attacks on personal dignity as constituting inhuman treatment as the war crime of outrages on personal dignity (article 8(2)(b)(xxi)) would cover such conduct.344

Waldron argues ‘inhuman’ and ‘inhumane’ are not the same.345 Relying on the Oxford English Dictionary he argues the modern use of ‘inhumane’ has a ‘milder’ meaning than ‘inhuman’ so consequently is ‘much more demanding than a prohibition on “inhuman conduct”’.346 (Note, though, that Common Article 3 requires ‘humane’ treatment so it must be asked whether the article itself prohibits (albeit indirectly) ‘inhuman treatment’.)

After analysis Waldron favours a victim-centric view of ‘inhuman’ rather than the ‘inflictor’s attitude to the suffering’ although he suggest the Oxford Dictionary meaning favours the later.347 Consequently he argues that ‘[s]uffering might be described as inhuman if it were thought that no human could or should have to put up with it, rather than inhuman because, in some normative sense, no human could or should be able to inflict it.’348 Further he suggests: Treatment may be described as inhuman if it fails in sensitivity to the most basic needs and rhythms of

338 Ibid 46.
339 Ibid 44.
340 Ibid.
341 Ibid 46.
342 Ibid 44.
343 Ibid 63.
345 Waldron, above n 296, 29.
346 Ibid 30.
347 Ibid 31.
348 Ibid.
a human life: the need to sleep, to defecate or urinate, the need for daylight and exercise, and perhaps even the need for human company. We can imagine what it is like not to be allowed to use a toilet; we can imagine what it is like to be deprived of sleep. This commonality of human experience seems to be what is being appealed to in some shape or form with this standard.

Above all, we should remember the context. These standards are supposed to operate in regard to situations like detention, incarceration, captivity: situations of more or less comprehensive vulnerability of a person; and total control by others of a person’s living situation.349

(c) Cruel treatment

Article 8(2)(c)(i)-4 sets out a serious violation of Common Article 3 – the war crime of ‘Cruel Treatment and Torture’. This includes violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Relevant elements of article 8(2)(c)(i)-4 are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.350

The crime and terminology of ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ is taken from Common Article 3(1)(a). See also Additional Protocol II article 4(2).

The ICTY Trial Chamber in Delalic determined regarding ‘cruel treatment’:

In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.351

Dörmann reports that at the ICC PrepCom no difference was seen between ‘inhuman treatment’ at article 8(2)(a)(ii) and ‘cruel treatment’ in article 8(2)(c)(i).352

Dörmann notes that no HRI instrument defines ‘cruel treatment’ although instruments such as the ICCPR article 7 contain an express prohibition. Further he notes that at the time of writing the UN Human Rights Committee had not defined ‘torture’ or ‘cruel, inhuman or degrading treatment or punishment’.353

349 Ibid 35.
350 Dörmann, above n 335, 397.
351 Delalic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [552].
352 Dörmann, above n 335, 398.
353 Ibid 400.
7 The Rome Statute and Outrages on Personal Dignity

Dörmann’s commentary to the *Rome Statute* sets out the relevant elements for arts 8(2)(b)(xxi) and 8(2)(c)(ii) ‘War Crime of Outrages on Personal Dignity’ whereby ‘committing outrages upon personal dignity, in particular humiliating and degrading treatment constitutes an offence. Contravention occurs when:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.\(^{354}\)

Article 8(2)(b)(xxi) applies to international armed conflicts and 8(2)(c)(ii) to non-international armed conflicts.

Dörmann reports that the ICC PrepCom determined there was no differences between ‘outrages on personal dignity, in particular humiliating and degrading treatment’ committed in international conflict – see article 8(2)(b)(xxi) and that committed in non-international conflict – see article 8(2)(c)(ii).\(^{355}\)

It is evident from the records of the PrepCom that the formulation of crimes set out in *Rome Statute* article 8 is based on Common Article 3, including definitions and the circumstances under which contraventions occur.\(^{356}\) In particular, *Rome Statute* article 8(2)(c)(ii) sets out an identically worded contravention against personal dignity as that contained in Common Article 3(1)(c), the first prohibition on conduct against human dignity. However, Common Article 3(1)(c) is a broad provision;\(^{357}\) and *Rome Statute* article 8(2)(c)(ii) appears to have been drafted in an intentionally expansive manner.\(^{358}\) The upshot is that specific instance of degrading treatment must be articulated by reference to other sources. Once such source is *Rome Statute* article 8(2)(b)(xxi). While no relevant instrument supports the existence of differences between the kind of degrading conduct criminalised in NIAC and IAC,\(^{359}\) Dörmann posits that identical wording between arts 8(2)(b)(xxi) and 8(2)(c)(ii) entails that the sources informing article 8(2)(b)(xxi) also inform 8(2)(c)(ii).\(^{360}\) Notably, article 8(2)(b)(xxi) draws meaning from Common Article 3 Additional Protocol I and case law.\(^{361}\) As such, judicial treatment of Common Article 3(1)(c) also stands to explain the content of article 8(2)(c)(ii).\(^{362}\)

The ICTY jurisprudence according to Boas, Bischoff and Reid indicates a ‘range of conduct’ under the title outrages on personal dignity that share ‘certain characteristics’.\(^{363}\) The *Kunarac*
Trial Chamber laid down certain general criteria that defined outrages upon personal dignity – ‘an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity’ – the Appeals Chamber finding that these criteria established an objective standard not dependent on the individual victim’s perception of the conduct.

The ICTY jurisprudence indicates that lasting damage is not required. The jurisprudence indicates that the following can constitute outrages on personal dignity: inappropriate conditions of detention; performance of subservient acts; relieving bodily functions in clothing; enduring constant of fear of being subjected to physical, mental or sexual violence in detention camps; forced incest; burying corpses in latrine pits; leaving infants without care of killing their guardians; and, removing fetuses from the womb.

E Unlawful Confinement

The Rome Statute at article 8(2)(a)(vii) provides for the war crime of unlawful confinement as a grave breach of the Geneva Conventions. This crime has been incorporated directly from Fourth Geneva Convention article 147. The relevant elements for Rome Statute article 8(2)(a)(vii)-2 are:

1. The perpetrator confined or continued to confine one or more persons to a certain location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

‘Confinement’ reflects an intention by the Rome Statute PrepCom to include not only imprisonment or detention in prisons or detention camps but measures regarding ‘assigned residence’. Proposals such as restraining liberty were rejected as too broad and inconsistent with the principle of legality.

Dörmann notes that the Elements to this crime include ‘confined or continued to confine’ reflecting the notion that initially legal confinement can become unlawful confinement.

364 Prosecutor v Kunarac (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-25-T & IT-96-23/1-T, 22 February 2001) [512]–[514].
365 Kunarac (Appeals Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-25 & IT-96-23/1A, 12 June 2002) [162]–[163]. See also Boas, Bischoff and Reid, above n 304, 276.
366 Boas, Bischoff and Reid, above n 304, 277–8.
367 Rome Statute art 8(2)(a)(vii):
For the purpose of this Statute, ‘war crimes’ means: … Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: … Unlawful deportation or transfer or unlawful confinement;
368 Dörmann, above n 335, 114.
369 Ibid 112.
371 Ibid 113.
The ICTY in Delacic (the Celibici Case) addressed the offence of unlawful confinement/imprisonment by relating the offence in part to compliance with procedural safeguards. For the Trial Chamber:

In case the internment of civilian persons can be justified according to articles 5, 27 or 42 of Geneva Convention IV, the persons so detained must still be granted some basic procedural rights. These rights are entrenched in article 43 of Geneva Convention IV …

The Appeal Chamber went further by stating:

The Appeals Chamber agrees with the Trial Chamber that the exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42, and where the provisions of Article 43 are complied with. Thus the detention or confinement of civilians will be unlawful in the following two circumstances:

(i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, ie they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and

(ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.

In Krnojelac the ICTY Trial Chamber listed the elements of the crime of imprisonment:

To establish the crime of imprisonment as a crime against humanity under Article 5(e) of the Tribunal’s Statute, the Trial Chamber accordingly finds that the following elements must be established in the circumstances of the present case:

1. An individual is deprived of his or her liberty.

2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.

3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.

According to Boas, Bischoff and Reid, the ICTY Chambers ‘have repeatedly held that, except for the general requirements that characterize war crimes and crimes against humanity, the crimes of unlawful confinement as a grave breach and imprisonment as a crime against humanity are identical.’ For them the underlying offence is that of ‘arbitrary detention’ with the above elements.

Regarding the definitions in the Body of Principles the International Commission of Jurists states:

372 Delacic (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [579].
373 Delacic (Appeals Judgment) (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [322].
375 Boas, Bischoff and Reid, above n 304, 76 (citations omitted).
the Commission on Human Rights has stated that ‘the [Body of Principles] […] also covers administrative detention.’

It should be recalled that, in accordance with the Rome Statute of the International Criminal Court, ‘imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law’ when committed ‘as part of a widespread or systematic attack directed against any civilian population’ is a crime against humanity.

It is also important to recall that the Statute of the International Tribunal for the Former Yugoslavia qualifies the unlawful detention of civilians as a grave breach of the Geneva Conventions and as a crime against humanity ‘when committed in armed conflict […] and directed against any civilian population.’ The Statute of the International Tribunal for Rwanda qualifies imprisonment ‘when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’ as a crime against humanity.

Ryan Goodman makes reference to an argument that article 5 of the Fourth Geneva Convention provides evidence that ‘humane treatment’ includes a prohibition on unlawful confinement.

**F Disappearance Anxiety: Failure to Inform**

At least with respect to the application of HRL, the further question arises as to whether members of a detainee’s family are indirectly ‘victims’ of ill-treatment. This question has been addressed by human rights treaty bodies.

In *Quinteros v Uruguay*, the Human Rights Committee examined the disappearance of Elena Quinteros with the responsibility for the disappearance falling on the authorities of Uruguay. The communication to the Committee was from the mother of the disappeared victim who argued she also was a victim of a violation of article 7 of the ICCPR (psychological torture because she did not know about the whereabouts of her daughter). The Committee is reported as finding that the mother had the right to know what had happened to her daughter and that the Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

The ECtHR examined this issue in the case of *Kurt v Turkey*. In that case, the applicant contended that she herself was the victim of inhuman and degrading treatment on account of her son’s disappearance at the hands of the authorities. She requested the Court to find, as had the European Human Rights Commission, that the suffering which she had endured engaged the responsibility of the respondent state under article 3 of the Convention. She relied in part for support of her argument on the decision of the United Nations Human Rights Committee in the case of *Quinteros*. The Court found a violation of article 3 of the ECtHR:

The Commission considered that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused her severe mental distress and anguish. Having regard to

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376 International Commission of Jurists, above n 14, 12 n 55.
377 Ibid 15 (citations omitted).
378 Goodman, above n 43, 51 n 12.
380 *Kurt v Turkey (Judgment)* (European Court of Human Rights, Application No 15/1997/799/1002, 25 May 1998) [130].
its conclusion that the disappearance of her son was imputable to the authorities, the Commission found that she had been subjected to inhuman and degrading treatment within the meaning of Article 3.\footnote{381}{Ibid [131].}

The Court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.\footnote{382}{Ibid [133].} It recalls in this respect that the applicant approached the public prosecutor in the days following her son’s disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety, as shown by her petitions of 30 November and 15 December 1993.\footnote{383}{Ibid [134].} However, the public prosecutor gave no serious consideration to her complaint. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.\footnote{384}{Gongadze v Ukraine [2005] XI Eur Court HR 1, 32 [184].}

Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities’ complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.\footnote{385}{Waldron, above n 296, 19.}

The ECtHR has provided guidance regarding the relevant factors that could give rise to liability for disappearance anxiety with the closeness of the relationship between the relative and the disappeared victim being one factor. In Gongadze v Ukraine, the Court found as follows:

Whether a family member of a ‘disappeared person’ is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the relative a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of serious violations of human rights. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family members in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.\footnote{386}{Ibid (emphasis in original).}

While not necessarily critical of the ultimate conclusions of the ECtHR cases regarding disappearance anxiety, Waldron is critical of the quality of the analysis, particularly the lack of explanation in applying the facts of each case to the relevant article 3 terms. According to Waldron the ECtHR principles ‘are simply announced, not explained.’\footnote{385}{Waldron, above n 296, 19.} He asks why the words ‘inhuman’ and ‘degrading’ are applied in the circumstances. Is it ‘degrading inasmuch as the parent is treated as though her anxiety amounted to nothing, as though she had no right to make such an inquiry, or as though officials could treat an inquiry from someone like her as beneath contempt?’ Is it ‘inhuman, inasmuch as any decent human being would understand a mother’s need to find out what had happened to her son, and would have to be particularly hard-hearted to ignore her distress?’ Is it inhuman because it predictably leads to a level of suffering that no human can reasonably be expected to endure?’ For Waldron neither the Courts nor scholars have provided the requisite analysis.
G Solitary Confinement and Segregation

Restrictions on communication by detainees and isolation from other detainees does not of itself constitute ill-treatment. In Iorgov v Bulgaria the ECtHR found as follows:

The Court notes that the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment .... As stated by the CPT, however, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities.387

Rodley notes that Rule 32 of the Standard Minimum Rules for the Treatment of Prisoners (‘SMR’)388 contemplates the possibility of ‘close confinement’.389 He concludes that solitary confinement is ‘not absolutely prohibited’, however, he highlights that Rule 32 also provides that in ‘no case may such punishment be contrary to or depart from the principle stated in rule 31’ with Rule 31 providing that ‘[c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.’ He interprets this to mean that solitary confinement can amount to ill-treatment. Further, he suggests that ‘it is evident that prolonged solitary confinement may be incompatible with the provisions of the International Covenant on Civil and Political Rights’.390

Regarding segregation, a number of instruments require separation between specified categories of detainees. Oswald, for example, notes that in relation to segregation, ‘for example, article 10 of the ICCPR requires that “unless there are exceptional circumstances, detainees who are not convicted of an offence are to be segregated from those who have been convicted and are to be treated in accordance with their “status of unconvicted persons.”’391 Also ‘accused juvenile persons shall be separated from adults’.392

The ICRC Study at Rule 119 also provides for limited segregation. It states: ‘[w]omen who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women.’ Rules 119 is said to apply in IAC and NIAC.393

H Force-Feeding

Force-feeding as such does not necessarily, but may, amount to ill treatment. In Nevmerzhitsky v Ukraine during the applicant’s time in detention he went on a hunger strike and was subjected to forced feeding. The applicant relied on article 3 of ECHR (prohibition of torture or inhuman

387 Iorgov v Bulgaria (Judgment) (European Court of Human Rights, First Section, Application No 40653/98, 7 July 2004) [83].
389 Rodley, above n 294, 402.
390 Ibid. For a review of the findings of the Human Rights Committee, the European Court of Human Rights, the European Committee for the Prevention of Torture, the Special Rapporteur on Torture and the Inter-American Court regarding solitary confinement see 402–7.
391 Oswald, above n 8, 179–80; ICCPR art 10(2)(a).
392 ICCPR art 10(2)(a); Oswald, above n 8, 180.
or degrading treatment), to complain about his conditions of detention including that he was force-fed while on a hunger strike. The Court stated as follows:

The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist. Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike must not involve more than the minimum level of severity envisaged by the Court's case law under Article 3 of the Convention.  

Case law from United States courts regarding claims for injunctions brought by detainees in Guantanamo Bay evidences the conclusion that force-feeding does not inherently constitute ill-treatment of detainees. However, although multiple decisions conclude that ill-treatment does not occur as there are legitimate penological reasons for force-feeding – conflating the potential for ill-treatment with the absence of penal grounds and ‘detainees’ with sentenced prisoners – there is limited curial consideration that force-feeding as conducted in Guantanamo constitute ill-treatment and violate human rights conventions. That said, no American court has granted a preliminary or permanent injunction to petitioners in regards to force-feeding claims. In the 2009 case of *Al-Adahi v Obama*, the Petitioners sought a preliminary injunction to stop the practice of force-feeding while restrained. Although the Court accepted that the Petitioners suffered medical problems including sinusitis, haemorrhoids and tonsillitis that may be related to force-feeding and ‘from all accounts … their living conditions at Guantanamo Bay have been harsh’ it found itself unable to issue an injunction. The court acknowledged that it was influenced by the Winter principle that courts give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest and concluded that the detainees were unable to discharge the requisite onus. Chiefly, the Petitioners could not demonstrate that they were likely to succeed on the merits. This was for two reasons. First, the court found that it lacked jurisdiction to rule on the conditions of detainee confinement under the *Military Commissions Act of 2006*. Second, a Constitutional violation did not arise because the Eighth Amendment to the US Constitution is only violated through deliberate indifference; prior courts had held that force-feeding to end hunger strikes did not rise to the level of deliberate indifference and, even if it did, inmates’ constitutional rights can be impinged for valid penological interests. Meanwhile the court considered itself ill-positioned to assess on the merits whether the harsh nature of force-feeding while restrained actually constituted torture. 

The implication from *Al-Adahi*, then is that force-feeding likely entails harsh treatment but that this is not inherently ‘ill-treatment’.

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394 *Nevmerzhitsky v Ukraine* [2005] II Eur Court HR 307, 329–30 [94].
396 Ibid 116.
397 Ibid 117.
398 Ibid 123.
400 Ibid 120–1.
401 Ibid 121.
402 Ibid 122.
Subsequently, the US District Court of the District of Columbia in *Dhiab v Obama*\(^{403}\) again declined to issue the sought-after injunction but explicitly recognised ill-treatment associated with the complained of forced-feeding. Kessler J considered that the findings in *Al-Adahi* regarding the *Military Commissions Act* continued to bar jurisdiction. However, her Honour made extensive comments on the nature of force-feeding, stating ‘it is perfectly clear from the statements of detainees, as well as the statements from the organizations just cited, that force-feeding is a painful, humiliating, and degrading process’.\(^{404}\) Further, the ‘Petitioner has set out in great detail in his papers what appears to be a consensus that force-feeding of prisoners violates *Article 7 of the International Covenant on Civil and Political Rights which prohibits torture or cruel, inhumane, and degrading treatment*’.\(^{405}\) As such, there is at least limited judicial consideration in the United States that force-feeding can constitute ill-treatment.

However, more recently, the same District Court appears to have resiled from its position in *Dhiab*. The Petitioners in *Aamer v Obama*\(^{406}\) claimed that force-feeding during Ramadan violated a constitutionally protected liberty interest – the freedom from unwanted medical treatment and that there was no legitimate penological interest in force-feeding detainees in Guantanamo Bay. Instead, it simply prolonged their detention, in violation of fundamental human rights. Departing from *Al-Adahi* and *Dhiab*, the Court found that the *Military Commissions Act* did not strip federal courts of jurisdiction\(^{407}\) and that the Petitioners had a ‘not insubstantial claim’. However, Aamer was unable to discharge the onus required for an injunction. The Court held that under US law injunctive relief will not sound merely because force-feeding may cause physical pain, invade bodily integrity and reiterated that prison regulations that impinge on prisoners’ constitutional rights may be valid.\(^{408}\) In addition to finding that Aamer provided the court no basis for concluding that legitimate penological interests could not justify force-feeding,\(^{408}\) the Court was not convinced that the present case was distinguishable from prior force-feeding cases.\(^{410}\) Crucially, since the Authorization for the Use of Military Force makes prolonged detention of certain individuals at Guantanamo Bay lawful while hostilities are ongoing, ‘force-feeding that furthers this [detention] serves the same legitimate penological interests as it would if petitioners were serving determinate sentences in state or federal prison.’\(^{411}\) Thus, here, a US court finds that it has jurisdiction to review the claim and the merits of force-feeding but, tellingly, considers that force-feeding does not rise to the level of ill-treatment and is simply a penal tool.

### I Handcuffs and Shackling

Oswald points out that the only instrument that deals specifically with the matter of restraints is the *SMR* and it deals with the context of imprisoned persons. Oswald states that the *SMR*
prohibits the use of chains or irons; requires that any restraint used must not be applied for any longer time that is strictly necessary; and requires that restraints must ‘never be applied as punishment.’ Restraints may be used as a precaution against escape during transfer or on medical grounds on the orders of a medical officer.

For Waldron the question is whether chains (restraints) are ‘degrading.’ According to Waldron what is degrading is the use of chains (restraints) ‘without valid justification.’ If the restraint is justified, for example, to prevent harm, then it is not degrading.

In the ECtHR case of Herczegfalvy v Austria, on 30 January 1980 the applicant was returned to a closed medical unit. He was handcuffed and had a belt placed around his ankles because of the danger of aggression and death threats he had made; the restraints were not removed until 14 February 1980. According to the Government, their position was changed regularly in order to avoid nervous paralysis. The Court found:

In this case it is above all the length of time during which the handcuffs and security bed were used … which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government’s argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue.

J Protection

There are a number of instruments that provide for the general protection of persons, including those detained. They include:

- **Fourth Geneva Convention** article 27(1):
  
  Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

- **Additional Protocol II** article 5(1)(b):
  
  In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; … the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict[.]

The ICRC Study provides at Rules 121 and 122 for certain protections for those deprived of their liberty. Both rules are stated to apply in IAC and NIAC. They provide:

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413 Ibid r 34.
414 Ibid r 33.
415 Ibid r 33(a)-(b). Oswald, above n 8, 167.
416 Waldron, above n 296, 25.
417 *Herczegfalvy v Austria (Judgment)* (European Court of Human Rights, Chamber, Application No 10533/83, 24 September 1992) [28].
418 Ibid [83].
419 See Oswald, above n 8, 171.
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RULE 121

Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene.

RULE 122

Pillage of the personal belongings of persons deprived of their liberty is prohibited.

K Particularly Vulnerable Detainees

According to the ICRC, Common Article 3 does not provide special protection to particularly vulnerable persons in detention and Additional Protocol II only requires the parties to non-international armed conflicts to separate detained women and men ‘within the limits of their capabilities’. Similarly, under customary law, detained children must be held in quarters separate from those of adults, except when they are accommodated with their family. Besides these rules, the law applicable to non-international armed conflicts does not provide further specific protection and thus require supplementing.420

Oswald suggests that there ‘are likely to be circumstances where detainees, because of their vulnerable status, deserve particular protections’ with detainees with a vulnerable status ‘including women, children, the elderly and the disabled’.421 He summarises the relevant provisions as follows: 422

[T]he Convention on the Rights of the Child423 reinforces the principle that in all actions concerning children their best interests ‘shall be a primary consideration’.424 The Convention also limits the circumstances where children may be separated from their parents.425 The disabled426 are to be ‘protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature’.427 Detainees with a mental illness have the right to receive ‘health care as appropriate to their health needs to the same standards as other ill persons’.428

IHL also envisages some fundamental protections for those that require special consideration based on their particular vulnerabilities. The requirements for treatment distinguish between women, mothers with dependant infants and pregnant women. For example, the wounded, sick, infirm, and expectant mothers ‘shall be the object of particular protection and respect’.429 Women ‘shall be the object of special respect’430 and ‘are to be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.431 Pregnant women and mothers having dependent infants ‘who are … detained shall have their cases considered with the utmost priority’.432 The provision concerning

420 International Committee of the Red Cross, above n 1, 10 (citations omitted).
422 Per CORC art 1 a child for the purpose of the Convention is a person below the age of 18.
423 Ibid art 3.
424 Ibid art 9(1).
425 Ibid art 10.
426 Declaration on the Rights of Disabled Persons art 1 defines ‘disabled persons’.
427 Ibid art 10.
428 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, UN Doc A/ RES/46/119, principle 8.
429 Fourth Geneva Convention art 16.
430 Additional Protocol I art 76(1).
431 Fourth Geneva Convention art 27.
432 Additional Protocol I art 76(2).
children relevant here, is that ‘[c]hildren shall be provided with the care and aid they require’433 and that appropriate steps must be taken to ‘facilitate their reunion’ with their families.434

The ICRC Study at Rule 120, said to be applicable in IAC and NIAC, provides for the special protection of child detainees. It states: ‘[c]hildren who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units.’

V RELINQUISHING CONTROL OVER DETAINEES

A Transfer and Handover

It is highlighted that a relevant factor in Professor Greenwood's analysis of the Canadian Forces' position regarding detention in Afghanistan (although separate to the analysis above) was the fact that relevant UNSC resolutions expressly stated that ISAF was to assist the Government of Afghanistan in restoring security.435 He concluded that in such circumstances to interpret human rights obligations of one state to preclude transfer of detainees to the host government would be to ‘frustrate the achievement’ of the UNSC mandate.436

1 The Challenges

The transfer of persons between States has emerged as one of the defining features of armed conflicts over the past several years, particularly in situations where multinational forces transfer persons to a ‘host’ State, to their country of origin or to a third State … The general international law principle prohibiting transfers to situations of abuse is commonly known as the principle of non-refoulement. This principle is not, however, explicitly incorporated into international humanitarian law governing non-international armed conflicts.437

The Copenhagen Non-Paper raised a number of legal challenges for consideration. Included were the continuing responsibilities of states after transfer of detainees, including monitoring responsibilities:

Regarding the question of transfer of detainees to the territorial State or a third party, a transfer will basically imply that the receiving State assumes the responsibility of the detainees. The question is whether such a transfer relieves the detaining State of the responsibility of the detainees and – if so – under which conditions...

Different views may be held as to what standards – international humanitarian law and/or human rights law – should apply in the transfer situation. A State may maintain its responsibility according to its international obligations when transferring a detainee to either the territorial State or a third State not

433 Additional Protocol II art 4(3).
434 Additional Protocol II art 4(3)(b). It should be noted that these rights are afforded to children who have not attained the age of 15.
436 Ibid [14].
437 International Committee of the Red Cross, above n 1, 11–12 (citations omitted).
having the same obligations. This may to some extent imply a duty for the transferring power to monitor a transferred detainee, regardless of any monitoring under-taken by the ICRC.438

As highlighted by Oswald, the complexity regarding transfer responsibilities results from the tension between giving precedence to the customary international law principle that recognises the sovereignty of the host State over all persons within its territory,439 and the obligation not to handover the detainee if there are substantial grounds for believing that the detainee would be in danger of being abused or ill-treated.440 Although his analysis is in the context of peace operations, aspects have broader application to international interventions. Oswald points out that while ‘there has been some debate as to whether article 2(7) [of the UN Charter] is a legal or a political limitation,441 it is clear that the International Court of Justice has identified the principle encapsulated in the article as a norm of customary international law.’442 He concludes that the presumption against interfering in the ‘domestic jurisdiction of any State’ is a restriction on the legal authority to hold detainees that are nationals of the host state in situations where the operation is being conducted with the consent of that state (and enforcement measures under Chapter VII do not apply).443

Another challenge in this area is whether ‘protection from transfers to face mistreatment should be conceptualized in absolute terms’ noting that according to the Bellinger and Padmanabhan the ICCPR, the Torture Convention, and the European Convention on Human Rights have all been interpreted to contain no security exceptions. Bellinger and Padmanabhan advocate, however, an interpretation that allows ‘states, in making their repatriation decisions, to balance the security risks posed by the individual against the risk of post-transfer mistreatment.’ They argue such an approach is consistent with the Geneva Conventions and the Refugee Convention444 which do allow for security exceptions.445

A final introductory issue is whether the transfer provisions are a legal imperative or policy objective. Here provisions concerning the transfer itself and provisions concerning residual responsibilities (such as monitoring after transfer must be distinguished). The issue was discussed, at a seminar on the Detention of Non-State Actors Engaged in Hostilities: The Future Law, held under the auspices of the Centre for Transnational Crime Prevention at the University of Wollongong in December 2011 (‘Detention Seminar’). Subject to the Chatham House Rule, a number of speakers indicated that their governments were of the view that the prohibition on torture and serious mistreatment is a part of customary international law meaning that transfer cannot occur if the requisite risk is present. However, the legal obligations ceased after handover with the requirements for continued monitoring, for example, being a policy not a legal norm.

440 Oswald, above n 8, 184.
443 Oswald, above n 8, 184–5.
445 Bellinger and Padmanabhan, above n 37, 241.
2 Transfer in IAC

Article 12 of the *Third Geneva Convention* regarding transfer of POWs provides:

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless if that Power fails to carry out the provisions of the *Convention* in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Regarding the level of responsibility of the receiving power, after transfer, the *Commentary* to article 12 states:

This provision establishes the principle of the full and complete responsibility of the receiving Power from the moment at which prisoners are transferred and for the whole period during which those prisoners are on the territory of the Power concerned. This obligation for the receiving Power is independent of the transferring Power, whose relationship with the former is defined in the third paragraph of the present Article. The rights and duties of the receiving Power in regard to prisoners follow directly from the Convention, and this Power is therefore in the same situation as any other Protecting Power.

Regarding the residual level of responsibility of the transferring power, after transfer, the *Commentary* to article 12 states:

Despite the fact that a certain responsibility is thus laid on the receiving Power, it was never the intention of the authors of the Convention thereby to relieve the transferring Power of all responsibility with regard to the prisoners who are transferred … Although joint responsibility may seem the most appropriate way of ensuring the maximum safeguards to prisoners, there would undoubtedly be difficulties of application, since it would give the transferring Power the right to interfere in the affairs of the receiving Power to an unlimited extent. The Geneva Conference therefore adopted a system of subsidiary responsibility, subject to certain specific conditions.

*Fourth Geneva Convention* article 45, contains a number of provisions regarding the conditions under which transfer of protected persons can take place. It includes:

Protected persons shall not be transferred to a Power which is not a party to the Convention.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

Regarding the responsibilities of the transferring and the receiving powers article 45 provides:

If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that

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447 *Ibid* 137.
Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

Regarding the residual responsibilities of the transferring and the receiving powers the ICRC Commentary to article 45, states:

The Power which has transferred the protected persons must not, however, cease to take an interest in their fate. Although they are no longer ‘in its hands’, it remains responsible for them in so far as the receiving Power fails to fulfil its obligations under the Convention ‘in any important respect,’ provided that it is notified of such failure by the Protecting Power.\(^\text{448}\)

Article 45 therefore provides for no express monitoring responsibility vested in the transferring Power although there is a need to react to information about detainees from other source, for example, from the protecting power.

*Fourth Geneva Convention* article 49 prohibits transfers outside of occupied territory.

### 3 Transfer in NIAC

*Additional Protocol II* and Common Article 3 do not refer to transfers. *Additional Protocol II* article 17(2) provides that ‘[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict.’

Christopher Greenwood in his *Report on the International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces* argues that neither the text of Common Article 3 nor state practice supports an implied transfer obligation.\(^\text{449}\)

The argument is that in accordance with general principles of international law, the obligation to comply with the *CAT* rests with the host state. Again in the Afghan context concerning the detention of individuals by Canadian Forces, Greenwood examined whether provisions of the *CAT*, such as the jurisdictional article, article 2(1), have universal application or are more limited in their scope such that not all provisions of all human rights treaties apply extraterritorially.\(^\text{450}\) He concludes:

I do not believe that it could seriously be asserted that any part of the territory of Afghanistan is currently within the jurisdiction on Canada … They are not themselves exercising legislative, judicial or even administrative functions there.\(^\text{451}\)

\[E\]ven when a human rights treaty may be applicable to the way in which a State treats persons outside its territory, the fact that those persons are present on the territory of another State cannot be overlooked. In

\(^{448}\) Ibid, vol 4, 268.


\(^{451}\) Ibid.
such circumstances, the obligations of the first State under the human rights treaty have to take account of its obligations to respect the territorial sovereignty of the second State.452

4 Transfer under Customary IHL

The ICRC Study identifies no specific rules concerning transfer responsibilities, including monitoring responsibilities. The Commentary to Rule 128 (Release and Return of Persons Deprived of Their Liberty) provides only that:

According to the Fourth Geneva Convention, no protected person may be transferred to a country ‘where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’ While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC’s conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).453

5 Transfer under HRL

Transfer restrictions are contained, explicitly or impliedly, in a number of HRL instruments. They include:

- **Torture Convention** Article 3(1): No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

- **Torture Convention** Article 3(2): For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.454

- **Refugee Convention** article 33(1): No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.455

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452 Ibid [48].
453 ICRC Study, above n 38, 455 (citations omitted).
454 CAT art 3. However, the Convention includes no security exclusion. See Bellinger and Padmanabhan, above n 37, 236.
455 There are exceptions though provided by art 33(2): The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. See also Bellinger and Padmanabhan, above n 37, 236.
• ICCPR and the *European Convention on Human Rights*. These have also been interpreted to include protection, with no exceptions, against transfer to face torture or cruel, inhuman, or degrading treatment.\(^{456}\)

Regarding CAT article 3, an unresolved issue is whether this provision is activated in the context of multinational operations when transferring from troop-contributing nation to, for example, a territorial state.\(^{457}\) Such transfers can involve non-state actors being transferred by international forces present in their home states to their home governments.\(^{458}\) Does expulsion or return contemplate transfers in such contexts?\(^{459}\)

Finally, Bellinger and Padmanabhan highlight another practical issue regarding HRI instruments and the transfer of detainees: ‘human rights law is generally clear about when states should not transfer detainees; by contrast, it provides no guidance on where states should send detainees if torture considerations prevent repatriation.’\(^{460}\)

6 Standard of Proof/Concern Regarding Risk with Transfers

An unresolved issue is the standard of risk required that would call into question the legality, or at least the appropriateness, of transfer.

The CAT at article 3 requires ‘substantial grounds’ to activate the prohibition contained in that article. However the CAT provides no explicit procedural requirements for assessing the risk of mistreatment.\(^{461}\)

The US government has made a number of statements concerning the appropriate risk threshold. They include:

• US policy is not to transfer a person to a country if it is determined that it is *more likely than not that the person will be tortured* or, in appropriate cases, that the person has a well-founded *fear of persecution* and would not be disqualified from persecution protection on criminal- or security-related grounds.\(^{462}\)

• It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.\(^{463}\)

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456 Bellinger and Padmanabhan, above n 37, 237 n 199.
457 Government of Denmark, above n 5, 13.
458 Bellinger and Padmanabhan, above n 37, 237.
459 Oswald, above n 8, 182–3.
460 Bellinger and Padmanabhan, above n 37, 238 (emphasis in original).
461 Ibid 238. This includes the right to submit evidence and be represented during an expulsion proceeding, unless compelling reasons of national security otherwise require. The authors note article 32(2) of the *Refugee Convention* does, however, prohibit states from expelling refugees except through ‘due process of law’.
462 Bellinger and Padmanabhan, above n 37, 235 n 188. See also Committee Against Torture, *Consideration of Reports Submitted by States Parties: United States of America*, 24th sess, UN Doc CAT/C/48/Add.3 (13 January 2006) annex 1, 57.
463 Bellinger and Padmanabhan, above n 37, 235 n 188.
The UK High Court examined the standard of risk in *Maya Evans*. The operational context concerned UK policy and practice in relation to the transfer to Afghan authorities of suspected insurgents detained by UK armed forces in the course of military operations in Afghanistan.

The Court determined that a ‘possibility’ of ill-treatment was not sufficient. Rather a ‘real risk of torture or serious mistreatment’ was required:

We have reached our conclusions…with hesitation because, on the evidence taken as a whole, there is plainly a possibility of torture or serious mistreatment of UK transferees at those facilities. In our judgment, however, the operation of the monitoring system (reinforced by observance of the conditions we have set out), within the framework of the MoU and EoL, is sufficient to guard against the occurrence of abuse at those facilities on such a scale as to give rise to a real risk of torture or serious mistreatment in accordance with the principles considered earlier in this judgment.

What, then, constitutes a ‘real risk’? The Court determined that isolated incidents were not sufficient, rather ‘a consistent pattern of abuse’ was required: ‘isolated examples of abuse may occur, but we are not satisfied that a consistent pattern of abuse is reasonably likely, such as to expose all UK transferees to a real risk of ill-treatment’.

Further, the Court determined that ‘real risk’ is not a probability question:

The leading judgment in *Hariri* was given by Laws LJ, with whom the other members of the court agreed… Laws LJ said that the point was one of logic: ‘absent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant was returning was one in which such violence was generally or consistently happening’, and ‘the fact that ill-treatment or misconduct might be routine or frequent would not be enough’ (para 8).…But in *Batayav (No.1)* Sedley LJ, with whom the other members of the court agreed, made these important cautionary remarks about the language used by Laws LJ in *Hariri*: …

There is a danger, if *Hariri* is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is.

Taking the Court of Appeal authorities as a whole, we think that the right course is to follow the approach approved in *Hariri*, subject to the cautionary remarks in *Batayav (No.1)*. In taking that course we keep firmly in mind that the ultimate question under the policy, as under article 3, is whether there is a real risk, and in particular whether there is a ‘proper evidential basis’ for concluding that transferees are at real risk… The exercise is not simply to determine whether there exists a consistent pattern of torture or serious mistreatment, but to decide on the basis of the evidence as a whole whether detainees captured by UK armed forces face a real risk of serious mistreatment if transferred into Afghan custody.

7 The Role of Assurances

The reliance on assurances is one response to the reality of contemporary detention operations which involve international troop-contributing states relying wholly or in part on territorial state detention regimes or on the detention regimes of other troop-contributing states. These assurances are ‘promises obtained from receiving states that they will not torture or otherwise
mistreat detainees’ thereby reducing ‘the risk of mistreatment to a sufficient extent that transfer may be conducted consistent with human rights obligations.’469 For Bellinger and Padmanabhan, notwithstanding ‘highly publicized failures … diplomatic assurances do have a role in allowing states to meet international legal obligations.’470

The assurances have taken various forms including unilateral assurances of the detaining authority, Memoranda of Understanding (‘MOU’) and Letters of Exchange.

For the UK Court in the Maya Evans case, assurances had a proper place but the degree to which they could be relied on by a transferring state to meet its HRL obligations would depend on whether the circumstances applying were sufficient to counter the risk of ill-treatment:

RB (Algeria) provides more general guidance on the subject of assurances…..

'I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon. It is obvious that if a state seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights, it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subject to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3.

Similar observations are to be found in the opinion of Lord Hope, in particular at paras 237-239. Although he, too, said that ‘there are grounds for doubting whether it could ever be right to rely on assurances given by the governments of states where treatment contrary to article 3 is generally practised,’ he too rejected any suggestion that such assurances are objectionable in principle and made clear that the court must examine in each case whether assurances are sufficient in the circumstances to counter the risk of treatment contrary to article 3 and that the weight to be given to them depends on the particular circumstances.

Although everything depends on the particular circumstances, it is clear from other passages in RB (Algeria) that relevant matters include the degree of control exercised by those giving the assurances over those whose conduct is in issue, and the existence and effectiveness of means of verification, whether by external monitoring or otherwise.471

The Maya Evans case also provided guidance on issues such as who has the authority to give assurances and how elaborate the assurances need to be. On the first issue, an assurance by a Minister of Defence would be sufficient if given on behalf of government and it has a substantive impact.472 Regarding how elaborate the assurances need to be the Court in Maya Evans concluded that they do not have to include all the minimum guarantees:

It was not essential, for the purposes of avoiding a real risk of serious mistreatment, to make provision for all the matters described as minimum guarantees in the September 2004 report of the UN Special Rapporteur. On the face of it, the basic obligation as to compliance with international human rights obligations, coupled with the provisions for full access by the AIHRC and UK personnel (and for visits by the ICRC and UN human rights institutions), covered the points that are essential for the purposes of the present case; especially when the requirements of access had been spelled out more fully in the EoL, including express provision for interviews in private.473

469 Bellinger and Padmanabhan, above n 37, 239 (citations omitted).
470 Ibid.
471 Evans [2010] EWHC 1445 (Admin) [248]–[249].
472 Ibid [293]–[295].
473 Ibid [294].
8 Post-Transfer Monitoring

In the section above on transfer, a distinction was made between obligations concerning transfer itself and residual responsibilities, such as monitoring after transfer. Reference was made then to the Detention Seminar where a number of speakers (subject to the Chatham House Rule) indicated that their governments were of the view that legal obligations ceased after handover with the requirements for continued monitoring, for example, being a policy not a legal norm.

Although instituted for policy reasons not for reason of perceived legal obligation a number of speakers at the Detention Seminar, again subject to the Chatham House Rule, provided an insight into the practices of various states regarding monitoring arrangements. Those arrangements, varying from state to state and over time, have included:

- Transfers being subject to assurances which included provisions regarding subjects such as: the death penalty; unlawful rendition; treatment; notification; own state nationals; continued monitoring.
- Allegations of mistreatment being investigated.
- A moratorium on transfers being an option.
- Establishment of national detention oversight mechanisms.
- The appointment of a national detention authority with a level of independence in some cases and in other cases not independence but the involvement of an appointed senior officer.
- The creation of detention oversight or monitoring teams involving possibly Provost Marshal, legal, and intelligence officers.
- The development of review mechanisms for those in national custody with established time limits and differing delegations based on the length of detention. For example: review within 48 hours after capture, subject to extensions in set time increments, for example, detention beyond 96 hours with review every 72 hours.
- Establishment of grounds for continued detention, for example, the detainee can provide ‘significant’ new intelligence or contribute to reintegration or likely to provide a significant contribution to evidence (secondary).
- Transfer MOU including matters such as: continuing full access to detainees in host nation custody; no transfer to a third state without with initial detaining state’s prior approval; access to ICRC; control of transfer to specific intuitions.
- Development of procedures for monitoring visits including: issues of force protection for monitoring team (a practical limitation); coordination with host nation detaining authority; private interview (or not); visits without notice (or not).
- Suspension of transfers subject to a particular standard of proof, for example, allegations of ill-treatment ‘cannot reasonably and rapidly be dismissed as unfounded’.

In the UK case of Maya Evans, the Court gave some guidance as to what it considered to be reasonable safeguards in reviewing the UK transfer safeguards in Afghanistan. In that context the Court referred ‘both to formal safeguards, in terms of assurances and the like, and to the practical operation of the transfer arrangements and the degree of knowledge that has been acquired over time about individual facilities and their staff’. The Court expressed a positive view of the following safeguards:

474 Ibid [292].
- Record keeping sufficient to indicate transfer between facilities.475
- A dedicated detainee oversight team.476
- Regular visits.
- Acceptance of terms of an MOU by the detaining authority.
- Private interviews.477

In the specific conditions that applied to the UK transfer context under review in Maya Evans, the Court suggested additional safeguards:

We have concluded, after some hesitation, that UK-captured detainees could now be transferred to NDS Kandahar without a real risk of their being subjected to torture or serious mistreatment at the hands of the NDS, provided that the existing safeguards are strengthened by observance of the following conditions: (i) all transfers must be made on the express basis (spelling out the requirements of the MOU and EOL) that the UK monitoring team is to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion; (ii) each transferee must in practice be visited and interviewed in private on a regular basis; and (iii) the UK must consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason (we have in mind circumstances such as a security alert) or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot reasonably and rapidly be dismissed as unfounded.478

It is noted that the ICRC Study contains no specific rule regarding the requirement for monitoring after transfer.

B Release and Repatriation

1 Release and Repatriation in IAC

For combatants/POWs the key provision regarding release/repatriation is Third Geneva Convention article 118: ‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.’

In IAC, the key provisions for the release/repatriation of civilians are Fourth Geneva Convention article 132 and Additional Protocol I article 75(3) which Pejić contends are part of the customary law for IAC.479 The US case of Hamden indicates that AP1 article 75 is part of customary international law for all conflicts not just IAC.

Aside from treaty provisions, a failure to release when the basis for detaining an individual has ceased would run the risk that the detention thereafter was arbitrary and unlawful.

2 Release and Repatriation in NIAC

NIAC treaty provisions regarding release and repatriation are limited in number and leave open the timing/circumstances of release/repatriation, notwithstanding the possible cessation of hostilities. The key provision is Additional Protocol II article 2(2).

475 Ibid [314].
476 Ibid [319].
477 Ibid [320].
478 Ibid [320].
479 Pejić, above n 12, 382.
At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict … shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

The ICRC Commentary for Additional Protocol II article 2(2) highlights the possible continuing justification for detention in NIAC:

In principle, measures restricting people's liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, ie, when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.\(^{480}\)

The nature of internal conflicts provides the rationale for the possibility of continued detention:

Because traditional noninternational armed conflicts are internal conflicts, internal security reasons may give states continuing security rationales for maintaining detention after the cessation of active hostilities, an option not available in international armed conflict.\(^{481}\)

Notwithstanding the limited nature of treaty provisions regarding release and repatriation in NIAC, when addressing the principle that internment must cease as soon as the reasons for it cease to exist Pejić proposes:

In non-international armed conflicts and other situations of violence this principle must, if anything, be even more stringently observed, particularly as human rights jurisprudence rejects the notion of indefinite detention.\(^{482}\)

3 Release/repatriation under HRL

HRL instruments also do not preclude continued detention beyond, for example, the cessation of hostilities. This would of course be subject to broader prohibitions such as that against arbitrary detention. As noted by Goodman: ‘[e]ven international human rights law – which one might expect to apply a heightened level of rights protection – does not foreclose the preventive detention of civilians under certain circumstances’.\(^{483}\)

4 Release/repatriation under Customary IHL

The ICRC Study at Rule 128 (Release and Return of Persons Deprived of Their Liberty) provides as follows:

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities.

B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities.

C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.

\(^{480}\) Sandoz, Swinarski and Zimmermann, above n 151, 1359 [4493].

\(^{481}\) Bellinger and Padmanabhan, above n 37, 229, fn 152.

\(^{482}\) Pejić, above n 12, 382.

\(^{483}\) Goodman, above n 43, 58.
The accompanying commentary states that ‘[w]ith respect to the meaning of the expression “end of active hostilities” in Article 118 of the Third Geneva Convention, Germany’s Military Manual states that this requires neither a formal armistice agreement nor the conclusion of a peace treaty’.484

5 The Problem with Release and Repatriation in NIAC

The timing of release and repatriation in NIAC is a ‘vexed’ issue due to the nature of NIAC:

As a general matter, conflicts with nonstate actors will not end with the signing of a formal surrender document on a battleship. Low-intensity hostilities may continue for generations … The result is that a norm that requires release and repatriation only upon cessation of active hostilities may lead to life imprisonment.485

Another difficulty in contemporary NIAC situations involving counter-terrorism/counter-insurgency dimensions is the profile of non-state actors. Determining the level of ‘dangerous’ of detainees is a fraught exercise. Bellinger and Padmanabhan highlight that a US Department of Defense report concluded that nearly 20 per cent of detainees who have been released from Guantanamo Bay are suspected of engaging in terrorist activity after release.486 However, Stewart reports that according to Lieutenant Colonel Anthony Christino III, formerly a Senior Watch Officer within the Joint Intelligence Task Force Combating Terrorism in which capacity he supervised ‘every piece of information that went in or out of the unit’ concerning Guantanamo, that ‘at least two-thirds’ of the 600-and-something detainees held at Cuban base as of May 2004 could be released immediately without hesitation.487

This reality of the profile of non-state actors in contemporary options gives rise to particular challenges regarding reviews to determine the release or otherwise of detainees and the timing of such reviews and release. Bellinger and Padmanabhan suggest these reviews would be ‘dangerousness’ reviews and ‘could also employ progressively higher standards of proof to justify detention’.488

A further vexed issue, legally and practically, is the location of release/repatriation of detainees where there may be a risk to them in returning, for example, to home location. In NIAC, Common Article 3 and the Additional Protocols do not provide rules regarding release/repatriation other than to establish the general requirement to release. In IAC, Third Geneva Convention article 118 provides only for repatriation at the end of hostilities. Fourth Geneva Convention article 45 however does have a limited restriction. It prohibits ‘a protected person’ from being ‘transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’.489

The uncertain state of the law in this area is highlighted by the following view:

484 ICRC Study, above n 38, 456.
485 Bellinger and Padmanabhan, above n 37, 229.
486 Ibid 231.
487 Stewart, above n 82, 25.
488 Bellinger and Padmanabhan, above n 37, 232.
489 Bellinger and Padmanabhan point out that despite the failure to include relevant provisions in the Geneva Conventions themselves, post-Conventions practice suggests that states are now reluctant to repatriate enemy fighters when they face substantial risk of mistreatment. Ibid 234.
The Geneva Conventions, including the provisions governing non-international armed conflict, contain a prohibition on torture and inhuman and degrading treatment. Some IHL experts have found an implied obligation from this prohibition that states not repatriate detainees when they face a substantial risk of mistreatment … other IHL experts have rejected such an implied obligation within the Geneva Conventions.  

The risk of course to those who fail to release/repatriate when obligated to do so is one of criminal liability for the offence of ‘unlawful confinement’.

6 Options for the Timing of Release/repatriation

What then are the options regarding the timing of the release/repatriation of non-state actors in contemporary NIAC situations? One is to adopt the IAC requirements of release at the end of hostilities. This, though, may not match the operational reality and may result in indefinite detention. Another, which is becoming increasingly discussed amongst commentators and practitioners, is to determine when the conflict with a particular detainee is ended – that is, to make a case-by-case determination. Bellinger and Padmanabhan describe this approach as terminating the ‘detention authority over individual fighters when they no longer pose a danger to the state’. They argue that this approach is contemplated by Fourth Geneva Convention article 132 which provides: ‘[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist’ and Additional Protocol II article 2(2).

Bellinger and Padmanabhan give credit to Curt Bradley and Jack Goldsmith for providing ‘the intellectual architecture’ for the above approach with Bradley and Goldsmith suggesting that ‘individualized reviews are akin to reconceptualizing the end of the conflict in terms of the individual rather than the non-state group’, that is, the ‘conflict with a particular detainee is terminated’.

V OPTIONS FOR CHANGE

A The Options

The introduction to this Chapter included a survey of commentators’ views regarding whether there were gaps in the coverage of detention in NIAC by international law, particularly by IHL and HRL. Deeks, for example, points out the following regarding Additional Protocol II:

The treaty provides virtually no guidance, however, on the procedural rules governing administrative detention. Articles 4 through 6 address the treatment of those detained for reasons related to the armed conflict, but do not contain rules regarding the detention process.

If it is accepted that there are gaps in the legal coverage for detention operations in NIAC what are the solutions? For Bellinger and Padmanabhan it is not simply a matter of applying existing law:

490 Ibid 235 (citations omitted).
491 Fourth Geneva Convention art 147.
492 Bellinger and Padmanabhan, above n 37, 230.
493 Ibid 231.
494 Ibid.
495 Deeks, above n 13, 414.
While IHL does provide important treatment protections for detainees in common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and Additional Protocol II, it fails to provide adequate guidance on many critical legal questions, including the four that we have been focusing on here. An all-too-frequent response to this situation is simply to reiterate that states need to implement existing rules — presumably meaning that states will find answers by applying the law of international armed conflict or international human rights law. But as we have demonstrated, these different bodies of law either have no answers or offer confusing or conflicting answers to many questions. Implementing the existing rules is not enough.496

Various options have been identified to address the perceived gaps in the legal coverage for detention operations in NIAC and are examined further below:

- The application of HRL;
- The development of new treaty law;
- The application of treaty law, with the Fourth Geneva Convention being prominent, by analogy; and,
- The adoption of policy-based frameworks (for example, ‘best practice’).

### B What needs to be developed?

While Additional Protocol II provides an essential set of rules, it would nevertheless be useful to supplement those rules and provide more detail with regard to conditions of detention. The relevant rules of customary law are by necessity formulated in general terms, and thus do not provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated.497 Whatever option is adopted, what aspects of detention need to be addressed? What are the ‘gaps’ that need filling? Some of these ‘gap’ were identified in Part I of this Chapter. They included: identifying the substantive grounds for detention; provision of guidance as to the subjects of detention (who may be detained); strengthening the rules on material conditions of detention; provisions regarding transfer; development of special rules for particularly vulnerable persons; development of procedural safeguards; provision of definitional clarity, for example, what is ‘arbitrary detention’; identifying when the right to detain is terminated; clarifying state’s repatriation obligations.

1 **Apply HRL as Lex Specialis regarding Treatment?**

Droege asserts that ‘[g]enerally speaking, for the protection of persons in the hands of the authorities, there is usually no contradiction between the norms’ and that consequently they can complement each other. *Lex specialis* is not needed as they do not contradict each other.498

However, as opposed to treaty-based provisions for detention in IAC (which are elaborate), according to Sassoli and Olson:

When comparing the treaty-based provisions regulating internment in both branches of law, human rights are more elaborate than the sparse treaty-based humanitarian law rules applicable to non-international armed conflict … As humanitarian law applicable to non-international armed conflict is silent

496 Bellinger and Padmanabhan, above n 37, 241–2.
497 International Committee of the Red Cross, above n 1, 9 (citations omitted).
498 Droege, above n 242, 348.
on the procedural regulation of internment, it would seem clear that in accordance with the _lex specialis_ principle as a maxim of logic, human rights should step into fill the gap. The ICRC _Study_ appears to adopt this approach when it interprets the humanitarian law rule prohibiting the arbitrary deprivation of liberty through the lens of human rights.499

But again practical difficulties arise in applying _HRL_ to conflict. Sassòli and Olson ask ‘whether it is realistic to expect states and non-state actors, possibly interning thousands of people, to bring all internees before a judge without delay during armed conflict’.500

A second practical problem in applying _HRL_ is that state and non-state actors appear to have different obligations under _HRL_. The application of human rights seems to make it impossible for one party to an armed conflict – the non-state actor – to intern legally.501

There are at least two arguments that favor retaining a gap between the application of _IHL_ and _HRL_. One is that although the content of the two paradigms may be converging over time, they presently remain distinct in a number of areas including detention and _habeas corpus_. The other is that although the content of _IHL_ and _HRL_ may overlap, their enforcement mechanisms are very different.502

2 Develop New Treaty Law

Although the development of new treaty law would have the potential to resolve all outstanding gaps regarding the legal coverage of detention operations in _NIAC_, currently few would see a treaty based solution as realistic. As stated by Bellinger and Padmanabhan:

> negotiating a new international treaty on these questions is highly unlikely in the near term. Politically, the polarization created by the US conflict with Al Qaeda precludes the possibility that enough states would reach sufficient agreement on these questions to conclude a treaty.503

3 Apply the _Fourth Geneva Convention_ by Analogy

Accepting that negotiating new treaty law is ‘unlikely in the short term’ Deeks recommends that states, as a matter of policy choice, should consider applying the key detention related provisions in the _Fourth Geneva Convention_ and _Additional Protocol I_ article 75 ‘into any and every administrative detention process they establish or conduct during armed conflict’.504 He says the ‘core procedures contained in the _Fourth Geneva Convention_ are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict’.505 He states:

The _Fourth Geneva Convention_ establishes four core procedural elements that seem critical to any administrative detention during armed conflict, regardless of which entity is conducting the detention: (1) a high triggering standard for detention; (2) an initial review of the detention by an independent court or board; (3) a right to appeal; and (4) periodic reviews of that detention. Additionally, Article 75’s requirement to notify the detainee of the reasons for his detention is an important way to ensure that the detainee can

499 Sassòli and Olson, above n 38, 621. See also ICRC _Study_, above n 38, 344–52.
500 Ibid 622.
501 Ibid.
503 Bellinger and Padmanabhan, above n 37, 242.
504 Deeks, above n 13, 434.
505 Ibid 405.
take advantage of his ability to contest his detention. These requirements address the entire lifespan of a detention, and are readily applicable in any type of armed conflict …

These procedures impose a high standard for a state to initially detain, require the state to immediately review that detention, permit the detainee to appeal the initial detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. Coupled with a requirement to inform a detainee of the reasons for his detention, this collection of procedures would offer a strong and operationally sustainable standard for administrative detention.

For Deeks, however, even if the Fourth Geneva Conventions provisions were adopted other unresolved issues would remain. They include:

- The detainee's role in contesting or appealing his detention: 'A detainee should, at a minimum, be permitted to submit an appeal in writing and, where possible, should be permitted to present his case in person.' Is it feasible for attorneys or personal representatives to be involved?

- Detainee access to factual information and witnesses: 'But what kind of evidence or witnesses should the detainee be able to request? Should the responsibility of the state to give the detainee these tools be on a sliding scale, as the length of detention increases? Arguably the answer to this last question is yes, though many states would balk at such a requirement.'

- What are the outer limits on detention periods: 'Both the Third and Fourth Geneva Conventions (and Article 75 of Additional Protocol I) envision potentially extended periods of detention, as long as the armed conflict continues. But should there be a notional outer limit on detention periods, beyond which a state must take added measures or permit judicial review to give further oversight to the detentions?'

Goodman also refers to the application of IHL for international law by analogy. In examining detention in the context of the conflict with al Qaeda, he states:

One reason to examine the rules that apply in international conflict is their use as an analogy. It is common for commentators to draw implicitly and explicitly on the Third and Fourth Geneva Conventions in discussing the conflict with Al Qaeda … the Fourth Geneva Convention does generally contain the most closely analogous rules concerning the detention of civilians. It thus constitutes the best approximation of IHL rules when interpretive gaps arise.

More fundamentally, IHL in international armed conflict – and the Fourth Geneva Convention in particular – is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in non-international armed conflicts … Simply put, whatever is permitted in international armed conflict is permitted in non-international armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain. That same logic, however, does not apply to proscriptive rules.

506 Ibid 433.
507 Ibid 405.
508 Ibid 435.
509 Ibid.
510 Ibid 436.
511 Goodman, above n 43, 50 (citations omitted).
Due to problems in applying HRL to internment in NIAC, Sassòli and Olson raise the possibility of applying the humanitarian law of international armed conflicts by analogy with the Fourth Geneva Convention being applied rather than the Third Geneva Convention as the Fourth Geneva Convention better matches the reality of NIAC. However, Sassòli and Olson raise a technical legal problem with such an application by analogy. Is this legitimate at law when doing so displaces specific human rights rules and thus directly overrides the formal lex specialis maxim? They then argue for the ‘parallel’ application of HRL and IHL.

The Sassòli and Olson analysis presupposes the absence of as detailed IHL rules as HRL rules which renders the IHL rules inadequate. Might though the lack of IHL detail be a deliberate or appropriate omission given the practicalities of conflict context?

4 Develop Policy-based Solutions

The breadth of legal and practical issues that require resolution in the conduct of detention activities in NIAC, the complexity and lack of consensus regarding the technical aspects of the existing legal framework and the unlikelihood of new treaty law being developed in the near term has resulted in the promotion of policy-based solutions. For example, Bellinger and Padmanabhan recommend as follows: ‘[a]s an interim measure, we suggest that states that are engaged in detention operations in conflicts with non-state actors intensify efforts to agree on a common set of principles to guide detention.

Indeed, the Copenhagen Process, which concluded on 19 October 2012, embraced such a multilateral stakeholder-driven policy-based approach. The Copenhagen Principles themselves are taken from state practice, IHL and HRL but their compilation was driven by dialogue between states and non-state groups to identify common rules for detention. While not binding in all instances of NIAC, they have been endorsed by a substantial and broad range of states and international organisations. Demonstrating the potential for policy-based solutions, John Bellinger considers that the extent of endorsement is referable, in part, to the ability of participants to collect what they consider relevant principles in one place and with greater specificity than other instruments like the ICCPR, CAT and Geneva Conventions. Still, the Copenhagen Process has not been without criticism – Jacques Hartmann, for example, contends that the Principles often suffer from vagueness, which he considers may reflect disagreement between the participants, or do little to develop principles to guide the implementation of existing principles. However, several principles derived from this policy-based approach do clarify and develop international law and, perhaps more importantly, the successes of the Copenhagen

512 Sassòli and Olson, above n 38, 623.
513 Ibid 625.
514 Ibid.
515 Bellinger and Padmanabhan, above n 37, 242.
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Process speak to the promise of policy-based alternatives in developing law relevant to NIAC outside traditional instrument-based means.520

As outlined in Part I of this Chapter, these policy-based options can be general or specific (for example, a country-specific MOU), institutionally driven, or be state-based and multilateral. The ICRC project on strengthening the legal protection of victims of armed conflict and the Copenhagen Process have been highlighted.

C Conclusion

By way of guidance as to what should be the overarching philosophy for future developments regarding detention the final word is given to one speaker (who spoke subject to the Chatham House Rule) at the December 2011 Wollongong detention seminar: ‘[w]ith detention, do not have fixed frameworks. Be alive to new challenges. Detention practices need to be flexible [and lawful]’.521

521 University of Wollongong Centre for Transnational Crime Prevention, above n 18 (Chatham House Rule).