INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW

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ABSTRACT

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In a world shaped by the simultaneous forces of globalization and fragmentation, very few armed conflicts remain isolated from any foreign involvement and confined to the territory of one State. On the contrary, many begin as internal conflicts that gradually acquire international characteristics of varying degree and nature. Yet, the law of armed conflict forces each such conflict into one of two legal categories: it must either be a non-international, or an international armed conflict. Accordingly, the prevailing approach in the literature is to examine what type of conflict, if any, corresponds to a certain situation in reality at a given time.

In contrast, this thesis opts for a dynamic approach, focussing on the combination of factors that transform a prima facie non-international armed conflict into an international armed conflict. It argues that four such modalities of internationalization have emerged thus far: (1) outside intervention; (2) State dissolution; (3) wars of national liberation; and (4) relative internationalization by way of recognition of belligerency, unilateral declarations, or special agreements. Since some situations feature more than two conflict parties, the thesis puts forward an autonomy-based interpretive model, which enables to determine whether such situations should be seen as a single internationalized armed conflict or a number of independent international and non-international armed conflicts.

On the basis of this comprehensive map of conflict internationalization, the thesis turns to the effects brought about by this process. It analyses two areas of the law of armed conflict considered to be regulated differently in the two respective types of conflict, namely matters of combatant status and belligerent occupation. It argues that fighters belonging to non-State armed groups participating in internationalized armed conflicts are in principle eligible for combatant status and it proposes an interpretive model for the determination whether they in fact meet the relevant criteria in practice. Finally, the thesis argues in favour of the applicability of the law of belligerent occupation to internationalized armed conflicts. To substantiate this claim, it delineates the temporal, geographical, and personal scope of the law of occupation in such conflicts.

In its totality, the thesis analyses the meaning, process, and effects of conflict internationalization and on this basis argues for a particular interpretation of the concept of internationalized armed conflict in international law.

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To Tomáš

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TABLE OF ABBREVIATIONS

AIDI	*Annuaire de l'Institut de Droit International*
AJIL	*American Journal of International Law*
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 3
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609
art	article
ASDI	*Annuaire Suisse de Droit International*
ASR	Articles of State Responsibility
AULR	*American University Law Review*
BGE	Decisions of the Swiss Federal Supreme Court [*Bundesgerichtsentscheide*]
BGer	Swiss Federal Supreme Court [*Bundesgericht*]
BYBIL	*British Year Book of International Law*
CA	Court of Appeal[s]
CUP	Cambridge University Press
Doc	Document
Duke J Comp & Int'l L	*Duke Journal of Comparative and International Law*
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
edn	edition

EJIL	*European Journal of International Law*
EU	European Union
EUFOR Tchad/RCA	European Union Force Chad/Central African Republic
FARC	Revolutionary Armed Forces of Colombia [*Fuerzas Armadas Revolucionarias de Colombia*]
FRELIMO	Mozambique Liberation Front [*Frente de Libertação de Moçambique*]
FRY	Federal Republic of Yugoslavia
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
GC II	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
Hague Regulations	Regulations concerning the Laws and Customs of War on Land, Annex to Hague Convention (IV) respecting the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 277
HR H-B	Croatian Republic of Herzeg-Bosnia [*Hrvatska Republika Herceg-Bosna*]
HRW	Human Rights Watch
HVO	Croatian Defence Council [*Hrvatsko vijeće obrane*]
HZ H-B	Croatian Community of Herzeg-Bosnia [*Hrvatska zajednica Herceg-Bosna*]
IAC	international armed conflict
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights

ICC	International Criminal Court
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep	International Court of Justice, Reports of Judgments
ICJ Statute	Statute of the International Court of Justice, of 26 June 1945, annexed to the UN Charter
ICL	international criminal law
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
IHRL	international human rights law
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
IIHL	International Institute of Humanitarian Law
ILC	International Law Commission
ILC ASR	International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, UN GA Res 56/83 annex, UN Doc A/RES/56/83 (12 December 2001)
ILC DARIO	International Law Commission, ILC Draft Articles on Responsibility of International Organizations, UN Doc A/66/10 (2011)
ILR	*Israel Law Review*
IMT	International Military Tribunal for the Trial of German Major War Criminals
IRRC	*International Review of the Red Cross*
JCSL	*Journal of Conflict and Security Law*
KFOR	Kosovo Force

KLA	Kosovo Liberation Army
KUFNS	Kampuchean United Front for National Salvation
LJIL	*Leiden Journal of International Law*
LNTS	League of Nations Treaty Series
MLC	Movement for the Liberation of the Congo
MLR	*Military Law Review*
n	note
NATO	North Atlantic Treaty Organization
NDFP	National Democratic Front of the Philippines
NIAC	non-international armed conflict
NLM	national liberation movement
NTC	National Transitional Council (Libya)
NYBIL	*Netherlands Yearbook of International Law*
ONUC	United Nations Operation in the Congo [*Organisation des Nations Unies au Congo*]
OUP	Oxford University Press
para # or [#] or §#	paragraph #
PCIJ	Permanent Court of International Justice
PKK	Kurdistan Workers' Party [*Partiya Karkerên Kurdistan*]
PLO	Palestinian Liberation Organization
POW	Prisoner of War
RCD	Rally for Congolese Democracy
Res	Resolution
Rome Statute	Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone

SFRY	Socialist Federal Republic of Yugoslavia
Temp Int'l & Comp LJ	*Temple International and Comparative Law Journal*
UDI	Unilateral Declaration of Independence
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNITA	National Union for the Total Independence of Angola [*União Nacional para a Independência Total de Angola*]
UNOSOM	United Nations Operation in Somalia
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US MT	United States Military Tribunal (Nuremberg)
VCLT	Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
VJIL	*Virginia Journal of International Law*
vol	volume
VRS	Army of Republika Srpska [*Vojska Republike Srpske*]
WCC	War Crimes Chamber (Serbia)
YIHL	*Yearbook of International Humanitarian Law*
YJIL	*Yale Journal of International Law*

TABLE OF CASES

INTERNATIONAL JURISDICTIONS

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

DOMESTIC JURISDICTIONS

TABLE OF TREATIES, LEGISLATION, AND INTERNATIONAL DOCUMENTS

CHAPTER 1

INTRODUCTION

> 'Every age had its own kind of war, its own limiting conditions, and its own peculiar preconceptions.'[1]

> 'War is the well from which the science of the law of nations was drawn.'[2]

> 'No easy answers are possible. The subject is full of legal complexities.'[3]

During the summer of 2014, fighting in eastern Ukraine intensified. In the Security Council, the Ukrainian representative complained bitterly of the alleged Russian 'supply of arms and mercenaries to illegal armed groups' since the beginning of the hostilities.[4] His Russian counterpart insisted that any Russian nationals found on Ukrainian territory would be nothing more than 'volunteers'.[5] Earlier, he had claimed in the same forum that

[1] Carl von Clausewitz, *On War* (Princeton University Press 1976) 593.

[2] Stanislaw E Nahlik, 'A Brief Outline of International Humanitarian Law' (1984) 24 IRRC 187, 189.

[3] Dietrich Schindler, 'International Humanitarian Law and Internationalized Internal Armed Conflicts' (1982) 230 IRRC 255, 256.

[4] UN Doc S/PV.7253 (28 August 2014) 14.

[5] ibid 13.

in any event, the 'legitimately elected' Ukrainian authorities requested Russia to use her armed forces to 'restore calm'.[6]

While the actual facts on the ground are bound to remain disputed for now, the recent Ukrainian events highlight a conundrum at the heart of the modern law of armed conflict. Although the literature on the classification of armed conflicts is rich and detailed, its focus is static, asking what type of conflict, if any, corresponds to a particular situation. However, as illustrated by at least some accounts of the Ukrainian crisis, an originally internal conflict may change and evolve, acquiring gradually additional elements of outside involvement.

Accordingly, this thesis replaces the static with a dynamic lens. Its aim is to argue for a particular approach to the interpretation of internationalized armed conflict in international law. Such conflicts are understood here as prima facie internal (non-international) armed conflicts, the legal nature of which has transformed, with the effect of the law of international armed conflicts becoming applicable in part or in full. The thesis thus aims to clarify the notion, process, and effects of internationalization of armed conflicts in international law.

1. Research overview

1.1 Aim and objectives

In 1971, Richard Falk expressed a 'sense of insufficiency arising from lumping all situations of civil strife into a single normative category'.[7] Today, the treatment of internationalized armed conflicts in scholarly writings often gives rise to comparable

[6] UN Doc S/PV.7125 (3 March 2014) 3–4.

[7] Richard A Falk, 'Preface' in Quincy Wright and Richard A Falk (eds), *The International Law of Civil War* (Johns Hopkins Press 1971) xv.

impressions. Conflicts described as 'internationalized' are—as will be shown below, frequently based on a too narrow definition—treated as a single category of armed conflicts that may be subjected to a uniform normative approach.[8] No treatise has thus far attempted to comprehensively map out the effects of internationalization on the applicability of the law of armed conflict. The aim of this thesis is to contribute to closing this gap by clarifying the notion, process, and effects of conflict internationalization.

Three primary objectives have guided the conduct of the present research project: (1) to set forth a clear, reasoned, and practical conceptualization of conflict internationalization; (2) to comprehensively identify the various forms of conflict internationalization in contemporary international law; and (3) to establish how the law of armed conflict applies to conflicts that have been internationalized in this sense. Together, the fulfilment of these objectives should allow for the construction of an overarching argument in favour of a particular interpretation of the concept of internationalized armed conflict in international law.

1.2 Methodology

The thesis studies conflict internationalization from the viewpoint of international humanitarian law (IHL, also referred to as the law of armed conflict throughout the text). Accordingly, it limits its scrutiny to the law applicable in armed conflicts (*jus in bello*) and excludes questions of the lawfulness of the use of force (*jus ad bellum*).[9] The study touches

[8] See, eg, Christine Byron, 'Armed Conflicts: International or Non-International?' (2001) 6 JCSL 63, 86 (naming the penultimate section of her article 'What would be the effect of the internationalization of a conflict on the participants?').

[9] For literature on the separation between *jus in bello* and *jus ad bellum* see, in particular, Hersch Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 BYBIL 206; Christoper Greenwood, 'The Relationship between Ius ad Bellum and Ius in Bello' (1983) 9 Review of International Studies 221; Robert Kolb, 'Origin of the Twin Terms Jus ad Bellum/Jus in Bello' (1997) 37 IRRC 553; Jenny Martinez and others, 'The Relationship between Jus ad Bellum and Jus in Bello: Past, Present, Future' (2006) 100 American Society of International Law Proceedings 109, 109–124 (proceedings from a panel discussion); Alexander Orakhelashvili, 'Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in

only incidentally on the related areas of international human rights law (IHRL) and international criminal law (ICL), although it does rely on the jurisprudence of the decision-making bodies active in those areas insofar as it bears upon the subject of the thesis. For instance, international rules concerning conflict qualification have been elucidated and developed by the case-law of the ICTY, which has grappled with the often perplexingly complex conflict situations arising within the territory of the former Yugoslavia in the 1990s.[10]

The analytical thrust of the study is on what the law is (analysis *de lege lata*), not on what the law should be (*de lege ferenda*). It is acknowledged that the norms of applicability of IHL in particular have been decried as ambiguous,[11] arbitrary,[12] archaic,[13] and

Bello' (2007) 12 JCSL 157; Jasmine Moussa, 'Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 IRRC 963; Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War' (2009) 34 YJIL 47; Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart 2011); JHH Weiler and Abby Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello' (2013) 24 EJIL 25.

[10] See, in particular, *Prosecutor v Tadić* (Decision on Jurisdiction) IT-94-1-AR72 (2 October 1995) ICTY; *Prosecutor v Rajić* (Rule 61 Decision) IT-95-12-R61 (13 September 1996) ICTY; *Prosecutor v Tadić* (Trial Judgement) IT-94-1-T (7 May 1997) ICTY; *Prosecutor v Delalić et al* (*Čelebići* Trial Judgement) IT-96-21-T (16 November 1998) ICTY; *Prosecutor v Aleksovski* (Trial Judgement) IT-95-14/1-T (25 June 1999) ICTY; *Prosecutor v Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999) ICTY; *Prosecutor v Delalić et al* (*Čelebići* Appeal Judgement) IT-96-21-A (20 February 2001) ICTY; *Prosecutor v Kordić and Čerkez* (Trial Judgement) IT-95-14/2-T (26 February 2001) ICTY; *Prosecutor v Naletilić and Martinović* (Trial Judgement) IT-98-34-T (31 March 2003) ICTY; *Prosecutor v Kordić and Čerkez* (Appeal Judgement) IT-95-14/2-A (17 December 2004) ICTY; *Prosecutor v Limaj, Bala and Musliu* (Trial Judgement) IT-03-66-T (30 November 2005) ICTY; *Prosecutor v Hadžihasanović and Kubura* (Trial Judgement) IT-01-47-T (15 March 2006) ICTY; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Trial Judgement) IT-04-84-T (3 April 2008) ICTY; *Prosecutor v Milutinović et al* (Trial Judgement) IT-05-87-T (26 February 2009) ICTY; *Prosecutor v Prlić et al* (Trial Judgement) IT-04-74-T (29 May 2013) ICTY.

[11] James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313, 349.

[12] René Jean Dupuy and Antoine Leonetti, 'La notion de conflict armé à caractère non international' in *The New Humanitarian Law of Armed Conflict*, vol 1 (Editoriale scientifica 1979) 258.

[13] Rosa Ehrenreich Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 University of Pennsylvania Law Review 675, 755.

artificial,[14] to name just a few of the unflattering epithets. Nevertheless, the study does not aim to propose how the law should evolve or what the preferred policy should be.

The sources of analysis in this study mirror closely the two main sources of international law,[15] namely international treaties and customary international law.[16] The study may thus be considered orthodox in its methodological approach; in particular, it does not interpret the law applicable to armed conflicts 'liberally' to include 'soft law'[17] and it does not consider practice of armed groups to contribute in and of itself towards the creation of international custom.[18]

The identification and analysis of norms arising from treaties present few methodological difficulties. The relevant international conventions are few in number and easy to access; the canons of interpretation are well-known and generally free from controversy. The thesis principally relies on the 1899 and 1907 Hague Conventions governing land warfare; the 1949 Geneva Conventions and their 1977 Additional Protocols. The indeterminate duration and the humanitarian nature of these treaties justify a dynamic approach to their interpretation,[19] in particular with respect to the

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[14] Rosemary Abi-Saab, 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern' in Astrid JM Delissen and Gerard J Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff) 209.

[15] cf Hugh Thirlway, *The Sources of International Law* (OUP 2014) 11.

[16] ICJ Statute, art 38(1)(a)–(b).

[17] cf Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 IRRC 649, 651 ('reference to "the law applicable to armed conflicts" should be interpreted liberally, as to include … soft law').

[18] cf Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) ('*ICRC Study*') xxxvi (considering the legal significance of non-State actors' practice as 'unclear'); but see, eg, Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477, 498; Jean-Marie Henckaerts, 'The ICRC Customary International Humanitarian Law Study: A Rejoinder to Professor Dinstein' (2007) 37 Israel Yearbook on Human Rights 259, 261; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (2010) 1 International Humanitarian Legal Studies 5, 22.

[19] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) (Ser A) No 16 (1 October 1999) (IACtHR) [114]; Stephane Jacquement, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law' (2001) 83 IRRC 651, 658;

generic terms contained therein.[20] In addition, the thesis does quite frequently cite the ICRC commentaries to the Geneva Conventions[21] and their Protocols.[22] However, insofar as reliance is placed on the argumentation contained therein, this is done solely on account of its persuasive nature; conversely, the commentaries should not be seen as the official or authentic interpretation of the relevant treaty text.[23]

Working with international custom has proved to be more challenging. Apart from poorer accessibility in general, the central problem has been the reluctance of States to engage publicly in the qualification of the nature of armed conflicts. Typically, official statements would condemn a form of conduct known to have occurred in a conflict without specifying under which rules—those applicable to non-international, or international conflicts—it is actually considered illegal.[24] Even the most comprehensive study of customary rules of IHL does not discuss questions of applicability[25]—as one commentator observed, this was 'inevitable' due to the near-absolute absence of State

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Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85 IRRC 235, 259.

[20] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 [66]. For a more detailed treatment, see Kubo Mačák, 'Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law' (2015) 48 Israel Law Review (forthcoming), section 5.1.

[21] Jean Pictet (ed) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, vol 1 (ICRC 1952) ('*GC I Commentary*'); Jean Pictet (ed) *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: Commentary*, vol 2 (ICRC 1960) ('*GC II Commentary*'); Jean Pictet (ed) *Geneva Convention relative to the Treatment of Prisoners of War: Commentary*, vol 3 (ICRC 1960) ('*GC III Commentary*'); Jean Pictet (ed) *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, vol 4 (ICRC 1958) ('*GC IV Commentary*').

[22] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) ('*APs Commentary*').

[23] cf *GC I Commentary* (n 21) 7; see also *Prosecutor v Slobodan Milošević* (Decision on Motion for Judgement of Acquittal) IT-02-54-T (16 June 2004) (ICTY) 19.

[24] See, eg, Australia, Statement of Minister for Foreign Affairs and Trade, Sen Deb 1991, 1494, reproduced in (1991) 13 Australian Year Book of International Law 447.

[25] cf *ICRC Study* (n 18).

practice regarding the legal nature of armed conflicts.[26] This reluctance may perhaps be due to the States' desire to 'avoid contaminating humanitarian questions with the political considerations which are inseparable from their international relations in periods of conflict.'[27] Whatever the motivation, it makes the identification of customary rules in this area rather challenging.

In order to abate this problem to some extent, I attempted to gauge the relevant *opinio juris* by way of direct collection of data conducted in the early phases of the research project. I prepared a questionnaire concerning the applicability of IHL to internationalized armed conflicts and dispatched it to all States with diplomatic representation in the UK and to the UK itself. The questionnaire was sent on 20 June 2011 by post to 163 diplomatic and consular missions in London and to the UK's Inter-departmental Committee for International Humanitarian Law. The addressees were requested to either answer the questions set out in the questionnaire or to forward it to the relevant department of the respective State's government. Out of the 33 responses received in the following seven months, only 11 contained substantial or otherwise relevant answers. Given this limited number, the utility of the returned questionnaires thus remains illustrative at best.[28] The full text of the questionnaire and the replies thereto remain on file with the author.[29]

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[26] Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst and Susan Carolyn Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 78.

[27] 'The International Committee of the Red Cross and Torture' (1976) 16 IRRC 610, 613.

[28] See, eg, nn 122 and 677 below.

[29] The volume of some of the submitted replies did not permit their inclusion as appendices to the present work: cf Oxford Student Handbook (Graduate Students) 2013–14, s 6.3.7 (providing that any appendices must be included in the word count); E-mail from Geraldine Malloy, Graduate Studies Administrator, to author (22 September 2014) (confirming that scanned questionnaire replies would be considered as appendices and thus included in the word count).

1.3 Scope

The general focus of the study is on the rules concerning the applicability of IHL. In particular, the study focusses on the law governing conflict qualification, combatant status, and belligerent occupation. It discusses the process of conflict internationalization in its various forms, but does not aim to cover the reverse process known as de-internationalization or internalization of armed conflicts.[30] Furthermore, in its analysis of the effects of internationalization, the study focusses on areas considered to be regulated significantly differently in NIACs and IACs, respectively.[31] It is acknowledged that this category may be seen as encompassing other topics in addition to combatant status and belligerent occupation.[32] Nonetheless, these two are widely accepted as the two main areas of crucial difference between the law of IAC and NIAC, as attested by the wealth of literature referring to them in this connection.[33] Accordingly, although their treatment

[30] This author has analysed the process of de-internationalization elsewhere with a specific focus on the 2011 conflict in Libya. See Kubo Mačák and Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya' (2012) 14 International Community Law Review 403, 423–429 (arguing that international law does not have an acceptable test for de-internationalization and that reclassifying of an ongoing IAC may result in serious conceptual and policy difficulties).

[31] See chapters 3 (combatant status) and 4 (belligerent occupation) below.

[32] See, eg, Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 36 (considering 'the rules relating to detention of combatants and civilians' as one of 'two key parts' of IHL regulated differently in IACs and NIACs); Dieter Fleck, 'The Law of Non-International Armed Conflicts' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 604–605 (listing, additionally, '[p]ublic property', '[r]elease of persons deprived of their liberty', '[b]elligerent reprisals', and '[m]ilitary objectives'). But see chapter 4, section 3.3.2 below (discussing the rules on the seizure of public property in occupied territories in the context of the treatment of the law of belligerent occupation).

[33] See, eg, Richard Baxter, 'Ius in Bello Interno: The Present and Future Law' in John Norton Moore (ed), *Law & Civil War in the Modern World* (Johns Hopkins University Press 1974) 530–531; Michael Bothe, Karl Josef Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 671–672; Waldemar A Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (1983) 33 American University International Law Review 53, 57–59; *APs Commentary* (n 22) 1332 [4397]; Christoper Greenwood, 'International Humanitarian Law (Laws of War)' in Frits Kalshoven (ed), *The Centennial of the 1st International Peace Conference: Reports & Conclusions* (Kluwer Law International 2000) 234; Marco Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 312; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 69; Robert Kolb, 'International Humanitarian Law and Its Implementation by the Court' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor*

does not exhaust the full spectrum of IHL, it should be the starting point of research in this area and it may serve as a bellwether for any future research undertakings. In other words, if these two cardinal bastions of the law of IAC are found to be transposable to internationalized armed conflicts, this finding may be taken as an inductive indicator with respect to those matters that could not, due to spatial constraints, be included in the present analysis.

1.4 Structure

The thesis is structured into five chapters. The present chapter lays out a general overview of the research project forming the present study as well as a conceptual and normative framework for the analysis contained in the remaining text. It justifies the need for the study by confirming the continuing distinction between international and non-international conflicts in international law and it sets forth the notion of internationalization used throughout the text of the study.

Chapter 2 examines the types of situations, in which a non-international armed conflict transforms to an international one, also referred to as modalities of internationalization. It will be argued that four such modalities have emerged until now in international law. The chapter further considers how internationalization occurs in so-called complex conflict situations, in other words circumstances of armed clashes which

Igor Blishchenko (Brill 2009) 1018–1019; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 93; Geoffrey S Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (2011) 22 Stanford Law & Policy Review 253, 277; Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP 2010) 47; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 513; Elzbieta Mikos-Skuza, 'International Law's Changing Terms: "War" becomes "Armed Conflict"' in Mary Ellen O'Connell (ed), *What Is War?: An Investigation in the Wake of 9/11* (Martinus Nijhoff 2012) 28; Heather Harrison Dinniss, *Cyber Warfare and the Laws of War* (CUP 2012) 142; Fleck (n 32) 604–605; Yves Sandoz, 'Land Warfare' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 116–117; Philip Spoerri, 'The Law of Occupation' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 185; Nils Melzer, 'The Principle of Distinction Between Civilians and Combatants' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 318.

feature more than two conflict parties. Together, the chapter presents a comprehensive map of the process of internationalization in international law.

The following two chapters analyse the effects produced by conflict internationalization in two specific areas of IHL. Chapter 3 focusses on the issue of combatant status. Since internationalized conflicts feature by definition at their outset at least one non-State party, traditional understanding would bar persons belonging to such an entity from being eligible for combatant status. However, the chapter engages in a historical analysis, examines the object and purpose of the regulation of combatancy, and responds to the most common objections in order to present a case for the applicability of combatant status to fighters participating in internationalized conflicts.

Chapter 4 is concerned with the law of belligerent occupation. An internationalized armed conflict breaks out in the territory of a single State, which prima facie poses a number of difficulties vis-à-vis the applicability of occupation law, premised as it is on the existence of two independent warring States. Nonetheless, the trends apparent in the historical development of this area of law and a close examination of the objections against its extension to non-State actors support its general applicability in internationalized conflicts.

The concluding chapter of the thesis presents the summary of the findings and the potential for future research. In particular, it will be argued that the study stands for a specific pro-humanitarian understanding of the concept of internationalized armed conflict in international law. Nevertheless, the thesis will also uncover a number of gaps in the applicability of IHL to internationalized armed conflicts, which cannot be reconciled by interpretation. The conclusion will thus attempt to sketch potential directions, in which the law and the academic scrutiny thereof may develop to alleviate these deficiencies.

2. Legal and conceptual framework

This section introduces the legal and conceptual framework that will be relied on throughout this study. It first presents what could be described as the static dimension of conflict qualification by analysing the historical development and current nature of the distinction between international and non-international armed conflicts under IHL. Second, it turns to the dynamic dimension of the same by putting forward a conception of internationalization that expresses the transformation from a non-international to an international armed conflict.

2.1 Distinction between international and non-international armed conflicts

2.1.1 Historical overview

Pre-modern times: Religion as the dividing line

Before the modern concept of state sovereignty gained traction in international law, the extent of the rules applicable to armed conflict depended on religious affiliations of the belligerents rather than on the type of territories they controlled.[34] On the one hand, inter-religious conflicts were purportedly waged in the name of God and limited by few rules. In this vein, the 13th century canonist Hostiensis considered as legitimate wars that Christian rulers waged against 'infidels'.[35] Even the otherwise progressive 16th century theologian and jurist Francisco de Vitoria still considered it 'indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery' although

[34] See also Louise Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict' (2009) 12 YIHL 157, 161–165 (emphasizing that in pre-modern era, before the emergence of cartography, spatial conceptions were markedly different to those prevailing today: boundaries did not exist and rulers controlled people, not territories).

[35] Gregory M Reichberg, Henrik Syse and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Blackwell 2006) 160–161

he duly warned that such 'enslaving is not lawful in a war between Christians'.[36] Similarly, until at least the 12th century, the prevailing view among Muslims was that holy war (*jihad*) was the only kind of relationship that could exist between Muslims and non-believers.[37] These inter-religious wars were placed under very few restraints as their goal was to secure the domination of one religion over another using all available means.

On the other hand, intra-religious conflicts—that is, conflicts waged between princes of the same religious affiliation—were much more strictly regulated both in the Christian and the Muslim worlds. Hostiensis condemned such conflicts as illegitimate unless one of the strict exceptions was met.[38] Vitoria was willing to grant that 'Christians may serve in war and make war' against one another,[39] but subjected their conduct to stringent rules.[40] Certain means and methods of warfare had been outlawed long before: for instance, already in 1139, the Second Lateran Council banned the use of crossbow in armed disputes between Christian princes, determining it to be 'suitable for use only against heathens'.[41] Similarly, a 10th century Baghdadi scholar Al-Mawardi divided intra-religious wars between Muslim princes into three classes, each with different sets of limitations on the means and methods of warfare.[42]

In addition to religiously motivated conflicts, popular uprisings against rulers were frequent even in pre-Westphalian times. In the Christian world, virtually no limitations

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[36] Francisco de Vitoria, *De Indis and De Jure Belli* (John Pawley Bate tr, 1557) vol I, book VI, §42.

[37] Rogier Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts' (2009) 91 IRRC 35, 43.

[38] Reichberg, Syse and Begby (n 35) 161.

[39] de Vitoria (n 36) vol I, book VI, §1.

[40] ibid §§3–60.

[41] Martin Van Creveld, *The Transformation of War* (Free Press 1991) 138.

[42] ibid 140 (listing wars against apostasy (*ahl al ridda*), against rebels (*ahl al baghi*), and against those who had renounced the authority of the *imam* (*ahl al muharabin*)).

were imposed on the means used to quell domestic rebellions.[43] For the Muslim scholar Al-Mawardi, however, *ahl al baghi* or 'war against rebels' constituted one of the classes of intra-religious war subject to some limits on war conduct.[44] With religion's increasingly diminished role in the sphere of international relations after the Thirty Years' War (1618–48), this type of conflict evolved into a separate category even in the Christian-dominated part of the world.

Westphalian era: Remit of law defined by State borders

The Peace of Westphalia (1648) marked the beginning of the development of modern international law.[45] In contradistinction to the war it concluded, it established an international community based on the principle of religious equality—albeit initially only with respect to denominations of the Christian faith—and thus contributed to the decline of the influence of religious ideas on the international plane.[46] With respect to the typology of conflicts, the emergence of a sovereign order contributed to a different treatment of inter-State and civil wars.

Hugo Grotius and Samuel von Pufendorf, international legal scholars of the 17th century, each included in their respective classifications of armed conflict a category akin

[43] See, eg, de Vitoria (n 36) vol I, book VI, §18 ('it is lawful to employ all appropriate measures … against internal foes, that is, against bad citizens'); see also Bartels (n 37) 43, citing Martin Luther, *An Open Letter on the Harsh Book against the Peasants* (1525), reproduced in Albert Marrin (ed) *War and the Christian Conscience: From Augustine to Martin Luther King, Jr* (Regnery 1971) 101–102 (it is 'God's will that the king be honoured and the rebels destroyed').

[44] Van Creveld (n 41) 140.

[45] See, eg, Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 AJIL 20, 26; but see, eg, Vaughan Lowe, *International Law* (OUP 2007) 9–10 (criticizing 'the fixation with Westphalia as the birth of international law'); Arimatsu (n 34) 165–166 (highlighting the emergence of cartography as an independent discipline in the period of Enlightenment and its importance for the development of the notion of territorial jurisdiction).

[46] Gross (n 45) 22.

or equivalent to civil wars; however, they left open the question whether limits to permissible conduct in war should also extend to such conflicts.[47]

Grotius divided wars into public and private based on the parties involved: wars between sovereign powers were public, while wars between persons without authority from the state were private.[48] Public wars were further divided into 'formal' and 'less formal', the former being a war waged under the authority of state sovereigns on both sides and observing certain formalities (such as a declaration of war). The latter subtype included conflicts, which did not meet the above conditions, for example if the war was 'waged against private persons'.[49] Grotius would thus classify a civil war as either a private war (if no sovereign power was involved) or as a less formal public war (if it was waged by the sovereign against his subjects).[50] Pufendorf, who built on Grotius' work, explicitly stated that 'civil wars' belonged to the class of informal wars.[51] Still, the underlying question of applicable limitations on the war conduct was left unanswered.

Emmerich de Vattel, a Swiss scholar, argued in the 18th century that the laws of war should apply in full in those civil wars which in their intensity resembled an international war. To Vattel, as soon as the rebels acquired 'sufficient strength to give [the sovereign] effectual opposition', the bands of society and government were broken, there was no common superior recognized by the enemy parties, and the war between them was

[47] Hugo Grotius, *The Law of War and Peace in Three Books* (Francis W Kelsey tr, 1625), book I, ch III; Samuel von Pufendorf, *On The Duty of Man And Citizen According to the Natural Law* (Frank Gardner Moore tr, John Hayes 1682), ch XVI.

[48] Grotius (n 47), book I, ch III, s I, §1.

[49] ibid, book I, ch III, s IV, §§1–2.

[50] At the outset of the chapter entitled 'Distinction Between Public and Private War; Explanation of Sovereignty', Grotius also refers to 'mixed wars' as that which are 'on one side public, on the other side private'. He does not elaborate on the relationship of this category to less formal public wars waged against private persons. It appears that such conflicts could fall simultaneously into both of these categories. See ibid, book I, ch III, s I, §1.

[51] von Pufendorf (n 47), ch XVI, §7.

equivalent in every respect to a public war between two states.[52] Conversely, the sovereign was not bound by the laws of war when suppressing rebellions of lower intensity. The only duty incumbent upon him by operation of international law was one of clemency, requiring him to grant amnesty where the offenders were numerous.[53]

The doctrine of belligerency, developed in the 19th century, resolved the difficulty of distinguishing between rebellions that triggered the application of the laws of war and those that did not. It stipulated that an internal conflict could only come within the scope of international law if the insurgents were recognized as belligerents. According to Lassa Oppenheim, a civil war was not a 'real war in the strict sense of the term in International Law'[54] because 'war is an armed contention between *States*.'[55] However, such a conflict could be elevated to the international plane by way of recognition.[56] The process of recognition structured the status acquired by anti-government forces into three stages: rebellion, insurgency, and belligerency.

A *rebellion* was an internal conflict characterized by non-recognition both by the territorial government and the outside States. As such, it was to be dealt with exclusively in the realm of domestic law.[57] If a rebellion was sustained and presented a credible threat to the ruling government, its status would change into that of an *insurgency*.[58] The territorial State could recognize the existence of an insurgency, indicating that it regarded

[52] Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Joseph Chitty tr, 1758), book III, ch XVIII, §§292–293, 295.

[53] ibid, book III, ch XVIII, §§290–291.

[54] Lassa Oppenheim, *International Law: A Treatise* (1st edn, Longmans, Green & Co. 1905 & 1906) vol II, 67.

[55] ibid 65 (emphasis original).

[56] ibid 65–66.

[57] Brad R Roth, *Governmental Illegitimacy in International Law* (Clarendon Press 1999) 173.

[58] Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2004) 4.

the insurgents as legal contestants and not as mere lawbreakers.[59] Finally, a formal recognition of the non-State party to the conflict as *belligerents* by the incumbent government had the effect of rendering the laws of war applicable to the conflict; recognition by a third State invoked the law of neutrality between this third State and the parties to the conflict.[60] On this basis, Great Britain was held liable for violating her neutrality obligations by building and selling warships to the Confederacy during the American Civil War in the (post-war) *Alabama Claims Arbitration*.[61] Whether or not recognition was obligatory under certain conditions remained unresolved in contemporary literature.[62] Its use, however, became less frequent; the last known recognition of belligerency by the territorial state took place during the Boer War at the turn of the 20th century[63] and, critically, no recognition was issued during the Spanish Civil War of the 1930s, leading some authors to argue that the doctrine fell into *desuetude*.[64]

[59] See also Richard A Falk, 'Janus Tormented: The International Law of Internal War' in James N Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press 1964) 200 (stating that rebels, whose insurgency was recognized, acquired an intermediate legal status, causing 'a partial internationalization of the conflict, without bringing the state of belligerency into being').

[60] Dietrich Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 Recueil des Cours 117, 145; Moir (n 58) 7–10.

[61] *Alabama Claims (United States v Great Britain)* (Award) (1872) 29 RIAA 125, 129–131.

[62] Bartels (n 37) 51; see also chapter 2, section 5.1.3 below (arguing that today, the decision whether to recognize is within the discretion of the State concerned).

[63] Hans-Peter Gasser, 'International Humanitarian Law' in Hans Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement* (P. Haupt 1993) 559; Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008) 14 fn 87.

[64] See, eg, Roscoe Ralph Oglesby, *Internal War and the Search for Normative Order* (Martinus Nijhoff 1971) viii; Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (New York University Press 1972) 171; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BYBIL 189, 197; J Crawford, 'First Report on State Responsibility', UN Doc A/CN.4/490 and Adds 1-6 (1998) [270]; René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 279; Eric David, *Principes de droit des conflits armés* (3e edn, Bruyllant 2002) 138; Andrew Sanger, 'The Contemporary Law of Blockade and the Gaza Freedom Flotilla' (2010) 13 YIHL 397, 424–425; see also chapter 2, section 5.1.1 below, rejecting the argument that recognition of belligerency has become obsolete.

As for inter-State conflicts, traditional international law developed von Pufendorf's distinction between formal and informal wars to require a formal declaration of war in order to trigger the application of the laws of war.[65] The 1907 Hague Convention (III) relative to the Opening of Hostilities codified this customary law requirement, stipulating that hostilities must only commence by either an explicit declaration of war or an ultimatum with a conditional declaration of war.[66] More than twenty years later, the 1928 Kellogg-Briand Pact prohibited the use of war in international relations.[67] Although in theory, these steps were taken to liberate humanity from the scourge of war altogether, or at least to subject its beginning to rigid rules, their actual outcome was markedly different. As a result, by denying the existence of war in a *formal* sense, States could escape allegations of violations of both *jus ad bellum* and *jus in bello*.[68] As the interbellum American jurist John Bassett Moore commented presciently in 1929, '[w]hen once you have outlawed war, do not use the word war any more.'[69] For instance, at the outbreak of the Sino-Japanese war in 1937, the Chinese and Japanese governments alike denied that a state of war existed between them.[70]

In summary, traditional international law stipulated rules applicable almost exclusively to inter-State wars understood in the formal sense. Conflicts taking place within one State's borders and on its territory were beyond the reach of international law—unless they reached intensity similar to that observed in inter-State conflicts or were

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[65] See, eg, Grotius (n 47), book III, ch III, §§5–6; de Vattel (n 52), book III, ch IV, §51; Johann Caspar Bluntschli, *Le droit international codifié* (Charles Lardy tr, 5th edn, Guillaumin 1895) 296 §521.

[66] Hague Convention (III) relative to the Opening of Hostilities (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 263, art 1.

[67] Kellogg-Briand Pact (signed 27 August 1928, entered into force 24 July 1929) 94 LNTS 57, art 1.

[68] See also Provost (n 64) 249.

[69] Quincy Wright, 'The Meaning of the Pact of Paris' (1933) 27 AJIL 39, 51.

[70] Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev edn, Little, Brown & Co 1947) vol III, 1687 fn 5.

given formal recognition by one of the relevant international actors. In 1949, the adoption of the four Geneva Conventions dramatically changed this state of affairs.

2.1.2 International armed conflicts

The Geneva Conventions were adopted in the aftermath of World War II, whose unprecedented conduct and consequences revealed deficiencies in the legal regulation of armed conflicts.[71] The rules on applicability of the Conventions can be found in the first two paragraphs of common article 2, according to which:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> 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.

Since their adoption, the Geneva Conventions have gained universal acceptance,[72] supporting the claim that the definition of armed conflict contained in common article 2—like most if not all of the rest of the instruments—has become customary international law.[73]

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[71] See further Lester Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War' (1945) 39 AJIL 680; Eugene A Korovin, 'Second World War and International Law' (1946) 40 AJIL 742; Lester Nurick and Roger W Barrett, 'Legality of Guerrilla Forces Under the Laws of War' (1946) 40 AJIL 563; Joyce AC Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 BYBIL 294; Raymund T Yingling and Robert W Ginnane, 'The Geneva Conventions of 1949' (1952) 46 AJIL 393.

[72] ICRC, 'Geneva Conventions of 1949 Achieve Universal Acceptance' (21 August 2006) <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm> accessed 1 October 2014.

[73] See, eg, *ICRC Study* (n 18) vol 1, xxiii and xxxvi; Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683, 686–688; Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010) 82; see also Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 AJIL 348.

The chosen wording replaced the formal conception of war with a material one.[74] Norms of humanitarian law come into effect immediately after the first shot is fired,[75] regardless of whether a war was formally declared or whether the situation was labelled as 'police action' or 'legitimate self-defence'.[76] This is the consequence of including an objectively ascertainable notion of 'armed conflict' next to the more equivocal term 'war'.[77] In fact, States nowadays very rarely admit being in a state of war, even in situations in which they readily acknowledge the application of IHL.[78] Similarly, it is unimportant whether the parties involved recognize each other as independent States.

[74] Lothar Kotzsch, *The Concept of War in Contemporary History and International Law* (E. Droz 1956) 298. Origins of this material conception of war can be found already in the Nuremberg Judgment of 1946. The IMT held that law of land warfare applied to the German occupation of of Czechoslovakia in 1939, even though Germany had not declared war and Czechoslovakia had not put up armed resistance at the time. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Nuremberg 1946) (IMT) 125.

[75] *GC IV Commentary* (n 21) 20; Provost (n 64) 250; see also *Čelebići* Appeal Judgement (n 10) [184] (juxtaposing IACs and NIACs insofar as the requirement of intensity and duration is concerned); but see Christoper Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 48 and Solis (n 73) 151 (both arguing for a more restrictive view). Interestingly, the next edition of Fleck's *Handbook*, in a chapter on the scope of application of IHL written by Jann Kleffner, abandons Greenwood's restrictive view and endorses the 'first shot' position. See Jann K Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 45.

[76] *GC I Commentary* (n 21) 32.

[77] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 31.

[78] For example, the UK denied that its 'military and naval operations' in Falkland Islands after the Argentine invasion in 1982, or 'hostilities against Iraq' in which it 'engaged' in 1991, or again the NATO intervention against Yugoslavia in which it prominently participated in 1999 amounted to a state of war with any of these States. See Letter from Lord President of the Council, Mr John Biffen, to Mr George Foulkes, MP (20 May 1982), reproduced in (1982) 53 BYBIL, 519–520 (on the UK-Argentine conflict); Statement of British Prime Minister, HC Debs, vol 184, col 375 (28 January 1991) (on the Gulf War); Statement by the Minister of State, Ministry of Defence, HL Debs, vol 605, WA 5-6 (14 June 1999) (on the NATO intervention). US Department of State legal advisor Michael Matheson went even further in a speech following the NATO intervention against the FRY, confirming that 'the position of the United States is that we are involved in an armed conflict. … You will find in all of the international instruments governing the use of armed force since World War II references to armed conflict [and not war].' Michael J Matheson, Deputy Legal Adviser, US Department of State, House International Relations Committee, Hearing on War Powers Act, Transcript (22 April 1999), reproduced in Sally J Cummins and David P Stewart, *Digest of United States Practice in International Law (1991–1999)* (International Law Institute 2005) 2156–2157.

For instance, although the Arab countries did not recognize Israel throughout the Arab-Israeli conflict, both sides accepted that the laws of war applied to the conflict.[79]

Despite the drafters' best intentions, however, it soon became clear that even this wording was not watertight. In the war of the Dutch New Guinea in the 1950s, fought between the armies of the Netherlands and Indonesia, the Dutch sought to deny the applicability of the Conventions by arguing that since *neither* of the parties regarded the situation as an armed conflict, the proviso 'even if the state of war is not recognized *by one of them*' was not met.[80] Naturally, such interpretation goes against the aim of the Conventions to protect the victims of wars and most likely flouts the obligation of the States to respect and ensure respect for the Conventions 'in all circumstances'.[81] Perhaps with this incident in mind, the drafters of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict filled the legal gap by adding two words to the corresponding provision: 'even if the state of war is not recognized by one *or more* of them'.[82]

There is virtually no threshold requirement of intensity or duration of the conflict.[83] The laws of war come into effect with any resort to force between two States,[84] even in the briefest of clashes such as the thirty-minute shootout between the US and Mexico in 1916[85] or the downing of US Naval pilot Lieutenant Bobby Goodman over Lebanon by

[79] Kleffner (n 75) 48.

[80] Kalshoven and Zegveld (n 77) 31.

[81] GCs, common art 1. See also *Kordić and Čerkez* Appeal Judgement (n 10) [373].

[82] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (signed 14 May 1954, entered into force 7 August 1956) 249 UNTS 240, art 18(1).

[83] See n 75 above for references to the academic debate on the matter.

[84] *Tadić* Decision on Jurisdiction (n 10) [70].

[85] Provost (n 64) 250.

Syria in 1980.[86] In conclusion, whatever the name, the intensity or the duration of use of force between two or more States, IHL applies.

Protective norms of international humanitarian law may be invoked even when States do not resort to use of force, specifically in the exceptional case of belligerent occupation. The material conception of war applies here as well: although a definition of occupation is absent from the Geneva Conventions, it may be found in article 42 of the 1907 Hague Regulations, which the Geneva Conventions supplement but do not supersede.[87] According to this provision, a territory is considered occupied when it is actually placed under the authority of a hostile army, irrespective of the formal proclamations by any of the parties.[88] Thus even if force is not used in acquiring authority over another State's territory (as in the cases of German occupation of Austria, Czechoslovakia, and Denmark in 1938–40), common article 2 triggers the application of the laws of war.[89]

The adoption of the Additional Protocol I to the Geneva Conventions in 1977 created a legal fiction, extending the application of the norms pertaining to IACs to those internal wars in which 'peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[90]

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[86] 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, 303 fn 17 (noting that the US characterized the situation as an armed conflict and providing further details on the development of the US legal views).

[87] GC IV, art 154. This interpretation has also been confirmed in the ICTY case-law. See *Naletilić and Martinović* Trial Judgement (n 10) [215]; *Kordić and Čerkez* Trial Judgement (n 10) [339].

[88] See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 116 [172] ('territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised').

[89] *GC IV Commentary* (n 21) 21.

[90] AP I, art 1(4).

By the inclusion of this provision, the Protocol provided for an *ex lege* internationalization of a class of internal armed conflicts.[91]

2.1.3 Non-international armed conflicts

Already in February 1945, the ICRC announced its goals with respect to the revision of the Geneva law as threefold: to extend the protection of detained civilians, to improve the enforceability of the laws of war, and, most importantly for the purposes of this thesis, to provide protection to victims of civil wars.[92] The upshot of the development of the law prior to World War II was that States either did not consider themselves bound or outright refused to be bound with respect to the permissible ways of quelling domestic insurgencies. The reasons for this view were fairly straightforward. Prior to the outbreak of an internal conflict, it was considered foolish to give an incentive to potential revolutionaries by assuring them that they would be granted protection equivalent to that of foreign soldiers in international wars.[93] Once a conflict was underway, governments were more than reluctant to recognize belligerency of their adversaries fighting to undermine these governments' authority.[94] Naturally, the ICRC's proposal at the outset of the diplomatic conference in Geneva to oblige parties to a non-international armed conflict to apply the 'principles' of the Conventions had very limited prospects of success.[95]

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[91] See chapter 2, section 4 below.

[92] François Bugnion, 'From the End of the Second World War to the Dawn of the Third Millennium: The Activities of the ICRC during the Cold War and its Aftermath' (1995) 305 IRRC 207, 211.

[93] See, eg, Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department 1949) ('*Final Record*') vol II B, 11 (Greece) (arguing that extending protection to political opponents might 'incite [them] to take up arms against a legitimate government'); ibid 330 (Burma) (criticizing the proposed text of common article 3 for being 'an encouragement and an incentive to the insurgents').

[94] Laura Perna, *The Formation of the Treaty Law of Non-international Armed Conflicts* (Martinus Nijhoff 2006) 30.

[95] The wording of the proposed article 2(4) of the draft Conventions, submitted by the ICRC prior to the 1949 diplomatic conference, was:

Indeed, the majority of the States present at the conference were not willing to concede what they saw as their sovereign right to maintain law and order in face of potential domestic upheavals.[96] The proposed text was criticized as striking 'at the root of national sovereignty' and as posing a threat to national security.[97] Additionally, it may have been perceived by the Western countries as capable of further instrumentalization by the countries of the Soviet bloc in their attempts to destabilize the Western colonial empires.[98] Nonetheless, after eleven weeks of deliberations, a solution was accepted at the conference.[99] It consisted of limiting the number of provisions applicable in civil wars to a bare minimum, and resulted in the adoption of the present text of common article 3:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the *principles* of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the parties to the conflict and shall have no effect on that status.

GC III Commentary (n 21) 31 (emphasis added). See further Bartels (n 37) 59–60.

[96] Moir (n 58) 24.

[97] *Final Record* (n 93) vol II B, 10 (United Kingdom).

[98] Antonio Cassese, 'Civil War and International Law' in Antonio Cassese (ed), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (OUP 2008) 116–117.

[99] Bartels (n 37) 63.

> (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.
>
> (2) The wounded and sick shall be collected and cared for. […]

An attempt to impose fundamental humanitarian principles of the Conventions on the participants in internal conflicts, the article is often referred to as a 'convention in miniature'[100] or a 'mini-convention'.[101] The ICJ described its contents as elementary considerations of humanity,[102] as general principles of humanitarian law,[103] and held that it was part of universally binding customary international law.[104] The ICTY has consistently ruled that common article 3 applies as a matter of custom both in NIACs and IACs.[105]

The text of the provision does not, on its face, include a bottom threshold of application, referring only to the existence of an armed conflict 'not of an international character'. Nevertheless, the *travaux préparatoires*[106] indicate and modern-day case-law[107]

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[100] Moir (n 58) 31.

[101] Kleffner (n 75) 69.

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

[103] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 [218].

[104] *Legality of the Threat or Use of Nuclear Weapons Case* (Advisory Opinion) [1996] ICJ Rep 226 [79].

[105] *Tadić* Decision on Jurisdiction (n 10) [89] and [98]; *Čelebići* Appeal Judgement (n 10) [138]–[139] and [147]; *Prosecutor v Gotovina* (Trial Judgement) IT-06-90-T (15 April 2011) (ICTY) [1671]; see also David P Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 AJIL 272, 273 (describing common article 3 as 'the most firmly established source of international law on internal war').

[106] See Bartels (n 37) 63–64; but see Claude Pilloud, 'Reservations to the Geneva Conventions of 1949' (1976) 16 IRRC 107, 116 (noting that in its reservation to common article 3, Portugal 'reserve[d] the right not to apply the provisions of Article 3' to the extent they might be incompatible with Portugal's domestic law for the alleged reason that 'there is no actual definition' of a NIAC in the text of the article). Pilloud further notes that a commission of experts convened by the ICRC later concluded that 'it would be completely contrary to the spirit of the Conventions to base a decision on whether or not to apply Article 3 solely on national laws.' ibid 117. Portugal did not actually enter this reservation at the time of ratification. Sivakumaran (n 33) 163 fn 63.

[107] See *Tadić* Decision on Jurisdiction (n 10) [70], as applied in *Tadić* Trial Judgement (n 10) [562]; *Limaj et al* Trial Judgement (n 10) [88]–[170]; *Haradinaj et al* Trial Judgement (n 10) [37]–[60].

confirms the generally accepted view that common article 3 implies a twofold requirement of minimum organization and intensity.[108] First, the rebels must be militarily *organized*, the indicators of which include responsible command, adherence to military discipline, and capability of respecting the laws of war.[109] Second, the hostilities must surpass a certain level of *intensity*, for instance when the police forces of the State in question are no longer capable of dealing with the insurrection, and therefore the army has to be mobilized in order to defeat the insurgents.[110] Although the precise application of these criteria depends on the case at hand, the requirement of a certain minimum threshold of application indicates that there is not, at present, a uniform or generic notion of 'armed conflict' applicable equally to international and internal wars.[111] This much is admitted implicitly in the *Tadić* decision on jurisdiction rendered by the ICTY, which is considered to contain a universally acceptable definition of armed conflict:[112] while an armed conflict between States is equated with any 'resort to armed force', '*protracted* armed violence' is required for a NIAC to exist.[113]

Common article 3 does not, however, establish any standard as to the nature of the conflict parties, and hence applies equally to 'vertical' civil wars (confrontations between

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[108] See, eg, Schindler (n 60) 147; Marco Sassòli and Antoine A Bouvier, *How Does Law Protect in War?*, vol 1 (ICRC 2006) 109; Kolb and Hyde (n 33) 78; Sivakumaran (n 33) 167–180.

[109] *Limaj et al* Trial Judgement (n 10) [88]–[89], [94]–[134].

[110] ibid [88]–[89], [135]–[170].

[111] Accord Schindler (n 60) 131; Dino Kritsiotis, 'The Tremors of Tadić' (2010) 43 Israel Law Review 262, 293–299; Marko Milanović and Vidan Hadži-Vidanović, 'A Taxonomy of Armed Conflict' in Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 269–272.

[112] See, eg, Moir (n 58) 42–43.

[113] *Tadić* Decision on Jurisdiction (n 10) [70] (emphasis added). The requirement that armed violence be protracted has been interpreted in practice as referring more to the conflict intensity than to its duration. See, eg, *Haradinaj et al* Trial Judgement (n 10) [49]. This is a reasonable interpretation. To require a minimum duration of conflict would mean that it would be impossible to qualify its legal nature at the time when it would break out. Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law' [2006] Program on Humanitarian Policy and Conflict Research at Harvard University, Occasional Paper Series 1, 6–7.

governmental armed forces and the forces of one or more armed groups) and to 'horizontal' civil wars (confrontations between the forces of several armed groups without the involvement of the government).

Dealing with the absence of a clear definition of the concept of NIAC was one of the hopes placed on the delegates at the Diplomatic Conference of 1974–77.[114] The States agreed on an applicability provision embodied in article 1 of the Additional Protocol II according to which the Protocol:

> shall apply to all armed conflicts which are not covered by Article 1 of [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other 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.[115]

The definition of non-international armed conflict in Protocol II is significantly more restrictive than the one found in the Geneva Conventions. It raises the applicability bar established by common article 3 in two main ways.

First, it only covers 'vertical' civil wars, as governmental armed forces must be involved in the conflict. Second, it requires the insurgent group to be in control of a discernible part of the State's territory, thereby excluding guerrilla-type violence from its scope.[116] The conditions contained in Protocol II resemble those required for recognition of belligerency.[117] However, because the full scope of the laws of war does not come into operation even if these conditions are met, the applicability rules contained in Protocol II

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[114] See Vassili Potapov, 'Reaffirmation and Development of International Humanitarian Law: An Analysis of Some Key Issues' (1977) 17 IRRC 3, 7–10.

[115] AP II, art 1(1).

[116] For example, in the Guatemalan Civil War, the insurgents were able to carry out sustained and concerted military operations without placing any part of the national territory under their control, which made AP II inapplicable to the conflict. Provost (n 64) 263.

[117] See text to n 405 below.

have been portrayed as regrettable[118] and even regressive.[119] Wide discontent with the stringency of these conditions can also be illustrated on the way the States defined internal armed conflict twenty years later for the purposes of the Rome Statute establishing the ICC. The delegations to the 1998 conference in Rome deliberately deviated from the Protocol II definition, opting for wording which required only a protracted armed conflict between governmental authorities and organized armed groups or between such groups to exist in order to establish the court's jurisdiction over war crimes committed in a civil war.[120]

2.1.4 Evaluation

The adoption of common article 3 in 1949 marked the first inroad into the otherwise exclusively domestic sphere of regulation of internal conflicts. Since then, the development of international law has been bringing the two categories of conflict closer to one another. A growing number of international conventions regulating the laws of war apply equally to both types of conflict.[121] Some States expressly declare in their military manuals that they apply international humanitarian law to any type of conflict whatever its legal characterization.[122] In addition, the ICTY held that customary rules

118 Kleffner (n 75) 133.

119 Provost (n 64) 264.

120 La Haye (n 63) 9; see also Rome Statute, art 8(2)(f).

121 See, eg, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (signed 13 January 1993, entered into force 29 April 1997) 32 ILM 800, art 1; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (signed 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 ('Ottawa Treaty'), art 1; Convention on Cluster Munitions (signed 30 May 2008, entered into force 1 August 2010) UN Doc CCM/77, art 1.

122 See, eg, US Department of Defense, Directive 2311.01E 'DoD Law of War Program' (9 May 2006) [4.1]; German Ministry of Defence, *ZDv 15/2 Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch [Humanitarian Law in Armed Conflicts: Manual]* (1992) [211]. The statement in the newest edition of the German manual has since been toned down: see German Ministry of Defence, *ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch [Humanitarian Law in Armed Conflicts: Manual]* (2013) [210]. Other types of official pronouncements also indicate confluence, including submissions in court proceedings stating that characterization of conflict is of lesser importance because many of the rules have

governing internal armed conflicts comprise many principles traditionally thought to regulate international conflicts only, including the protection of civilians and civilian objects from hostilities or the prohibition of means and methods of warfare proscribed in international conflicts.[123] More recently, this has been further corroborated by an extensive study conducted by the ICRC, according to which approximately 90% of customary rules of IHL identified therein applied in both types of conflict.[124]

Still, the distinction between IACs and NIACs has anything but disappeared. The two types of conflict arise in markedly different ways: while IACs 'would usually be triggered by an armed attack, the evolution of [NIACs] is more likely to follow a path of escalation of internal strife and violence'.[125] Furthermore, the Rome Statute, an indicative recent multilateral convention, preserves the distinction in its provisions on war crimes.[126]

become identical: cf David Turns, 'The "War on Terror" through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues' (2007) 10 New York City Law Review 435, 469–470 (making this point in relation to the State of Israel's submissions in the *Targeted Killings* case); see also Letter from the UK Foreign and Commonwealth Office to author (11 July 2011), on file with author (stating that 'in many cases of armed conflict in which UK forces are engaged, the UK will apply the more developed rules of LOAC applicable to international armed conflicts as a matter of policy'); Letter from the Embassy of the Principality of Monaco to author (10 August 2011), on file with author (stating that Monaco 'doesn't distinguish between international and non-international conflicts'); Letter from the Ministry of Foreign Affairs of the Republic of Latvia to author (15 July 2011), on file with author (stating that 'Latvia does not distinguish between international and non-international armed conflicts applying the law of armed conflicts').

[123] *Tadić* Decision on Jurisdiction (n 10) [127].

[124] *ICRC Study* (n 18); ICRC, 'Customary IHL – Helping to Improve the Protection of Victims of Armed Conflict' (29 July 2014) <http://www.icrc.org/eng/resources/documents/interview/2014/07-29-customary-international-humanitarian-law-cihl.htm> accessed 1 October 2014. The study's methodology has not, however, been free from criticism. See, eg, George H Aldrich, 'Customary International Humanitarian Law: An Interpretation on behalf of the International Committee of the Red Cross' (2005) 76 BYBIL 503, 507; John Bellinger and William Haynes, 'U.S. Initial Reactions to ICRC Study on Customary International Law' (2006) 101 AJIL 639; Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 82 International Law Studies 99, 101–105; John Bellinger and William J Haynes, 'A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law' (2007) 89 IRRC 443, 444–448; Daniel Bethlehem, 'The Methodological Framework of the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 9–10; Iain Scobbie, 'The Approach to Customary International Law in the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007).

[125] Lubell (n 33) 91.

[126] See Rome Statute, art 8(2); see also *Prosecutor v Thomas Lubanga Dyilo* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) (ICC) [539] (confirming the relevance of the IAC/NIAC distinction in IHL).

Declarations in military manuals do not necessarily amount to an obligation under international law; rules of this sort may be expressions of State policy, not of *opinio juris*.[127] Even the ICTY emphasized that only some of rules and principles governing IACs have gradually been extended to internal conflicts and that only the 'general essence' of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[128] In addition, there are legal notions which do not easily square with the reality of internal armed conflicts, such as combatant status[129] or belligerent occupation.[130]

To recapitulate, despite the trend of gradual confluence between the two main types of armed conflict, the division still exists. As a result, the rights and duties of those engaged in armed conflicts depend to a considerable extent on the exact qualification of the conflict at hand. It has been correctly observed that '[o]nly in a system which creates a distinction between the rules that apply in international and internal armed conflict, would the concept of an internationalized armed conflict be considered necessary.'[131] Having confirmed that the said distinction still persists, the thesis now turns to the concept of internationalization.

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[127] Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 LJIL 441, 457. The US employed a similar line of argument in its criticism of the methodology of the ICRC customary IHL study. See Bellinger and Haynes (n 124) 640–641.

[128] *Tadić* Decision on Jurisdiction (n 10) [126].

[129] But see Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 153–173 (arguing in support of a universal combatant status applicable in IACs and NIACs alike).

[130] But see Sivakumaran (n 33) 529–532 (arguing in support of an extended applicability of the law of belligerent occupation to NIACs).

[131] Alison Duxbury, 'Drawing Lines in the Sand - Characterising Conflicts for the Purposes of Teaching International Humanitarian Law' (2007) 8 Melbourne Journal of International Law 259, 267.

2.2 Concept of internationalization of armed conflicts

2.2.1 Emergence of the term 'internationalization' in international law

The observation that a domestic uprising may grow into hostilities that come within the purview of international law is anything but novel. As stated above, the Swiss scholar Emmerich de Vattel wrote in 1758 that a civil war in which the rebels wield strength sufficient to effectively oppose the sovereign is equivalent to a war between two States under international law.[132]

The phrase 'to internationalize a war', although absent in Vattel's writings, entered English language by 1865, when it was first included in Webster's *American Dictionary of the English Language*.[133] It was, however, still used only to denote a change in the factual circumstances rather than to express the transformation of the law applicable to the situation at hand.

In 1901, the international legal scholar Hannis Taylor used the term 'internationalization' in a sense more relevant for the present purposes. He wrote that a part of State territory that is subject to foreign invasion and occupation becomes 'internationalized', meaning that in a district temporarily placed under the control of the foreign army, certain rules of international law became applicable.[134]

However, it took until the mid-1960s when, against the backdrop of the Vietnam War, a number of publicists started to write about 'international' or 'internationalized'

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[132] de Vattel (n 52), book III, ch XVIII, §§292–295; see also text to nn 52–53 above.

[133] Noah Webster, *An American Dictionary of the English Language* (G&C Merriam 1865) 707 ('Internationalize, v.t. To make international; to cause to affect or pertain to the mutual relations of two or more nations; as, *to internationalize a war*.') (emphasis added).

[134] Hannis Taylor, *A Treatise on International Public Law* (Callaghan & Co 1901) 556–557. For example, international law would permit the appropriation of public property to prevent it from falling into enemy hands.

civil wars in the context of the law applicable to such types of violence. Major Talmadge Bartell argued in 1964 that the 'communist' practice of providing military assistance to insurgents in civil wars had 'internationalized' such conflicts and thus modified the applicable law.[135] In the same year, Richard Falk wrote that the recognition of belligerency of the insurgents by outside States would render the internal war 'fully internationalized'.[136]

Finally, in 1965 Dietrich Schindler offered the first comprehensive treatment of conflict internationalization. He referred to internal conflicts, in which outside States provided military assistance to one of the conflict parties, as to 'international civil wars'. He further discussed whether international law of war should apply to all or only some of the relationships in such conflicts. Schindler's contribution was in the fact that by using the term 'internationalization of civil wars' (*Internationalisierung der Bürgerkriege*), he implied the change in the law applicable to (at least some relationships within) a previously purely internal conflict.[137]

2.2.2 Towards the definition of 'internationalization' in international law

Schindler's work and its revised English versions published in 1979[138] and 1982[139] became perhaps the most widely cited in the contemporary legal analysis of conflict internationalization. However, literature review reveals an absence of a consensus on the

135 Talmadge L Bartelle, 'Counterinsurgency and Civil War' (1964) 40 North Dakota Law Review 254, 254, 290. However, Bartell appears to have been writing *de lege ferenda* as he did not provide any legal basis for his propositions.

136 Falk (n 59) 194.

137 Dietrich Schindler, 'Die Anwendung der Genfer Rotkreuzabkommen seit 1949' (1965) 22 ASDI 75, 93–98.

138 Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 150–151.

139 Schindler (n 3).

exact meaning and scope of the term. Instead, two views can be said to dominate in academic writing. On the one hand, many authors, including Schindler, regard internationalized conflict as a civil war with some form of outside armed interference.[140] On the other hand, a number of writers highlight the 'mixed' or 'hybrid' nature of internationalized conflicts, defining these as conflicts which have both non-international and international elements.[141]

[140] Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 150 ('non-international conflicts in which foreign States or international organizations intervene with armed troops'); Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (1983) 33 AULR 145, 145 ('An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power.'); R Bierzanek, 'Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés' in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC 1984) 282 ('le phénomène de conflit interne internationalisé: l'intervention d'Etats tiers dans les guerres civiles'); Stewart (n 11) 315 ('the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government'); Pejić (n 26) 84 ('a non-international armed conflict in which a third State or a multinational force intervenes (internationalised non-international conflict)'); Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 IRRC 69, 71 (the author considers a conflict to be 'internationalized' in case of 'intervention in a previously existing internal conflict'); Tamás Hoffmann, 'Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts' in Michael J Matheson and Djamchid Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (Brill 2010) 218 fn 4 ('The notion of "internationalized non-international armed conflict" … specifically pertains to civil wars characterized by the intervention of the armed forces of a foreign State.'); Lubell (n 33) 93 (considering internationalized conflicts to mean 'armed conflicts involving a third state as well as internal violence between the government and non-state actors'); Katie A Johnston, 'Transformations of Conflict Status in Libya' (2012) 17 JCSL 81, 95 (arguing that internationalization occurs 'as a result of the intervention of another state [in a NIAC] on the side of the non-state party').

[141] Adam Roberts, 'Counter-terrorism, Armed Force and the Laws of War' (2002) 44 Survival 7, 16 ('"internationalised civil war" … is not a formal legal category, but an indication that the rules pertaining to both international and civil wars may be applicable in different aspects and phases of the conflict'); Stewart (n 11) 314 ('internationalized armed conflicts' are 'conflicts that contain both international and non-international elements'); Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 German Yearbook of International Law 293, 313 (describing the conflict in Iraq after 2004 as 'one or possibly several internationalized internal armed conflicts' governed by the law of NIAC); UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) ('*UK Military Manual*') 16 ('many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international'); Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (n 127) 446 ('a type of armed conflict that possesse[s] qualities of both international and internal armed conflict … came to be known as "internationalized" armed conflict.'); Arimatsu (n 34) 177 (describing the conflict in Afghanistan after 2002 as 'a non-international armed conflict, albeit internationalized'); Robin Geiss and Michael Siegrist, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?' (2011) 93 IRRC 11, 13–16 (describing the conflict in Afghanistan after 2002 as 'an "internationalized" non-international armed conflict') (internal quotation marks kept).

Neither of these interpretations, it is submitted, captures fully the essence and meaning of conflict internationalization. As will be shown in this study, foreign intervention is just one vehicle of transformation from an internal to an international conflict. The American Civil War of the 1860s or the Yugoslavian Civil War of the 1990s have been, it is argued, prominent examples of internationalized armed conflicts, albeit not due to an external interference.[142] This first view is therefore unsatisfactory because of its incompleteness *ratione materiae*.[143]

The second view, while not principally incorrect, is question-begging and potentially overinclusive. It begs the question which of these elements must be present in a conflict for it to be considered international. It may also be overinclusive in that it also refers to conflicts as 'internationalized' even if they were never internal in the first place. For instance, this view would quite illogically characterize a conflict involving two States and a subsequently formed non-State armed group as 'internationalized'.[144] This definition should therefore also be rejected.

It is proposed that internationalization be understood as *the process of transformation of the legal nature of a prima facie internal (non-international) armed conflict, which renders the law of*

[142] See chapter 2, sections 5.1 and 2.2, respectively.

[143] This would also be the case with the small number of publications which equate internationalized armed conflict with one of the other modalities of internationalization. See, eg, Hilaire McCoubrey and Nigel White, *International Organizations and Civil Wars* (Dartmouth 1995) 62–63 (considering the term 'internationalized' armed conflicts as covering wars of national liberation only); Wolff Heintschel von Heinegg, 'Introduction' in Michael N Schmitt and Wolff Heintschel von Heinegg (eds), *The Scope and Applicability of International Humanitarian Law*, vol 1 (Ashgate 2012), xi (stating that article 1(4) AP I recognized 'so-called "internationalized" wars').

[144] For instance, hostilities between Vietnam and Cambodia (Kampuchea) broke out in May 1975. An insurgent group aligned with Vietnam, the Kampuchean United Front for National Salvation (KUFNS), was formed in Cambodia in December 1978; it invaded Cambodia together with Vietnam the following year. The conflict between Cambodia and Vietnam had been international at least until the Khmer Rouge government was toppled in early 1979. See, eg, Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (n 140) 153–154; *Case of Kaing Guek Eav alias 'Duch'* (Trial Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) (ECCC) [423] and Section 2.1. Although the creation of the KUFNS added a non-international element to the existing situation, it could not have internationalized the conflict—it had already been international at the time.

international armed conflicts applicable in part or in full to such a conflict, which may thenceforth be described as an 'internationalized armed conflict'. This definition is, first and foremost, consistent with the understanding of the term 'to internationalize' in general language, namely 'to make international'.[145] An internationalized armed conflict is indeed 'made international' insofar as the law to be applied to it is concerned. Second, the definition is capable of covering all possible modalities of conflict internationalization and does not limit itself to foreign intervention in civil wars. Third, it is not overinclusive, as it stresses the process of conflict transformation instead of simply stating the presence of both internal and international elements in the conflict. There are some examples of academic writing, which have used the concept of internationalization in this sense.[146] It is also the meaning ascribed to it throughout the rest of this thesis.

[145] See the dictionary definition quoted at n 133 above.

[146] See, eg, Robert Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan' (2002) 7 JCSL 37, 43; Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 15; Milanović and Hadži-Vidanović (n 111) 292–293.

CHAPTER 2

PROCESS OF INTERNATIONALIZATION OF ARMED CONFLICTS

1. Introduction

How do internationalized armed conflicts come about? This chapter analyses the ways by which the legal nature of a prima facie NIAC transforms into an IAC. It is argued that there are two principal mechanisms through which this result may be brought about.

First, a non-international conflict is internationalized when two independent subjects of international law become engaged against each other as the conflict develops ('standard internationalization'). On the one hand, this may be the effect of an involvement of an *external* actor such as a third State or an international organization by way of a sufficiently intensive military intervention (section 2). On the other hand, this may be the outcome of an *internal* development if the territorial State dissolves during the civil war into two or more successor States (section 3).

Second, a conflict may in certain circumstances be internationalized even as the conflict parties maintain their State/non-State asymmetry, as long as the non-State party acquires the requisite legal attributes ('complementary internationalization'). This process may be of an *absolute* nature, as is the case in the so-called 'wars of national liberation' defined in article 1(4) AP I (section 4), or of a *relative* nature, as in the instances of

internationalization by means of recognition of belligerency, special agreements foreseen by common article 3, and unilateral declarations (section 5).

Additionally, some internationalized armed conflicts are marked by a plurality of conflict parties and a potentially convoluted web of conflict relationships among them. It can be difficult to determine what body—or bodies—of law should apply to such complex conflict situations. It is argued that they should be seen as a single internationalized armed conflict if the involvement of the aligned conflict parties amounts to a single use of force against the territorial State; in all other cases, the proposed model allows for the existence of a number of legally separate international and non-international armed conflicts in one State territory (section 6).

2. Intervention

Semantically, the term 'international armed conflict' denotes an armed conflict between two nations—or States. Geneva Conventions affirm this understanding and apply only if an armed conflict erupts 'between two or more of the High Contracting Parties'.[147] The archetypal modality of internationalization is that when an outside power interferes with a previously internal armed conflict to the extent which warrants a change in classification of the said conflict.

Lack of consent with outside interference by the territorial State is, it is argued, one of the preconditions of internationalization of the conflict. In addition, certain nature and level of interference are also necessary for a conflict to be internationalized in this way. However, to begin this scrutiny, it is essential to consider first arguments in favour of

[147] GCs, common art 2(1).

internationalization even of those conflicts, in which the outside State intervenes in support and with the consent of the government in power.

2.1 Consensual intervention

Foreign support of governments beleaguered by domestic revolts has not been uncommon.[148] The Cold War period has seen a number of foreign military interventions to assist the governments in charge of former colonies. The UK came to the aid of President Julius Nyerere of Tanganyika in 1964, after he had lost control of the capital to mutinous army troops.[149] Between 1962 and 1994, France intervened in its former colonies more than a dozen times, typically on the side and with the support of the de jure governments.[150]

The practice exists to this day. Even though the US-led interventions in Afghanistan and Iraq began as enforcement operations against established governments, consent with foreign military presence was later given by new sympathetic governments installed in democratic elections.[151] In another recent example, in 2002, the government of the Central African Republic, assisted by Libyan and Congolese troops, fought off an attempt to seize power led by General François Bozizé.[152] Much more controversially,

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[148] For an extensive study of military intervention upon governmental invitation from the perspective of international law, see Doswald-Beck (n 64); Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung [Intervention upon Invitation: Use of Force by Foreign Troops in Internal Conflicts at the Invitation of a Government under International Law]* (Springer 1999).

[149] David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 Duke J Comp & Int'l L 209, 216.

[150] John Darnton, 'The World; Intervening with Elan and No Regrets' *New York Times* (26 June 1994) <http://www.nytimes.com/1994/06/26/weekinreview/the-world-intervening-with-elan-and-no-regrets.html> accessed 1 October 2014.

[151] For legal qualification of these conflicts, see n 162 and the accompanying text below.

[152] ICG, 'Central African Republic: Anatomy of a Phantom State' (13 December 2007) <http://www.crisisgroup.org/en/regions/africa/central-africa/central-african-republic/136-central-african-republic-anatomy-of-a-phantom-state.aspx> accessed 1 October 2014, 14.

Russia attempted to justify its use of force against Ukraine by an alleged invitation issued by the ousted president Viktor Yanukovych in early 2014.[153]

Even though relevant literature gives a number of arguments in favour of internationalization of such conflicts, it is submitted that these are not persuasive. First, some argue that military intervention on the government side can be qualified as partial occupation that meets with no armed resistance from the territorial State, thus triggering the application of the second paragraph of common article 2.[154] Textually, this contention is at odds with the definition of occupation given in article 42 of the Hague Regulations that stipulates that a territory is occupied when it is 'actually placed under the authority of the hostile army'. Even if the territorial State conceded, unusually, the authority over a part of its territory to an allied third State, the allied army—acting by definition in concert with the territorial government—is surely not 'hostile' to the territorial State. The provision in the Geneva Conventions was inserted in order to extend protection even in cases not covered by the first paragraph of article 2, such as the German occupation of Czechoslovakia in 1939 or Denmark in 1940, which took place with virtually no armed resistance.[155] Of course, if the territorial State's invitation to intervene or consent with the intervention was not validly given,[156] the situation would be more akin to a resistance-less occupation. However, in such a situation, the conflict would be internationalized not by

[153] UN Doc S/PV.7125 (3 March 2014) 3–4.

[154] See, eg, Stewart (n 11) 331–332. See n 371 below for the text of common article 2(2).

[155] *GC IV Commentary* (n 21) 21; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [95].

[156] On validity of consent, see further Doswald-Beck (n 64) 191–192, 251–252; Wippman (n 148) 211–212; Nolte (n 148) 161–162; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), in Yearbook of the ILC, 2001, vol II, part two, 73, commentary to art 20 [4].

application of common article 2(2) *per analogiam*, but because of a State's military operation in another State's territory without genuine consent of the latter.[157]

Second, some authors argue that intervention of an outside State so fundamentally transforms the internal conflict that it can no longer be subject to the limited normative framework for NIACs.[158] Aldrich points to the Vietnamese Civil War (1955–75) in which there were at least four parties to the conflict: South Vietnam as the territorial State, the Vietcong as the local insurgents, and the United States and North Vietnam as intervening third States. He argues that separating the conflict—which he saw as a 'single armed conflict with two warring sides'—into pairs of sub-conflicts and applying different sets of rules to each is 'practically impossible', pointing out the US practice of according prisoner of war (POW) status to all enemy captives including the Vietcong.[159] The 'fundamental transformation' argument fails to reconcile with the normative structure underlying rules on the applicability of IHL. As stated above, common article 2 is unequivocal on the requirement that there be two opposing States in order for a conflict to be considered international.[160]

In addition, it is evident from State practice that this understanding has not become reflected in customary international law either. The US practice of granting POW status on all captured fighters was followed expressly as a matter of discretion and policy, and

[157] See also nn 175–180 and accompanying text below with respect to cases in which genuine consent was absent.

[158] See also section 6 below (discussing in detail the dilemma between the so-called 'global' and 'mixed' views of conflict internationalization in complex conflict situations characterized by a multiplicity of conflict parties).

[159] George H Aldrich, 'The Laws of War on Land' (2000) 94 AJIL 42, 62–63; see also Annex A of MACV Directive 381-46 (27 December 1967), reproduced in Charles I Bevans, 'Contemporary Practice of the United States Relating to International Law' (1968) 62 AJIL 754, 766–768. But see, eg, Richard A Falk, 'International Law Aspects of Repatriation of Prisoners of War During Hostilities' (1973) 67 AJIL 465, 463 (questioning whether North Vietnam was bound to treat the situation as an IAC at all).

[160] Although both of these States need not necessarily be directly engaged in fighting each other: see text to nn 183–185 below.

not out of sense of a legal obligation.[161] Recent conflicts with consensual third State intervention such as Iraq (after the handover of power to the interim government) or Afghanistan (after the constitution of Loya Jirga) are not considered to be international.[162] With respect to the Central African Republic, the non-international nature of the abovementioned conflict in 2002 there was moreover authoritatively confirmed by the ICC in the *Bemba* case.[163] Aldrich's charge of 'practical impossibility' is undermined by the case-law of the ICTY, whose decisions have applied different bodies of law to parallel international and internal armed conflicts.[164]

Third and a related argument is that through foreign intervention, the internal armed conflict gains intensity equivalent to that of IACs, and thus IHL in its entirety should apply.[165] Putting aside the requirement that two opposing States are engaged in the conflict,[166] intensity by itself is not a necessary, or even a sufficient condition for internationalization. In fact, the level of conflict intensity triggering the application of IHL is higher in non-international than in international armed conflicts.[167] For example, despite its limited temporal and geographical ambit, the conflict over the nearly

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161 George S Prugh, *Law at War, Vietnam, 1964–1973* (Department of the Army 1975) 65–66.

162 There is, however, a host of practice proclaiming the non-international nature of these conflicts. See, eg, ICRC, 'Iraq Post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority' (5 August 2004) <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList322/89060107D77D7299C1256EE7005200E8> accessed 1 October 2014; German Federal Attorney General, 'Close of Investigations to the Air Strike of 4 September 2009' (19 April 2010) <http://www.generalbundesanwalt.de/de/showpress.php?themenid=12&newsid=360> accessed 1 October 2014.

163 *Prosecutor v Jean-Pierre Bemba Gombo* (Confirmation of Charges Decision) ICC-01/05-01/08 (15 June 2009) (ICC) [246].

164 *Tadić* Decision on Jurisdiction (n 10) [77]; *Tadić* Appeal Judgement (n 10) [84]. See further section 6 below.

165 This argument has been made *de lege ferenda* in, eg, Denise Bindschedler-Robert, 'A Reconsideration of the Law of Armed Conflicts' in *Conferences on Contemporary Problems of International Law: The Law of Armed Conflicts* (Carnegie Endowment for International Peace 1971) 53.

166 See text to n 160 above.

167 See text to nn 108–113 above.

uninhabited Falkland Islands that lasted only eleven weeks in 1982 was governed by IHL in full scope.[168] On the contrary, the Rwandan civil war in 1994, during which the whole country descended into vicious interethnic violence with about 800,000 lives lost, was described authoritatively in several ICTR decisions as a NIAC.[169]

Finally, it has been argued that an invitation to intervene implies recognition of belligerency by the issuing government.[170] This argument interprets invitation as an admission by the territorial State that the rebels' strength is no longer surmountable without assistance, which amounts to recognition of belligerency.[171] Yet this argument must be rejected, too. As will be shown below in a section discussing the doctrine of belligerency, this legal institute is—if surviving in contemporary international law at all—of discretionary nature only.[172] It is true that recognition may be tacit: by undertaking certain measures permissible only in an international conflict (such as the proclamation of a naval blockade), a State is in fact tacitly recognizing the belligerency of its opponents.[173] However, a request for outside assistance is a manifestation of State sovereignty and is irrelevant to the conflict nature. Therefore, the better view is that under these circumstances, recognition of belligerency is not implied. This approach was also

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168 See, eg, Letter from the British Ambassador to the UN to the President of the UN Security Council, UN Doc S/15198 (11 June 1982). The UK, however, denied that the 'military and naval operations' amounted to a state of war between the UK and Argentina. See n 78 above.

169 *Prosecutor v Ntagerura* (Trial Judgement) ICTR-99-46-T (25 February 2004) (ICTR) [74]; *Prosecutor v Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) (ICTR) [621]; *Prosecutor v Semanza* (Decision on Prosecution's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54) ICTR-97-20-T (3 December 2000) ICTR, Annex A; *Prosecutor v Semanza* (Appeal Judgement) ICTR-97-20-A (20 May 2005) (ICTR) [198].

170 ICRC, 'Protection of Victims of Non-International Conflicts: Report to the XXIst International Conference of the Red Cross' (1969) 9 IRRC 344, 346; ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts: Report* (ICRC 1969) 100–101; Bindschedler-Robert (n 165) 53; Tom Farer, 'Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict"' (1971) 71 Columbia Law Review 37, 69.

171 Bindschedler-Robert (n 165) 53; Farer (n 170) 69.

172 See section 5.1.3 below.

173 See nn 445–446 below.

endorsed by government experts in 1971 and 1972 when they rejected an ICRC proposal in favour of conflict internationalization based on the argument of implicit recognition of belligerency.[174]

There are undoubtedly strong policy reasons for internationalizing a conflict through foreign intervention in support of the territorial State. Byron points out that the invitation may often not be genuine and may be issued by a puppet representative installed or supported by the intervening State prior to any military action.[175] It is widely believed that such an 'invitation' was issued in 1979 to the Soviet Union by Babrak Karmal, an Afghan who at that point held no official position in the Afghani government[176] and it has already been argued that the putative Ukrainian invitation to Russia in 2014[177] had been equally problematic.[178] Byron notes further that the purpose of the Geneva Conventions—to protect individuals, not to serve State interests—would be better served if IHL in its entirety applied to such conflicts.[179] However, policy reasons cannot alter the content of a legal norm when that norm is unequivocal. It is submitted that the 'genuineness' (in other words, international validity) of an invitation is a fact to be determined by the subject of interpretation and application of the law. The victim-oriented perspective of the Conventions, propounded by the ICRC Commentaries, is commendable but does not override the text of common article 2 which presupposes the

[174] See Schindler (n 3) 259–260.

[175] Byron (n 8) 82.

[176] Michael W Reisman and James Silk, 'Which Law Applies to the Afghan Conflict?' (1988) 82 AJIL 459, 481; but see Adam Roberts, 'What Is a Military Occupation?' (1984) 55 BYBIL 249, 278.

[177] See text to n 153 above.

[178] James Green, 'Editorial Comment: The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited' (2014) 1 Journal on the Use of Force and International Law 3, 6.

[179] Byron (n 8) 82–83, citing *GC III Commentary* (n 21) 23.

presence of two opposing States in an IAC. As long as the territorial State consents to the engagement of a third State, this condition is not met and the conflict remains internal.[180]

2.2 Non-consensual intervention

2.2.1 Types of conflict concerned

Broadly speaking, there are two types of intervention in which the consent of the established government is lacking. First, a third State intervenes in support of a rebel group acting against the established government. This scenario is generally accepted as internationalizing a previously internal armed conflict.[181]

Second, a third State intervenes in a civil war on the territory of another State with no established government. In this situation, often described as a 'failed State' scenario,[182] there is no entity capable of issuing an invitation or consent to an outside intervention. Even though in such a case the outside State is not, strictly speaking, fighting against another State—as there are no armed forces that could be attributed to the territorial State anymore—it is using force against the State by operating militarily within that State's territory without consent.[183] Similarly, under the terms of the UNGA Resolution

[180] Accord Vité (n 140) 73; Akande (n 32) 62; Fleck (n 32) 582.

[181] Allan Rosas, *The Legal Status of Prisoners of War* (Suomalainen Tiedeakatemia 1976) 285; Michael N Schmitt, Charles H B Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict* (IIHL 2006) [1.1.1(1)]; Moir (n 58) 46; Vité (n 140) 86; Akande (n 32) 57; contra Roger Pinto, 'Les règles du droit international concernant la guerre civile' (1965-I) 114 Recueil des Cours 451, 464–465 (considering that the conflict remains non-international in this case because the underlying political objective of all warring parties remains the same: the overthrow or the retention of the established government).

[182] See, eg, Daniel Thürer, 'The "Failed State" and International Law' (1999) 81 IRRC 731, 733–734; Yoram Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' in Kenneth Watkin and Andrew J Norris (eds), *Non-international Armed Conflict in the Twenty-first Century* (Government Printing Office 2012) 418 fn 33; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 164.

[183] Accord Rosas (n 181) 285; Gasser, 'International Humanitarian Law' (n 63) 510–511; Yoram Dinstein, *War, Aggression, and Self-defence* (4th edn, CUP 2005) 245; Kalshoven and Zegveld (n 77) 221; Akande (n 32) 73–74; but see Yoram Dinstein, *War, Aggression, and Self-defence* (5th edn, CUP 2011) 270 (silently abandoning the position from the previous edition); Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JCSL 245, 253–254; Lubell (n 33)

on Definition of Aggression, an attack by one State against the *territory* of another State does not have to involve an attack on the *armed forces* of that State to constitute an 'act of aggression', in other words a form of armed attack generally sufficient to trigger applicability of IHL.[184] Accordingly, in *Congo v Uganda*, the ICJ applied rules governing international conflict to the conduct of Ugandan forces in the Congo even though Uganda had not engaged Congolese governmental forces.[185]

2.2.2 Nature and intensity requirements

Military nature

The principle of non-intervention in the affairs of other States, enshrined in article 2(7) of the UN Charter, complements the principle of sovereign equality. Violations of this principle form a wide spectrum. As set out in the Declaration on Friendly Relations (1970), all forms of direct and indirect intervention in the external and internal affairs of other States, including 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements', violate the principle of non-intervention.[186] However, not every form of unsolicited foreign interference in an internal conflict leads to its internationalization.

95–96; Elizabeth Wilmshurst, 'Conclusions' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 484.

184 UNGA Res 3314 (XXIX) (Definition of Aggression) (14 December 1974), compare art 3(a) and (b), with art 3(d). See also ICRC, *Model Manual of the Law of Armed Conflict* (ICRC 1999) rule 501. ICRC considers intentional attacks against targets in the territory of another State as bringing about a situation of armed conflict between the two States irrespective of whether the armed forces of the State under attack are being engaged.

185 *Congo v Uganda* (n 88) [217]–[220]; but see *Lubanga* Trial Judgment (n 126) [541]. This author agrees with Akande's contention that—although the resort to force between States is the key characteristic of an international conflict—it is not required 'that both States must actually use force'. Instead, it suffices 'if one State uses force against another State'. Dapo Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities' (2010) 59 ICLQ 180, 185 fn 24; see further Akande, 'Classification of Armed Conflicts' (n 32) 73–79.

186 UNGA Res 2625 (XXV) (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) (24 October 1970), principle III, para 1.

While an expression of political support or provision of economic aid may benefit the insurgents, it does not make the outside State a party to the conflict.[187] Only assistance of military character, that is, intervention in the narrow sense of the term, the essence of which is force,[188] may position the outside State inside an ongoing internal conflict, thereby internationalizing the conflict.

Sufficient intensity

This assistance must surpass a certain level of intensity in order to constitute a relevant participation of the third State in the internal conflict. For instance, the ICTY in *Rajić* required a 'significant and continuous military action' by the outside armed forces.[189] It is submitted that the level of intensity of outside involvement must be such that makes the third State a party to the conflict. On the one hand, provision of technical counsellors or logistical support does not suffice, as it merely improves the standing of one of the conflict parties. On the other hand, regular and continuous engagement in hostilities by foreign armed forces renders the dispatching State a party to the conflict. By becoming a party to the conflict, the third State transforms the conflict into an international one.[190]

As a side note, this issue should not be confused with the separate question of the effects of internationalization on complex conflict situations featuring more than two conflict parties. This latter question is concerned with whether internationalization affects all conflict relationships extant in the territory of a particular State, merging them into a

[187] ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971* (ICRC 1971) vol V ('Protection of Victims of Non-International Armed Conflicts') 18–19.

[188] See TJ Lawrence, *Principles of International Law* (4th edn, DC Heath 1910) 124.

[189] *Rajić* Rule 61 Decision (n 10) [13].

[190] See also ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971* (n 187) vol V ('Protection of Victims of Non-International Armed Conflicts') 19.

single internationalized armed conflict ('global view'), or whether a number of independent conflicts of different legal nature may coexist in such territory afterwards ('mixed view').[191] It is dealt with in detail in a separate section which opts for a nuanced hybrid approach contingent on the extent of the mutual autonomy of the multiple conflict parties.[192]

2.2.3 Indirect intervention

So far, this chapter has dealt with direct forms of intervention, in which the outside State acts in another State's territory through its own armed forces. A third State may, however, become a party to the conflict also by acting through insurgents within another State's territory, provided that it wields sufficient control over the group. As demonstrated in the recent ICTY judgement in the *Prlić* case, an outside State may be simultaneously intervening both directly *and* indirectly.[193]

The test used to measure the level of control required to establish an indirect intervention is controversial. The controversy originates in ICTY's assessment of the conflict in Bosnia and Herzegovina. While the Trial Chamber in *Tadić* concluded that the conflict was not international,[194] the Appeals Chamber in the same case reached the opposite conclusion.[195] It is argued first, that both Chambers misconstrued the law of State responsibility in their respective analyses, and second, that a test based on State responsibility is ill-suited for the determination of internationalization of internal conflict

[191] See, eg, Stewart (n 11) 333–335; Pejić (n 26) 90–91.

[192] See section 6 of the present chapter.

[193] *Prlić* Trial Judgement (n 10) vol 3 [568].

[194] *Tadić* Trial Judgement (n 10) [607].

[195] *Tadić* Appeal Judgement (n 10) [162].

by outside intervention. Finally, an alternative test, based on the existence of two parties to the conflict, is proposed.

Application of the law of State responsibility in the case-law of international tribunals

Interpretation of the Nicaragua ruling by the Tadić Trial Chamber

The ICTY assessed the nature of the armed conflict in Bosnia and Herzegovina as part of the examination of its jurisdiction over grave breaches of the Geneva Conventions allegedly committed by Duško Tadić. As the provisions governing grave breaches are only applicable in IACs, the Trial Chamber examined the relationship between the armed forces of the *Republika Srpska* ('VRS', an insurgent entity within Bosnia) and the Federal Republic of Yugoslavia ('FRY', the third State closely allied with and supporting the VRS). It chose the test of imputability imported from the law on State responsibility, as interpreted by the ICJ in *Nicaragua*.[196] While the Trial Chamber did not clearly set out the conditions it deemed to be applying, it cited a passage of the ICJ judgment analysing whether the relationship between the rebels and the third State 'was so much one of dependence on the one side and control on the other' that the rebels could be equated with an organ or an agent of the third State.[197]

In order to determine whether this was the case in *Tadić*, the Chamber required the Prosecution to demonstrate not only dependence of the VRS on the FRY, but also that the FRY 'exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the [FRY]'.[198] After determining that the FRY played a vital role in the establishment, support and staffing of

[196] *Tadić* Trial Judgement (n 10) [585].

[197] ibid [585], citing *Nicaragua* (n 103) [109].

[198] *Tadić* Trial Judgement (n 10) [588].

the VRS, it narrowed down the question to whether, 'as the [ICJ] required of Nicaragua' (without citing a specific point in ICJ's judgement), the FRY exercised 'effective control over the operations of the VRS'.[199] It then concluded on examination of the facts that although the two were 'highly dependent allies', the VRS could not be considered as de facto organs or agents of the FRY and therefore, the conflict was not of international nature.[200]

Analysis of the Tadić Trial Judgement

The question of imputability of acts of non-State actors to third States is addressed in article 8 of the ILC Articles on State Responsibility:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Should influence and control of the third State over a non-State actor—an individual or a group—grow to the level that such an actor becomes indistinguishable from an organ of the said State, article 4(1) of the ILC ASR becomes applicable. It prescribes that 'conduct of any State organ shall be considered an act of that State under international law'.

Reflecting the logic of these customary[201] norms, the ICJ separated in the *Nicaragua* case the scrutiny of the relationship between a State and a non-State armed group into two complementary tests.[202] The first of them has been described variously as the 'agency

[199] ibid [595].

[200] ibid [606]–[607].

[201] See, eg, *Case Concerning the 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 91 [385] (re article 4) and [398] (re article 8).

[202] This interpretation of the ICJ judgment was made, inter alia, by Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493; Marko Milanović, 'State Responsibility for Genocide' (2006) 17 EJIL 553; and Judge McDonald in her dissenting opinion in *Tadić* Trial Judgement (n 10). It was confirmed by the ICJ in *Bosnian Genocide* (n 201).

test',[203] 'strict control test'[204] or 'complete control test'.[205] In it, the Court, in order to determine whether a relationship of agency equivalent to that between a State and its organs has formed, required the rebels to be completely dependent in all fields of activity on the third State and the third State to actually make use of that dependence.[206] If these requirements were met, the Court would attribute *all* acts of the rebel group to the third State.[207]

In the opposite case, the second test, one of 'effective control', would become applicable as a subsidiary legal test.[208] In this test, only certain acts of the insurgent group would be imputed to the third State, even if a relationship of complete dependence did not exist between the two actors.[209] However, it must be shown that the rebels acted under the third State's instructions or under its effective control.[210] Specifically, the third State 'must be able to control the beginning of the operation, the way it is carried out, and its end.'[211] Admittedly, the ICJ did not make the relationship of subsidiarity between the two tests explicit in *Nicaragua*. However, it is apparent from the methodology of the scrutiny that it only turned to the 'effective control' test after determining that it could not equate the rebels with a State organ of the outside State in question.[212]

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[203] *Tadić* Appeal Judgement (n 10) [106] (summarizing the prosecution submissions).

[204] Talmon (n 202) 498.

[205] Milanović (n 202) 576.

[206] *Nicaragua* (n 103) [109].

[207] ibid [116]; see also *Bosnian Genocide* (n 201) [397].

[208] Talmon (n 202) 502; Milanović (n 202) 577.

[209] *Nicaragua* (n 103) [115].

[210] ibid [115]; *Bosnian Genocide* (n 201) [400].

[211] Talmon (n 202) 503.

[212] *Nicaragua* (n 103) [109]–[115]; see further text to nn 218–222below.

Therefore, it is submitted that the Trial Chamber in *Tadić* misconstrued *Nicaragua* by conflating the two tests and applying them interchangeably to the case at hand. In her dissenting opinion, Presiding Judge McDonald criticized this error[213] and argued that the facts of the case warranted stopping the inquiry with the first test, which had established an agency relationship between the VRS and the FRY.[214]

Reaction by the Tadić Appeals Chamber and its analysis

Despite having at its disposal Judge McDonald's analysis and concurring Prosecution submissions,[215] the Appeals Chamber in the same case rejected that *Nicaragua* established the two described tests of State responsibility.[216] Instead, it argued that the ICJ, by its reference to 'effective control' was merely 'spelling out the requirements of the same test'.[217]

This claim of just one general test of attribution appears to be unwarranted. First, the ICJ in *Nicaragua* did indeed use two tests *seriatim*. Only after rejecting that the rebels could be equated with organs of the third State ('agency test')[218] did the Court analyse whether State responsibility could be established based on that State's effective control over the military or paramilitary operations of the rebels ('effective control test').[219] Second, the logic of the rules on State responsibility dictates that even if an entity does not act as an organ of the State (thus establishing responsibility under article 4 ILC ASR),

[213] *Tadić* Trial Judgement (n 10) Separate and Dissenting Opinion of Judge McDonald, 294–295.

[214] ibid, Separate and Dissenting Opinion of Judge McDonald, 298.

[215] cf *Tadić* Appeal Judgement (n 10) [111].

[216] ibid [112].

[217] ibid [112].

[218] *Nicaragua* (n 103) [109]–[110].

[219] ibid [115].

it can still incur subsidiary responsibility for acts under direction or control of that State (article 8 ILC ASR). Finally, despite the perhaps 'somewhat unclear'[220] and 'not always … straight'[221] line of reasoning adopted by the ICJ in *Nicaragua*, the same Court expressly confirmed this interpretation in *Bosnian Genocide*.[222]

Use of the rules on State responsibility to determine conflict nature

Dismissal of the Nicaragua ruling by the Tadić Appeals Chamber; 'overall control' test

The Appeals Chamber in *Tadić* insisted that the ICJ applied a single threshold for State responsibility, namely one of 'effective control'.[223] It then criticized this test as defying the logic of the system of international law on State responsibility.[224] The Chamber saw the purpose of the law of State responsibility in preventing States from acting through individuals and shedding responsibility whenever these individuals breached international law.[225] It concluded that due to the hierarchy and structure of authority present in organized armed groups as opposed to individuals and unorganized groups,[226] a lower standard of 'overall control' should be used to establish State responsibility for acts of organized groups:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.[227]

[220] *Tadić* Appeal Judgement (n 10) [114].

[221] ibid [108].

[222] cf *Bosnian Genocide* (n 201) [391]–[393], [399]–[400].

[223] *Tadić* Appeal Judgement (n 10) [112].

[224] ibid [124].

[225] ibid [117].

[226] ibid [120].

[227] ibid [131].

The two elements apparent from this test—supporting and co-ordinating—were further elaborated on in the later cases before the ICTY.[228] As the law stands today, the test requires the intervening State (1) to provide the armed group with financial and training assistance, military equipment and/or operational support, and (2) to participate in the organization, co-ordination or planning of military operations with the armed group.[229]

Analysis of the Tadić Appeals Judgement

By introducing this new standard of 'overall control', the Appeals Chamber created the possibility that a State would be held responsible for the conduct of groups, which retained a significant degree of independence and were not subject to operational control and instruction. In doing so, it has not only stretched the connection that must exist between the conduct of a State's organs and its international responsibility 'almost to a breaking point',[230] but it has, it is submitted, departed from the logic behind the interplay of articles 4 and 8 ILC ASR, thereby allowing attribution of acts well beyond what a State should answer for on the international plane. Finally, it is submitted that, to establish the nature of the conflict, the ICTY need not have dealt with the question of State responsibility at all.

The ICJ in *Nicaragua* did not apply the law of State responsibility to determine the nature of the conflict in Nicaragua. It dealt with issues of State responsibility in an unrelated part of the judgment and never connected the two issues[231]—this connection

[228] See, in particular, *Kordić and Čerkez* Trial Judgement (n 10) [115]; *Kordić and Čerkez* Appeal Judgement (n 10) [361]; *Naletilić and Martinović* Trial Judgement (n 10) [198]; *Prlić* Trial Judgement (n 10) vol 1 [86(a)].

[229] *Prlić* Trial Judgement (n 10) vol 1 [86(a)]; cf Talmon (n 202) 506.

[230] *Bosnian Genocide* (n 201) [406].

[231] cf *Nicaragua* (n 103) [109], [115] (State responsibility), and [219] (conflict nature); see also Theodor Meron, 'Classification of Armed Conflict in the former Yugoslavia: Nicaragua's Fallout' (1998) 92 AJIL 236, 241; Milanović (n 202) 578–579 fn 129 (observing sardonically that the fact that 'the relevant parts of the *Nicaragua* judgment are separated by more than a hundred paragraphs is an obvious indication').

was first made by the ICTY Trial Chamber in *Tadić*.[232] The Trial Chamber was mute on why it turned to the law on State responsibility. The Appeals Chamber attempted to fill this gap and justify its approach by claiming that IHL lacked unique criteria for determining whether a group of individuals is 'under the control of a State'.[233] Because of this absence of *lex specialis*, the Appeals Chamber turned to the *lex generalis* comprised of the norms of State responsibility laid down in general international law.[234]

It is submitted that this reliance on the law of State responsibility is erroneous. As Milanović aptly puts it,

> international humanitarian law is in no way *lex specialis* to the law of state responsibility: the issue of the qualification of the legal nature of an armed conflict is solely one for international humanitarian law, and has nothing to do with the law of state responsibility, even though the factual patterns on which these branches of law operate might be very similar.[235]

As a final comment at this point, it bears noting that this view *had* been represented among the ICTY's judges prior to the *Tadić* ruling, although, regrettably, the Appeals Chamber chose not to endorse it.[236]

Proposal of alternative test decoupling State responsibility and conflict qualification

IHL must be capable of determining its applicability within the framework of its own norms. It is not concerned with the *subjective* question of responsibility for the conduct of States; its sole aim is to adjudge the *objective* question whether two opposing States are parties to an armed conflict. This is best assessed not by examining whether a third State

[232] *Tadić* Trial Judgement (n 10) [585].

[233] *Tadić* Appeal Judgement (n 10) [98].

[234] ibid [98].

[235] Milanović (n 202) 587.

[236] See *Aleksovski* Trial Judgement (n 10) Dissenting Opinion of Judge Rodrigues [21]; *Čelebići* Trial Judgement (n 10) [230].

can be held internationally responsible for the acts of a rebel group against the territorial State, but by focusing on whether a State has used force through a non-State group. Apart from few exceptions,[237] it is only through the use of force that an IAC comes about.[238]

The necessary extent of control by a third State over the insurgents may vary. It is submitted that elements of the test of 'overall control' help establish whether force has been used by one State against another. If an outside State supports rebels materially or logistically (first step of the test), it cannot yet be said to be using force through them. Its involvement would still, however, amount to a violation of the principle of non-intervention.[239] Only when an outside State also participates in organizing and co-ordinating rebels within another State's territory (second step), its involvement would amount to use of force against the latter State.[240] Nevertheless, at this point the rebels could still maintain a degree of independence to the extent that they would not be considered the State's de facto organs or entities effectively controlled by it for the purposes of determining State responsibility.[241]

There are several advantages to accepting this test for the internationalization of armed conflicts. First, separating the rules on the nature of armed conflicts and those on

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[237] See nn 87–89 and accompanying text above (discussing occupation without armed resistance as one of the triggers of IAC).

[238] See also *Tadić* Appeal Judgement (n 10) Separate Opinion of Judge Shahabuddeen [7]–[14] and [24].

[239] cf *Nicaragua* (n 103) [228], [292(3)].

[240] cf ibid [228]. The required degree of support may be disentangled from the question of 'control' altogether: *participation* in organization and co-ordination is not equivalent to *control* and thus, to some extent, the notion of 'overall control' is a misnomer. The German national courts used in their analysis of the nature of the Yugoslavian conflict a test that did not refer to control, yet would—in the opinion of this author—result in the same determination as the 'overall control' test. In *Jorgić*, the Higher Regional Court of Appeal of Düsseldorf required a 'close personal, organisational and logistical interconnection' between the intervening State (FRY) and the insurgent group (VRS) to hold that, after 19 May 1992, the conflict in Bosnia and Herzegovina had been international. The judgment was not published; for the reference see Talmon (n 202) 514 fn 130.

[241] cf *Nicaragua* (n 103) [292(9)].

State responsibility will improve the doctrinal purity of these areas of international law. Second, embracing a test, upon which the ICTY and other international courts have relied as precedent[242] would not endanger the concerned decisions made since *Tadić*. Third, this would resolve the ongoing dispute between the ICTY and ICJ,[243] perceived by some as a demonstration of the alleged process of 'fragmentation' of international law.[244]

2.3 Intervention by international organizations

Although this chapter has so far considered only instances of intervention by States, post-World War II practice shows that international organizations can also be the subjects of outside interference in an internal armed conflict. This type of interference primarily includes peace-keeping and peace-enforcement operations sanctioned by the United Nations. Moreover, regional organizations such as the ECOWAS, NATO or EU have also intervened in internal conflicts. These operations come in a wide variety and only some of them have the potential to transform the nature of a conflict. I will first look at situations, which clearly lack this potential, either because the intervention is not of sufficient intensity or because it is consensual.

[242] See, eg, *Prosecutor v Aleksovski* (Appeal Judgement) IT-95-14/1-A (24 March 2000) (ICTY) [134]; *Čelebići* Appeal Judgement (n 10) [26]; *Naletilić and Martinović* Trial Judgement (n 10) [184]; *Kordić and Čerkez* Appeal Judgement (n 10) [307]; *Prlić* Trial Judgement (n 10) vol 1 [86(a)]; *Prosecutor v Brima et al* (Trial Judgement) SCSL-04-16-T (20 June 2007) (SCSL) [251].

[243] Both courts have labelled the analyses of the other institution as 'unpersuasive', leading to an impasse that cannot be institutionally resolved given the lack of hierarchy among international judicial institutions. See *Tadić* Appeal Judgement (n 10) [115]; *Bosnian Genocide* (n 201) [404].

[244] See, eg, Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553, 564–567.

2.3.1 Nature and intensity requirements

Sufficient intensity

First, classic peace-keeping operations based on the consent of all parties to the conflict and limited in their mandate to refrain from the use of force except in self-defence[245] cannot be said to trigger the application of IHL in and of themselves. For instance, the 2008–9 EU military operation in Chad and the Central African Republic (Operation EUFOR Tchad/RCA) was to operate as a non-belligerent force, unaligned with any of the conflict parties and tasked with the protection of civilians and facilitation of the delivery of humanitarian aid.[246] Such a multinational force does not become a party to the conflict and its personnel do not become combatants.[247] In addition to the domestic law of the territorial State, the troops' conduct may be governed by rules agreed by the dispatching international organization and contributing countries.[248] However, norms of IHL do not apply unless and until the troops engage in combat exceeding the use of force in individual self-defence.[249] As the international organization stays outside of the armed conflict, the non-international nature of the conflict remains unaltered for the purposes of application of IHL.

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[245] cf Eric Suy, 'Peacekeeping Operations' in René Jean Dupuy (ed), *A Handbook on International Organisations* (1988) 379.

[246] UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778 [6(a)]; Council Joint Action (EU) 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L279/21; Council Joint Action (EU) 2009/795/CFSP of 19 October 2009 repealing Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic [2009] OJ L283/61.

[247] cf *Prosecutor v Sesay et al* (Trial Judgement) SCSL-04-15-T (2 March 2009) (SCSL) [233] (holding that the protection of peacekeepers as civilians does not cease if they only use armed force in exercising their right to individual self-defence).

[248] See, eg, Report of the Special Committee on Peacekeeping Operations and its Working Group, Annex (Revised Draft Model Memorandum of Understanding), UN Doc A/61/19/Rev.1 (2008) 39–46.

[249] Convention on the Safety of United Nations and Associated Personnel (signed 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, art 2(2) *a contrario*; *Sesay* Trial Judgement (n 247) [233]; *Prosecutor v Bahar Idriss Abu Garda* (Confirmation of Charges Decision), Pre-Trial Chamber I, ICC-02/05-02/09 (8 February 2010) (ICC) [83].

Consent of the territorial state

Second, even if a multinational force intervenes without the consent of one or more of the insurgent groups operating in the territory of a State, the nature of the conflict does not change if force is used with the consent of the State. Similarly to third State intervention in support of the established government,[250] the extension of consent over the actions undertaken by the international organization rules out conflict internationalization. Because the two subjects of international law are not acting against each other, the conflict remains internal, unless the insurgents can elevate their status by some other means.[251]

2.3.2 Internationalizing forms of intervention

The remaining modality of internationalization through outside intervention by an international organization is that through 'peace-enforcement' operations initiated by international organizations without consent of the territorial State and with a mandate to use force to achieve the mission's aims.[252] The only international body authorized to conduct such operations is the United Nations acting through the Security Council under Chapter VII of the UN Charter. A regional enforcement action may lawfully be undertaken only with the Security Council's authorization.[253]

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[250] See section 2.1 above.

[251] But see ICRC, 'Expert Meeting on Multinational Peace Operations: Report' (2003) <https://www.icrc.org/eng/assets/files/other/icrc_002_0912.pdf> accessed 1 October 2014, 11.

[252] As stated above, international forces that were not originally mandated to engage in hostilities may still become involved in fighting, either on their own initiative or in self-defence against an outside attack. Such a case would also be treated according to the principles discussed in this section.

[253] UN Charter, art 53(1); see further Michael Akehurst, 'Enforcement Action by Regional Agencies' (1967) 42 BYBIL 175; for the opposing view see, eg, Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 Temp Int'l & Comp LJ 333. Discussion of the legality or otherwise of the so-called humanitarian intervention is beyond the scope of this work.

Nevertheless, on several occasions regional organizations have used force on the territory of a third State without the State's consent or a prior Security Council authorization. For example, in 1991 ECOWAS intervened in the Liberian civil war in order to stop the violence and restore law and order;[254] and in 1999 NATO intervened against governmental forces of the Federal Republic of Yugoslavia with purported aim to 'prevent an overwhelming humanitarian catastrophe' resulting from ethnic cleansing of the Albanian ethnic minority in Kosovo.[255] The legality of such actions is a question of *jus ad bellum* and as such it is accordingly beyond the scope of this work. For greater clarity, the ensuing analysis focuses on UN operations; however, the described principles would, unless otherwise specified, apply to other international organizations as well.

There are essentially two models of command structure in international peace enforcement operations. The command authority and operational control[256] may remain with the troop-contributing States as was the case in the 1950–53 Korean War (military forces from individual States were placed under the unified command of the United States[257]) or in the 1991 Gulf War (States responding to the Iraqi invasion of Kuwait acted individually with authorization of the Security Council[258]). Alternatively, command and control over multinational forces may rest with the international organization as it did in the United Nations Operation in Congo (ONUC) in 1961[259] or in the Somali

[254] ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90, on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia (7 August 1990), reproduced in Marc Weller, *Regional Peace-keeping and International Enforcement: The Liberian Crisis*, vol 6 (Grotius Publications 1994) 67–68.

[255] UN Doc S/PV.3988 (24 March 1999) 12 (United Kingdom).

[256] See Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (CUP 2007) 115–116 (defining the notions of command and control).

[257] UNSC Res 84 (7 July 1950) UN Doc S/RES/84; see also Richard Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command' (1952) 29 BYBIL 325, 335.

[258] UNSC Res 678 (29 November 1990) UN Doc S/RES/678.

[259] UNSC Res 143 (14 July 1960) UN Doc S/RES/143 (establishing the ONUC); UNSC Res 161 (21 February 1961) UN Doc S/RES/161 (authorizing the ONUC to use force).

operation UNOSOM after it was endowed with enforcement powers in 1993.[260] In the former model, the sending States become the conflict parties for the purposes of IHL; in the latter, the United Nations becomes a conflict party itself.[261]

International troops subject to command and control of contributing states

In the first model, the responsibility for the national contingents' conduct remains with the States. Even with the United Nations authorization, a national force retains the status of the sending State's organ.[262] According to article 7 of the Draft Articles on the Responsibility of International Organizations, the responsibility would shift to the organization only if the international body exercised 'effective control' over the force's conduct.[263] However, in this model such control is precluded by the fact that command authority and operational control remains with the sending States.

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[260] UNSC Res 751 (24 April 1992) UN Doc S/RES/751 (establishing the UN operation in Somalia); UNSC Res 814 (26 March 1993) UN Doc S/RES/814 (expanding its mandate acting under Chapter VII of the UN Charter); Report of the Commission of Inquiry Established pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties Among Them, UN Doc S/1994/653 (24 February 1994) 26 [125] (reporting that 'a virtual war situation' between the UN forces in Somalia and domestic armed militias occurred over the course of four months). In practice, however, '[m]any major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations'. ibid 45 [244].

[261] The following text justifies this position with reference to the law governing international responsibility of States and international organizations. It should be reiterated that this author considers that IHL is capable of determining its applicability within the framework of its own norms and that, when determining the legal nature of armed conflicts, it is not concerned with the subjective question of responsibility (see text to nn 237–244 above). The analysis of the norms governing international responsibility is undertaken only in order to identify the entity that should properly be seen as the relevant conflict party. In other words, the ensuing text looks into who controls the forces in question in order to determine who should be considered as the intervening third party: the contributing States, or the authorizing international organization? See also Akande, 'Classification of Armed Conflicts' (n 32) 64 ff (distinguishing between UN-authorized forces that should 'be regarded simply as a national armed force' and those 'to be regarded instead as a UN force with the UN having responsibility under international law for the acts of those forces').

[262] cf ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, UN GA Res 56/83 annex, UN Doc A/RES/56/83 (12 December 2001) ('ILC ASR'), art 4.

[263] ILC Draft Articles on Responsibility of International Organizations, UN Doc A/66/10 (2011) ('ILC DARIO') art 7.

A decision contrary to the above conclusion was given by the ECtHR in *Behrami and Saramati*,[264] which held that even the conduct of national forces acting with UN authorization, but outside of the United Nations chain of command, is attributable to the UN.[265] The European Court considered, inter alia, whether detaining the applicant on the KFOR commander's orders fell within that court's jurisdiction *ratione personae*[266] and found the case inadmissible, the UN not being a party to the ECHR.[267] Considering the criterion of 'effective control' in article 7 ILC DARIO as applicable,[268] the Court nevertheless held that while KFOR had 'operational command', the 'ultimate authority and control' was retained by the Security Council.[269] Therefore, any conduct of the KFOR performed in the furtherance of the Security Council's authorization was attributable to the UN only.[270]

The European Court was widely criticized both for its reasoning and the conclusion.[271] For the present purposes, it suffices to say that the Court wrongly applied—or failed to apply—the 'effective control' standard built into article 7 of the ILC DARIO. As the ILC noted in response to the ECtHR's decision, 'when applying the criterion of effective control, "operational" control would seem more significant than

264 *Behrami and Behrami v France, Saramati v France, Germany and Norway* (App nos 71412/01 & 78166/01) (2007) 45 EHRR 85 (ECtHR).

265 ibid [132]–[141].

266 ibid [72], [121].

267 ibid [144]–[152].

268 ibid [31]–[32]. The text of the ruling speaks of article 5, but the provision was later renumbered, first to article 6, and finally to article 7 (used in the main text of this study).

269 ibid [133]–[134].

270 ibid [141].

271 See, eg, Marko Milanović and Tatjana Papić, 'As Bad as It Gets: The European Court of Human Rights Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267. For further references, see Draft Articles on the Responsibility of International Organizations, with Commentaries (2011), in Yearbook of the ILC, 2011, vol II, part two, 23–24, commentary to art 7 [10] fn 115.

"ultimate" control, since the latter hardly implies a role in the act in question'.[272] When the Security Council gives mandate for an operation but has no actual control over the troops' conduct, responsibility for such conduct lies with the contributing States. It is submitted, therefore, that to the extent that *Behrami and Saramati* suggests otherwise, it was wrongly decided.[273]

Since the sending State retains responsibility over the conduct of the contingent under its command authority and operational control, it is the State that is also a party to the conflict, not the organization authorizing the mission.[274] Hence, the conflict is internationalized (or not) according to the principles and rules applicable to third State intervention.[275]

International troops subject to command and control of international organization

In the second model, the responsibility for the conduct of armed forces is vested with the international organization, which acts as a separate legal entity distinct from its troop-contributing member States. The United Nations possesses a separate legal personality

[272] Draft Articles on the Responsibility of International Organizations, with Commentaries (2011), in Yearbook of the ILC, 2011, vol II, part two, 23, commentary to art 7 [10]. But see Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649, 667.

[273] See also *Al-Jedda v UK* (App no 27021/08) [2011] ECHR 1092 (ECtHR) [80]–[84] (holding that an authorization granted by the Security Council does not by itself result in all conduct undertaken on the basis of this authorization being attributable to the United Nations and not to the troop-contributing States). Regrettably, the Court did not dispense of the criticism of its ruling in *Behrami* and satisfied itself with holding that neither the 'effective control test' nor the 'ultimate authority and control test' would have been met on the facts of the case. See ibid [84].

[274] This is consonant with State practice: see, eg, Dutch Minister of Defence, Note to the Senate on Legal aspects of military deployment, Kamerstukken I 2003/2004 29200 X, C (28 April 2004), reproduced in (2005) 36 NYBIL, 348–349; Agreement concerning the service with the United Nations Peace-Keeping Force in Cyprus of the national contingent provided by the Government of Canada (signed 21 February 1966, deemed to have taken effect from 13 March 1964) 555 UNTS 120 [10] (recognizing expressly this responsibility). The relevant text is identical to that of the agreements concluded between the UN and the other seven contributing States (Austria, Australia, Denmark, Finland, New Zealand, Sweden, and UK).

[275] See section 2.2 above.

under international law[276] and is responsible for acts carried out by its organs;[277] these principles may also be extended to other organizations acting in situations of armed violence. Furthermore, international organizations bear responsibility for organs or agents placed at their disposal by third States or international organizations.[278] Although a State's military force is normally considered to be such State's organ under the law of international responsibility,[279] the functional link between that State and its troops is severed when the troops are placed under the UN command. While some powers, especially those of disciplinary and criminal nature, are likely to remain with the contributing State,[280] troops commanded by the UN are subject to its effective control. As a result, the key functional link between an armed force and the contributing State is replaced by a novel link between the force and the UN and, consequently, the force's conduct is attributable to the UN.[281] Troops under the UN chain of command are in a position equivalent to that of UN organs,[282] which has in principle been accepted by the

[276] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179; see also text to nn 947–949 below.

[277] *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [66]; see also Draft Articles on the Responsibility of International Organizations, with Commentaries (2011), in Yearbook of the ILC, 2011, vol II, part two, 13, commentary to art 3 [3].

[278] ILC DARIO, art 7.

[279] ILC ASR, art 4.

[280] See Michael Bothe, 'Peacekeeping' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 691 fn 249; Draft Articles on the Responsibility of International Organizations, with Commentaries (2011), in Yearbook of the ILC, 2011, vol II, part two, 20, commentary to art 7 [1].

[281] Draft Articles on the Responsibility of International Organizations, with Commentaries (2011), in Yearbook of the ILC, 2011, vol II, part two, 23, commentary to art 7 [9]. But see *Attorney-General v Nissan* [1970] AC 179 (House of Lords) 223 per Lord Pearce.

[282] It is submitted that this formulation is preferable to Bothe's claim that the placing of the national contingent at the UN's disposal actually makes the unit 'an organ of the UN'. Bothe (n 280) 691.

UN itself.[283] Therefore, if the UN uses force through these troops, it becomes a party to the conflict.[284]

The remaining issue is to establish whether international organization becoming a party to an internal armed conflict internationalizes the conflict in terms of applicable rules of IHL. In order to answer this question, the study first deals with the objection that due to its privileged position the UN cannot be subject to the same rules of conduct in war as ordinary belligerents. Second, the study considers whether an international organization may be subject to norms applicable to IACs codified in the Geneva Conventions whose text is prima facie limiting in that respect.

The argument that the UN should be subject to a privileged set of rules or none at all due to its distinct nature and the higher moral ground of its operations has been made repeatedly virtually since the organization was established. Among the early prominent proponents, Lauterpacht opined that due to its dignity and purpose, 'the collective enforcement of the basic instrument of organized international society [i.e. the UN Charter] … should rank in a category different from war' (thus dissociating it from the application of the laws of war).[285] A committee of the American Society of International Law, which counted Hans Kelsen among its six members, ostensibly led by the same rationale, suggested in 1952 that the UN should not be bound by all laws of war but only

[283] ILC, Responsibility of International Organizations: Comments and Observations Received from International Organizations, UN Doc A/CN.4/545 (25 June 2004) 17–18.

[284] This conclusion is also supported by international practice. See Agreements providing for compensation of damage arising from the conduct of the ONUC forces in the Congo, concluded by the UN with Belgium (535 UNTS 197), Greece (565 UNTS 3), Italy (588 UNTS 197), Luxembourg (585 UNTS 147), and Switzerland (564 UNTS 193); Report of the UN Secretary General: Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations, UN Doc A/51/389 (20 September 1996) 6 [17]; ILC, Responsibility of International Organizations: Comments and Observations Received from International Organizations, UN Doc A/CN.4/545 (25 June 2004) 17; Dutch Minister of Defence, Note to the Senate on Legal aspects of military deployment, Kamerstukken I 2003/2004 29200 X, C (28 April 2004), reproduced in (2005) 36 NYBIL, 348–349.

[285] Hersch Lauterpacht (ed) *Oppenheim's International Law* (7th edn, Longmans 1952) 224–225.

choose those rules that 'fit its purposes'.[286] In the model agreement with the troop-contributing States issued in the early 1990s, the UN still insisted that it would only observe the 'principles and spirit' of IHL in peacekeeping operations.[287] Notably, in 1999, Kofi Annan as the UN Secretary-General avoided such sweeping terms in a non-binding bulletin on the observance of IHL by the UN forces.[288] Nevertheless, the essence of his proclamation was very much in line with the view of Lauterpacht and Kelsen propounded half a century earlier—the UN chose which norms it deemed applicable to its own operations:

> The fundamental principles and rules of international humanitarian law *set out in the present bulletin* are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.[289]

Although the rules listed in the same bulletin represent the main principles of IHL and exceed the protection given in common article 3, they still lack comprehensiveness of the full body of law applicable to IACs.[290]

It is submitted that an exemption from the full application of IHL for one party to the conflict, no matter how noble its aims or dignified its purpose, would significantly diminish the other party's incentive to follow the same norms. Indeed,

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[286] Report of Committee on Study of Legal Problems of the United Nations, 'Should the Law of War Apply to United Nations Enforcement Action?' (1952) 46 ASIL Proceedings 216, 220.

[287] Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary-General, UN Doc A/46/185 (23 May 1991) [28].

[288] Secretary-General's Bulletin, 'Observance by United Nations forces of international humanitarian law', UN Doc ST/SGB/1999/13 (6 August 1999).

[289] ibid, s 1 (emphasis added).

[290] See also Ivan Shearer, 'Rules of Conduct During Humanitarian Intervention' (2002) 78 International Law Studies 71, 77.

> it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from the rules of warfare without being bound by them.[291]

Instead of furthering humanitarian aims of the United Nations, such an approach would conflate unacceptably *jus ad bellum* with *jus in bello*,[292] violate the principle of equal application of IHL which stands at the core of this body of law,[293] and create a race to the bottom insofar as applicability of humanitarian norms is concerned.

Moreover, exempting the UN as such from the full application of IHL would violate the legal maxim *nemo plus juris transferre potest quam ipse habet* (no one can transfer a greater right than he has himself). In the area of IHRL, the ECtHR held expressly that States may not absolve themselves from their responsibility under human rights conventions by establishing international organizations and transferring to them competences originally belonging to the concerned States.[294] It is submitted that a similar logic applies to the rules of IHL. Under common article 1 of the Geneva Conventions and corresponding norms of international customary law, the States are bound to respect the full extent of IHL 'in all circumstances'.[295] Therefore, they cannot skirt its application in situations of peace enforcement by transferring their power to use force onto an international organization they themselves established—this would amount to attributing

[291] Lauterpacht, 'The Limits of the Operation of the Law of War' (n 9) 242.

[292] cf AP I, preamble (IHL applies 'without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict').

[293] For a general summary of the principle and its contemporary significance, see Adam Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90 IRRC 931; for its relevance to internationalized armed conflicts, see chapter 3, section 3.2 below.

[294] *Waite and Kennedy v Germany* (App no 26083/94) (1999) 30 EHRR 261 (ECtHR) [67]; *Bosphorus v Ireland* (App no 45036/98) (2006) 42 EHRR 1 (ECtHR) [154].

[295] See also *Nicaragua* (n 103) [220] (confirming that the obligation to respect and to ensure respect for the Conventions derives not only from the Conventions themselves, but is also part of international customary law).

to the UN a power which its constituent States did not possess.[296] Hence, the argument that the scope of the rules applicable to the UN forces should significantly differ from those applicable to States flouts the precepts of IHL and general international law alike, and must be rejected. The fact that the UN (or any other such entity) possesses the material capacity to become party to an armed conflict gives rise to its subjective capacity to be bound by IHL.[297] This seems to be the prevalent view among the States, as well.[298]

Finally, the UN is a subject of international law[299]— albeit of derivative nature and with limited legal capacity—that may, by virtue of its establishing document, participate in armed conflicts. As the organization can be a party to a conflict in a way analogous to that of third States, its involvement duly transforms the legal nature of an internal conflict. True, textually the conflict does not occur between two 'High Contracting Parties' to the Geneva Conventions as required by common article 2(1) simply because the UN is not a party to the Conventions. In the language of the Conventions,[300] however, the UN is clearly a Power which is eligible to become a party to a conflict.[301]

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296 cf Terry D Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 NYBIL 33, 82.

297 Tristan Ferraro, 'IHL Applicability to IOs Involved in Peace Operations' (2012) 42 Proceedings of the Bruges Colloquium 15, 17.

298 See, eg, Netherlands, *Humanitair Oorlogsrecht: Handleiding [Humanitarian Law: Manual]* (Koninklijke Landmacht, Militair Juridische Dienst 2005) [1231]; UK, House of Lords, Written answer by Parliamentary Under-Secretary of State, FCO, HL Deb 10 March 2003, vol 645 col WA143 <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030310/text/30310w01.htm> accessed 1 October 2014; *UK Military Manual* (n 141) [14.3]–[14.4]; see also Institute of International Law, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties (25 August 1999) para II.

299 *Reparation for Injuries* (n 276) 178.

300 GCs, common art 2(3) (stipulating that signatories shall be bound by the Conventions even in relation to a non-party Power if it 'accepts and applies the provisions thereof').

301 cf Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 130; La Haye (n 63) 20; but see Derek William Bowett, *United Nations Forces: A Legal Study* (Praeger 1964) 510.

Thus if it expressly accepts and applies the provisions of the Conventions, there should be no doubt as to the international character of the conflict.[302]

Nevertheless, taking into account the humanitarian aim underlying both the conventional norms of IHL and the UN Charter, it is submitted that common article 2 should be interpreted broadly to include hostilities between a High Contracting Party (the non-consenting territorial State) and an international organization entrusted with maintaining collective security by States who are all High Contracting Parties themselves. Should this line of argument be accepted, internationalization would result automatically without the need for the UN to make a declaration under common article 2(3). Accordingly, as long as the command and control over outside forces rests with the UN as it largely did during the peace enforcement operations in the Congo (1961) and Somalia (1993),[303] such conflicts should properly be seen as internationalized in the sense proposed in this thesis.[304]

3. Dissolution

This section focusses on the effects of the original NIAC itself and examines to what extent it can bring about internationalization without the involvement of any external forces. Eruption and escalation of hostilities during an internal armed conflict may

[302] That was, for example, the UN's practice with respect to its operation in Congo, the ONUC. See Letter from the UN Secretary-General to the ICRC reproduced in (1962) 2 IRRC 29, 29. This public communication followed a series of appeals made to the UN by the ICRC, demanding the widest possible application of IHL to UN operations. See, eg, Letter from President of ICRC to UN Secretary-General (8 November 1961), ICRC Archives, BAG 202-223-003.

[303] See nn 259–260 and accompanying text above.

[304] cf Finn Seyersted, *United Nations Forces in the Law of Peace and War* (AW Sijthoff 1966) 212–214 (arguing that the UN intervention in the Congo civil war constituted an IAC between the UN and the Katangese forces); Keiichiro Okimoto, 'Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences' (2003) 6 YIHL 199, 217–218 (arguing that the UN forces in the Congo and in Somalia were subject to the law of belligerent occupation); Akande, 'Classification of Armed Conflicts' (n 32) 69 (arguing that the hostilities between the UN forces and the Congolese armed forces amounted to an IAC).

produce effects domestically and abroad which transform the conflict's nature, rendering rules governing international conflicts applicable. This section examines, in particular, the effects of dissolution of a State on whose territory the conflict is underway and the destabilizing effect an armed conflict may have on its surrounding region.

3.1 Disintegration

In addition to contest over control or power within a State, one of the most frequent causes of internal conflict is a struggle of a non-State actor for independence from the central government. If the insurgents succeed, and a new State emerges while the conflict is still underway (for example, during some of the decolonization wars), the nature of that conflict changes. It is no longer an internal armed conflict between the insurgents and the established government, but rather an IAC between two sovereign States. The result would be identical if—instead of one State seceding from another—a State dissolved into two or more independent States (e.g., the former Yugoslavia).

In general international law, State secession is a legally neutral act (neither legal nor illegal) and it is only its consequences that have legal significance.[305] Internationalization of an armed conflict is one of these consequences—provided that the secession is successful and a new State is formed before the end of hostilities. As illustrated by the *Åland Islands* case,[306] pre-1945 international law required the seceding State-to-be to govern its territory effectively and with sufficient stability before it could be recognized as

[305] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 390; but see John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 102–104. The ICJ refused to discuss the legality *vel non* of State secession in its 2010 advisory opinion on Kosovo, see *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 141 [56].

[306] *Åland Islands Case* (1920) League of Nations Official Journal Spec Supp 3, 9 (holding that Finland did not become a State 'until a stable political organisation had been created' which was in 'May, 1918, [when] the civil war ended').

a State.[307] By implication, the original State would have either abandoned the armed struggle for the seceded territory or would have been defeated militarily.[308] As a result, those aspiring to independence could not achieve it until after the armed conflict had ended—whether by an agreement or through the defeat of the incumbent State's forces.

Control over territory still is, in principle, a precondition for a claim to statehood in international law.[309] However, after World War II, in several internal armed conflicts the independence of the emerging State was generally recognized well before the end of the conflict and thus before stability and permanence of control could be established.[310] These conflicts generally belong to two broad categories, namely (1) State secession in the decolonization context and (2) irreversible State dissolution.[311]

3.1.1 State secession of self-determination units

With respect to the first category, State practice shows that a State can emerge during an ongoing internal conflict, if the emerging entity is a distinct political unit to which the principle of self-determination applies.[312] Naturally, if article 1(4) of the Additional Protocol I was applicable, such a conflict would become international by virtue of legal

[307] Crawford (n 305) 383, citing William Vernon Harcourt, *Letters by Historicus on Some Questions of International Law* (Macmillan 1863) 9.

[308] cf Crawford (n 305) 382.

[309] ibid 59.

[310] This author does not consider recognition by third States to be constitutive of statehood; as long as objective conditions of statehood are met, recognition serves only as evidence of legal status. However, if recognition is entirely or nearly entirely lacking in relation to a specific entity, eg the Turkish Republic of Northern Cyprus or historically the South African Bantustan States, such an entity's claim to statehood is severely undermined as it would not be able to demonstrate its capacity to enter into relations with other States, which is one of the conditions of statehood under the Montevideo Convention. This is the perspective from which the presence or absence of third State recognition will be considered in the following text. See ibid (n 305) 27; Dugard and Raič (n 305) 98–99; Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art I.

[311] The ensuing analysis is based in large part on James Crawford's authoritative overview of State practice in relation to State secession, updated with respect to post-2006 practice. See Crawford (n 305) 383–418.

[312] Crawford calls these entities 'self-determination units', see ibid 115–121, 124–128.

fiction stipulated in the provision, regardless of the formation of a new State.[313] However, for reasons described later in this work, article 1(4) has so far never been applied in practice.[314]

Nevertheless, the emergence of new States during national liberation wars has removed the need for a legal fiction to the effect that two entities with full international personality are involved in the conflict. A relatively recent example is Guinea-Bissau's struggle for independence from Portugal between 1963 and 1974. The liberation movement of Guinea-Bissau emerged in 1963 and by the end of 1973, it achieved effective control over most (but not all) of the territory. At that point, it had also been recognized as a State by forty States and the UN General Assembly.[315] The conflict between the rebels and the parent State continued for a few more months until Portugal finally pledged to recognize Guinea-Bissau's independence in August 1974. However, Guinea-Bissau's statehood was widely believed to have been established well before then.[316]

Although the traditional requirements of stability and permanence, the corollaries of the principle of territorial integrity, are not fully met in cases such as Guinea-Bissau's, State practice indicates that these are trumped by the principle of self-determination. Consequently, a State may emerge while a conflict is still underway.[317] In practice, this depends on the reaction of third States, whose recognition affirmed Guinea-Bissau's statehood prior to Portugal's concession. The criteria for State recognition (popular

313 See section 4 of the present chapter.

314 See sections 4.3 and 4.5 of the present chapter.

315 UNGA Res 3061 (XXVIII) (Illegal Occupation by Portuguese Military Forces of Certain Sectors of the Republic of Guinea-Bissau and Acts of Aggression Committed by Them Against the People of the Republic) (2 November 1973) [1].

316 Crawford (n 305) 386 and sources cited therein.

317 ibid 387.

support and territorial control) are analogous to those for recognition of belligerency. Crawford's observation that in such cases, recognition of statehood may 'have replaced' recognition of belligerency[318] is perhaps a welcome development as it contributes to the confluence of the rules on modalities of internationalization. It should be noted, however, that the process of decolonization is considered to be complete (perhaps with the exception of Western Sahara).[319] Since the principle of self-determination of peoples gained prominence primarily in this specific context,[320] and its application to territories other than former colonies is not generally accepted in State practice, this mode of internationalization will in the future be sporadic to non-existent.

3.1.2 Irreversible state dissolution

Outside of the context of self-determination struggles, the only type of situation in which new States emerge during an internal conflict is in cases of irreversible State dissolution coupled with the extinction of the parent State, such as the dissolution of Yugoslavia in the early 1990s.[321] Before examining the salient features of this case, a distinction needs to be made between irreversible dissolution and situations in which the parent State continues to exist.

Since 1945, Crawford observes, virtually no unilateral secession—i.e. secession without the parent State's consent—has been successful.[322] The sole universally accepted

[318] ibid 387.

[319] cf Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 171–172.

[320] cf *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 31.

[321] For previous attempts to define dissolution in this sense in international law, see, eg, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (signed 8 April 1983, not yet in force) UN Doc A/Conf 117/14, art 18; ILC Articles on Nationality of Natural Persons in Relation to the Succession of States, UN Doc A/54/10 (3 April 1999), art 22.

[322] Crawford (n 305) 390.

exception is Bangladesh, which had by 1973 been recognized as State by over 100 States and admitted to the Commonwealth, while facing continued opposition from Pakistan.[323] (Bangladesh's statehood was only recognized by Pakistan in February 1974.[324]) However, Bangladesh only achieved attributes of statehood and State recognition well *after* the close of hostilities, which had ended already in December 1971.[325] A more recent and controversial case is the one of Kosovo's unilateral declaration of independence in 2008.[326] Nevertheless, even if Kosovo were considered to have gained independence from Serbia and, consequently, statehood,[327] this would still have happened long after the end of the armed conflict between the Kosovo Liberation Army and the Serbian-Yugoslavian armed forces in 1999.[328]

Another potential recent example is, of course, Palestine. A plausible case may certainly be made in favour of Palestinian statehood especially following the UN General Assembly vote to grant it 'non-member observer State status' in 2012.[329] This is generally understood as the General Assembly's recognition of Palestine as a sovereign State.[330] Moreover, it has been said that the prevailing view among States and scholars is now in

323 Dugard and Raič (n 305) 121–122; but see Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood' (2013) 12 Chinese Journal of International Law 19, 25–26 and 30.

324 Elliot Tepper, 'The New Pakistan: Problems and Prospects' (1974) 47 Pacific Affairs 56, 59 fn 2b.

325 Dugard and Raič (n 305) 121–122.

326 Assembly of Kosovo, 'Kosovo Declaration of Independence' (17 February 2008) <http://www.assembly-kosova.org/?cid=2,128,1635> accessed 1 October 2014.

327 cf Vidmar (n 323) 30 (considering Kosovo to be an example of an entity with ambiguous legal status: '[f]or some it is a State, for others it is not') (internal footnotes omitted).

328 The 2010 ICJ advisory opinion concluded only that the UDI issued two years earlier did not violate any applicable rule of international law. The opinion expressly excluded the question whether or not Kosovo had achieved statehood following the UDI. *Kosovo* Advisory Opinion (n 305) [51], [123(3)].

329 UNGA Res 67/19 (Status of Palestine in the United Nations) (4 December 2012) [2].

330 See, eg, E Kontorovich, 'Israel/Palestine - The ICC's Uncharted "Territory"' (2013) 11 JICJ 979, 979–980.

favour of considering Palestine as an independent State,[331] although it must be added that this view is certainly not accepted without exception.[332] In any event, even if Palestine has by now become a State, it would be inappropriate to consider this to be the result of *secession* from a parent State. Israel is not the parent State vis-à-vis Palestine; it may at best be considered as the occupying Power exercising control over the occupied Palestinian territories[333] (which have been aptly though somewhat dissatisfyingly described as 'territories with a controversial international status'[334]). However, Israel has never been the territorial sovereign with regard to these territories.[335] Therefore, even assuming arguendo that Palestine has emerged as an independent State during the Israeli-Palestinian armed conflict, it would in any event not be an example of a successful secession from a parent State in the sense discussed here.

In sum, it appears that no State has ever achieved statehood during the conflict if the parent State continued to exist after the war. It may thus be concluded that as the law stands at present, such situations would not be internationalized by way of State disintegration.

Conversely, in cases of irreversible dissolution of the parent State, the issue of consent given by that State becomes irrelevant.[336] Logically, if a conflict leads to the

331 See, eg, Andreas Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?' (2013) 11 JICJ 303, Yaël Ronen, 'Israel, Palestine and the ICC - Territory Uncharted but Not Unknown' (2014) 12 JICJ 7, 8–9 fn 4–5; Charles F Whitman, 'Palestine's Statehood and Ability to Litigate in the International Court of Justice: Comment' (2013) 44 California Western International Law Journal 73, 77–87; Kai Ambos, 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction' (6 May 2014) <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/> accessed 1 October 2014.

332 See, eg, Joseph H H Weiler, 'Differentiated Statehood? 'Pre-States'? Palestine@the UN' (2013) 24 EJIL 1, 3–4; Vidmar (n 323) 40–41.

333 *Wall* (n 155) [78].

334 Bothe, Partsch and Solf (n 33) 50.

335 Crawford (n 305) 434.

336 ibid (n 305) 418.

destruction of the central authority which could speak on behalf of the former State, the consent of that State cannot be plausibly solicited. This impossibility of granting consent distinguishes the situation of complete State breakdown from a mere unilateral secession, as was the case of Bangladesh and, perhaps, Kosovo.[337] The obvious and (in spite of the ICTY's unsubstantiated statement suggesting otherwise[338]) so far the only example of the former in the post-1945 practice is the breakdown of the Socialist Federal Republic of Yugoslavia.

Although hostilities in Yugoslavia ended with the Dayton Peace Agreement in November 1995,[339] Member States of the European Community recognized statehood of the newly emergent States of Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina already between December 1991 (Germany's unilateral recognition of Slovenia and Croatia) and December 1993 (EU Member States' recognition of Macedonia).[340] Significantly, in *Tadić*, the ICTY accepted expressly the international nature of the conflict between the SFRY successor States (Bosnia and Herzegovina on the one side, and Serbia and Montenegro on the other) 'from the beginning of 1992', affirming that by that point they must have each acquired independent statehood.[341] The conditions of stability and permanence were thus overridden by a concern for the effectiveness of international law. Indeed, in the absence of a central government acting on behalf of the predecessor State,

[337] This distinction is not new to international law: cf Vienna Convention on Succession of States in Respect of Treaties (signed 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, arts 34–35.

[338] *Tadić* Appeal Judgement (n 10) [166] ('in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, *new States are often created during the conflict* and ethnicity rather than nationality may become the grounds for allegiance.') (emphasis added).

[339] Bosnia and Herzegovina-Croatia-Yugoslavia, General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Paris (entered into force 14 December 1995) (1996) 35 ILM 75 ('Dayton Agreement').

[340] See Crawford (n 305) 395–401.

[341] *Tadić* Trial Judgement (n 10) [569]; see also *Milošević* Decision on Motion for Judgement of Acquittal (n 23) [85]–[115].

the continuation of hostilities between the new States should not stand in the way of their taking on duties and responsibilities within the international community.

3.1.3 Acceptance by parent state

Besides these two rare categories of cases, an even more exceptional and a virtually theoretical modality of internationalization exists. Namely, the predecessor State could accept and recognize the statehood of the emerging entity. If that entity fulfilled the objective criteria of statehood, its existence as State would be affirmed by the parent State's recognition, despite there still being a situation of armed conflict between the two. However, this possibility is probably theoretical since the struggle for independence is typically the cause of the internal conflict. Even if the incumbent State desires to elevate the insurgents' status, it will surely prefer a mode less damaging to its territorial integrity, such as recognition of belligerency or an agreement based on common article 3 of the Conventions.[342]

3.2 Destabilization

Armed conflicts, like contagious diseases, pay little respect to territorial borders established by men. A civil war brings with it a state of lawlessness which may spread beyond the territory of any one State. Governmental and insurgent armed forces may temporarily make use of the neighbouring States' territories for tactical reasons. Outside States may decide to support one of the parties to the conflict with the aim to protect their national interests. Fighting may erupt outside the borders of the State of origin, but along the same ethnic lines as in the original conflict. Yet, all of these forms of regional

[342] See sections 5.1 and 5.2 below.

destabilization can be subsumed under one of the other modalities of internationalization—or easily distinguished from them.[343]

What remains is the case of regional destabilization due to massive refugee flows. For instance, in 1994 the Tutsi-dominated insurgent group RPF took control of Rwanda and stopped an unprecedented genocide perpetrated mainly by Rwandan Hutus against Tutsis. Hutu civilians in Rwanda, fearing reciprocal violence, fled to eastern Zaire (now Congo) in hundreds of thousands. Their arrival polarized the relatively harmonious relations between Zairian Hutus and Tutsis, led to further persecution of local Tutsis and finally to a spike in interethnic violence in Zaire, destabilizing the region for years to come.[344]

Although the flow of refugees does not per se export violence across borders, it has been argued that it can internationalize the armed conflict at the source of such migration. Writing expressly in the context of applicability of IHL, Emily Crawford put 'the flow of refugees from a war zone across state borders' on par with foreign intervention as a mode of conflict internationalization.[345] The observation that cross-border displacement of populations brings about conflict internationalization is found also in the work of other scholars and documents of international organizations.[346]

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[343] Use of force in another State's territory without its consent renders the conflict international (see section 2.2.1 above). Outside support of armed forces fighting a civil war depends on the object and the intensity of the support (see section 2.2.2 above). Finally, an eruption of parallel fighting along the same ethnic lines but without a further cross-border element would not change the nature of any of the conflicts—legally speaking they would be independent of each other.

[344] Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (Cornell University Press 2005) 14.

[345] Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (n 127) 446 fn 23. She cites Dietrich Schindler and James Stewart's articles to support her observation; however, none of these authors speaks of refugee flows in this context: cf Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 126; Stewart (n 11) 313.

[346] See, eg, Niels M Blokker and Marieke Kleiboer, 'The Internationalization of Domestic Conflict: The Role of the UN Security Council' (1996) 9 LJIL 7, 32; JN Abuodha, 'Sovereignty with Responsibility: A Critical Analysis of State Sovereignty in the context of International Humanitarian Intervention in Internal

Although these other texts have a more flexible understanding of 'internationalization' of armed conflicts, their existence justifies further exploration of this question.

Large population movements caused by internal strife adversely affect the countries surrounding the unstable State. The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, established by the General Assembly in 1981,[347] observed that flows of refugees

> may affect the political and social stability, as well as the economic development, of the receiving States, and also carry adverse consequences for the economies of the countries of origin and entire regions, thus endangering international peace and security.[348]

Luke Lee of the same UN group argued that because endangering international peace and security violates article 1 and Chapter VII of the UN Charter, 'an act generating refugee flows' must be seen as an internationally wrongful act which activates international responsibility of the State concerned.[349] As a result, even an internal conflict producing refugees should be elevated to the international plane, permitting outside States to respond individually or collectively.[350] In a similar vein, India attempted to justify its 1971 invasion of East Pakistan (now Bangladesh) in response to 'a kind of aggression', namely Pakistan's instigation of the influx of over ten million refugees from that territory:

> If aggression against another foreign country means that it strains its social structure, that it ruins its finances, that it has to give up its territory for

Conflicts' (2007) 1 Kenya Law Review 252, 260; United Nations Secretary-General's Report on the Protection of Civilians in Armed Conflict, UN Doc S/2001/331 (30 March 2001) [28].

347 UNGA Res 148 (XXXVI) (International Co-operation to Avert New Flows of Refugees) (16 December 1981) [4].

348 UNGA, International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General, UN Doc A/41/324 (13 May 1986) [63].

349 Luke Lee, 'Toward a World Without Refugees: The United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees' (1986) 57 BYBIL 317, 331–332.

350 ibid 332.

> sheltering the refugees … what is the difference between that kind of aggression and … the more classical type, when someone declares war[?][351]

Extending this argument, one could argue that the effects of refugee flows on other States remove the internal conflict from the *domaine réservé* of one State, thereby rendering the conflict international in nature and triggering application of the whole body of IHL.

Both the premise and the extension of the argument must be examined. Lee assumes international responsibility of the State for refugee displacements. However, even in an internal armed conflict involving the State's military—a State organ under article 4 ILC ASR—it is unlikely that the population displacement could be traced back to a single 'act generating refugee flows'. Mass population movements are complex phenomena resulting from a multitude of interlinked and independent causes, including, inter alia, the conduct of the non-State party to the conflict. It would often be difficult if not impossible to isolate the exact act attributable to the State in order to trigger its international responsibility.[352] The argument that refugee flows are potentially a vehicle of conflict internationalization was further undermined by the fact that no other member of the international community supported the Indian-invented notion of 'refugee aggression'.[353]

Nevertheless, even if refugee flows invoke the international responsibility of the State concerned, internationalization of the armed conflict for the purposes of IHL does not follow. The Security Council has already considered purely internal conflict situations to be a threat to peace and international security yet there is no doubt that these

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[351] UN Doc S/PV.1606 (4 December 1971) 15, reproduced in Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 61.

[352] cf *Milutinović* Trial Judgement (n 10) vol 3, 13–17 (demonstrating the difficulty in identifying causality in the context of migration flows allegedly triggered by military action in Kosovo).

[353] The UN 'Definition of Aggression', adopted only three years later by the General Assembly, does not mention the act generating refugee flows (or any variant thereof) among the defined acts of aggression. See UNGA Res 3314 (XXIX) (Definition of Aggression) (14 December 1974), art 3.

continued to be non-international for the purposes of IHL (provided none of the other factors of internationalization were applicable, of course).[354] More crucially, this study has repeatedly emphasized that, in principle, for a conflict to be internationalized, two States must be involved in the conflict against each other. Even though other States are affected by refugee flows, and sometimes greatly so, as the Rwandan-Zairian example so aptly demonstrates, this does not by itself make them parties to the internal conflict within the territory of another State. Furthermore, the legal nature of a conflict marked by population displacement does not differ from other internal armed conflicts in terms of the underlying motivation behind States' reluctance to extend rules governing international conflicts to non-international ones, namely the 'fear' (in the words of the ICRC) that observance of these rules would interfere with the government's lawful prerogative to suppress a revolt.[355] Therefore, in contemporary international law, refugee flows do not internationalize internal armed conflicts for the purposes of application of IHL.

4. Wars of national liberation

In 1977, in response to nearly two decades of decolonization, the signatories of the Additional Protocol I to the Geneva Conventions carved out a category of internal conflicts and, by way of legal fiction, proclaimed it international in nature. Article 1(4) of the Protocol stipulated that 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' are to be considered within the material scope of the instrument,

[354] See UNSC Res 794 (3 December 1992) UN Doc S/RES/794 (considering that 'the magnitude of the human tragedy caused by the conflict in Somalia' constitutes a threat to international peace and security). The conflict in Somalia—at least until the SC authorized in 1993 the UN forces operating there to use enforcement powers (see n 260 above)—is considered to be the example par excellence of a NIAC. See, eg, Moir (n 58) 39; Provost (n 64) 267.

[355] See *GC III Commentary* (n 21) 44.

applicable already according to its name to IACs only.[356] In theory, this provision was meant to internationalize qualifying conflicts in the territories of States Parties to the Protocol without the need for any further international element. In reality, the provision was heavily criticized for its political and subjective nature and has never actually been applied.

4.1 Historical context

In the 1960s and 1970s, while the process of decolonization was firmly under way, developing countries were stepping up their demands that wars waged for the purpose of 'national liberation' be subject to the full scope of IHL.[357] The concept of national liberation found its legal basis in the principle of self-determination, enshrined in article 1(2) of the UN Charter and developed by the 1970 Declaration on Friendly Relations.[358]

Wars of national liberation were increasingly perceived as conflicts with a just cause, with liberation movements eager to apply the rules of IHL but lacking the appropriate legal mechanism to do so. For example, during the Algerian war of independence, the provisional government-in-exile submitted a declaration of accession to the GCs to Switzerland as the depository of the Conventions. Switzerland, however,

[356] AP I, art 1(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.').

[357] See UNGA Res 2105 (XX) (Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) (20 December 1965) [10]; UNGA Res 2621 (XXV) (Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) (12 December 1970) [3(6)(a)]; UNGA Res 3103 (XXVIII) (Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes) (12 December 1973), art 3.

[358] UNGA Res 2625 (XXV) (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) (24 October 1970), Annex, [1(5)].

declined to regard the accession as effective, citing the lack of international recognition for the exile government.[359]

The demands culminated during the 1974–77 Diplomatic Conference in Geneva, at which a broad coalition of mostly developing States pressed for the extension of the GCs to such conflicts.[360] Although article 1(4) was adopted with the aim to resolve this problem and provide for such a legal mechanism, its wording gave rise to further controversy at least in three important areas, which are dealt with in the following subsections.

4.2 Material scope of application

First, it is unclear from the drafters' choice of wording to which conflicts this provision applies. This is due to a number of reasons. The subject of the clause, 'peoples' is undefined in the Protocol and one would search in vain for a generally accepted definition elsewhere in international law, as admitted even by the ICRC Commentary to the Protocol.[361] Although the term appears in several provisions of the UN Charter, its meaning in that instrument varies from a synonym for 'States' in the preamble to simply 'inhabitants' with respect to the non-self-governing territories regulated by Chapter XI.[362] The text of the provision thus regrettably brings about interpretive ambiguity already at the level of determining the entity endowed with rights and duties as a conflict party in this type of conflicts.

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[359] Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers 1961) 183, 189.

[360] Switzerland, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Federal Political Department 1978) ('*Official Records*') vol VIII, CDDH/I/SR.13, 97–102.

[361] *APs Commentary* (n 22) 52 [103].

[362] See, eg, UN Charter, art 73.

This ambiguity is reduced to some extent by the requirement that such 'peoples' must be engaged in the conflict in question 'in the exercise of their right of self-determination'.[363] The entity in question thus must be a beneficiary of the right of self-determination as understood in the UN Charter and the Declaration on Friendly Relations.[364] In spite of the ambiguity of the Charter mentioned above, the Declaration expressly bestows this right upon peoples living under colonial domination.[365] Some groups, such as the populations of Western Sahara or East Timor respectively, have thus been subsequently designated by the ICJ as 'peoples' in this sense without any notable opposition or controversy.[366] It can therefore be observed that article 1(4) certainly does not cover, as Green suggested, any internal conflict as long as it 'is directed towards self-government'.[367] On the contrary, it would apply only if the territorial State was acting in violation of the principle of equal rights and self-determination of peoples stipulated in the Declaration, evidenced by the absence of 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[368]

Nevertheless, article 1(4) provides for a trio of privileged motives triggering its applicability. In other words, the 'peoples' in question must be fighting against 'colonial domination', 'alien occupation' or 'racist regimes'. The phraseology chosen by the

363 AP I, art 1(4).

364 ibid.

365 UNGA Res 2625 (XXV) (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) (24 October 1970), Annex, [1(5)].

366 See *Western Sahara* (n 320) [70]; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90 [31].

367 LC Green, 'Low-Intensity Conflict and the Law' (1997) 3 ILSA Journal of International&Comparative Law 493, 503.

368 UNGA Res 2625 (XXV) (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) (24 October 1970), Annex, [1(5)]; accord Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 137; Frits Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' in Frits Kalshoven (ed), *Reflections on the Law of War: Collected Essays* (Martinus Nijhoff 2007) 196; see also *APs Commentary* (n 22) 54–55 [108]–[113].

drafters leaves much to be desired in terms of legal certainty. 'Colonial domination' and 'racist regimes' are loaded terms[369] and have on occasion been used as tools of international politics rather than as terms of legal precision.[370]

The term 'alien occupation' is even more problematic. It is misguiding as the majority of possible situations of belligerent occupation, i.e. occupation of the territory of one State Party to the Conventions by another, had already been included in the ambit of common article 2(2).[371] There are only two remaining cases. The occupied territory could belong to a State not party to the Geneva Conventions, which is a merely theoretical possibility at the time of universal acceptance of this set of instruments.[372] Alternatively, the provision could apply to territories of controversial international status,[373] which practically limits its impact to West Bank and Gaza, or it would do so, had Israel, as the occupying force in those territories, acceded to the Additional Protocol I, which it has not.[374]

The possibility for politicization is further aggravated by the fact that there is no independent entity with the power to decide whether the criteria are met. Proposals to endow either the UN General Assembly or the Security Council with the general power

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[369] But see Bothe, Partsch and Solf (n 33) 49.

[370] For example, in 1975 the United Nations General Assembly based its determination that 'zionism is a form of racism' upon an observation that a racist regime operated in the occupied Palestine. This determination was only revoked in 1991. UNGA Res 3379 (XXX) (Elimination of All Forms of Racial Discrimination) (10 November 1975); UNGA Res 46/86 (Elimination of Racism and Racial Discrimination) (16 December 1991).

[371] GCs, common art 2(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.').

[372] ICRC, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (2014) <http://www.icrc.org/IHL> accessed 1 October 2014.

[373] Bothe, Partsch and Solf (n 33) 50; see also Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 138 (stating that the provision on 'alien occupation' would additionally cover the case of Western Sahara).

[374] cf ICRC, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (n 372) 4.

to determine the legal nature of armed conflicts have not been brought to fruition.[375] In addition, several States stated in reservations entered at time of their ratification of the Protocol that the legitimacy of the authority representing a people engaged in a war of national liberation should be recognized by a regional intergovernmental organization.[376] However, even for these States the absence of such recognition would only have bearing on the validity of an article 96(3) declaration (discussed in the following section) and not on the applicability of IHL as such.[377]

It can thus be concluded that the terms used in article 1(4) are significantly ambiguous and leave considerable uncertainty as to the exact material scope of this provision. The article has accordingly been subject to heavy criticism for its subjectivity and vagueness by a number of Western countries, including Canada,[378] Germany,[379] the

375 Bierzanek (n 140) 289–290.

376 See Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (3rd edn, OUP 2000) 501 [7] (Belgium), 503 [L] (Canada), 506 [15] (Ireland), and 507 [4] (South Korea).

377 Julie Gaudreau, 'The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims' (2003) 85 IRRC 143.

378 Canada, Legal Bureau, Letter (2 May 1974), reproduced in (1975) 13 Canadian Yearbook of International Law, 337–338.

379 *Official Records* (n 360) vol VI, CDDH/SR.36, 61.

UK,[380] the US,[381] the Netherlands[382] and Switzerland.[383] The United States have even cited this provision as one of the reasons for rejecting the Protocol.[384]

4.3 Temporal scope of application

Second, the inclusion in article 96(3) of the mechanism, through which the authority representing a people engaged in a war of national liberation may undertake to apply the Conventions and the Protocol, raises the issue of the exact moment of conflict internationalization.[385] Is it immediately when conditions set out in article 1(4) have been met, or only after a valid article 96(3) declaration has been made?[386]

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[380] BA Wortley, 'Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions' (1983) 54 BYBIL 143, 145.

[381] US, Senate Committee on Foreign Relations, Report on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (22 March 1995), reproduced in Cummins and Stewart (n 78) 2189–2190.

[382] Netherlands, Minister for Foreign Affairs, Letter to Parliament (18 May 1987), Bijl. Hand. I 1986/87-18277 (R 1247) No 38b, reproduced in (1988) 19 NYBIL, 381.

[383] Switzerland, Conseil fédéral, Report of 18 February 1981 (Message du Cons. Féd. à l'Ass. Féd., du 18 février 1981, concernant les Protocoles additionnels aux Conventions de Genéve, FF 1981 I 973), reproduced in (1982) 39 ASDI, 143–144.

[384] Letter of Transmittal from President Ronald Reagan (29 January 1987), reproduced in (1987) 81 AJIL 910, 911; but see Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 276.

[385] AP I, art 96(3). The text of the provision is as follows:

> The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
>
> (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

[386] The latter interpretation is supported, inter alia, by the authors of the UK Manual of the Law of Armed Conflict. See *UK Military Manual* (n 141) [3.4.2(c)]. See also LC Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 80.

This study finds the former interpretation more plausible for a number of reasons. The argument in support of the latter, conditional interpretation says that an insurgent group will not have an incentive to issue a declaration of application and to actually adhere to the laws of war, if the full scope of IHL was to be applied automatically.[387] While the absence of any valid article 96(3) declaration issued thus far[388] gives some weight to this contention,[389] this study finds the incentive argument unpersuasive. First, the text of the provision is explicit in that the receipt of the declaration by the depositary brings the Conventions and the Protocol into force 'for the said authority' only,[390]

[387] See Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press 1988) 169–170.

[388] To the present author's knowledge, it has twice been claimed—with at least some persuasive force—that an article 96(3) declaration has been made, namely with respect to a Philippine liberation movement and the Palestine Liberation Organization. Michel Veuthey made the claim with respect to the former armed group: 'the National Democratic Front of the Philippines (NDFP) … used another way to try and be a party to the Geneva Conventions, namely through a declaration of intent as foreseen in article 96 paragraph 3 of Additional Protocol I'. Michel Veuthey, 'Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations' in College of Europe (ed), *Proceedings of the Bruges Colloquium Relevance of International Humanitarian Law to Non-State Actors* (Collegium, Bruges 2002) 144. Similarly, Leslie Green stated in his treatise on the law of armed conflicts that the PLO had issued an article 96(3) declaration on 21 June 1989. Green, *The Contemporary Law of Armed Conflict* (n 386) 134 fn 43.

Nonetheless, upon closer examination, neither of these claims appears to be correct. An undertaking to apply the Conventions and the Protocol I under art 96(3) may only be issued by a national liberation movement engaged in an armed conflict against the territorial State if that State is a party to the Protocol. Philippines, however, only ratified the Protocol in 2012 and Israel has yet not done so at all: cf ICRC, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (n 372) 4–5. The NDFP declaration, although it was actually purported to have been issued '[i]n accordance with Article 96, paragraph 3 of Protocol I' must thus be understood as a null and void undertaking. cf NDFP, 'NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977' (5 July 1996) <http://members.casema.nl/ndf/about/ndf_on_geneva_protocol.html> accessed 1 October 2014.

The situation is more interesting with respect to the Palestinian declaration mentioned by Green. In this document, the PLO in fact informed Switzerland as the depositary of the Geneva Conventions and Protocols of the intention of 'the State of Palestine' to accede to the these international treaties. It is thus submitted that this document is better understood as a putative instrument of accession issued by an entity whose statehood was disputed. That is also how it was treated by the Swiss government, which stated at the time that it was 'not in a position to decide whether this communication can be considered as an instrument of accession' due to 'the uncertainty within the international community as to the existence or non-existence of a State of Palestine'. For the relevant text of the communications in question, see ICRC, 'Palestine and the Geneva Conventions' (1989) 30 IRRC 64. See also Switzerland, 'Notification to the Governments of the States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims' (10 April 2014) <http://justsecurity.org/wp-content/uploads/2014/04/Switzerland-Depository-Palestinian-Accession-2014.pdf> accessed 1 October 2014 (accepting the accession of the 'State of Palestine' to the Geneva Conventions).

[389] Noelle Higgins, *The Approach of International Law to Wars of National Liberation* (The Martin Institute 2004) 50.

[390] AP I, art 96(3)(a).

implying that the effects on the territorial State arise independently of such a declaration. Second, the more plausible explanation for the absence of such declarations is the fact that in none of the territorial States involved in the conflicts that were presumably targeted by article 1(4) (such as those in Southern Africa and Palestine[391]) were State parties to the Protocol. Hence, a formal declaration under this provision would have been of little use to the concerned movements.[392] Third, this interpretation would make humanitarian protection subject to reciprocity, which is unacceptable in light of the modern development of IHL.[393]

It is therefore submitted that a war of national liberation is internationalized as soon as fighting in the sense of article 1(4) erupts; an article 96(3) declaration has effect on the status of the insurgent movement only, making it a Party for the purposes of the Additional Protocol; and no additional action by the territorial State is required.

4.4 Effect on the legal status of the liberation movement

The third and final area of controversy concerns the status of insurgents in wars of national liberation. According to article 4 of the Protocol, the application of the Protocol shall not affect the legal status of the Parties to the conflict. Patently, the liberation movement does not become a 'State' or an entity with full international legal

391 For demonstration that the provision was drafted specifically with conflicts in South Africa, Rhodesia, and Israel in mind, see Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 138; Waldemar A Solf, 'A Response to Douglas J Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol' (1986) 20 Akron Law Review 261, 281; George H Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (1991) 85 AJIL 1, 6;.

392 In fact, some insurgent groups did issue declarations of application of the Conventions and the Protocol, albeit without a reference to article 96(3) of the Protocol. For example, in 1980, the African National Congress made a declaration to the ICRC stating an intention to respect 'wherever practically possible' the rules of the Conventions and AP I. See Annex to the Letter from the Chairman of the UN Special Committee against Apartheid to the Secretary-General (3 December 1980) UN Doc A/35/710. See further n 388 above.

393 Fleck (n 32) 583–584; see also *ICRC Study* (n 18) rule 140.

personality.[394] However, the proposition that application of the Protocol shall have no effect whatsoever on the legal status of insurgents is impossible to uphold. At the very least, it changes the status of movement members who meet further requirements stipulated by the Protocol[395] from internationally irrelevant 'fighters'[396] to the codified status of combatants entitled to an array of rights under the Conventions and the Protocol.[397] Additionally, according to the Protocol, after the depositary of the Protocol receives a declaration made by a national liberation movement under article 96(3), the movement becomes 'a Party to the conflict with immediate effect', assuming 'the same rights and obligations as those assumed by a High Contracting Party'.[398] In other words, the legal status of the movement and its members is fundamentally altered, putting it on par with the territorial State in terms of its rights and duties under IHL.

4.5 Evaluation

Despite the theoretical possibility, no conflict has ever been internationalized under article 1(4), perhaps also because wars of national liberation were a 'temporally and geographically limited phenomenon.'[399] In addition, even setting aside the charge of the political motivation behind the adoption of this provision,[400] the criticism it has attracted in the decades afterwards suggests that it has not acquired the status of customary

394 But see text to nn 965–967 below (demonstrating that NLMs may be seen as benefiting from limited legal personality).

395 AP I, arts 43–44.

396 Understood in the sense of para 1.1.2 of Schmitt, Garraway and Dinstein (n 181).

397 Green, *The Contemporary Law of Armed Conflict* (n 386) 80. See further chapter 3 below.

398 AP I, art 96(3)(a)–(b).

399 David E Graham, 'The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century' (1975) 32 Washington & Lee Law Review 25, 53.

400 cf James E Bond, 'Amended Article 1 of the Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla' (1975) 32 Washington & Lee Law Review 65, 69 (observing in this connection that article 1(4), like '[a]ll law—bad or good—is politically motivated').

international law.[401] Finally, interpretation difficulties resulting from the vague and subjective nature of the provision's operative terms and the evident reluctance of the concerned States to accede to the Protocol appear to have reduced the provision to little more than a dead letter.[402]

5. Recognition of belligerency, unilateral declarations, and special agreements

Along with States, insurgents are considered to be 'traditional' subjects of international law. However, unlike States, insurgents possess only a limited legal capacity marked by the transience of their existence: they either win the civil strife and transform into a fully-fledged State, or lose and disappear from the international scene.[403] A State may, however, by its attitude and conduct towards the rebels elevate their international legal standing *inter partes* by at least three distinct legal mechanisms: recognition of belligerency, conclusion of a special agreement under common article 3 of the Geneva Conventions, and unilateral decision by the territorial State.[404] This, it is argued, has the effect of *relative internationalization*: treatment of the insurgents as equals to the acting State

[401] Kleffner (n 75) 46; Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' (n 182) 408; Sivakumaran (n 33) 216; contra Cassese, 'Wars of National Liberation and Humanitarian Law', 106–108; David W Glazier, 'Wars of National Liberation' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated May 2009) [15].

[402] cf Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (n 391) 7; contra Glazier (n 401) [15] (opining that since the Additional Protocol I has been ratified by over 85% of the existing States, its article 1(4) is '*statistically likely* to apply to any future conflict that otherwise qualifies') (emphasis added). Notably, even States that have ratified the Protocol are unwilling to acknowledge the applicability of article 1(4) to concrete situations. For example, despite the claims to self-determination made by the Kurdish armed group PKK (*Partiya Karkerên Kurdistan*, Kurdistan Workers' Party) operating in the Turkish territory, Germany stated that it viewed the situation as a NIAC and that article 1(4) remained inapplicable. See Reply by the Federal Government to the written question submitted by Bundestag member Vera Wollenberger and the parliamentary party of the Alliance 90/Greens (7 September 1994), reproduced and translated in Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War?*, vol 3 (3rd edn, ICRC 2011), case no 249.

[403] See, eg, Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 2002) 104; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 71–72 and 127–131; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 197.

[404] cf Waldemar A Solf, 'Commentator on the subject of Non-International Armed Conflicts' (1982) 31 American University Law Review 927, 931.

internationalizes the conflict in question primarily with an effect on the insurgents and the recognizing State.

5.1 Recognition of belligerency

5.1.1 Existence in contemporary law

According to the rule of traditional customary law outlined by Oppenheim in 1906,

> any State can recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war.[405]

At that time, recognition of belligerency was considered as 'a very modern addition to International Law'.[406] A century later, the tables have turned and many now contend that the rule has fallen into complete or 'virtual' *desuetude*.[407] It has been argued in response that *desuetude* does not apply to customary international law,[408] but this proposition is not generally accepted.[409]

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[405] Oppenheim (1st edn) (n 54) vol II, 86; see also Lassa Oppenheim, *International Law: A Treatise* (2nd edn, Longmans, Green & Co. 1912) vol II, 92 (maintaining the text intact save for the replacement of the modal verb 'can' with 'may').

[406] Amos S Hershey, *The Essentials of International Public Law* (Macmillan 1912) 121.

[407] See, eg, Oglesby (n 64) 100; Higgins (n 64) 171; Doswald-Beck (n 64) 252; J Crawford, 'First Report on State Responsibility', UN Doc A/CN.4/490 and Adds 1-6 (1998) (n 64) [270]; Provost (n 64) 279; David (n 64) 138; Sanger (n 64) 424–425; see also Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 520; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 8 fn 2; Moir (n 58) 41; Douglas Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 BYBIL 1, 192.

[408] Iain Scobbie, 'Gaza' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 303–304 ('desuetude … applies only to treaties'); Akande, 'Classification of Armed Conflicts' (n 32) 50 (endorsing Scobbie's view).

[409] Mark Eugen Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Brill 1985) 32–33; Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy* (Martinus Nijhoff 2006) 232; Jan Wouters and Sten Verhoeven, 'Desuetudo' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated November 2008) [13]–

Happily, although not always prominent, instances of practice do exist even now. Authors usually cite the American Civil War (1861–65)[410] or the Boer War (1899–1902)[411] as the last episodes of recognized belligerency.[412] In fact, these were only the last instances, in which the *territorial State* was (uncontroversially) seen as having recognized insurgents challenging its authority.[413] Instances of *third State* recognition have been rare in the period following World War II but not non-existent.[414] Nicaraguan Sandinistas were recognized by the member states of the Andean Group (1979);[415] El Salvadorean rebels by France and Mexico (1981);[416] the Colombian insurgent group FARC by

[16]. I am grateful to Douglas Guilfoyle for drawing my attention to the controversy at the heart of the claim referred to in the main text.

410 Yair M Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 MLR 109, 110; McCoubrey and White (n 143) 7.

411 Gasser, 'International Humanitarian Law' (n 63) 559; La Haye (n 63) 14 fn 87.

412 A less well-known occurrence was the Costa Rican recognition of the state of belligerency between itself and the Rivas-Walker regime since 1856, acknowledged in the arbitral award in the case of *Accessory Transit Company v Costa Rica*. See *Accessory Transit Company v Costa Rica* (Decision of the Umpire, Commander Bertinatti) (1862) 29 RIAA 78, 80.

413 It has been said that the 'declaration of war' issued by the Nigerian government to the secessionist State of Biafra in 1967 amounted to a recognition of belligerency. Charles Zorgbibe, 'Sources of the Recognition of Belligerent Status' (1977) 17 IRRC 111, 114. Sivakumaran argues, albeit without any references to support this view, that the declaration 'was not intended in that manner by the parent state'. Sivakumaran (n 33) 17. While establishing intent is notoriously difficult with respect to proclamations issued by States and should not be seen as determinative with respect to the effects of such statements, it is perhaps appropriate to acknowledge that the Biafran case is not generally accepted as a clear recognition of belligerency by the territorial State.

414 Contra, eg, Sivakumaran (n 33) 19.

415 Joint Declaration of the Foreign Ministers of Member States of the Cartagena Agreement on the Situation in Nicaragua (16 June 1979), reproduced in Rafael Nieto Navia, '¿Hay o no hay conflicto armado en Colombia?' (2008) 1 Anuario Colombiano de Derecho Internacional 139, 147.

416 Joint Franco-Mexican Declaration on El Salvador, reprinted in Information Bulletin of the Political-Diplomatic Commission of the FMLN-FDR (16 October 1981) 4.

Venezuela (2008).[417] At times, other more ambiguous cases of recognition by third States have been put forward by academics as further instances of State practice in this sense.[418]

The argument that the doctrine of belligerency has been superseded by other provisions of IHL[419] is also unpersuasive. With respect to common article 3, this would amount to a claim that the law applicable to internal armed conflicts ('*jus in bello interno*') would be limited to this provision, which would have overridden the customary norms pertaining to the recognition of belligerency.[420] Similarly, it has been argued that even if recognition of belligerency were to occur, only 'common Article 3 and not the Conventions as a whole will apply to the conflict.'[421]

In response, while the ICRC commentaries to the GCs are admittedly equivocal on this point,[422] in its remarks to National Red Cross societies issued immediately after the conference, the Committee expressly stated that the application of common article 3 is independent of any potential recognition of belligerency.[423] Irrespective of the ICRC's actual view, the text of common article 3 does not exclude other norms from being

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417 Venezuelan President Hugo Chavéz's proposal that the FARC and a smaller rebel group ELN be recognized as belligerents was supported on 17 January 2008 by the Venezuelan National Assembly in a 'near unanimous vote' by a resolution to grant the FARC belligerent status. Chris Kraul, 'Chavez Keeps Up Campaign to Get Rebels Off Terrorist List' *Los Angeles Times* (Los Angeles, 20 January 2008).

418 See, eg, John Dugard, 'SWAPO: The Jus ad Bellum and the Jus in Bello ' (1976) 93 South African Law Journal 144, 156 (arguing that the recognition of the Namibian liberation movement SWAPO as 'the authentic representative of the Namibian people' by the UN GA might be seen as recognition of belligerency); Sam Foster Halabi, 'Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context' (2012) 28 American University International Law Review 321, 373–390 (considering that the recognition of Libya's NTC by France, Italy, Qatar, US, and UK may have amounted to a recognition of belligerency in the traditional sense).

419 See, eg, Provost (n 64) 279–280; Heintschel von Heinegg (n 143) xiv.

420 Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (1st edn, OUP 1982) 12–13. Compare, however, with the most recent edition of the book: Roberts and Guelff (eds), *Documents on the Laws of War* (3rd edn, OUP 2000) 23–24.

421 Moir (n 58) 41–42.

422 Compare *GC IV Commentary* (n 21) 36 with *GC III Commentary* (n 21) 38.

423 ICRC, *The Geneva Conventions of August 12, 1949: Analysis for the use of National Red Cross Societies* (ICRC 1950) vol II, 8.

applied to internal armed conflicts; on the contrary, its *chapeau* stipulates that the ensuing provisions should be applied 'as a minimum' only.[424] In addition, at the 1949 Diplomatic Conference in Geneva, the Australian delegation proposed that recognition of belligerency should be considered as a prerequisite for common article 3 to apply.[425] However, this proposal was rejected in the drafting process, and thus the two legal categories maintained their mutual independence even post-1949.[426] In sum, internal conflicts to which common article 3 applies may still be internationalized by way of recognition of belligerency,[427] as long as the more stringent conditions for recognition are met.

The argument fares better in relation to Additional Protocol II. The threshold of applicability of this instrument encapsulated in article 1(1) seems to 'mirror' closely conditions associated with belligerency.[428] States party to Protocol II thus appear to have agreed that when these conditions are met, the conflict is to be regulated by the Protocol and internationalization by way of recognition of belligerency would thus be excluded.

Nevertheless, the rules on recognition remain relevant at least for States *not* party to Protocol II.[429] Furthermore, the Second Protocol's applicability is triggered automatically when the conditions in article 1(1) are met, irrespective of any further action or assent of

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[424] GCs, common art 3.

[425] *Final Record* (n 93) vol II B, 121.

[426] See ibid, vol II B, 129 (citing 'enormous practical difficulties').

[427] cf Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 34 (noting that the applicability of common article 3 is 'not contingent on any recognition of belligerency' and that upon recognition, the conflict has to be treated as if it were an IAC); see further chapter 4, section 4.2 below, in particular text to nn 1111–1115 and 1124–1128 (discussing the application of the law of belligerent occupation to conflicts internationalized in this way).

[428] Lootsteen (n 410) 128.

[429] See ibid 128–130. As of 1 October 2014, 167 States have ratified AP II. Non-contracting States include India, Iran, Iraq, Israel, Pakistan, Somalia, Turkey, and the US. See ICRC, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (n 372); cf n 743 below (listing notable non-State parties to AP I).

the parties to the conflict. This provision does not rule out the possibility that when these requirements are met—and Protocol II is thus applicable—a State could in addition recognize the rebels as belligerents, thereby internationalizing the conflict *inter se*.

Again, this position is supported on a closer examination of the *travaux préparatoires*. At the 1974–77 diplomatic conference, the Egyptian delegate (and later an international judge) Georges Abi-Saab stated that in situations in which a recognition of belligerency was granted, 'there would be no need for a Protocol II, because, according to general international law, the whole body of the law of war would then apply.'[430] This statement remained unopposed at the conference.[431]

It may thus be summarized that the doctrine of recognition of belligerency has not been replaced by either the Geneva Conventions or their Additional Protocols.

5.1.2 Relative nature

The effects of recognition of belligerency are in principle limited to the relationship between the recognizing State and the recognized group. Because the act of recognition transforms the nature of a conflict between specific actors, the result can be denoted as *relative internationalization*. Why is the legal effect of recognition limited in this way?

The main reason lies in the nature of international legal obligations. Due to the horizontal structure of the international community and equality of its members as subjects of international law, a novel international obligation may in principle arise only on the basis of *consent* of the concerned State(s).[432] Internationalization of a conflict

[430] *Official Records* (n 360) vol VIII, CDDH/I/SR.24, 235 [31] (Egypt).

[431] cf ibid, vol VIII, CDDH/I/SR.24, 238–239.

[432] See, eg, Oppenheim, *International Law: A Treatise* (2nd edn) (n 405) vol I, 17; *Lotus Case (France v Turkey)* (Merits) PCIJ Rep Series A No 10 (PCIJ) 18; see also Shaw (n 403) 9–11. Shaw accepts the importance of the role of consent in international law but points out the flaws in accepting it as the sole basis for

imposes on both the territorial and an outside State a host of new obligations. For the territorial State, this means that after recognition, rules of IHL are triggered as between the conflict parties. For an outside State, rights and duties of neutrality become applicable.

The relative nature of internationalization by recognition of belligerency is obvious in cases where belligerency is recognized by a third State. For example, during World War I, the Allied Powers recognized the Polish National Army fighting for Poland's independence against Russia. Nevertheless, the PCIJ held in the *Upper Silesia* case that this recognition had no effect with respect to Germany, which 'had no share in the transaction'.[433] Therefore, the effect of recognition is solely in relation to the recognizing State, with respect to whom the insurgents are then accorded the same 'war status' as the parent State.[434] However, their status with respect to other States (and *a fortiori* to the parent State) would not be affected.[435] Nevertheless, as pointed out by Baxter, widespread recognition of belligerency by third States would put pressure on the government in power to recognize the insurgents, as well.[436] The recognizing State consequently

obligation in international law. For instance, if a State 'withdraws' its consent to a rule of international law, the rule does not become optional or non-binding for the State in question. On the contrary, if the State acted upon its decision, it would be in breach of the particular rule. The reliance on consent for the purposes of the argument in the main text is, however, more limited and consistent with Shaw's view. The present author views the absence of State consent (for example, in the form of acknowledgement of a status of belligerency) as preventing in principle the emergence of an obligation directly affecting the non-consenting State (such as obligations stemming from the transformed nature of conflict triggered by the recognition). The specific application of this principle is demonstrated in the ensuing text.

[433] *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A No 7 (PCIJ) 28.

[434] George Grafton Wilson, *Handbook of International Law* (1st edn, West Publishing Company 1910) 41.

[435] ibid 41; see also Hans Kelsen, *Principles of International Law* (Rinehart 1952) 291; *APs Commentary* (n 22) 1321 [4346]; Zorgbibe (n 413) 113.

[436] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 518; accord Zorgbibe (n 413) 113.

becomes subject to the rights and duties of neutrality with respect to both belligerent parties.[437]

If recognition is granted by the territorial State, the relative nature of internationalization is less evident. Of course, the primary effect of recognition is indeed *inter partes*: both parties will be subject to the norms of IHL applicable to IACs. However, recognition is also thought to activate rights and duties of neutrality with respect to third States. It is submitted that it is preferable to regard recognition as a demonstration of a view that a conflict is to be treated as international, implying the *intention* to impose duties and confer rights of neutrality on the concerned outside States.[438] Although in principle the outside States are free to disagree with this view,[439] in practice it has generally been respected by third States.[440] In sum, recognition of belligerency is relative in that it affects only the relationship between the recognizing State and the recognized group; yet in practice, recognition given by the territorial State is typically respected by outside States as well.

5.1.3 Discretionary nature

Recognition of belligerency is within the discretion of the recognizing State. A persuasive argument put forward by Lauterpacht in 1947 advocates obligatory recognition in case

[437] William Edward Hall, *A Treatise on International Law* (Alexander Pearce Higgins ed, 7th edn, Clarendon Press 1917) 30; Kelsen (n 435) 291; see also Resolution of the Institute of International Law concerning Rights and Duties of Foreign Powers as regards the Established and Recognized Governments in case of Insurrection (1900), art 7, reproduced in James Brown Scott (ed) *Resolutions of the Institute of International Law* (OUP 1916) 158.

[438] cf Hall (n 437) 30.

[439] In which case, for example, they retain a right not to respect blockades established by the insurgents. Resolution of the Institute of International Law concerning Rights and Duties of Foreign Powers as regards the Established and Recognized Governments in case of Insurrection (1900) (n 437), art 5(2).

[440] In Lauterpacht's words, the view of the established government, 'which is entitled to regard the rebellion as a criminal act of treason' must be seen by outside States as 'highly persuasive evidence in the matter'. Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 247.

the customary conditions are met. He added a fourth condition to the three set out above, namely that (4) circumstances must exist 'which make it necessary for outside States to define their attitude by means of recognition of belligerency'.[441] Lauterpacht argued that recognition of belligerency is declaratory of facts (four conditions for recognition) but constitutive of rights (for the insurgent group and for third States). As such, it must be viewed as taking place in fulfilment of a legal duty and not as an act of policy guided only by the interests of the State concerned. He perceived this process as collective and believed it should be further developed by conferring upon an international authority the power to determine whether the requirements of recognition of belligerency exist in a given case.[442]

The argument for obligatory recognition suffers from two key weaknesses. First, it is deficient due to its circular nature. Defining one of the factual conditions for belligerency as the existence of circumstances *necessitating* recognition only restates the desired outcome, namely that recognition is obligatory if conditions are met. Second, Lauterpacht's argument is at odds with actual practice. Not only has an international recognizing authority that he had desired never come about, but more importantly, States have very rarely granted recognition to insurgents despite the abundance of internal armed conflicts in modern history.[443] Even in the period when recognitions of belligerency were more common than today, there were instances in which such recognition was not forthcoming, presumably for political considerations and despite the

441 ibid 176; see also Henry Wheaton, *Elements of International Law* (Dana's 8th edn, Little, Brown & Co. 1866) 29–30 fn 15 (stating that recognition may only be issued if the third State's 'own rights and interests are so far affected as to require a definition of its own relations to the parties' as otherwise it would be premature and may be regarded as an unfriendly act).

442 Lauterpacht, *Recognition in International Law* (n 440) 253–255.

443 This paucity of recognition in recent State practice may also be explained by the fact that recognition of belligerency by third States in the absence of corresponding recognition granted by the territorial State has generally been considered as an unfriendly or hostile act. See Green, *The Contemporary Law of Armed Conflict* (n 386) 72 and sources cited therein.

rebels in question meeting the customary law conditions. An example of the kind is the US President Cleveland's decision not to recognize the Cuban insurgents as belligerents during the third Cuban revolution of 1895–98.[444] Nevertheless, even supposing that there once had been a conception of obligatory recognition of belligerency in international law, the development of customary law after World War II has eliminated it. Hence, internationalization by way of recognition of belligerency is better seen as discretionary in nature.

Nonetheless, the discretionary nature of recognition of belligerency is an issue separate from the necessity of explicit recognition. The majority of the cases of recognition by the territorial State have been, in fact, tacit and evident only from the use of measures permissible only in international conflict.[445] For instance, the US blockade against the Confederate States in 1861 was, in the words of the US Supreme Court, 'official and conclusive evidence' that the Civil War was a conflict between the established government and a recognized belligerent.[446] Nevertheless, President Lincoln's decision to impose the blockade was discretionary, which was also duly recognized by the same court.[447] Analogously, if the ongoing armed violence between Israel and the Hamas-

[444] See Mayo W Hazeltine, 'What Shall be Done about Cuba?' (1896) 163 The North American Review 731, 789 ('It is well-known that the revolutionists have organized a *de facto* government. They have adopted a constitution; they have assumed a national name; they possess a national flag, and they have despatched a delegate plenipotentiary to treat with the government of the United States. It is true that they possess no navy and no seaport, but in this respect they are not much worse off than were the thirteen American colonies when their independence was recognized by France.') (italics original).

[445] *APs Commentary* (n 22) 1320–1321 [4345]; Elbe Riedel, 'Recognition of Belligerency' in R Bernhardt (ed), *Encyclopedia of Public International Law*, vol 3 (1982) 48; see further Wilson (n 434) 43; Hershey (n 406) 120 fn 16.

[446] *Prize Cases* (1862) 67 US 2 (US SC) 670.

[447] ibid 670.

controlled Gaza Strip originated as a NIAC,[448] the naval blockade imposed by Israel on Gaza in 2007 would also amount to an implicit recognition of Hamas's belligerency.[449]

5.2 Unilateral declarations and special agreements

While recognition of belligerency is limited by stringent conditions as to the conduct and control exercised by the insurgents, parties to an internal conflict not meeting these requirements may declare their willingness to apply some or all of the rules applicable in IACs.[450] Although not all unilateral acts give rise to international legal obligations, acts given in public and with the intention to be bound are universally considered to imply obligation for the acting entity.[451] A declaration to apply a certain set of rules during an armed conflict is by definition issued in public and, unless stated otherwise, manifests the intention to be bound by these rules; therefore, it can be concluded that it will in principle be binding on the issuing entity.

Insurgent groups have issued such declarations on multiple occasions, be it in anticipation of reciprocal treatment, international prestige, or enhanced discipline within

[448] The question of classification of the conflict in Gaza is controversial and falls beyond the scope of this study. One view consistent with the analysis presented here is that following the physical withdrawal of the Israeli forces from Gaza in 2005, Israel's belligerent occupation of Gaza has ended; since Gaza was not an independent State nor a territory belonging to any other sovereign, the conflict between it and Israel would consequently have been non-international. See Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 YIHL 369. For a more detailed treatment of the legal qualification of the conflict see, eg, Scobbie, 'Gaza' (n 408) 280–316.

[449] See also Kevin Jon Heller, 'Why Is Israel's Blockade of Gaza Legal?' (2 June 2010) <http://opiniojuris.org/2010/06/02/why-is-israels-blockade-of-gaza-legal/> accessed 1 October 2014; Scobbie, 'Gaza' (n 408) 301 (arguing that the imposition of the blockade served to internationalize the conflict); but see Guilfoyle (n 407) 191–194.

[450] cf Marco Sassòli and Laura M Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599, 623 (highlighting the similarity between the doctrine of recognition of belligerency and common article 3 agreements and encouraging the application of the law of IAC by analogy in NIACs).

[451] See *Nuclear Tests Case (New Zealand v France)* (Judgment) [1974] ICJ Rep 253, 267; ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006) UN Doc A/61/10, principle 1.

own ranks.[452] Provided that the insurgent group has a sufficiently cohesive and hierarchical structure, which makes it possible for it to actually comply with its declaration, this undertaking is binding on the group in question.[453] Although an insurgent group only enjoys a limited legal capacity in international law, it is submitted that such self-imposed restriction on permissible war conduct is a quintessential example of an act within this capacity.

Similarly, a government engaged in a civil war may agree to apply IAC norms to the insurgents. This has happened on multiple occasions, although the States concerned usually emphasized that they do so only as a matter of policy, implying their refusal to consider themselves bound by such decisions. For instance, the US Military Command in Vietnam decided in 1966 to treat all captured enemy soldiers as prisoners of war.[454] The Nigerian government followed a similar policy in the 1967–70 civil war.[455] Likewise, Israel, despite its position that Geneva Conventions do not apply de jure to the Palestinian Occupied Territories,[456] has consistently declared that it applies the provisions of the Fourth Geneva Convention within the territories de facto.[457] In order for such a proclamation to rise to the level of international obligation, the issuing government

452 For a detailed list of such declarations, see, eg, Ingrid Detter, *The Law of War* (2nd edn, CUP 2000) 186 and Michelle L Mack and Jelena Pejić, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (ICRC 2008) 20.

453 cf Detter (n 452) 189.

454 MACV Directive Number 381-11 (5 March 1966), reproduced in Prugh (n 161) 127–131. The practice to treat captured enemy soldiers as POWs in Indochinese conflicts dates back to the Franco-Vietnamese war (1946–54). On the basis of the French declared intention to respect the spirit and 'insofar as the particular conditions of the struggle in Indochina permit it', the letter of the GCs, the ICRC even argued that the conflict—otherwise seen as a decolonization war—was international. See Letter from Director of ICRC to the Swiss Ministry of Foreign Affairs (27 January 1954), ICRC Archives, BAG 202-223-001.

455 Solf, 'Commentator on the subject of Non-International Armed Conflicts' (n 404) 929–930.

456 But see Switzerland, 'Notification to the Governments of the States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims' (10 April 2014) (n 388) (accepting the accession of the 'State of Palestine' to the Geneva Conventions).

457 The described Israeli legal position was first outlined by the then Attorney General Meir Shamgar in 1971. Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 Israel Yearbook on Human Rights 262, 263–266. It was rejected by the ICJ in 2004. *Wall* (n 155) [90]–[101].

would have to make clear its intention to be bound by it.[458] Accordingly, in *Mrkšić*, the ICTY Appeals Chamber held that various statements of the Yugoslavian National Army to the effect that the Geneva Conventions would apply to the treatment of the ethnically Croatian POWs in Vukovar in 1991 gave rise to the actual applicability of these instruments as a matter of law.[459]

Whether the norms in question are applied as a matter of law or policy, the difference is often minimal. For political reasons, States tend to observe declarations delimiting their behaviour in armed clashes as these are issued as concessions to the opposing party, typically with the aim to induce it to reciprocal conduct or to improve the perception of the issuing State by the international public opinion; their violation would thus serve little practical utility. Hence, a clear expression of the State's intention to be bound would not decrease its actual room for manoeuvre once the declaration in question has been issued, while improving legal certainty for all actors involved. Nevertheless, it should be acknowledged that international criminalization on the basis of such extensions of applicability of IHL as seen in the *Mrkšić* case likely serves as a countervailing incentive for the military commanders concerned.

Provided that the binding declarations are comprehensive and entail a proclamation that the declaring entity will apply the full body of IHL to the conflict at hand, one may again speak of relative internationalization of a conflict. If a declaration of this kind is made only by one party to the conflict, its legal effect differs from recognition of belligerency in that the declaration is only binding on the issuing entity. However, if both

[458] ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006) UN Doc A/61/10, principle 7.

[459] *Prosecutor v Mrkšić et al* (Appeal Judgement) IT-95-13/1-A (5 May 2009) (ICTY) [69].

parties make a declaration or enter into an express agreement to apply IAC norms,[460] the legal effects are analogous to those of a situation, in which the territorial State, but not third States, grants recognition of belligerency. The conflict would in such a case be internationalized between the parties to the extent agreed.

A seemingly opposite view has been expressed by a Trial Chamber of the ICTY in the *Blaškić* case, which held that 'the parties to the conflict may not agree between themselves to change the nature of the conflict'.[461] It should however be noted that this holding was given in response to a Defence argument that the conflict in central Bosnia was internal in nature, as supposedly evidenced by the text of an agreement between the conflict parties.[462] If the Defence had succeeded in this argument, a range of norms would have had to be deemed inapplicable to the situation. It is unlikely that the ICTY would object to the parties agreeing instead to abide by the more onerous norms of the law of IAC.[463] The better view thus is that the parties may not 'contract out' of a particular normative framework which would otherwise be binding on them,[464] but may certainly 'contract in' and accept additional obligations, even to the extent of internationalizing the conflict in question *inter se*.

Such result is certainly encouraged by common article 3(3), which prescribes the parties to a conflict to 'endeavour to bring into force, by means of special agreements,' norms pertaining to IACs. Many agreements of this kind have been entered into by

460 Two corresponding declarations issued by the parties to an internal conflict are normatively equivalent to an express agreement between them. See Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 148.

461 *Prosecutor v Blaškić* (Trial Judgement) IT-95-14-T (3 March 2000) (ICTY) [82].

462 ibid [78]–[80].

463 cf ibid [82] (commending the ICRC—which was instrumental in mediating the preparation of the agreement in question—for attempting 'to provide the best possible protection to civilians and persons placed *hors de combat* whilst the war unfolded around them').

464 Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 59.

conflict parties in internal armed conflicts around the world, including in the Yemen (1963),[465] ex-Yugoslavia (1992),[466] and Sudan (2002).[467]

6. Complex conflict situations

Armed conflicts are complex phenomena exhibiting a plethora of causes, contributing factors and conflicting interests. This is true even for the most binary of conflicts, in which two parties only resort to violence in order to achieve a pursued aim. However, the situation gets exponentially more complicated by the entry of every additional independent conflict party, creating the potential for mutual interdependence, alliances, and tension. As far as the scope of the present work is concerned, such situations translate to a further complication. If the entry of a third party results in, or is a factor in, the conflict internationalization (under one of the forms discussed in the previous sections), what effect does it have on the law applicable to such situations?

The plurality of parties implies the plurality of potential conflict relationships. For example, since the mid-1990s, an ongoing internal armed conflict had existed in Afghanistan between the de facto Taliban government and the insurgent group Northern Alliance.[468] The intervention of US-led coalition forces following the 9/11 attacks meant that a range of new actors entered the conflict scene. Should the mutual relationships between each of these actors be considered separately, as 'mini-conflicts' of sorts, or did

[465] ICRC, *Annual Report 1963* (ICRC 1964) 16–17; Kathryn Boals, 'The Relevance of International Law to the Internal War in Yemen' in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press 1971) 315.

[466] Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina (22 May 1992); UN Doc S/25824, Annex (12 May 1993) 3 (confirming that the GCs and AP I were 'fully applicable' in the conflict).

[467] Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack (31 March 2002).

[468] See, eg, Laurie R Blank and Benjamin R Farley, 'Characterizing United States Operations in Pakistan: Is the U.S. Engaged in an Armed Conflict?' (2010) 34 Fordham Int'l Law Journal 151, 179

an overarching single IAC come into existence following the commencement of attacks from abroad?

More complex situations are also conceivable. Following the assumption of power by Laurent Kabila in 1998, the territory of the Democratic Republic of the Congo (DRC) was plagued by several separate instances of armed hostilities. Some of these appeared to have been purely internal in nature, such as the tribal conflict between the Balendu and the Bahema. Others were marked by heavy foreign involvement. For instance, the most formidable rebel group, the Congolese Rally for Democracy (RCD), was assisted in its struggle against the Kinshasa government by no fewer than three regional powers, including Burundi, Rwanda, and Uganda. Yet others were conflicts fought by outside States against their insurgents in Congo's territory, such as Angola's civil war between the ruling government and the UNITA rebel forces. In total, it is widely accepted that between 1998 and 2003, nine States and over 20 armed groups were involved in what became known as the Second Congo War or as the Great War of Africa.[469] How should such situations be assessed? Should internationalization of one conflict have bearing on other conflicts in the same territory?

6.1 The apparent choice: 'Global' versus 'mixed' approach

The dilemma presented by such complex situations is often described as a choice between a 'global' and a 'mixed' characterization of situations of armed violence.[470] As it is typically presented, the 'global' approach implies that a foreign military intervention

[469] See, eg, Report on the Situation of Human Rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr Roberto Garretón, in accordance with Commission on Human Rights Resolution 2000/15, UN Doc E/CN.4/2001/40 (1 February 2001) 2.

[470] See, eg, Stewart (n 11) 333–335.

'transforms or contaminates' the ongoing NIACs in the target State's territory. Hence, they must *all* be considered international.[471]

At the other extreme, under the 'mixed' approach, the intervention would not have any effect on the nature of the ongoing conflicts. Law of IACs would *only* be applied to the relationship between the intervening and the target State.[472] As a logical extension of this view, each conflict pair should be assessed separately, with tens or even hundreds of conflicts potentially co-existing in one State's territory.

It is submitted that IHL does not actually present an 'either-or' dilemma of this type. The two positions are reconcilable. In the ensuing text, they are also referred to as the 'pure' variants; the present author submits that a 'hybrid', more nuanced approach should be adopted that combines the elements of both 'pure' approaches. I begin by deconstructing the pros and cons of the 'pure' approaches, considering the global approach first and the mixed second, before proposing the 'hybrid' model as a workable alternative.

6.1.1 Pure global view and the geographical scope of applicability of IHL

The first point of call with respect to assessing the 'pure global' approach is embodied in the question of geographical scope of applicability of IHL. Perhaps if the rules prescribe the law to apply to the *whole* territory of the conflict parties, it could be argued that the entry of an outside power extinguishes the law of NIACs and replaces it with the law of IACs with effect for that territory.[473] If that were the case, by way of an example, the

[471] See, eg, Hoffmann, 'Squaring the Circle?' (n 140) 230 fn 48 and the references cited therein.

[472] See, eg, ibid 20 and the references cited therein.

[473] This understanding is advanced, for example, by Judge Rodrigues in his dissenting opinion in *Aleksovski*. See *Aleksovski* Trial Judgement (n 10) Dissenting Opinion of Judge Rodrigues [19]–[20]. It bears noting that to the extent to which he bases his reasoning on the *Čelebići* Trial Judgement (n 10), he seems to accept the

NATO intervention against the government of Libya in 2011—undoubtedly an IAC—should be seen as triggering the application of the law of IACs as regards all conflict parties in Libya's territory, including the rebel forces that were operating from Benghazi in the first stages of the conflict.

What is the geographical scope of application of norms of IHL as enshrined in the Geneva Conventions? The 1969 Vienna Convention on the Law of Treaties, most of which is considered to be reflective of customary law,[474] only establishes a residual rule:[475] according to article 29, a treaty is binding upon each party in respect of its 'entire territory' unless a different intention appears from the treaty or is otherwise established.[476] The Geneva Conventions and their First Additional Protocol do not, however, contain a general clause about their territorial scope and a close examination of their provisions uncovers a spectrum of possible solutions.

Some of the provisions seem to apply due to their nature in the immediate theatre of operations only. For instance, rules governing targeting cannot by definition apply elsewhere. If a conflict party designates a new target outside of the combat zone, the act of its designation merely extends the combat zone to encapsulate that target as well. On the other hand, some provisions seem to apply irrespective of territorial considerations. For example, persons deprived of their liberty by one of the conflict parties do not lose their protection if they are transported outside of the territory in which combat operations are being conducted.[477] Although hundreds of thousands of German POWs

possibility that entirely unrelated conflict pairs should still be adjudged separately. However, his underlying approach is one focusing on territorial applicability of IHL triggered by the Geneva Conventions.

474 Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 12–13.

475 Anthony Aust, *Handbook of International Law* (CUP 2005) 86–87.

476 VCLT, art 29.

477 Arimatsu (n 34) 181; citing *Hamdan v Rumsfeld* 548 US 557 (2006) (US SC) and *Boumediene v Bush* 553 US 723 (2008) (US SC).

were transported into the US during World War II following the defeat of the *Afrika Korps* in Northern Africa, it was never suggested that their status was affected by their transfer.[478] So how do we determine what territory the rules of IACs apply to?

An attempt to answer this question authoritatively appears in the very first case handled by the ICTY. In the context of the *Tadić* case, the Appeals Chamber of the ICTY was faced with a very practical problem that the accused could only be held accountable for certain crimes if they had been committed within the context of an armed conflict.[479] Led by the apparent aim to clarify the legal landscape, it stated that IHL applies 'from the initiation' of an armed conflict 'in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party' until peace is re-established.[480] This way it was able to conclude that IHL applied even with respect to crimes committed in prison camps for civilians, located far away from the theatre of hostilities.

With respect to IACs, the Appeals Chamber based its assessment on textual and teleological reasons. Textually, it referred to provisions stipulating the end of application of IHL, which contain language to the effect that the Conventions and Protocol I shall cease to apply 'in the territory of Parties to the conflict' on the general close of military operations.[481] The Chamber's obvious although unstated inference is that if the rules are supposed to cease to apply in the parties' territory at a certain point in time, they must have applied across that territory before that moment.

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[478] See Arnold P Krammer, 'German Prisoners of War in the United States' (1976) 40 Military Affairs 68. Notably, many former inmates were so impressed by the treatment they had received in the POW camps that they decided to stay after the war and become Americans themselves. ibid 72.

[479] cf ICTY Statute, arts 2, 3 and 5.

[480] *Tadić* Decision on Jurisdiction (n 10) [70].

[481] GC IV, art 6; AP I, art 3(b). See *Tadić* Decision on Jurisdiction (n 10) [68].

Although possibly superficially appealing, this interpretation has to be rejected if one carefully examines the context of the norms on temporal application of the Conventions and the Protocol. The said provisions use the phrase 'in the territory of Parties to the conflict' to differentiate this general case of application of the norms to the conflict itself, from a special case of their application to occupied territories. In these territories, the norms disassociate the end of application of IHL from the close of hostilities.[482] As the examples of the Palestinian Occupied Territories since 1967 or of the Japanese occupation of Singapore after World War II show, occupation may end years after the military operations are over. In such cases, the occupier will continue to exercise governmental functions in the occupied territory. The drafters therefore considered it desirable to continue to hold the occupying State bound by IHL in order to safeguard the protection of the persons in its power.[483] These provisions, therefore, determine the temporal scope of application of the treaty instruments, nothing more, nothing less. The rules 'switch off' the application of the GCs in the conflict parties' territory, regardless of whether they were 'switched on' everywhere in that territory in the first place. The ICTY Appeals Chamber's textual interpretation therefore appears to be incorrect.

Teleologically, the Chamber reasoned that 'the very nature of the Conventions—particularly Conventions III and IV—dictates their application throughout the territories

[482] cf GC IV, art 6(3) ('In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of [enumerated articles].'); AP I, art 3(b) ('in the case of occupied territories, [the application shall cease] on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.').

[483] cf *GC IV Commentary* (n 21) 62–63; *APs Commentary* (n 22) 68 [154]–[156]. Note, however, that significantly prolonged occupation may affect the capacity and desirability of the occupying Power to strictly follow all rules applicable in times of occupation. For instance, the maintenance of the legislation in force prescribed by article 43 of the 1907 Hague Regulations becomes cumbersome and even counter-productive in cases of long-term occupation. For a closer analysis of this issue, see, eg, Dinstein, *The International Law of Belligerent Occupation* (n 427) 116–120.

of the parties to the conflict; any other construction would substantially defeat their purpose'.[484] Although the Chamber did not go into any further detail, its position appears to be that the Conventions could not achieve their main purpose—the protection of the victims of war[485]—if they did not apply to these persons. However, here the Chamber mistakenly uses the vehicle of the application *ratione loci* to achieve an aim properly served by the application *ratione personae*. It has been shown that some provisions (such as those setting out parties' obligations towards detainees) need to apply even outside of the territory of the warring parties in order to safeguard protection to the victims of war foreseen by the Conventions.[486] The correct perspective is to approach the problem via the personal scope of application of IHL rules. Moreover, the absence of a reference to application *ratione loci* in the IHL treaties is not a coincidence: the drafters had discussed the possibility and agreed that such a reference would be too restrictive and would not add to the clarity of the instrument in question.[487] The purpose referred to by the Appeals Chamber is better served if these rules are considered applicable to persons and relationships with a nexus to the IHL-triggering armed conflict.

In relation to internal armed conflicts, the Chamber held that the aim of protection of those taking no active part or no longer taking part in the hostilities (common article 3) and of all those affected by an armed conflict (Article 2(1) of Protocol II) suggested 'a broad geographical scope' extending beyond the actual hostilities.[488] Although it

[484] *Tadić* Decision on Jurisdiction (n 10) [68].

[485] cf *GC I Commentary* (n 21) 14 ('The discussions [at the 1949 diplomatic conference] were dominated throughout by a common horror of the evils caused by the recent World War and a determination to lessen the sufferings of war victims.'), 16 (the participants at the 1949 diplomatic conference were 'resolved that any future victims of war should be provided with the widest possible safeguards').

[486] See text to n 477 above.

[487] *APs Commentary* (n 22) 138 [413].

[488] *Tadić* Decision on Jurisdiction (n 10) [69].

highlighted in passing the 'war nexus' requirement[489] proposed above, which would suggest using a *ratione personae* lens, in the end it settled for a strictly geographical criterion of applicability, namely that IHL is to apply 'in the whole territory under the control of a party'.[490] This is liable to criticism on two grounds.

First, as shown above, applying a territorial lens to persons and relationships affected by armed conflicts is unhelpful as it obfuscates the reality that it is not their geographical location but rather their link (or nexus) to the conflict that makes IHL norms relevant to them. Moreover, similarly to norms applicable in IACs, the drafting history of the Additional Protocol II indicates that the omission of a criterion *ratione loci* was deliberate;[491] in the words of the ICRC commentary, 'the applicability of the Protocol follows from a criteria [*sic*] related to persons, and not to places.'[492]

Second, the limiting proviso that the territory in question must be 'under the control of a party' is unsubstantiated by any analysis, unparalleled with the requirements pertaining to IACs, and it results in further uncertainty as to the level of control required.[493] Accordingly, in the judgements of the ICTY's sister tribunal, the ICTR Trial Chambers usually acknowledge the *Tadić* decision but then omit the control requirement.[494] Likewise, in *Niyonteze*, one of the few national judgements to grapple with this issue, the Swiss Military Appeals Tribunal expressly acknowledged that the norms

489 ibid [69].

490 ibid [70].

491 *Official Records* (n 360) vol VIII, CDDH/I/SR.22, 211 [47]–[48].

492 *APs Commentary* (n 22) 1360 [4490].

493 See also Arimatsu (n 34) 188.

494 See, eg, *Akayesu* Trial Judgement (n 169) [635]–[636]; *Prosecutor v Kayishema and Ruzindana* (Trial Judgement) ICTR-95-1-T (21 May 1999) (ICTR) [182]–[183]; *Prosecutor v Rutaganda* (Trial Judgement) ICTR-96-2-T (6 December 1999) (ICTR) [101]–[102]; *Prosecutor v Musema* (Trial Judgement) ICTR-96-13-T (27 January 2000) (ICTR) [283]; *Prosecutor v Bagilishema* (Trial Judgement) ICTR-95-1A-T (7 June 2001) (ICTR) [101]; *Prosecutor v Semanza* (Trial Judgement) ICTR-97-20-T (15 May 2003) (ICTR) [367].

governing NIACs apply beyond 'the front or the narrow geographical context of the ongoing combat operations'.[495] Even the ICTY has been quite liberal in applying the requirement from its own case-law. For example, in *Milutinović et al* it held five representatives of Serbia criminally responsible for the crimes of deportation and forcible transfer as crimes against humanity committed against Kosovo Albanian civilians.[496] The Trial Chamber was satisfied that the elements of the crimes were fulfilled by a Serbian-orchestrated campaign of violence and intimidation in the then-province of Kosovo, without inquiring in depth whether each of the villages from which the civilians fled was actually under the control of the Serbian forces.[497]

In summary, it is suggested that the ICTY's holding from *Tadić* need not be considered incorrect insofar as it is taken to mean that provisions of IHL *may* apply in the whole territory of the conflict parties. This is undoubtedly correct: if the facts on the ground are closely related to the hostilities and fall within the subject matter of IHL rules, then IHL will apply to the affected persons and relationships. In the ICTY's ensuing jurisprudence, this is also how the rules of applicability were interpreted, with emphasis placed on the war nexus, not on the geographical location.[498] Similarly, the ICRC as the guardian of IHL interprets its mandate to relate to situations of armed conflict, which it

[495] *Niyonteze v Public Prosecutor* (26 May 2000) (Switzerland, Tribunal militaire d'appel 1A) 32 ('…le front ou le contexte géographique étroit du théâtre effectif des opérations de combats…').

[496] *Milutinović* Trial Judgement (n 10) vol 3 [1208]–[1212].

[497] ibid, vol 2 [1179]–[1262]. Significantly, the Chamber did, however, state that there was a nexus between the crimes and the armed conflict: ibid, vol 2 [1180].

[498] See, eg, *Prosecutor v Stakić* (Trial Judgement) IT-97-24-T (22 March 2006) (ICTY) [342]; *Prosecutor v Kunarac et al* (Appeal Judgement) IT-96-23&IT-96-23/1-A (12 June 2002) (ICTY) [57]–[58]; *Prosecutor v Mrkšić et al* (Trial Judgement) IT-95-13/1-T (27 September 2007) (ICTY) [423].

understands as covering 'the entire territory of the parties to a conflict *as far as the protection and assistance of the victims of that conflict are concerned*'.[499]

In contrast, it would be patently incorrect to conclude that an outbreak of an armed conflict in the territory of a State triggers the application of IHL relative to that type of conflict across the entire State territory, without regard to the actual reach of the ongoing conflict. Persons unaffected by and unrelated to the conflict[500] fall outside the scope of IHL even if they find themselves in the conflict-ridden State's territory.[501]

This interpretation thus excludes one variant of the pure 'global' approach that would have all conflicts transformed to international solely on the basis of territorial applicability of IHL. Its rejection means that an outbreak of an IAC does not affect all relationships in a State's territory. The next step to consider, then, is whether the addition of this international element might affect the nature of all *conflict* relationships. If that was the case, the pure 'global' approach could still be plausible insofar as this effect would make law of IAC applicable to these conflicts.

6.1.2 Pure global view and policy considerations

There are some strong policy reasons militating in favour of the use of the pure global view, including the improved ease and consistency of application. Before moving on to

[499] Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement (signed 26 November 1997) (1998) 38 IRRC 159 ('Seville Agreement'), art 5(1)(a) (emphasis added).

[500] The requirement of a connection with the conflict does not imply that the conflict is to be the only cause of the situation these persons find themselves in. For example, there is no reason why victims of natural disasters whose plight was exacerbated by the armed conflict should not be covered by IHL provisions on humanitarian relief. See also Daniela Gavshon, 'The Applicability of IHL in Mixed Situations of Disaster and Conflict' (2009) 14 JCSL 243, 248 (reaching the same conclusion on the basis of a teleological analysis of Part II of GC IV). In terms of formal logic, it is sufficient for the conflict to be a contributing cause; it need not be a complete or a necessary cause of the situation at hand.

[501] Daniela Gavshon notes that the opposite view could lead to absurd outcomes such as the relief to the victims of Hurricane Katrina in the US in 2005 being governed by IHL if the US was considered to have been involved in international armed conflicts in that time period: ibid 247.

the analysis of these individual reasons, it bears emphasizing that the argument in favour of the pure 'global' view is of a general nature. Put differently, it maintains that as long as several conflicts co-exist in one State's territory, their legal nature will always change to international once an IAC breaks out in that territory, irrespective of the mutual relationships between individual conflicts.

It is submitted that this variant of the 'global' approach should also be rejected. Applying such a standard for determination of the conflict nature is too sweeping and it ignores the often more nuanced reality on the ground. Proponents of this view, admittedly, portray its blanket nature as a key advantage. They argue that application of the same norms to all conflict situations is easier[502] and consistent.[503] Although this is true (in a near-tautological sense), upon inspection, neither of these reasons actually proves convincing.

First, in a similar context, Sassòli rightly rejects the ease or difficulty of conflict qualification as irrelevant: 'the fact that a situation is difficult to qualify under existing law is, except for first-year students, no argument to apply a new, easy solution'.[504] Lawyers often have to put up with the application of complex norms to complex facts and while simplification of application may be an expedient goal *de lege ferenda*, it cannot in and of itself serve as a justification to create a new meta-rule of application.

Second, the call for consistency is laudable in principle but mistaken in this context. It appears in Judge Rodrigues's dissent in *Aleksovski* where he seemed to argue for two

[502] Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc S/25274 (10 February 1993) [45]; Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674 (27 May 1994) [44]; *Aleksovski* Trial Judgement (n 10) Dissenting Opinion of Judge Rodrigues [23] (embracing the cited report of the Commission of Experts); Hoffmann, 'Squaring the Circle?' (n 140) 244.

[503] *Aleksovski* Trial Judgement (n 10) Dissenting Opinion of Judge Rodrigues [27].

[504] Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' (n 33) 330.

kinds of consistency: the consistency of protection of 'victims of similar acts' and the consistency of judicial determination of conflict nature in such complex situations.[505] The risk of inconsistency in both of these senses is an inevitable consequence of the existence of a distinction between international and non-international armed conflicts in IHL. As long as there will be two types of conflict, there will be some glaring discrepancies in the protection of victims of acts that are 'similar' or even identical—except for the type of conflict in which they occur.[506] The possibility of various Trial Chambers reaching different conclusions as to the conflict nature is definitely not a desirable outcome but it results from the Chambers' primary responsibility to determine and assess the facts before them.[507]

In addition, the blanket nature of the 'global' approach may result in absurd outcomes. The complex situation in the Congo during the Great War of Africa between 1998 and 2003 is a case in point. After Laurent Kabila took power in the capital Kinshasa, the country descended into violence. The newly installed president's weak hold on power was perceived by many regional actors as the opportunity to profit from the country's vast natural resources. Kabila's government was directly challenged by at least two separate rebel movements. The Rally for Congolese Democracy (RCD) was established in Goma on the Rwandan-Congolese border with significant Rwandan support and was engaged in the most serious clashes with the government forces. The Movement for the Liberation of the Congo (MLC) operated with Ugandan support in the northern Equateur province. In addition to these confrontations for domination over the

[505] *Aleksovski* Trial Judgement (n 10) Dissenting Opinion of Judge Rodrigues [27].

[506] This has been criticized on numerous occasions. See, eg, Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (n 127); Yves Sandoz, 'Foreword' in *ICRC Study* (n 18) vol 1, xxii; Stewart (n 11) 313 and references cited therein. However, these arguments are properly made on the level of *lex ferenda*, not with respect to *lex lata* to be applied to existing conflicts. See also Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (n 60) 138–139.

[507] See, eg, *Tadić* Appeal Judgement (n 10) [64].

Congo, several 'wars within the war' (a term coined by Filip Reyntjens[508]) continued at their own pace. One of them was the conflict between the Bahema and the Balendu ethnic groups in the Ituri region. Although there is evidence that Uganda fuelled the conflict by supporting the Bahema, these clashes predated the Second Congo War and they can be accurately described as 'classical ethnic confrontations over power and assets (land)' localized in Ituri.[509]

A persuasive case can be made in support of the internationalized nature of the conflict between the RCD and the Congolese government. RCD was established in 1998 with significant Rwandan support and there is strong evidence that its operations were co-ordinated from Kigali. This would suffice for the two crucial components of the test for internationalization by intervention proposed elsewhere in this work—essentially, support and co-ordination[510]—to be met. But it would be absurd to claim that by the same token, all conflicts occurring in the Congolese territory simultaneously (the UN Special Rapporteur spoke of no less than nine![511]) should automatically be considered international, too. Perhaps the Ugandan support for the Bahema was of the nature and intensity that would turn it into a conflict party operating against the Balendu without the territorial State's consent. This would also trigger the applicability of the law of IACs for the conflict parties. But to claim that the Rwandan involvement with the RCD in Goma affected the legal nature of the conflict in Ituri would mean to divorce the law from the facts on the ground.

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508 Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996–2006* (CUP 2009) 207.

509 ibid 216.

510 See section 2.2.3 of the present chapter.

511 Report on the Situation of Human Rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr Roberto Garretón, in accordance with Commission on Human Rights Resolution 2000/15, UN Doc E/CN.4/2001/40 (1 February 2001) 3.

This logic equally undermines the broader claim of the proponents of the 'pure' global view that following internationalization, all conflicts in a given State's territory should be seen as a single 'global' international conflict. It is conceivable that several conflicts come about in one State's territory yet they have an insignificant or no mutual relationship. Especially in States blessed with vast territories or cursed with a complicated position in the region, this plurality of mutually independent armed conflicts is often the reality. Russia's short but heated border conflict with Georgia in 2008 overlapped in time with its much more long-winded domestic confrontation with the Chechen separatists.[512] Similarly, during the first phase of a guerrilla war launched against Peru by the armed group *Sendero Luminoso* (Shining Path) in the south of the country in the 1980s, a short-lived international confrontation over the control of disputed border territory flared up between Peru and Ecuador in the north.[513] In neither of these instances has it been seriously suggested that IHL stipulates that the conflicts occurring in the same territory should somehow be considered merged or subsumed under one another.

Law must recognize the possibility of States being engaged in several discrete conflicts simultaneously. It should not be interpreted as joining such conflicts artificially. Because in such situations internationalization does not affect *all* conflicts in a given State's territory, the pure global view of internationalization must be rejected.

6.1.3 Limitations of the pure mixed view

For the proponents of the pure 'mixed' view, the existence of an outside intervention should not change anything in relation to the law applicable to the ongoing internal conflict. The relationship between the intra-territorial parties should be governed by the

[512] See, eg, ICRC, 'Annual Report 2008' (2009) <https://www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2008.htm> accessed 1 October 2014, 264.

[513] See George M Lauderbaugh, *The History of Ecuador* (Greenwood 2012) 142.

law of NIACs irrespective of the extent and nature of involvement of the outside Power. According to this view, only the hostile relationship between the intervening and the target State could be governed by the law of IACs.

This extreme form of legal compartmentalization is easily rejected. It has been shown elsewhere in this work that internationalization of a previously internal armed conflict can be brought about by an outside State's involvement of a certain extent and nature in that conflict.[514] If this involvement meets the twin requirements of support of the insurgents and participation in their organization, co-ordination or planning of military operations, then the outside State may be said to be using force against the territorial State indirectly *through* the proxy of the local insurgents.[515]

If the insurgent group submits itself to the command and control of the outside State, relinquishing thus its autonomy, it would be illogical to insist on decoupling the conflict into its international and non-international strands. Following the Yugoslavian army's withdrawal from Bosnia in May 1992, the Bosnian Serb faction of the army was formally renamed and reconstituted as a separate militia, the VRS. However, on the facts established by the ICTY, the VRS never acquired independence of its operations, acted in pursuance of the military goals formulated in Belgrade and remained subject to a chain of military command leading up to the General Staff of the Yugoslavian army at its top.[516] Accordingly, since May 1992 the FRY was using force against Bosnia and Herzegovina through the VRS. Because the VRS did not operate as an autonomous actor and because any separate military activities of the FRY in Bosnia and Herzegovina were of ancillary

[514] See chapter 2, section 2.2 above.

[515] See, in particular, text to nn 239–241 above.

[516] *Tadić* Appeal Judgement (n 10) [152].

nature,[517] it is submitted that there only existed one conflict in the territory of Bosnia and Herzegovina at the relevant time. It follows that a single conflict should be governed by one body of law applicable to armed conflicts. As the FRY's involvement internationalized the conflict following the principles described previously, this applicable body must be the law of IAC.[518]

The artificiality of dividing conflicts into isolated segments is also highlighted by academic writings and the positions of some States.[519] While cases akin to the Bosnian example from mid-1990s certainly do not lend themselves to this segmentation, the argument should not be taken too far. The preceding section demonstrated that several discrete conflicts may exist in one State's territory. In such instances, it would indeed be artificial *not* to consider them separately and to join in law what in reality remains separate.

In any event, the existence of situations of internationalized conflict which cannot be plausibly divided into international and non-international 'sub-conflicts' confirms that the pure 'mixed' view must also be rejected. Such situations must be treated as a single IAC with three parties: the target State on the one side and the outside State and the armed group it is assisting on the other.

6.2 Spectrum, not a choice: Introducing the hybrid model

Due to the complex nature of contemporary conflicts, one can rarely speak of the existence in one State territory either, on the one hand, of two or more conflicts that are

[517] ibid [151](iii).

[518] See also ibid [162] (reaching an equivalent conclusion).

[519] Meron, 'Classification of Armed Conflict in the former Yugoslavia: Nicaragua's Fallout' (n 231) 238 ('to divide [a conflict] into isolated segments to exclude the application of the rules of international armed conflict would be artificial'), referring to *Prosecutor v Tadić* (Amicus Curiae Brief Presented by the Government of the United States) IT-94-1-T (25 July 1995) (ICTY) 28.

entirely separate and unrelated (thus clearly justifying the mixed approach) or, on the other hand, of one evidently single indivisible conflict (thus clearly justifying the global approach). In reality, complex conflict situations typically fall somewhere in between. Conflict parties, in-State and foreign, use armed violence in varying degrees in the individual conflict pairs and affect, to a certain extent, the remaining conflict pairs by doing so. It is submitted that it is the degree of armed violence used and the extent to which it affects the other conflict pairs that determines whether the conflict pairs should be considered separately ('mixed approach') or together ('global approach'). As this model combines the elements of both supposed opposite views, it is presented as a hybrid model. In order for this model to be workable, it must opt for one of the approaches as the baseline and then provide a framework which allows determining at what point the baseline approach must give way to the other one.

An examination of the States' positions expressed during the drafting history of the Additional Protocols to the Geneva Conventions strongly supports the position that the conflict pairs occurring in a State's territory should initially be considered separately. First, in the run-up to the diplomatic conference of 1974–77, the ICRC's proposal that foreign military assistance should trigger the full applicability of IHL was rejected twice and eventually dropped from the final draft of the Additional Protocols.[520] This refusal should be seen as an expression of a clear view of the international community that outside military assistance does not per se modify the nature of the conflict at hand. However, the government experts seemed to be unanimous in their opinion that the relationship between the opposing States should be governed by the provisions applicable to IACs.[521] This position thus left it entirely conceivable that an originally

[520] Schindler (n 3) 259–260.

[521] ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, 3 May–3 June 1972: Report on the Work of the Conference* (ICRC 1972) vol 1 [2.347].

internal conflict with some foreign involvement would be governed by two sets of rules: those applicable to, respectively, international and non-international armed conflicts.

Second, during the diplomatic conference itself, a number of government delegations expressed their concern that rules governing IACs should not be projected into the domestic sphere. The delegates were worried that such application might encroach on the sovereignty of the afflicted States or even become the pretext for external armed intervention.[522] These anxieties were reflected in the outcome of the conference, which preserved the existence of two types of conflict in international law, international and non-international, and clarified the thresholds of their applicability.[523] State practice entailed in the preparatory works on the Additional Protocols thus indicates that rules governing IACs were considered to be applicable to the inter-State recourse to violence only. As the 'mixed approach' recognizes this distinction and allows for differentiated application of the law, it is submitted that it should be used as the baseline.

At a certain point on the spectrum, however, the use of force by the outside intervener and the rebels it supports becomes so indistinguishable that it is impossible to speak of separate conflicts anymore. As always, the exact location of this 'tipping point' may be difficult to determine. It is helpful to consider the potential scenarios demonstrating the extent to which the conflict pairs existing in the territory of a State may be mutually intertwined. They are presented in the increasing order of mutual interrelation, from independence to unity.

[522] See, eg, *Official Records* (n 360) vol VIII, CDDH/I/SR.22, 212 [58]; ibid, CDDH/I/SR.23, 221 [33] (Romania); ibid, CDDH/I/SR.24, 231 [14] (Mexico); ibid 234 [28]–[29] (Egypt).

[523] See AP I, art 1(3)–(4); AP II, art 1; see further chapter 1, section 2.1.

First, conflicts occurring especially in States with vast territories may be entirely unrelated. For example, in 2010, India was plagued by localized conflicts over the territorial control of the geographically distant and separate states of Assam and Kashmir, with no known mutual overlap or interaction.[524]

Second, the conflicts may affect each other indirectly without there being any alignment or assistance between the conflict parties from across the conflict pairs. A recent example of such a situation is Sudan in the period between 2003 and 2005. The government of Sudan was concurrently involved in a longstanding conflict of declining intensity with the separatist South as well as in newly flared up fighting against two local armed groups in Darfur. The individual non-State parties fought on different fronts and had little known direct interaction, but they may have affected each other indirectly by relying on the same natural resources and by triggering population movement across the territory of Sudan.[525]

Third, the conflicts may affect each other directly by having mutual strategic significance, albeit without actual assistance or co-ordination between the individual conflict parties. This can be achieved, for instance, when the parties to different conflicts are engaging a common foe, which results in considerable relative relief for one or each of them. In its early stages, the 2011 conflict in Libya appeared to fit this muster, when the NATO-led intervention targeted solely the Gaddafi government forces, without directly assisting the rebels operating from Benghazi.[526] Still, the air strikes by the NATO

[524] Uppsala Conflict Data Program, 'UCDP Conflict Encyclopedia' (*Uppsala University*, 2011) <www.ucdp.uu.se/database> accessed 1 October 2014.

[525] See, eg, ICRC, 'Annual Report 2003' (2004) <https://www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2003.htm> accessed 1 October 2014, 95–98 and ICRC, 'Annual Report 2004' (2005) <https://www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2004.htm> accessed 1 October 2014, 102–106.

[526] See, eg, 'Press Briefing on Libya' <http://www.nato.int/cps/en/natolive/opinions_74038.htm> accessed 1 October 2014 ('The NATO mandate does not give us any authority to decide on sides at a NATO level. The operational activities that are being carried out, as I've said, are to protect the civilian

forces offered significant relief to the rebels as the Libyan state army had to split its attention and resources into two different zones of combat.[527]

Fourth, the relationship between the parties to the separate conflicts may be one of mutual support without it reaching the level of joint organization, co-ordination or planning of military operations. This support may take various forms, from financial assistance to the provision of training and advice, to the supplies of military equipment and arms. These forms of support were a common, if mostly covert, form of waging the so-called 'proxy wars' in the Cold War era. For instance, the United States funded training and arms for the *Khampas*, i.e. the guerrillas fighting the Chinese government in Tibet during and after the 1959 uprising.[528]

Fifth, the level of mutual assistance and support between the conflict parties may develop to provide the other party a role in the making of strategic and tactical decisions as to how to engage the common enemy. The aligned conflict parties can thus be said to participate jointly in the organization, co-ordination or planning of their military operations. The conflict in Libya in 2011 developed in this way: between April and May, reports emerged that the rebels and NATO had established a 'joint operations centre' to co-ordinate the preparation of individual forces' military operations conducted on land and from air.[529]

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population. Any relationship with pro- or anti-Qadhafi forces is beyond this forum for myself at this stage.').

[527] See further Mačák and Zamir (n 30) 413–423.

[528] Dawa Norbu, *China's Tibet Policy* (Curzon Press 2001) 268 ff.

[529] Maher Chmaytelli and Peter S Green, 'Libya Rebels, NATO Don't Have Joint Operations, Official Says' *Bloomberg* (16 April 2011) <http://www.bloomberg.com/news/2011-04-16/libya-rebels-nato-don-t-have-joint-operations-official-says.html> accessed 1 October 2014 (confirmation by the rebels and denial by NATO); Bruno Waterfield, 'Libya: British Military Advisers Set Up "Joint Operations Centre" in Benghazi' *The Telegraph* (18 May 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8521977/Libya-British-military-advisers-set-up-joint-operations-centre-in-Benghazi.html> accessed 1 October 2014 (confirmation by the UK).

Sixth, one of the aligned conflict parties may be acting entirely through the other one, without it being actively present with its own forces on the ground. In such a situation, the two parties are still separate entities, but one of them is subordinated to the other to the extent that the hierarchically superior party controls the operations of the inferior party. As a result, the shared enemy is actually fighting against one independent force only. For example, in the Bosnian Civil War in 1992, this was the case with the Serbian support of the Bosnian Serb militias, the VRS.[530]

Finally, seventh, at the opposite end of the spectrum from total independence is unity. Allied conflict parties may eventually merge and become a single warring faction in the conflict, subjected to one leadership and one hierarchical command structure, thus turning the former non-State party into an organ of the third State.[531] Also here there will in fact remain a single conflict pair, namely between the erstwhile shared enemy and the newly unified conflict party. One may think, for example, of the partisan groups fighting the Nazi regimes in the occupied Eastern European countries at the end of World War II which were incorporated in the Red Army upon its progress across the continent towards the heart of the Reich.[532]

It follows from the criticism of the 'pure' approaches[533] that scenario 1 (utterly disconnected conflicts in one State's territory) is best served by the mixed approach,

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[530] See *Tadić* Trial Judgement (n 10) Separate and Dissenting Opinion of Judge McDonald, 291 ('the Federal Republic of Yugoslavia (Serbia and Montenegro) essentially depleted its own army to establish the VRS to carry out effectively the war effort in Bosnia and Herzegovina without significant overt involvement of the [FRY].'); contra Trial Chamber view in the same judgement at [606] (believing the two were mere allies); but see *Tadić* Appeal Judgement (n 10) [152] (effectively supporting Judge McDonald's view). See also text to n 517 above (noting the ancillary role played by the Yugoslav army units in Bosnia and Herzegovina at that time).

[531] ILC ASR, art 4; see also *Bosnian Genocide* (n 201) [391]–[392] (holding that entities that act in 'complete dependence' on the third State may be equated with an organ of that State).

[532] See Edgar M Howell, *The Soviet Partisan Movement 1941–1944* (Ray Merriam ed, 6th edn, Merriam Press 2006) 230.

[533] See sections 6.1.1–6.1.3 above.

whereas scenario 7 (one single conflict due to the parties' merger) is best served by the global approach. Where does, however, the latter replace the former on this proposed spectrum of situations? Where do we draw the line?

It is suggested that the dividing point is represented by the moment at which the two parties can be said to be using force together. This, on the one hand, requires more than mere complicity as understood in the ILC ASR, that is, more than mere provision of aid or assistance,[534] embodied in scenario 4. Although under the law of State responsibility, each of the two entities might be responsible for a wrongful act resulting from their complicity, for the purposes of conflict qualification the two remain autonomous. Their respective confrontations with the territorial State should thus still be considered as separate armed conflicts in line with the baseline mixed view.

On the other hand, the requirement of joint use of force is not equivalent with the demand that the insurgent group be subordinated to the intervening State or even subjected to one line of command. It suffices that the two entities participate in the organization, co-ordination, or planning of their military activities. In such a case neither of the parties is using force autonomously anymore. Their activities are sufficiently intertwined for the purposes of finding a single IAC.

In summary, the dividing line lies on the border between the fourth and the fifth scenarios. The use of operational autonomy as a distinguishing criterion is sufficiently nuanced to provide for a solution to the conundrum presented at the outset of the present chapter. Situations in which the mutual effect of the conflict pairs is insufficient to disrupt parties' autonomy should be seen as situations of a separate use of force and thus of separate armed conflicts. Once the autonomy of the aligned conflict parties is sacrificed, their use of force against the common enemy should be seen as a joint effort,

534 ILC ASR, art 16.

enclosing all three relevant parties in a single IAC. In practice, much will, of course, depend on the assessment of the facts.

For instance, the autonomy of the KLA vis-à-vis NATO during the 1999 conflict was dividing the academics writing about the conflict. On the one hand, Greenwood highlighted that the relations between NATO and the KLA were not 'sufficiently close' for the conflict between the KLA and the FRY to be considered part of the IAC between the NATO States and the FRY.[535] On the other hand, Ronzitti considered it possible that the KLA was so close to the NATO forces and, in fact, subjected to the control of NATO, that it did not represent an autonomous party to the conflict.[536] Without taking a position on the Kosovo conflict at the moment, it appears that the model presented here produces answers that are in alignment with casuistic analysis found in academic writing, attesting to its broader workability.

6.3 Evaluation

Internationalization of conflicts marked by a plurality of conflict parties brings about a dilemma relevant to the application of IHL. It is clear that international law of armed conflict should become applicable to such situations—that is the essence of internationalization, after all—but to what extent? Should it apply to all conflict parties, or only to those that are full-fledged States? James Stewart lamented that this dilemma entails a choice 'between a theory that cannot work and a practice that is not justified'.[537] The present writer respectfully disagrees. There is a third way.

[535] Christoper Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign' (2002) 78 International Law Studies 35, 45–46.

[536] Natalino Ronzitti, 'Commentary' (2002) 78 International Law Studies 35, 114.

[537] Stewart (n 11) 335.

The hybrid model proposed in the previous section responds to the academic criticism and provides an answer to Stewart's choice that is both justifiable and workable. It is justified as it takes duly into consideration the States' reluctance to extend norms governing IACs to internal situations. It only triggers the application of this body of law to the conflict 'globally' when the use of force by the individual conflict parties, external and internal, can no longer be distinguished.

It is also workable as it provides clear rules determining the nature of complex conflict situations on the basis of assessment grounded in real historical examples. The model does not force either an artificial segmentation of a conflict characterized by a joint use of force or an overarching application of the same body of law to discrete conflict situations. Although in the form presented here it focuses on triangular relationships between the territorial State, a third State, and an in-State armed group, its method is easily scalable to more complex situations as each of the conflict pairs can be assessed on this basis separately.

7. Conclusions

A non-international armed conflict transforms into an international armed conflict if it meets certain requisite legal conditions. This chapter has sought to show that several distinct sets of such conditions have developed in international law. Hence, the notion of 'internationalized armed conflicts' cannot be equated with only one of these modalities. On the contrary, the said concept encompasses conflicts internationalized through outside intervention; by way of State dissolution; through a legal fiction set out in article 1(4) AP I; and on a relative basis.

The former two forms of internationalization bring about the 'standard' common article 2 situation of two or more States (or, more precisely, independent subjects of

international law) being involved in an armed conflict. This may either be the result of (1) a direct or indirect intervention by an *external* actor such as a State or an international organization, or of (2) an *internal* development occasioning the dissolution of the territorial State.

The latter two forms are complementary and stem from the development of treaty and customary norms, which proclaim certain intra-State conflicts as (or as equivalent to) IACs. These are (3) the so-called 'wars of national liberation', a practically defunct legal category, which was designed to transform internal conflicts into IACs on an *absolute* basis; and (4) instances of *relative* internationalization effected by means of recognition of belligerency, unilateral declarations, and special agreements under common article 3.

Finally, this chapter has attempted to provide a workable and justifiable model for the application of IHL to conflicts marked by a plurality of conflict parties. It has proposed that when the use of force by the aligned conflict parties can no longer be distinguished, the law of IACs applies 'globally' to the complex conflict situation as if it were a single internationalized armed conflict. Yet, if the parties maintain their operational autonomy, the situation should be seen as 'mixed', characterized by a multiplicity of mutually independent conflict pairs.

The chapter has accordingly argued in favour of a comprehensive approach to the determination which situations, actors, and relationships originating in internal armed conflicts should be seen as governed by the law of IAC. The following chapters of the thesis turn to the consequences that this extension of the applicable law has for the individual aspects of internationalized conflicts.

CHAPTER 3

COMBATANT STATUS IN INTERNATIONALIZED ARMED CONFLICTS

1. Introduction

Perhaps one day battlefield robots, auto piloted UAVs, and self-replicating cyber viruses will completely remove the need for the presence of the 'human factor' in armed conflicts. Until that day comes, the determination of who may legitimately participate in an armed conflict is going to remain a key legal exercise of international humanitarian law.

In 'classic' IACs, where armies of two independent States meet on the battlefield, this determination is based on the distinction between combatants and non-combatants. Combatants are considered to be authorized to participate directly in hostilities, whereas non-combatants are not.

Internationalized armed conflicts differ from the 'classic' conflicts by the nature of the conflict parties. Irrespective of the way in which the internationalization process may have occurred, at its outset one of the parties was a non-State actor. It may have transformed into a full-fledged State during the process of internationalization, although this will likely not be generally accepted while the conflict remains underway. It may have

remained a non-State actor which would, however, have developed links to an outside State or an international organization.

The general understanding in the literature is that members of non-State armed groups do not normally benefit from combatant status.[538] This chapter, therefore, looks at the position of non-State actors in the law of IACs and it puts forward a view according to which most fighters belonging to most non-State armed groups in most types of internationalized armed conflicts should, in fact, be considered eligible for combatant status. In order to make this argument, the chapter proceeds in three consecutive and interdependent steps.

First, it traces the historical development of the regulation of combatants and argues that, contrary to more sceptical views, IHL has for decades now enabled certain classes of non-State actors access to combatant status (section 2). Second, it analyses the object and purpose of the regulation of combatancy to demonstrate that it is not at odds with the extension of combatant status to non-State actors fighting in internationalized conflicts (section 3). Third, the chapter responds to the most common objections against the extension of this status to non-State actors through the perspective of internationalized armed conflicts as proposed in this thesis (section 4).

This three-step analysis will demonstrate that fighters belonging to non-State armed groups acting in internationalized conflicts may, on a conceptual level, benefit

[538] See, eg, Aldrich, 'Customary International Humanitarian Law: An Interpretation on behalf of the International Committee of the Red Cross' (n 124) 507; Anthony Rogers, 'Combatant Status' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 117; Kolb and Hyde (n 33) 69; Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization' (2009) 91 IRRC 95, 116; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 33; Solis (n 73) 187; Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 79; Lubell (n 33) 139; William Banks, 'Toward an Adaptive International Humanitarian Law: New Norms for New Battlefields' in William Banks (ed), *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press 2011) 6; Sivakumaran (n 33) 71; Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 85.

from combatant status. The remaining question, therefore, is whether they may also meet the criteria of combatancy in practice. The final substantive section of the chapter accordingly provides a nuanced answer extrapolated from the applicable law contained in the Geneva Conventions and their Additional Protocol I.

2. Historical overview

2.1 Pre-modern times: Before the concept of combatancy

In pre-modern times, the right to participate in war was not subject to strict legal criteria. Little need was felt to regulate who was allowed to take part in hostilities. It was common, as Vattel wrote, that 'immediately on a declaration of war, every man became a soldier' and whole adult male populations of the contesting territorial units engaged in the war against each other.[539] Alternatively, in more stratified societies characterized by feudal structures, participation in combat was seen as the honourable duty of the noblemen.[540] Serfs and slaves were often not expected to take part in fighting.[541] Either way, little consideration was given to the plight of the non-fighting population who often became the target of indiscriminate attacks of the assaulting army.[542] In these circumstances, the need for the delineation of the entitlement to participate in hostilities was not felt as pressing.

[539] de Vattel (n 52), book III, ch II, §9.

[540] Francois Louis Ganshof, *Feudalism* (3rd edn, Harper & Row 1964) 87 (discussing the obligation to provide 'military service as a mounted knight' as part of the duty of *auxilium* owed by a vassal to his feudal lord). The 'military classes' were bound by a nascent legal system, the medieval law of arms (*jus militare*), which can be considered one of the roots of international law of war. Gerald Irving Anthony Dare Draper, 'The Status of Combatants and the Question of Guerrilla Warfare' (1971) 45 BYBIL 173, 173–175.

[541] See, eg, Yolande Diallo, 'African Traditions and Humanitarian Law' (1976) 16 IRRC 387, 392–393 (mapping out West African traditions that confirm this trend even in the 20th century)

[542] See, eg, Gregory P Noone, 'The History and Evolution of the Law of War Prior to World War II' (2000) 47 Naval L Rev, 181 ('Genghis Khan would punish a city for fighting against him by killing every inhabitant – men, women, and children regardless of combatant or non-combatant status.'); Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 17.

This observation is paralleled by a closer reading of the works of the classical international legal scholars. These do contain, admittedly, traces underlying the principle of distinction, which were arising from the writers' moral and religious instincts. For example, Francisco de Vitoria opined that 'the deliberate slaughter of the innocent is never lawful in itself.'[543] Similarly, Hugo Grotius held that 'the bidding of mercy, if not of justice' requires that 'no action be attempted whereby innocent persons may be threatened with destruction'.[544] However, classical works published before the nineteenth century do not go beyond stating this fundamental principle and they do not, in particular, attempt to define who the 'non-innocent' persons were who could lawfully participate in hostilities.[545] For example, even in a section tellingly entitled 'Who may be classed under the term combatants', Grotius discussed a separate issue, namely when safe-conducts granted to the army could be extended to its senior officers.[546] At most, one could infer a partial answer to this question from Grotius's views on who should be spared during wartime,[547] but this analysis would still not result in the identification of the criteria of combatancy.

2.2 Dawn of modernity: The landscape starts to change

The legal landscape started to change with the advent of the Enlightenment Age in Europe. In his landmark work *The Social Contract*, Jean Jacques Rousseau expressed the

[543] de Vitoria (n 36) vol I, book VI, §35. Vitoria expressly mentions Exodus 23 and Deuteronomy 20 as the authority for his claim.

[544] Grotius (n 47), book III, ch XI, §8.

[545] Green, *The Contemporary Law of Armed Conflict* (n 386) 102–104.

[546] Grotius, book III, ch XXI, §10. This point is also made by Green, *The Contemporary Law of Armed Conflict* (n 386) 104.

[547] Grotius lists children, women, old men, and persons 'whose manner of life is opposed to war', including priests, writers, farmers, and merchants. Grotius, book III, ch XI, §§2, 9–12; see also Kalshoven, 'Grotius' Jus in Bello, with Special Reference to Ruses of War and Perfidy', 332–333 (referring to these Grotius's views as an illustration of 'Grotian moral justice').

important idea that war was a relation 'not between man and man, but between State and State'.[548] The object of the war, thus understood, was to defeat the enemy State, and to achieve this aim, it sufficed to subdue that State's armed forces.[549] The period of the early nineteenth century marks the general acceptance of the notion of war no longer as the domain of feudal rulers or city-states but rather as an instrument of national policy.[550] Sparked by the writings of humanitarians such as Henry Dunant, who wrote a searing memoir about the aftermath of the 1859 Battle of Solferino,[551] international public opinion increasingly turned its attention to the plight of the victims of wars.[552] After Dunant unsuccessfully attempted to visit German fighters interned in Paris during the 1870 Franco-German war,[553] he reportedly understood that 'victims of a conflict, particularly those who took up arms to defend their country although not members of a regular army, could be protected only if the concept of belligerent (and hence of prisoner of war) were clearly defined.'[554]

Legal instruments of the time paid an increased amount of attention to this issue. The first codification of the laws of armed conflict, the 1863 Lieber Code adopted in the United States,[555] referred expressly to the distinction between combatants and non-combatants and stipulated that non-combatants had 'to be spared in person, property,

[548] Jean Jacques Rousseau, *The Social Contract* (Cosimo 2008) 19.

[549] ibid 20; see also O'Connell (n 542) 19–20; but see Lassa Oppenheim, *The Future of International Law* (OUP 1921) 62–63 (warning against too broad reading of Rousseau and arguing that even non-combatants are in a 'passively hostile position' vis-à-vis the enemy State and that they may, accordingly, lawfully become the object of coercive measures taken by that State's armed forces).

[550] Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 49.

[551] Henry Dunant, *A Memory of Solferino* (ICRC 1862).

[552] Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 26.

[553] Yvonne de Pourtales and Roger Durand, 'Henry Dunant, Promoter of the 1874 Brussels Conference' (1975) 15 IRRC 61, 65–66.

[554] ibid 66.

[555] See chapter 4, section 2.2 below for more detailed treatment of the historical background to the adoption of this codification.

and honor as much as the exigencies of war will admit'.[556] The Code did not contain a definition of a lawful combatant, but a limited understanding of this concept could be drawn from two of its provisions. Article 57 stated that '[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent'.[557] In contrast, article 155 described non-combatants as the 'unarmed citizens of the hostile government'. The Lieber Code thus affirmed the important distinction between unarmed civilians and armed soldiers.[558]

The Lieber Code quickly became influential abroad and many European nations used it as a basis for their own military instructions.[559] In addition, the 1860s marked the adoption of two additional groundbreaking international instruments of the laws of war: the 1864 Geneva Convention dedicated to the protection of persons wounded in wars[560] and the 1868 Declaration of St Petersburg prohibiting exploding bullets below 400 grams.[561] However, these legal documents likewise did not answer the challenge identified by Henry Dunant and he thus spearheaded the initiative for the organization of an international conference designed to prepare a comprehensive code on the regulation of war.[562]

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556 Lieber Code, arts 22 (protection of non-combatants) and 155 (principle of distinction).

557 The term 'belligerent' nowadays denotes a party to an armed conflict, not an individual fighter.

558 See Rogers (n 538) 103–104; but see Rotem Giladi, 'A Different Sense of Humanity: Occupation in Francis Lieber's Code' (2012) 94 IRRC 81, 112 (putting forward an alternative view that Lieber considered 'the whole citizenry of the belligerents as enemies' and thus 'directly rejected Rousseau's doctrine').

559 Leon Friedman (ed) *The Law of War: A Documentary History*, vol 1 (Random House 1972) 152.

560 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (signed 22 August 1864, entered into force 22 June 1865).

561 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg (entered into force 11 December 1868), reproduced in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts* (3rd edn, Henry Dunant Institute 1988) 101.

562 de Pourtales and Durand (n 553) 66–77 (detailing Dunant's efforts in the preparation of the conference).

2.3 Brussels Declaration: The first definition of combatant status

The Brussels Conference of 1874 was attended by the delegates of 15 European powers.[563] Already during this early conference, a divide between larger military States and their smaller, weaker counterparts was beginning to show and it occasioned the considerable stalling of the diplomatic process.[564] On the one hand, the great Powers of the period like Prussia and Russia were anxious to limit the privilege of lawfully taking part in hostilities to a narrowly defined class of army soldiers clad in State uniforms.[565]

Small States like Belgium and the Netherlands, on the other hand, shared the concern that any regulation adopted should not deprive them of their ability to rely on mass forms of resistance in case of foreign invasion.[566] They therefore demanded that combatant status not be limited to members of regular armies but that it should also extend to resistance fighters defending their home State.[567]

In the end, the conference delegates succeeded in formulating a compromise wording in the final draft of the agreement, known as the Brussels Declaration.[568] Its article 9 thus contains the first international attempt to formulate a definition of

[563] Schindler and Toman (n 561) 25.

[564] Friedman (n 559) 152.

[565] Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 194.

[566] WJ Ford, 'Resistance Movements in Occupied Territory' (1956) 3 NILR 355, 355; Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 194.

[567] Nahlik (n 2) 200. Colonel Draper describes this difference also in terms of varying ideologies, labelling the representatives of the larger States as the 'military school', versus the 'patriotic school' of representatives of the weaker States. Gerald Irving Anthony Dare Draper, 'The Legal Classification of Belligerent Individuals' in Michael A Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer 1998) 197–199.

[568] Brussels Declaration Concerning the Laws and Customs of War (27 August 1874), reproduced in Schindler and Toman (n 561) 21–28.

combatant status, which appears under the heading 'Who should be recognized as Belligerents Combatants and Non-Combatants':

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. That they be commanded by a person responsible for his subordinates;
>
> 2. That they have a fixed distinctive emblem recognizable at a distance;
>
> 3. That they carry arms openly; and
>
> 4. That they conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia constitute the army, or form part of it, they are included under the denomination "army".[569]

Although the Brussels Declaration was never ratified due to the lack of general will to accept it as a binding agreement,[570] its content was highly influential in the ensuing development of the law of armed conflict.[571] The text of article 9 was reproduced in virtually unmodified form[572] in the Hague Regulations of 1899 and 1907.[573] It was then incorporated in the 1929 Geneva Convention on the Treatment of Prisoners of War by way of a referral to the 1907 Regulations.[574]

There is no doubt that in the late nineteenth and early twentieth centuries, the prevailing paradigm of international law was based on State sovereignty and that the

[569] Schindler and Toman (n 561) 28.

[570] Jozef Goldblat, *Arms Control: The New Guide to Negotiations and Agreements* (SAGE 2002) 279; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 51; Katja Göcke, 'Brussels Declaration (1874)' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated October 2009) [7] ('all of the great powers refused to accept the Brussels Declaration as a binding convention').

[571] cf Hague Convention (II) with Respect to the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) 32 Stat 1803, TS 403, preamble (confirming the inspiration of the drafters by the 'views which are enjoined at the present day, as they were twenty-five years ago at the time of the Brussels Conference in 1874, by a wise and generous foresight').

[572] The only difference of more than syntactical import was the inclusion of the words 'or volunteer corps' in the last sentence of the provision, which signified the parties' understanding that in addition to militias, even volunteer corps could be integrated within a State army.

[573] Hague Regulations (1899), art 1; Hague Regulations (1907), art 1.

[574] Geneva Convention Relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931) 118 LNTS 343, art 1(1).

government delegates participating at the international conferences considered the rules they adopted to apply in the context of inter-State warfare only,[575] possibly expanded by the situations of recognized belligerency.[576] It is nevertheless worth noting that in the adopted form, the provision originating at the 1874 Brussels Conference and confirmed at The Hague accorded combatant status to fighters belonging to potentially non-State entities described as 'militias' and 'volunteer corps'.[577] These were, to be sure, understood by the delegates to be acting to defend their home State against foreign invaders,[578] but the adopted text did not require any specific connection linking these units to a particular State.[579] In fact, the requirement of subordination of these units under a 'general command' was proposed in the first draft of the Declaration, but it was removed following the submission of the Austrian-Hungarian delegate who argued that such an attachment would be 'rare' in practice.[580] Revealingly, the delegates in 1874 may have been more apprehensive of the reality of contemporary warfare than their counterparts a century later. As will be shown at the end of this chapter, a similar requirement in Additional Protocol I that forces be subjected to a 'command responsible' to a conflict

[575] See, eg, James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Johns Hopkins Press 1909) 27, citing the following passage by William Ladd as outlining 'the actual program of the Hague Conferences': '[it] is to have *nothing to do with the internal affairs of nations, or with insurrections, revolutions, or contending factions of people or princes*, or with forms of government, but solely to concern themselves with the intercourse of nations in peace and war.' William Ladd, *An Essay on A Congress of Nations* (Whipple and Damrell 1840) 16 (emphasis added).

[576] See Bartels (n 37) 47 (arguing that the concept of belligerency strengthened, rather than undermined the sovereignty-based approach); see also chapter 2, section 5.1 above.

[577] The interpretation that these terms were intended to cover units not under direct control of States, and thus non-State actors, is confirmed by the inclusion of the final sentence of the provision, which draws a distinction between militias *lato sensu* (to be seen as part of the 'army' of the State) and *stricto sensu* (only these had to fulfil the four conditions). On this distinction in the context of the later Geneva Conventions, see section 5.1.1 below.

[578] cf Scott, *The Hague Peace Conferences of 1899 and 1907* (n 575) 528–530.

[579] But see, eg, Rosas (n 181) 296; Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 258; Nurick and Barrett (n 71) 567.

[580] Conférence intergouvernementale, *Actes de la conférence de Bruxelles de 1874* (Librairie des publications législatives 1874) 29–30.

party may prevent many actors in internationalized conflicts from meeting the Protocol's criteria of combatancy.[581]

2.4 Geneva Convention III: Expansion of the concept of combatancy

The reality of World War II confirmed the emergence of a new type of armed non-State actors with an unresolved legal status. All across Europe, so-called partisan movements engaged the Nazi German armed forces to contest for control over territories attacked or occupied by the Wehrmacht. Understandably, the partisans uniformly demanded to be treated as lawful combatants, but the German practice in this respect was far from consistent. They accorded prisoner-of-war treatment to some partisan units but denied it to most.[582] Post-war commentary was divided on the question whether partisans, as groups offering resistance in occupied territory, could qualify at all for combatant status.[583] War crime tribunals seemed to have accepted that the partisans should have been seen as combatants provided they met the four criteria, which was often not the case, especially on account of their insufficient or inconsistent use of uniforms.[584]

The adoption of the Third Geneva Convention in 1949 removed some of these doubts. Subparagraphs 1, 2, 3, and 6 of article 4A complemented and partially modified the Hague conditions. Their text is as follows:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

[581] See section 5.2 below.

[582] WJ Ford, 'Resistance Movements and International Law (II)' (1967) 7 IRRC 579, 581–584.

[583] See Rosas (n 181) 298 fn 372 (opponents) and fn 373 (proponents); see also WJ Ford, 'Resistance Movements and International Law (IV)' (1968) 8 IRRC 7, 7–12.

[584] See WJ Ford, 'Resistance Movements and International Law (III)' (1967) 7 IRRC 627, 627–639; see also Kalshoven and Zegveld (n 77) 34.

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> […]
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[585]

Unlike the previous texts, the Convention does not speak of conditions for combatant status but instead defines which persons should be considered prisoners of war upon capture.[586] Nevertheless, it is submitted that the provision reaches beyond the attribution of POW status and that persons falling into one of the abovementioned categories were to be seen as combatants, too.[587]

Responding to the need to clarify the status of the partisans, the drafters added an express reference to 'organized resistance movements' to the text of subparagraph 2.[588]

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[585] GC III, art 4A.

[586] cf GC III, art 4A, chapeau. The provision, in contrast to previous texts, does use the term 'capture' but rather, and more accurately, 'fall[ing] into the power of the enemy'. This more cumbersome but also more precise wording was chosen in order to prevent conflict parties from denying prisoner-of-war status to persons detained following a mass capitulation, ie those who were not, strictly speaking 'captured' by the detaining Power. *GC III Commentary* (n 21) 50.

[587] See, eg, Marco Sassòli, 'Combatants' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated April 2013) [8]–[13]; but see, eg, Rosas (n 181) 300 (arguing that regular armed forces may include non-combatant personnel); see also *APs Commentary* (n 22) 515 [1677] (admitting certain ambiguity in the wording of the Third Convention).

[588] See also *GC III Commentary* (n 21) 52–61 (notably, the whole section devoted to subparagraph 2 is entitled 'Partisans' and on page 58, the Commentary confirms that 'this wording … constitutes a clear

Moreover, reflecting the academic disputes referred to above,[589] the adopted text made it clear that it did not matter whether the partisans were operating in or outside their State's territory or whether that territory was occupied.[590] The requirement of 'belonging to a Party to the conflict' confirmed the heretofore tacit understanding that so-called 'independent forces'[591] could not be operating without any link whatsoever to a belligerent State.[592] The ICRC Commentary was, however, quick to point out that this affiliation need not be de jure or even express; it was said to be sufficient 'if the operations are such as to indicate clearly for which side the resistance organization is fighting'.[593] This liberal interpretation of the requirement of 'belonging' ought to be underlined at this point as it acquires crucial importance in the analysis of the entitlement to benefit from combatant status by non-State actors in conflicts internationalized by outside intervention.[594] At any rate, in order to benefit from the rights and privileges accorded to combatants, partisans still had to fulfil the four[595] conditions, which was already at the time known to be highly problematic for irregular groups relying on guerrilla methods of warfare.[596]

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reference to the events of the Second World War and to the resistance movements which were active during that conflict').

589 See text to n 583 above.

590 cf *GC III Commentary* (n 21) 50 and 58–59.

591 Rosas (n 181) 300, drawing on Erik JS Castrén, *The Present Law of War and Neutrality* (Suomalainev Tiedeakemia 1954) 146.

592 *GC III Commentary* (n 21) 57.

593 ibid 57.

594 See text to nn 801–807 below.

595 This author takes the view that since the adoption of the Geneva Conventions, the traditional *four* conditions have, in fact, been complemented by a *fifth* condition of 'belonging to a Party to the conflict' expressed in the chapeau of article 4A(2) of GC III. This view does not affect the historical analysis presented here and it will be discussed below in section 5.1.2 on the application of the conditions to 'irregular' non-State forces in internationalized armed conflicts.

596 See, eg, Castrén (n 591) 149 (admitting that 'most partisan movements similar to those appearing during the Second World War' would still fall short of protection on this basis); see also *APs Commentary* (n 22) 383 [1370] (expressing surprise that although perhaps 'millions of resistance fighters opposed the occupying

Also importantly for the present purposes, the new Convention included in subparagraph 3 a new category of 'regular armed forces who profess allegiance to a government or authority not recognized' by the opposing conflict party. In some of the early post-adoption writings, it was argued that this provision could be used to bring fighters in *internal* conflicts within the scope of the Convention.[597] That would be taking the thrust of the provision too far. The provision was drafted to cover resistance troops akin to the Free French Forces (*Forces Françaises Libres*) who were fighting the occupying German forces but who did not engage in direct hostilities against the collaborating government based in Vichy.[598] Stated more generally, the provision was meant to cover cases of governments in exile who continued to resist an occupying Power from abroad.[599] Such conflicts were still understood as *international*—in fact, without an IAC in existence, the application of the GCs as a whole would not be triggered, and so this subparagraph would not apply either.[600] Yet, the provision should be highlighted as another possible gateway through which members of entities that were arguably of a non-State nature could benefit from combatant status.

armies in Europe and elsewhere, often with nothing more than makeshift equipment at their disposal, … the Hague Regulations were not, on the whole, seriously shaken thereby'); see also Howard S Levie, *Prisoners of War in International Armed Conflicts* (Naval War College Press 1979) 42 (arguing that 'this attempted enlargement of the provisions of prior conventions accomplished little or nothing').

[597] See, eg, Farer (n 170) 29

[598] *GC III Commentary* (n 21) 61–62; Rosas (n 181) 252–253.

[599] *GC III Commentary* (n 21) 63; Rosas (n 181) 254.

[600] Rosas (n 181) 252 fn 145 and references cited therein.

2.5 Additional Protocol I: Equating regular and irregular forces

The decolonization period marked the appearance of national liberation movements as prominent and influential non-State actors on the international scene.[601] Those of them engaged in secession conflicts found it was nearly impossible to reconcile their characteristic method of guerrilla warfare based on stealth and ambush with the obligation to meet the four conditions.[602] The combination of these factors—the influence of the liberation movements and the changing nature of warfare—led to a further development of the law regulating lawful combatancy.[603] At the 1974–77 Diplomatic Conference, notably attended by the representatives of eleven national liberation movements,[604] two important changes were agreed insofar as qualification as combatant was concerned.

Firstly, the normative structure of the regulation was inversed. Article 43 of Protocol I does not make any difference between regular and irregular combatants or

[601] See generally Wilson (n 387).

[602] See, as a *pars pro toto* contemporary reference, Draper, 'The Status of Combatants and the Question of Guerrilla Warfare' (n 540) 183 (observing that guerrilla warfare was a feature of the period) and 214 (arguing that guerrilla fighters were dissuaded from meeting the four conditions, because the conditions were stringent and because their fulfilment would likely lead to death, defeat, or capture).

[603] See *APs Commentary* (n 22) 383–384 [1370]–[1373].

[604] See Resolution 3 (I) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records* (n 360) vol I, CDDH/55, 5 (inviting 'the national liberation movements which are recognized by the regional intergovernmental organizations concerned, to participate fully in the deliberations of the Conference and its Main Committees'); Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (10 June 1977) [3] (listing liberation movements that took part in the Conference, namely 'African National Congress (South Africa) (ANC) (first, second and third sessions) African National Council of Zimbabwe (Rhodesia) (ANCZ) (third and fourth sessions) Angola National Liberation Front (FNLA) (first and second sessions) Mozambique Liberation Front (FRELIMO) (first session) Palestine Liberation Organization (PLO) Panafricanist Congress (South Africa) (PAC) (first, second and fourth sessions) People's Movement for the Liberation of Angola (MPLA) (first and second sessions) Seychelles People's United Party (SPUP) (first session) South West Africa People's Organization (SWAPO) Zimbabwe African National Union (ZANU) (first and second sessions) Zimbabwe African People's Union (ZAPU) (first and second sessions)').

between regular armies and resistance movements.[605] All members of armed forces other than medical and religious personnel were pronounced to be combatants.[606] Accordingly, fighters no longer had to meet further conditions in order to qualify for combatancy. The Protocol provided, inversely, that a combatant could *lose* his status if (1) he did not distinguish himself from the civilian population during the attack and its preparation or (2) in situations where, owing to the nature of the hostilities, he cannot so distinguish himself, he did not carry his arms openly during the attack and its preparation.[607]

Secondly, the Protocol expanded its scope to situations of wars of national liberation by including them in article 1(4). While the importance of that provision for the internationalization of such conflicts has been discussed earlier in this work,[608] it should be emphasized here that this extension of applicability made provisions on combatant status clearly applicable to a certain class of non-State actors, namely national liberation movements.[609] Although under the interpretation advanced above, combatant status could in principle be granted to non-State actors already on the basis of article 4A(3), they would nevertheless have had to meet the criterion of being 'regular' armed forces.[610] The adoption of the Protocol, however, extended the privileges of combatancy also to irregular forces, albeit still only in conflicts that fell under the scope of this instrument.[611]

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[605] cf Wilson (n 387) 173 ('Article 43 changes the approach to the definition of armed forces. It makes no distinction between regular and irregular combatants, resistance movements and regular armies.').

[606] AP I, art 43(2) ('Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.').

[607] AP I, art 44(3) (argument *a contrario* 'he shall *retain* his status as a combatant…') (emphasis added).

[608] See chapter 2, section 4 above.

[609] cf *APs Commentary* (n 22) 507 ('it is perfectly clear that the Protocol has extended its field of application to entities which are not States').

[610] See text to n 585 above for the text of the provision.

[611] cf Wilson (n 387) 174 (emphasizing that the import of article 43 was that it 'extend[ed] the privileges of combatancy to irregular forces even when the authority commanding them is not recognized').

2.6 Evaluation

This brief historical overview demonstrates that the development of conditions of combatant status has been strongly influenced by a State-sovereignty paradigm. States have so far been careful to maintain the exclusivity of application of the concept of combatancy to IACs. Indeed, as academics, case-law, and the ICRC admit in a rare unison voice, combatancy is one of the concepts that has not benefited from the recent trend of confluence between the two types of conflict.[612] Nevertheless, at nearly all times in modern history, States were willing to extend the status to a limited set of non-State actors. Could this approach apply to non-State actors in internationalized armed conflicts more generally? In order to answer that question, I look in the next step of the analysis at the object and purpose of the regulation of combatancy.

3. Object and purpose of the regulation of combatancy

The gradual adoption of the Rousseauvian paradigm, namely that the object of armed confrontation is to defeat the enemy through the defeat of its armed forces while excluding the non-fighting population,[613] allowed for the development of two countervailing first-order principles of IHL. To limit the permissible use of armed force to what is necessary to bring about the defeat of the opponent (principle of military necessity) means, at the same time, to protect the life, health, and property of the potential victims of wars in all other circumstances (principle of humanity).[614]

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[612] See Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 47; Mikos-Skuza (n 33) 28; Harrison Dinniss (n 33) 142; Fleck (n 32) 604; *Tadić* Decision on Jurisdiction (n 10) [126]–[127]; *ICRC Study* (n 18) vol 1, 384.

[613] Rousseau (n 548) 20; see also text to n 548 above.

[614] See Pictet, *Development and Principles of International Humanitarian Law* (n 552) 61–62; see further Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795.

The regulation of combatancy serves to instrumentalize the interplay of the two opposing principles by answering whom the belligerents may lawfully target as part of their effort to prevail over the enemy. For this purpose, IHL has developed a second-order principle, the principle of distinction. In ordinary IACs, both conflict parties are subject to the same set of legal rights and obligations, which is expressed in another second-order principle, the principle of equal application.

It is submitted that the foregoing understanding of the rules of combatancy, arising in the law of IACs, is equally applicable to modern internationalized armed conflicts. In this section, both of the aforementioned second-order principles are analysed to the extent they form the normative underpinning of the regulation of combatancy. This analysis forms the context of the discussion of objections against the application of combatant status to non-State actors which follows in the next section of this chapter.

3.1 Principle of distinction

The answer to the question who may be legally targeted in war finds its most powerful and clear expression in article 48 of the First Additional Protocol, entitled 'Basic Rule' and generally considered reflective of customary law:[615]

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times *distinguish between the civilian population and combatants* and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[616]

This requirement translates into two important consequences in relation to the regulation of warfare, strengthening the two first-order principles mentioned above. This is true

[615] *ICRC Study* (n 18) rule 1; *Nuclear Weapons* (n 104) [78]–[79]. The provision was adopted by consensus at the Diplomatic Conference in Geneva. *Official Records* (n 360) vol XIV, CDDH/III/SR.10, 79 [15]; ibid, vol VI, CDDH/SR.41, 161 [107].

[616] AP I, art 48 (emphasis added).

wherever the rule on distinction can be found applicable, irrespective of the character of the conflict parties.

Firstly, where followed, the rule improves the protection of persons not taking part in the hostilities. It assures the conflict parties that attacks against them will come only through a certain identifiable class of persons and thus removes the need or the desire to target those who pose no danger—chiefly, the civilians. This highlights the importance of maintaining the distinction at all times as otherwise, in Dinstein's words, '[i]f combatants were free to melt away amid the civilian population, every civilian would suffer the results of being suspected as a masked combatant.'[617]

Secondly, the Rousseauvian paradigm requires that combatants, understood as tools in the hands of the war-waging Sovereign who wields them, are not to be punished for mere participation.[618] It is ordinarily not by choice that they become involved in their State's war effort—many States rely on compulsory draft[619] and armed groups likewise resort to forced recruitment[620]—and even those who voluntarily make the decision to lend their life and limb to the military effort of their authority normally do not have a say in the original resolution to go to war.[621]

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[617] Yoram Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity* (Martinus Nijhoff 1989) 103

[618] Rousseau (n 548) 20.

[619] See CIA, 'The World Factbook: Military Service Age and Obligation' (2014) <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html> accessed 1 October 2014; but see James Burk, 'The Decline of Mass Armed Forces and Compulsory Military Service' (1992) 8 Defense Analysis 45 (discussing the qualified trend of decline of compulsory military service in the western world).

[620] This is the practice of many armed groups, including, for example, Uganda's Lord's Resistance Army or Sierra Leone's Revolutionary United Front who are also known for forcibly conscripting children. See, eg, Terrence Lyons, 'Governance: A Security Perspective' in Joanna Spear and Paul D Williams (eds), *Security and Development in Global Politics: A Critical Comparison* (Georgetown University Press 2012) 123

[621] This problem has been described as the question of the 'innocent soldier'. See, eg, Robert F Turner, 'Intentional Targeting of Regime Elites: The Legal and Policy Debate' (2002) 36 New England Law Review 785, 787 (claiming the authorship of the concept and adding, '[m]ost of the kids that died in Vietnam were not responsible for the policies that sent them there … most of Saddam Hussein's troops were not morally

3.1.1 Combatants as rational subjects responding to incentives

Nevertheless, it would be wrong to consider, as some do, the combatants solely as instruments[622] or automatons[623] or as persons who have traded their right to life for the right to kill.[624] It has been correctly observed that such an approach would impermissibly objectify participants in warfare and devalue their lives.[625] Quite conversely, combatant status plays an important function in relation to combatants themselves and their decisions with respect to their compliance with the law. The guarantee that combatants' participation in hostilities shall not per se be considered criminal after the conflict, translates into a strong incentive to abide by all other norms of IHL during their military deployment.[626] As long as a combatant follows the limitations imposed by the law of war, the fact of his engagement in conduct that would under ordinary conditions of peace be considered highly criminal, including the killing and maiming of other persons and the destruction of others' property, will not bring upon him the risk of *ex post facto* prosecution or punishment. This issue is re-examined in more depth in the discussion of the argument that the unwillingness to extend combatant status to non-State fighters is in

responsible for his acts of aggression against Iran and Kuwait'); see also Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (n 293) 933 and 957–961.

622 Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (Palgrave Macmillan 2002) 160–165.

623 Carl Ceulemans, 'The Moral Equality of Combatants' (2007) 37 Parameters 99, 104.

624 William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 EJIL 741, 757.

625 Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 International Law and Politics 641, 647.

626 Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (n 33) 64–65; Jason Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 Virginia Journal of International Law 1025, 1026; Eric Talbot Jensen, 'The Laws of War: Past, Present, and Future: Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance' (2005) 46 Virginia Journal of International Law 209, 234; Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 274.

part borne out of the States' intention to maintain the power to prosecute these persons for their participation in hostilities.[627]

3.1.2 Nature and extent of combatant privilege

The nature of the authority conferred in this respect by IHL upon the combatants has been the subject of discussion. Since Grotian times, it has been often expressed in terms of a grant of a right or a privilege: a 'right of war',[628] 'licence to kill',[629] 'combatant privilege',[630] 'the right to participate directly in hostilities,'[631] and so on. Other writers argue that the law of war only prohibits prosecutions but does not itself govern the legality of the underlying conduct; it is an 'immunity', not a right in itself.[632] Although this distinction may prima facie appear to be of an academic nature only,[633] the preferred view is that the status is only a bar to prosecution, for profound moral and practical reasons.

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627 See section 4.2 below.

628 Grotius (n 47), book III, ch IV, s V, §1.

629 See, eg, Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 538) 33; Christian Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 EJIL 15, 16; *Report on Terrorism and Human Rights* OEA/Ser.L/-V/II.116 Doc 5 rev 1 corr (22 October 2002) (IACmHR) [68]; Solf, 'Commentator on the subject of Non-International Armed Conflicts' (n 404) 928.

630 See, eg, Matthew Evangelista, *Law, Ethics, and the War on Terror* (Polity 2008) 72; Solis (n 73) 42; Solf, 'Commentator on the subject of Non-International Armed Conflicts' (n 404) 928; but see, eg, Kenneth Anderson, 'What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base' (2002) 25 Harvard Journal of Law & Public Policy 593 (using the term 'combatant's privilege' as the privilege to avoid prosecutions, thus in line with the more limited, immunity-based understanding discussed in the text to n 632 below).

631 AP I, art 43(2).

632 See, eg, Sean Watts, 'Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict' (2012) 88 International Law Studies 145, 152 (the rule 'merely prohibits prosecutions'); Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (n 293) 935 (arguing that IHL is not the source of the 'right' to participate in hostilities); Richard Baxter, 'So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs' (1951) 28 BYBIL 323, 323–324 (arguing that international law contains limits on permissible behaviour in war but does not grant rights to that effect).

633 Notably, some influential authorities do not recognize the normative difference and use the terms interchangeably. See, eg, Kolb and Hyde (n 33) 203 (combatants enjoy 'immunity: they cannot be prosecuted under criminal law simply for having taken part in the hostilities') and 153 (IHL contains 'the licence to kill an enemy in combat').

As a preliminary matter, although article 43 of Additional Protocol I speaks of a 'right' to participate in hostilities,[634] too much emphasis should not be placed on this wording. According to the drafting history, the formulation was chosen (to the admitted relief among the delegates) to facilitate the agreement on a definition of a combatant; there is no indication in the discussions that the drafters would have wanted to grant an *additional* right to the combatants.[635]

Therefore, IHL does not create a 'licence to kill'; its only import is to prevent prosecution for conduct with regard to which this body of law remains normatively neutral. This view allows construing combatant status as a pure instrumentality,[636] thus at once alleviating the extent of suffering in war without imposing an approbation of the law on violent acts widely perceived as deeply immoral.[637] It is also more palatable for States as it does not displace their domestic laws that contain a prohibition of intentional killing of persons, but rather only prevents the prosecution of such acts in situations of armed conflict, and as such it ought to result in wider acceptance of the application of combatant status.

3.2 Principle of equal application

Does the regulation of combatancy apply equally to all conflict parties? In principle, IHL is a symmetric body of law. It prescribes the same duties and obligations for both parties

634 See n 631 above.

635 See *Official Records* (n 360) vol XV, CDDH/236/Rev.1, 401 [85] ('The drafting of article 42 [now article 44] was considerably simplified when the Working Group decided to deal with the question of spies in article 40 [now article 46] only and to define the term "combatant" in article 41 [now article 43]. *There was general relief that it proved possible to avoid terms such as "lawful combatant", "legitimate combatant", and "privileged combatant" by defining a combatant as a member of armed forces who has a right to participate directly in hostilities.*') (emphasis added).

636 cf Watts (n 632) 163.

637 See further Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (n 293) 957–961 (discussing the moral problem of the 'innocent soldier' and its legal reverberations in light of modern warfare).

to a conflict. This is certainly true in IACs where equal application of the laws of war is considered one of the key principles by the doctrine,[638] confirmed by case-law[639] and the relevant treaty law.[640] This equality in law should not be mistaken for equality in fact. There is no doubt that in reality, individual belligerents will often be in vastly different positions as to the availability of human, material, and information resources. As a recent example of a standard inter-State conflict, the 1982 Falkland War may suffice. Even though the United Kingdom deployed a significantly superior air and naval fleet to that available to Argentina, there was no call for a differentiated application of IHL.[641]

Armed conflicts which feature a non-State armed group as a conflict party will inevitably display an even stronger asymmetry of means and resources. That this asymmetry is not always one-sided and that it does not favour the State party in all respects has been highlighted very lucidly in a recent study:

> The state enters the war with a force advantage but with an information disadvantage. It has the strength to hit what it sees, but can see little of what it wishes to hit. The guerrilla fighters, on the contrary, have an information advantage but a force disadvantage. They can see what they wish to hit, but they have limited capabilities to hit what they see.[642]

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638 See, eg, ibid.

639 *List et al* (Judgment) (19 February 1948) (1949) 8 Law Reports of Trials of War Criminals 34 (US MT) 59–60.

640 AP I, preamble (IHL 'must be fully applied in all circumstances to all [protected] persons … without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict').

641 Although the UK denied that the operations in Falkland Islands amounted to a 'state of war', there was no question that IHL applied to the situation. See Letter from Lord President of the Council, Mr John Biffen, to Mr George Foulkes, MP (20 May 1982), reproduced in (1982) BYBIL, 519–520 (on the UK position); see further Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action* (2nd edn, ICRC 1984) (on the conflict in general).

642 Klejda Mulaj, 'The Kosovo Liberation Army and the Intricacies of Legitimacy' in Klejda Mulaj (ed), *Violent Non-State Actors in World Politics* (Columbia University Press 2010) 103, paraphrasing Gordon H McCormick, 'Terrorist Decision Making' (2003) 6 Annual Review of Political Science 473, 484.

Some see this inequality in fact as requiring unequal treatment in law, as well.[643] The proposition that States should be subject to the same regulation as their non-State counterparts has been notoriously difficult for the States to accept.[644] Rarely, however, has this sentiment been expressed as clearly as in the statement of the Zairian delegate to the 1974–77 Diplomatic Conference. He argued that law should not put on equal footing 'a sovereign State and a group of insurgent nationals, a legal Government and a group of outlaws, a subject of international law and a subject of domestic law'[645] and added that in his view, armed groups not only 'had not the same rights as the national Government' but, '[i]ndeed, they did not possess *any rights at all*, but simply had an obligation to deal humanely with all those who did not take part in hostilities'.[646]

This reluctance on the part of the States has led some commentators to conclude that the notion of equality does not apply to NIACs.[647] It is submitted that such a conclusion would be too hasty. In fact, the law of NIAC prescribes equivalent obligations without paying regard to the nature of the conflict party. Common article 3 achieves this by requiring 'each Party to the conflict' to abide by its prescriptions equally. Additional Protocol II was phrased in passive voice to respond to a concern that a mention of 'parties to the conflict … might be interpreted as a recognition of the insurgent party',[648]

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643 See, eg, René Provost, 'The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany' (2011) 93 IRRC 437, 438–439.

644 Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-international Armed Conflict' (2007) 89 IRRC 655, 656 ('The principle of equality of belligerents, central to the traditional law of armed conflict, is arguably the most disagreeable aspect for states when it comes to adopting a law of non-international armed conflict.').

645 *Official Records* (n 360) vol VII, CDDH/SR.56, 219 [124].

646 ibid, vol VII, CDDH/SR.56, 219 [126] (emphasis added).

647 See, eg, Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers' (2006) 88 IRRC 881, 903 ('notion[] of … equality between the parties in every respect [is] inappropriate for non-international conflicts, since states have simply refused to accept [it].'); Watts (n 632) 151 ('no "equal application" principle operates in the present law of NIAC').

648 *APs Commentary* (n 22) 1339 [4423].

but there is no doubt that on a principle level, its norms apply to all conflict parties in an equal fashion.[649]

Therefore, the better view is that even in NIACs, IHL prescribes equal rights and obligations for the parties.[650] Somer correctly distinguishes this equality of rights and obligations from a general equality of status, describing only the former as 'equality' and reserving the term 'parity' for the latter.[651] Indeed, this restrictive understanding of equality is in line with its incentive function described above and, importantly, it has the potential of assuaging concerns about raising the status of armed groups on par with the States.[652] Sassòli and Bouvier, who are in accord with the interpretation proposed here, add an important caution that while the principle of equal treatment applies in NIACs, it does not, by way of IHL, extend to domestic law.[653]

The principle of equal application has thus retained its crucial importance in both main types of armed conflict under the framework of IHL. Internationalized armed conflicts, as NIACs that have developed into IACs, thus must also comport to the restrictions of this principle. An outright denial of combatant status to one of the parties to an internationalized armed conflict would, however, amount to an unequivocal breach of this principle. The second step of the analysis put forward in this chapter thus

649 ibid 1345 [4437] (stating explicitly that 'Protocol II and common Article 3 are based on the principle of the equality of the parties to the conflict').

650 Accord Somer (n 644) 663; Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War?*, vol 1 (3rd edn, ICRC 2011), part I, ch 2, 21; Sivakumaran (n 33) 243; *APs Commentary* (n 22) 1345 [4442]; *Third Report on the Human Rights Situation in Columbia* OEA/Ser.L/V/II.102, Doc 9 rev 1 (26 February 1999) (IACmHR) ch 4 [13] ('humanitarian law rules governing internal hostilities apply equally to and expressly bind all the parties to the conflict, i.e. State security forces, dissident armed groups and all of their respective agents and proxies').

651 Somer (n 644) 663.

652 cf Jelena Pejić, 'Terrorist Acts and Groups: A Role for International Law?' (2004) 75 BYBIL 71, 82 (warning that advocates of the removal of the principle of equality of the parties under IHL 'should think twice, as they risk creating a monster that will come back to haunt them').

653 Sassòli, Bouvier and Quintin, *How Does Law Protect in War?* (n 650), part I, ch 2, 21 ('IHL treats parties to a non-international armed conflict equally, but cannot oblige domestic laws to do so.').

proceeds by examining the reasons frequently advanced to legitimize this denial by way of objecting against any extension of the status to members of non-State groups.

4. Objections to the extension of combatant status to non-State actors

For the ensuing discussion, it bears reminding that the regulation of combatant status achieves the goals bestowed upon it by the principles of distinction and equal application through its three cardinal consequences. Firstly, those who have combatant status become legitimate targets for the opposing forces. Secondly, the law provides a shield from prosecution to those combatants who participate in hostilities and by doing that perpetrate acts that would otherwise be criminal under domestic law. Thirdly, when a person with the status of a combatant is captured, he must be granted prisoner-of-war status with the resultant protection guaranteed by IHL.

Opponents of granting combatant status to fighters belonging to non-State armed groups deem it unacceptable for any of these three benefits to apply to such persons. Internationalized armed conflicts, however, inevitably feature at least one non-State actor at the conflict outset. This section therefore considers arguments levelled against the extension of combatant status to non-State actors. It will demonstrate that, however strong these arguments may be in traditional civil wars, their effect in internationalized armed conflicts is much weaker and does not generally prevent the extension of status to fighters in these conflicts.

4.1 Sovereignty

On the face of it, at both post-World War II diplomatic conferences aimed at the development of IHL, proposals that would have improved the standing of fighters

belonging to non-State armed groups were rejected on account of arguments invoking State sovereignty. In 1949, Norway proposed that even in NIACs as defined by the future common article 3 of the Conventions, no person should be punished 'merely for having taken part in the war on the one side or on the other'.[654] The proposal was vocally rejected by the British delegation as tantamount to an 'abnegation of sovereignty'[655] and was later quietly abandoned by the Norwegians.[656]

At the time of drafting of the Additional Protocols, the idea of according combatant status across the board had already been abandoned. Accordingly, the original ICRC draft of Protocol II only contained an exhortation for the courts deciding upon the sentence for persons prosecuted for participation in hostilities in NIACs to 'take into consideration, to the greatest possible extent, the fact that the accused respected' IHL.[657] Many States re-emphasized their commitment to a conservative conception of sovereignty at the conference.[658] Correspondingly, when even this meekly worded provision was removed from the final agreed text along with about a half of the draft Protocol,[659] the deletion was lauded as a triumph of the sovereignty-protective approach.[660]

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654 *Final Record* (n 93) vol II A, 322 (Norway).

655 ibid, vol II A, 322 (United Kingdom).

656 With little in the way of support for the proposal, the Norwegian delegation moved for it to be deferred during the 21st meeting of the Second Committee. Norway never submitted a formal amendment and thus the conference participants did not return to this issue afterwards. See ibid, vol II A, 465 (reporting on the deferral).

657 Draft AP II, art 10(5).

658 See, eg, *Official Records* (n 360) vol VIII, CDDH/I/SR.22, 205 [17] (Argentina); ibid 211 [53] (Indonesia); ibid, CDDH/I/SR.23, 221 [33] (Romania).

659 See *APs Commentary* (n 22) 1335 [4412]–[4417].

660 *Official Records* (n 360) vol VII, CDDH/SR.49, 61 [11] (Pakistan); see also ibid 62 [14] (Sudan); ibid 65 [33] (Saudi Arabia), ibid, CDDH/SR.56, 203 [51] (India); but see ibid, vol VII, CDDH/SR.56, 206 [65] (Norway). See also *APs Commentary* (n 22) 1332 [4397].

4.1.1 Sovereignty objection and non-State actors

What lies behind these pro-sovereignty proclamations? The States were notably not refusing to extend combatant status or POW protection to *all* non-State armed groups. In fact, the historical analysis presented earlier in this chapter has demonstrated that at each development stage since the 1874 Brussels Declaration, some non-State groups could lawfully claim combatant status.[661] It bears emphasizing that the statements of this kind were made in contemplation of a specific scenario of 'traditional' civil war, featuring a contest for the rule in a particular State between its government and an insurgent group.[662] It is the internal aspect of sovereignty that was at the heart of the matter here, in other words, the understanding that because the political power belongs to the sovereign State, the subjects of the State have no right to rebel against it.[663] The factual pattern of internationalized armed conflicts is, however, markedly different from this description and thus the pro-sovereignty statements should not be taken at their face value as equally applicable to conflicts that are the subject of the present work.

It should nevertheless be emphasized that no doubt is cast on the drafters' intention to preserve the States' sovereignty in dealing with the 'traditional' insurrections. In Geneva, certain States did attempt to put forward an alternative humanitarian understanding of sovereignty applicable to all types of armed conflict. This interpretation was based on the argument that since sovereignty exists for the benefit of the whole

[661] See section 2 above.

[662] cf Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 272 (arguing that European civil wars of the *interbellum* period were the primary contextual background for the development of common article 3); Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 186–189 (summarizing the concerns over sovereignty expressed during the *travaux* on AP II, making it clear that traditional civil wars taking place in the territory of one State were again the sole focus of the drafters).

[663] See, eg, Samantha Besson, 'Sovereignty' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated April 2011) [56].

people, IHL should apply in full and equally even in internal armed conflicts.[664] Needless to say, this view never gained much traction at the conference itself or in the international community in general. It may thus be summarized, in the words of Sean Watts, that legal status is 'the ultimate prize of revolutionary war' and that for the States to surrender it in classic civil wars would be 'at odds with both the historical experience of NIAC, and their clearest self-interest'.[665]

The historical exposé at the beginning of this chapter has demonstrated that even after 1949 and 1977, a plausible argument could be made on the basis of the positive law that certain non-State actors were eligible to benefit from combatant status. Quasi-independent partisan forces who fulfilled four conditions under article 4A of the Third Geneva Convention would qualify as combatants, provided they could be considered as fighting for a State party to the conflict, even if the government of that conflict party was ineffective or even in exile.[666] In conflicts falling under the purview of Additional Protocol I, membership in irregular armed forces no longer constituted an obstacle to eligibility for combatant status.[667]

4.1.2 Impact on individual modalities of internationalization

On closer scrutiny, the sovereignty objection thus clearly does not pose a challenge to some types of internationalized armed conflicts. Wars of national liberation are the most straightforward case. States that accept this category of armed conflict—i.e. first and foremost States parties to Additional Protocol I—do not object from the position of

[664] See, eg, *Official Records* (n 360) vol VII, CDDH SR.56, 206 [65] (Norway); see also ibid, vol VIII, CDDH/I/SR.23, 218 [19] (New Zealand).

[665] Watts (n 632) 163.

[666] See text to nn 597–600 above.

[667] See text to nn 605–611 above.

sovereignty against the members of national liberation movements receiving privileged treatment as combatants. On the contrary, this was one of the desired outcomes of the adoption of AP I[668]—and equally one of the most prominent reasons for harsh criticism and eventually rejection of the Protocol by a number of States including the US and Israel.[669] Yet, in a historical irony, the outcome was actually never achieved as until now, combatant privileges have never been accorded to such persons on the basis of the Protocol.[670]

Conflicts in which the government recognizes its opposing force as belligerents likewise pose few problems from the perspective of the sovereignty objection. While the clash for sovereignty lies clearly at the heart of any such struggle, recognition of belligerency is a discretionary[671] unilateral act by the government in power that entails its tacit agreement to treat the rebels on par with a party to an IAC.[672] Accordingly, in the last unequivocal instances of recognition of belligerency by the territorial government, that is, in the American Civil War and in the Boer War,[673] the rebel fighters were extended combatant status and POW treatment.[674] The same analysis would hold, *a*

668 Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 195–196.

669 See Letter of Transmittal from President Ronald Reagan (29 January 1987), reproduced in (1987) 81 AJIL 910; Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (n 391) 7–10; *Official Records* (n 360) vol VI, CDDH/SR.36, 41 [60] (Israel).

670 Accord Theodor Meron, 'The Time Has Come for the United States to Ratify Geneva Protocol I' (1994) 88 AJIL 678, 683. See also chapter 2, section 4.5 (concluding that post-1977 development appears to have reduced article 1(4) AP I to little more than a dead letter).

671 See chapter 2, section 5.1.3 above.

672 See, eg, Lootsteen (n 410) 109–110.

673 See text to nn 410–413 above; see also n 413 above (considering the putative recognition of belligerency of Biafra by the Nigerian government in 1967).

674 Quincy Wright, 'The American Civil War, 1861–65' in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press 1971) 61–62; Lootsteen (n 410) 115; Higgins (n 389) 13; Wilson (n 387) 38.

fortiori, for the hypothetical conflicts that would see State dissolution acknowledged and recognized by the parent State—something that never happens in practice.[675]

On the other hand, situations in which the incumbent government disputes the legitimacy and any legal status of its opponent may indeed pose problems from the perspective of the sovereignty objection. Hence, non-State fighters in wars of secession that do not meet the conditions in article 1(4) AP I and rebels assisted by outside intervening powers, to name the two main situations of this kind, would be the prime targets of the argument against their combatant status from the position of sovereignty.

State practice affirms this. It has already been observed that States rarely make public the legal qualification of the conflicts they are involved in.[676] For some, it may in fact be a matter of policy *not* to do so.[677] Nevertheless, there has not yet been a conflict of the type described in the previous paragraph, in which a State would unequivocally recognize, as a matter of law and not just for reasons of policy, the combatant status of its opponents.[678] It is true that on a few occasions, States fighting non-State actors agreed to accord some of the protections of the IAC law to its opponents, including POW treatment for the captured non-State fighters. With respect to the wars of secession outside of the decolonization context, a prominent example in this respect was the

675 See chapter 2, section 3.1.3 above.

676 See text to nn 24–29 above.

677 See, eg, Letter from the Swiss Department of Defence to author (22 August 2011), on file with author (stating that Switzerland does not 'officially qualify conflicts under IHL', although an 'internal qualification' is undertaken); Letter from the Russian Embassy in the UK to author (7 October 2011), on file with author (stating that 'there hardly is a person who could have the authority to convey … an "official" position of the country on that issue'); Letter from the High Commission for the Republic of Cyprus to author (undated), on file with author (stating that Cyprus does not disclose its legal assessment of the legal effects of conflict internationalization).

678 cf Aldrich, 'Customary International Humanitarian Law: An Interpretation on behalf of the International Committee of the Red Cross' (n 124) 507 (arguing that States 'will always oppose anything that appears to give rebels belligerent status').

Nigerian stance during the conflict in Biafra.[679] As for foreign interventions, the US agreed to treat captured non-State fighters as POWs in Vietnam[680] and the French did so in Algeria.[681] However, all of these States have expressly stated that they did that out of policy considerations and not on the basis of a legal duty.[682]

On a doctrinal level, the objection may be overcome even in these conflicts by highlighting the competing sovereignty claims of the conflict party opposing the territorial State. In foreign interventions, these are espoused by the intervening State; in State dissolution scenarios by the newly emergent State. The fact remains, however, that the territorial States in these conflicts have been reluctant to accord combatant status to their non-State opponents regardless of these considerations. To understand their concern, the argument from sovereignty these States have raised needs to be unpacked. In these cases, the governments in power perceive the insurrectionists' violent struggle as treasonous and thus, in an avowed aim to protect the State's sovereignty, they oppose any attempts to restrain their right to prosecute the rebel fighters.[683] The next subsection thus turns to this second objection from the perspective of internationalized armed conflicts.

4.2 Prosecution

Internationalized armed conflicts as defined here occur in the territory of a particular State with the participation of this State's forces. The activities of the armed group challenging that State will thus qualify as crimes under the domestic law of the State in

679 Solf, 'Commentator on the subject of Non-International Armed Conflicts' (n 404) 929–930.

680 MACV Directive Number 381-11 (5 March 1966), reproduced in Prugh (n 161) 127–131.

681 Rosas (n 181) 149.

682 Solf, 'Commentator on the subject of Non-International Armed Conflicts' (n 404) 929–930; MACV Directive Number 381-11 (5 March 1966), reproduced in Prugh (n 161) 127–131; Rosas (n 181) 149.

683 Greenwood, 'International Humanitarian Law (Laws of War)' (n 33) 234; Lubell (n 33) 137–138; Sivakumaran (n 33) 70–71.

question.[684] Combatant status as an instrument of international law does not change this qualification; instead, it provides immunity from prosecution on the domestic level.[685] This is precisely the core of the second objection: bestowing combatant status upon members of non-State armed groups would make them immune from prosecution for their participation in hostilities.[686] It is claimed that 'no state will ever agree to rescind its right to prosecute non-state fighters who have fired at its military forces—for good reason'.[687] This section accordingly looks at the force of this objection through the analysis of State practice and by way of theoretical examination of the justifications behind it.

4.2.1 Prosecution as a tool against non-State actors

The case in favour of the prosecution objection appears to be quite solid. A government facing an armed opponent has the incentive to utilize all tools at its disposal to bring about its enemy's destruction. The domestic criminal justice mechanism as an instrument of internal sovereignty is one of such tools: prosecuting and sentencing rebel fighters to prison or even execution is an effective way of preventing them from continuing the armed struggle and thus it results in weakening the enemy. Indeed, some armed groups have been 'decapitated' this way following the capture of their leader, such as the Kurdish armed group PKK in Turkey after the capture of Abdullah Öcalan or the *Sendero Luminoso*

684 Lubell (n 33) 19; Fleck (n 32) 590.

685 Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (n 33) 57–58; Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 Harvard International Law Journal 367, 376 fn 38; Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 78; Orna Ben-Naftali, 'PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011) 173 fn 236; Melzer (n 33) 305–306.

686 cf *APs Commentary* (n 22) 1332 [4397] ('[combatant] status would be incompatible … with national legislation which makes rebellion a crime').

687 Andrew J Carswell, 'Classifying the Conflict: A Soldier's Dilemma' (2009) 91 IRRC 143, 160.

(Shining Path) in Peru after the capture of Abimael Guzmán.[688] On the basis of the foregoing, one would thus expect to see prosecution of non-State fighters take place in every armed conflict featuring a confrontation between the territorial State and a non-State actor.

4.2.2 Prevalence of amnesties and the absence of prosecution in modern practice

Surprisingly, the practice in this respect is extremely patchy. Several recent studies have, on the contrary, documented many of the contemporary cases in which States voluntarily refrained from prosecution of the non-State fighters on the basis of either an amnesty agreement between the government and the non-State group or a domestic legislative amnesty act.[689] This pattern can be observed in the most recent armed conflicts, too. For example, in May 2009, a law enacted by the Democratic Republic of the Congo provided for amnesty for about twenty illegal armed groups active in the North and South Kivu provinces.[690] A similar statute, albeit on its face limited to those individuals whose actions were aimed at 'promoting or protecting the revolution' was adopted soon after the conclusion of the 2011 conflict in Libya.[691]

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688 Abdulkader H Sinno, 'Armed Groups' Organizational Structure and their Strategic Options' (2011) 93 IRRC 311, 318.

689 See Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 104–109 (documenting a wealth of practice of amnesties granted in the decades prior to the publication); A G Reiter, 'Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts' (2012) 1 Transitional Justice Review 137, 166 (concluding, on the basis of a dataset of civil war cases between 1970 and 2005, that States use amnesties, not prosecutions, to resolve ongoing civil wars); see also ICRC, 'Practice Relating to Rule 159. Amnesty' (2014) <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159> accessed 1 October 2014.

690 Reuters, 'Congo: Amnesty Passed for Illegal Armed Groups' *New York Times* (7 May 2009) <http://www.nytimes.com/2009/05/08/world/africa/08briefs-Congo.html?_r=0> accessed 1 October 2014.

691 Libya, Law 38 (2012), On Some Procedures for the Transitional Period. See HRW, 'Libya: Amend New Special Procedures Law' (11 May 2012) <http://www.hrw.org/news/2012/05/11/libya-amend-new-special-procedures-law> accessed 1 October 2014. This author has criticized the statute elsewhere for

Admittedly, these amnesties are typically adopted only following the termination of the conflict and do not thus affect the conflict while it is underway.[692] Only exceptionally, amnesties are extended during an ongoing armed conflict, and this is usually done with the aim to induce the surrender of the non-State fighters and hasten the conflict termination.[693] In any event, all amnesties of the recent history seem to have been adopted as voluntary acts not motivated by any sense of legal obligation.[694] In fact, the only legal provision that serves as a quasi-legal basis for post-conflict amnesties is article 6(5) AP II, whose normative force is particularly weak: it only requires the authorities in power to 'endeavour' to grant the 'broadest possible' amnesty at the conflict's end.[695]

Nevertheless, the recurring reluctance of the post-conflict authorities in power to resort to blank prosecution of all persons participating in hostilities is significant. One writer, observant of this tendency, concludes her analysis by stating that the trend has 'gone some way to creating an *ex post facto* combatant status' for non-State fighters in NIACs.[696] Even putting aside the finer points of logic underpinning the proposition that the process of *creation* of a legal status may be achieved to 'some way', this author does not find that conclusion warranted. Although the aims of article 6(5) may be laudable, neither this provision nor the trend it has commenced 'in no way concedes legitimate

being overbroad and flouting the customary law obligation to prosecute and punish war crimes. See Mačák and Zamir (n 30) 435.

692 However, it ought to be mentioned that depending on the particular definition of 'conflict termination', amnesties issued during the conflict may appear less exceptional: cf Reiter (n 689) 165 (finding that '[o]f the 36 conflicts [analysed in the study] that terminated in a peace agreement, half (18) granted amnesties to rebels before the conflict ended').

693 See, eg, Algeria, Civil Harmony Law 1999 and Presidential Decree No 2000-03; Uganda's Amnesty Act 2000, s 3.

694 Accord Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 104.

695 AP II, art 6(5). This provision is echoed in rule 159 of the ICRC's Customary IHL Study. See *ICRC Study* (n 18) vol 1, 611–612.

696 Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 79.

combatancy status to members of dissident forces'.[697] The amnesties granted are correctly seen as providing only an *ex post facto* immunity from prosecution, which is, as it has been shown above, only one of the several facets of combatant status.

Importantly for the present purposes, the abovementioned emerging trend of waiving criminal prosecutions after armed conflicts does, however, provide a convincing counterargument to the prosecution objection analysed here. The fact that in actual practice, States often do not make use of their criminal justice system to deal with the persons who opposed them in armed struggle, is a tacit yet critical pronouncement on the efficacy of such measures. It is submitted that the authorities in power realize that to use the judicial branch to punish mere participation would often result in further backlash among the general population and might prevent national reconciliation.[698] From this perspective, the usefulness of prosecution thus appears limited at best and certainly not guaranteed in each conflict.

4.2.3 Fairness and efficiency of prosecution

Beyond the foregoing analysis of practice, two further doctrinal remarks ought to be made in response to the prosecution objection. Firstly, prosecution and punishment for mere participation may be criticized as fundamentally unfair. In IACs the unfairness of prosecuting combatants is one of the moral justifications of this legal status. Provided that the combatants respect IHL and thus contribute towards the civilizing of war,[699] it is

[697] McCoubrey and White (n 143) 76.

[698] This much is generally accepted in transitional justice and post-conflict reconciliation scholarship. See, eg, Johanna Herman, Olga Martin-Ortega and Chandra Lekha Sriram, 'Beyond Justice versus Peace: Transitional Justice and Peacebuilding Strategies' in Aggestam K and Björkdahl A (eds), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge 2012) 49–50.

[699] Henri Meyrowitz, 'The Function of the Laws of War in Peacetime' (1986) 26 IRRC 77, 86 (highlighting the function of IHL as a means of civilizing war).

generally accepted it would be 'both inappropriate and unjust' to punish them for performing a duty imposed on them by their State.[700]

The situation of fighters in internationalized armed conflicts is comparable. They belong to (originally) non-State armed groups that are subject to a hierarchical structure and strict enforcement mechanisms approximating those of full-fledged States. The process of internationalization transforms the non-State actor in question, resulting in either its emergence as a State or making it legally equivalent to a State for the purposes of IHL or at least closely tied to a third State.[701] Its members are thus subjected to a duty to take part in the fighting by this State-like entity without having a chance to opt out.[702] As long as they respect IHL, their prosecution would thus appear to be equally unfair.

Secondly, prosecution and punishment for mere participation may be seen as inefficient in attaining the humanitarian goal of IHL. It has been said that IHL aims to 'civilize' or 'humanize' war.[703] In order to achieve that aim successfully, this body of law must provide incentives for the actors to abide by its norms. Lawful combatants in IACs know that if they obey the rules of IHL, they do not place themselves at risk of prosecution at the end of the conflict and that they may correspondingly avail themselves of the protections of IHL. This serves as a powerful incentive for the combatants to

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[700] The quoted pair of terms appears in Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 266. See also n 619 above and accompanying text (regarding the obligation to serve in a State army).

[701] See chapter 2, sections 2–5 above.

[702] Many NSAs subject their members to the equivalent of a compulsory draft. See n 620 above for examples of practice.

[703] Meyrowitz (n 699) 86; Jacques Meurant, 'Inter Arma Caritas: Evolution and Nature of International Humanitarian Law' (1987) 24 Journal of Peace Research 237, 238–239; Banks (n 538) 5; see also Pictet, *Development and Principles of International Humanitarian Law* (n 552) 1. Views sceptical of the humanizing function of IHL are quite rare today: for a mild example, see Arimatsu (n 34) 161. This was, however, certainly not the case prior to World War II. See, eg, Reginald Bacon, *The Life of Lord Fisher of Kilverstone: Admiral of the Fleet* (Hodder & Stoughton 1929) vol I, 120–121 (recording a strongly dismissive statement by John Fisher, a British admiral from the World War I period); Bertha von Suttner, *Memoirs of Bertha Von Suttner: The Records of an Eventful Life*, vol 2 (Ginn & Co 1910) 278–286 (arguing that humanization of war is not a legitimate goal from the pacifist perspective).

distinguish themselves from non-combatants, thus protecting civilians, with the effect of contributing considerably to the humanitarian aim of the law.[704] As it has been pointed out on numerous occasions, the denial of immunity from prosecution to non-State fighters translates into disincentive to comply with the norms of IHL.[705]

An important debate, ongoing especially in American literature, deals with the question whether this effect operates at the individual or at the group (organizational) level. The presumption in most of the writing on the subject is that individual fighters would be induced to comply with the law out of concern for the way in which they themselves would be treated in case of capture.[706] The American scholar Robert Sloane, however, argues convincingly that it may be overly optimistic to expect individuals to conduct a rational calculation of this sort if they have not been educated in IHL and subjected to an effective military hierarchy.[707] In other words, the incentive effect operates primarily, or even exclusively, at the group level.

Sloane observes correctly that these conditions require the existence of an organizational structure superimposed over individual fighters.[708] He appears to go too far, however, in equating compliance with the existence of 'professional state armies'.[709]

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[704] Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (n 33) 64–65; Jensen (n 626) 233–234; Callen (n 626) 1026; Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 274.

[705] Michelle L Mack, 'Compliance with International Humanitarian Law by Non-State Actors in Non-International Armed Conflicts (working paper)' (2003) IHL Research Initiative 1, 2–3; Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (n 18) 48.

[706] See, eg, Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (n 33) 64–65; Callen (n 626) 1063; Derek Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts (Background Paper)' [2003] International Humanitarian Law Research Initiative 1, 4; Jensen (n 626) 233–234.

[707] Robert D Sloane, 'Prologue to a Voluntarist War Convention' (2007) 106 Michigan Law Review 443, 459.

[708] ibid 459.

[709] Sloane, 'Prologue to a Voluntarist War Convention' 459–460. He does admit for 'few exceptions' to his observation but does not specify what those would be.

Internationalized conflicts as well as large-scale civil wars prove that non-State armed groups can develop structures capable of providing indoctrination in IHL and enforcing compliance. For example, in the 2011 Libyan conflict the rebels unified by the National Transitional Council adopted, with the help of Western experts,[710] a frontline manual on the fundamental rules of IHL[711] and arranged for its dissemination and enforcement among the troops.[712] Many other examples have been catalogued by the ICRC in an appendix to a recent issue of the *International Review of the Red Cross* dedicated to the topic of non-State armed groups.[713]

Ultimately, the question of the level at which this incentive mechanism functions primarily can only be resolved by an empirical study. For the present purposes, however, it is sufficient to observe that a plausible argument may be constructed in favour of a causal link between the prosecution of fighters for mere participation and (the lack of) their observance of IHL.[714] Therefore, withdrawing immunity from non-State fighters may seriously jeopardize the fundamental civilizing and humanizing aspiration of IHL.

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[710] See Iain Scobbie, 'Operationalising the Law of Armed Conflict for Dissident Forces in Libya' (31 August 2011) <http://www.ejiltalk.org/operationalising-the-law-of-armed-conflict-for-dissident-forces-in-libya/> accessed 1 October 2014.

[711] NTC, 'Frontline Manual on the Fundamental Rules of Armed Conflict' (19 May 2011) <http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt> accessed 1 October 2014; see also NTC, 'The Treatment of Detainees and Prisoners' (25 March 2011) <http://www.ntclibya.org/english/prisoners> accessed 1 October 2014 (confirming the issuance of 'codes of conduct' on the treatment of detainees early on after the commencement of the conflict).

[712] cf Statement of Alistair Burt, Parliamentary Under Secretary of State (Afghanistan/South Asia, counter terrorism/proliferation, North America, Middle East and North Africa), Foreign and Commonwealth Office, HC Deb, 12 September 2011, c1000W.

[713] See ICRC, 'A Collection of Codes of Conduct Issued by Armed Groups' (2011) 93 IRRC 483.

[714] Corn argues persuasively that even if this link was not proven empirically, States ought to consider granting combatant immunity to non-State actors in NIACs to enhance the credibility of State action against such belligerents. See further Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (n 33) 288–289 (section 'What if it didn't work?').

4.3 Inability to follow IHL

Perhaps the most common objection against the extension of the law of IACs to non-State actors is a charge that they would be unable to fulfil the conditions of IHL.[715] It is claimed that the lack of material, administrative, and human resources, inherent in the condition being a non-State, will render these entities incapable of meeting their obligations under IHL.[716] As summarized by Emily Crawford:

> By holding non-State groups to the level of obligation required under the Conventions, non-State groups are being asked to behave in a manner, which almost by definition, they cannot; to wit, as a properly constituted State.[717]

It is said that to demand compliance where it is not within the capacity of the subject concerned would be unwise as 'it reduces the law to hypocrisy and invites disregard of the entire legal regime'.[718]

However, this objection may bear more force in relation to other norms of the law of IACs than in relation to rules on combatancy.[719] The extension of combatant status to non-State fighters does not in and of itself pose problems of ability *vel non* to apply IHL by the groups in which these persons are organized. This is both due to the fallacious assumption at the basis of this objection as well as due to the nature of the norms in question.

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[715] See, eg, Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 74–76 (discussing this specifically as a reason for denial of combatant status to non-State actors); see also *Official Records* (n 360) vol VIII, CDDH/I/SR.4, 28–29 [25] (United Kingdom); ibid, vol VI, CDDH/SR.36, 42 [62]–[63] (Israel).

[716] See, eg, *Official Records* (n 360) vol V, CDDH/SR.12, 124 [39] (Denmark); ibid, vol VIII, CDDH/I/SR.32, 337 [70]–[71] (Canada); ibid [76] (Mexico); but see ibid, vol VIII, CDDH/I/SR.33, 344 [7]–[8] (Belgium).

[717] Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 75.

[718] Bond (n 400) 71.

[719] See chapter 4, section 3.3 below (concerning the law of belligerent occupation); see further Sivakumaran (n 33) 72–73 (discussing the capability question in general terms).

4.3.1 Non-State actors and the assumed lack of resources

First, the objection is based on the assumption of a lack of resources implicit in the non-State status of the armed groups in question. Such an assessment can only be made, however, on a case-by-case basis, and not by way of generalizing to all non-State actors.[720] After all, one of the arguments against the internationalization of article 1(4) AP I conflicts was that due 'the usual lack of resources and governmental infrastructure in the third-world countries' where such conflicts were 'most likely to occur', neither the government nor the insurgents would be able to comply with the full scope of the Geneva Conventions.[721] Some non-State armed groups may indeed have more considerable resources at their disposal than their State counterparts.

This point is well exemplified by the so-called Croatian Republic of Herzeg-Bosna (HR H-B). This territorial unit, notably never recognized as an independent State[722] and hence[723] a non-State entity,[724] existed within the current borders of Bosnia and

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[720] cf ibid (n 33) 72–73 (arguing that 'armed groups have varying degrees of capability [and] are not monolithic entities').

[721] Bond (n 400) 71.

[722] See, eg, *Hadžihasanović and Kubura* Trial Judgement (n 10) 642 ('On 18 November 1991, the Croatian Community of Herceg-Bosna ("HZ H-B") proclaimed its independence. The community would never gain international recognition.'); see also UNSC Res 787 (16 November 1992) UN Doc S/RES/787 [3] (affirming that no entity unilaterally declared in violation of the territorial integrity of Bosnia and Herzegovina would be accepted). Although Professor Ruth Wedgwood claimed in her *amicus curiae* brief in the *Blaškić* case that this entity was recognized as a State by the Republic of Croatia, this assertion was not supported by any citation and appears to be uncorroborated by any other source. See *Prosecutor v Blaškić* (Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum) IT-95-14-T (18 July 1997) (ICTY) 28. Croatia had officially recognized the independence of Bosnia and Herzegovina and its president Franjo Tudjman maintained the official line of recognition of Bosnia and Herzegovina's sovereignty and territorial integrity when he was challenged as to the extent of Croatia's ambitions on Bosnian land. Ivana Nizich, *War Crimes in Bosnia-Hercegovina*, vol 1 (Human Rights Watch 1993) 30 fn 17. That Tudjman's regime never extended official recognition to HR H-B has also been confirmed informally to the author by the prominent Croatian historian Tvrtko Jakovina (record on file with author).

[723] See also n 310 above (regarding the declaratory and constitutive theories of recognition).

[724] *Naletilić and Martinović* Trial Judgement (n 10) 265 [4]. But see *Prosecutor v Blaškić* (Transcript) IT-95-14 (30 June 1997) 316, 326, 336, (1 July 1997) 415–416, (2 July 1997) 437 (testimony of the Prosecution witness Zoran Pajić, an expert on international law and Yugoslavian constitutional law, to the effect that HR H-B was an independent State). For a persuasive summary of arguments against HR H-B's statehood, see, eg, *Blaškić* Subpoena Objection Decision (n 722) 27–29. The view espoused here is further

Herzegovina between 1991 and 1994.[725] Through its military arm, the Croatian Defence Council (*Hrvatsko vijeće obrane*, HVO), it engaged in an armed conflict against the government of Bosnia and Herzegovina.[726] Despite being a non-State actor, it commanded the administrative apparatus in thirty *opštinas* (municipalities) in Western Herzegovina and central Bosnia.[727] Therefore, it would be improper to speak of its inability to adhere to the rules of IHL due to a lack of resources as its administrative and organizational structure closely mirrored that of States.[728] The ICTY was similarly undeterred from putting several of the key HR H-B and HVO representatives on trial and holding some of them responsible for violations of IHL applicable in IACs.[729] In fact, the HVO and the Bosnian army accepted in a 1993 ceasefire agreement that the law of IACs applied to the conflict in Bosnia and Herzegovina.[730]

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corroborated by statements by representatives of Herzeg-Bosna which consistently denied any aspirations to statehood. Vladislav Pogarčić, 'Why was the Croatian Community of Herzeg-Bosnia Created?', Republic of Bosnia and Hercegovina – Croatian Community of Herzeg-Bosnia – Office of the President (26 July 1993) 7; Interview with Bosnian prime minister Mile Akmadčić, *Globus* (19 March 1993).

[725] Decision on the establishment of the HZ H-B (18 November 1991) (confirming the establishment of this entity and listing the municipalities which formed it in art 2); Founding Decision on the Establishment and Declaration of the Croatian Republic of Herzeg-Bosnia (28 August 1993), art 1 (declaring the establishment of the HR H-B as the successor entity of the HZ H-B); Washington Framework Agreement between the Government of the Republic of Bosnia and Herzegovina and the Government of the Republic of Croatia and Bosnian Croat party (signed 1 March 1994, entered into force 30 March 1994) (1994) 33 ILM 743 (putting an end, de facto and de jure, to this entity).

[726] *Naletilić and Martinović* Trial Judgement (n 10) [16]; *Prlić* Trial Judgement (n 10) vol 1 [436].

[727] Radha Kumar, *Divide and Fall? Bosnia in the Annals of Partition* (Verso 1997) 47–48; *Prlić* Trial Judgement (n 10) vol 1 [425].

[728] Anton Bebler, 'South-East European Federalism and Contemporary Bosnia and Herzegovina' (2007) 24 Acta Slavica Iaponica 1, 13. Indeed, many of the State-like attributes were cited by the Prosecution expert witness Zoran Pajić in the course of the *Blaškić* proceedings to support the case for HR H-B's statehood. See n 724 above. See further *Prlić* Trial Judgement (n 10) vol 1, 173–344.

[729] See, especially, *Prosecutor v Blaškić* (Appeal Judgement) IT-95-14-A (29 July 2004) (ICTY) (former colonel of the HVO); *Prosecutor v Kupreškić et al* (Appeal Judgement) IT-95-16-A (23 October 2001) (ICTY) (five members of the HVO and a Croatian military police commander); *Kordić and Čerkez* Appeal Judgement (n 10) (vice-president of the HR H-B and military commander of the HVO); case *Prosecutor v Ljubičić*, IT-00-41 (ICTY) (commander of the HVO military police units) (case referred to Bosnia and Herzegovina); *Prlić* Trial Judgement (n 10) (top political and military officials of the HR H-B and HVO). The ICTY considered that the conflict between the HVO and the State army of Bosnia and Herzegovina was an IAC. See *Kordić and Čerkez* Appeal Judgement (n 10) [342]–[374]; *Prlić* Trial Judgement (n 10) vol 3 [568].

[730] Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina (22 May 1992); UN Doc S/25824, Annex (12 May 1993) 3 (confirming that the GCs and AP I were 'fully

On the other hand, certain failing or failed States may be in a position comparable rather to those weaker non-State actors unable to meet all of their IHL obligations that are the object of this objection. By suffering the total or partial collapse of institutions, law, and order, the ability of these States to ensure the implementation and enforcement of law in general and IHL in particular is heavily impaired.[731] As fighting atomizes and group structures in the territory of a failed State break down, 'every combatant is his own commander' and application of IHL becomes impossible.[732] Accordingly, in Somalia, with the outbreak of the civil war in the early 1990s, the State structure of power and authority all but disappeared, the professional State army ceased to exist,[733] and the abidance with IHL by State forces became illusory. In comparison with the admittedly *non-State* entity HR H-B, the Somali 'State'[734] controlled fewer, if any, resources and suffered from the 'subjective impossibility' to uphold its international obligations.[735]

4.3.2 Resource-intensiveness of the rules on combatancy

Second, in contrast to many other norms of the law of IACs, the rules governing combatant status are actually not strictly speaking resource-intensive. Of the three main

applicable' in the conflict). See also chapter 2, section 5.2 above (putting forward the argument that such bilateral agreements bring about relative internationalization of the conflict between the conflict parties).

731 The impossibility to meet the international obligations of the State brought about by State failure has been described as '*subjektive Unmöglichkeit*', 'subjective impossibility', by Prof. Matthias Herdegen. See Matthias Herdegen, 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"' in Daniel Thürer (ed), *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (CF Müller 1996) 77.

732 Thürer (n 182) 745.

733 Federal Research Division, *Somalia: A Country Study* (Kessinger Publishing 2004) 35.

734 The continuity of the Republic of Somalia as a State de jure is doubted by some commentators. See, eg, Ryan Van Eijk, 'The United Nations and the Reconstruction of Collapsed States in Africa' (1997) 9 AJICL 573, 573; Nii Lante Wallace-Bruce, 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law' (2000) 47 NILR 53, 67; Dimitros Lalos, 'Between Statehood and Somalia: Reflections of Somaliland Statehood' (2011) 10 Washington University Global Studies Law Review 789, 789; contra Crawford (n 305) 223 and 701 fn 3.

735 See n 731 above.

consequences of combatant status (targeting, prosecution, detention),[736] the first two do not require the direct allocation of any material or personnel resources whatsoever. Their effect is regulatory only: the status permits a certain course of action for the opposing force, namely, to target the bearers of the status; and it simultaneously prohibits a different course of action, namely, to prosecute these persons for participation.

As for the third consequence, it may appear that the detention regime implicit in the grant of a POW status does indeed require considerable resources. Detained POWs are entitled to a range of resource-intensive rights during their captivity, including the provision of sufficient food,[737] clothing,[738] and medical attention[739] as well as to procedural guarantees presupposing the existence of judicial infrastructure.[740] In order to understand the flaw in this assumption, it bears reminding what the target of the objection under scrutiny was.

It is recalled that the objection targets the extension of combatant status to the fighters of non-State armed groups. Under the hypothesis that this extension were granted, the persons (newly) entitled to the 'resource-intensive' rights would be those belonging to non-State actors and the entity (newly) vested with the corresponding obligations would be their opponent, that is, the State which the non-State actor was fighting against. No doubt is cast, however, on the ability of the State party to an internationalized armed conflict to abide by its IHL obligations due to a resource shortage and, as becomes apparent, no new duties would be imposed on the non-State

[736] See the introductory part of section 4 of the present chapter above.

[737] GC III, art 26.

[738] GC III, art 27.

[739] GC III, arts 29–31.

[740] GC III, arts 99–108.

party in question. Even with respect to the third consequence of combatant status, the currently analysed objection thus proves to be unconvincing.

In sum, I do not advocate here a general dismissal of the objection of inability to abide by IHL with respect to all obligations under this body of law. As far as regulation of combatancy is concerned, however, it has been demonstrated that non-State actors are not unavoidably unable to apply and follow these rules. Therefore, in the context of the present chapter, the objection of inability should not be seen as insurmountable.

5. Application of the criteria for combatant status in internationalized armed conflicts

It should be emphasized that overcoming the general objections to extending the status of combatancy to non-State armed group members does not mean that each fighter participating in an internationalized armed conflict would automatically be entitled to combatant status. These persons would still have to fulfil the criteria for this status,[741] a result that has been somewhat pessimistically described as 'virtually impossible'.[742] This section therefore analyses to what extent the criteria for combatancy may be fulfilled by fighters in internationalized armed conflicts. Two sets of markedly different criteria arise from Geneva Convention III and Additional Protocol I. These sets are discussed in turn in the ensuing text since the latter instrument—unlike its predecessor—has not yet achieved universal ratification.[743] Wars of national liberation, as a category introduced by

[741] Akande, 'Classification of Armed Conflicts' (n 32) 78.

[742] Banks (n 538) 6.

[743] See ICRC, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (n 372). As of 1 October 2014, 174 States have ratified AP I. Notable non-participating States include the three signatories who have not, however, ratified the Protocol yet (Iran, Pakistan, and the US) and States who have neither signed nor ratified the Protocol so far, including India, Indonesia, Israel, and Turkey. cf n 429 above (listing notable non-State parties to AP II).

the first Protocol, are only analysed in the text devoted to the conditions set out by that instrument.

5.1 Geneva Convention III

Geneva Convention III distinguishes between members of regular and irregular armed forces. With respect to the former, article 4A(1) of the Convention ascribes POW status to 'members of the armed forces of a Party to the conflict'.[744] This category is generally understood to mean 'regular forces', in other words an army subordinated to the government of a State.[745] Save for membership in these formations, no further conditions are required by the Convention text for eligibility to POW status.

5.1.1 Regular armed forces

Some fighters in internationalized armed conflicts can certainly be described as belonging to this category. In particular, as new States are being formed through the disintegration of the parent State, the army of the newly emergent State would meet this criterion. For example, with Guinea-Bissau's achievement of statehood and independence of Portugal and the corresponding internationalization of the conflict between the two in 1973,[746] the army of Guinea-Bissau was a regular government army falling under article 4A(1) of the

[744] See text to n 585 above for the text of the provision.

[745] *GC III Commentary* (n 21) 51–52; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 538) 41; Ipsen (n 538) 89–90.

[746] See text to nn 315–318 above.

Convention.[747] It was also under this understanding that Portugal allowed the ICRC to visit the Bissauan detainees as prisoners of war.[748]

Should the text of the Convention be taken as the final word that such fighters are released from meeting the conditions attaching expressly only to 'irregular' groups in the second paragraph of the same article?[749] Yoram Dinstein suggests a negative answer on the basis of his analysis of two instances of domestic case law, the Privy Council decision in *Mohamed Ali*[750] and the United States Supreme Court judgment in *ex parte Quirin*.[751] In these cases, members of regular armed forces who swapped their uniforms for civilian clothes to undertake a military operation were denied POW status precisely because they had not met one of these conditions. Dinstein infers from this that the Convention should be read as only presuming that regular forces meet the Hague conditions; whereas if this presumption is rebutted, the persons concerned are to lose POW status.[752]

It is submitted that this analysis is unconvincing for both jurisdictional and substantive reasons. First of all, as for reasons related to jurisdiction, it has rightly been pointed out that these judgments—as decisions of domestic tribunals—carry only persuasive weight in international law and cannot be considered conclusive on the issue.[753] Furthermore, *ex parte Quirin* was decided prior even to the Convention's adoption

[747] Any doubts about the application of the Convention to the conflict were dispelled by Guinea-Bissau's accession to the GCs on 28 February 1974. Claude Pilloud, 'Reservations to the Geneva Conventions of 1949 (II)' (1976) 16 IRRC 163, 164.

[748] Heather A Wilson, 'Humanitarian Protection in Wars of National Liberation' (1987) 8 Arms Control 36, 41.

[749] These conditions are discussed below in section 5.1.2.

[750] *Mohamed Ali et al v Public Prosecutor* [1969] 1 AC 430 (Privy Council).

[751] *Ex parte Quirin* (1942) 317 US 1 (US SC).

[752] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 538) 42–43.

[753] Rogers (n 538) 114.

and entry into force, which further undermines its value in interpreting this instrument.[754] Also significantly, both cases limit themselves to considering whether members of regular armed forces must meet the condition of wearing a fixed distinctive sign such as a uniform and remain silent on the remaining three conditions, a nuance that is lost in Dinstein's writing.[755]

Secondly, substantive scrutiny demonstrates that reading the four conditions into the first paragraph would be incorrect. It should be reiterated at the outset that according to the ordinary meaning of the provision,[756] no conditions except for membership attach to regular armed forces;[757] the burden of proof thus rests with the proponents of interpretations alternative to the unequivocal text. The Privy Council's judgment in *Mohamed Ali* is disappointing in this respect. It bases the argument for the necessity to meet all four conditions on two main sources, the writings of J. M. Spaight and Jean Pictet.[758]

Spaight's quotation appears to be the most persuasive as it expressly requires the compliance with all four conditions for recognition of combatant status.[759] It however predates the Convention by nearly forty years and relates only to a differently worded

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[754] cf James G Stewart, 'Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law' (2006) 4 JICJ 12, 20 fn 39 and accompanying text; Jordan J Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 YJIL 325, 331.

[755] *Ex parte Quirin* (n 751) 12; *Mohamed Ali* (n 750) 449–450. Dinstein surprisingly claims that '[t]he Privy Council pronounced that *even members of the armed forces must observe the cumulative conditions imposed on irregular armed forces*' although no such statement can be found in the text of the judgment. See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (1st edn, CUP 2004) 36; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) (n 538) 42 (the second edition omits the word 'cumulative' and is otherwise identical; emphasis added).

[756] VCLT, art 31(1).

[757] GC III, art 4A.

[758] *Mohamed Ali* (n 750) 448–450.

[759] James Molony Spaight, *War Rights on Land* (Macmillan 1911) 56 ('The four conditions must be united to secure recognition of belligerent status.').

provision on combatancy in the 1899 and 1907 Hague Regulations.[760] Even with regard to this different treaty text, a perusal of the quote from Spaight in its context reveals that his position remains ambiguous as to whether the unity of the conditions should apply to regular armies or only to irregular forces.[761]

As for Pictet, the judgment cites a virtually equivalent passage from his famous commentary to the GCs, which, however, again relates to the Hague Regulations (as it appears in a section dealing with the history of the commented provisions) and not to the 1949 Conventions.[762] Another quote from Pictet's commentary relates to the third subparagraph of article 4A governing forces belonging to governments in exile,[763] which Pictet *describes* as having the characteristics of regular armed forces regulated by the first subparagraph.[764] The verb 'describes' in the previous sentence is worthy of italics: by no means does Pictet insist on the conditionality of these characteristics in the text.[765]

To the extent that the meaning of the analysed provision could nevertheless be considered ambiguous or obscure,[766] the issue is best resolved by inspecting the intentions of the drafters as evidenced in the *travaux préparatoires* of the Third

[760] See text to nn 569–573 above for the formulation used by the Brussels Declaration and the Hague Regulations.

[761] Spaight (n 759) 56–57 (the author is discussing irregular forces and *levées en masse*; he does not expressly attach the four conditions to regular forces).

[762] *GC III Commentary* (n 21) 48. The judgment is conspicuously silent on the context in which this quote appears. See *Mohamed Ali* (n 750) 450.

[763] See text to nn 597–600 above.

[764] *GC III Commentary* (n 21) 63 ('These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war.').

[765] See ibid 63. Pictet opined that the drafters saw 'no need to specify' the requirements contained in the four conditions for such forces, apparently presuming that they would under ordinary circumstances meet those criteria. That is still, it is submitted, a position different from stating that the criteria should be read into the first and the third subparagraphs of art 4A.

[766] VCLT, art 32(a).

Convention.[767] Pictet's commentary on the crucial first subparagraph of article 4A is silent as to the reasons behind the exclusion of the four conditions from the final text.[768] Speculations appear in some writings that this was due to the drafters' consideration of the conditions as part of customary law and hence unnecessary to include in the treaty text.[769]

Recourse thus has to be had to the authentic record from the diplomatic conference in Geneva, where the text of this provision was the subject of a very lengthy and heated discussion.[770] On 21 June 1949, General Devijver of Belgium, the rapporteur of the Special Committee proposed a 'working text', which unmistakably drew on article 1 of the Hague Regulations[771] and which would have accorded POW status to '[m]embers of armed forces who are in the service of an adverse belligerent, *as well as* members of militia or volunteer corps belonging to such belligerent, and fulfilling [the four conditions]'.[772]

At the session of Committee II devoted to the discussion of this text, General Slavin of the Soviet Union protested against this wording, arguing that as it stood then, 'it would appear that members of the Armed forces *would have to fulfil the four traditional requirements* … in order to obtain prisoner of war status, *which was contrary to the Hague*

[767] VCLT, art 32(a).

[768] cf *GC III Commentary* (n 21) 50–51

[769] See, eg, W Thomas Mallison and Sally V Mallison, 'The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict' (1977) 9 Case Western Reserve Journal of International Law 39, 48; John C Yoo, 'The Status of Soldiers and Terrorists under the Geneva Conventions' (2004) 3 Chinese Journal of International Law 135, 144.

[770] See, in particular, *Final Record* (n 93) vol II A, 237–238, 244, 386–389, 413–437, 465–470; ibid, vol II B, 267–269, 340–342. Towards the end of the discussion, the rapporteur of the Committee II quite appropriately labelled the later article 4A as 'the main object' of the whole Convention. ibid, vol II B, 267; accord *GC III Commentary* (n 21) 49 ('Article 4 is … the key to the Convention').

[771] See notes 569–573 and accompanying text above.

[772] *Final Record* (n 93) vol II A, 465 (Belgium) (emphasis added).

Regulations'.[773] The rapporteur defended the draft as compliant with the Hague Regulations and argued that on his reading, the text 'carefully specified that only members of militia or volunteer corps should fulfil all four conditions'.[774] The discussion nonetheless brought to light two possible interpretations of the conjunction 'as well as'. Did it separate the category of (regular) armed forces from militia and volunteer corps for the purposes of meeting the four conditions, as argued by the rapporteur, or did members of both of these categories have to meet the requirements, as General Slavin feared?

At this junction and to 'overcome the drafting difficulty',[775] in other words, to remove the ambiguity highlighted by the Soviet delegate, the provision was split up into two subparagraphs, forming the basis for the text finally adopted at the conference.[776] The final report of Committee II to the plenary assembly of the conference later confirmed that the aim of the division of subparagraph (1) was 'to show clearly' that the conditions were to apply to irregular forces only.[777] On this examination of the preparatory work of the Convention, therefore, the strictly textual reading of article 4A should prevail.[778]

It should also prevail over the admittedly ambiguous wording of the Hague Regulations—this ambiguity being apparent in the uncertainty among the drafters in Geneva as well as in the potentially contrary interpretations by Spaight and Pictet discussed above—as the Geneva Convention is a *lex posterior* and on the basis of the

[773] ibid 466 (Soviet Union) (emphases added).

[774] ibid 466.

[775] ibid 466.

[776] ibid 466–467.

[777] *Final Record* (n 93) vol II A, 561.

[778] See also W Hays Parks, 'Special Forces' Wear of Non-Standard Uniforms' (2003) 4 Chicago Journal of International Law 493, 509; Rosas (n 181) 328.

principle that the Convention supplements and expands the protection granted by the Regulations, and not vice versa.[779]

Where does this leave forces such as the Bissauan army in 1974 or the regular armed forces of the republics seceding from Yugoslavia in the 1990s? On the basis of the foregoing analysis, it is submitted that members of such armies do not have to meet all four conditions for the purposes of being considered as combatants. However, a word of caution is in order at this point.

This analysis does not in the least absolve these forces from observing other norms of IHL. They still have to respect the fundamental principle of distinction which requires their members to distinguish themselves from non-combatants.[780] They also have to ensure their members' compliance with the law of war in general.[781] If captured out of uniform following an act of sabotage, as the defendants in *Mohamed Ali* and *Quirin* were, their soldiers could still be tried for violating IHL, namely its rules prohibiting perfidy.[782] It bears reminding that the question of prosecution for war crimes or other violations of IHL is separate from the determination of combatant/POW status.[783]

Therefore, the sole difference advocated here is that these persons should be deemed eligible for combatant and hence POW status on the basis of their membership in regular armed forces. The possibility that their opponent—the parent State—would

[779] *GC III Commentary* (n 21) 5 and 51.

[780] *ICRC Study* (n 18) rules 1 and 106; Solis (n 73) 251. The *ICRC Study* suggests in rule 106 that the failure to distinguish oneself is sanctioned by the loss of POW status. It does not justify, however, the normative jump from the obligation to distinguish to the purported sanction. Its interpretation thus also appears to be at variance with the text of GC III and the intention of its drafters as analysed above. See *ICRC Study* (n 18) vol 1, 384–386.

[781] Hague Convention (IV) respecting the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 277, art 1; GCs, common art 1; *ICRC Study* (n 18) rule 139.

[782] Hague Regulations, art 23(b); *ICRC Study* (n 18) rule 65, especially at 224. See also Ipsen (n 538) 106–107.

[783] GC III, article 85.

not recognize the government to which such an army belongs would, of course, not change this conclusion due to the operation of the third subparagraph of article 4A.[784]

5.1.2 Irregular armed forces

Those fighters in internationalized armed conflicts who do not qualify for combatant status as members of regular armed forces have to meet conditions attaching to irregular forces under the second subparagraph of article 4A of GC III. Although the literature often speaks of 'four traditional requirements',[785] the four conditions listed in *alinéas* (a) to (d) of the abovementioned provision ought properly be seen as complemented by a fifth one, which appears in the *chapeau* of that provision, namely, 'belonging to a Party to the conflict'.[786] This qualification reflects the historical fact of exclusion of armed bands of marauders or pirates acting for private purposes from combatant and POW status[787] and it was included intentionally as such by the drafters in 1949.[788] As such, it should be seen as part and parcel of the other requirements pertaining to irregular forces under the Convention. Conversely, no further conditions appear in the text of the provision or should be read into it.[789]

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[784] GC III, art 4A(3); see also analysis in the text to notes 597–600 above.

[785] See, eg, Mallison and Mallison (n 769) 74; Pictet, *Development and Principles of International Humanitarian Law* (n 552) 39; Detter (n 452) 139; Yoo (n 769) 140; George Cadwalader, 'The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References' (2011) 14 YIHL 133, 140.

[786] GC III, art 4A(3), chapeau. See text to n 585 above for the text of art 4A.

[787] Solis (n 73) 197; Mallison and Mallison (n 769) 50.

[788] *Final Record* (n 93) vol II A, 478–479.

[789] See Solis (n 73) 197–198 (refusing additional conditions advanced in the literature as unsupported by the Convention or state practice); but see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 538) 43–48 (suggesting hierarchical organization and non-allegiance to the detaining Power as two further requirements).

Belonging to a Party to the conflict

The requirement of belonging is qualitatively different from the other four conditions. While the fulfilment of the 'traditional four' depends primarily on the factual circumstances of each particular case, this requirement is of a more general nature and its fulfilment requires rather a theoretical examination. What is at stake here, then, is the question whether non-State actors in internationalized armed conflicts may ever meet this criterion.

Internationalization inter partes

Of the two remaining types of internationalized conflicts,[790] conflicts internationalized *inter partes*, that is, on a relative basis, may be disposed of more easily. Insofar as the conflict in question is internationalized by consent of the opponent of the insurgent non-State conflict party, for example demonstrated by a recognition of belligerency, this consent extends to treating the non-State actor as a 'Party to the conflict' in the full meaning of the term under law of IAC. It goes without saying that the forces of the recognized party 'belong' to it and thus the condition would always be met. This is implicit in the recognizing State's will to voluntarily elevate the situation to the international plane.[791] It is also apparent in State practice during the American Civil War and the Boer War in both of which the recognition of belligerency by the territorial State has been followed by the extension of POW status to the recognized forces.[792] Indeed, it

[790] Conflicts internationalized by State disintegration have been dealt with in section 5.1.1 above on 'regular armed forces'. Conflicts internationalized *ex lege* due to their status as wars of national liberation under article 1(4) of AP I do not arise under the Conventional framework and will be discussed in section 5.2 below.

[791] See chapter 2, section 5.1.3 above.

[792] Lootsteen (n 410) 115; Higgins (n 389) 13; Wilson, *International Law and the Use of Force by National Liberation Movements* (n 387) 38.

could be argued that the extension of combatant and POW status was considered to be one of the primary intended consequences of such recognition.[793]

It has been said that conflicts may also be internationalized *inter partes* by an act of a neutral third State, most commonly by a recognition of belligerency issued by that State.[794] While such recognition would not normally pose any challenges with regard to targeting and prosecution, as these aspects of combatancy simply do not reach third uninvolved States, it could complicate matters in relation to the detention of the fighters participating in the conflict.

Geneva Convention III contains a number of provisions regulating the position of neutral countries vis-à-vis POWs detained in IACs. Most of them require that the conflict be seen as international also in the mutual relationship of the warring parties and as such would be inapplicable due to relative nature of the internationalization process. For instance, the selection and appointment of a Protecting Power under article 8 of the Convention requires the co-operation and ultimately consent of both conflict parties.[795] This would, however, not be required in law as for the territorial State, the conflict would not be internationalized, which would render the said provision inoperable.

Conversely, certain provisions do not hinge upon the territorial State's recognition of the international nature of the conflict and can be applied of their own standing. Accordingly, the law of neutrality provides that if troops belonging to one of the conflict parties appear in the territory of a neutral State, that State is obliged to intern them for the duration of the conflict.[796] GC III then prescribes that these troops be given

[793] cf Lootsteen (n 410) 110; Rosas (n 181) 292 fn 350.

[794] See chapter 2, section 5.1.2 above.

[795] *GC III Commentary* (n 21) 100.

[796] Hague Convention (II) with Respect to the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) 32 Stat 1803, TS 403, art 57; Hague Convention (V) respecting the

treatment equivalent to POWs under the same Convention.[797] There is little practice on this basis, one of the last reported cases being the Swiss internment of about 15,000 foreign military personnel from both sides of the conflict during World War II.[798] Nevertheless, third-State recognition of belligerency has been a sporadic occurrence after 1945.[799] It would thus appear that the recognizing States were in violation of their neutrality obligations if they did not intern or, *a fortiori*, if they provided support to the fighters of the party recognized as belligerent as was reportedly the case with Venezuela and FARC after 2008.[800]

In summary, therefore, in line with the relative character of third-State recognition, only those provisions relating to combatancy which can be applied without the territorial State's consent or co-operation would be triggered by such recognition.

Foreign intervention

As for conflicts internationalized by foreign intervention, it is submitted that the non-State actor there would always meet the criterion of 'belonging to a Party to the conflict'. It bears reminding that an internal conflict is internationalized if an outside State uses force against the territorial State through a non-State armed group in its territory. Under the understanding advanced in this thesis, this criterion is met if the outside State

Rights and Duties of Neutral Powers and Persons in Case of War on Land (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 299, art 11.

797 GC III, art 4B(2).

798 Solis (n 73) 202.

799 See text to nn 415–417 above (summarizing the post-1945 practice of third-State recognition of belligerency).

800 Kraul, (n 417) (reporting on a 17 January 2008 recognition of belligerency for FARC and ELN by Venezuela); BBC, 'Colombian FARC Rebels' Links to Venezuela Detailed' (10 May 2011) <http://www.bbc.co.uk/news/world-latin-america-13343810> accessed 1 October 2014 (summarizing a report by the International Institute for Strategic Studies according to which Venezuela provided sanctuary to FARC members and allowed them to operate on its territory).

participates in organizing and co-ordinating the rebel group.[801] There must, therefore, by definition be a certain connection between the non-State armed group and the intervening State, one that has been described by the ICTY as 'overall control'[802] (although this approach has been criticized in the present work).[803] However, does this connection suffice to consider the non-State actor as 'belonging' to the outside State in question for the purposes of article 4A(2)?

The ICRC Commentary on the Convention makes it clear that the requirement of belonging should be interpreted very liberally. It reminds the reader that the drafters had in mind varying cases of resistance movements active during World War II when drafting the provision and that it was supposed to cover all of these cases.[804] The affiliation that would fulfil the analysed criterion could thus 'find expression merely by tacit agreement' insofar as it was clear for which side the irregular forces were fighting or it could, conversely, be 'confirmed by official recognition' by an outside State.[805] This liberal interpretation also finds strong support in academic literature.[806] As aptly summarized by Katherine Del Mar, compared to 'overall control', the 'belonging' requirement sets a particularly low threshold:

> Whereas "overall control" amounts to control exercised by a state over individuals insofar as the state "organis[es], coordinat[es] or plan[s] the military actions" of the individuals, the "belonging" requirement demands nothing more than a form of acceptance, either express or tacit, on the part

[801] See chapter 2, section 2.2.3 above.

[802] *Tadić* Appeal Judgement (n 10) [131].

[803] See text to nn 230–236 above.

[804] *GC III Commentary* (n 21) 57.

[805] ibid 57.

[806] Bindschedler-Robert (n 165) 40; Henri Meyrowitz, 'Le statut des guérilleros dans le droit international' (1973) 107 Journal du droit international 875, 901–902; Rosas (n 181) 258.

> of the state and the individuals concerned that the latter are fighting on behalf of the state.[807]

Hence, in any conflict internationalized by a connection amounting to ICTY's 'overall control', this connection would always meet the requirement of belonging, as well.

Four traditional requirements

The remaining four conditions can be assessed together. Whether a non-State actor in an internationalized armed conflict meets them depends primarily on its structure and organization. Larger forces that are well organized and subjected to a strict military hierarchy following the army model may fit the criteria quite easily. For example, the Bosnian Croat forces known as the HVO were created by separation from the Croatian State army.[808] They have thus maintained the original military hierarchy, while adopting own uniforms and insignia.[809] There seems to be no doubt that their members carried their arms openly. Finally, although some of their members, including the commanding officers, have been prosecuted for violations of IHL,[810] this does not bear on the capacity of the armed group as such to conduct itself in accordance with IHL. In fact, the HVO military command issued orders emphasizing the importance of the lawful conduct of its troops, confirming that the leadership was aware of the significance of this requirement while at the same time believing that the HVO fighters were capable of fulfilling it.[811]

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[807] Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law' (2010) 21 EJIL 105, 112 (footnote omitted).

[808] In spite of the separation, both the HVO and its foe, the Bosnian Army, accepted that the conflict in Bosnia and Herzegovina was to be governed by the law of IACs. See Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina (22 May 1992); UN Doc S/25824, Annex (12 May 1993) 3.

[809] *Naletilić and Martinović* Trial Judgement (n 10) [195]; *Prlić* Trial Judgement (n 10) vol 1 [775].

[810] See n 729 above.

[811] See, eg, *Kordić and Čerkez* Trial Judgement (n 10) [699] (referring to an order issued by Mario Čerkez on 18 March 1993); *Prlić* Trial Judgement (n 10) vol 1 [697] (referring to the 'Book of Service Rules for the Armed Forces of the HZ H-B' issued by Mate Boban on 3 July 1992); ibid [707] (referring to an order issued by Mate Boban on 15 September 1993).

Leaving aside the factual question to what extent the HVO actually did respect IHL as a group, it can nevertheless be observed on the basis of the foregoing that armed groups akin to it[812] may be able to meet all four traditional conditions.[813] Many, of course, will choose not to, and sometimes even make it explicit by proclamation as when Hezbollah claimed they would not abide by IHL due to previous perceived violations by Israel.[814] It has been correctly stated that questions about the lawfulness of Hezbollah's military operations 'cast doubt' as to whether its members should be considered combatants.[815] Nevertheless, it can be concluded that those groups that do meet the conditions in the framework of internationalized armed conflicts, to which the Geneva Conventions apply, should benefit from combatant status.

5.2 Additional Protocol I

The first Additional Protocol to the Geneva Conventions has, on the whole, significantly loosened the conditions for combatancy. The criteria have newly been based on a membership approach, equalizing members of regular and irregular military structures. Under article 43(2) of the Protocol, all members of the armed forces of a Party to the conflict except medical and religious personnel were defined as combatants.[816] The legal

[812] See also *Blaškić* Trial Judgement (n 461) [147] (ascribing POW status to the 'Bosnian Muslim combatants held by the HVO').

[813] See also Kalshoven, 'The Position of Guerrilla Fighters under the Law of War', 494; *Official Records* (n 360) vol VIII, CDDH/I/SR.4, 32 [46] (Mozambique Liberation Front – FRELIMO).

[814] See, eg, Statement of Hezbollah Secretary-General Hassan Nasrallah (16 July 2006), reproduced in HRW, 'Civilians under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War' (August 2007) <http://www.hrw.org/reports/2007/iopt0807/iopt0807web.pdf> accessed 1 October 2014, 12. See further Said Mahmoudi, 'The Second Lebanon War: Reflections on the 2006 Israeli Military Operations against Hezbollah' in Ola Engdahl and Pål Wrange (eds), *Law at War: The Law as it Was and the Law as it Should Be* (Martinus Nijhoff 2008) 185.

[815] Lubell (n 33) 138–139; but see ibid 251–254 (concluding that the 2006 conflict between Israel and Lebanon was a NIAC, thus mooting the issue of combatancy).

[816] See n 606 above for the text of the provision.

status of a combatant and the ensuing right to be a POW upon capture could only be forfeited by his failure to distinguish himself in a way required by the Protocol.[817]

Much ink has been spilled about this duty to distinguish oneself, especially in the specific situations, in which the 'nature of the hostilities' renders it impossible to follow the ordinary general duty to distinguish oneself during the preparation for or while engaged in an attack.[818] In these situations, the Protocol only requires combatants to carry their arms openly during each military engagement and while they are visible to their adversaries during the military deployment prior to launching an attack.[819] Personal accounts of the direct participants at the Diplomatic Conference as well as impartial academic analyses have convincingly shown that these specific situations were understood to be limited to fighting in occupied territories and wars of national liberation as defined in article 1(4) of the Protocol.[820]

In any event, the focus here is on the question whether combatant status may apply to non-State actors in internationalized armed conflicts within the framework of Additional Protocol I. It is therefore not necessary to go into detail on the factual circumstances under which the status would be lost; the aim is simply to demonstrate that there are situations in which the status would be granted in the first place.

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817 AP I, art 44(2)–(4).

818 See, eg, Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (n 391) 7–10; Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 201–205; Hans-Peter Gasser, 'An Appeal for Ratification by the United States' (1987) 81 AJIL 912, 919–922; Guy B Roberts, 'New Rules of Waging War: The Case against Ratification of Additional Protocol I' (1985) 26 Virginia Journal of International Law 109, 133–134; Jensen (n 626) 228–230.

819 AP I, art 44(3).

820 Richard Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 Harvard International Law Journal 1, 12; Gasser, 'An Appeal for Ratification by the United States' (n 818) 920; Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (n 391) 10; Kalshoven, 'The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977' (n 368) 202.

In general, the conditions in the Protocol are more relaxed than the original traditional conditions from the Geneva Conventions. The duties to have a fixed distinctive sign and carry arms openly have been replaced by a more general duty to distinguish oneself from civilians. The obligation to conduct operations lawfully,[821] often seen as applicable also to individual members of an armed formation,[822] has been replaced by a more easily satisfiable group-level-only condition of being subject to an internal disciplinary system enforcing compliance with IHL.[823] It can thus be observed that, *a minori ad maius*, if a non-State group satisfies the GC III conditions, it would also meet the conditions in the Protocol.

The sole exception appears to be the original requirement of 'belonging' to a conflict party,[824] which has moulded into a requirement that the force in question is 'under a command responsible' to a Party to the conflict.[825] Although seldom recognized in the literature as such,[826] this is a higher standard, requiring a stronger connection to the subject considered as a conflict party than what was required by the Third Geneva Convention.

Nevertheless, it is submitted that this will not be problematic in most conflicts within the scope of this thesis. In wars of national liberation, brought under the scope of the Protocol by way of its article 1(4), the non-State actor in question, in other words the

[821] GC III, art 4A(2)(d).

[822] See, eg, Robert K Goldman and Brian D Tittemore, 'Unprivileged Combatants and The Hostilities In Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) ASIL Presidential Task Force on Terrorism 1, 14.

[823] AP I, art 43(1)(second sentence).

[824] GC III, art 4A(2)(chapeau).

[825] AP I, art 43(1)(first sentence).

[826] See, eg, Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 538) 52 (equating the link required under GC III and AP I); Kolb and Hyde (n 33) 202 (considering the requirement from GC III remained intact in AP I).

liberation movement exercising its right to self-determination, is itself considered a Party to the conflict and no further connection or attribution to a third party would be necessary.

Likewise, in situations of State dissolution and internationalization *inter partes*, the newly emerged State or the recognized belligerent, respectively, are to be considered as a 'Party to the conflict' in the meaning of the Protocol.[827] The question of the existence of a responsible command thus arises only in relation to the internal hierarchy and structure of such forces. Since these actors, through their acquisition of a degree of international legal personality, become a Party to the conflict, they do not need to be connected to another subject of international law for the purposes of combatant status.

The conclusion would differ, however, in conflicts internationalized by outside intervention. In these situations, the role of the 'Party to the conflict' in the sense prescribed by the Protocol is held by the outside intervening Power. For the non-State actor to be under a 'command responsible' to this outside Power is, however, a threshold higher than that required by the criterion of 'belonging' or even that of the 'overall control' test.[828] It implies that the non-State group would be subject to direct hierarchical military subordination by the outside Power[829] and to a system of sanctions of the latter.[830] In such circumstances, the situation would notably also have to be treated as a single internationalized armed conflict due to the resulting loss of autonomy on part of the non-State actor.[831] This may be true for certain private military contractors operating

[827] cf ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (ICRC 1973) 50.

[828] Compare with the text to notes 804–807 above.

[829] See *APs Commentary* (n 22) 513 [1672]; *ICRC Study* (n 18) vol 1, 15.

[830] Ipsen (n 538) 86.

[831] See chapter 2, section 6.2 and in particular scenarios 6 and 7, discussed in text to nn 530–532.

alongside foreign forces such as Blackwater, Dyncorp, or Vinnel in Iraq,[832] but it will not be the norm with respect to those rebel groups that are functioning more independently.

In any event, members of such groups would not be left without any status due to the operation of the 'savings clause'[833] contained in article 44(6) of the Protocol. Under this provision, persons who get POW protection under article 4 of the GC III are entitled to benefit from it even if they do not meet the criteria prescribed by the Protocol.[834] Consequently, even if the interconnection between the internal non-State actor and the external intervening Power does not rise to the level of the former being 'under a command responsible' to the latter, as long as the criteria under GC III are met, the members of the non-State group would still qualify for combatant status as described in the previous subsection.

6. Conclusions

The inapplicability of combatant status to non-State armed groups is one of the items of received wisdom in the IHL academic community. Non-State actors involved in internationalized armed conflicts are, however, different from their counterparts in traditional civil wars. This chapter explored this difference and demonstrated, on the basis of a historical analysis, consideration of the object and purpose of the regulation, and discussion of the most common objections, that fighters belonging to these formations are eligible for combatant status. It then showed that they may also

832 Avril McDonald, 'Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq' in Michael N Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Brill 2008) 377; but see US, *Contractors on the Battlefield, US Field Manual No 3-100.21* (2003) [1-22]; Renée De Nevers, 'Private Military Contractors and Changing Norms for the Laws of Armed Conflict' in William Banks (ed), *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press 2011) 155–156.

833 *Official Records* (n 360) vol XV, CDDH/236/Rev.1, 403 [92].

834 AP I, art 44(6).

realistically meet the conditions for this status as prescribed by the Third Geneva Convention and the First Additional Protocol. Beyond answering the question asked at the outset, this chapter thus also provided a workable toolkit for the analysis whether the members of a particular non-State group fighting in an internationalized armed conflict should be treated as combatants with all the consequences this status confers.

CHAPTER 4

BELLIGERENT OCCUPATION IN INTERNATIONALIZED ARMED CONFLICTS

1. Introduction

Although belligerent occupation is sometimes perceived as a notion associated with the large-scale wars of the past, the recent conflicts in ex-Yugoslavia, Iraq, the DRC, Eritrea and Ethiopia or Georgia prove that to think that it is becoming obsolete would be 'no more than utopian dreaming'.[835] At the same time, it is a concept firmly rooted in the law of IAC, so much so that the orthodox writing uses it as a prime example of a notion that cannot be transplanted into NIACs.[836]

The reasoning behind the conventional position is certainly understandable. The triangular relationship at the heart of the law of belligerent occupation between the occupying power, the ousted power, and the occupied population, cannot be easily transferred into the reality of a conflict occurring in a single State territory.[837] While

[835] Dinstein, *The International Law of Belligerent Occupation* (n 427) xiii.

[836] See, eg, Richard Baxter, 'Comments' in PD Trooboff (ed), *Law and Responsibility in Warfare: The Vietnam Experience* (University of North Carolina Press 1975) 65; Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' (n 33) 312; Kolb and Hyde (n 33) 69; Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 47; Sandoz, 'Land Warfare' (n 33) 117; Spoerri (n 33) 185.

[837] Sivakumaran (n 33) 529.

'classic' IACs reflect a duality of States, their territories and populations, it is more problematic to associate these attributes with conflict parties if at least one of them is a non-State actor. Yet this is precisely how internationalized armed conflicts begin: as an armed contestation between a State and a non-State armed group. Does that mean that the law of belligerent occupation must remain inapplicable to such conflicts?

This chapter advances a negative, yet nuanced answer to this question. It stands for the proposition that the law of occupation should be seen as *in principle* applicable to the situations of internationalized armed conflict, with the actual extent of applicability depending on the specific circumstances of a particular conflict.

In order to make this argument, the chapter proceeds in three consecutive and interdependent steps. First, it examines the history of the law of occupation and argues that, despite its grounding in a State-centric paradigm, isolated developments have occurred which have expressly extended rules on occupation to non-State actors and that a general trend of individualization of this body of law has been underway at least since the adoption of the 1949 Geneva Conventions (section 2).

Second, it responds to the principal objections against the extension of the law of occupation to situations featuring non-State actors (section 3). These include the arguments that such actors lack the legal personality, sovereign status, and actual ability necessary to be bound by and comply with this body of law. The chapter aims to demonstrate that none of these objections rules out the applicability of occupation law to internationalized conflicts in principle.

Finally, the chapter puts forward a positive case for the application of the law of belligerent occupation structured into three parts, each looking at a different aspect of applicability (section 4). The first considers the temporal scope to argue that the law of

occupation commences its application once the conflict party in question has sufficiently consolidated its control over enemy territory. The second discusses the geographical scope of application and demonstrates how to identify territory to which the law of occupation applies in the specific type of armed conflict under consideration. The third part then builds on the jurisprudence of the ICTY to argue that in the specific situations arising in internationalized conflicts, the criterion of nationality may give way to the criterion of allegiance in the determination of the persons protected by occupation law.

The chapter thus advances an argument for the enhanced applicability of the law of belligerent occupation in internationalized armed conflicts. As a whole, the argument certainly runs against the orthodox position that occupation as a notion of the law of IAC is not transferrable into single-territory conflicts. It does, however, benefit from prior writing endorsing positions partially supportive of the case presented here. Some academics have considered (some of) the law of occupation as applicable to NIACs.[838] Some have posited that it would apply to some of the conflicts designated as internationalized in this thesis.[839] The chapter respectfully considers these academic positions and, where possible, builds the analysis at their basis into the argument presented here. The overall aim of the chapter is to put forward a comprehensive, practice-informed, and workable pro-applicability case encapsulating all internationalized armed conflicts.

[838] See, eg, Roberts, 'What Is a Military Occupation?' (n 176) 296–297; Sivakumaran (n 33) 529–532; Fleck (n 32) 605.

[839] See, eg, Roberts, 'What Is a Military Occupation?' (n 176) 292–293 (stating that '[o]ne may hazard the opinion' that the law of occupation should apply to situations, in which a liberation movement occupies a State's territory); Dinstein, *The International Law of Belligerent Occupation* (n 427) 34 (stating, without further analysis, that the law of belligerent occupation would apply to wars of national liberation and conflicts in which the insurgents obtain recognition of belligerency from the government); Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 IRRC 133, 158–160 (arguing that the law of occupation applies to situations of 'occupation by proxy', ie occupations carried out by forces under the control of an outside State).

2. Historical overview

The argument of this chapter begins with an analysis of the historical development of the law of belligerent occupation from the perspective of the regulation of internationalized armed conflicts. The present section thus focuses on the position of non-State actors and individuals in the consecutive periods of development of this area of law. It asks two main questions. First, to what extent can the law as it evolved support the notion of application of the concept of belligerent occupation to non-State actors? Second, how has the underlying aim of the law of belligerent occupation evolved with the ongoing emancipation of the individual on the international plane? The section uncovers the reasons arising from the history of the law of belligerent occupation which support an extensive view of the applicability of this law to modern internationalized armed conflicts.

2.1 Origins of the law of occupation

Despite its breadth, the law of occupation is a relatively novel addition to the regulation of armed conflicts. Under the traditional Westphalian paradigm of international law,[840] war between States was a legitimate manifestation of State sovereignty, for some writers even 'a right inherent in sovereignty itself'.[841] According to Clausewitz, war could be waged for one of two principal aims. First, the objective could be to completely overthrow the enemy, forcing him to accept any terms desired by the victorious power. Second, it could be 'merely' to subjugate parts of his territory with the goal of their eventual annexation.[842] In both of these kinds of war it was understood that enemy

[840] See also n 45 above (referring to the debate concerning the role of the Peace of Westphalia in the transition towards modern international law).

[841] Hershey (n 406) 349.

[842] von Clausewitz (n 1) 7.

territory under control of the victorious side at the end of the war was fair game for conquest.[843] In some instances this could mean the total obliteration of a previously existing State, such as during the 1795 Third Partition of Poland, which saw the forcible split of the Polish-Lithuanian Commonwealth among Prussia, Austria, and Russia.[844] It bears reminding that in line with the Rousseau doctrine, war was in that period seen as a relationship between States, with little heed given to the needs or the protection of their inhabitants.[845] The combination of this disregard for the plight of individuals with the conception of conquest as legitimate spoils of war meant that there was little need for the regulation of the conduct of the foreign armies in enemy territory before annexation could be effectuated.

The origins of the legal regulation which would apply before the final decision on annexation but after the outside army acquired control over enemy territory can be traced back to Vattel's writings. Although he accepted conquest as a valid precondition for the transfer of legal title, he considered it desirable to accord protection to the property of the private individuals.[846] He thus proposed that the conqueror would only lawfully seize the public possessions, while individuals would be allowed to keep their private property.[847] This solution laid the groundwork for the future law of occupation as it made it clear that even in the scope of armed conquest, the victorious army remains constrained by the bounds of law. Vattel's proposition was motivated equally by humanitarian considerations as by a desire to provide for legal certainty in extremely

[843] See, eg, de Vattel (n 52), book III, ch XIII, §§195, 197.

[844] Norman Davies, *God's Playground: A History of Poland* (2nd edn, OUP 2005) vol 1 ('The Origins to 1795') 386–411.

[845] Rousseau (n 548) 19–20; see further text to nn 548–549 above.

[846] de Vattel (n 52), book III, ch XIII, §200.

[847] ibid.

volatile times.[848] Yet it was still believed that the sovereignty of the defeated State was transferred to the victor and that the victor was not obliged to conserve the institutions or the laws of the territory under its control.[849]

A breakthrough in the conceptualization of occupation came a century later with the publication of the 1844 treatise written by the German lawyer August Wilhelm Heffter.[850] Heffter was the first author to describe occupation as an interim phase which brought about the temporary suspension of the exercise—but not the transfer—of the sovereignty of the occupied State.[851] On this understanding, the purpose of legal regulation during occupation was not just to govern the conduct of the foreign hostile army towards the inhabitants of the occupied territory. Unlike the previous writers, Heffter's conception of occupation was novel in that it took into consideration also the interests of the ousted sovereign. The victorious side was thus obliged—until the final resolution of the matter could be made either in the form of a peace treaty, a complete defeat (*debellatio*), or a withdrawal by the occupant—to conserve the laws, institutions, and property of the ousted sovereign.[852] Nevertheless, it is a testament to his period that even Heffter still considered that the occupying State held a legitimate expectation that it would acquire sovereignty after a successful military campaign.[853]

There is no doubt that this conception of the law of occupation was predicated on the premise that the warring parties would be States and States only. The notion of

[848] Giladi (n 558) 85.

[849] See, eg, Georg F von Martens, *Precis du Droit des Gens Moderne de l'Europe* (Jean Chretien Dieterich 1789) 348–349

[850] August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* (1st edn, Schroeder 1844).

[851] Benvenisti (n 319) 27–28.

[852] Heffter (n 850) 220–221, as interpreted by Benvenisti (n 319) 27–28 and Yutaka Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation' (2012) 94 IRRC 51, 56–57.

[853] Heffter (n 850) 308, as interpreted by Benvenisti (n 319) 631.

sovereignty, whose protection lay at the heart of the novel conception of sovereignty propounded by Heffter, was inextricably linked with the existence of States. This also reflected the reality of the 19th century. The concept of internationalized armed conflict was not to appear for another hundred years.[854] One conceivable type of conflict meeting the criteria of an internationalized conflict as proposed in this thesis would have been a civil war featuring the recognition of belligerency of the non-State party.[855] Remarkably, it was precisely in the context of such a conflict that the next major development of the law of occupation took place.

2.2 Lieber Code: A non-State-permissive conception

Francis Lieber, the principal author of the 1863 Lieber Code was a veteran of the Napoleonic Wars and a professor at the Columbia College in New York.[856] The document was not solicited by the US government; it was Lieber in his private capacity who proposed its preparation, which was accepted by President Lincoln.[857] The final text, approved by the president, was promulgated in General Orders No. 100 under the title 'Instructions for the Government of Armies of the United States in the Field'.[858] As a compilation of legal norms that the US government considered to apply in times of war, it constituted an important statement of *opinio juris* in this area, with a significant part

[854] See chapter 1, section 2.2.1 above.

[855] See chapter 2, section 5.1 above.

[856] Richard Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100' (1963) 3 IRRC 171, 172.

[857] ibid 182.

[858] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (1863), originally published as General Orders No. 100, War Department, Adjutant General's Office, 24 April 1863.

devoted to the law of occupation.[859] It has even been described as 'the first successful attempt to codify a branch of international law'.[860]

Some of the terminology used in the Code as well as the fact of its adoption during a civil war may nevertheless raise doubts as to the applicability of its provisions on occupation as a matter of international law. First, with respect to the terminology, the Code stipulated in its first article that an occupation of a territorial unit results in the application of 'Martial Law' to that territory,[861] a term nowadays normally considered as a concept of domestic law.[862] However, Rotem Giladi correctly points out that 'Martial Law' was simply 'Lieber's code word for the occupant's military authority.'[863] This is consistent with the contextual and historical interpretation of this term. The following articles in the Code make it clear that 'Martial Law' entailed the conservation of civil and penal law in force in the occupied territories insofar as permitted by military necessity[864] and that it was seen as applicable in hostile countries.[865] Similarly, the contemporary American case-law used 'Martial Law' as a broader concept encompassing all 'kinds of military jurisdiction', including, in particular, that 'exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents'.[866] It is therefore submitted

[859] cf Doris A Graber, *The Development of the Law of Belligerent Occupation,1863–1914: A Historical Survey* (Columbia University Press 1949) 15 (noting that roughly one third of the articles of the Lieber Code concern occupation).

[860] Scott, *The Hague Peace Conferences of 1899 and 1907* (n 575) 525.

[861] Lieber Code, art 1.

[862] See, eg, Jonathan Wallace and Susan Ellis Wild, *Webster's New World Law Dictionary* (Houghton Mifflin Harcourt 2010) 176 ('martial law n. Civil law exerted over citizens by military, generally in times of war or emergency.'); see also *United States v Minori Yasui* (1942) 48 F.Supp. 40 US, District Court, D Oregon, 49.

[863] Giladi (n 558) 89.

[864] Lieber Code, arts 3 and 6.

[865] Lieber Code, arts 1, 3, and 6.

[866] *Ex parte Milligan* (1866) 71 US 2 (US SC) 141–142.

that Lieber's term 'Martial Law' should simply be understood as the period reference to the 'law of belligerent occupation'.[867]

Second, while admittedly adopted during the American Civil War, the Code ought properly to be seen as applicable to both main types of conflict. Paradoxically, Lieber's goal was to regulate inter-State conflict; in his own words, he 'disrelished'[868] the addition of the last section which was the only one expressly covering internal conflict.[869] That the Code would be workable in an international conflict was confirmed already a few years later when both France and Prussia applied it in their mutual war of 1870.[870] Nevertheless, the section was maintained in the promulgated text which, moreover, expressly foresaw that the law of occupation could also be applied to the territory controlled by the rebel forces.[871] The Lieber Code is thus a landmark legal instrument which, in spite of its principal inter-State orientation, allowed for application of the law of belligerent occupation also to non-State actors.[872] The United States' practice during the civil war reflected this normative construction and provides a very instructive source for the potential application of the law of occupation to internationalized armed conflicts.[873]

The Lieber Code entailed a non-formalistic conception of occupation. The application of occupation law was not contingent on proclamations or other formal requirements being met by the occupation army; its presence in the occupied territory

867 Frank Burt Freidel, *Francis Lieber: Nineteenth-century Liberal* (Louisiana State University Press 1947) 550; Giladi (n 558) 89.

868 Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100' (n 856) 184.

869 Lieber Code, section x ('Insurrection – Civil War – Rebellion').

870 Scott, *The Hague Peace Conferences of 1899 and 1907* (n 575) 526.

871 Lieber Code, art 153.

872 cf Giladi (n 558) 89.

873 See section 4 below and, in particular, text to nn 1092–1097, 1111–1112, and 1124–1126 below.

was sufficient.[874] The Code confirmed that local law continued to apply[875] but it did not provide yet for a duty to restore and maintain public order and safety.[876] The occupant's authority was limited not by the authority of the displaced government, but only by the war aims of the occupant as operationalized by the concept of military necessity.[877] This conception of occupation, detached from the fulfilment of formal conditions and from the status of the ousted power, could be applied to both main types of armed conflict with relative ease.

Nevertheless, this non-State-permissive conception of the law of occupation was destined to remain an aberration for a long time. Although occupation law was applied in a number of conflicts after the end of American Civil War, these were exclusively inter-State conflicts like the Franco-Prussian War (1870–71) or the Spanish-American War (1898).[878]

2.3 Post-Lieber Code codifications: Return to the State-centric model

The non-binding though influential texts adopted in the late nineteenth century confirmed this trend. The first of them was the 1874 Brussels Declaration.[879] On the one hand, it filled the gap left open by the Lieber Code by codifying the duty of the occupant to restore and maintain public order and safety.[880] This way, the regulation of occupation

[874] Lieber Code, art 1.

[875] Lieber Code, art 6.

[876] Giladi (n 558) 105.

[877] ibid 106.

[878] Arai-Takahashi (n 852) 76–77.

[879] See chapter 3, section 2.3 above for more detailed treatment of the historical background of this document.

[880] Brussels Declaration (n 568) arts 2–3:

came to reflect the modern conception of occupation as a *transition* of public power from the legitimate ousted power to the occupant, as opposed to the Lieber Code's understanding of occupation as an *original* source of the occupant's power.[881] On the other hand, unlike the Lieber Code, the Declaration was designed to regulate inter-State relations only.[882] Its drafting history leaves no doubt that the representatives of 15 European powers were preparing for possible wars among themselves and there is no indication that—as contrasted to the provisions on combatants[883]—the regulation of occupation was contemplated to be applicable to occupation by or of non-State actors.[884]

The 1880 Oxford Manual on the Laws of War on Land,[885] the second of these texts, was even clearer in its terms. While the text of the Brussels Declaration had spoken merely of '[the] occupied territory',[886] 'the army of occupation',[887] and 'the hostile Power',[888] which would have perhaps still allowed for a strictly linguistic interpretation permitting the extension of the application of the relevant norms to non-State actors, this private codification of the Institute of International Law revealed a much more unambiguously State-centric approach also from the textual perspective. The

Article 2. The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.

Article 3. With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.

881 cf Giladi (n 558) 105.

882 See n 575 above and the accompanying text.

883 See text to nn 576–580 above.

884 See generally *Actes de la conférence de Bruxelles de 1874* (n 580).

885 The Laws of War on Land, Manual (adopted by the Institute of International Law at Oxford, 9 September 1880) ('Oxford Manual'), reproduced in Schindler and Toman (n 561) 29–40.

886 Brussels Declaration (n 568) arts 36, 37, and 41.

887 ibid, arts 5 and 6.

888 ibid, art 37.

corresponding provisions in the Manual already referred respectively to the '[t]erritory [of] the *State* to which it belongs',[889] 'the invading *State*',[890] and 'the enemy *State*'[891].

The Hague Regulations changed little in this regard. Admittedly, several of their provisions speak of 'belligerent parties', which would again seemingly permit an extensive interpretation reminiscent of that advanced with respect to the Brussels Declaration.[892] However, article 2 of the Hague Convention IV, to which the Regulations are appended, states clearly that the Regulations were to apply only between Contracting powers and only if all the belligerents were parties to the Convention.[893] The Convention, like other Hague Conventions, was only open for ratification to States,[894] and thus it cannot be doubted that references to 'belligerent parties' were supposed to relate to States only.

Therefore, for the purposes of the present argument, the Hague Regulations served primarily to solidify and clarify the core obligations of the occupying Power. This was done by way of combining two 'apparently incongruous'[895] provisions of the Declaration[896] in one, namely article 43 of the Hague Regulations. The delegates of the First Peace Conference at The Hague thus laid down the 'cornerstone'[897] or the 'gist'[898] of the modern law of occupation:

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[889] Oxford Manual (n 885) art 41 (emphasis added).

[890] Oxford Manual (n 885) art 41 (emphasis added).

[891] Oxford Manual (n 885) chapeau to section II.C.a (emphasis added), art 52 (emphasis added); chapeau to section II.C.b (emphasis added).

[892] See Hague Regulations, arts 3 and 36. But see, eg, ibid, arts 37 and art 39. It can be concluded that the Regulations used these terms interchangeably as synonyms.

[893] Hague Convention IV (n 781) art 2.

[894] cf ibid, preamble (listing the High Contracting Parties) and art 5 (detailing the ratification procedure).

[895] Arai-Takahashi (n 852) 60.

[896] Brussels Declaration (n 568) arts 2–3. See n 880 and accompanying text above.

[897] Eyal Benvenisti, *The International Law of Occupation* (1st edn, Princeton University Press 1993) 9.

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life],[899] while respecting, unless absolutely prevented, the laws in force in the country.[900]

This provision specifies two main duties of the Occupying Power resulting from the combination of the former articles 2 and 3 of the Brussels Declaration:[901] first, a positive obligation to restore and ensure public order and civil life in the occupied territory as far as possible, and, second, a negative obligation to respect the laws in force except where absolutely prevented.[902] Both were written from the perspective of the interests of the occupying State and the occupied State, balancing the security interests of the former with the stability interests of the latter.

This is in line with the understanding of the Hague Regulations as an instrument concerned solely with inter-State warfare.[903] The aim of the protection provided for in times of belligerent occupation was therefore also State-centric, focussing mainly on the preservation of the European public order rather than on the humanization of warfare

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898 Benvenisti, *The International Law of Occupation* (n 319) 68.

899 The phrase used in the authoritative French text was 'l'ordre et *la vie publics*' (emphasis added). I use here the English translation generally accepted in the literature as opposed to the first English translation, which had used the words 'public order and *safety*' (emphasis added). See, eg, Edmund H Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54 Yale Law Journal 393, 393 fn 1; MS McDougal and FP Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press 1961) 746–747; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 EJIL 661, 663–664; Benvenisti, *The International Law of Occupation* (n 319) 68 fn 1.

900 Hague Regulations, art 43.

901 See n 880 above for the full text of these provisions.

902 cf Dinstein, *The International Law of Belligerent Occupation* (n 427) 90–91.

903 See, eg, Scott, *The Hague Peace Conferences of 1899 and 1907* (n 575) 27, citing Ladd (n 575) 16 (emphasis added). See further Scott, *The Hague Peace Conferences of 1899 and 1907* (n 575) 539.

per se.[904] Unlike the next important instrument, the Hague Regulations were not directly concerned with the rights of individuals.[905]

2.4 Geneva Convention IV: Individualization of the law of occupation

The 1949 Fourth Geneva Convention embodied the latest dramatic change in the regulation of belligerent occupation. Benvenisti describes this as two achievements of the Convention: that it, first, adopted a 'bill of rights for the occupied population' and, second, shifted the emphasis of the regulation from the political elites to the peoples.[906] It is submitted that both changes are actually just different aspects of a single yet profound paradigm shift in international law dating back to the end of World War II. This has been described as the individualization or humanization of international law, in other words, the gradual rise of the prominence attributed to the individual *qua* human being in international law, including as a bearer of legal rights and obligations.[907]

It is thus symptomatic that the abovementioned bill of rights in Geneva Convention IV[908] begins with article 47 which guarantees conventional rights to the protected persons against any institutional, administrative or territorial changes

[904] Giladi (n 558) 83.

[905] cf *Final Record* (n 93) vol II A, 675.

[906] Eyal Benvenisti, *The International Law of Occupation* (1st rev edn, Princeton University Press 2004) 105–106.

[907] See, eg, Gerry Simpson, 'Punishing Human Rights Violators' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 125; Anne-Marie Slaughter, 'Rough Regimes and the Individualization of International Law' (2001–2002) 36 New England Law Review 815, 815–823; Theodor Meron, *The Humanization of International Law* (Brill 2006); Antônio Augusto Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice' (2007) 6 Chinese Journal of International Law 1, 1–3; Sean Murphy, 'Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"' (2007) 75 George Washington Law Review 1105, 1140–1148; Markus Benzing, 'Sovereignty and the Responsibility to Protect in International Criminal law' in Doris König and others (eds), *International Law Today: New Challenges and the Need for Reform?* (Springer 2008) 44; but see Arimatsu (n 34) 161.

[908] GC IV, arts 47–78.

introduced by the Occupying Power.[909] Pictet's commentary describes it as a provision of 'essentially humanitarian character' with an object 'to safeguard human beings and *not to protect the political institutions and government machinery* of the State as such'.[910] Although the applicability provisions of the Convention leave no doubt that an IAC must exist in order for the rules on occupation to operate,[911] this novel humanitarian individual-centric approach acquires fundamental importance in the consideration of the extent to which the rules in the Convention may be viewed as adaptable to the reality of internationalized conflict.[912]

The Convention also amplified and clarified the scope of the negative obligation in article 43 of the Hague Regulations.[913] Article 64 of GC IV authoritatively defined the situations in which the Occupying Power was permitted to depart from the laws in force in the occupied territory, heretofore only described *in abstracto* as those in which the occupier was 'absolutely prevented' from respecting these laws. The Occupying Power could newly repeal or suspend the existing laws if and only if they constituted a threat to its security or an obstacle to the application of the Convention.[914] Conversely, it could adopt new laws if these were essential to safeguard its security, to fulfil its conventional obligations, or to maintain the orderly government of the territory.[915] The existence of a duty[916] to modify laws incompatible with the Convention and to adopt new ones in order to procure its proper application further underlines the individualized conception of the

[909] GC IV, art 47.

[910] *GC IV Commentary* (n 21) 273–274 (emphasis added).

[911] See chapter 1, section 2.1.2 above.

[912] See sections 3 and 4 below.

[913] cf Gutteridge (n 71) 324; Yingling and Ginnane (n 71) 422.

[914] GC IV, art 64, first para.

[915] GC IV, art 64, second para.

[916] Dinstein, *The International Law of Belligerent Occupation* (n 427) 113.

law of occupation propounded by the Convention as opposed to the State-centric conception protective of institutions and elites espoused by the Hague Regulations.[917] Its enactment should be seen as the drafters' reaction to the atrocious discriminatory laws adopted by the Nazi Germany and the legitimization of their subsequent repeal by the Allied occupying powers in 1945.[918] Such laws would run counter to article 27 of the Convention[919] and the Occupying Power would now, in fact, have a *duty* to repeal them under the new individual-centric framework introduced by the Geneva Convention.[920]

2.5 Additional Protocol I: Occupation and national liberation movements

The 1977 Additional Protocol I is most relevant for the present purposes due to its extension of the scope of the law of belligerent occupation to wars of national liberation. Its article 1(4) subjects armed conflicts in the exercise of the right of self-determination to the application of the Protocol and all four Geneva Conventions. This mechanism has been dealt with elsewhere in this thesis.[921] Suffice it to say here that the adoption of this provision allowed, for the first time since the Lieber Code, for the application of the occupation law to non-State actors, here the so-called national liberation movements.

[917] See also Benvenisti, *The International Law of Occupation* (n 319) 203 fn 19.

[918] *Final Record* (n 93) vol II A, 670 (United States); ibid 771 (India); ibid 833 (summarizing the view of the Third Committee that laws that 'constitute an obstacle to the application of the Convention' would include those that 'provid[e] for racial discrimination').

[919] GC IV, art 27(3).

[920] cf Dinstein, *The International Law of Belligerent Occupation* (n 427) 113–114 (inferring this duty from the obligation to respect and ensure respect for the Convention stipulated in common article 1 read together with the proscription to invoke the provisions of internal law as justification for the failure to perform a treaty found in article 27 of the VCLT).

[921] See chapter 2, section 4 above.

The Protocol did not otherwise greatly amend the scope of the Convention.[922] From the perspective of the present argument, an important addition was article 75 of the Protocol. This provision, entitled 'Fundamental Guarantees', is a veritable mini-convention of human rights applicable in armed conflicts[923] and accepted as reflective of customary law even by the most vocal opponents of the Protocol.[924] Its inclusion affirms the trend of individualization of international humanitarian law in general and, additionally, the applicability of this provision to situations of belligerent occupation[925] further confirms the interpretive approach proposed in this chapter.

2.6 Post-Additional Protocols period: Implementation issues

With the adoption of the Additional Protocols, the treaty-driven process of development of the law of belligerent occupation came to a halt. This area of law has emerged as a well-developed and consolidated body of rights and duties applicable during a situation of armed occupation. The key issue has become one of application.

In the contemporary period, the law of occupation has very seldom been relied on and applied by the States involved in modern occupations.[926] Such reliance does, of course, entail in itself the acceptance of the label of an Occupying Power, which may result in a number of consequences viewed as undesirable by the State in question. Firstly, these States may have been reluctant to bring upon themselves the 'litany of

[922] See Dinstein, *The International Law of Belligerent Occupation* (n 427) 7 (listing the few examples in which Geneva provisions relevant to belligerent occupation were amended or abrogated by the Protocol).

[923] cf *APs Commentary* (n 22) 865 [3007].

[924] William H Taft, 'The Law of Armed Conflict After 9/11: Some Salient Features' (2003) 28 YJIL 319, 321–322; US, The White House, Office of the Press Secretary, 'Fact Sheet: New Actions on Guantanamo and Detainee Policy' (7 March 2011) 3.

[925] See AP I, art 72.

[926] Benvenisti, *The International Law of Occupation* (n 319) 202; Nazil Bhuta, 'The Antinomies of Transformative Occupation ' (2005) 16 EJIL 721, 734–735.

onerous positive duties' entailed in the modern occupation law.[927] Secondly and somewhat less pragmatically, their reluctance may also have been brought about by the perceived characterization of occupation as internationally 'unlawful' conduct.[928] Since many UN General Assembly resolutions starting with Resolution 3314 on the Definition of Aggression[929] condemned foreign occupation as a moral equivalent or even legal subspecies of aggression, the acknowledgement of the status of an occupier could have resulted in international opprobrium.[930] Thirdly, this reluctance was also an aspect of the Cold War reality. Despite the frequent interventions and proxy wars of the period, neither of the two main superpowers was willing to publicly describe these situations as belligerent occupation. Such a step could have invited a *tu quoque* response: in poignant shorthand, Bhuta writes that 'if the Soviet Army in Budapest and Prague was an "army of occupation", so too was US military presence in Saigon and Seoul'.[931]

The law of occupation was expressly acknowledged as applicable directly by the Occupying Powers only twice in the post-1977 era: by Israel with respect to the Occupied Palestinian Territories (although only by its judicial branch and insofar as Hague Regulations[932] but not Geneva Conventions were concerned[933]) and by the US and the

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927 Arai-Takahashi (n 852) 69.

928 ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory - Report' (2012) <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf> accessed 29 May 2014, 4; see also *Congo v Uganda* (n 88) Separate Opinion of Judge Kooijmans [62]–[63].

929 UNGA Res 3314 (XXIX) (Definition of Aggression) (14 December 1974), art 3(a) (qualifying as aggression, inter alia, 'any military occupation, however temporary' that results from an invasion or attack on the territory of another State).

930 See, eg, UNGA Res S-9/2 (Declaration on Namibia) (3 May 1978) [12]; UNGA Res ES-9/1 (The Situation in the Occupied Arab Territories) (5 February 1982) [2]; UNGA Res 37/123 (The Situation in the Middle East) (16 December 1982) [2]; UNGA Res 43/26 (Question of Namibia) (17 November 1988) [4].

931 Bhuta (n 926) 734.

932 *Affo v Commander Israel Defence Force* (1988) 83 ILR 121 (Israel, Supreme Court) 165–166 (holding that customary international law of belligerent occupation did apply to Gaza on account of Israel's effective control over that area).

933 cf *Wall* (n 155) [93] (noting that Israel's position is to deny the de jure applicability of GC IV).

UK with respect to Iraq after 2003.[934] There is thus a dearth of direct statements made by the States from which specific *opinio juris* regarding the law of occupation could be deduced. This shortage further complicates the analysis made below especially with respect to the application of the law of occupation in internationalized conflicts.[935]

2.7 Evaluation

The historical examination of the development of the law of occupation reveals two important observations. The first one is the strong grounding of this area of law in a State-centric paradigm. The vast majority of regulation adopted to govern the reality of occupied territories is based on a presumption of the existence of two established and comparable independent States interlocked in a war against each other. Nevertheless, several isolated developments going against this general trend have been identified here. These include the 1863 Lieber Code and the 1977 Additional Protocol I, both of which foresaw the application of rules on occupation also to a territory occupied by a non-State actor. These instruments provide for important exceptions that serve as vehicles for the applicability of the law of belligerent occupation to some types of internationalized conflicts.

The second observation is the identification of a trend, parallel with the general development of public international law, of individualization of the law of belligerent occupation. From a non-existent branch of law where right of conquest sufficed, law of belligerent occupation first became a brake on inter-State relations that concerned itself solely with these States' interests, namely with the preservation of their elites, institutions,

[934] Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2003/538 (8 May 2003).

[935] See section 4 below.

and structures. The trend of individualization then brought individuals' interests to the fore, putting the persons before the institutions and individuals before States. The existence of this trend also serves as a powerful argument in favour of the applicability of occupation law to novel situations brought about by internationalized conflicts.

3. Objections to the extension of occupation law to non-State actors

Literature is scarce in analysis of whether and to what extent the law of occupation may apply to non-State actors. The traditional approach is to distinguish between IACs on the one hand, to which the law of belligerent occupation applies in full, and NIACs on the other, to which this area of law remains inapplicable.[936] A few authors have tried to challenge this orthodoxy somewhat by arguing for selective application of the IAC norms in NIAC situations.[937]

Nevertheless, these approaches remain solidly grounded in the IAC-NIAC dichotomy and do not directly consider the extent to which rules of the law of belligerent occupation may apply to non-State actors in international or internationalized conflicts. A recent exception is an article by Tom Gal published in 2014, in which she argues in favour of the application of the law of belligerent occupation to conflicts internationalized by outside intervention, described therein as '*Tadić*-type conflicts'.[938] Yet

[936] See, eg, Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 531; Greenwood, 'International Humanitarian Law (Laws of War)' (n 33) 234; Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 272; Dinstein, *The International Law of Belligerent Occupation* (n 427) 33–34; see also Hans-Peter Gasser and Knut Dörmann, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 267.

[937] See, eg, Roberts, 'What Is a Military Occupation?' (n 176) 296–297; Sivakumaran (n 33) 529–532; Fleck (n 32) 605.

[938] Tom Gal, 'Unexplored Outcomes of Tadić' (2014) 12 JICJ 1.

even Gal does not put forward a systematic defence of her approach vis-à-vis the assumptions underlying the traditional view.

Since the non-State actor element is a definitional feature of internationalized armed conflicts, a scrutiny of these assumptions becomes necessary for the purposes of the argument of the present work. They may be viewed as logically connected objections against an approach extending the applicability of the norms of occupation law to non-State actors. This section accordingly looks at three principal objections of this kind, namely that (1) non-State actors lack the capacity to have rights and duties arising from the law of occupation; that (2) they may not become subjects of the law of occupation due to their sovereignty deficit; and that (3) in any event, they would be unable to comply with the norms of this body of law.

3.1 Personality

Unlike the rules on combatancy, which ultimately appertain to each putative combatant individually, the law of belligerent occupation is predicated on the existence of a group-level entity with specific rights and obligations, both in the role of the removed and the occupying authorities. As the removed authority, this entity must have been in control of a distinct territory until the commencement of the occupation. As the occupier, it must have come to control such territory through the act of military occupation. In both of these potential positions, it must then have the capacity to have rights and obligations arising from the law of occupation. Of course, with respect to States as primary subjects of international law endowed *ex definitione* with territories and means to control them, all of this is assumed without need for further discussion. Such capacity—in other words, legal personality—is, however, not automatically accepted with regard to non-State actors.

3.1.1 Traditional international law: States as the exclusive bearers of legal personality

The traditional view confers legal personality on States only. In the classical formulation by Lassa Oppenheim, '[s]overeign States exclusively are International Persons—i.e. subjects of International Law'.[939] This conception of international legal personality was supported by other pre-World War II writers including Heinrich Triepel[940] and Dionisio Anzilotti[941].[942] Although this position finds much less doctrinal support in modern writing, one can find traces of its acceptance well into the second half of the 20th century,[943] including in reference to armed groups.[944] On this basis, non-State actors, including those acting in internationalized conflicts, could not accrue rights and responsibilities directly from international law as they would not benefit from legal personality in that legal system.

3.1.2 Modern international law: Pragmatic conception of legal personality

The traditional view can be countered both on the level of general international law and specifically with respect to international humanitarian law. As far as general international law is concerned, the States-only conception of personality was based on the idea of an

939 Oppenheim, *International Law: A Treatise* (1st edn) (n 54) vol I, 99; Oppenheim, *International Law: A Treatise* (2nd edn) (n 405) vol I, 107 (identical formulation). In the later editions, the editors were willing to modify this pronouncement slightly by including the League of Nations as an international person *sui generis*. The State-centric focus to the exclusion of all sub-State entities had, however, remained: cf Lassa Oppenheim, *International Law: A Treatise* (Ronald F Roxburgh ed, 3rd edn, Longmans, Green & Co. 1920 & 1921) vol I, 125; Lassa Oppenheim, *International Law: A Treatise* (Arnold McNair ed, 4th edn, Longmans, Green & Co. 1926 & 1928) vol I, 133.

940 See Heinrich Triepel, *Droit International et Droit Interne* (A de Lapradelle ed, A Pédone 1920) 20.

941 See Dionisio Anzilotti, *Opere di Dionisio Anzilotti: Corso di diritto internazionale* (Cedam 1955) 112.

942 See further Roland Portmann, *Legal Personality in International Law* (CUP 2010) 42–64.

943 See, eg, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

944 See, eg, *Official Records* (n 360) vol VII, CDDH/SR.50/Annex, 104 (Zaire) (reproduced in full in text to n 957 below).

international community composed solely of States.[945] If that had ever been an accurate description of the reality, it is certainly not the case today. Even Oppenheim and the editors of his work after his death had to acknowledge in its later editions the '*sui generis*' role of the newly established League of Nations, admitting it possessed a degree of personality due to it being endowed with specific rights and duties.[946] In a landmark ruling of the ICJ, the *Reparation for Injuries* advisory opinion, the Court introduced a pragmatic needs-based conception of legal personality.[947] According to the ICJ, the nature of an entity as a participant in a legal system is determined by the needs of the community.[948] As the requirements of international life evolved to embrace organized and institutionalized collective action, with the United Nations at its apex, attribution of international legal personality to international organizations became indispensable.[949]

A similar argument may be advanced with respect to non-State armed groups. These actors are now a regular presence on the international plane as they play a prominent role in numerous armed conflicts.[950] The growing regulation of conduct during such conflicts and the legal protection of interests and rights implicated by these conflicts attest to the fact that the needs of the international community have evolved and now require for the non-State armed groups to be capable of holding rights and

945 Portmann (n 942) 43–44.

946 Oppenheim, *International Law: A Treatise* (3rd edn) (n 939) vol I, 125; Oppenheim, *International Law: A Treatise* (4th edn) (n 939) vol I, 133.

947 *Reparation for Injuries* (n 276) 174, 178.

948 ibid 178.

949 ibid 178.

950 IISS, 'Armed Conflict Database' (2014) <https://acd.iiss.org/en> accessed 1 October 2014 (reporting that in 2014, there were 41 active conflicts around the world and 79 active non-State armed groups).

duties. Due to this development, attribution of international legal personality to non-State actors has likewise become indispensable.[951]

3.1.3 International humanitarian law: Non-State actors as bearers of limited legal personality

In addition to general international law considered in the previous section, the area of IHL provides additional grounds for the rejection of the traditional view. It is generally accepted that international humanitarian law applies to and binds armed groups.[952] This is true of customary IHL in general.[953] In addition, core IHL treaties also ascribe rights and duties directly to non-State actors. For instance, common article 3 lists provisions which bind directly 'each Party to the [non-international] conflict', at least one of whom must logically be a non-State actor. The fact that these actors are bound by IHL norms confirms that they have the capacity to have rights and duties under this body of law: the latter is the prerequisite of the former.[954]

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[951] Accord Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369, 373–374; see also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 278; Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2014) 19 Journal of Conflict & Security Law 1, 3.

[952] See, eg, Jelena Pejić, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 376; Lubell (n 33) 18; Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (n 18) 10–14; David Tuck, 'Detention by Armed Groups: Overcoming Challenges to Humanitarian Action' (2011) 93 IRRC 759, 767; Fleck (n 32) 598; Murray (n 951) 1; see also *Nicaragua* (n 103) [218]; *Third Report on the Human Rights Situation in Columbia* [84]; *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72(E) (31 May 2004) (SCSL) [22].

[953] *ICRC Study* (n 18) (concluding that a large number of rules apply to all conflict parties in NIACs); Françoise Hampson, 'The Impact of the War on Terror on the Accountability of Armed Groups' in Howard M Hensel (ed), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate 2007) 158 fn 67 (noting that the fact of NSAs being bound by customary IHL 'appears to be generally accepted' despite there being 'no completely satisfactory way of explaining' this in theory); Sivakumaran (n 33) 239.

[954] But see *Prosecutor v Kallon and Kamara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E) (13 March 2004) (SCSL) [47] (distinguishing the existence of international legal personality of armed groups from their capacity to be bound by Common article 3, apparently denying the former but accepting the latter).

It is of interest that this pro-personality understanding was challenged at the 1974–77 Diplomatic Conference. Several developing States protested against the inclusion of the expression 'parties to the conflict' as the subject of the rights and duties imposed by Protocol II. Apart from the fears that this wording might affect the sovereignty of States parties or that its adoption would lead to the formal death of the instrument as it would never be applied,[955] it was also argued that this phrase would unacceptably place the entities involved in the conflict on an equal footing.[956] The delegate from Zaire was the most explicit in linking the issue with that of legal personality:

> 'As far as my delegation is concerned, *only a sovereign State can claim to have international legal personality* and, as such, it enjoys all the prerogatives of sovereignty, including that of entering into international agreements and conventions, that is to say, of becoming a party to them. Accordingly, dissident armed forces are primarily a group of rebels with no international legal personality. Their only legal status is that granted them under the domestic laws of their national State. *To claim otherwise is to place a sovereign State on the same footing as a rebel movement, and that would imply de facto recognition of the movement.*'[957]

Although the initiative to delete all references to 'parties to the conflict' succeeded in Geneva as the drafters replaced them with somewhat inelegant formulations in passive voice,[958] it is submitted that this deletion did not in fact affect the legal status of non-State armed groups in international law. Although the drafters could not agree on a common denominator for the entities involved in a NIAC, it is clear that the Protocol—like common article 3 which it develops and supplements[959]—contains binding obligations

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[955] See, eg, *Official Records* (n 360) vol VII, CDDH/SR.49, 61 [11] (Pakistan) (summarizing the reasons behind the proposed deletion of about a half of the draft Protocol); see also nn 659–660 and the accompanying text (discussing this deletion).

[956] See, eg, ibid, vol VIII, CDDH/I/SR.40, 426 [29] (Iraq); ibid, vol VII, CDDH/SR.49, 65 [33] (Saudi Arabia); ibid, CDDH/SR.56, 219–220 [124]–[129] (Zaire).

[957] ibid, vol VII, CDDH/SR.50, 104 (emphases added, paragraphs collapsed).

[958] Compare, eg, Draft AP II, art 29(1) ('Should the parties to the conflict undertake such displacements, they shall take all possible measures…') with AP II, art 17(1) ('Should such displacements have to be carried out, all possible measures shall be taken…').

[959] cf AP II, preamble.

and not mere exhortations.[960] Someone therefore needs to be the subject of these obligations.[961] Accordingly, the only entities that can plausibly be required to carry them out are those that are engaged in an armed struggle against one another.[962] Moreover, as demonstrated above, the norms apply equally to all conflict parties irrespective of the type of the conflict in question.[963] We have, therefore, returned back to square one: non-State actors, like States, are bound by obligations contained in Additional Protocol II.[964] By implication, on the basis of the analysis outlined above, they have a limited legal personality.

If it is true that non-State actors have a certain legal personality even in NIACs, which are marked by the States' deep-seated fear of any erosion of their sovereign status and rights, then this should all the more so hold in internationalized conflicts where any such concern is naturally much allayed. This is exemplified by the ease with which the doctrine[965] and case-law[966] ascribe legal personality to national liberation movements.[967]

960 But see, eg, *Official Records* (n 360) vol VII, CDDH/SR.52, 136 [81] (Holy See) (claiming that by deleting the term 'parties to the conflict' from the draft Protocol, the delegates had restricted it to a non-mandatory 'statement of good intentions').

961 See Hans Kelsen, *On the Pure Theory of Law* (University of California Press 1978) 114–117.

962 cf *Official Records* (n 360) vol VII, CDDH/SR.49, 76 (Belgium).

963 See chapter 3, section 3.2 above.

964 Accord *APs Commentary* (n 22) 1345 [4442].

965 See, eg, Wilson, *International Law and the Use of Force by National Liberation Movements* (n 387) 130–136; Malanczuk (n 403) 104–105; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 123–124.

966 See, eg, *Yasser Arafat and Kalaf Salah* (Judgment no 1981, 28 June 1985) (Italy, Court of Cassation) 884, reproduced in Cassese, *International Law* (n 403) 141.

967 This liberal understanding has also translated to the States' willingness to permit some NLMs to participate as observers alongside the States' representatives in international conferences and even permanent international institutions including the UN. See n 604 above (listing the NLMs participating in the 1974–1977 diplomatic conference in Geneva); UNGA Res 3237 (XXIX) (Observer status for the Palestine Liberation Organization) (22 November 1974) (granting the observer status in the UN General Assembly to the Palestine Liberation Organization).

Similarly, an armed group recognized as a belligerent is understood to acquire limited international legal personality vis-à-vis the recognizing State.[968]

It can thus be concluded that non-State actors in internationalized armed conflicts should be considered eligible for rights and duties under international law. As such, they may, from a conceptual perspective, perform the role of both the occupier and the occupied. Does, however, their lack of sovereignty change anything about this conclusion?

3.2 Sovereignty

Occupation appears to be closely intertwined with sovereignty. In classic inter-State conflicts, the modern law of occupation is sometimes even described as an outcome of the recent development of the concept of sovereignty. For example, Benvenisti writes that '[t]he obligation to respect the sovereign rights of the ousted government, reflects the final stages of the crystallization of the concept of sovereignty as a nation's claim for exclusive control over its territory and nationals.'[969] Does that mean that law of occupation may only regulate relationship between two sovereign bodies?

3.2.1 Disentangling the law of occupation and sovereignty

An affirmative answer would rule out the application of the law on occupation to internationalized conflicts except those in which a new sovereign State has emerged through the process of State dissolution. To put it differently, sovereignty is a defining attribute of States. In line with the traditional understanding of sovereignty, the State is sovereign because it is a State and, accordingly, an entity that is not a State cannot be

[968] See Riedel (n 445); see further chapter 2, section 5.1 above.

[969] Benvenisti, *The International Law of Occupation* (n 319) 21.

sovereign.[970] As a result, non-State actors—even in internationalized conflicts—cannot be considered sovereign.[971] The extent of interdependence between the requirement of sovereignty and the applicability of occupation law therefore needs to be examined.

The argument that both sides of the conflict must be sovereign States in order for the law of occupation to apply has been revisited in relation to the Israeli-Palestinian conflict. David Ball argued that unlike general IHL, which applies to such conflicts also on the basis of customary international law, 'the specific laws of war regarding belligerent occupancy [sic] may not'.[972] This argument is based on three considerations. First, the law of occupation as set out by the Hague Regulations speaks exclusively in terms of 'States'.[973] Second, without a displaced sovereign, the law could only apply directly to individual persons, which Ball considers problematic.[974] Finally, the civilian population not belonging to any sovereign—in this case, the Palestinians—would not be 'affected citizens'.[975]

None of these are convincing. First, as discussed in the historical analysis section above, the reference to States is a testament to the period in which the Regulations were adopted. The content of the norms set out by the Regulations is now uniformly

970 cf James Crawford, Martti Koskenniemi and Surabhi Ranganathan, *The Cambridge Companion to International Law* (CUP 2012) 117.

971 cf *Al-Bihani v Obama* (2010) F.3d 866 (US, DC Circuit Court) 873. In this case, a US federal court refused to apply the rules of co-belligerency to a non-State armed group. Like the presently considered arguments related to occupation law, the court considered these rules as rooted in the concept of State sovereignty, and thus inapplicable to non-sovereign non-State actors: 'Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.'

972 David Ball, 'Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict--A Modern (Re)assessment' (2004) 79 New York University Law Review 990, 1001.

973 ibid.

974 ibid.

975 ibid 1002.

considered to constitute customary international law.[976] As soon as the law of IAC applies, the content of the norms can be applied. Similarly, the ICJ considered the Regulations applicable by force of custom[977] to the Palestinian territories without conducting a specific enquiry into the status of those territories[978] and fully cognizant of—although not expressly acknowledging—the fact that the Palestinian side was represented by a non-State actor.[979]

The second concern is equally misplaced. Ball does not show how the direct application of the law to individual persons should be problematic. In fact, in the Israeli conditions, the government's observance of the law of occupation (or the lack thereof) has been a constant source of litigation before the domestic courts.[980] This continuous stream of cases, relating precisely to the application of occupation law to individuals, has been brought primarily by Palestinian petitioners who considered that their individual rights arising from occupation law had been violated.[981] What is more, it is not accurate to say that there would, by definition, be no equivalent entity to the displaced sovereign. The non-State actor to whom the civilians owe their allegiance may perform equivalent or quasi-equivalent functions to those of the former territorial sovereign.

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976 See, eg, *IMT Nuremberg Judgment* (n 74) 254; *Krupp et al* (Judgment) (30 June 1948) (1949) 10 Law Reports of Trials of War Criminals 69 (US MT) 133; *Judgment of the International Military Tribunal for the Far East* (12 November 1948) (IMTFE), reproduced in John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial* (Garland 1981) vol 22, 491; *GC IV Commentary* (n 21) 614; *R v Finta (No 1)* (1989) 82 ILR 424 (Canada, High Court of Justice) 439; *Affo* (n 932) 163; *Polyukhovich v Commonwealth of Australia* (1991) 91 ILR 1 (Australia, High Court) 123; *Wall* (n 155) [89]; contra Benvenisti, *The International Law of Occupation* (n 319) 131 (arguing that because of the disregard of the law of occupation during World War II, the Regulations *lost* their customary status by the end of the war).

977 Israel was not a party to the Hague Convention IV, to which the Regulations are appended.

978 *Wall* (n 155) [89]; see also ibid [101].

979 ibid [91]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order) (19 December 2003) (ICJ) [2]; see also text to notes 989–995 below.

980 See generally David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94 IRRC 207.

981 See ibid 215–236.

Finally, the argument that the Palestinian civilians' lack of full citizenship precludes their qualification as 'affected citizens' concerns the extent of personal scope of application of the law of occupation. Accordingly, this issue is dealt with in more detail in a later section where the criterion of allegiance is put forward as an appropriate alternative in the determination of protected person status.[982] Suffice it to say at this point that the consideration of the claims brought by the inhabitants of the occupied territories by the Israeli courts amounts to a tacit acknowledgement by the occupying Power that these individuals do fall within the law's remit *ratione personae*. In other words, the absence of association with a sovereign entity does not exclude the applicability of the law of occupation to the affected persons.

3.2.2 Sovereignty-agnostic nature of the law of occupation

It is therefore submitted that the modern law of occupation should properly be seen as sovereignty-agnostic. Its role is chiefly conservationist and humanitarian: it serves to conserve the status quo ante[983] and to protect the humanitarian needs of the population.[984] It does not, however, affect the sovereignty of the territory brought under the occupant's control.[985] In Oppenheim's words, '[t]here is not an atom of sovereignty in the authority of the Occupying Power.'[986] This is confirmed by article 4 of Additional

[982] See section 4.3.3 below.

[983] Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 580.

[984] Ben-Naftali (n 685) 161.

[985] Oppenheim, *International Law: A Treatise* (4th edn) (n 939) vol I, 445; McDougal and Feliciano (n 899) 752; Dinstein, *The International Law of Belligerent Occupation* (n 427) 49.

[986] Lassa Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 LQR 363, 364.

Protocol I, which sets out the 'undisputed principle of international law'[987] that the occupation of a territory does not affect its legal status.[988]

The ICJ likewise did not consider it necessary to enquire into the exact status of the Palestinian territories in its *Wall* advisory opinion and the non-existence of two separate sovereign entities did not prevent it from holding that the law of belligerent occupation applied to those territories.[989] This approach, separating the issue of applicability of the law of belligerent occupation to a certain territory from the question of the title to that territory, is standard in international jurisprudence concerning situations of occupation.[990]

Dinstein agrees in this connection that the fact that one of the conflict parties may be a non-State entity is 'immaterial', but he suggests that the problem is 'handle[d]' by the regulation of unilateral undertakings in common article 2(3).[991] To the extent that this suggestion might be interpreted as a proposition that such an undertaking would be *necessary* for the application of the law of occupation to situations involving non-State actors, the present author would respectfully disagree. (A unilateral declaration may, however, be one of the routes bringing about the relative internationalization of an armed conflict.[992]) It is true that the Court noted that the Palestinians had issued such a declaration.[993] However, the existence of the declaration was not decisive for the ICJ.[994]

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[987] *APs Commentary* (n 22) 72.

[988] AP I, art 4.

[989] *Wall* (n 155) [95].

[990] See, eg, *Central Front - Ethiopia's Claim 2* (Partial Award of 28 April 2004) (Eritrea-Ethiopia Claims Commission) [28]–[29].

[991] Dinstein, *The International Law of Belligerent Occupation* (n 427) 24.

[992] See chapter 2, section 5.2 above.

[993] *Wall* (n 155) [91]; Dinstein, *The International Law of Belligerent Occupation* (n 427) 25.

[994] cf *Wall* (n 155) [91]–[92] (commencing the paragraph mentioning the declaration with the qualifier 'Furthermore' and proceeding to the following paragraph, in which the Court cited common article 2, without any further analysis of the declaration or its legal relevance).

Instead, the determinative factor was the existence of a trigger of application of the law of IAC.[995] This trigger exists, by definition, in each of the subtypes of internationalized conflict.

It is thus submitted that the same rationale ought to be followed here, irrespective of the existence *vel non* of two sovereign bodies on the opposite sides of the conflict. This understanding is in line with the trend of individualization of humanitarian law described previously[996] as well as with a more recent tendency, identified by Adam Roberts, 'to think of war as a set of minimum rules to be observed in the widest possible range of situations and not to worry excessively about the precise legal definition of military occupation'.[997]

In conclusion, the potential lack of sovereignty characterizing one of the conflict parties should not, contrary to the traditional view, be seen as preventing the application of the law of belligerent occupation. It thus remains to be seen whether this conclusion needs to be modified in any way due to the perceived or real lack of capacity on part of non-State actors to abide by the norms of the law of occupation, which is the subject of the following section.

3.3 Inability to follow IHL

A typical recurring objection to the extension of the application of IHL to non-State actors is the claim that even if conceptually such an extension was possible, in any event armed groups would be unwilling and/or unable to comply with the more demanding

[995] ibid [95] (holding that if the conditions of applicability in common article 2 are fulfilled, the GCs apply in full).

[996] See section 2.4 above.

[997] Roberts, 'What Is a Military Occupation?' (n 176) 258.

norms of the law of IAC.[998] There is some force in this objection. After all, the maxim *impossibilium nulla obligatio est* (there is no obligation to do anything which is impossible) has been recognized since the Roman times[999] by many modern legal systems[1000] and there is no fundamental reason why it would not operate on the international plane, as well.[1001]

3.3.1 Inability and unwillingness distinguished

A preliminary observation must be made as to the scope of the present objection. Namely, the objection of inability—which is the true focus here—ought to be decoupled from the frequently mentioned twin consideration of unwillingness.[1002] It is true that, just as any other subject of law, armed groups may be reluctant to accept the applicability of particular (or all) norms of IHL.[1003] Sometimes, as in the recent case of Hezbollah, they

998 See also chapter 3, section 4.3 above (concerning the regulation of combatant status).

999 Alan Watson (ed) *The Digest of Justinian* (rev edn, University of Pennsylvania Press 2009) vol 4, 482 (book 50, 17, 185).

1000 J Gordley, 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 American Journal of Comparative Law 513, 513.

1001 See, eg, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, Separate Opinion of Judge ad hoc Torres Bernárdez [65] (referring to the principle as applicable to the resolution of the case without further analysis); *Blaškić* Subpoena Objection Decision (n 722) [95] (referring to the related principle *ultra posse nemo tenetur*—defined as 'one should not be compelled to engage in a behaviour that is nearly impossible'—as applicable to the resolution of the case without further analysis); see also Bond (n 400) 71 (noting that demanding the impossible 'reduces the law to hypocrisy and invites disregard of the entire legal regime').

1002 There certainly are areas of international law where the use of these two considerations together clearly is or may plausibly be justified. These include the determination of admissibility of cases before the ICC; State responsibility to protect victims of large-scale human rights violations; or rules governing self-defence against non-State actors acting from a third State's territory. The argument presented in this section is not intended as a judgment on any of these alternate uses of the dual criteria of unwillingness and inability. See further, eg, Rome Statute, art 17; ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001), xi; Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483.

1003 Similarly, it is a matter of empirical fact that for various reasons, States are reluctant to be labelled as occupying powers and thus frequently contest the applicability of the law of occupation to situations of effective foreign control over territory. See further ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory - Report' (n 928) 4.

may even go so far as to proclaim in advance their intention to ignore these rules.[1004] Happily, other armed groups have been warmer to the idea of compliance with IHL. For example, a representative of the FRELIMO, speaking at Geneva in March 1974, on the eve of the Mozambican War of Independence, stated that compliance by armed groups is not contingent on 'the technical apparatus or the material means' but rather on 'the will to apply the principles of humanitarian law'.[1005]

It should certainly be admitted that the potential lack of voluntary submission to the law is relevant from the policy perspective and, if empirically confirmed, should inform any decisions concerning the future development of the legal norms in question (i.e. from the perspective of *lex ferenda*). However, it is an unacceptable argument for the purposes of *lex lata*. To uncover the flaw at the heart of this claim, one only needs to be reminded that not much more than a century ago, the celebrated Russian jurist Fyodor Fyodorovich Martens himself dismissed the application of the law of war to non-European *States* along very similar lines. In his book *La Paix et la Guerre*, he wrote that 'it would be impossible to expect Turks or Chinese to observe the laws and customs of war as elaborated by the common efforts of the Christian and civilised nations'.[1006] This observation not only strikes the modern reader as unabashedly xenophobic and racist (commendably, modern international law put to rest any distinction between 'civilized' and 'uncivilized' States[1007]), but—more importantly—it highlights how the exclusion of a

[1004] See n 814 above and references cited therein.

[1005] *Official Records* (n 360) vol VIII, CDDH/I/SR.5, 36 [18] (Mozambique Liberation Front – FRELIMO); see also ibid 44 [34] (PLO); ibid 45 [41] (Guinea-Bissau).

[1006] Fyodor Fyodorovich Martens, *La paix et la guerre: la Conférence de Bruxelles 1874; Droit et devoirs des belligérants (leur application pendant la guerre d'Orient 1874–1878); La Conférence de La Haye 1899* (N de Sancé tr, A Rousseau 1901) 46–47, quote translated into English and reproduced in Arai-Takahashi (n 852) 77 fn 161.

[1007] See, eg, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38, Separate Opinion of Judge Weeramantry, 236 fn 9; Lauterpacht, *Recognition in International Law* (n 440) 31 fn 1. For a more detailed discussion of the civilized/uncivilized distinction, see

category of subjects from the remit of the law may fatally undermine the prospect of the effectiveness of the legal norms in question. By way of example, Martens's dismissive attitude appears to have been shared by the 'civilized' States of his era engaged in the Boxer Expedition in 1900–1 in China (a broad ad hoc alliance of major Western military powers including Austria-Hungary, France, Germany, Great Britain, Italy, Japan Russia, and the US).[1008] As Provost reports, IHL was not deemed applicable, resulting in 'episodes of pillage, rape, destruction and refusal of quarters by the expeditionary forces.'[1009] Individual unwillingness to apply IHL is not an excuse for the conduct of a particular actor and it should equally be rejected to serve, in some vague generalized form, as a systemic justification for disapplication of IHL to a class of actors, too.

3.3.2 Inability and effectiveness of the law

Having set aside the considerations of unwillingness, the remainder of the analysis accordingly focuses on inability in a narrow sense. This objection is based on the argument that it should not be expected of non-State armed groups to act in a manner akin to that expected of States as the primary addressees of the IHL norms on occupation.[1010] In an ICRC expert meeting on Occupation and other forms of administration of foreign territory, two experts further substantiated this argument with reference to the goal of effectiveness of IHL. It is worth stating out their contention in full:

Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 917–939.

[1008] See further John K Fairbank and Kwang-Ching Liu (eds), *The Cambridge History of China. Volume 11: Late Ch'ing, 1800–1911, Part 2* (CUP 1980) 115–130.

[1009] Provost, *International Human Rights and Humanitarian Law* (n 64) 248, citing Fritz Grob, *The Relativity of War and Peace* (Yale University Press 1949) 64–79.

[1010] See, eg, Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 75; Gal (n 938) 73; see also *Official Records* (n 360) vol VIII, CDDH/I/SR.4, 28–29 [25] (United Kingdom); ibid, vol VI, CDDH/SR.36, 42 [62]–[63] (Israel).

> Two other experts pointed out that another important reason for classifying as a non-international armed conflict a confrontation opposing the occupying forces to organized armed groups not belonging to the occupied State was the groups' capacity to comply with the relevant IHL rules. They argued that the law governing non-international armed conflict, particularly because of its limited number of provisions, was better suited to dealing with such situations as it was specifically designed for dealing with armed violence involving non-State actors. In fact, the limited resources of these groups, combined with the absence of the apparatus necessary to implement the law of international armed conflict, would limit their ability to comply with the full set of norms applicable in international armed conflict. Since IHL efficiency was notably based on its effectiveness and the ability of the parties to respect its provisions, choosing the law governing non-international armed conflict as the legal framework applicable to the fighting between the occupying power and organized armed groups was deemed fitting and practical.[1011]

Although the experts' argument was made in the context of a discussion of the legal classification of hostilities on occupied territory,[1012] its thrust obviously applies to the present scrutiny, as well. Would it therefore be correct to say that the effectiveness of IHL demands the inapplicability of the IAC law of occupation to conflicts featuring a non-State party? It is submitted that such a position should be rejected as overinclusive. While there certainly are *some* armed groups that may be unable to comply with *some* norms of the law of belligerent occupation, it is not the case that potential inability to apply the norms in question would somehow render the whole body of law inapplicable to the conflicts at hand. In the following text, I aim to demonstrate that (1) not all non-State actors in internationalized conflicts are equal in their capacity to comply with occupation law; (2) not all norms of occupation law are equally onerous; and (3) the law of belligerent occupation itself contains safeguards capable of bolstering the occupying power's capacity to comply with it.

[1011] ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory - Report' (n 928) 128.

[1012] See ibid 124–128.

Firstly, it is inaccurate to characterize all non-State actors in internationalized armed conflicts as fundamentally lacking in resources. As it was argued in chapter 3 at length and demonstrated on the respective examples of the Croatian Republic of Herzeg-Bosna and Somalia, some armed groups may have more considerable resources at their disposal than full-fledged States.[1013] Moreover, this objection does not relate to all types of internationalized armed conflicts equally. In particular, in the cases of State dissolution, the emerging State—due to its fulfilment of the criteria of statehood—can be expected to wield sufficient resources to ensure the full applicability of the IAC law of occupation. Accordingly, the ICTY determined on a number of occasions that the successor States of the Socialist Federal Republic of Yugoslavia acted as both occupying and occupied States during the Yugoslavian War of 1991–95.[1014] The capacity to abide by IHL of these newly emergent States was not placed under serious doubt by the Tribunal. The actors in the remaining types of internationalized conflicts might, of course, be significantly less able to observe the law of occupation, especially at the outset of the conflict.

Secondly, the duties arising out of the law of belligerent occupation are not equally onerous and some may lend themselves more easily than others to full compliance by non-State actors. For example, Gal argues that it would be 'unreasonable' to force armed groups to comply with the more demanding norms exemplified by 'provisions discussing legislation and requirements for the treatment of internees'.[1015] By contrast, Sivakumaran provides a list of general protections and prohibitions contained in the law of belligerent

[1013] See chapter 3, section 4.3 above, in particular text to nn 722–735.

[1014] *Rajić* Rule 61 Decision (n 10) [38]–[43] (holding that Croatia was in belligerent occupation of a part of the Bosnian territory in 1993); *Blaškić* Trial Judgement (n 461) [149]–[150] (holding that Croatia was in belligerent occupation of a part of the Bosnian territory in 1993); *Gotovina* Trial Judgement (n 105) vol 1 [1218] and vol 2 [2014], [2309] (acknowledging that the Federal Republic of Yugoslavia was in belligerent occupation of parts of Croatia in 1995).

[1015] Gal (n 938) 73.

occupation which find their equivalents in the law of NIAC.[1016] Obligations contained in these norms typically demand the addressee simply to refrain from conduct amounting to international crimes or otherwise infringing individual rights.

It can therefore be assumed that compliance with such norms is within the power of even the least organized armed groups in internationalized armed conflicts. Accordingly, in the *Martić* case, the ICTY considered norms of the law of belligerent occupation permitting the forcible seizure of property by the occupying power as applicable in its consideration of the elements of the crime of plunder.[1017] The Tribunal did not inquire into the nature of the armed conflict during which the acts in question had been committed,[1018] nor did it place any importance on the fact that the defendant represented a non-recognized political entity 'Republic of Serbian Krajina', in other words, a non-State actor.[1019] A similar approach was followed in the *Mrkšić* case.[1020] It is submitted that this approach is in line with the relative ease of application of the prohibitory norms entailing negative obligations such as to abstain from unlawful acts against protected persons and their property.

[1016] Sivakumaran (n 33) 530 ('Certain general protections and prohibitions contained in the law of belligerent occupation—for example, *the protections afforded to the wounded and the sick; the protection of civilian hospitals; the principle of humane treatment; the prohibition of collective penalties, pillage, and reprisals; the taking of hostages; the prohibitions of deportation and forcible transfer; and the right to due process and judicial guarantees*—are already applicable to non-international armed conflicts, whether through comparable treaty provisions or through customary international law.') (emphasis added).

[1017] *Prosecutor v Martić* (Trial Judgement) IT-95-11-T (12 June 2007) (ICTY) [102]–[103]. The defendant was found guilty on the count of plunder of public or private property, as a violation of the laws or customs of war. See ibid [518].

[1018] cf ibid [347] ('The Trial Chamber finds that a state of *armed conflict* existed in the relevant territories of Croatia and [Bosnia and Herzegovina] during the time relevant to the crimes charged in the Indictment.') (emphasis added); but see *Sesay* Trial Judgement (n 247) [982] (holding expressly that '[t]he rights and duties of occupying powers, as codified in the 1907 Hague Convention and the Fourth Geneva Convention, apply only in international armed conflicts').

[1019] See *Martić* Trial Judgement (n 1017) [2].

[1020] *Mrkšić* Trial Judgement (n 498) [422] and [457] (refusing to make a finding on the nature of the conflict); ibid [458] fn 1711 (referring to art 70 GC IV, which contains a general prohibition of the arrest of protected persons for acts or opinions expressed *before the occupation*, to establish the content of the offence of imprisonment as a crime against humanity for the purposes of that case).

Furthermore, in many cases, it will be possible for the armed group in question to comply even with the relatively more onerous requirements of the law of belligerent occupation. While scope of the present work does not permit the discussion of all such requirements, it is worthwhile to consider, by way of example, at least one category of norms referred to in the literature as potentially problematic in this sense.

As mentioned above, 'provisions discussing legislation' in the law of belligerent occupation are among those whose application to non-State actors Gal considers as unreasonable.[1021] Such a blanket rejection may, however, prove to be too sweeping upon closer analysis. In fact, legislation has been issued by non-State actors in internationalized armed conflicts in the past and sometimes it has even been accepted *ex post facto* by the eventually victorious enemy.

For instance, in the archetypal conflict internationalized by the recognition of belligerency, the American Civil War, the Confederate states continued to issue legislative acts during the period of the ongoing hostilities. The Supreme Court in a string of post-war cases acknowledged the general validity of the Confederate legislation.[1022] Although formally a non-State actor, the conflict party whose belligerent rights were recognized by the territorial State, due to its high degree of organization and territorial control implicit in the criteria for belligerency, will likely be capable of issuing and enforcing legislation.[1023]

[1021] Gal (n 938) 73. Although Gal does not provide a specific list, it can be assumed she is referring to articles 51(3), 64(1), 67, 68(2), 70(2), and 73 GC IV, as well as article 43 of the Hague Regulations, all of which speak of 'law', 'the law', or 'the laws' valid in the occupied territory.

[1022] See, in particular, *Texas v White* (1868) 74 US 700 (US SC) 733; *Horn v Lockhart* (1873) 84 US 570 (US SC) 573; *United States v Insurance Companies* (1874) 89 US 99 (US SC) 103; see also *Taylor v Thomas* (1874) 89 US 479 (US SC) 491; *Williams v Bruffy* (1877) 96 US 176 (US SC) 192; *Keith v Clark* (1878) 97 US 454 (US SC) 476; *Baldy v Hunter* (1898) 171 US 388 (US SC) 401.

[1023] See text to n 405 above for the traditional criteria for belligerency.

Similarly, some armed groups acting in conflicts internationalized by outside intervention have been known to enact and enforce their own 'laws'. For example, the Croatian Republic of Herzeg-Bosna (HR H-B)[1024] issued its own legislation during the armed conflict in Bosnia and Herzegovina,[1025] although the validity of these enactments was later put into doubt due to the non-recognition of this entity by the post-war Bosnian constitution.[1026] Likewise, the Libyan National Transitional Council (NTC) started promulgating its own 'laws' months before it consolidated power over the whole territory of Libya in October 2011.[1027] Since—unlike the HR H-B—the NTC emerged victorious at the end of the conflict,[1028] all of these enactments remained in force following the election of the General National Congress in July 2012,[1029] subject only to their potential future invalidation by Libya's Supreme Court.[1030] These two armed groups are far from being an exception to the rule; in fact, as observed by Sivakumaran, armed groups that exercise control over territory or which constitute de facto States are

[1024] See nn 722–730 above and the accompanying text for the historical background and legal nature of this entity.

[1025] HR H-B, Founding Decision On the Establishment and Declaration of the Croatian Republic of Herzeg-Bosnia, 28 August 1993, art 6 ('Legislative authority is invested in the House of Representatives of the Republic.').

[1026] cf UNHCR, 'Amnesty Laws in Bosnia and Herzegovina' (19 March 1998) <http://www.refworld.org/docid/3ae6b33214.html> accessed 1 October 2014, section III.2; see also Constitution of Bosnia and Herzegovina (Annex 4 of The General Framework Agreement for Peace in Bosnia and Herzegovina) (14 December 1995), art I(3).

[1027] See Temehu, 'Declarations, Laws & Resolutions Issued By The NTC' (2014) <https://www.temehu.com/ntc.htm> accessed 1 October 2014; see also Chatham House, 'Libya: Establishing the Rule of Law' (May 2012) <http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/0512libya_summary.pdf> accessed 1 October 2014, 11–14 (discussing the history and legitimacy of the laws passed by the NTC during the transitional phase).

[1028] See further Mačák and Zamir (n 30) 429–435 (arguing that the armed conflict in Libya terminated in late October 2011 and discussing the obligations of IHL that remained applicable after that date).

[1029] Chatham House (n 1027) 12.

[1030] See, eg, BBC, 'Libya Revokes Muammar Gaddafi Praise Law' (14 June 2012) <http://www.bbc.co.uk/news/world-africa-18446110> accessed 1 October 2014 (reporting that the Supreme Court overturned Law 37, enacted by the NTC in May 2011, for its unconstitutionality).

particularly prone to enacting legislation.[1031] The worries about their capacity to do so found in the literature will thus in many instances be misplaced.

The remaining unresolved point here, therefore, is the nature of these enactments. It could plausibly be argued that because these materials are issued by non-State entities, they do not in fact qualify as 'legislation' for the purposes of the law of belligerent occupation.[1032] Nevertheless, the fact that non-State armed groups may have the capacity to enact their own legislation has been acknowledged by States at least since the time of the negotiation of the two Additional Protocols.[1033] While this evolving understanding admittedly does not amount to subsequent practice regarding the interpretation of the law of belligerent occupation in general in the sense of article 31(3)(b) of the VCLT, it may nevertheless be relevant for the purposes of the present analysis. After all, States must be presumed to have agreed the provisions of the law of belligerent occupation with a desire to enable their effectiveness; in fact, the obligation to ensure respect for the Geneva Conventions in all circumstances features prominently in common article 1 to the Conventions.[1034] If it is accepted that these provisions apply, at least to some degree, to conflicts that are characterized by the participation of non-State actors, then, since these provisions are based on an understanding that a conflict party enacts legislation, their application should not be rejected only on the basis of a formalist argument that non-State laws are not laws at all. Somer makes a similar argument in the context of due

[1031] Sivakumaran (n 33) 140.

[1032] cf Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP 2002) 187; Sivakumaran (n 33) 140.

[1033] cf *APs Commentary* (n 22) 1399 [4605]. A number of domestic judgments issued even earlier had confirmed the general willingness to give effect to the laws issued by unrecognized entities. See, eg, *Hausner v Banque Internationale de Commerce de Petrograd* (1924) BGE 50 II 507 (BGer) 511–513 (giving effect to the laws of as-of-then unrecognized Soviet regime); *Salimoff v Standard Oil Co* (1933) 262 NY 220 (US, CA NY) 227–228 (giving effect to the laws of the as-of-then unrecognized Soviet regime); *Banco de Bilbao v Sancha; Same v Rey* [1938] 2 KB 176, 195–196 (giving effect to the laws enacted by the nationalist insurgents in Spanish Civil War).

[1034] See also *Nicaragua* (n 103) [220].

process requirements imposed on non-State armed groups by the law of NIAC: 'To the extent that the fair trial provisions of IHL require the right to legislate in order to establish courts and enact penal provisions covering conduct related to the conflict, such capacity should exist independent of the state party.'[1035] The present author respectfully agrees with this approach. To deny that non-State armed groups have the capacity to enact legislation, even if they actually *do* pass laws, only by refusing that what they actually adopt is legislation at all, reminds one of the Belgian surrealist René Magritte's painting of a pipe with the caption '*Ceci n'est pas une pipe*'.[1036]

Thirdly, while the experts cited in the ICRC report may be correct that the non-State actor would lack the necessary resources at the outset of the conflict,[1037] it should be recognized that an armed conflict is not a constant situation that does not undergo any development. Quite the contrary, the relative strength of the parties, their control over territory and population, as well as their general capacity for action are all subject to persistent variation. 'War is dynamic; things change, and change quickly.'[1038] It is thus possible that in and of itself, the non-State party may not readily possess, for example, the 'food and medical supplies, … clothing, bedding, means of shelter, [and] other supplies essential to the survival of the civilian population' it is required to provide under the terms of article 69 AP I. Nevertheless, the solution to the problem of the alleged lack of resources, lying at the heart of the inability objection, may be found within the law of belligerent occupation itself.

[1035] Somer (n 644) 658; see also Françoise Hampson, 'Fundamental Guarantees' in Elizabeth Wilmshurst and Susan Carolyn Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 287 fn 20; Sivakumaran (n 33) 75–76.

[1036] 'This is not a pipe.' See René Magritte, *La Trahison des Images* [The Treachery of Images] (1929).

[1037] See text to n 1011 above.

[1038] Jim Storr, 'Neither Art Nor Science: Towards a Discipline of Warfare' (2001) 146 The RUSI Journal 39, 40; see also Jim Storr, *The Human Face of War* (Continuum 2009) 57 (discussing the dynamic and evolutionary nature of war).

Accordingly, it is submitted that the law of belligerent occupation contains safeguards aimed precisely at bolstering the capacity of the occupying authority to abide by the rules contained in this area of law. These are implicit particularly in rules on taxation and use of enemy property. Taxation in occupied territories is governed by articles 48 and 49 of the Hague Regulations. In their totality, these provisions permit the occupier to maintain and impose taxes and other compulsory payments in the occupied territory. They also contain an inseparable obligation to use such collected monies only 'for the needs of the [occupying] army' and 'the administration of the territory in question'.[1039] Additionally, requisitions in kind and services may be demanded from the population;[1040] the US Military Tribunal confirmed in *Krupp* that this would include 'urgently needed equipment and supplies for the proper functioning of the occupation authorities'.[1041] Articles 53 and 55 further permit the seizure of all movable public property and the use of immovable public property in the occupied territory, respectively. Article 55 specifies that as regards the immovables, the occupying power must use them as 'administrator and usufructuary' only.[1042] As interpreted by the Institute of International Law, the combined effect of these provisions is that the occupant may 'dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population'.[1043]

These permissive clauses should accordingly be seen as enabling provisions, channelling the necessary resources towards a party suffering from their absence. Stewart notes that as a matter of *policy*, rebel groups should be allowed to seize certain types of

[1039] Hague Regulations, art 49.

[1040] Hague Regulations, art 52.

[1041] *Krupp et al*, 137.

[1042] Hague Regulations, art 55.

[1043] Institute of International Law, 'Bruges Declaration on the Use of Force' (2003) 70-II AIDI 285, 287.

property during the war as 'there is little basis for expecting [them] to comply with the laws of war without offering certain *privileges*'.[1044] This may be true in NIACs, but the argument presented here for the purposes of internationalized armed conflicts goes even further. Since internationalization triggers the applicability of the law of IAC,[1045] the provisions permitting taxation and seizure and use of property should be seen as serving a reinforcing function vis-à-vis the remainder of the law of belligerent occupation by strengthening the capacity of the non-State actor to implement this body of law.[1046] Similar enabling provisions exist in relation to particular detailed obligations of the occupier, confirming this broad approach.[1047] Their application should thus not be constrained to the realms of policy or seen as a privilege offered to the non-State actor, but it should rather be interpreted as an essential facet and a *requirement* of the law as such.

To conclude, although the concern for the effectiveness of IHL is cited by the proponents of its limited applicability with respect to armed groups due to their supposed inability to apply it, in reality, a more effective result may actually be achieved by accepting an extended application of the law. It can certainly not be said that *all* non-State armed groups in internationalized conflicts are incapable to apply *all* obligations of the law of belligerent occupation. On the contrary, the law itself endows these actors with tools to facilitate law-compatible conduct. As in the previous chapter, it should of course be emphasized that this argument should not be seen as a general dismissal of the

[1044] James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Foundations 2011) 21–22 (emphasis added).

[1045] See chapter 1, section 2.2.2 above.

[1046] See also German Ministry of Defence, *ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch [Humanitarian Law in Armed Conflicts: Manual]* (2013) [553]; Peru, Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial No 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima (1 December 2004) [91.c(2)]; *UK Military Manual* (n 141) [11.88].

[1047] See, eg, AP I, art 63(5).

inability objection with respect to all IHL obligations.[1048] Nevertheless, insofar as the law of belligerent occupation in internationalized conflicts is concerned, the actual effect of the objection is significantly limited.

4. Application of the law of belligerent occupation in internationalized armed conflicts

The last section of this chapter puts forward a tripartite positive case for the application of the law of belligerent occupation to internationalized armed conflicts. It looks at three traditional aspects of applicability, namely the temporal, geographical, and personal scope of application. The chapter does not devote a separate section to the material scope of application. In principle, the material applicability of the law of belligerent occupation as such has been confirmed by the response to the objections covered in the previous section. It could perhaps be contended that this needs to be demonstrated with respect to the individual rules of this area of law. That would, however, not be realistic in the scope of the present thesis. To do so would mean undertaking a rule-by-rule study of the law of belligerent occupation, which would certainly be beyond the means of this research project.[1049] Nevertheless, references to specific rules of the law of occupation have been used so far in this chapter to illustrate the analysis and the same approach will be used in the present section.

[1048] See chapter 3, section 4.3.2 above.

[1049] cf *ICRC Study* (n 18) (a two-volume study collating 161 rules of customary rules of IHL, counting upwards of 5,000 pages and prepared by dozens of national experts over nearly a decade); Michael N Schmitt (ed) *Tallinn Manual on the International Law applicable to Cyber Warfare* (CUP 2013) (a single-volume study identifying 95 rules of international law applicable to cyber warfare as the result of a three-year project by twenty international law scholars and practitioners).

4.1 Temporal scope

One of the essential characteristics of internationalized armed conflicts as a subtype of armed conflicts in general is that, by definition, they come about by way of transformation of a previously existing (non-international) armed conflict. In other words, an internationalized armed conflict never commences without an antecedent NIAC.[1050] At the same time, due to the attributes of the mechanism of internationalization, at the point of this transformation, both (or all) conflict parties will likely be in the possession of some part of the territory of the 'parent' State.[1051] The extent to which these territorial segments may qualify as enemy territory under the law of belligerent occupation is the subject of the following section.[1052] However, presuming that they do so qualify, should it be accepted that trigger of applicability of the law of belligerent occupation is coterminous with the moment of internationalization? In the present section, I argue in favour of a negative and therefore more nuanced answer to this question. The answer proposed here is that the law of occupation applies in those areas in which the parties have consolidated their control sufficiently, while recognizing that this moment may and typically will arrive later than the point of internationalization itself.

4.1.1 The Pictet theory: Uncertainty in the law of IAC

In order to determine the point at which the law of belligerent occupation starts to apply in internationalized armed conflicts, it is necessary to revisit the rules on the temporal scope of this body of law in 'standard' or 'simple' IACs. In his seminal work on the

[1050] See chapter 1, section 2.2.2 above.

[1051] See, eg, text to nn 309–310 above (discussing the requirement of territorial control with respect to conflicts internationalized by State dissolution); text to nn 405–406 above (ditto, re conflicts internationalized by recognition of belligerency).

[1052] See section 4.2 below.

international law of occupation, Benvenisti devotes to this issue a one-paragraph section entitled 'When occupation begins'.[1053] He answers the eponymous question with a pithy statement: 'Once control is established, occupation begins.'[1054] This commendable brevity conceals the vigorous debate as to the exact point at which the control in question is sufficient to trigger the application of the law of belligerent occupation.[1055]

With respect to standard IACs, this debate reflects the uncertain conceptual distinction between invasion and occupation. In other words, at what point since the entry of a hostile army into a State's territory ('invasion phase') does the army exercise such control that it is bound by the law of occupation ('occupation phase')? On the one hand, some believe that there is in fact no distinction between the two phases for applying the rules in question; instead, what is decisive is whether the invading forces exercise control over a protected person.[1056] This position is often referred to as the 'Pictet theory' as it was Jean Pictet who first expressed it:

> There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.[1057]

[1053] Benvenisti, *The International Law of Occupation* (n 319) 55.

[1054] ibid.

[1055] See, in particular, Lauterpacht, *Oppenheim's International Law* (n 285) 434; *GC IV Commentary* (n 21) 60; Roberts, 'What Is a Military Occupation?' (n 176) 256; Green, *The Contemporary Law of Armed Conflict* (n 386) 285; Dinstein, *The International Law of Belligerent Occupation* (n 427) 38–42; Akande, 'Classification of Armed Conflicts' (n 32) 45–46; Marten Zwanenburg, 'Challenging the Pictet Theory' (2012) 94 IRRC 30; Michael Bothe, 'Effective Control During Invasion: A Practical View on the Application Threshold of the Law of Occupation' (2012) 94 IRRC 37; Marco Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories Under Invasion: The Case for the Applicability of the Fourth Geneva Convention During the Invasion Phase' (2012) 94 IRRC 42; Kenneth Watkin, 'Use of Force During Occupation: Law Enforcement and Conduct of Hostilities' (2012) 94 IRRC 267, 270–273; Gasser and Dörmann (n 936) 273–274.

[1056] See, eg, *GC IV Commentary* (n 21) 60; Roberts, 'What Is a Military Occupation?' (n 176) 256; Akande, 'Classification of Armed Conflicts' (n 32) 46; Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories Under Invasion: The Case for the Applicability of the Fourth Geneva Convention During the Invasion Phase' (n 1055).

[1057] *GC IV Commentary* (n 21) 60.

On the other hand, there are those who maintain that until such time as the invading army stabilizes its control over the territory in question, the law of occupation would not apply at all.[1058] It has been suggested that during the 'invasion phase' it would be materially impossible to apply certain norms of occupation law which involve a degree of civil-military cooperation,[1059] with examples including the obligation to facilitate the proper working of all institutions devoted to the care and education of children[1060] or to ensure and maintain medical and hospital establishments and services.[1061]

4.1.2 When occupation begins in internationalized conflicts

Attempting to resolve the debate on the 'Pictet theory' would be beyond the scope of the present work. As internationalized armed conflicts by definition evolve from NIACs, they are not characterized by an 'invasion phase' considered essential in IAC-type situations. Nevertheless, the debate related to IACs is particularly relevant for the present purposes as it highlights the considerations determining the exact point at which the law of belligerent occupation should be seen as applicable.

Accordingly, what both sides agree on is that a degree of consolidation of power is necessary for the entirety of the law of belligerent occupation to be operative (whether this is described as a formal condition of applicability[1062] or a simple consequence of the conflict party's capability to abide by certain more onerous norms[1063]). Mere presence in

[1058] See, eg, Lauterpacht, *Oppenheim's International Law* (n 285) 434; Dinstein, *The International Law of Belligerent Occupation* (n 427) 41; Zwanenburg (n 1055).

[1059] Zwanenburg (n 1055) 34–36.

[1060] GC IV, art 50.

[1061] GC IV, art 56.

[1062] Zwanenburg (n 1055) 35.

[1063] Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories Under Invasion: The Case for the Applicability of the Fourth Geneva Convention During the Invasion Phase' (n 1055) 46.

the hostile territory is patently insufficient for these purposes. As demonstrated on the examples mentioned above, armed forces would simply not be in the position to apply those norms of occupation law which entail specific positive obligations such as the duty to maintain child care and health care institutions.[1064] This applies equally to internationalized armed conflicts, even though they are not characterized by an 'invasion phase' as such.

Consequently, it is essential that the fighting in the territory in question subsides for a material period of time. As expressed by the ICTY in *Naletilić and Martinović*, 'battle areas may not be considered as occupied territory.'[1065] Although there is 'no hard and fast rule as to … a minimal duration of belligerent occupation',[1066] international jurisprudence has accepted periods of control lasting from 24 hours,[1067] to 'a few days'[1068] to 'almost six weeks'[1069] as sufficient in this respect. At the moment of internationalization, this condition will likely not be met, and it certainly will not be met automatically merely due to the transformation of the conflict nature.

In sum, the threshold of internationalization is *not* in and of itself coterminous with the moment at which the law of belligerent occupation begins to apply in internationalized armed conflicts. Similarly to standard IACs, the conflict party in question must consolidate its control over the territory of its enemy, putting an end to the fighting there and substituting its own authority for that of the occupied

[1064] See nn 1059–1061 and the accompanying text above.

[1065] *Naletilić and Martinović* Trial Judgement (n 10) [217].

[1066] Dinstein, *The International Law of Belligerent Occupation* (n 427) 39.

[1067] *Naletilić and Martinović* Trial Judgement (n 10) [587].

[1068] *Central Front - Eritrea's Claims 2, 4, 6, 7, 8, and 22* (Partial Award of 28 April 2004) (Eritrea-Ethiopia Claims Commission) [57].

[1069] *Issa and Others v Turkey* (App no 31821/96) (2004) 41 EHRR 27 (ECtHR) [45] *juncto* [73]–[74].

authorities.[1070] Once these requirements are fulfilled, the law of belligerent occupation commences to apply in an internationalized armed conflict. The next subsection turns to the somewhat more vexed issue of the determination of the territory in which this body of law ought to be deemed applicable.

4.2 Geographical scope

Provided that the argument of this chapter is accepted insofar as responses to the potential theoretical objections are concerned[1071] and with respect to the identification of the starting point of application of the law of belligerent occupation,[1072] two fundamental problems of practical application remain. Since internationalized armed conflicts commence in the territory of a single State, it is problematic to identify how exactly norms mentioning occupied territory and the population thereof should be applied. This and the following section examine these two issues in turn.

4.2.1 Conflict parties and their territory

Simply put, the fundamental problem with the geographical scope of application of the norms of belligerent occupation in internationalized conflicts is the absence of a clear delineation between what could be described as the 'home field' and the 'away field'.[1073] In a standard IAC, the whole territory of a State as a conflict party is eligible to become occupied.[1074] For the original sovereign, this is the 'home field', which benefits from the

[1070] cf Roberts, 'What Is a Military Occupation?' (n 176) 274–275; *Naletilić and Martinović* Trial Judgement (n 10) [217]; Dinstein, *The International Law of Belligerent Occupation* (n 427) 39.

[1071] See sections 3.1–3.3 above.

[1072] See section 4.1 above.

[1073] I am grateful to Dapo Akande for this metaphor.

[1074] cf GCs, common art 2(2) ('The Convention shall … apply to all cases of *partial or total* occupation of the territory of a High Contracting Party') (emphasis added).

protection of the law of belligerent occupation. For the occupying Power, this is the 'away field', which it must treat in accordance with the obligations provided for in the same body of law. In internationalized conflicts, such designation is more problematic.

With respect to internal armed conflicts, the territory-designation problem is well summarized by Baxter:

> Territory cannot be belligerently occupied by the lawful government or the rebels. There is no starting point which divides territory into friendly and enemy areas, so that, when the latter type of area is occupied, it will be belligerently occupied. It surely cannot be maintained that the insurgents should be required to treat all territory over which they exercise control as being belligerently occupied or that the lawful government should be forced to treat territory liberated from the control of rebels as belligerently occupied. It is of the essence of belligerent occupation that it should be exercised over foreign, enemy territory. Such requirements as that of Article 43 of the Hague Regulations that the occupant must respect, "unless absolutely prevented, the laws in force in the country" are simply unworkable in domestic conflict.[1075]

Although it may be tempting to simply extend this reasoning to internationalized armed conflicts due to the fact that they begin as internal conflicts themselves, this would be mistaken. It should instead be recognized that the territory-designation problem does not affect all internationalized armed conflicts equally. In particular, conflicts internationalized by State dissolution should not pose any problems in this respect; the emerging States will likely have reasonably well defined borders to determine which territory belongs to the respective conflict parties.[1076] For example, the successor States of the former Socialist Federal Republic of Yugoslavia maintained their existing borders from the pre-war federal period.[1077] Consequently, when situations of belligerent

[1075] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 531. Baxter expressed similar doubts as to the applicability of the law of belligerent occupation in wars of national liberation. See Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (n 820) 15–16.

[1076] See generally chapter 2, section 3.1 above.

[1077] cf Badinter Arbitration Committee, Opinion No 3 (14 January 1991), reproduced in Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples'

occupation came about in the internationalized conflicts occurring between pairs of ex-Yugoslavian States, the determination of the occupied territory did not prove any more problematic than in standard IACs.[1078]

The other three types of internationalized armed conflicts do, however, occur in the territory of a single State even after the moment of internationalization. In order to determine whether or not parts of that State's territory may be considered occupied under the law of belligerent occupation, three consecutive questions need to be answered. First, does international law foresee that a State would occupy its own territory? Second, may such occupation relate to a territory previously held by a non-State group? Third, may a non-State armed group occupy a State's territory? It is submitted that under the circumstances prevailing in internationalized conflicts, all three questions should be answered in the affirmative.

4.2.2 Occupation of a State's own territory

As to the first point, it has been suggested that it is 'axiomatic that a state can never occupy its own territory as a belligerent'.[1079] With respect to NIACs, such a view certainly

(1992) 3 EJIL 178, Appendix, 184–185 (taking the view that following the break-up of Yugoslavia, the former internal borders would become international borders protected by international law).

[1078] See, eg, *Rajić* Rule 61 Decision (n 10) [38]–[43] (holding that Croatia was in belligerent occupation of a part of the Bosnian territory in 1993); *Blaškić* Trial Judgement (n 461) [149]–[150] (holding that Croatia was in belligerent occupation of a part of the Bosnian territory in 1993); *Gotovina* Trial Judgement (n 105) vol 1 [1218] and vol 2 [2014], [2309] (acknowledging that the Federal Republic of Yugoslavia was in belligerent occupation of parts of Croatia in 1995).

[1079] Marko Milanović, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 89 IRRC 373, 383 fn 47. Milanović cites Leslie Green's treatise on the law of armed conflict in support of his view. In fact, Green argued for a more nuanced proposition, opining that a State may in fact place its own territory under military occupation, but that an occupation of this kind would be subject to national and not international law, with the exception of the treatment of enemy nationals. See LC Green, *The Contemporary Law of Armed Conflict* (2nd edn, Manchester University Press 2000) 257 (edition cited by Milanović); Green, *The Contemporary Law of Armed Conflict* (3rd edn) (n 386) 285 (the most recent edition).

remains the prevailing orthodoxy[1080]—although even in this context, it may be gradually becoming 'less axiomatic'.[1081] Nevertheless, upon closer scrutiny, it does not hold up to the available international practice and jurisprudence concerning internationalized armed conflicts and standard IACs.

There are admittedly limited instances of practice supporting the view that State may not occupy its own territory. The foremost among these is the current UK military manual, which expresses the opinion that upon 'liberation' of a State's own territory and before the restoration of normal government, the situation is a matter for the domestic law of the State concerned.[1082] Two cases are cited in a footnote following this proposition.[1083] The first one is the *Battat v R* case decided by the Privy Council in 1951.[1084] The reason why this judgment is cited at all is a bit of a mystery as its text does not discuss IHL or the notion of belligerent occupation at all, and thus it carries significantly limited value for the present purposes.[1085] The second cited case is *Tan Tuan et al v Lucena Food Control Board et al*, a 1949 *en banc* decision of the Philippines Supreme Court.[1086] This case concerned a brief period at the end of World War II when a part of the territory of the Philippines (which had, since the 1898 Treaty of Paris, been a US

[1080] See, eg, Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' (n 33) 312; Kolb and Hyde (n 33) 69; Benvenisti, *The International Law of Occupation* (n 319) 61.

[1081] cf Sivakumaran (n 33) 531.

[1082] *UK Military Manual* (n 141) [11.1.2].

[1083] ibid fn 8.

[1084] *Battat v R* [1951] AC 519.

[1085] cf ibid.

[1086] *UK Military Manual* (n 141) [11.1.2] fn 8.

colony[1087]) was reconquered by the US from the Japanese.[1088] In fact, *Tan Tuan* directly contradicts the position expressed in the manual, as evidenced by the following passage:

> The Province of Tayabas had been declared liberated … on June 14, 1945. … *The fact that this was not foreign territory did not deprive the United States Army of the status of belligerent occupant.* … A nation can not [sic] conquer its own territory, but it may subdue and occupy such portions of it as are made the theater of an insurrection against its authority …, or, for that matter, of foreign invasion.[1089]

The ratio from *Tan Tuan* was confirmed in a later case before the same court.[1090] The opinion in the UK military manual thus does not appear particularly well supported by legal authority.[1091]

In contrast, the US military manual on the Law of Land Warfare accepts the applicability of the law of belligerent occupation to 'territory liberated from the enemy' and also expressly to '[d]omestic territory recovered from rebels treated as belligerents'.[1092] This seems to have been the US position at least since the time of the American Civil War. The Lieber Code expressly provided for the theoretical possibility that belligerent occupation could be established in the State's own territory.[1093] Equally, in practice during the civil war, the territory of the seceding states was recognized by the Union army as enemy territory and once control over it was established, it was

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[1087] See Nicholas Tarling (ed) *The Cambridge History of Southeast Asia Volume 2: The Nineteenth and Twentieth Centuries* (CUP 1993) 260–261.

[1088] See ibid 329–336 and 349.

[1089] *Tan Tuan et al v Lucena Food Control Board, Federico Marquez, Godofredo Reyes, Alfredo Bonus, Teotimo Atienza and the Court of Appeals* GR No L-1451 (6 October 1949) (Supreme Court of the Republic of the Philippines).

[1090] *Saura Import and Export Co, Inc v Bibiano L Meer* GR No L-2927 (26 February 1951) (Supreme Court of the Republic of the Philippines).

[1091] See also *Public Prosecutor v X (Eastern Java)* (1948) 15 Annual Digest 535 (Case No 176) (Temporary Court Martial at Surabaya) (holding that IHL applies to a territory reconquered from the common enemy).

[1092] US, Field Manual No 27-10, The Law of Land Warfare (18 July 1956, as amended on 15 July 1976) 10; contra Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 531.

[1093] Lieber Code, art 5.

automatically subject to the law of occupation.[1094] This much was recognized by express presidential statements during the war[1095] as well as by post-bellum jurisprudence of the US Supreme Court.[1096] Apart from the US and UK military manuals, the other publicly available military manuals do not directly discuss this matter.[1097]

Although the issue was not eventually resolved by the ICTY, it is of some significance that it was briefly revisited by that court in *Hadžihasanović et al*. It arose as a preliminary matter in relation to a count in the indictment charging one of the accused with unlawful labour in violation of the law of belligerent occupation.[1098] The acts in question were alleged to have occurred in the territory of Bosnia and Herzegovina while the accused was a Bosnian Army general.[1099] The tribunal was thus directly faced with the question whether the law of occupation could apply to a State occupation of its own territory.[1100] Instead of rejecting it outright as axiomatically wrong, it considered it as an open question of substantive law, which was to be determined at trial.[1101] Unfortunately,

[1094] Wright, 'The American Civil War, 1861–65' (n 674) 62.

[1095] See, eg, Executive Order of President Abraham Lincoln (20 October 1862), reproduced in *Burke v Miltenberger* (1873) 86 US 519 (US SC) 519.

[1096] See, eg, *New Orleans v The Steamship Company* (1874) 87 US 387 (US SC) 387 (holding that the city of New Orleans was held by military occupation by the Union army between 1 May 1862 and 18 March 1866); see also *The Venice* (1863) 69 US 258 (US SC) 276–277.

[1097] cf New Zealand, *Interim Law of Armed Conflict Manual* (New Zealand Defence Force 1992); Canada, *The Law of Armed Conflict at the Operational and Tactical Level* (Office of the Judge Advocate General 2001); Australia, *The Manual of the Law of Armed Conflict (Australian Defence Doctrine Publication 06.4)* (Australian Defence Headquarters 2006); German Ministry of Defence, *ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch [Humanitarian Law in Armed Conflicts: Manual]* (2013).

[1098] *Prosecutor v Hadžihasanović et al* (Indictment) IT-01-47 (5 July 2001) (ICTY) [22]–[24] (charging Enver Hadžihasanović with unlawful labour) and [46]–[48] (alleging that conduct charged as grave breaches of the GCs occurred, inter alia, during the 'partial occupation' of Bosnia and Herzegovina).

[1099] ibid [32].

[1100] ibid [32]–[34].

[1101] ibid [35].

in the subsequent amendment of the indictment in that case, the count was removed by the Prosecution and thus the issue was never adjudicated upon.[1102]

Nonetheless, it is submitted that the totality of the cases and opinion cited significantly undermines the position that a State may under no circumstances become an occupying power in relation to its own territory. On the contrary, it is submitted that it is more consistent with the analysed line of judicial and extrajudicial views, as well as with the humanizing and individualizing trend dominating this area of law[1103] to allow for such a possibility. It is on this assumption that the analysis proceeds to the second question.

4.2.3 Occupation of territory belonging to a non-State actor

Provided that a State may in law become the occupying power of its own territory, the next question is whether it can acquire this position vis-à-vis a non-State actor. Practice in this respect is inevitably very scarce, even in the types of conflict under consideration.

One might begin with so-called wars of national liberation where relevant practice is truly non-existent since, as it has been previously noted, no conflict has as of yet been internationalized under article 1(4) AP I.[1104] The analysis must therefore be doctrinal in nature. To the extent that the present question is discussed in the literature at all, two different positions are discernible, both rejecting the applicability of the law of occupation. According to the first one, highlighted by Benvenisti, the national liberation movement, acting in the exercise of the right of self-determination, would be entitled on this basis to consider itself 'the rightful sovereign, not subject to any limitations on its

[1102] cf *Prosecutor v Hadžihasanović et al* (Amended Indictment) IT-01-47-PT (11 January 2002) ICTY.

[1103] See section 2.7 above.

[1104] See chapter 2, section 4.5 above.

powers stemming from the law of occupation'.[1105] According to the alternative view expressed by Baxter, neither of the parties in such a conflict would be willing to accept that the territory under their control should be regarded as belligerently occupied.[1106]

It is submitted that both cited views are in fact problematic. The former comes very close to diluting a *jus in bello* question (does the law of occupation apply?) with a *jus ad bellum* consideration (does the movement have a rightful claim to self-determination?). As such, it should be rejected as potentially setting a dangerous precedent. Otherwise, if it were allowed to deny the applicability of (a part of) IHL by reference to *jus ad bellum* criteria, many belligerents would surely find it an easy escape route from the reach of potentially unwanted obligations.[1107] As for the latter view, it is not only speculative (as it is impossible to anticipate the attitude of the conflict parties towards their legal obligations, in particular if an article 96(3) declaration were to be issued and accepted[1108]), but it, similarly to the first view, also infuses the debate with extraneous considerations. The parties' potential unwillingness to apply the law should be seen as deplorable, but not as determinative vis-à-vis the actual applicability of the norms in question.

Contrary to both views described above, it is significant that State parties to Additional Protocol I accepted the applicability of norms on belligerent occupation in wars of national liberation simply by their inclusion in an instrument clearly applicable to

[1105] Benvenisti, *The International Law of Occupation* (1st rev edn) (n 906) 185. Interestingly, Benvenisti abandoned this line of argument in the second edition of his book. See Benvenisti, *The International Law of Occupation* (2nd edn) (n 319).

[1106] Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (n 820) 15–16.

[1107] See Lauterpacht, 'The Limits of the Operation of the Law of War' (n 9) 212; Greenwood, 'The Relationship between Ius ad Bellum and Ius in Bello' (n 9) 226; Antoine A Bouvier, 'Assessing the Relationship between Jus in Bello and Jus ad Bellum: An "Orthodox" View' (2006) 100 American Society of International Law Proceedings 109, 112; Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War' (n 9) 104–105.

[1108] See chapter 2, section 4.3 above.

such conflicts.[1109] It is therefore submitted that the better view is that if the territory belonging to a national liberation movement can be clearly defined—as it could have been, for example, in many decolonization conflicts, which had been the actual impetus for the drafting of article 1(4)[1110]—then its temporary control by the territorial State should be considered sufficient for the application of the norms of belligerent occupation.

Although conflicts internationalized by way of recognition of belligerency are largely a thing of the past, practice supporting the applicability of the law of belligerent occupation to occupied territory was more forthcoming in these situations. The delineation of the relevant territory in these conflicts is facilitated by the fact that one of the customary requirements of belligerent recognition is that the 'insurgents … are in possession of a *certain part* of the territory of the legitimate Government'.[1111] Should this territory come under the control of the State party to the conflict *after* the recognition of belligerency has been granted, the applicability of the law of IAC dictates that this land be subjected to the law of belligerent occupation. The paradigmatic example is, again, the American Civil War. The territory of the Southern secessionist states was easy to determine due to the federal structure of the country at war. Executive and judicial institutions of the North alike acknowledged the applicability of occupation law to those parts of this territory (such as the city of New Orleans) that came under control of the Union army.[1112] Another example is the Boer War of 1899–1902, the locus of the last

[1109] cf *APs Commentary* (n 22) 238 [798] (noting that article 19 concerning neutral and other States not Parties to the conflict 'does not cover liberation movements to which the Protocol may apply'); ibid 284 [984] (noting that the expression 'friendly forces' found in article 25 'd[oes] not cover the armed forces of a liberation movement'). A contrario, those norms of the Protocol where a similar proviso was not made—including those concerning occupied territories—should be deemed to apply to national liberation movements.

[1110] See text to nn 357–359 above.

[1111] Oppenheim, *International Law: A Treatise* (1st edn) (n 54) vol II, 86 (emphasis added).

[1112] See text to nn 1094–1096 above.

known express recognition of belligerency by the territorial State.[1113] In that conflict, protections of the law of belligerent occupation were similarly considered applicable to the occupied Boer territory, as evidenced both by the period criticism of the violations of this body of law committed by the British forces,[1114] as well as by the accounts of their compliant behaviour.[1115]

Finally, there are only very isolated instances of practice supporting the applicability of the law of belligerent occupation to the territory of a non-State armed group in a conflict internationalized by an outside intervention. This is likely due to a number of reasons. The States' reluctance to bestow upon their non-State opponents any legal status[1116] certainly ranks high among these reasons and the problem is further compounded by the uncertainty in the legal qualification of these conflicts. Nonetheless, limited examples of practice do exist. One may be found in connection with the non-State armed group Croatian Defence Council (*Hrvatsko vijeće obrane*, HVO) active in Central Bosnia in the early 1990s and subsequently found to have acted under the overall control of Croatia.[1117] Its representative Dario Kordić (and a later defendant before the ICTY[1118]) issued a written statement during the conflict according to which 'the HVO was the only military force allowed [in a particular part of the Bosnian territory] and *any other force would be treated as an occupying force*'.[1119] Another separate example arose in the same broad context in relation to the Bosnian city of Mostar, which had formed a part of

[1113] See text to n 412 above.

[1114] See, eg, Spaight (n 759) 332, 340–341, 343, 350–353.

[1115] See, eg, ibid 396 and 407.

[1116] See, eg, *Official Records* (n 360) vol VII, CDDH/SR.50/Annex, 104 (Zaire) (reproduced in full in text to n 957 above); Watts (n 632) 163 (stating that 'historical experience of NIACs, and [the States'] clearest self-interest' weigh against any grant of legal status to the rebels).

[1117] *Blaškić* Trial Judgement (n 461) [122]; *Prlić* Trial Judgement (n 10) vol 3 [568].

[1118] See *Prosecutor v Kordić and Čerkez*, IT-95-14/2-T (ICTY).

[1119] *Kordić and Čerkez* Trial Judgement (n 10) [508] (emphasis added).

the territory of the HZ H-B, an ethnically Croatian enclave defended by the HVO. When Mostar temporarily fell under the control of the Serb-Montenegrin forces in 1992, the city authorities issued a decision stating that 'the Mostar municipality is *under partial occupation* by units of the so-called Yugoslav People's Army'.[1120] Too much should not be inferred from these proclamations, however. They were made by representatives of non-State actors who may or may not have wanted to endow their statements with any legal significance. What is more, they are too infrequent and unaccompanied by any complementary statements by the State party to the conflict concerned. It would thus be a step too far to argue that these proclamations amount to any discernible change in the law. However, they demonstrate well the *possibility* of identifying a territory of an armed group which subsequently comes under control of a State. It is thus submitted that even conflicts internationalized by an outside intervention may, under certain circumstances, come under the scope of the law of belligerent occupation.

4.2.4 Occupation of State territory by a non-State actor

The third and the final question asks whether a non-State armed group may occupy a State's territory. Many of the considerations discussed in regard to the second question apply here, as well. This is true particularly with respect to conflicts potentially internationalized by operation of article 1(4) AP I as the discussion here is purely doctrinal due to the absence of available practice.[1121] As Roberts observed, liberation movements are typically seen 'as underdogs, not overlords' and thus the possibility they would occupy the territory of a State was not even discussed at the diplomatic

[1120] *Naletilić and Martinović* Trial Judgement (n 10) [17], citing a decision of the Mostar Municipal Assembly, Municipal Crisis staff Number 427/92 (29 April 1992) (emphasis added).

[1121] See text to nn 1104–1106 above; see further chapter 2, section 4.5 above.

conferences in Geneva.[1122] Nevertheless, he opined that the law on occupations ought to be applied fully in such situations.[1123] For reasons discussed above, the present author agrees with this assessment.

As for conflicts internationalized by belligerent recognition, practice is scarcer than that discussed with respect to occupation by the territorial State. This is hardly a surprising observation. Rebels are, after all, typically in a weaker starting position than the incumbent government and in both most recent examples of a recognition granted by the territorial State, they were eventually defeated. It is therefore more likely that they would not establish sufficient control over enemy territory in order to trigger the law of occupation. This seems to have been the case both in the Boer War as well as in the American Civil War, especially after belligerent recognition had been granted.[1124] Notably, however, during the latter conflict, the secessionist states did come in temporary control of portions of the northern states of Missouri, Kentucky, and Maryland, but as Wright concludes, '[t]hese controls were, however, short lived and were treated as "invasion" rather than "occupation.""[1125] Nevertheless, it is implied in this statement that if the South's control over parts of the Union territory had been more permanent, it would have been treated as occupied territory. This is in line with the Lieber Code's conception

[1122] Roberts, 'What Is a Military Occupation?' (n 176) 293.

[1123] ibid 292–293. It should be noted that Roberts focussed his analysis on cases when a liberation movement occupied the territory of *another*, ie a neighbouring State, referring to examples that included 'the entry of Yugoslav partisans into Trieste in the closing phase of the Second World War; the role of forces of the National Liberation Front of South Vietnam in frontier areas of Cambodia up to 1975; and the activities of forces of the Palestine Liberation Organization in parts of Lebanon in the 1970s and early 1980s'. ibid 292.

[1124] Prior to the recognition of belligerency in the Boer War, the Boer militias staged an invasion into the British-held Natal and Cape Colony areas. However, even in this early phase of the war, the Boers were not able to maintain their hold over the British territory long enough to substitute the British control over these areas. See further Denis Judd and Keith Surridge, *The Boer War: A History* (IB Tauris 2013) 105–158 (discussing the early stages of the war).

[1125] Wright, 'The American Civil War, 1861–65' (n 674) 63 (internal quotation marks kept).

of belligerent occupation.[1126] As mentioned above, due to the customary requirements of recognition of belligerency,[1127] the identification of the territory of the non-State party will be relatively easy.[1128] By necessary implication, the remaining territory should be considered as the territory of the State party to the conflict. In these conflicts, therefore, logic as well as practice supports the affirmative answer to the analysed question.

The remaining category contains conflicts internationalized by outside intervention. There is a wealth of judicial opinion and findings of international organs which have considered non-State armed groups to establish sufficient control to occupy State territory. The interpretative question relates to whether it is the non-State group that should be considered the Occupying Power in such a situation, or rather the third State which supports the said armed group.

Several relevant examples of practice may be given. The Independent International Fact-Finding Mission on the Conflict in Georgia considered parts of the Georgian territory to have been occupied by the Abkhaz forces, triggering the applicability of the law of belligerent occupation.[1129] Both the UN General Assembly and Security Council have considered the Azerbaijani territory under the control of Armenian-supported separatists in the Nagorno Karabakh region as occupied.[1130] Similarly, the ICTY held that parts of territory of Bosnia and Herzegovina controlled at various times by Bosnian Serbian and Bosnian Croatian non-State armed groups were to be considered as occupied

[1126] Lieber Code, art 153; see also text to n 871 above.

[1127] See text to n 405 above for the traditional criteria for belligerency.

[1128] See text to n 1111 above.

[1129] IIFFMCG, *Independent International Fact-Finding Mission on the Conflict in Georgia: Report* (September 2009) vol 2, 213, 290, and 311.

[1130] UNGA Res 62/243 (The Situation in the Occupied Territories of Azerbaijan) (14 March 2008) [2] and [3]; ibid, preambular [5]; UNSC Res 884 (12 November 1993) UN Doc S/RES/884, preambular [5].

territories.[1131] In addition, in the recent case *Prlić et al*, the Tribunal expressly confirmed that as a matter of law, in circumstances characterized in this thesis as a conflict internationalized by outside intervention,[1132] the territory under the control of a non-State armed group is to be considered as being in a state of occupation:

> The Chamber would recall that the Tribunal's case-law is clear concerning the criteria applicable to any determination of the international nature of a conflict. The Appeals Chamber has established that an armed conflict is international in nature when, for example, a foreign State exercises overall control over one of the parties to the conflict. Accordingly, the Chamber finds that *if the Prosecution proves that the party to the armed conflict under the overall control of a foreign State fulfils the criteria for control of a territory as identified above, a state of occupation of that part of the territory is proven*.[1133]

The remaining issue concerns the identification of the Occupying Power in these complex conflict situations. It is submitted that as long as the non-State party in question maintains a degree of operational autonomy, it should be considered the Occupying Power for the purposes of the law of belligerent occupation. This is a necessary consequence of the conceptualization of the relationship between the law of State responsibility and the rules on conflict qualification put forward in this thesis.[1134]

This issue bears closer examination. In situations in which the non-State party maintains its operational autonomy in full, the conflict between itself and the territorial

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[1131] *Prosecutor v Karadžić and Mladić* (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 & IT-95-18-R61 (11 July 1996) (ICTY) [1.31] (finding that the VRS had occupied parts of Bosnian territory); *Blaškić* Trial Judgement (n 461) [149]–[150] (finding that the HVO had occupied parts of Bosnian territory); *Hadžihasanović and Kubura* Trial Judgement (n 10) [400] and [643] (finding that the VRS had occupied parts of Bosnian territory); ibid [955] (finding that the HVO had occupied a part of the Bosnian territory); *Prlić* Trial Judgement (n 10) vol 3 [589] (finding that the HVO had occupied several parts of the Bosnian territory); see also Court of Bosnia and Herzegovina, *Prosecutor's Office of Bosnia and Herzegovina v Radomir Vuković and Zoran Tomić*, X-KR-06/180-2, Verdict (22 April 2010) 7 (finding that the Srebrenica Safe Area in Bosnia and Herzegovina had been subject to 'total occupation by the VRS').

[1132] See chapter 2, section 2.2.3 above.

[1133] *Prlić* Trial Judgement (n 10) vol 1 [96] (emphasis added).

[1134] See chapter 2, section 2.2.3 above.

State remains non-international in nature in spite of outside involvement.[1135] Therefore, the law of belligerent occupation would not apply to the territory under its control at all.[1136] At the other end of the spectrum, if the entirety of the non-State party's operational autonomy had been sacrificed in favour of the intervening (and thus controlling) State, it is this State that should be considered to be the Occupying Power.[1137] The non-State actor acts as the agent of the intervening State in the sense of article 29 of the Fourth Geneva Convention[1138] and article 8 ILC ASR.[1139] In the middle between these two extreme types of situations lie conflicts which should be considered internationalized due to the sufficient control of the outside party, but which do not yet trigger the responsibility of the intervening State for the conduct of the armed group in question.[1140] In other words, these are the situations, in which the non-State actor controls a part of the home State's territory, but is not itself subject to 'effective control' of the outside State.[1141] In this middle-type of situation, which seemed to have been the case in some of the ex-Yugoslavian conflicts, for some time during the Libyan conflict, and possibly in the Abkhaz-controlled territory of Georgia, the semi-autonomous non-State actor would be the Occupying Power.

[1135] See chapter 2, section 6.2 above.

[1136] See, eg, Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' (n 33) 312; Kolb and Hyde (n 33) 69; Benvenisti, *The International Law of Occupation* (n 319) 61.

[1137] See chapter 2, section 6.2 above.

[1138] GC IV, art 29 ('The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.'). See also Gal (n 938) 65 (arguing, on the analysis of the ICRC commentary on article 29, that the notion of 'agent' in that provision applies to non-State actors).

[1139] ILC ASR, art 8.

[1140] See chapter 2, section 6.2 above, in particular text to nn 529 and 534–536 (concerning scenario 5).

[1141] See further chapter 2, section 2.2.3 above.

To the extent that this admittedly complex matter is discussed in the literature at all, commentators tend to conflate the middle and one of the extreme positions. For instance, Ferraro argues that '*a state* would be an occupying power for the purposes of IHL when it exercises *overall control* over de facto local authorities or other local organized groups that are themselves in effective control of a territory or part thereof.'[1142] This approach, however, unacceptably strains the law of State responsibility. It would make the outside State responsible under IHL for acts for which it should not have to answer on the international plane because they were performed by an independent third party.[1143]

It is proposed that the better approach is to separate the question of conflict qualification (determined by a test akin to the 'overall control' test propounded by the ICTY[1144]) from the question of the identification of the Occupying Power (determined by a case-by-case consideration of the facts on the ground and the degree of operational autonomy of the individual actors).[1145] Admittedly, the ICTY has nominally maintained its problematic[1146] State responsibility-oriented approach to conflict qualification developed in its earlier case-law.[1147] Nevertheless, its later jurisprudence actually lends support to the approach proposed here with respect to the law of occupation. First, in *Naletilić and Martinović*, the Tribunal drew a clear distinction between the tests concerning conflict qualification and the determination of the existence of occupation, respectively.[1148] More recently, the Tribunal accepted in *Prlić* that the HVO (and *not* Croatia, which had

[1142] Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (n 839) 158 (emphases added); see also, eg, Gal (n 938) 77.

[1143] See further chapter 2, section 2.2.3 above (in particular subsection 'Analysis of the Tadić Trial Judgement'). See also Gal (n 938) 77–78 (criticizing this gap in responsibility from a normative perspective).

[1144] *Tadić* Appeal Judgement (n 10) [131].

[1145] See text to nn 1135–1141 above.

[1146] See chapter 2, section 2.2.3 above (in particular subsection 'Analysis of the Tadić Trial Judgement').

[1147] cf *Prlić* Trial Judgement (n 10) vol 1 [85]–[86] and vol 3 [518].

[1148] *Naletilić and Martinović* Trial Judgement (n 10) [214].

exercised overall control over the former[1149]) should be treated as the Occupying Power with respect to the relevant territories.[1150] This case demonstrates that it is conceptually possible to delimit the territory subject to belligerent occupation by a non-State party as well as to consider this actor to be the actual Occupying Power. This is also the approach embraced here.

4.3 Personal scope

The final question concerning the scope of application relates to the designation of the protected persons under the law of occupation. In the law of IAC, these are defined as individuals who find themselves 'in the hands of [an] Occupying Power *of which they are not nationals*.'[1151] At the beginning of an internationalized armed conflict, however, all inhabitants except for foreign residents share the same nationality of the territorial State. Does this mean that the concept of protected persons does not extend to internationalized armed conflicts? I argue here that the designation of protected persons may be founded in internationalized conflicts on the concept of allegiance in lieu of the traditional approach based on nationality.

4.3.1 Traditional view: Nationality as the sole criterion

Similarly to territory, population is one of the defining characteristics of a State in international law.[1152] 'The sum of its nationals, and thus the concept of nationality as such, determines the "personal dimension" of a State in its international relations and

[1149] *Prlić* Trial Judgement (n 10) [545].

[1150] ibid [589].

[1151] GC IV, art 4(1) (emphasis added).

[1152] Montevideo Convention (n 310) art 1.

gives rise to specific rights and duties of States.'[1153] Under ordinary circumstances, international law does not further atomize the concept of nationality.[1154] Therefore, there is only and exactly one population associated with one State, namely, all those who share the same nationality.[1155] However, a situation of armed conflict can hardly be described as ordinary and internationalized armed conflicts pose further challenges of their own.

Nonetheless, the traditional view is that all provisions of IHL that protect persons of another nationality are 'fundamentally unworkable in internal conflict'.[1156] Baxter gives two reasons in support of this view:

> It is not possible to say that rebels should be treated *as if* they were enemy nationals. In the first place, this is not what the Convention says. In the second place, how can this status be determined, when the allegiance of civilians is sought by both belligerents and cannot readily be ascertained in individual cases? *Nationality is a fixed legal status; loyalty or allegiance is quite another thing.*[1157]

He thus juxtaposes nationality and allegiance as two alternative criteria of association of civilians with a conflict party and then simply dismisses the latter without further analysis. Importantly, the jurisprudence of the ICTY has since departed from the traditional view

[1153] Oliver Dörr, 'Nationality' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> (updated November 2006) accessed 1 October 2014 [1].

[1154] cf European Convention on Nationality (signed 6 November 1997, entered into force 1 March 2000) 2135 UNTS 213, art 2(1).

[1155] See *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4 [57].

[1156] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 530; see also ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971* (n 187) vol V ('Protection of Victims of Non-International Armed Conflicts') 69 (recognizing that the concept of nationality is 'not consistent' with the nature of a NIAC); Marco Sassòli and Laura M Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (2000) 82 IRRC 733, 743 ('in an international armed conflict, atrocities committed against fellow citizens are … traditionally not considered as "grave breaches"').

[1157] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 530–531 (first emphasis original, second emphasis added).

based on nationality, endorsing instead precisely allegiance as the 'decisive criterion for determining the status of a protected person'.[1158]

4.3.2 The ICTY approach: Replacing nationality with allegiance

The ICTY developed this 'original approach'[1159] to the interpretation of article 4 of the Fourth Geneva Convention already in the *Tadić* case.[1160] The defence had argued in that case that in the context of the armed conflict occurring solely in the territory of Bosnia and Herzegovina, the victims could not be regarded as protected persons under IHL because they had been of the same nationality as the alleged perpetrators.[1161] Although the victims as well as the alleged perpetrators including the defendant in the case were indeed all of Bosnian nationality, they did differ in their ethnicity: the former were Bosnian Muslims or Bosnian Croats while the latter were Bosnian Serbs.[1162] The ICTY Appeals Chamber rejected the nationality-based approach as excessively formalistic.[1163] On the basis of a textual, historical, and teleological analysis of the relevant provisions in the Fourth Geneva Convention, it considered the allegiance-based

[1158] *Prlić* Trial Judgement (n 10) vol 1 [100], citing *Tadić* Appeal Judgement (n 10) [166].

[1159] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 247. Note that a 'means of applying' GC IV norms based not on nationality, but rather on 'other more elusive criteria of a social, political, ideological, or ethnic nature which create new types of *allegiances*' (emphasis added) was suggested already in 1971 at the Conference of Government Experts in Geneva. Nonetheless, this proposal did not receive sufficient traction at the time and the baton was picked up only 25 years later by the ICTY. See ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971* (n 187) vol V ('Protection of Victims of Non-International Armed Conflicts') 69.

[1160] *Tadić* Appeal Judgement (n 10) [166].

[1161] *Prosecutor v Tadić* (Defence Motion on the Jurisdiction of the Tribunal) IT-94-1-T (23 June 1995) (ICTY) 2; *Prosecutor v Tadić* (Defence Brief to Support the Motion on the Jurisdiction of the Tribunal) IT-94-1-T (23 June 1995) (ICTY) [9.4]; *Tadić* Appeal Judgement (n 10) [2.9] and [2.18].

[1162] *Tadić* Trial Judgement (n 10) [180] (concerning the accused's ethnicity) and [726], [730], [734], [742], [752] (concerning the ethnicity of some of the victims).

[1163] *Tadić* Appeal Judgement (n 10) [165]–[166]; see also ibid [96] ('[IHL] is not grounded on formalistic postulates.').

approach to constitute the crucial test.[1164] With respect to the case before it, the Appeals Chamber concluded that the victims and the perpetrators did not owe allegiance to the same conflict party, and thus it deemed article 4 as applicable.[1165] This approach thus places the substance of relations between individual actors before the formal legal characterization of their mutual bonds.[1166] It has been confirmed by a host of later decisions of the ICTY and now forms an indelible part of its stable jurisprudence.[1167] It has also been accepted by the ICC,[1168] the ECCC,[1169] and—albeit indirectly—the Belgrade War Crimes Chamber.[1170]

4.3.3 The traditional view and the ICTY approach juxtaposed: In defence of allegiance

Locating the criterion of allegiance in Geneva Convention IV

Given the marked discrepancy between the traditional view and the recent case-law produced and inspired by the ICTY, it is necessary to appraise the objections given against such a development. Firstly, Baxter is indeed correct in his observation that the

[1164] ibid [164]–[169].

[1165] ibid [169].

[1166] ibid [168].

[1167] See, eg, *Blaškić* Trial Judgement (n 461) [125]–[126]; *Aleksovski* Appeal Judgement (n 242) [151]; *Čelebići* Appeal Judgement (n 10) [83]; *Kordić and Čerkez* Trial Judgement (n 10) [152]–[154]; *Blaškić* Appeal Judgement (n 729) [167]–[182]; *Prlić* Trial Judgement (n 10) vol 1 [100].

[1168] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges, Pre-Trial Chamber) ICC-01/04-01/07 (30 September 2008) (ICC) [290]–[291]; see also ICC, Elements of Crimes (2000) UN Doc PCNICC/2000/1/Add.2, fn 33.

[1169] *Duch* Trial Judgement (n 144) [419] and [425]–[426].

[1170] *Anton Lekaj* (Judgment) KV 4/05 (18 September 2006) (WCC) 26 and 39 (finding that the ethnically Serbian inhabitants of Kosovo, a province of the FRY at the time, were protected persons vis-à-vis the conduct of the KLA and stating that the victims had been considered disloyal by the KLA members); see also Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 53–54 (criticizing the *Lekaj* ruling for failing to justify its apparent use of the allegiance test).

alternative view is prima facie incompatible with the text of the Convention,[1171] which limits the protection to those individuals who are 'not nationals' of the Occupying Power.[1172] However, the ICTY rightly observed that there are other provisions in the same Convention, which detract from the importance of the formal legal bond of nationality.[1173] Specifically, article 44 forbids the States in their capacity as Detaining Powers to treat refugees as enemy aliens solely on the basis of their de jure nationality of an enemy State when these refugees do not, de facto, enjoy the protection of any State.[1174] In addition, article 70(2) prohibits the Occupying Power from arresting, prosecuting, convicting or deporting its own nationals who have sought refuge in the territory of the occupied State.[1175] The inclusion of these provisions indicates that the drafters did not consider the fact of shared nationality as a conclusive factor which would remove such persons from the protection of the law in all situations.

Although most commentators commend the ICTY for its pro-humanitarian interpretation of the concept of protected persons,[1176] Tamás Hoffmann advances a

[1171] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 531.

[1172] GC IV, art 4(1).

[1173] *Tadić* Appeal Judgement (n 10) [165].

[1174] GC IV, art 44.

[1175] GC IV, art 70(2).

[1176] See, eg, William J Fenrick, 'The Application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia' (1999) 81 IRRC 317, 327 (considering the ICTY approach as 'very progressive'); Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 260 (considering that the ICTY approach 'enhances the humanization of [IHL]'); Kriangsak Kittichaisaree, *International Criminal Law* (OUP 2001) 140–141 (relying on the ICTY approach to argue that the article 4 requirement 'is not to be applied strictly'); Natalie Wagner, 'The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the former Yugoslavia' (2003) 85 IRRC 351, 375–376 (stating that the ICTY approach is required by the realities of contemporary inter-ethnic conflict); Schabas (n 1159) 247 (considering the ICTY approach as 'an original' one); Dieter Fleck, 'Shortcomings of the Grave Breaches Regime' (2009) 7 JICJ 833, 843 (considering the ICTY approach as 'necessary and correct'); but see Sassòli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (n 1156) 743–744 (criticizing the ICTY approach for being insufficiently justified and overbroad in its implications).

forceful critique in a recent piece.[1177] He refers to the principle *inclusio unus est exclusio alterus* to argue that article 70(2) should be seen as an exception which confirms the general rule based on the nationality approach.[1178] Nevertheless, this provision is not the only IHL norm adopting a more nuanced approach to the criterion of nationality. Apart from article 44 cited above, two further provisions merit an express mention in this connection.

First, already in 1907, the Hague Regulations proclaimed that '[i]t is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.'[1179] Second, article 68(3) of the Fourth Geneva Convention provides that before the imposition of the death penalty against a protected person, the court must take into account that 'since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.'[1180]

These provisions demonstrate that the law of belligerent occupation places weight not only on the formal bonds inherent in nationality, but also on the actual allegiance owed by the protected persons. The former provision protects the inhabitants from having their allegiance interfered with by the Occupying Power and the latter provision highlights the importance of the fact that the inhabitants are not bound by a duty of allegiance to the Occupying Power.[1181] Moreover, several additional provisions of Geneva

[1177] Tamás Hoffmann, 'The Perils of Judicial Construction of Identity: A Critical Analysis of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia Pertaining to the Notion of Protected Persons' in Fiona Jenkins, Mark Nolan and Kim Rubinstein (eds), *Allegiance and Identity in a Globalised World* (CUP 2014, forthcoming).

[1178] ibid; see also *APs Commentary* (n 22) 46.

[1179] Hague Regulations, art 45.

[1180] GC IV, art 68(3); see also Ka Ho Tse, 'The Relevancy of Nationality to the Right to Prisoner of War Status' (2009) 8 Chinese Journal of International Law 395, 401 (arguing, in the context of the right to POW status, that '[t]he fact that most POWs do not owe a duty of allegiance to their detaining power does not necessarily imply that those who owe such a duty should be taken out of the category of POWs').

[1181] Dinstein, *The International Law of Belligerent Occupation* (n 427) 52–53.

Convention IV refer to allegiance instead of nationality as a method of associating protected persons with a conflict party.[1182]

It is therefore submitted that the better view is that the regulation of protected persons in the law of belligerent occupation and particularly in the Fourth Geneva Convention is based on a delicate balance between, on the one hand, the interests of the States manifested in the adoption of the nationality criterion as the general rule[1183] and, on the other hand, the humanitarian aims of this body of law[1184] reflected in those provisions that complement this criterion with the consideration of allegiance in specific cases.[1185] Internationalized armed conflicts should equally be seen as specific cases because they are characterized by an international element bringing them within the scope of the law of IAC. The concern for the effectiveness of the law thus also militates in favour of a complementary allegiance-based approach to the identification of protected persons in such conflicts.

Hoffmann further takes issue with the argument made in *Tadić* that the modern reality of inter-ethnic armed conflicts necessitates the use of criteria other than nationality for the determination of allegiance.[1186] He cites Monica Duffy Toft's monograph on the geography of ethnic violence[1187] to substantiate his claim that '[i]nter-ethnic conflicts have

[1182] GC IV, arts 98(2), 105, 107(1), and 135(2).

[1183] See *GC IV Commentary* (n 21) 46 (stating that the Convention is 'faithful' to the principle of international law proscribing the interference in a State's relations with its own nationals).

[1184] See ibid 21 (stating that 'the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests').

[1185] Contra Hoffmann, 'The Perils of Judicial Construction of Identity' (n 1177) ('The expansive interpretation of art 4 of Geneva Convention IV is … not justifiable based on textual interpretation[.]).

[1186] *Tadić* Appeal Judgement (n 10) [166].

[1187] Monica Duffy Toft, *The Geography of Ethnic Violence: Identity, Interests, and the Indivisibility of Territory* (Princeton University Press 2003).

been occurring throughout the history of humanity.'[1188] In fact, one would search in vain for the specific support of this proposition in Duffy Toft's book. Conversely, she places great emphasis on post-Cold War conflicts in her analysis and the four detailed case studies in her book all concern conflicts taking place between 1990 and 1994.[1189] To the extent that Hoffmann's claim was intended to weaken the suggestion that inter-ethnic conflicts play a significantly more prominent role today than they used to, it thus fails to convince.[1190]

Nevertheless, Hoffmann is right in his observation that such conflicts certainly were not inconceivable at the time of the drafting of the Geneva Conventions.[1191] I disagree, however, with the implications he draws from this observation. He claims that 'the problem was clearly considered by states during the treaty negotiations', but that 'they refused to give any concessions in extending the scope of the Fourth Geneva Conventions to their civilian populations'.[1192] Although he summarizes the *travaux préparatoires* debates on this issue accurately, his analysis does not justify the relevance of their inclusion for the purposes of the present argument.

The debates Hoffmann refers to concerned the possibility of the extension of the application of IHL to *non-international* armed conflicts. The ICTY allegiance-based approach endorsed here is, however, predicated on the existence of an international (or internationalized, as understood in this thesis) armed conflict. The fact that the drafters were not ready to accept the extension of protected person status to their own citizens in

[1188] Hoffmann, 'The Perils of Judicial Construction of Identity' (n 1177).

[1189] Duffy Toft (n 1187), 45–126 (analysing, in turn, the case studies of the conflicts between (1) Russia and Tatarstan, (2) Russia and Chechnya, (3) Georgia and Abkhazia, and (4) Georgia and Ajaria).

[1190] Accord Wagner (n 1176) 375–376 (stating that the ICTY approach is required by the realities of contemporary inter-ethnic conflict).

[1191] Hoffmann, 'The Perils of Judicial Construction of Identity' (n 1177).

[1192] ibid.

NIACs does not therefore appear to be directly relevant to the issue upon consideration. For all these reasons, it can be concluded in relation to Baxter's first point[1193] that close textual and contextual analysis of the relevant law as well as its drafting history do not exclude the application of the allegiance-based approach.

Overcoming the practical obstacles to the determination of allegiance

Baxter's second concern is of a practical nature. He suggests that allegiance cannot readily be ascertained in individual cases.[1194] Similarly, several commentators have argued that it would be difficult to apply the allegiance test 'in the heat of the conflict'.[1195] In reality, these practical obstacles are not insurmountable for at least three main reasons.

First, four decades after the publication of Baxter's piece in 1974, we have the benefit of the constant international jurisprudence spearheaded by the ICTY. The Tribunal held in *Naletilić and Martinović* that it would 'review, on a case by case basis, the effective allegiance of the victims'.[1196] It has been considerably active in this sense and, as stated above, its approach has since been endorsed by other international and domestic courts.[1197] The ICTY's line of cases since the 1999 *Tadić* appeal judgement has therefore by now become 'persuasive precedent' for the determination of protected persons status in similar cases in the future.[1198] It can thus no longer be said that there are no criteria or indicators for the determination of allegiance during armed conflicts.

[1193] See text to n 1157 above.

[1194] Baxter, 'Ius in Bello Interno: The Present and Future Law' (n 33) 531.

[1195] Sassòli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (n 1156) 744; Fleck, 'Shortcomings of the Grave Breaches Regime' (n 1176) 843.

[1196] *Naletilić and Martinović* Trial Judgement (n 10) [207].

[1197] See nn 1168–1170 above.

[1198] Wagner (n 1176) 367–368.

With respect to the more modern objection about the practical difficulty to apply these criteria 'in the heat of the conflict',[1199] it suffices to say that this is hardly the only difficult determination that IHL prescribes the commanders to make in the midst of an armed conflict. As Sassòli himself argues in a different context,[1200] 'the fact that a situation is difficult to qualify under existing law is, except for first-year students, no argument to apply a new, easy solution'.[1201] If the allegiance test renders uncertain results under volatile circumstances, the commander would be best advised to err on the side of caution and treat the individual in question as a protected person;[1202] in short, *in dubio pro humanitate*.[1203]

Second, there are situations in which actual allegiance is manifestly clear and its determination does not pose any major problems even without consulting the available case-law. This will likely be the case in inter-ethnic conflicts in which the fact of belonging to a particular ethnic group is readily apparent by immutable physical characteristics including skin colour or specific facial features.[1204] Similarly, allegiance may sometimes be determined with relative ease by a proxy characteristic. For example, at the

[1199] See n 1195 above.

[1200] See text to n 504 above.

[1201] M Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in S Yee and W Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, London 2001) 330.

[1202] GC III, art 5 (in case of doubt as to whether a person is entitled to POW status, he or she is to enjoy the protection of GC III until his or her status is determined by a competent tribunal) per analogiam.

[1203] cf XIXth International Red Cross Conference, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War* (ICRC 1956) 82 (citing the principle *in dubio pro humanitate* as applying in the event of doubt as to the extent of anticipated civilian loss caused by an attack); but see Hoffmann, 'The Perils of Judicial Construction of Identity' (n 1177) (arguing that the ICTY's approach is wrongly based on the principle *in dubio pro humanitate* due to its underlying role as a criminal court, which should instead be acting *in dubio pro reo*).

[1204] However, modern research into ethnic diversity suggests that people are less capable of distinguishing members of individual ethnicities than they tend to believe. See, in particular, James Habyarimana and others, 'Ethnic Identifiability: An Experimental Approach' (2005) Unpublished manuscript (Georgetown University); James Habyarimana and others, 'Placing and Passing: Evidence from Uganda on Ethnic Identification and Ethnic Deception' (2007) Paper Presented at the 2007 Annual Meeting of the American Political Science Association; James Habyarimana and others, *Coethnicity: Diversity and the Dilemmas of Collective Action* (Russel Sage Foundation 2009) 36–67 (chapter on Ethnicity and Ethnic Identifiability).

time of the conflict in Bosnia and Herzegovina, religious affiliations with Catholicism, Orthodox religion, and Islam had stabilized and hardened into group-level ethnic consciousness associated with the Bosnian Croat, Serb, and Muslim ethnic groups respectively.[1205] The fact of membership in one of these religious groups was thus a highly accurate proxy for the determination of effective allegiance of a given person.

Third, the determination of allegiance will normally be ascertainable by the conduct of the conflict party in question towards a putative protected person. If he or she is treated as a potential threat to the relevant conflict party, such treatment would amount to a good indication that the person is perceived as owing his or her allegiance to the enemy. This can be well illustrated on the example of the Bosnian Muslim members of the HVO during the armed conflict in Bosnia and Herzegovina. Initially these persons joined the HVO of their own will, having even reportedly sworn allegiance to this non-State armed group.[1206] However, after an attack on a HVO military base, in which some of them participated, the HVO authorities started perceiving this whole group as a threat.[1207] The leadership of the HVO then ordered for the Muslim members to be disarmed and detained *en masse*.[1208] For the ICTY, this conduct was sufficient to hold that these persons 'were perceived by the HVO as loyal to the [Bosnian state army]' and thus protected persons within the meaning of article 4 of GC IV.[1209] It is true that in practice, this approach may mean that virtually all victims of internationalized armed conflicts would benefit from the protected persons status. As Sassòli and Olson observe, 'a State

[1205] Robert J Donia, *Bosnia and Hercegovina: A Tradition Betrayed* (Columbia University Press 1995) 80–85.

[1206] *Prlić* Trial Judgement (n 10) vol 3 [609].

[1207] ibid.

[1208] ibid.

[1209] ibid [610]–[611]; see also *Duch* Trial Judgement (n 144) [426] (similarly basing the determination of protected person status on *perceived* allegiance).

will only rarely abuse those who maintain their allegiance to it'.[1210] Similarly, once a conflict party perceives a person as effectively loyal to the enemy, the probability of adverse consequences for this person will increase exponentially. Nevertheless, the approach is well in tune with the ongoing trend of humanization of IHL identified in the historical section of this chapter and as such, it is submitted that the expanded scope of protection is an advantage, not a disadvantage of this line of argument.

In conclusion, the designation of protected persons in internationalized armed conflicts on the basis of the allegiance test should be seen not only as conceptually viable and generally compatible with the text of the Fourth Geneva Convention, but also as practically possible. Finally, it should be mentioned that the determination of allegiance need not be based only on the criterion of ethnicity. If the conflict in question is not inter-ethnic in nature, but it instead arises from ideological confrontation, allegiance may be determined by political or ideological factors.[1211] For example, in the *Duch* case, the ECCC considered certain Cambodian nationals as protected persons simply due to the perception on the side of the government that they were 'Vietnamese sympathizers' and the court did not further elaborate on their actual ethnicity.[1212] The analysis advanced here has primarily discussed the criterion of ethnicity due to the detailed treatment that this factor has received in the available international jurisprudence. However, it is of course recognized that allegiance may be determined by reference to other comparable factors, as well.

[1210] Sassòli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (n 1156) 744.

[1211] Tse (n 1180) 419 (referring in this connection to 'commitment to communism' as such an ideological factor potentially applicable in the context of the conflict in Malaysia, in which the Malaysian leftist insurgents were supported from the outside by Indonesia).

[1212] *Duch* Trial Judgement (n 144) [426].

5. Conclusions

Together with combatant status, belligerent occupation is one of the two main concepts that have resisted the trend of confluence between international and non-international armed conflicts. This chapter has considered whether and to what extent the law of belligerent occupation may apply to conflicts internationalized in one of the ways put forward in this thesis.

The main challenge identified in this chapter arises out of the fact that, similarly to traditional NIACs, internationalized armed conflicts begin in the territory of a single State, whereas according to the orthodox understanding of the law of belligerent occupation, this body of law is based on a duality of warring States, their territories and populations. In response, I put forward a pro-humanitarian progressive understanding of this area based on a thorough historical analysis, consideration of the main conceptual and practical objections, and a tripartite positive case for the application of the law of occupation in internationalized armed conflicts.

In addition to enabling the conclusion that it is indeed possible for the concept of belligerent occupation to operate in modern internationalized conflicts, the chapter also provided workable criteria on the basis of which the extent of this application may be determined in practice. It is therefore hoped that the argument presented here will at least in a small share contribute towards the ongoing trend of humanization of war.

CHAPTER 5

CONCLUSION

This study has sought to argue for a particular interpretation of the concept of internationalized armed conflict in international law. In the ever more globalized international system, armed conflicts rarely if ever remain isolated from any foreign involvement and confined to the territory of one State. This holds true for virtually all major conflicts that have shaped the post-Cold War era: ex-Yugoslavia, Rwanda, Afghanistan, Iraq, Libya, Syria, and so on. As I am typing these concluding words, the armed conflict in eastern Ukraine is unfolding, with claims made on both sides of the dispute as to the extent of Russian involvement in the fighting.[1213] The topic of this work only seems to have become more topical since the beginning of the research project a few years ago.

[1213] Compare, eg, Laura Payton, 'Ukraine to Get Helmets, Vests from Canada to Help Protect Border' *CBC News* (7 August 2014) <http://www.cbc.ca/news/politics/ukraine-to-get-helmets-vests-from-canada-to-help-protect-border-1.2729999> accessed 1 October 2014 (reporting a statement of a Russian diplomat that the 'conflict in Ukraine is an internal conflict and there is no Russian involvement in this conflict'), with Geoff Dyer, 'US Says Images Show Russian Attacks on Ukraine' *Financial Times* (27 July 2014) <http://www.ft.com/cms/s/0/2c22f4bc-15a5-11e4-ae2e-00144feabdc0.html> accessed 1 October 2014 (reporting US government 'accusations of direct Russian military action against Ukraine'); see further text to nn 4–6 above.

A challenge to the classic understanding

Strangely for the modern observer, but rather more understandably when seen in the historical perspective, the law of armed conflict does not befit conflicts which straddle borders but do not commence as clashes between fully fledged sovereign States. The past decades have witnessed numerous conflicts break out in the territory of a single State and later acquire international characteristics of varying degree and nature. Yet, the law forces each such conflict into one of two straitjackets sewn after World War II and adapted very little since: it must either be a non-international, or an international armed conflict.

The choice is of much more than just semantic consequence. Even though the famous *Tadić* decision on jurisdiction[1214] set in motion a process of confluence between these two main types of armed conflict, a number of major differences have remained. Various writers place emphasis on different areas of IHL, but two matters are arguably most generally accepted as those that have withstood this trend of confluence, namely the regulation of combatancy and the law of belligerent occupation. Should a conflict change its nature from a NIAC to an IAC (in other words, become 'internationalized'), the consequences in these areas would, in principle, be most profoundly felt.

That such a transformation of the legal nature of a conflict is conceivable is certainly not a novel observation. Already in the 18th century, Emmerich de Vattel observed that if an internal conflict acquires a certain set of characteristics—focussing on the strength of the rebels and the intensity of the fighting—it must be treated in the same way as an international conflict.[1215] As international reality and international law developed, so did these conditions. However, Vattel's principle remains: the accumulation of certain prerequisites alters the nature of an internal conflict and renders

[1214] *Tadić* Decision on Jurisdiction (n 10).

[1215] de Vattel (n 52), book III, ch XVIII, §§292–295.

the norms governing IACs applicable to the conflict in question. This, at the core, is the meaning of conflict internationalization.[1216]

However, the law of IAC, of which the norms on combatant status and belligerent occupation form a part, was drafted with 'standard' (or 'classic') inter-State armed conflicts in mind. A classic IAC—as, for example, the 1980–88 First Persian Gulf War between Iraq and Iran—would be characterized by the participation of two sovereign States, each with an effective government and a clearly defined territory and population. The conflict would be symmetric in nature and engage 'state armies of roughly equal military strength and of comparable organizational structures.'[1217] However, if a conflict were to begin in the territory of one such State as a NIAC and only gradually evolve into an IAC, it would by no means necessarily result in a standard IAC situation. Therefore, some of the norms of the law of IAC premised upon the standard two-State model might be applicable to such internationalized armed conflicts only with difficulty or not at all.

Process of internationalization

In order to construct an interpretive approach providing for the situations of internationalized conflicts, it is first necessary to understand the process of internationalization and its various modalities. In chapter 2, I argued that four distinct modalities of internationalization have emerged thus far in international law. The first two of them bring about situations that may be subsumable under the terms of common article 2 and since these are the closest to the notion of standard IACs described above, they could be described as instances of 'standard internationalization'. The remaining two modalities are seen as cases of 'complementary internationalization', because they are to

[1216] See chapter 1, section 2 above.

[1217] Banks (n 538) 5.

be treated as international although they ostensibly do not meet the conditions in common article 2 and as such, they complement the two standard ones.

First, an internal conflict is internationalized if a third State or international organization intervenes in the conflict ('external standard internationalization').[1218] In order to bring about the internationalizing effect, the intervention must be of military nature, sufficient intensity, and conducted without the consent of the territorial State. It may be direct or indirect, but if it is the latter, the involvement of the outside actor must amount to a use of force through a non-State armed group engaged in the conflict in question. A good recent example is the 2011 Libyan conflict: assuming the veracity of the reports concerning the establishment of a joint operations centre for the co-ordination of NATO and rebels' military operations, the conflict should be seen as internationalized by NATO's indirect intervention.[1219]

Second, an internal armed conflict is internationalized if the parent State disintegrates within the duration of the conflict. Under traditional international law, stability and permanence of control—conditions by definition incompatible with the existence of an armed conflict—were required for the emergence of a new State. However, the post-1945 era brought about situations in which new States were formed during an armed conflict, both within and outside of the context of decolonization, including the cases of Guinea-Bissau in the 1970s and ex-Yugoslavia in the 1990s. These examples highlight the situations in which internal development brings about a common article 2 situation and hence can be described as instances of 'internal standard internationalization'.[1220]

[1218] See chapter 2, section 2 above.

[1219] See further Mačák and Zamir (n 30) 418–423.

[1220] See chapter 2, section 3 above.

Third, an internal armed conflict waged in furtherance of the self-determination of a people ('war of national liberation') may become international *ex lege* on the basis of article 1(4) of Additional Protocol I. In theory, this provision was designed to internationalize qualifying conflicts inside the territories of States Parties to the Protocol without the need for any further international element. In reality, the provision was heavily criticized for its political and subjective nature and has never actually been applied. As its purported effect was to internationalize such conflicts vis-à-vis all subjects of international law and irrespective of the reaction of the territorial State, this modality can be denoted as 'absolute complementary internationalization'.[1221]

Fourth, an internal conflict may be internationalized on a relative basis, with effects limited to the non-State actor engaged in the conflict and a third party that is acting towards such non-State actor in a way designed to activate the law of IAC as between these two subjects. I have argued that this effect may be brought about by way of the customary doctrine of recognition of belligerency; through a unilateral decision of the territorial State; and by the conclusion of a special agreement under common article 3. The archetypal examples of instances of this 'relative complementary internationalization' have included the 1861–65 American Civil War (recognition of belligerency) and some sub-conflicts in the Yugoslavian Civil War in the 1990s (special agreement).[1222]

Together, these four modalities represent a comprehensive map of conflict internationalization in contemporary international law. The relationship between the 'standard' and 'complementary' forms of internationalization exemplifies the horizontal nature of international law.[1223] Even though common article 2 contains a (standard)

[1221] See chapter 2, section 4 above.

[1222] See chapter 2, section 5 above.

[1223] On the horizontal nature of international law, see, eg, Rosalyn Higgins, *Problems & Process: International Law and How We Use it* (Clarendon Press 1994) 1; Malanczuk (n 403) 3; Cassese, *International Law* (n 403) 5–

definition of international armed conflicts, States in their law-creating capacity may generate norms, conventional and customary, which complement that definition. Therefore, in the two latter-mentioned cases, conflicts are internationalized even if they do not involve two States as belligerent parties.

It is certainly possible that further complementary modalities will appear in the future. However, their creation would have to follow the rules on the formation of international law. In other words, a new multilateral treaty may define a new class of conflicts as international just as article 1(4) AP I did in 1977. Likewise, with sufficient State practice and *opinio juris* to the effect that some conflicts, such as those in which belligerency of the non-State party is recognized, should additionally be treated as international, a corresponding norm of customary law may emerge. However, without such development, the nature of the conflict must be considered on the basis of the primary mechanism of standard internationalization and by reference to common article 2.[1224]

A further complication is brought about in situations that feature more than two conflict parties. Naturally, these are a logical consequence of conflicts internationalized by outside intervention. But it is conceivable that other forms of internationalization develop into such complex conflict situations, as well. A workable model is thus necessary in order to determine whether to consider such situations as a single internationalized armed conflict or a number of independent international and non-international armed conflicts. I have argued in favour of such model based on the

6; Eileen Denza, 'The Relationship Between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) 418.

[1224] But see, eg, Pinto (n 181) 464–465 (arguing that civil wars with intervention against the established government and in support of the insurgents should be considered as NIACs because the political objective guiding the conduct of the parties, namely the overthrow or the retention of the government, is non-international in nature). On the basis of the foregoing, such views have to be rejected as incorrect.

retention of autonomy of the allied conflict parties: once the autonomy is foregone and replaced with a single use of force, the law of IAC applies 'globally' to the situation at hand. Until then, the situation should be seen as 'mixed', in other words as a set of mutually independent conflict pairs.[1225]

Effects of internationalization

Once the process of internationalization is understood, one can turn to the effects this process brings about. The study has focussed on two areas of IHL that are considered to have maintained markedly different normative frameworks in NIACs and IACs, respectively. These are the matters of combatant status and belligerent occupation. The study has subjected each to a close scrutiny from the perspective of their historical development, objections advanced against the extension of the applicability of the relevant law, and practical application to internationalized conflicts as such.

Combatant status

In chapter 3, I argued that fighters belonging to non-State armed groups participating in internationalized armed conflicts are in principle eligible for combatant status. This is not an uncontroversial position. Indeed, the conventional understanding in the literature is that members of armed groups do not normally benefit from combatant status. Moreover, States have generally been portrayed as very reluctant to extend the benefits of such status to persons fighting for non-State armed groups. This has variously been justified by the States' interest in safeguarding their sovereignty; their desire to subject such fighters to prosecution; and by the purported inability of non-State actors to abide by the supposedly onerous norms of IHL.

[1225] See chapter 2, section 6 above.

However, historical scrutiny offers a more nuanced account. Practically since the time the distinction between combatants and non-combatants solidified into law, the applicable rules have permitted members of at least some non-State armed groups to benefit from combatant status. At various times in the history of regulation of armed conflicts, these have included militias and volunteer corps; armed forces professing allegiance to a non-recognized authority; and national liberation movements.[1226] Moreover, an examination of the object and purpose of the regulation of combatancy resulting from this historical development further supports a pro-humanitarian interpretation of the applicable law. A wholesale denial of combatant status to fighters in internationalized armed conflicts would be incongruous with the principles at heart of this area of law, namely the principles of distinction and equal application.[1227]

Although some of the objections levelled against the extension of status to combatants belonging to non-State actors carry certain force, on the whole they do not convince that such status should be denied across the board in all internationalized conflicts. The strongest objection relates to States' sovereignty or, more precisely, to their fear that it would be impermissibly diluted by placing non-State fighters on par with State armed forces. I argue, however, that this objection is misplaced in some types of internationalized conflicts and even in the remaining ones, upon unpacking it translates into a desire oft-attributed to States to protect their sovereignty by retaining the right to prosecute these fighters—i.e. it transforms to a separate objection of prosecution. Still, in practice, more often than not, States refrain from prosecution, and for good reason. The threat of prosecution for mere participation in hostilities amounts to a formidable disincentive to abide by the law on part of the non-State actors. Therefore, concerns of

[1226] See chapter 3, section 2 above.

[1227] See chapter 3, section 3 above.

efficiency are shown to operate strongly against the objection of prosecution. Finally, the third frequent objection of inability is erroneous insofar as in fact, the abidance by the rules related to combatant status does not prove to be particularly onerous for non-State actors under scrutiny.[1228]

Although the three key objections are shown not to exclude the extension of combatancy to non-State actors in principle, it is another matter to determine whether a concrete member of a non-State armed group should benefit from this extension in practice. I argued for a three-pronged approach dependent on the applicable legal framework and the nature of the armed forces of the non-State actor. First, the criteria for combatancy are the most lenient for members of regular armed forces in conflicts governed by the Third Geneva Convention only, as these persons need not meet the 'four traditional conditions' from article 4A(2) of the Convention. Second, members of irregular armed forces in such conflicts must meet these conditions, as well as the criterion of belonging to a Party to a conflict. Nevertheless, it is conceivable that they would qualify for combatancy, as demonstrated on examples from internationalized conflicts ranging from the antiquated Boer War to the relatively recent Yugoslavian Civil War. Third, fighters in conflicts to which AP I applies as well may paradoxically find the requirements in that framework more difficult. Although the Protocol does not distinguish between regulars and irregulars anymore, its requirement of being 'under a command responsible' to a conflict party may be harder to meet for some non-State armed groups than the GC III requirement of 'belonging'. Nonetheless, such armed groups would be assisted by the 'savings clause' in article 44(6) of the Protocol, which would pave the way to combatant status even for them.[1229]

[1228] See chapter 3, section 4 above.

[1229] See chapter 3, section 5 above.

Belligerent occupation

In chapter 4, I argued in favour of the applicability of the law of belligerent occupation to internationalized armed conflicts. Again, this view cannot be said to benefit from universal acceptance. After all, the law of belligerent occupation is premised on the 'classic' inter-State symmetric warfare characterized by a duality of territories, populations, and legal orders. In contrast, at the outset of an internationalized conflict, such a duality is noticeably absent, seemingly supporting the orthodox view of restricted applicability.

Such a view would, I have argued, be at odds with the trends apparent in the historical development of the law of belligerent occupation. First, in spite of the general grounding of this branch of law in a State-centric paradigm, several isolated developments have contemplated the possibility of non-State actors becoming belligerent occupants of a portion of State territory. The Lieber Code foresaw this effect with respect to armed groups recognized as belligerents and the First Additional Protocol extended rights and duties of occupation law to qualifying NLMs. Second, the law of belligerent occupation has undergone a fundamental transformation as part of a general trend of individualization and humanization of international law. As a result, it should no longer be seen as a simple brake on inter-State relations and a protector of States' interests, elites, and institutions. Instead, and this is crucial for the overall argument of the thesis in this part, the law has gradually brought individuals' interests to the fore, putting the persons before the institutions and individuals before States.[1230]

These historical trends make it easier to refute objections levelled against the extension of applicability of occupation law to non-State actors. The first one considered here was of a conceptual nature, doubting the non-State actors' capacity to have rights

[1230] See chapter 4, section 2 above.

and duties under the law of occupation at all. In response, I argued in favour of a view ascribing at least limited legal personality onto armed groups under IHL. Second, the objection of sovereignty returned for an *encore* in new garb as a claim that occupation law may only be seen as applicable to relationship of two sovereigns. I contended that the modern law of occupation should better be seen as sovereignty-agnostic: conservationist and humanitarian, but blind to the sovereign status of the conflict parties or its absence. Third, the objection of inability posed perhaps the greatest challenge vis-à-vis non-State actors in this context. Happily, its import is limited to some armed groups only and, moreover, it is neutered to some extent by the safeguards inherent in the law of occupation, which bolster the occupant's capacity to comply with the law.[1231]

In the final move, I put forward a tripartite positive case for the application of the law of belligerent occupation to internationalized armed conflicts. First, from a temporal perspective, the law applies once the parties have sufficiently consolidated their territorial control. Notably, this moment may and typically will arrive later than the point of internationalization itself. Second, the designation of territory subject to the law of belligerent occupation is heavily dependent on the type of internationalization in question, but specific guidelines may be identified showing that it is not an insurmountable obstacle as some believed. Third, the personal scope of application of this body of law benefits from the rich jurisprudence of the ICTY. On its basis, I argued that the concept of nationality, a fixed legal status firmly associated with standard IACs, may in internationalized armed conflicts be replaced by an alternative concept of allegiance.[1232]

[1231] See chapter 4, section 3 above.

[1232] See chapter 4, section 4 above.

Common features

Although the regulation of combatant status and belligerent occupation are separate areas of IHL, insofar as their applicability to internationalized armed conflicts is concerned, some common features can be identified.

First, the historical analysis of the development of both of these areas has confirmed that extension of the law of IAC to non-State actors is not an unprecedented novelty. On the contrary, the possibility and desirability of such a conceptual reinterpretation for the purposes of internationalized conflicts is underscored by the ongoing trend of humanization of international law.

Second, objections that could conceivably be or have been raised against such an extension on a general level do not appear convincing upon closer scrutiny. They are either better seen as limited in their effect to traditional NIACs or apply to various types of internationalized conflicts with varying extent (or not at all). In addition, IHL's internal safeguards further weaken the practical import of some of these objections.

Third, moving to the practical level, it has been shown that this conceptual approach is robust enough to withstand application to concrete circumstances arising in actual internationalized armed conflicts. To this effect, the study has put forward a specific applicability approach for each of the two areas under scrutiny informed by examples of State practice.

Final remarks

On the whole, the study thus presents an argument in favour of extensive application of IHL to internationalized armed conflicts. However, 'extensive' should certainly not be seen as identical to 'exhaustive'. In addition to the moderately optimistic picture painted thus far, the study has also uncovered gaps that cannot be bridged by interpretation. A

number of examples stand out. With respect to combatancy, the modification of the GC III criterion of 'belonging' to one of 'responsible command' found in AP I may limit the availability of combatant status in certain internationalized conflicts.[1233] Furthermore, in conflicts internationalized by outside intervention, the *lex lata* concerning the belligerent occupation by the parent State of a territory held by a non-State actor is uncertain at best and the virtual absence of practice gives little hope for much change in the future.[1234] Finally, some, although definitely not all, non-State actors will indeed lack the ability to abide by some of the relevant IHL norms, frustrating already on a theoretical level the utopian ideal of general compliance in internationalized armed conflicts.[1235]

It remains open for future research whether these gaps can be filled and if so, how this can be achieved. Perhaps we simply have to acknowledge that the gaps are an unfortunate corollary of the Westphalian paradigm still prevailing in international law. Even though this view may appear to be morally problematic—as it leads to 'glaring discrepancies in the protection of victims of acts that are "similar" or even identical'[1236]—perhaps it is inevitable given the enduring distinction between IACs and NIACs in international law. Maybe these gaps do not in fact amount to a diagnosis of any severe predicament and we should not succumb to normative hypochondria: 'Humanitarian law is basically fine.'[1237]

Conversely, it may be that challenges brought about by internationalized armed conflicts would best be dealt with by way of a new multilateral instrument, perchance a

[1233] See chapter 3, section 5.2 above.

[1234] See chapter 4, section 4.2 above.

[1235] See chapter 3, section 4.3 and chapter 4, section 3.3 above.

[1236] Text to n 506 above.

[1237] Gabor Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror" ' (2003) 27 Fletcher Forum of World Affairs 55, 69.

fourth Additional Protocol to the Geneva Conventions. Calls for such development have been made on a number of occasions.[1238] Yet their humanitarian desirability seems to be indirectly proportionate to their prospects of success. Any revision of IHL in this area would have to get a broad coalition of States on board,[1239] reconcile the views of some of them with those propounded by the ICRC,[1240] and remember to bring the non-State actors to the negotiating table, too.[1241] In sum, it may well be that in the foreseeable future, the adoption of such an instrument shall remain the subject of academic imagination.

The study paves further avenues for research. It has been said that several matters regulated differently in IACs and NIACs remained outside of the scope of the thesis primarily for reasons of space, perhaps the foremost among them the treatment of detainees.[1242] The framework of analysis proposed in chapters 3 and 4 could further be extended to such areas, bringing the scope of the analysis closer to covering the full spectrum of IHL. Similarly, the study has largely avoided delving into the material scope

[1238] See, eg, Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (n 140) 157; M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2007–2008) 98 Journal of Criminal Law and Criminology 711, 808; Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (n 33) 163; Gregory Rose, 'Preventive Detention of Individuals Engaged in Transnational Hostilities: Do We Need a Fourth Protocol Additional to the 1949 Geneva Conventions?' in William Banks (ed), *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press 2011) 63; Watts (n 632) 165.

[1239] cf Rose (n 1238) 63; see also Statement of Martin Eaton of the UK delegation to the First Periodical Meeting of States Parties to the Geneva Conventions on Humanitarian Law, held in Geneva in January 1998, reproduced in Geoffrey Marston, 'United Kingdom Materials on International Law 1998' (1998) 69 BYBIL 433, 605.

[1240] cf Remarks of Professor Yoram Dinstein at the Book Launch of Michael Bothe and others, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff 2013) (Oxford, 10 July 2014) (noting that the passage of nearly forty years without a substantial revision of the body of IHL is the result of a 'chasm' between the ICRC and the US that had developed in the post-1977 era) (notes from the event on file with author).

[1241] cf Marco Sassòli, 'Engaging Non-State Actors: The New Frontier for International Humanitarian Law' in Jean-Damascène Gasanabo (ed), *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law* (Geneva Call 2007) 9.

[1242] See chapter 1, section 1.3 above.

of application of individual rules of IHL, particularly those of the law of belligerent occupation.[1243] Although to do so would necessitate a much larger and most likely collaborative project reminiscent of the ICRC study on customary international humanitarian law[1244] or the Tallinn Manual on the International Law of Cyber Warfare,[1245] this study could form the cornerstone of such an endeavour. Finally, another potential direction of future research would be to explore the implications of the findings in this study for the narrowing gap between IACs and NIACs in international law.[1246]

* * *

Immediately after observing that every age has its own kind of war,[1247] Carl von Clausewitz added a word of advice to academics seeking to analyse wars of any period, present and future. He mandated that 'the theorist must scrutinize all data with an inquiring, a discriminating, and a classifying eye.'[1248] It has been the aspiration of this study to do just that with respect to the analysis of a class of conflicts which have a good claim to be considered the wars of our own age: internationalized armed conflicts.

In the final evaluation, it appears the father of the modern notion of internationalization, Dietrich Schindler, was rather correct when he quipped that this area was full of legal complexities and permitting no easy answers.[1249] Yet I have helpfully been led through the thickets of research into internationalized conflicts by the somewhat

[1243] See chapter 4, section 4 above and in particular the text to n 1049 above.

[1244] *ICRC Study* (n 18).

[1245] Schmitt, *Tallinn Manual on the International Law applicable to Cyber Warfare* (n 1049).

[1246] See, eg, Sarah Cleveland and Daniel Bethlehem, *Project on Harmonizing Standards for Armed Conflict* (Columbia Law School Human Rights Institute, work-in-progress).

[1247] See n 1 above.

[1248] von Clausewitz (n 1) 593–594.

[1249] Schindler (n 3) 256.

more optimistic adage preserved by Stanislaw Nahlik and also quoted at the very beginning of this thesis, according to which war is the well from which the science of the law of nations was drawn.[1250]

Accordingly, I hope that by offering a new conceptualization of internationalized armed conflicts in international law as applied to two controversial areas of the law of armed conflict, the present study will contribute to the understanding of its subject matter and perhaps, in a modest measure, strengthen the ongoing trend of humanization of war.

[1250] Nahlik (n 2) 189.

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