INSTITUT DE HAUTES
ÉTUDES INTERNATIONALES
ET DU DÉVELOPPEMENT
GRADUATE INSTITUTE
OF INTERNATIONAL AND
DEVELOPMENT STUDIES

The Protection of Civilians against the Effects of Hostilities under the International Humanitarian Law of Non-International Armed Conflict

THESIS
submitted at the Graduate Institute
in fulfilment of the requirements of the
PhD degree in International Studies

by

Emilia RICHARD
(Vaud)

Thesis N° 1038

Geneva
2014

The Protection of Civilians against the Effects of Hostilities under the International Humanitarian Law of Non-International Armed Conflict

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Sur le préavis de M. Andrew CLAPHAM, professeur à l'Institut et directeur de thèse, de M. Andrea BIANCHI, professeur à l'Institut et membre interne du jury, et de Mr Jann KLEFFNER, Associate Professor, Head of the International Law Centre, Swedish National Defence College, Stockholm, Sweden et expert extérieur, le directeur de l'Institut de hautes études internationales et du développement autorise l'impression de la présente thèse sans exprimer par là d'opinion sur son contenu.

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Directeur

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RESUME / ABSTRACT
(1700 caractères maximum espaces compris)

Titre de la thèse / Title of thesis : La protection des civils contre les effets des hostilités dans le cadre du droit international humanitaire des conflits armés non internationaux / The Protection of Civilians against the Effects of Hostilities under the International Humanitarian Law of Non-International Armed Conflict

Le manuscrit est la première étude exhaustive sur la protection des civils contre les effets des hostilités dans le cadre du droit international humanitaire des conflits armés non internationaux. Ce travail revisite certaines hypothèses de par trop usées, évite le chemin tentant de simplement argumenter pour une application du droit des conflits armés internationaux par analogie et questionne si nous n'avons pas été trop prompts à nous précipiter pour appliquer le droit de la guerre à ce type de conflit armé, au péril de la population civile. Cette thèse constitue une importante contribution au débat académique, ainsi qu'au débat entre Etats et acteurs humanitaires sur certains des concepts de base les plus pertinents qui régissent la réglementation internationale de la conduite des hostilités dans les conflits armés non internationaux.

The manuscript is the first comprehensive in-depth study on the protection of civilians against the effects of hostilities under the international humanitarian law of non-international armed conflicts. This work revisit some well worn assumptions, avoids the tempting path of simply arguing for an application of the law of international armed conflict by analogy and goes on to question whether we have not been too quick to rush to apply the laws of war to this type of armed conflict at the peril of the civilian population. This thesis is an important contribution to the scholarly debate and the debate amongst states and humanitarian actors on some of the most pertinent basic concepts that govern the international regulation of the conduct of hostilities in non-international armed conflict. .

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With these lines, I would like to express my immense gratitude to the people who accompanied, supported and encouraged me throughout the journey that constituted this thesis. Doing a Ph.D. is often considered as a solitary practice. Indeed, the candidate is alone when she has to take the crucial choices. She is also alone when she has to defend her work that has taken her years to articulate. But in my case, the five years it took me to articulate a coherent thesis and to present this Ph.D. were years of research, discussions and work in a supportive atmosphere with many amazing people that paved my way with great ideas, challenging assertions and encouragements.

First and foremost, my tribute goes to the late Professor Nino Cassese, who inspired and galvanized me. Without him, international justice and the fight against impunity would not be the same. Without him, this research would not have been born, as the idea of my topic is the fruit of a fascinating discussion I had with him, while wandering together, at night, in the old town of Geneva. Importantly, he also taught me to never give up, especially in difficult times. I sorely miss him and his determination to changing the world will always guide me.

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To my family

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List of abbreviation

AP I	Additional Protocol I
AP II	Additional Protocol II
CIHL	Customary International Humanitarian Law
DPH	Direct Participation in Hostilities
ICJ	International Court of Justice
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
LTTE	Liberation Tigers of Tamil Eelam
LRA	Lord Resistance Army
NATO	North Atlantic Treaty Organization

Introduction

At the beginning of the twentieth century, the ratio of military to civilian casualties in war was eight to one.[1] Nowadays, the share has more than reversed as ninety per cent of the victims in armed conflict are civilians.[2] This leap in the proportion of war victims who are civilians has been developing continuously over recent decades. As I write, every day civilians are being killed or injured, their houses, places of worship and hospitals are being destroyed by the use of explosive weapons with wide-area effects in targeted or indiscriminate attacks. This is currently happening on a daily basis in Syria, Democratic Republic of the Congo, Central African Republic, Mali, Somalia, South Sudan, Sudan, Afghanistan, Myanmar and elsewhere. Civilians' lives are being destroyed, the survivors are left in conditions of extreme vulnerability, deprived of their most vital needs, with few opportunities to hope for a better tomorrow.

However, the plight of civilians in war is not new, and non-international armed conflicts are not a new phenomena in military life. From the beginning of human history, belligerents have developed capabilities to defeat their opponents and suppress them. Human history has always been tainted with blood. The record of massacres throughout the centuries is simply astonishing. Furthermore, practically all the colonial wars of the late nineteenth and twentieth century were asymmetrical wars.

But what has dramatically changed is the ratio of military to civilian casualties. Today civilians bear the brunt of the armed violence. What is the most striking is the dramatic development of a new trend: in contrast to incidental, battle-related violence that may harm civilians indiscriminately, we are seeing more 'one-sided' violence targeting civilians directly and intentionally. Data show that campaigns of one-sided

[1] Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Cambridge: Polity, 2001, at p. 8.
[2] 6917th Meeting, United Nations Security Council, 12 February 2013.

violence have significantly increased since the early 1990s.[3] The UN Secretary-General has remarked that 'particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces: they are their principal objects.'[4] Governmental armed forces do not respect civilian immunity, as we can see now in Syria and in the DRC for instance. Therefore, the impact of armed violence on civilians has become incommensurable. The civilian populations account for the vast majority of victims of acts of violence committed by parties to armed conflicts as a result of several factors, including deliberate targeting, indiscriminate and excessive use of force, the use of civilians as human shields and of sexual and gender-based violence, as well as other acts that violate applicable international law.

This dissertation focuses on internal armed conflicts. Since 1945, the vast majority of armed conflicts have been of a non-international character, or as more commonly termed, 'internal' armed conflicts, opposing one or several states to one or several non-state armed groups. International armed conflicts between sovereign states appear to be a phenomenon in distinct decline, as shown by the 2011 UCDP/PRIO Armed Conflict Dataset. Indeed, in 2011, 37 major armed conflicts were active around the world, 6 more than in 2010. 27 of them were of a non-international character, 6 more than in 2010, 9 were considered as internationalized and only 1 conflict was deemed to be 'international'.[5]

The rising number of internal armed conflicts is due to a variety of factors, among them the deliquescence of nation states, the desire to overthrow a government, the desire for secession or independence by particular groups within the boundaries of a state or simply the desire to wage war by particular groups for economic gain. Hence the characteristics of the types of internal armed conflicts are as numerous as are wars

[3] See Stepanova, Ekaterina, "Trends in armed conflicts: one-sided violence against civilians" in *SIPRI Yearbook 2009*, Chapter 2, available at http://www.sipri.org/yearbook/2009/02

[4] Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN.Doc.S/2001/331 (30 march 2001) para. 3.

[5] *SIPRI Yearbook 2012*, Annex 2A, available at http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/. Furthermore, it is to be noted that most obviously, their criteria for internationalized armed conflict would fit my own definition for non-international armed conflict, as those are armed conflict that oppose stated armed forces to non-state actors. This will be discussed in this dissertation.

themselves. Each of them has its own specificities related to its history, geography, politics, sociology, anthropology, religion and ethnicity.

To take into account these highly diversified situations, this study covers all types of non-international armed conflicts, from low intensity armed conflicts to full-blown civil wars. Their common denominator is that they are armed conflicts between a state and one or several organized armed groups, or between organized armed groups. The use of the terms 'non-international armed conflict' and 'internal armed conflict' will be used synonymously.[6]

The proliferation of non-international armed conflicts coupled with the ever-increasing number of civilian casualties compared to combatants draws the observers' attention to the compelling need to protect unarmed populations targeted by belligerents in armed conflicts or victimized as an unintended result of the fighting. There is a seemingly unanimous recognition that civilians should be protected against the effects of armed violence and that the distinction between civilians and combatants must be respected.

The whole notion of protection of civilians is a direct consequence of the atrocities committed during World War II. It started in 1949 with the adoption of the Fourth Geneva Convention on the protection of civilians in international armed conflicts. But the last decade has seen a tremendous development of the idea of the protection of civilians by the international community. This issue has been strengthened in diverse fora and has been elaborated from the points of view of different actors. Accordingly, the question of the protection of civilians can be approached from a multitude of angles of analysis.

At the institutional level, The United Nations is very much involved in the question.
For instance, the United Nations Security Council, to which the Secretary General has already presented twelve reports on the protection of civilians, has held a biennial debate on the protection of civilians in armed conflict for more than ten years now.

[6] This is so with the view to avoid inelegant repetitions. I am however aware of the fact that normally the term 'internal armed conflict' is used in order to capture armed conflicts that are being fought within the boundaries of one state. For a discussion of the different types of non-international armed conflicts, see Chapter 4.

Many discussions focus on issues related to humanitarian access and assistance. Furthermore, since 1999, peacekeeping missions have systematically included the protection of civilians in their mandate, even if they rarely have the necessary resources to implement it. The UN Security Council and the High Commissioner for Human Rights rely more and more often on the use of commissions of inquiry and fact-finding missions to investigate and verify alleged violations of human rights and IHL. The UN Secretariat as well as regional bodies such as the African Union, have developed protection guidelines and operational directives,[7] and multinational armed forces, such as ISAF in Afghanistan, are giving increased attention to the notion of protecting civilians in order to win the hearts and minds of the people.[8] Lastly, in 2005, the United Nations General Assembly adopted the notion of Responsibility to Protect, a concept that offers new grounds for ensuring the protection of civilians from the effects of armed conflict. This new doctrine is, however, hotly debated due to the challenges it encompasses to the sovereignty of states in situations where such states do not protect their own population. However, for now, this is a rather theoretical doctrine (with the exception of the military intervention in Libya in 2011 which was perceived by the international community to be an application of the doctrine). All the above mentioned confirms the growing trend in favour of a strengthening of the protection of the civilian population in armed conflicts, which covers of whole array of different topics.

This research focuses specifically on international humanitarian law (IHL), and more specifically on the law related to the conduct of hostilities. The primary goal of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities according to a careful balance between military necessity and humanity. IHL applicable to non-international armed conflicts has gone through extraordinary changes in the last twenty years, and is still in constant development. This is good news, as up until recently this legal framework was rather sketchy. The problem with any application of IHL to internal armed conflicts is that it remains shaped by states which are still very reluctant to tolerate any interference in their domestic affairs.

[7] Lovell, D.W., "Protecting Civilians During Violent Conflict: An Issue in Context", in *Protecting Civilians During Violent Conflict. Theoretical and Practical Issues for the 21st Century*, (David W. Lovell & Igor Primoratz eds., 2012), at 3.

[8] See generally Civilian Casualty Mitigation CIVCAS. No. ATTP 3-37.31, pt. 1-58 (July 2012). ; UK *Government Strategy on the Protection of Civilians in Armed Conflict*, Foreign and Common Wealth Office (FCO), March 2010.

Historically, IHL was not concerned with conflicts occurring within the territory of empires, or later within states. The supreme principle of sovereignty kept these situations within the *domaine réservé* of the sovereign, as purely domestic affairs, not of concern for other nations. Today we have still not escaped from this situation, when we think about recent situations such as the civil wars in Sri Lanka and Syria. But there are other very clear reasons for this, as we will see throughout this dissertation.

Under IHL, the rules for the protection of civilians in non-international armed conflicts can be divided into two separate categories. The first category deals with the protection needs of those civilians who find themselves in the hands of the other party. It covers questions of detention, violence and abuse of power. This set of protection is commonly called the Law of Geneva. The second category relates to the need of protection for civilians against the effects of military operations and armed hostilities. This category sets limits to the conduct of military operations and is commonly called the Law of The Hague. This dissertation will cover the normative aspects of the protection of civilians related to the second category. The objective is to analyse the legal limits imposed on the belligerents when they conduct their military operations in order for the protection of civilians to be implemented.

The main purpose of this dissertation is to clarify the IHL framework protecting civilians against the effect of hostilities and to propose satisfying answers to some fundamental questions: What is a non-international armed conflict? What is a civilian? What is a civilian object? How are these persons and objects to be protected against direct and indiscriminate attacks? Does the principle of proportionality apply to these types of conflicts? Are disproportionate attacks considered unlawful in non-international armed conflict? How do civilians lose their protection against direct attack? And can a notion of gradation in the use of force be considered under IHL? Indeed, if quite an abundant amount of scientific literature already exists on the issue of non-international conflicts, there seems to be a lack of thorough research which seeks to clarify basic concepts such as these, and which focuses specifically on the idea of civilians and their legal protection in non-international armed conflicts.

This dissertation is written in fourteen chapters, each having a particular objective. Chapter 1 describes the historical development of the concept of civilian immunity in human history. Indeed, the necessity of distinguishing between non-combatants and combatants in war in order to spare the former is not a new idea. This concept has developed thanks to branches such as philosophy, religion, ethics, law and culture. In order to understand the latent idea behind the concept of civilian immunity, it has been necessary to describe its historical development, starting from Antiquity. Chapter 1 analyses the beginnings of the codification of the laws of war, up until 1949, the date of the adoption of the relevant Geneva Conventions, whereby the distinction between international and non-international armed conflicts has been entrenched. This Chapter shows that the idea that certain groups of people should be protected from the killing and wounding in war and from the worst effects of its impoverishment and disruption is an ancient and enduring one.

Bearing in mind the distinction between international and internal armed conflicts that was upheld in Geneva in 1949, the objective of Chapter 2 is to carefully survey the applicable IHL treaty legal framework for the latter category. It discusses the general antipathy that the international community - being constituted by sovereign independent states - had, until recently, for any international regulation of internal armed conflicts; and particularly the issue of substituting international humanitarian law for their own domestic law. After having reviewed the sketchy IHL treaty law applicable to internal armed conflicts, international criminal law is analysed, with regard to its potential to constitute an important means by which IHL may be enforced. The argument is made that these two branches of law are inextricably linked together, especially when it comes to internal armed conflicts. Indeed, it is through the lens of war crimes that certain rules of humanitarian law were first shown to be applicable in non-international armed conflicts and that existing IHL rules applicable to internal armed conflicts have been fleshed out by bodies of international law other than international humanitarian law.

Chapter 3 deals with the notion of customary international law as a source for IHL applicable in non-international armed conflicts. It clarifies first that there are customary international norms also applicable in this type of armed conflict and further analyses what is its necessity. The process of establishing customary IHL in

non-international armed conflicts is a far more complicated process than in international armed conflicts, for several reasons that are scrutinized. It is shown that the methodology for customary international law formation in the field of international humanitarian law is structurally different than for other branches of international law. For instance, it is argued that the traditional two-element approach emphasising state practice is not adaptable for explaining the formation of customary IHL in non-international armed conflicts. A more relaxed approach to its identification is analysed. The increasing convergence of the substantive rules for international and non-international conflicts is also discussed. Ultimately, another useful concept to anchor norms essential to the protection of community and human values will be discussed. These are general principles that can, as argued, be used as a legal instrument in order to buttress the customary law method.

After having discussed the IHL legal sources applicable to non-international armed conflict, the objective of Chapter 4 is to identify the different legal criteria that contribute to the identification of these conflicts. Indeed, the qualification of the nature of an armed conflict is a major issue for the determination of the applicable rules of international humanitarian law and the protection of victims in situations of armed violence.

Chapter 5, in turn, is devoted to a discussion of the characteristics of non-international armed conflicts at the turning point of the twenty first century. In order to better understand the difficulties of the application and adequacy of the respective IHL norms to factual situations, different challenges are discussed, such as asymmetry in the fighting, the impact of increasingly blurred lines of distinction and several other factors resulting in the ever increasing risks for civilians and the civilian population caught in the middle of hostilities. The characteristics of the strong party and the weak party to an armed conflict are carefully analysed.

The central question of who exactly are civilians is tackled in Chapter 6, as it is thanks to civilian status that a person is deemed as being protected against attacks under IHL. This set of norms places crucial emphasis on the different categories of individuals, and enacts rules regulating the behaviour of each category. The objective of the chapter is to elucidate how the different categories of persons in the law of

internal armed conflict are to be distinguished from each other, in order for civilians to be clearly identify and protected. This Chapter shows that the very concept of civilian is extremely complicate to understand in civil war. Civilian identity is entrenched with ambiguity, due to the fact that everyone's roles and relationships are part of the conflict in one way or another. From this it follows that the concept of civilian status, as a legal category, is also very ambiguous and highly contested.

Chapter 7 deals with another challenge related to the application of the principle of distinction, that of the identification of a civilian object. In order to have a viable body of law regulating combat operations and sparing civilians and the civilian population from hostilities and their effects, it is essential not only to define who, but also what may not be legally attacked. Civilian objects benefit from an analogous immunity to that of civilian persons. And like civilian persons, civilian objects are defined negatively: everything that is not a military objective will be categorised as a civilian one. Accordingly, the concept of what constitutes a legitimate target or a military objective is central to the principle of distinction and is at the heart of this chapter.

The first and foremost inference from the obligation of distinction between the different categories of persons and objects is that direct or deliberate attacks against civilians or civilian objects are forbidden. This absolute prohibition as applicable in non-international armed conflict is the subject of Chapter 8. The first part of the Chapter deals with this prohibition as contained in treaty and customary IHL for non-international armed conflict. The second part of the Chapter considers how international courts and tribunals have dealt with war crimes related to the prohibition of directing attacks against civilians and civilian objects under international criminal law. We analyse the difficulties faced by the Prosecution of proving the different elements of this crime before an international court. Indeed, the object and purpose of IHL is to protect persons who are not or no longer taking part in hostilities. It is a body of *preventive* law that is normally applied on the battlefield by persons that are not lawyers. This branch of law was therefore not originally created for appraising the individual criminal responsibility of soldiers and commanders, but to guide states in their conduct of hostilities. International criminal law is a body of *post-acts* law, and international courts and tribunals have to cope with the extremely difficult task of applying it while respecting the rights of the accused.

After having analysed the question of the prohibition of direct attack against civilians and civilian objects in internal armed conflicts, Chapter 9 deepens the analysis of the civilians' protective legal framework against unlawful attacks. It addresses the difficulty of distinguishing between categories of persons in non-international armed conflicts due to the intermingling of civilians with military objectives. This problem is at the heart of the prohibition of indiscriminate attacks and the objective of chapter 9 is to examine how, in internal armed conflicts, IHL regulates the actual conduct of hostilities by an attacker, in order for the prohibition of indiscriminate attacks to be implemented in practice. The second part of this chapter is devoted to the issue of how international courts and tribunals have dealt with the war crime of indiscriminate attacks in non-international armed conflict.

The discussion then continues on the other IHL rules governing lawful attacks on military objectives, namely the principles of proportionality and precaution in attack. These rules are extremely important for the issue of the protection of civilians from the effects of armed conflict. Chapter 10 discusses the notion that, despite being protected against direct and indiscriminate attacks, civilians still face the dangers of being the victims of incidental damage, due to the reverberating effects of an attack. Collateral injury and damage to civilians is not *per se* illegal. This question is dealt with by the principle of proportionality in attack, which can be viewed as the cornerstone of this protection and is an important extrapolation of the principle of distinction.

Under IHL, the practical and efficient application of the principle of distinction and proportionality in non-international armed conflict requires measures of precautions. Chapter 11 examines the different types of precautionary measures that need to be applied by attacking and defending parties to the conflict. As most of the precautionary measures are to be applied *to the extent feasible*, when it comes to non-international armed conflict this presupposes that the strong side, which has better military and technologically capacities, will obviously have more duties under the law. This notion of feasibility is duly discussed throughout this chapter.

After having reviewed the principle of proportionality and its attached precautionary measures, Chapter 12 deals with the question of whether, and if so when, an ostensible violation of the principle of proportionality constitutes a war crime under international criminal law. As we will see, the question of what constitutes excessive incidental damage is one of the most controversial questions in the assessment of the legality of possible disproportionate attacks. This is indeed a difficult issue as objective standards for the appraisal of the intended military advantage and the expected collateral damage are virtually non-existent.

At this stage of the argument, it is taken for granted that uninvolved civilians are entitled to protection from direct attack, while still being still subjected to suffer from lawful collateral damage, despite being also protected from indiscriminate and disproportionate attacks. Chapter 13 deals with the delicate issue of direct participation in hostilities. We discuss the question of loss of civilian protection, in order to clarify the limit of the protection civilians are supposed to enjoy against direct attacks. The purpose of this Chapter is the identification of criteria that determine whether and, if so for how long, a particular conduct amounts to direct participation in hostilities, thereby leading to the loss of protection for a particular civilian engaged in such action.

The final Chapter of this dissertation, Chapter 14, discusses a developing legal concept requiring a gradation in the use of force in non-international armed conflicts in IHL. The idea of a restraint on the use of force in direct attacks was proposed by the ICRC in 2009 via a document discussed throughout the dissertation. The ICRC based its argument of restraint on the principles of military necessity and humanity and the pros and cons of this approach are discussed. Bearing in mind the difficulties and criticisms related to the utilisation of the principle of military necessity to insert such a gradation on the use of force, other possibilities are investigated.

The methodological approach adopted for this study has been to consider the issue of the protection of civilians against the effects of hostilities in the law of non-international armed conflict thematically, in a consistent manner and with a typical legal analysis to determine the law on each particular issue. I carried out an exhaustive review of the literature of the relevant treaties, with their Commentaries

and *Travaux Préparatoires,* and of the customary norms as applicable in non-international armed conflict.

In order to appraise these rules in an objective manner, I analysed the process of their formation and crystallisation. This review allowed me to analyse carefully and objectively the literature, doctrine and case law of courts and tribunals, in order to form my own opinion on what the law actually is. In addition, I tried to always put this analysis into perspective with the contemporary challenges of non-international armed conflicts and to provide examples. Some of the examples are fictitious, but most of them are directly drawn from the countless non-international armed conflicts that reality provides us with.

Above all, this is a dissertation about intention, recklessness and suffering. This thesis can be seen as an overly abstract analysis which talks intellectually about violence and atrocities. It may be felt by the reader that I did not include painful illustrations of civilian violence. This was done on purpose, in order to have a cold and legal perspective, not obscured by feelings of disarray and outrage. However, be assured that these feelings have been present in my mind throughout the research and writing of the thesis.

Chapter 1:

The historical development of the concept of civilian immunity

Introduction

The necessity of distinguishing between civilians and combatants in war in order to spare civilians is not a new idea. Branches such as philosophy, ethics, law, culture and religion have played a major role in the development of this concept.[9] In order to understand the latent idea behind this concept, it is therefore necessary to describe its historical development. The idea that certain groups of people should be protected from the killing and wounding of war and from the worst effects of its impoverishment and disruption is an ancient and enduring one. The idea persists that 'there is a category of people who must somehow be set apart from the fury of battle because of who they are, what they do or what they cannot do.'[10] Approaches to the issue of civilian immunity have varied according to places and civilizations and have been influenced by religious concepts and philosophical ideas. As we will see in this Chapter, from the Middle Ages until well into the seventeenth century, discussion of the rules of war in Europe was dominated by theological considerations, although some elements of classical philosophy remained influential.

Despite the astonishing record of massacres throughout the centuries[11], there have been many efforts worldwide to spare civilians during wars, at least in theory. The

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[9] Greenwood, C., "Historical Development and Legal Basis", in *The Handbook of International Humanitarian Law*, (Dieter Fleck ed., 2008), at 15.
[10] Slim, H., *Killing Civilians - Method, Madness and Morality in War* (HURST Publishers Ltd. 2007), at 1.
[11] For instance, you can find a long list of massacres of civilians in ancient history, written by Hugo Grotius in his *On the Law of War and Peace*, 1625.

existence of such a long record of killings could be partly explained by the nature of war before the emergence of the Nation State: 'war was a contest of territories, a pursuit to extend empires, with inhabitants considered part of the war booty and seen as enemies.'[12]

The deaths of civilians, their deliberate targeting, and the violations of international humanitarian law are not new phenomena, and 'history is full of war events during which civilians got caught in hostilities and paid a high price.'[13] 'Armies, armed groups, political and religious movements have been killing civilians since time immemorial.'[14] But the idea of limited war in general, and of immunity of civilians in war in particular, can be seen as an outcome of a process of civilization and humanization of warfare that has its roots in ancient philosophical and religious thinking. In this Chapter we will consider how this idea evolved as a major tradition in philosophy and moral theology in the Middle Ages, and has been systematically developed by philosophers, political and legal thinkers of the modern age 'until it came to be recognized as one of the most important achievements of moral progress.'[15]

Nowadays, the main category of protected people has come to be known as 'civilians', a term that seeks to emphasize a clear contrast between ordinary unarmed people and the armed forces that either defend or attack them. The term implies that a civilian is somehow the logical opposite of his or her military counterparts in modern society. As explained by Slim, 'civilian' is

> 'the word we now rely on to cradle and preserve the ancient idea that mercy, restraint and protection should have a place in war. The civilian label is thus the mark of a very important distinction between combatants and non-combatants in war, between the weak and the strong, those who are active and implicated in the fight and those who are passive and caught up in it. Introducing the civilian idea into a war makes the point that the enemy is not all the same. This modern version of a timeless moral sense gives rise to what

[12] Van Engeland, A., *Civilian or Combatant? A Challenge for the Twenty-First Century* (Oxford University Press. 2011), at 4.
[13] Id. at x.s
[14] Slim, *Killing Civilians - Method, Madness and Morality in War*, at 3.
[15] Primoratz, I., *Civilian Immunity in War* (Oxford University Press 2007), at 2.

> we might call the civilian ethic in war – a certain morality now enshrined in international law which spells out how this special group must be cared for and protected.[16]

However, there has never been unanimity about the moral ideal of the innocent civilian and the ethic of their protection in war. 'Marking out a special category of people called civilians from the wider enemy group in war is a distinction that is not, and never has been, either clear, meaningful or right for many people pursuing and fighting a war.'[17] In addition, despite all the intellectual developments related to the concept of civilian immunity in war, history is full of accounts of massacres. For instance, we can recall the massacre of Melos in 416 BC, when the Athenians besieged the island of Melos during the Peloponnesian War. Ultimately, when they arrived on the island, the Athenians killed all the men, while the women and children were enslaved.[18] We can also mention here the atrocities committed by Attila and his Huns, who 'ground almost the whole of Europe into dust'[19] or the terrible acts committed by the Crusaders, in the name of the Catholic Church, among them the sacking of Jerusalem, which claimed the lives of 40,000 civilians during the siege, final assault, and fall of the city.[20] We could go on citing massacres forever, but the examples provided suffice to illustrate how human history is tainted with civilian blood. The XXth century, however, stands out for one simple fact. At the beginning of the twentieth century, the ratio of military to civilian casualties in war was eight to one; by its end, that ratio was reversed, and is now one to eight.[21] Therefore, we may wonder whether we are witnessing a new trend of total disregard for civilian immunity. Before answering this question, it is necessary here to survey the main important periods in the development of the idea of civilian immunity throughout the centuries.

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[16] Slim, *Killing Civilians - Method, Madness and Morality in War*, at 1.
[17] Id. at 2.
[18] Cartledge, P., "Might and Right: Thucydides and the Melos Massacre", 36 *History Today* (1986).
[19] Ammianus Marcellinus, *Roman History*, Book 31, 575-623 (London: Bohn 1862).
[20] John and Laurita Hills, "The Jerusalem Massacre of July 1099 in the Western Historiography of the Crusades", in 3 *The Crusades*, Benjamin Z. Kedar and Jonathan S.C. Riley Smith (eds.), Ashgate Publishing Limited, 2004. And on the Crusades, see also Amin Malouf, *Les Croisades vues par les Arabes,* 1983.
[21] Kaldor, M., *New and Old Wars: Organized Violence in a Global Era* (Polity Press. 2006), at 8.

First attempts to protect civilians

One of the first known attempts to regulate war can be found in the *Ramayana*. As explained by Weeramantry, in this epic poem there is a little episode:

> 'Rama was told at one stage by his military advisors that there was a hyper destructive weapon that was available and they were inviting him to use it. But of course, so great was the respect for law; it was said to him that you cannot use this weapon without first consulting the sages of the law. These wise people were consulted and they gave their opinion and said that you cannot use this hyper destructive weapon; it will ravage the countryside of the enemy; it will kill a vast number of enemy; that is not the purpose of war. The purpose of war is not to exterminate your enemy and destroy his countryside. The purpose of war, if at all, is to subjugate your enemy so that you can live in peace with him thereafter.'[22]

Another attempt to regulate war can be found in the Old Testament. For instance, Deuteronomy 20:19 puts a limit on collateral damages as well as damages to the environment: 'When you besiege a city for a long time, making war against it in order to take it, you shall not destroy its trees by wielding an axe against them. You may eat from them, but you shall not cut them down. Are the trees in the field human, that they should be besieged by you?'[23]

Basic principles of humanitarian law can be found in various legal, religious, or philosophical sources outside the West. The renowned *Art of War* by Sun Tzu (dated to 500 BC) and the *Manu Smriti*, an anonymous Sanskrit treatise (dated between 200 BC and 200 AD), forbade the killings of prisoners of war. The Code of Manu is the oldest code of Hindu law and speaks of the legal regulation of armed conflicts. It prohibits some weapons because of the wounds they make. It dictates that unarmed soldiers, as well as civilians, cannot be killed. Morality supports the document, along with religious values. That said, it is really law the document talks about, in particular

[22] Weeramantry, C.G., "The Revival of Customary International Humanitarian Law", in *Custom as a Source of International Humanitarian Law*, (Larry Maybee & Benarji Chakka eds., 2006) at 33.
[23] Deuteronomy 20:19

in relation to war: violations of this code would have been judged in a court. In his book, Sun Tzu prescribed humanitarian limitations in the conduct of hostilities.[24] In both documents, the distinction between civilians and combatants appears but is not directly addressed.[25]

Similar rules of warfare can be found in the Greek and the Roman civilisations when they were fighting other civilized states, properly organised, and not conglomerations of individuals living together in an irregular and precarious association. As explained by La Haye, 'the dichotomy between international and internal conflict did not exist at that time, as the respect for the rules of warfare grew from recognition of the nature of the enemy as a civilized and organised group.'[26]

Saint Augustine of Hippo

In the IVth Century, Saint Augustine of Hippo (354 – 430) was a Christian theologian and philosopher who lived in the Roman Africa Province. Saint Augustine is seen as the most important figure in the foundation of the 'just war' theory in Western culture. The doctrine of *just war* was developed first by the Romans and then by the Catholic Church. It holds that a conflict must meet the criteria of philosophical, religious, ethical or political justice, and follow a certain number of conditions to be just. These rules include the protection of civilians. The concept originally goes back to Cicero,[27] and was subsequently developed by St Augustine, and Thomas Aquinas. St Augustine is known as the first person who laid down the principle that 'the final object of war is peace'.[28] Interestingly, this reveals that in its very origin the Christian

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[24] Sun Tzu, *The Art of Warfare.* For example, he commented: 'Generally in war the best policy is to take a state intact; to ruin it is inferior to this. To capture the enemy's army is better than to destroy it, to take intact a battalion, a company or a five-man squad is better than to destroy them … to subdue the enemy without fighting is the acme of skill… The worst policy is to attack cities. Attack cities only when there is no alternative.' Quoted from La Haye, E.L., *War Crimes in Internal Armed Conflicts* (Cambridge University Press ed., Cambridge University Press. 2008), at p. 75, footnote 6.

[25] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 8. See also La Haye, *War Crimes in Internal Armed Conflicts*, at pp. 33-34.

[26] La Haye, *War Crimes in Internal Armed Conflicts*, at 34.

[27] Macus Tullieux Cicero, senator and philosopher, is considered as a father of the theory of "just war". See *Cicero De Officiis* (M. Ponsot trans. Paris: F. Tandou 1864) Cicero believed war must be led justly, which included refraining from attacking unarmed civilians. His thoughts about human treatment during war were very important and integrated into Christian thinking. *See* Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 7.

[28] Augustine, *Epistolae*, CLXXXIX, 6; referred to in Keen, M., *The Laws of War in the Late Middle Ages* (Gregg Revivals. 1965), at 66.

apologetic for war was legal in intention: the object of war was not to chastise sin but to restore harmony by the redress of wrong.[29]

Saint Augustine's theology of just war articulates around the idea that war can only be acceptable when waged for a good and just purpose, rather than for self-gain or as an exercise of power. Therefore, 'the reason for not killing was not based upon ethics or law, but rather on religion.'[30] This is why in order to justify war in a Christian manner, 'St Augustine relied on the convenient fiction that all in the population whose leadership had done wrong shared in the guilt.'[31] In order to justify the killing of people in war, Augustine relied on a guilt-based justification that met the Christian standards of the punitive model of a just war.[32] Therefore, to be clear, in his writings, Augustine did not address the question of civilian immunity, as at that time no distinction was being made between the combatant and non-combatant segments of the enemy population. He simply explained that neither category should be harmed wantonly, but both could be attacked if necessary for victory.[33]

The Pax Dei movement

Five centuries later, from the 970s to the 1030s, despite the dominance of St. Augustine's justification of war - the punitive model of war, and the earlier general rule that the entire population was considered a valid target for attack - the *Pax Dei* movement,[34] originating from what is currently France and linked to the Catholic

[29] Id., at 66. On Just War theory, please see also for instance Fisher, D., *Morality and War, can war be just in the twenty-first century?* (Oxford University Press. 2011), at pp. 64-84; Keen, *The Laws of War in the Late Middle Ages*, at pp. 63-119.

[30] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 9.

[31] McKeogh, C., "Civilian Immunity in War: From Augustine to Vattel", in *Civilian Immunity in War*, (Igor Primoratz ed., 2007), at 80.

[32] For a deeper explanation, please refer to Id., at pp. 62-67.

[33] Id., at 64. For more about Augustine philosophy, *see* Hartigan, R.S., "Saint Augustine on War and Killing: The Problem of the Innocent", 27 *Journal of the History of Ideas* (1966).

[34] The *Pax Dei* or Peace and Truce of God was a medieval European movement of the Catholic Church that applied spiritual sanctions in order to limit the violence of private war in feudal society. The movement constituted the first organized attempt to control civil society in medieval Europe through non-violent means. It began with very limited provisions in 989 AD and survived in some form to the thirteenth century. For Georges Duby, the Peace and Truce of God, by attaching sacred significance to privacy, helped create a space in which communal gatherings could take place and thus encouraged the reconstitution of public space at the village level. (...) In the eleventh and twelfth centuries many a village grew up in the shadow of the church, in the zone of immunity where violence was prohibited under peace regulations. (Duby, "Introduction: Private power, public power", in Duby, ed. *A History of*

church, started to have more and more influence. One of the main aims of the *Pax Dei* movement was to limit political violence in the private wars of feudal societies, and from this perspective, the movement granted a protected status to certain categories of persons and property. It was the first time a differentiation between categories of persons in war was made. The protection of the Church and its resources was clearly a central theme of the Peace movement. But the Canons issued by this movement quickly expanded the categories of person to which protection from attack in war ought to be given. The prohibition on assault started with the clergy members, and was extended gradually to monks, later to nuns and even to widows and noblewomen travelling without their husbands. Later councils extended this principle until it encompassed all unarmed and non-combatant persons. Accordingly, this move was the first step towards a principle of non-combatant immunity. A second step was taken when those engaged in agriculture were added to the category of the immune.[35]

In this respect, the Canons of the *Pax Dei* movement foreshadowed the emergence of the concept of 'civilian' and can be seen as an early manifestation of the pressures for the development of a principle of non-combatant immunity.[36] Accordingly, in medieval Christendom, non-combatant immunity became a key principle expressed in the form of canonical lists where protection was associated with a person's specific role in society. It was seen as an act of chivalry to protect civilians.[37] During the Middle Ages, there was a sort of improvement as war was waged between two armies facing one another, with limited involvement of the civilian population.

At the same period, Islam focused on the prohibition to kill civilians and the distinction which is deeply entrenched and rests on a godly command: killing a civilian demonstrates a lack of *kufr* (faith). Islamic law is very rich in terms of civilian protection, as the Islamic philosophers had produced full-scale treatises on

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Private Life: II. Revelations of the Medieval World (1988:27)). (from: http://en.wikipedia.org/wiki/Peace_and_Truce_of_God#cite_note-0)

[35] Mc Keogh, "Civilian Immunity in War: From Augustine to Vattel", at p. 68. See more generally *Interpreting Violence, Anti-civilian thinking and practice and how to argue against it more effectively* (2007); Head, T. & Landes, R., *Peace of God: Social Violence and Religious Response in France Around the Year 1000* (Cornell University Press. 1992) at 5.

[36] Mc Keogh, "Civilian Immunity in War: From Augustine to Vattel", at 68.

[37] It is important to bear in mind that it is at this exact period that the Crusaders, in the name of Catholic Church, were committing atrocious crimes and that Jerusalem was sacked. On the association of certain roles with protection, see Keen, *The Laws of War in the Late Middle Ages*, at 189.

international law. Ashabani and others had written on the law of War and Peace, the sanctity of treaties, humanitarian conduct, how to treat prisoner of war, etc, which are all the sum and substance of modern international law. An example can be found in the Prophet's teaching as taught by his Commander Habi Sufian. He laid down ten commandments for warfare, which included: do not kill a woman, a child or an old man; do not cut down fruitful trees; do not destroy inhabited areas; do not slaughter sheep, cows, cattle or camel, except for food; do not burn date palms, do not embezzle, etc. All those laws which have to be followed during wartime are laid down as obligations in terms of Islamic teaching.[38] In addition, one of the cornerstones of the Islamic humanitarian philosophy was the distinction between civilians and combatants, and the divine order that civilians cannot be targeted.[39]

Saint Thomas Aquinas

In the South of what is nowadays Italy, eight hundred years after Augustine, Saint Thomas Aquinas (1225-1274), an immensely influential philosopher and theologian in the tradition of scholasticism, famously shifted the basis of the state's authority from the suppression of the consequences of sin to the promotion of the common good. No longer were all rulers seen as having a divine mandate to rule; only those who promoted the common good had a right to the obedience of their subjects.[40] With his *Summa Theologica*, he provided the philosophical basis for the theory of the independent secular state.[41] However, with respect to the moral justification of war, he simply restated the old Augustinian justification of war.[42] The just cause of war was some fault and sin committed by an adversary that needed to be punished and that rendered him deserving of attack.[43] His definition of a just war is a 'war that must be started and controlled by the leader of a State; it should be waged for a just cause; it must be waged for good against evil; law must be respected or established quickly;

[38] Weeramantry, "The Revival of Customary International Humanitarian Law", at 37.
[39] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century,* at 2. Therefore the distinction between civilians and combatants is clearer in Islamic legal sources than in any other document until the Geneva Conventions. See Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 9.
[40] Mc Keogh, "Civilian Immunity in War: From Augustine to Vattel", at 69.
[41] Keen, *The Laws of War in the Late Middle Ages*, at 76.
[42] Mc Keogh, "Civilian Immunity in War: From Augustine to Vattel", at 69, referring to Thomas Aquinas, *Summa Theologiae*, II. II, qu. 40, art. 1. Trans. By Fathers of the English Dominican Province (London: Burns Oates & Washbourne, 1917-22).
[43] Id., at 69, referring to Thomas Aquinas, *Summa Theologiae*, II. II, qu. 83, art. 8, ad 3.

war should be the last resort; and the principle of proportionality must be respected.'[44] This principle is crucial when it comes to civilians, as 'Aquinas made a difference between targeting civilians, which is illegitimate, and the legitimate targeting of military objectives.'[45] He can be considered as one of the precursors of modern international humanitarian law.

It is between the XIIIth and XVIIIth centuries that the changes in the technology and personnel of war led to a growing mismatch between the established guilt-based justification and the military and political realities of warfare.[46] At the end of the Hundred Years War, 'the idea of chivalry, of a united order of Christian soldiers pledged to the armed defence of justice, was a legacy of the age of Crusades which has little significance in the contemporary world of emergent nation states.'[47] A number of European armies had begun to issue regulations for their own internal discipline, which included prohibitions against attack of unarmed civilians. Warfare had become the domain of highly disciplined armies and, with the exception of situations of siege, took place away from population centres. This entailed that the civilian population was not involved.

Secularization

A few centuries after Augustine and Aquinas, Vitoria, Grotius, and Hobbes secularized the concept of "just war theory". It was in the context just above mentioned that Francisco de Vitoria (1486-1546), a preeminent theologian and political theorist of XVIth Century Catholic Europe, made an attempt to clearly establish civilian immunity in war, though this claim remained a difficult one to make within the punitive model of war. The justification for killing combatants remained their guilt, but his innovation was that the immunity of civilians was to rest on their presumed innocence. Vitoria's 'assumption of the guilt of combatants on both sides (unless it was known to the contrary) and of the innocence of non-combatants on both sides (unless it was known to the contrary) would have immense practical benefits,

[44] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 11.
[45] Hartigan, R.S., *The Forgotten Victim: A History of the Civilian,* (Transaction Publishers. 1982) at 40.
[46] For more on this, see McKeogh, *Civilian Immunity in War: From Augustine to Vattel*, at 70.
[47] Keen*, The Laws of War in the Late Middle Ages*, at 246.

for it opened the way to firm *in bello* restrictions on the targeting of civilians.'[48] The legitimate target was narrowed down from the entire population of one's adversary to its combatants alone. This innovation allowed a distinction to be drawn between combatant and non-combatant members of the enemy population: only those who bore arms or were engaged in fighting were to be presumed guilty in the absence of evidence to the contrary. Non-combatants on both sides, regardless of the justice of their causes, were to be presumed innocent unless it could be shown that they knowingly and wilfully promoted injustice and wickedness. As such, non-combatants should not be killed, as the 'deliberate slaughter of the innocent is never lawful in itself.'[49] Innocence is a very powerful moral basis for non-combatants' immunity from targeting. According to Vitoria, killing innocents was a serious breach of natural law.

Hugo Grotius

Despite the attempts of the Christian Church to limit battlefield and civilian casualties, it should be mentioned that major atrocities never stopped being committed. As a result of the decline of the chivalric orders, the invention of firearms, and the creation of armies consisting of mercenaries, the morals of war regressed towards the end of the Middle Ages. Considerations of chivalry were unknown to these armies. Equally, they made no distinction between combatants and the civilian population. 'Mercenaries regarded war as a trade which they followed for the purpose of private gain.'[50] During the bloodiness of the Thirty Years War[51], the work of Hugo Grotius (1583-1645), a jurist in the Dutch Republic, along with that of Francisco de Vitoria, is acknowledged as the analytical basis of the contemporary law of land warfare.[52] First of all, he developed the principle that only sovereign states may legitimately make war. Secondly, he defined the very project of the modern laws of

[48] McKeogh, "Civilian Immunity in War: From Augustine to Vattel", at 71.
[49] Vitoria, "De jure belli*",* 35, in *The Principles of Political and International Law in the work of Francisco de Vitoria*, Extracts with an introduction and notes by Antonio Truyol Serra. Madrid Ediciones Cultura Hispanica, 1946, 88, quoted by Id., at 72.
[50] Greenwood, "Historical Development and Legal Basis", *at* 19.
[51] During the Thirty Years War, which began as a religious conflict between Protestant and Catholics, eight millions civilians were either killed or displaced.
[52] Camins, E., "The past as prologue: the development of the 'direct participation' exception to civilian immunity", 90 *International Review of the Red Cross*, (2008), at 856.

war: 'to regulate, mitigate, and standardize practices of warfare.'[53] According to Grotius, a public war was 'declared at the same time (…) upon all a sovereign's subjects'.[54] Accordingly, the right to kill a public enemy, which arises in war,[55] extended 'not only to those who actually bear arms, or who are immediately subjects of the belligerent power, but even all who are within the hostile territories'.[56] Indeed, Grotius explicitly stated that the *lex lata* permitted the slaughter of infants, women, old men, hostages and 'suppliants' seeking to surrender, as in a war they were enemies because subjects of the enemy power.[57] He found ample evidence of the slaughter of non-combatants in the writing of ancient scholars and the 'common practice of nations'.[58] However, he methodically distinguished between actions which were 'permissible' according to the law of nations and those which were 'right', 'praiseworthy' or 'honourable'.[59] This is why, in a *lex ferenda* move[60], he attempted to make a moral claim for moderation in warfare. Grotius urged restraint in relation to persons 'whose modes of life are entirely remote from the use of arms.'[61] More specifically he referred to children, women, persons who perform religious duties, men of letters, and even merchants and artisans.[62] He stated as a basic principle that 'humanity will require that the greatest precaution should be used against involving the innocent in danger'.[63] While he did not expressly define 'innocent persons', he appears to have been referring to those who are unarmed[64] and have not committed any serious crimes.[65] Therefore, in his view, innocent civilians had to be passive, implying therefore a notion of culpability for those who were politically or militarily active. Immunity was to be given to all passive non-combatants.

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[53] Nabulsi, K., *Traditions of War, Occupation, Resistance, and the Law* (Oxford University Press. 1999), at 128.
[54] Grotius, H., *On the Law of War and Peace* (Kessinger Publishing. 1625). Book III, ch. III, s. IX.
[55] Id. at Book III, ch. IV, s. V
[56] Id. at Book III, ch. IV, s. VI.
[57] Id. at Book III, ch. IV, ss. VI-XIV.
[58] Id. at Book III, ch. IV, ss. VI-XIV.
[59] Id. at Book III, ch. I, s. II and book III, ch. X, s. I.
[60] He explained for instance that 'as the law of nations permits many things (…) which are not permitted by the law of nature'. Id. at Book III, ch. IV, s. XV.
[61] Id. at Book III, ch. XI, s. X.
[62] Grotius, book III, ch. XI, s. VIII - XII.
[63] Grotius, *On the Law of War and Peace*, Book III, ch. XI, s. VIII.
[64] See Gardam, J., *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Martinus Nijhof Publishers. 1993), p. 13. See also Grotius, *On the Law of War and Peace*, Book III, ch. XI, s. X were Grotius refers to 'those whose modes of life are entirely remote from the use of arms.'
[65] Grotius, book III, ch. XI, s. II.

As a philosopher rooted in the Enlightenment period, Grotius declared the punitive justification of war to be at an end.[66] His dismissal of the punitive model of war 'allowed a principle of non-combatant immunity to be established with a firm foundation in law and justice.'[67] Accordingly, with Grotius, the laws of war gained a new basis in natural law. 'War was no longer the infliction of punishment on individuals, but a method of settling legal disputes between states when other methods have failed.'[68]

In addition, Grotius' contribution was of great significance in putting forward the view that the justness of the cause of a belligerent had no impact on the duty to observe the laws of war. Not long after Grotius' death, by the late seventeenth century, modern nation-states, although in an incipient form, had emerged as the only legitimate authorities in Europe that could make war on their neighbours and suppress rebellion within their own realms.[69] The status of these new nation-states was cemented with the adoption, in 1648, of the Peace of Westphalia, which ended the bloody Thirty Years War. The peace treaty also abolished private armies and conferred a legal monopoly on states for the maintenance of armies and for fighting wars. Following on from the 'just war' theories, ideas of military honour and chivalry required that wars be fought 'publicly and openly.'[70]

Emerich de Vattel

More than a hundred years after Grotius, Emerich de Vattel (1714-1767), a Swiss philosopher, 'cautiously moved toward a judicial statement of non-combatant immunity to match the practical immunity increasingly being achieved in conflict.'[71] In doing so, Vattel adopted Grotius' metaphor describing combatants as instruments

[66] Grotius, Book III, ch. II, s. VI and ch. XI, s. XVI.
[67] McKeogh, "Civilian Immunity in War: From Augustine to Vattel", at 76.
[68] Id., at 73.
[69] Howard, M., "Constraints on warfare", in *The Laws of War: constraints on Warfare in the Western World*, (Michael Howard, et al. eds., 1994), at 9.
[70] Camins, "The past as prologue: the development of the 'direct participation' exception to civilian immunity", at 856.
[71] Id., at 858.

of the state.[72] This characterization will be the view that will underlie the developments in the laws of war in the twentieth century, as it is the basis of the principle of belligerent equality and it establishes a distinction between combatants and non-combatants. Vattel also followed Grotius in claiming immunity for all those who are not in the business of fighting, regardless of age or gender. For Vattel, 'women, children, feeble old men and the sick' and also 'ministers of public worship and men of letters and other persons whose manner of life is wholly apart from the profession of arms' are categorized as 'enemies who offer no resistance, and consequently the belligerent has no right to maltreat or otherwise offer violence to them, much less to put them to death.'[73] The enemy were those who carried arms. The innocents did not.[74]

Vattel was writing at a time when there had been a distinct move towards the application of the laws of war to internal armed conflicts. Generally speaking, Vattel prohibited guerrilla war.[75] But, taking stock of its existence, he argued that certain principles of humanitarian law should apply anyway: 'it is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness and honour (…) should be observed by both sides in a civil war.'[76] Vattel argued that this rule, which prohibited the murder, torture, mutilation, or other mistreatment of persons not engaged in the conflict, should be accepted by parties involved in civil wars.[77]

So for both Grotius and Vattel, the foundation of the claim for civilian immunity was justice. 'Justice requires that non-combatants be spared. Justice permits us to kill those who are guilty and those engaged in harming us; non-combatants are neither. Given this, justice requires that those not directly involved in trying to harm us be

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[72] Vattel, E.d., *The Law of Nations, or the Principle of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G. Fenwick ed., Carnegie Institute 1916. 1758), Book 3, sect. 6, at 237.
[73] Mc Keogh, "Civilian Immunity in War: From Augustine to Vattel", at 77. Referring to Emerich de Vattel, *The Law of Nations, or the Principle of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), trans. Charles G. Fenwick (Washington: Carnegie Institute, 1916), book 3, ch. 8, sects. 145-6, pp. 282-3.
[74] See Vattel, The Law of Nations, or the Principle of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, in Book III, Chapter V, paras 71-72; and Chapter VIII, para 147.
[75] See Id. at Book III, chap. 5, paras 69-70 and 226
[76] Id. at Book, Volume III, at 338.
[77] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 163.

spared.'[78] Accordingly, respect for civilians was conditional on their behaviour toward the enemy army, as it was expected of civilians not to participate in hostilities, to be supremely passive and to maintain a normal everyday life in the midst of war. We have not departed from this approach nowadays.

The Age of Enlightenment

With the emergence of the Nation State, the idea that an entire population represents an entity to conquer slowly disappeared, leaving space for the concept of citizens as a separate entity. Indeed, as we have seen, before this period, inhabitants of territories were considered as part of the war booty and seen as enemies.

In contrast to Grotius, who was writing in the midst of the Thirty Years war, wars in Rousseau's time (1712-1778) were fought by professional armies, the expense of which kept conflicts small. Indeed, during the period from 1648 to 1789, war became very much a game between professionals without a great deal of involvement of the civilian population. It is at this period that 'military strategists started to make the transition from ethics, religion, and philosophy to law, by developing the laws of war.'[79]

Sadly enough, Rousseau is not famous for his writings on the laws of war and his book *Principes de droit de la guerre,* which was published only after his death. Exactly one hundred years before the famous book of Henri Dunant, *A memory of Solferino*, Rousseau departed from Grotius, of whom he was dismissive, as in his opinion he favoured authoritarianism. Rousseau took the view that war is a matter of relations between governments, involving the citizens of a state only 'accidentally'. For him, combatants are instruments, and war is a relationship of States with States,

[78] McKeogh, "Civilian Immunity in War: From Augustine to Vattel", at 77.
[79] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 13.

distinct from physical persons.[80] Combatants are physical persons, as distinct from belligerents, who are moral persons.[81] Rousseau stressed that:

> 'The nature of things requires belligerents to distinguish combatants from non-combatants. As non-combatants, citizens are not, in any real sense, the enemies of an opposing army, and should not be made its object. (…) War gives no right to inflict any more destruction than is necessary for victory. These principles were not invented by Grotius, nor are they founded on the authority of the poets; they are derived from the nature of things; they are based on reason.'[82]

He thereby formally recognized the principle of distinction. His view of the soldier, in addition to the recognition that non-combatant citizens are not, in any real sense, the enemies of an opposing army, and should not be made its object became a key intellectual foundation of the modern laws of war, as shown by the ICRC which often cites him as a basis for the subsequent development of international humanitarian law.[83] Prior to Rousseau's contribution, the separate identity of the individual and his state was not recognized by the law of nations and the identification of one with the other was total. In this context, Rousseau's maxim is appealing for its 'surpassing simplicity'[84], as 'it sets up an unbridgeable conceptual divide between combatants and non-combatants.'[85]

As observed by Meron, 'the conceptual gulf Rousseau's maxim established, coupled with the idea that the only legitimate object of war is to weaken the military forces of the enemy, brought Grotius' conception of the *lex ferenda* to life.'[86] However, Rousseau's principle for protecting civilians looks very frail in internal armed conflicts, in which groupings of people who do not constitute a state are fighting on one and perhaps both sides in a conflict. Despite this caveat, Rousseau's theoretical

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[80] Rousseau, J.-J., *Rousseau: The Social Contract' and Other Later Political Writings* (Victor Gourevitch ed., Cambridge University Press 1997), at pp. 46-47.
[81] Haggenmacher, P., *Retour sur quelques textes classiques du droit des conflits armés: Rousseau, Saint-Pétersbourg, Martens* (2011).
[82] Rousseau, *Rousseau: 'The Social Contract' and Other Later Political Writings*, at 57.
[83] See for instance: http://www.icrc.org/eng/resources/documents/misc/5kzfju.htm.
[84] Best, G., *Humanity in Warfare, The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson. 1980), at p. 56
[85] Best, G., *War and Law Since 1945* (Oxford University Press. 1994), at 258.
[86] Meron, T., "Shakespeare's Henry the Fifth and the law of war", 86 *The American Journal of International Law* 1 (1992), at 25.

foundation developed the requirement that has been codified in the Hague Law that belligerents do not have unlimited choice in the means chosen to inflict damage on the enemy. It is from this fundamental principle of the laws of war that flows the principle that civilians should be spared as much as possible.

So thanks to the influence of jurists like Grotius and philosophers like Rousseau, excesses in warfare became, at least theoretically, repugnant to the conscience of mankind. In addition, with the development of military organization and discipline, the distinction between armed forces and non-combatants became more pronounced. War was conceived to be a struggle between states, rather than between peoples.[87]

Nineteenth and Twentieth Century and the nascent concept of international humanitarian law

Belligerency

Prior to the nineteenth century, internal wars were considered to be a matter of domestic security, in which the existing authority in the state treated rebels as criminals, unworthy of any legal protection. The will to preserve state sovereignty and security has therefore been the main obstacle in the development of international humanitarian law in internal armed conflict. However, by the nineteenth century, 'the sharp theoretical distinction traditionally drawn between internal and international armed conflict was not necessarily adhered to in practice, and the legal status of internal armed conflicts could be fundamentally altered by invoking the doctrine of recognition of belligerency.'[88]

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[87] Lester Nurick, L., "The distinction between combatant and noncombatant in the law of war", 39 *American Journal of International Law* 680, (1945), at 681. This part of the Chapter, for the sake of brevity, focused mainly on the work conducted by westerner philosophers and lawyers. However, it is important to keep in mind that the requirement that certain humanitarian principles be observed in warfare was well established in other cultures. See for instance, Bello, *African Customary Humanitarian Law*, 1980; Khadduri, *The Law of War and Peace in Islam,* 1955; Singh, "Armed Conflicts and Humanitarian Laws of Ancient India", in Swiniarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles,* 1984; Muntabhorn, "The 1899 Hague Peace Conference and the Development of the Laws of War: Asia's contribution to the Quest for Humanitarianism", paper delivered at the Asia-Pacific regional meeting in Melbourne in February 1999.

[88] Moir, L., *The Law of Internal Armed Conflict* (Cambridge University Press ed. 2002), at 4.

The first attempt to define the characteristics of a civil war came with the institution of the recognition of belligerency during the XVIIIth and XIXth centuries.[89] It gradually became acceptable to apply the rules of war to certain large-scale civil wars, in instances where the rebels were recognised as being belligerents by the legitimate government or a third party.[90] However, the notion of recognition of belligerency was made dependent on recognition of rebels by the government. 'The necessity of such recognition was contrary to the humanitarian purpose of contemporary international humanitarian law.'[91] The category of civil war regulated by international law at that time considered only armed conflicts of a general character where the rebels were an organised force under a responsible command, occupying a substantial part of state territory.

More specifically, four conditions had to be satisfied before a state of belligerency could be recognised. These conditions were that:

> i) there was an armed conflict within the state concerned, of a general, as opposed to a local character; ii) the insurgents must occupy and administer a substantial part of the state territory; iii) they must conduct their hostilities in accordance with the laws of war, through organised armed forces under a responsible command; iv) circumstances exist that make it necessary for third states to make clear their attitude to those circumstances by recognition of belligerency.[92]

These criteria were the first defined characteristics of large-scale civil wars.[93] If the conflict in question was not seen as fulfilling these criteria, its regulation would be considered to fall within the reserved domain of the state.[94] Therefore, the theory of belligerency shows that states were ready to consider the possibility of applying the

[89] For an extensive overview of the notion of belligerency, see Id., at pp. 4-18.
[90] La Haye, E., *War Crimes in Internal Armed Conflicts* (Cambridge University Press ed., Cambridge University Press. 2008), at pp. 6-7.
[91] Paulus, A. & Vashakmadze, M., "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", 91 *International Review of the Red Cross* 95, (2009), at 99.
[92] La Haye, *War Crimes in Internal Armed Conflicts*, at pp. 6-7 referring to H. Lauterpacht, *Recognition in international law* (Cambridge: Cambridge University Press, 1947), at 176.
[93] As we will see, these criteria, with the exception of point iv), are basically the same as the Second Additional Protocol criteria.
[94] See Moir, *The Law of Internal Armed Conflict*, at pp. 4-18.

laws of war to internal armed conflicts only if the organized armed groups could fulfil the conditions required to obtain 'belligerent status'.[95]

Lieber Code 1863

During the years 1840-1860, European powers started to spread their influence beyond Europe, and across the Atlantic the United States of America fell into a bloody civil war between the Northern and the Southern states. The methods used by the South in the American Civil War (1861-1865) compelled the Union government to find ways of addressing the legal status of guerrilla warfare. In the early years of the conflict the Union army tended to equate all irregular troops with 'guerrillas', who in turn were classified as criminals. As in Europe during the revolutionary wars, 'this generalization applied not only to those who bore arms for the South, but also to non-combatant civilians who either actively or passively supported irregular troops.'[96] Therefore, one of the thorniest problems Lieber, a German-American lawyer and philosopher, faced was the definition of guerrilla warfare and the status of the guerrilla. In 1862, Lieber addressed this situation in his essay *Guerrilla Parties Considered with Reference to the Laws and Usages of War.*[97] In his essay, Lieber explains that a guerrilla party means an irregular band of armed men, carrying on an irregular war.[98] He explains that they are particularly dangerous because they easily evade pursuit, and by laying down their arms become insidious enemies.[99]

Shortly after his essay on the Guerrilla, Francis Lieber prepared his *Instructions for the Government of Armies of the United States in the Field*, that were promulgated as General Orders No. 100, issued by the War Department on April 24, 1863 (hereafter

[95] Perna, L., *The Formation of the Treaty Law of Non-International Armed Conflict* (Martinus Nijhoff Publishers ed. 2006), at 49.
[96] Camins, "The past as prologue: the development of the 'direct participation' exception to civilian immunity", at 861
[97] Replicated in Hartigan, R.S., *Military Rules, Regulations & the Code of War, Francis Lieber and the Certification of Conflict* (Transaction Publishers. 2011), at pp. 31-44.
[98] Lieber, F., "Guerrilla Parties Considered with Reference to the Laws and Usages of War", in *Military Rules, Regulations & the Code of War: Francis Lieber and the Certification of Conflict*, (Richard Shelly Hartigan ed., 1862), at 33.
[99] Ibid.

Lieber Code).[100] The Lieber Code is usually considered to be the first document in the modern codification movement and constitutes a major step in the development of the law of armed conflict, as it attempted to strike a balance between the demands of military necessity and principles of humanity. The Code was many years ahead of its time as ‘even today the rules of humanitarian law applicable in internal armed conflicts are more limited in their scope than the provisions of the Lieber Code.’[101]

The Code remains a benchmark for the conduct of an army toward an enemy army and population. It was, in effect, the blueprint of the new rules, which developed as customary law on the international level and was used as a basis, together with the 1874 Brussels Project and the Oxford Manual of the Institute of International Law,[102] of the Hague Conventions on Land Warfare and the annexed Regulations adopted in 1899 and 1907. Lieber defines precisely the status of the enemy troops and the population. Article 15 of the Code codified the permissible destruction of life during war in stating that ‘Military necessity admits of all direct destructions of life or limb of *armed* enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.’[103] With this article, albeit not without ambiguity, the Code legally recognized for the first time the nascent concept of the distinction between combatants and non-combatants.

The most important statements in the Lieber Code seem to be his dicta on civilians. They succinctly ‘summarize a centuries-old effort by international legal theorists to distinguish and immunize those who did not actively participate in combat.’[104] The Code is ‘part of the slow development in custom and practice, and theological and philosophical thought, of the notion that persons who did not directly make war ought not to be subjected to the threat or reality of death or rapine.’[105] However, the Lieber Code neither protects nor even mentions *civilians*. Instead it talks about *citizens*, and establishes a profound ambiguity about their position. Article 21 defines the term

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[100] “Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, promulgated as General Order No. 100 by President Lincoln, 24 April 1863”, in Schindler and Toman (eds.), *The Laws of Armed Conflicts,* Martinus Nijhoff Publishers, 1988, at pp. 3-23.
[101] Greenwood, “Historical Development and Legal Basis”, at pp. 21-22.
[102] See further below.
[103] Article 15 (Emphasis added).
[104] Hartigan, *Military Rules, Regulations & the Code of War, Francis Lieber and the Certification of Conflict*, at 19.
[105] Id., at 24.

'enemy' as 'citizen or native of a hostile country', which is as such 'subjected to the hardships of the war'. Therefore, unarmed foreign citizens are subjected to the hardships of the war, and, taken together, Article 21 and Article 15 emphasize the status of armed citizens as legitimate targets.

Nevertheless, Article 22 of the Code asserts the 'distinction between the private individual belonging to the hostile country and the hostile country itself, with its men and arms' and provides for the immunity of unarmed citizens, stating that 'the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.'[106] The question of precisely how much 'the exigencies of war will admit' has to be clarified, as it was not further developed in the Lieber Code.

With respect to the status of citizens, Article 155 of the Code differentiates between the status of enemies in regular war and in a war of rebellion. In a 'regular war', that is to say a war opposing two nation states, 'all enemies are divided into two general classes – that is to say, into combatants and non-combatants, or unarmed citizens, of the hostile government.'[107] As we have seen in Article 21, both of them are considered enemies, and might be targeted, despite the protection of Article 22 that protects unarmed citizens 'as much as the exigencies of war will admit' and article 23 protecting 'private citizens' and 'inoffensive individuals'.

In a war of rebellion, however, Article 155 'distinguishes between the *loyal* citizen in the revolted portion of the country and the *disloyal* citizen.'[108] It further divides the category of '*disloyal* citizens' into 'those citizens known to sympathize with the rebellion without positively aiding it', and 'those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto'. According to Article 156, while loyal citizens were to be protected, disloyal citizens were to have 'the burden of the war' thrown upon them, subjecting them to a 'stricter police' than usual and requiring them to declare their fidelity to the government. Therefore, in reading the Code in a certain way, citizens in a war of rebellion are not

[106] Article 22.
[107] Article 155.
[108] Emphasis added.

considered enemies as defined by Article 21. However, the Lieber Code seems to contradicts itself as, on the one hand, according to Articles 22 and 23, unarmed citizens 'are to be spared as much as the exigencies of war will admit' and 'are no longer murdered, enslaved or carried off to distant parts, as much as the commander can afford to grant in the overruling demands of a vigorous war', and on the other hand, according to Articles 155 and 156, the Code asks the military commander of the legitimate government to differentiate loyal from disloyal citizens and requires him to 'protect the manifestly loyal citizens' but not the disloyal citizens, who are subjected to a 'stricter police than the non-combatant enemies and have to suffer in regular war.'

As we see, the Lieber Code is ambiguous with respect to the position of citizens. All *armed* enemy citizens may be directly attacked.[109] However, the Code is less direct on the protection from attack provided to hostile, but unarmed, citizens. To this day we have not completely escaped from this ambiguity about whether the civilian is an enemy or a subject of protection; and whether, to merit protection, 'the civilian needs to be 'inoffensive', perhaps indeed 'entirely innocent of all entanglement in the ongoing conflict.'[110]

The 1868 Saint Petersburg Declaration

The Saint Petersburg Declaration is the first formal agreement prohibiting the use of certain weapons in war.[111] In reality, it is its Preamble, more than its object, that is very famous. Haggenmacher has gone as far as calling the specific object of this declaration 'derisory'.[112] However, what is important here is that in its Preamble, reflecting the theories developed by Rousseau nearly a century earlier, this Declaration enacted a cardinal principle of restraint in war, when it implicitly

[109] Article 15 to read with article 21.

[110] Roberts, A., "The Civilian in Modern War", 12 *Yearbook of International Humanitarian Law* 13, (2009), at 35.

[111] Schindler, D. & Toman, J., *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers 1988), at 101.

[112] Haggenmacher, *Retour sur quelques textes classiques du droit des conflits armés: Rousseau, Saint-Pétersbourg, Martens*. The Saint Petersburg Declaration prohibited the use of a specific type of bullet for humanitarian reasons.

supported the idea that most members of society can be left out of war.[113] It stated that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'. The principle of distinction expressed here means that no military necessity justifies direct attacks on civilians or civilian objects. Therefore, the St Petersburg Declaration established the illegitimacy of the targeting of non-combatants. This Declaration, coupled with Rousseau's maxim on the separate identity of the individual and his state, led Meron to affirm that 'the concept of innocence, on which Grotius and his contemporaries had focused, expanded and metamorphosed into notions of civilian status and the protection of civilians from attack.'

The 1874 Brussels 'Project of an International Declaration concerning the Laws and Customs of War'

The Lieber Code was used as a basis in the first major international conference to discuss the harmonisation and codification of the laws of war, which took place in Brussels in 1874. During the conference, discussions turned on those areas which were in need of negotiation or clarification, and this is the reason why the issue of the necessity to distinguish between the civilian population and combatants was not discussed.

In addition, the principle of restraint stated in the preamble of the Saint Petersburg Declaration was adopted in 'slightly looser terms'[114] in the Brussels 'Project of an International Declaration concerning the Laws and Customs of War.'[115] The Final Protocol states that 'the only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary

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[113] Sandoz, Y., et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhof Publishers 1987), at para 1863. Says that the principle of distinction was implicitly recognized in the 1868 St Petersburg Declaration.

[114] Camins, "The past as prologue: the development of the 'direct participation' exception to civilian immunity", at 864. In the Preamble of the St Petersburg Declaration it is stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."

[115] "Project of an International Declaration Concerning the Laws and Customs of War", Brussels Conference of 1874, in Toman and Schindler (eds.) *The Laws of Armed Conflicts,* Martinus Nijhoff Publishers, 1988, at pp. 25-34.

suffering.'[116] With this wording, it is not anymore the military forces that should be weakened but the enemy generally, thereby permitting greater collateral damage. Article 12 contains the fundamental restriction that 'the laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.' Certainly, this rule was intended to protect the military forces themselves from methods of warfare that were regarded as contrary to the standards of civilized nations. However, 'it had the subsidiary effect of protecting civilians, and the seeds of the modern doctrine of proportionality in relation to civilians can be found in it.'[117] Article 13 expressly forbids 'the employment of arms, projectiles or material calculated to cause unnecessary suffering'[118] as well as 'any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war'.[119]

The Brussels Conference did little on the status of belligerents and, in the absence of rules protecting civilians, individuals who participated in hostilities continued to do so at their own risk. Although it is nowhere explicitly stated that peaceful civilians were not a legitimate object of direct attack, it should be assumed that at this stage it doubtlessly formed a principle of customary international law.[120] Since not all the governments were willing to accept it as a binding convention, the Brussels Declaration was not ratified, as not all parties were willing to accept it as a binding document. However, the major conventions adopted in 1899 and 1907 in The Hague were the fruits of the groundwork laid down at Brussels in 1874.

The 1880 Oxford Manual

Even if the Brussels Declaration was never ratified, it provided an important basis for the work of the jurists of the Institute of International Law, who produced the 'Oxford Manual' in 1880.[121] Indeed, this Declaration provided the first comprehensive code of

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[116] "Project of an International Declaration Concerning the Laws and Customs of War", Brussels Conference of 1874, in Toman and Schindler (eds.) *The Laws of Armed Conflicts,* Martinus Nijhoff Publishers, 1988, at 26.
[117] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 18.
[118] Article 13(e).
[119] Article 13(g).
[120] See for instance Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 18.
[121] *The Laws of War on Land.* Manual published by the Institute of International Law (Oxford Manual). Adopted by the Institute of International Law at Oxford, 9 September 1880. In Dietrich Schindler and

the laws and customs of war. The Oxford Manual, despite the fact that it was never adopted in treaty form, purported to codify 'the accepted ideas of our age so far as this has appeared allowable and practicable',[122] and provided in Article 1 that:

> 'The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.'

On the basis that 'the contest (is) carried on by 'armed forces only', Article 7 of the Manual forbids the 'maltreatment' of 'inoffensive populations.' The fact that peaceable inhabitants should not be attacked, confirms the 'close link between the entitlement of citizens to protection and their peaceful behaviour.'[123] Like the Brussels Declaration, however, the Manual did not give further consideration to the issue of persons who fell into the gap between the 'armed forces' and 'inoffensive population', such as civilians who participate in hostilities, indirectly or directly.

The Oxford Manual formed, along with the Brussels Declaration, the basis of the Hague Conventions on the conduct of land warfare and its attached Regulations which were adopted in 1899 and 1907. By the XIXth century, the major European powers had accepted civilian immunity as a central tenet of their military practice.

The Hague Conventions 1899 and 1907

It is in the period from 1874 to 1907 that the exact term 'civilian' entered the laws of war in contradiction to 'soldier'.[124] However, already at its inception, the concept of 'civilian' did not entail an intact identity nor a clear protection. In contrast with the Oxford Manual and, to a lesser extent, the Brussels Protocol,[125] the Hague Conventions did not refer specifically to the immunity of civilians from attack as a basic principle, nor required commanders to avoid indiscriminate attacks in the choice of means and methods of warfare. The principle that the right of belligerents to adopt

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Jiri Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1988, at pp. 35-48.

[122] Oxford Manual Preamble.

[123] Roberts, "The Civilian in Modern War", at 35.

[124] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 29, footnote 11.

[125] See Oxford Manual, Article 7 and Brussels Final Protocol.

means of injuring the enemy is not unlimited was stated in Article 22 of the Regulations Respecting the Laws and Customs of War on Land.[126] The same Regulations, with article 23(1)(g) and articles 25-28 briefly touched upon the protection of civilian populations from the dangers created by hostilities.

One of the reasons for the brevity of these provisions was that at that time the firing range of artillery was still relatively short and air-power and modern missiles did not yet exist.[127] In addition, the Conventions did not purport to be a comprehensive codification of all the laws of armed conflict.[128] The Martens Clause, in the Preamble to the Conventions makes this quite clear: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases, not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'[129] The Martens Declaration is about 'limitation and restraint, and its singular importance as a declaration of principles and a point of constant reference lies as much in its generality as in its uniqueness.'[130]

The Martens Clause was first inserted, at the suggestion of the Russian delegate Fyodor Fyodorovich Martens, in the preamble of the 1899 Hague Convention II containing the Regulations on the Laws and Customs of War on Land, and then restated in the 1907 Hague Convention IV on the same matter but with a slight change in the wording. Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. All the delegates believed that citizens were likely to take up arms, although they differed in their response to the possibility. Generally

[126] *Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 The Hague Convention IV Respecting the Laws and Customs of War on Land,* in Toman and Schindler (eds.) *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1988, at pp. 75-98.
[127] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 1827.
[128] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 20.
[129] Preamble of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, in Schindler & Toman, The Laws of Armed Conflicts, at 70.
[130] Best, *Humanity in Warfare, The Modern History of the International Law of Armed Conflicts*, at 164.

speaking, large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.[131] Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but similar versions in later treaties regulating armed conflicts.[132]

The thirteen treaties concluded in The Hague were of a somewhat incomplete nature in that they addressed themselves particularly to areas needing clarification and harmonisation. 'Those unaware of the details of the customary law of the time would have a totally erroneous impression if they approached these treaties as providing a complete law on hostilities.'[133] Indeed, the absence of specific mention of the civilian population as a general rule led to much mistaken literature and some misguided court judgments this century. The reason why this is important to appreciate is because the 1899 and 1907 Hague Conventions were the sole written regulations relating to the conduct of hostilities until the 1977 Protocols Additional to the Geneva Conventions.

There was no clear protection of civilians in the Hague Conventions, as they give little thought to protection for non-combatants. The Hague Regulations do not as such specify that a distinction must be made between civilians and combatants and that civilians should not be directly targeted. And when the term 'civilian' is used, in article 29(2), it is with respect to a person who is potentially involved in actions in support of an army. When the term 'inhabitant' is used, this seems to refer to the peaceable inhabitant. Therefore, The Hague Regulations do not really help in terms of distinction, and stick to a codification of the traditional approach to the citizenry.

At first glance, the one clear provision of protection based on the principle of distinction between civilians and civilian objects and military objectives is found in

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[131] Ticehurst, R., "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, (1997). See also Alexander, A., "The Genesis of the Civilian", 20 *Leiden Journal of International Law* (2007), at p. 365; Cassese, A., "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", 11 *European Journal of International Law* (2000), at pp. 197-198.
[132] Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, reprinted in Schindler & Toman, The Laws of Armed Conflicts, at 70 ff. The four 1949 Geneva Conventions for the protection of war victims (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), *op. cit*., pp. 373-553; 1977 Additional Protocol I, Art. 1(2), *op. cit*., p. 628, and 1977 Additional Protocol II, Preamble, *op. cit*., p. 691; 1980 Weapons Convention, Preamble, *op. cit*., p. 179.
[133] Doswald-Beck, L., "The Civilian in the Crossfire", 24 *Journal of Peace Research, Special Issue on Humanitarian Law of Armed Conflict* (1987), at 254.

Article 25, which states: 'The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.' However, Article 25 entrenches the citizen's exposure to danger, despite its appearance as a protective clause. The crucial aspect of this article is the codification of the traditional distinction between fortified and open towns. This means that non-combatants in fortified towns could expect no immunity from warfare.

With respect to the development of the law relating to the protection of civilians, the most significant legal protection included in the 1907 Fourth Hague Convention[134] contains important but inadequate rules governing the protection of civilians in occupied territory. Of the fifteen articles of the Hague Regulations on 'Military Authority over the Territory of the Hostile State', only three relate to the physical integrity of civilians. 'The sufferings of populations in Nazi-occupied Europe demonstrated very well the gaps in the Fourth Hague Convention, and the need for a more protective regime.'[135] However, these Hague Conventions are important in that when the 1899 Conference convened, the laws of war were almost all unwritten. Therefore, this Conference began the process, which has gone on throughout the 20th Century, of developing a substantial body of written law for the conduct of hostilities. However, the Hague Conventions of 1899 and 1907 were concerned with the law applicable to conflicts between States and therefore did not deal with internal armed conflicts. Lastly, despite their poverty in term of protection of civilians, it is interesting to note that the judges at the International Tribunal at Nuremberg were of the view that the Hague Conventions, although in advance of existing international law at the time of their adoption, had, by 1939, attained the status of custom.[136] Furthermore, the Hague Regulations provisions were considered so well established as to give rise to criminal responsibility even in internal conflicts.[137]

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[134] *Hague Convention IV Respecting the Laws and Customs of War on Land,* Signed at The Hague, 18 October 1907, in Schindler & Toman, *The Laws of Armed Conflicts*, at pp. 69-98.

[135] Meron, T., "The Geneva Conventions and Public International Law British Foreign and Commonwealth Office Conference commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009", 91 *International Review of the Red Cross* (2009), at 620.

[136] *Trial of Major War Criminals Before the International Military Tribunal,* Nuremberg (1946), Judgement, Vol XXII, at 497.

[137] Robinson, D. & Hebel, H.v., "War Crimes in Internal Conflicts: Article 8 of the ICC Statute", *Yearbook of International Humanitarian Law* 193, (1999), at 202.

First World War

As we have seen, the codification of the law of armed conflicts demonstrates that prior to the First World War the principle of civilian immunity was accepted, albeit in a rudimentary manner, as a basic precept to be balanced against the dictates of military necessity. However, the consequences of these rudimentary and inadequate rules 'were not really apparent until the First World War and the advent of new methods of warfare.'[138] Thus, when the hostilities broke out, the laws of war contained no concept of a civilian population distinguished from the military and deserving protection on that ground alone. When the war began, non-combatants were perceived as citizens, who were either voluntarily passive or wilfully dangerous. These citizens were potentially and probably aggressive, bound to the fate of their state, and they might hold themselves remote from the conflict or might be drawn in, whether voluntarily or by force of circumstances. These non-combatants were therefore granted only minimal protection by law.

Atrocities in the First World War showed the deficiency of the few provisions existing for the protection of inhabitants and on methods of attacks. The technological development of weapons resulting in an enlarged field of military action and the development of aircraft and forms of long-range bombardments have changed the character of warfare. Hostilities were no longer taking place at the battlefront, but objectives well behind the lines could also be attacked. This allowed for the bombardment of population centres far from the front, thus increasing the number of civilian victims. They became extremely vulnerable and were inevitably collateral targets in such warfare, potentially on a much larger scale than previously. Similarly, aerial warfare posed an unprecedented threat to civilians, and 'these developments demonstrated that civilians were exposed to dangers at least as serious as those faced by combatants and needed more specific legal protection than they had hitherto been accorded.'[139] The Hague Rules of 1899 and 1907 were only applicable to land warfare, as the particular technology of air warfare did not exist at the time of their adoption. Accordingly, with aerial warfare, the norm of non-combatant immunity from attack came under great pressure, and 'it was one thing to accept this concept

[138] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 20.
[139] Roberts, "The Civilian in Modern War", at 36.

when compliance with this rule did not interfere with military effectiveness. But with the advent of weapons such as aerial bombardment, whose effectiveness was decreased if the principle of non-combatant immunity was adhered to, what was an abstract principle required reassessment in the light of military necessity.'[140]

1923 Hague Rules of Aerial Warfare

After the First World War, the 1922 Washington Conference on the Limitation of Armaments had set up a Commission of Jurists to decide whether the 1907 Hague Convention dealt adequately with new methods of warfare. As just mentioned, the atmosphere at that time was that the civilian population was seen as an appropriate and easy target and the obvious military advantages of aerial warfare prevented agreement on a new legal regime. The Commission held thirty plenary meetings and its most difficult task was the regulation of bombardment from the air, particularly the question of what military targets were to be immune from attack when they were in centres of population.[141] Some concerned jurists began describing the civilian population as a group that deserved protection, and in order to support this claim they employed a rhetorical slip and stated that civilians *were already* protected. 'New as the concept of civilian was, it was thereby endowed with a legal history.'[142] The result of these jurists' concerns was the Hague Rules of Air Warfare[143] of 1923 that was an attempt to achieve a balance between military interests and the protection of the civilian population. These Rules protected, for the first time in international law, the specific idea of the *civilian* as opposed to any other concept of non-combatant or citizen. This led to the replacement of the traditional categories of law with a military/civilian distinction. The logic was that according to the two principles of humanity and civilization, there ought to be a distinction between combatants and non-combatants and a belligerent ought not to direct attacks against civilians.

The Draft Rules statement introduced the idea of a vulnerable civilian population and it marks the point when the contemporary system, centred on the civilian, began to

[140] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at p. 21.
[141] Id. at 21.
[142] Alexander, "The Genesis of the Civilian", at 373.
[143] *Hague Rules of Air Warfare*, Drafted by a Commission of Jurists at The Hague, December 1922 – February 1923, in Schindler & Toman, *The Laws of Armed Conflicts*, at pp. 207-217.

emerge. However, it should be stressed that the Rules on Air Warfare, despite mentioning for the first time ever the term 'civilian', did not define it and the protection afforded to this category of persons was rather complicated and unclear. Despite the fact that Article 22 prohibited the use of 'aerial bombardment for the purpose of terrorizing the civilian population, of destroying private property, or of injuring non-combatants', Article 24, in dividing potential targets into zones, watered down the Article 22 protective clause into a complex set of rules. As a result, the Rules incorporated 'the paradoxical characterization of the population as a military aid and a protected victim, thereby perpetuating their position as a target.'[144] Ultimately, the Draft Rules and their interpretation gave a great degree of leeway to air bombardment and little protection to civilians.

Although these rules were never adopted in legally binding form, it was the first time the international community had addressed itself to formulating specific rules to overcome the problem of indiscriminate bombardment. The document formulated a definition of military objectives, considered the concept of indiscriminate attacks and introduced the notion of proportionality.

The 1934 ICRC Draft 'International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent'

Thus, in the inter-war period, there seemed to be an acceptance that the principle of distinction was still valid, despite the fact that there were no treaty provision as such dealing with it. However, with no positive law protecting, nor defining civilians, their immunity from attack was precarious and vulnerable to arguments that military necessity permitted them to be targeted. It is in this context that the ICRC prepared and presented in 1934 a draft 'International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent' (the 'Tokyo draft') that would have supplemented the Hague Conventions. Unfortunately, the outbreak of World War II annihilated the whole process. World War II was catastrophic for millions of civilians, especially for those in besieged and bombarded cities, and in occupied territories. In addition, the

[144] Alexander, "The Genesis of the Civilian", at 375.

mass slaughter of Jews, Gipsies and disabled people 'showed that the killing of civilians could be, not just a side-effect, but a major aim of some belligerents.'[145] In addition, arguments of military necessity were used by the Allies to justify widespread bombing of civilian and industrial targets, thus destroying the newborn notion that the principle of humanity required the protection of innocent civilians and the necessity to spare civilians from attack. 'It was estimated that aerial bombardment alone was responsible for the death of twelve million civilians and the practice of saturation bombing of civilian targets was widespread. Consequently, it was difficult to assert that the direct targeting of civilians remained contrary to international law or that the collateral destruction of civilians in attacks on military targets was regulated.'[146] At that time, the distinction between combatants and civilians became totally blurred.

Post World War II

After the conflict, the trauma caused by the atrocities committed during World War II prompted a broad international acceptance of the need to adopt a new and stronger international agreement for the protection of civilians in war. The Fourth Geneva Convention obligated the occupier, as Sir Hersch Lauterpacht memorably wrote, 'to assume active responsibility for the welfare of the population under his control.'[147] These obligations included ensuring the population's basic needs in terms of food, health, and administration of justice; and more broadly, protection of the individual's human dignity. In further contrast to the Fourth Hague Convention, the Fourth Geneva Convention contains detailed provisions on the protections afforded to civilians not only in occupied territories, but also in all territories of the parties to the conflict. As observed by Meron, 'the Fourth Geneva Convention constitutes a great leap in what has been a very long march towards a more proactive approach to

[145] Roberts, "The Civilian in Modern War", at 37.

[146] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 24. Gardam explains that it appears that states were initially concerned to avoid the direct targeting of civilians and, moreover, to exercise care to avoid widespread civilian casualties. To a large extent this was a stance taken for pragmatic reasons. It was militarily efficient to direct attacks against objects contributing to the enemy's military capability. As the conflict developed, however, the perceived demands of military necessity eroded these standards. The direct targeting of civilians for the purpose of terrorizing the population to bring an early end to the conflict was resorted to.

[147] Lauterpacht, H., "The Law of War", in *International Law: Collected Papers – Disputes, War and Neutrality* (Elihu Lauterpacht ed., 2004), at 604.

safeguarding civilian welfare.'[148] However, the Convention does not deal with the protection of civilians from the effects of hostilities, and, more importantly, is only applicable to international armed conflicts.

Indeed, it is with the 1949 Geneva Conventions that the distinction between international and non-international armed conflicts has been entrenched. Apart from the consensual recognition of belligerency, states were strongly opposed to any compulsory international regulation of internal armed conflicts. This distinction has been confirmed in 1977 with the two Additional Protocols to the Geneva Conventions, Protocol I applying solely to international armed conflicts and Protocol II applying to armed conflicts not of an international character. This differentiation between the two types of armed conflicts has been upheld in the Rome Statute. This could appear as a purely legalistic distinction, if it did not entail a fundamental distinction in the content and scope of protection for war victims in these two admittedly different situations. It is interesting to note in this context that none of the Declarations or Conventions on the laws of armed conflicts adopted prior to 1949 contained a specific provision on the scope of application of these instruments. Furthermore, we have seen in this chapter that there was a trend toward the application of rules related to the conduct of hostilities to situations of internal armed conflicts. This trend was already visible in Grotius' work, some of whose main ideas were first developed in defence of private and mercenary wars. We have seen also that Vattel argued for the application of certain principles of humanitarian law to internal conflicts. Lastly, the Lieber Code was to serve as a field manual for the use of Federal troops engaged in the American civil war and was seen at that time, in Europe, as a code that could apply only in similar cases of civil wars.[149]

Bearing in mind the distinction between international and internal armed conflicts that was upheld in Geneva in 1949, the objective of Chapter 2 will be to survey carefully the applicable treaty legal framework for this type of conflict.

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[148] Meron, "The Geneva Conventions and Public International Law British Foreign and Commonwealth Office Conference commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009", at 621.

[149] Abi-Saab, R., "Humanitarian Law and Internal Conflicts: the Evolution of Legal Concern", in *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven*, (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991), at 210.

Chapter 2:

Treaty International Law Applicable to Internal Armed Conflicts

In the preceding Chapter, we have seen that the codification of the laws of war began in 1862 with the Lieber Code. It was followed by many conventions on both the treatments of sick or wounded, prisoners of war and civilians (Geneva Conventions of 1864, 1906 and 1929) and on the means and methods of warfare (Declaration of St. Petersburg 1868, Hague Conventions 1899 and 1907). With the exception of the Lieber Code, these conventions were only applicable to parties to an international armed conflict and non-international armed conflicts were not covered in these instruments. Historically, the regulation of armed conflict by international law tended to focus on those conflicts that were international in character. The will to preserve state sovereignty and security has been the main obstacle in the development of IHL in internal armed conflict, as states were convinced that this constitutes a violation of state sovereignty and interference in their internal affairs.[150] Accordingly, until the adoption of the Geneva Conventions of 1949, 'there was little by way of regulation of internal armed conflict through international law.'[151]

As we will see, the general antipathy that the international community, being constituted by sovereign independent states, has for any international regulation of internal armed conflicts, particularly the issue of substituting international humanitarian law for their own municipal law, is not a new phenomenon and has continued until recently. The truth is that the rules governing internal armed conflicts

[150] See eg. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977, v, at 103, para 15 (Delegate of Romania); v, at 381, para 9 (Delegate of Iraq); vii, at 61, para 11 (Delegate of Pakistan); vii, at 72, para 75 (Delegate of Chile); viii, at 205, para 17 (Delegate of Argentina).
[151] Sivakumaran, S., "Re-envisaging the International Law of Internal Armed Conflict", 22 *European Journal of International Law*, (2011), at 222.

have been neglected, or even avoided, as states were convinced, wrongly in the opinion of this author, that it was not in their interest to develop them. However, this now is changing, as we will see throughout this dissertation.

From Belligerency to Common Article 3

Until the adoption of Common Article 3 to the 1949 Geneva Conventions, the traditional laws of war did not apply to armed conflicts not of an international character, unless a state of belligerency with insurgents was recognized by the state involved.[152]

However, there have been several attempts to bring some regulations into this type of armed conflict. For instance, in 1912, a draft Convention on the role of the Red Cross in civil wars or insurrections was submitted, for the first time, to the International Red Cross Conference. However, the subject was not even discussed.[153] The question was again placed on the agenda of the Xth International Red Cross conference in 1921, and a resolution was passed affirming the right of all victims of civil wars, or social or revolutionary disturbances[154], to relief in conformity with the general principles of the Red Cross. This Resolution also laid down the duties of the National Red Cross Society of the country in question.[155] The resolution did not have the force of a convention, 'but it enabled the ICRC in at least two cases – the civil war in the plebiscite area of Upper Silesia in 1921 and the civil war in Spain – to induce both

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[152] Moir, L., "Grave Breaches and Internal Armed Conflict", 7 *Journal of International Criminal Justice* 763, (2009), at 763. For an extensive historical review of the birth of the law of non-international armed conflicts, refer to Momtaz, D., *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux* (Martinus Nijhoff ed., Martinus Nijhoff. 2001), *Recueil des Cours,* at pp. 23-27 and Moir, *The Law of Internal Armed Conflict*, at pp. 4-18.

[153] Pictet, J., *Commentary on the Geneva Conventions of 12 August 1949, Volum I* (ICRC ed., International Committee of the Red Cross 1952), at 39. See also Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale* (Institut Henry-Dunant et Editions Pedone. 1986), at pp. 31-35.

[154] In Rosemary Abi-Saab Opinion, the reference to 'revolutionary disturbances' could be explained by the immediate proximity of the Russian revolution. Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale*, at 36.

[155] Resolution XIV, *Dixième Conférence internationale de la Croix-Rouge tenue à Genève du 30 mars au 7 avril 1921.* Compte-rendu, Genève, 1921, at 218. See Id. at pp. 35-39.

sides to give some kind of undertaking to respect the principles of the Geneva Conventions.'[156]

Therefore, in a way, the civil war in Upper Silesia in 1921 and the Spanish civil war in 1936-39 proved to the community of nations that civil wars too needed regulations. The horrors committed in the course of the Spanish civil war have been a turning point in the evolution of IHL for internal armed conflicts. 'State practice with regard to the recognition of belligerency, most notably during the above mentioned war, suggests that states were unwilling or reluctant to use that device.'[157] Then, still under the influence of the Spanish civil war, at the XVIth International Red Cross Conference in 1938 a Resolution called 'Role and Action of the Red Cross in Civil Wars' invited national societies and the ICRC to combine their efforts in order to obtain the application of the rules laid down in the Geneva Convention of 1864 and in the two Geneva Conventions of 27 July 1929.[158] This Resolution did much to supplement and strengthen the 1921 Resolution. In the 1938 Resolution, state Parties requested 'the International Committee, making use of its practical experience, to continue the general study of the problems raised by civil war as regards the Red Cross, and to submit the results of its study to the next International Red Cross Conference.'[159] The International Conference was thus envisaging, explicitly and for the first time, the application by the Parties to a civil war, if not of all the provisions of the Geneva Conventions, at any rate of their essential principles.

This Resolution, coupled with the atrocities committed in the two conflicts above-mentioned, encouraged the International Committee of the Red Cross to reconsider the possibility of inserting provisions relating to civil war in the Conventions themselves. However, states were not ready to apply the Geneva Conventions in their

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[156] Bianchi, A. & Naqvi, Y., *International Humanitarian Law and Terrorism* (Hart Publishing. 2011), at 104. See also Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I, at pp. 27-28.

[157] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 49.

[158] See Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux*, at 26.

[159] Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I. at 41. See also Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale*, at pp. 40-42.

entirety to non-international armed conflicts.[160] In 1939 the Second World War broke out with all its well-known attendant horrors. After the terrifying abominations of the second world war, there have been attempts to include the principle of civilian immunity[161] into the Hague Conventions. However, in 1947, the Dutch government felt that incorporating the principle of civilian protection into The Hague conventions would be better left to the International Committee of the Red Cross. With the failure of this attempt to revise the Hague Conventions, the issue lay dormant for over two decades, until the adoption of the two Additional Protocols of the Geneva Conventions.[162]

1948 Stockholm meeting

I will not enter in a detailed discussion of the negotiating history of Common Article 3, as this is outside the scope of this chapter.[163] Suffice here to mention certain trends. After the war, at the 17th international conference of the Red Cross in Stockholm in 1948, the ICRC submitted a proposal to revise international humanitarian law applicable to internal armed conflicts. If accepted, this project would have insured the extension of most of the IHL rules to internal conflicts on the basis of reciprocity. The proposal read as follow:

> '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

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[160] On the negotiating history of Common Article 3, see Pictet Commentary, Common Article 3, GC I-IV. See also *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol IIB at 9-15.

[161] The principle of immunity is outlined in Article 48 of the 1977 First Additional Protocol to the 1949 Geneva Conventions, and Article 13 of the Second Additional Protocol to the 1949 Geneva Conventions. The question of civilian immunity will be dealt with in Chapters 6 to 14.

[162] On this specific issue, please see Kalshoven, F., "Civilian Immunity and the Principle of Distinction", 31 *The American University Law Review*, (1982), at 858.

[163] For a thorough study of the adoption and content of Common Article 3 to the 1949 Geneva Conventions, see Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum I. Commentary I*, at pp. 38-49; Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux,* at pp. 28-30; Moir, *The Law of Internal Armed Conflict*, at pp. 23-88; La Haye, *War Crimes in Internal Armed Conflicts*, at pp. 39-43; Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at pp. 49-60; Zegveld, L., *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press ed., Cambridge University Press. 2002), at pp. 9-18; Pinto, R., *Les Règles du Droit International Concernant la Guerre Civilie* (The Hague Academy of International Law. 1967), at pp. 524-543. Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale*, at pp. 43-71; Cowling, M., "International Lawmaking in Action - The 2005 Customary International Humanitarian Law Study and Non-International Armed Conflcts", 2006 *African Yearbook of International Humanitarian Law*, (2006); Pejic, J., "The protective scope of Common Article 3: more than meets the eye", 93 International Review of the Red Cross, (2011).

> occur in the territory of one or more of the High Contracting Parties, the implementation 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 nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.'[164]

The Stockholm draft was presented at the Diplomatic Conference in 1949 in Geneva. However, it was almost unanimously rejected by state members.[165] It was the first time ever that states considered the issue of non-international armed conflict in order to adopt substantive law applicable to such conflicts.

The draft gave rise to two main topics of division among negotiating states. In the first place, the opportunity to have such an article was contested by several states who could not envisage having the laws of war applicable to rebels, or who were afraid that such an article could cover all forms of insurrection, thereby obliging governments to grant belligerent status to all rebels and therefore limiting governments to legitimate measures of repression.[166] The second area of disagreement turned around the conditions of applicability of what would become Common Article 3. It soon became clear that the conference needed either to choose to limit the types of conflicts covered by the protection of Common Article 3, or to limit the extent of the provisions contained in the article. The first alternative would result in most of the Conventions applicable in international armed conflicts also applying to large-scale civil conflicts. In the second alternative, only minimal provisions would be applicable to larger types of civil conflicts. Finally, after numerous proposals, amendments and rejections, the French delegation presented another solution, namely the limitation of the applicable provisions, and the dropping of the clause requiring reciprocity.[167] At

[164] Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I. Commentary III, at p. 31.
[165] Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux*, at 27. See also RosemaryAbi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale*, at pp. 47-50.
[166] See *Final Record of the Geneva Diplomatic Conference of 1949*, vol. 2, at p. 322 and vol. 2-B, at pp. 13 ff.
[167] Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I. at 46.

this stage, the plenary meeting adopted Common Article 3 by thirty-four votes to twelve, with one abstention.[168]

Article 3, common to the four Geneva Conventions of 12 August 1949, constitutes therefore the first legal regulation of non-international armed conflict to be contained in an international instrument, and the provision, in addition to Common Article 1, is the only article of the four 1949 Conventions that applies to internal armed conflicts. It has been described as creating 'an unprecedented inroad into the exclusive competence of governments to deal with their internal affairs, in that they bound themselves in advance to comply with certain fundamental rules.'[169] Common Article 3 'constitutes the keystone of humanitarian law applicable in non-international armed conflicts'.[170] This article is an attempt to impose the underlying humanitarian principles of all four Conventions to all parties to internal armed conflict. As a result, it is frequently referred to as a 'Convention in miniature'[171] or as a 'microcosm' of the Conventions as a whole.[172] The Article lays down a basic set of protections that applies in the case of 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.'[173] Its content was deliberately confined to a few minimum rules to ensure the widest scope of application.

To summarize, the discussions around common Article 3 were some of the most lengthy and disputed of the Geneva diplomatic conference. Views formed during the Spanish Civil War were mainly applicable to large-scale civil wars, so when it came to agreement on treaty norms for internal armed conflicts in general, a more conservative and sovereignty-oriented approach emerged from the diplomatic conference.[174]

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[168] La Haye, *War Crimes in Internal Armed Conflicts*, at 41. See also Elder, D., "The historical background of common article 3 of the Geneva Convention of 1949", 11 *Case Western Reserve journal of international law*, (1979), at pp. 43-52; Moir, L., "The historical development of the application of humanitarian law in non-international armed conflict to 1949", 47 *International and Comparative Law Quarterly* (1998), at pp. 365-60.

[169] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 41.

[170] Id. at para 1319.

[171] Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I. *Commentary I,* at 48.

[172] Moir, *The Law of Internal Armed Conflict*, at 31.

[173] Article 3(1) Common to the Four Geneva Conventions of 1949 (hereinafter Common Article 3)

[174] La Haye, *War Crimes in Internal Armed Conflicts*, at 40.

The very question of what is meant by "armed conflict not of an international character" was a burning issue at the Diplomatic Conference. ‘The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms - any form of anarchy, rebellion, or even plain banditry.’[175] Indeed, states were not ready to renounce their sovereignty, which means in this context to renounce their freedom to choose the means of fighting an insurgency within their boundaries. It is necessary here to stress that human rights law was at that time in its inception, and states were convinced that they had a free hand to deal with these situations. Several delegations feared ‘that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government’s lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority and power, upon the adverse Party.’[176] The concern was based on ‘uneasiness about the laws’ implications for the status of parties to the conflict, and, in particular, on states’ concerns about restrictions on their ability to sanction individuals under domestic law for their belligerent acts.’[177] For most of the states it was not acceptable to erode their capacity to maintain internal order. Consequently, the fear of ‘giving a legal status to the armed group’ is the origin of Common Article 3(4), which provides that ‘the application of the preceding provisions shall not affect the legal status of the Parties to the conflict’.

This extreme resistance of states to any codification move applicable to internal armed conflicts had the effect that the rules adopted in 1949, dedicated to this type of conflict, were very rudimentary and generally beyond customary law. Despite several lacunae that will be dealt with throughout the dissertation, Common Article 3 constitutes the first-ever major encroachment on the sovereignty of states. ‘At the time of its adoption it was considered to be revolutionary and hence it is not surprising that its provisions do not have a high regulatory content, as it merely sets out a few broad, general principles that provide protection for all persons taking no

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[175] Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I. *Commentary I*, at p. 49. On the qualification of a non-international armed conflict, see Chapter 4 of this dissertation.
[176] Id. at *Commentary IV,* at p. 44.
[177] Fleck, D., *The Handbook of International Humanitarian Law* (Oxford University Press 2008), at 612.

active part in the hostilities.'[178] Until 1977, it was the only provision giving some minimum humanitarian protection to the civilian population, sick and wounded persons, as well as detained persons in this type of armed conflict.[179]

Military authorities have always been reluctant to have rules regulating the conduct of hostilities, especially from a humanitarian viewpoint that would restrict their margin of discretion. The extent to which Common Article 3 regulates the conduct of hostilities is debated.[180] Indeed, the drafting history and the differing methods of treaty interpretation can lead to varying conclusions. Two different views dominate the discussion.

The first view asserts that Common Article 3 does not deal with the conduct of hostilities. For some commentators, the provision only affords protection to persons falling under the direct control of a party to the conflict and therefore the article has no direct relevance for the conduct of hostilities.[181] As stated by the ICRC Commentary, 'although it expresses the principle that persons who do not or no longer participate in hostilities should be protected, there are, on the other hand, no rules on the conduct of hostilities aimed at sparing the civilian population as such.'[182] Furthermore, although one could argue that Common Article 3 sets out the principle of distinction, this was probably not the intention behind the provision, given the

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[178] Cowling, "International Lawmaking in Action - The 2005 Customary International Humanitarian Law Study and Non-International Armed Conflicts", at p. 75.

[179] The Hague Convention on Cultural property deals strictly with respect for cultural property. See further below for a discussion.

[180] Bellal, A., et al., "International law and armed non-state actors in Afghanistan," 93 *International Review of the Red Cross* (2011), at 7.

[181] See, e.g., Pejic, J., "The protective scope of Common Article 3: more than meets the eye", at 219; Zegveld, *Accountability of Armed Opposition Groups in International Law*, at 83; G. I. A. D. Draper, "Wars of national liberation and war criminality", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict*, Oxford University Press, Oxford, 1979, at p. 183; Abi-Saab, G., "Non-International Armed Conflicts", in *International Dimensions of Humanitarian Law*, (1988), at 235. The Rome Statute of the International Criminal Court also appears to distinguish between acts prohibited under Common Article 3 and other violations committed during the conduct of hostilities. See Rome Statute, Art. 8(2)(c) and Art. 8(2)(e). See also Garraway, C., "The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"", in *International Law and the Changing Character of War*, (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011), at 183; Hampson, F.J., "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", in *International Law and the Changing Character of War*, (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011), at 195.

[182] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 4365. See also para. 4776.

Conference's focus on Geneva Law.[183] Doswald-Beck considers that it is clear that the Diplomatic Conference of 1949 did not address the question of combat law and that therefore the principle of distinction is not regulated as such in Common Article 3. She further explains that the provision concentrates on the treatment of those who are not, or are no longer, taking part in hostilities.[184] Hampson too considers that Common Article 3 is not applicable to the conduct of hostilities. She writes that:

> 'Civilians in need of protection from the fighting do not fit within (the Geneva Conventions) framework. Their vulnerability arises not from the adversary but from the fact of fighting. They need protection from their own side as much as from the enemy. Any measures to improve their protection will have a direct impact on the conduct of hostilities. In other words, rules on targeting and opening fire form part of Hague law, even if part of their object is the protection of the civilian population.'[185]

However, according to the second view, Common Article 3 does apply to the conduct of hostilities. For others, like Cullen, it is clear from the *travaux préparatoires* of the Geneva Conventions that the intended scope of applicability for Common Article 3 was far narrower than that which is currently the case.[186] Accordingly, the different view shared by other scholars would be the following: the reference to 'violence to life and person' covers acts committed in the course of military operations. The argument goes like this: At first sight, Common Article 3 does not provide protection to civilians during military operations, apart from, firstly, the requirement that persons not taking part in hostilities should be treated humanely and secondly, the prohibition of violence to life and person. Therefore, the necessity to distinguish is present to a certain extent, with regard to the requirement of humane treatment for a certain category of persons, namely those not involved in hostilities.[187] Thus for example, according to Gardam, it could be argued that 'the failure to distinguish between civilians and combatants, particularly if this failure manifests itself in a direct attack

[183] Camins, "The past as prologue: the development of the 'direct participation' exception to civilian immunity", at p. 872.
[184] Doswald-Beck, "The Civilian in the Crossfire", at 254 and 258.
[185] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 195.
[186] Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press. 2010), at 49.
[187] Protection is for those 'taking no active part in hostilities' and for 'armed forces who have laid down their arms and those placed hors de combat' (Article 3(1)).

on civilians, is contrary to Common Article 3 requirements.'[188] In the same vein, Rogers affirms that:

> 'Common Article 3 does not deal directly with the conduct of hostilities. It seems, at first sight, only to protect the victims of such conflicts. (…) However, a close reading of the text of the article leads to the conclusion that it does more than that. For example, the principle of civilian immunity can be inferred from paragraph 1, which prohibits violence to the life of persons taking no active part in hostilities.'[189]

Bothe et al. explain that 'Common Article 3 is primarily intended to ensure humane treatment of persons in the power of a party to a non-international armed conflict'. However, they assert that 'it is arguable that the prohibition of 'violence to life and person' against 'persons taking no active part in the hostilities' is 'broad enough to include attacks against civilians in territory controlled by the adverse party in a non-international armed conflict.'[190]

The fact that Common Article 3, protecting persons not taking part in hostilities, would be applicable also during the conduct of hostilities can be inferred also from the wording that requires these people to be protected 'in all circumstances' (i.e. reciprocally). The second paragraph of Article 3(1) further requires the prohibition of certain acts 'at any time' and 'in any place whatsoever', illustrating the stringency of the ban. There can be no excuse for such behaviour (the commission of the acts listed in article 3(I)(a) to (d)), even in a combat situation.

In the end, the reason for the non-regulation of the principle of distinction *per se* in the Geneva Conventions might be that in 1949, when the four Conventions were adopted, there was a clear demarcation line between the laws of war, dealing with the conduct of hostilities, (the law of The Hague), and the emerging principles of humanitarian law, dealing with the protection of victims, (the law of Geneva).

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[188] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at p. 27.

[189] Rogers, A.P.V., *Law on the battlefield* (Juris Publishing Second ed. 2004), at 221. See also Moir, *The Law of Internal Armed Conflict,* at pp. 58–61.

[190] Bothe, M., et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhof Publishers 1982), at 667.

Therefore, 'at that time, an interpretation of a humanitarian document so as to affect the laws of warfare proper was hard to maintain.'[191]

The unique position of Common Article 3 and its relationship within the rest of the Geneva Conventions have been confirmed by the International Court of Justice in the *Nicaragua* Case in 1986. The Court stated that Common Article 3 was declaratory of customary international law, and that it constituted 'a minimum yardstick' for both international and internal armed conflicts, in addition to the more elaborate rules applicable to international armed conflicts.[192]

State Practice has shown that the application of Common Article 3 is far from being automatic. 'States are loath to recognise the existence of an internal armed conflict on their territory because this might be viewed as an acknowledgment of the government's inability to prevent a civil war.'[193] The United Kingdom in Kenya, Cyprus and Northern Ireland, refused to admit that Article 3 was applicable in these cases. Portugal never admitted any obligation to apply Article 3 to rebel forces in Mozambique and Angola. Similarly, Pakistan, Sri Lanka, or Russia, during the conflicts in Chechnya, never publicly recognised any obligations under Article 3.[194]

Common Article 3 should be considered as a first step on the way to a more complete protection of victims in internal armed conflicts. The provision introduced three major innovations into international law. In the first place, it applies norms of international law to the relationship between a state and its own citizens/residents, a relationship which had up to then been regarded largely as a matter within the sovereign powers of the State, regulated only by its own domestic legal system; secondly, it applies these norms not only to state actors, but to non-state actors, namely organized armed groups that do not belong to a state and are involved in an armed conflict with the state's

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[191] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law,* at 27. The discussion on the principle of distinction and related questions will be effectuated in Chapter 5.
[192] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, 1986, ICJ Rep 14, 114 (hereinafter *Nicaragua* case) case, paras. 218, 113–4.
[193] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 98.
[194] La Haye, *War Crimes in Internal Armed Conflicts*, at 42 with related references. See also Abresch, W., "A Human Rights Law of Internal Armed Counflict: The European Court of Human Rights in Chechnya", 16 *European Journal of International Law* 741 (2005), at pp. 741 – 767.

armed forces or with other armed groups in its territory; and lastly it grants a role for the ICRC in non-international armed conflicts.[195]

Accordingly, 'Common Article 3 has served its purpose only because it brought internal conflicts formally within the ambit of the Geneva Convention and of humanitarian law in general. It has indeed serious limitations that could only be surmounted by an extensive and somewhat bold and forward looking interpretation.'[196]

1954 Hague Convention for the Protection of Cultural Property and its 1999 Second Protocol

In 1939, a draft convention for the protection of monuments and works of art in time of war was elaborated under the auspices of the International Museums Office. Because of the outbreak of the war, the text was only adopted in The Hague in 1954.[197] The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[198] contains a number of rules relating to the protection of cultural property in situations of armed conflicts. Article 19 provides that 'in the event of an *armed conflict not of an international character* occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.'[199] This provision binds state and non-state parties to the conflict.

Conscious of the need to improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property, state parties adopted the Second Protocol in The Hague in March 1999. The text provides for measures to reinforce, respect and implement

[195] Kretzmer, D., "Rethinking the Application of IHL in Non-International Armed Conflict", 42 *Israel Law Review* 8 (2009), at p. 37.
[196] Georges Abi-Saab, "Humanitarian Law and Internal Conflicts: the Evolution of Legal Concern", at 213.
[197] Schindler & Toman, *The Laws of Armed Conflicts* at 741.
[198] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954.
[199] Ibid., Article 19 (emphasis added).

the Hague Convention.[200] However, the wording of Protocol II is unclear with respect to its application to all parties to a non-international armed conflict, whether state armed forces or organized armed groups. As highlighted by Clapham, while the 1999 Protocol II extends to non-international armed conflicts, it 'seems specifically to address its key obligations to a *state* 'Party' (with a capital P) to the Protocol rather than the 'parties' to the conflict (with a small p). This exclusive capitalization for state 'Parties' is not present in the Geneva Conventions of 1949 nor in the Hague Convention of 1954.'[201] Furthermore, Article 1(a) of Protocol II clarifies unambiguously that 'For the purposes of this Protocol: a. "Party" means a State Party to this Protocol'. Does this mean that Protocol II, despite applying to internal armed conflict, does not address any obligations to organized armed groups, as obligations are addressed to Parties or a Party? While acknowledging that it is a state-centred reading, Clapham explains that 'the Protocol seems on its face to refer to non-state actor "parties" to the conflict (with a small p) simply to remind that the application of the Protocol to an internal armed conflict "shall not affect the legal status of the parties to the conflict."'[202] I share Henckaerts view when he submits that 'a literal interpretation would lead to a manifestly absurd result of declaring a treaty applicable to non-international armed conflicts and at the same time eliminating most of its practical relevance in such conflicts.'[203] It is indeed difficult to see how the Convention and its Protocol II could be implemented in non-international armed conflict with only the state party being bound by it. This would be a pure nonsense.

[200] See Article 22 of the Second Protocol to the Hague Conventions of 1954, 26 March 1999.

[201] Clapham, A., "Focusing on Armed Non-State Actors", in *Oxford Handbook on International Law in Armed Conflict*, (Andrew Clapham & Paola Gaeta eds., Forthcoming), at 11.

[202] Ibid., referring to Protocol II of 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, articles 1 and 22(6), see also articles 22(7), 32(4) and 35(2). Note the provision for a party to a conflict to accept the protocol only applies to a 'State party', article 3(2).

[203] Henckaerts, J.-M., "New Rules for the Protection of Cultural Property in Armed Conflict: The Significance Of the Second Protocol to the 1954 Hague Convention For the Protection Of Cultural Property in the Event of An Armed Conflict", in *Protecting Cultural Property in Armed Conflict: The First Ten Years of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of an Armed Conflict*, (N. van Woudenberg & L. Lijnzaad eds., 2010), at pp. 21-42 esp at 39-40.

The Second Protocol Additional to the Geneva Conventions of 1949, or a Story of Disappointed Expectations

Historical Context

The need to develop the provisions of Common Article 3 arose during the period from 1949 to 1977. Indeed, practical experience had shown that the basic rules of humane treatment provided by this article were not sufficient in addressing the dramatic increase in atrocities committed in internal conflicts since World War II.[204] Not only had internal armed conflicts increased in number, due to the decolonisation process and the dynamics provoked by the Cold War, but also the acts committed in the conduct of hostilities in such conflicts had proven to be atrocious.[205] 'Suffice it to mention that eighty percent of the victims of armed conflicts since World War II have occurred in internal conflicts and most of such victims have been civilian casualties.'[206] Therefore, the need to protect civilian populations during internal armed conflicts was more than urgent.[207]

We have seen that Common Article 3 extended small parts of the law of armed conflict into internal armed conflicts. These parts dealt with the protection of individuals ('Geneva Law') and not the conduct of hostilities ('The Hague Law'). In the Diplomatic Conference that led to the adoption of the two 1977 Additional Protocols to the 1949 Geneva Conventions, detailed proposals were put forward to extend the 'Hague-type' provisions introduced in Additional Protocol I, and thus applicable only to international armed conflict, into Additional Protocol II dealing

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[204] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 99.

[205] From 1945 until 1977, suffice here to think, among many others, about the internal armed conflicts of Greece, China, Algeria, Venezuela, Tibet, Eritrea, Angola, Yemen, Zanzibar, South Rhodesia, Colombia, El Salvador, Guatemala, Peru, Sudan, Ireland, Biafra, Libya, Bangladesh, Cambodia, Lao and Vietnam.

[206] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 99.

[207] For details of the trends that led to the adoption of Protocol II and its drafting history, see Sandoz, et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. para. 4457; Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at pp. 99-105, Moir, *The Law of Internal Armed Conflict*, at pp. 89-99; RosemaryAbi-Saab, *Droit Humanitaire et Conflits Internes, origines et évolution de la réglementation internationale*, at pp. 91-138; or a complete review of the drafting history of Protocol II, see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at pp. 86-114; Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*.

with internal armed conflict. 'For the most part, these attempts were unsuccessful and Additional Protocol II contains primarily 'Geneva-type' law.'[208] The traditional concerns about state sovereignty, enhanced by the dozens of states emerging from decades of colonization, brought suspicion of these new international rules restricting sovereignty within the state's own borders. In addition, 'it was widely, though perhaps naively, believed that nations were much less likely to disregard the safety of their own nationals during internal conflicts than might be the case for civilians of an enemy state.'[209] As a result, these civilians were viewed as less in need of legal protections.

However, Protocol II still made a necessary contribution in that it provides in writing for some regulation on the conduct of hostilities. In contrast to Common Article 3, the provisions of Protocol II appear to be addressed not simply to the party in control of the civilians, but 'to all parties involved in the conflict, perhaps especially those *not* in control of the civilians.'[210] This is what places these provisions within the realm of Hague Law rather than Geneva Law, and to this extent it is possible to see this as new law, although 'the principle of distinction contained in the Hague Rules must have been part of customary international law to the extent that it applied to non-international armed conflicts.'[211] The Protocol contains provisions dealing with the protection of the civilian population. The general principle that civilians shall not be the object of attack is stated in Article 13. Article 14 prohibits the starvation of civilians as a method of combat, and Article 15 prohibits attacks on objects that are indispensable for the survival of the civilian population.

Despite these few provisions, Additional Protocol II can be described as a disappointing, limited and rather restrictive extension of Common Article 3. Indeed, many internal armed conflicts are not covered by Additional Protocol II, be it because the state concerned is not a party to the Protocol, or because the conflict does not fall within the scope of application defined in Article 1(1) of Protocol II. The scope of

[208] Garraway, "The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"", at 183. See also Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 194.
[209] Sylvester, D.J. & Fellmeth, A.X., "Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife", Paper SSRN, (2010), at 6.
[210] Abi-Saab, "Non-International Armed Conflicts", at 235 (emphasis added).
[211] Moir, *The Law of Internal Armed Conflict*, at pp. 116-117.

application of Protocol II is outlined in its Articles 1 and 2. Article 2 deals with the personal field of application, asserting that 'this Protocol shall be applied without any adverse distinction to all persons affected by an armed conflict as defined in Article 1'. Article 1 deals with the material field of application. It defines the conditions which must be present for an internal armed conflict to be regulated by Additional Protocol II.[212] According to its paragraph 1, the Protocol:

> 'shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other 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.'

Accordingly, Protocol II further narrowed the scope of non-international armed conflict by establishing a much higher threshold of application than Common Article 3, with stringent requirements to be met by groups involved in it, and by specifying, in paragraph 2, that such a conflict does not include 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.'[213]

The Protocol and its relationship with Common Article 3

Protocol II is far more detailed than Common Article 3 but lists several conditions that shall be met in order for the Protocol to be applicable. At the time of the 1974-1977 Diplomatic Conference, some delegates thought that state practice would redefine Common Article 3 'upwards', giving that article the same material field of application as Protocol II. However, it seems that 'a discernable shift has in fact been in the opposite direction, largely through the efforts on the part of the ICRC, to push the threshold of Common Article 3 down as low as possible.'[214]

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[212] Id. at 100.
[213] The material scope of application of Protocol II will be dealt with in Chapter 4 of this dissertation.
[214] Moir, *The Law of Internal Armed Conflict*, at 103.

Accordingly, the most disappointing aspect of Protocol II, at least at first sight, relates to the 'split applicability' of the Provisions of Protocol II and Common Article 3, bearing in mind that the primary objective of the aforementioned Protocol was to improve the protection of civilians in internal armed conflicts. However, as we will see further down in this dissertation, this split applicability, when it comes to the rules on the conduct of hostilities, might better protect civilians against the effects of hostilities for low intensity internal armed conflicts.

At this stage of the reflection, the conclusion to be drawn from this shortcoming of Additional Protocol II is that the Geneva Conventions' definition of armed conflict remains in place,[215] but 'for Protocol II to apply in internal armed conflicts, the additional requirements of Article 1 thereof mentioned must be fulfilled.'[216] As a consequence, in updating the substantive law, Protocol II introduced stringent requirements for the applicability of its rules (article 1(1)) and a minimum threshold (article 1(2)) below which it should not apply.

Article 1 clarifies the continued validity of Common Article 3 to the Geneva Conventions: 'This Protocol, (…) develops and supplements Article 3 common to the Geneva Conventions of 1949 without modifying its existing conditions of application'. 'The Diplomatic Conference chose to adapt the scope of protection of Protocol II to the degree of intensity of the conflict.'[217] However, this sentence is not to be taken too literally since 'it is the idea behind Article 3 which is developed and supplemented, not the provisions of the article itself.'[218] 'Indirectly, Protocol II can have a substantial impact in elucidating the material protection provided for in Common Article 3.'[219] However, the explicit reference to 'without modifying its existing conditions of applications' clarifies the autonomous existence of Common Article 3. As specified in the ICRC Commentary, 'its applicability is neither limited nor affected by the material field of application of the Protocol. This formula, though

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[215] See Protocol II, Article 1(1), and Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4359. See also para 4453.
[216] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 105.
[217] Junod, S., "Additional Protocol II: History and Scope", 33 *American University Law Review* (1983), at p. 35.
[218] See Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 623.
[219] Abi-Saab, "Non-International Armed Conflicts", at 237.

legally rather complicated, has the advantage of furnishing a guarantee against any reduction of the level of protection since provided by Common Article 3.'[220] Accordingly, we can safely argue that the additional restrictions provided for in Article 1(1) only define the field of application of the Protocol and do not extend to the entire law of non-international armed conflict. Common Article 3 thus preserves its autonomy and covers a larger number of situations.

The scope of the Second Protocol is clearly narrower and more restrictive than that of Common Article 3[221], as a set of provisions outlining when an armed conflict comes within the scope of its terms means that 'the Protocol will apply only to the most intense and large-scale armed conflicts.'[222] Again, that is the reason why it was absolutely essential to conserve the autonomy of Common Article 3. As explained by Abi-Saab, 'it became a matter not of precaution but of necessity, as it became clear that the Protocol would cover only one species, the most characterized and intense one, of the armed conflicts governed by common article 3.'[223]

Contrary to Common Article 3, which does not contain the requirement of reciprocity[224] contained in Article 1 of Protocol II, 'the Protocol appears to regard some reciprocity between the armed forces involved as a precondition for the applicability of the Protocol.'[225] Certainly, both Protocol II and Common Article 3 are equally applicable to all parties to such a conflict.[226] However, whereas Article 1(1) of Protocol II stipulates that the forces of the non-state parties in question must be similar to an army, by requiring them to have a command structure and control a certain amount of territory, Common Article 3 does not contain any requirement of

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[220] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* at para. 4457.

[221] In Common Article 3, except the necessity of the existence of an armed conflict, there is no threshold for its application. Compare with the high threshold of Protocol II which requires that the conflicts be between armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.

[222] Moir, *The Law of Internal Armed Conflict*, at 101.

[223] See Abi-Saab, "Non-International Armed Conflicts", at p. 229. See also Moir, *The Law of Internal Armed Conflict*, at 101.

[224] For a discussion of reciprocity, see Chapter 5.

[225] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 122.

[226] Junod, "Additional Protocol II: History and Scope", at pp. 35-36. See also Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 4442–4444.

this sort. Therefore, the aforementioned article[227] contains minimum guarantees, regardless of reciprocity, for any person in the power of a party to a conflict. As stated above, this interpretation was confirmed by the ICJ in the *Nicaragua* case, where the Court asserted that these rules derive from 'elementary considerations of humanity', independently of any element of reciprocity.[228] Accordingly, we can safely affirm that most IHL rules – in particular those relating to internal armed conflicts – are applicable regardless of reciprocity. Asymmetrical conflict consequently does not entail the non-applicability of the minimum IHL requirements.

Consequently, an internal armed conflict may fall within the material field of application of Common Article 3 without fulfilling the conditions determined by Additional Protocol II. Conversely, all armed conflicts covered by Additional Protocol II are also covered by Common Article 3.[229] Accordingly, the Protocol defines a more limited field of application than that of Common Article 3, establishing several criteria to be fulfilled in order to be applicable to a given internal armed conflict.

Conclusions on Protocol II

Despite the 'salvage operation that was conducted'[230] on its dismembering, Protocol II has made a major contribution in that it provides in writing, albeit not in a detailed manner, for the regulation of hostilities. Protocol II can be seen as disappointing in its content, partly due to the threshold of application set in Article 1, but mainly because a large part of the provisions adopted in Committee were eliminated in the plenary. However, while it has a significantly narrowed scope of application and uses terms

[227] Together with article 75 of Protocol I. This will be developed in the subsequent chapters of this dissertation.
[228] *Nicaragua* case, para. 218, For the 'elementary considerations of humanity' as a principle of international law, see ICJ, Corfu Channel Case (United Kingdom v. Albania), Judgment (Merits), ICJ Reports 1949 (hereinafter *Corfu Channel* case), p. 22.
[229] For a full overview of the relationship of Protocol II and common Article 3, please refer to La Haye, *War Crimes in Internal Armed Conflicts*, at 9, Fleck, *The Handbook of International Humanitarian Law*, at 609ff., Vité, S., "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", 91 *International Review of the Red Cross* 69 (2009), at 79ff., Junod, "Additional Protocol II: History and Scope", at 35ff.
[230] Fenrick, in Dupuis, M.D., et al., "The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*"* 2 *American University Journal of International Law and Policy* (1987), at 474.

different from those in Common Article 3, the generic categorization of persons is the same in Common Article 3 and Additional Protocol II.[231]

The Protocol 'can hardly be regarded as a bold and far-reaching attempt to maintain standards of humanity in internal armed conflicts.'[232] However, despite the disappointment created by the rare applicability of Protocol II, due to its high threshold of application, it should be stressed that it has supported a definite educational process which has enhanced awareness of existing rules of humanitarian protection and has surely helped to promote the inclusion of the notion of non-international armed conflicts in a number of international instruments that have been adopted in recent decades.[233] In addition, the discussions around its adoption have led to further legitimacy for the basic notion of humane treatment and protection for those not taking part in hostilities in internal armed conflicts.[234] 'The Protocol's real significance rests in the symbolic and long-range contributions it makes to a still evolving body of human rights for all individuals in all armed conflicts.'[235]

So treaty IHL regulating atrocities, such as those committed in El Salvador, Rwanda, former Yugoslavia, Sri Lanka, DRC and Chechnya, is in place, but is proving alarmingly ineffective. After Protocol II, with a few exceptions, the IHL treaties that have been concluded in the last two decades regulate internal armed conflict as a matter of course. This is what we are going to analyse briefly in the next section.

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[231] This question is dealt with in Chapter 5.
[232] Forsythe, D.P., "The Legal Management of Internal War: The 1977 Protocol of Non-International Armed Conflicts", 72 *The American Journal of International Law* (1978), at 294.
[233] See for instance the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices; the 2001 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.
[234] See Chapter 6 for further discussion.
[235] Forsythe, "The Legal Management of Internal War: The 1977 Protocol of Non-International Armed Conflicts", at 295.

Other treaties dealing with non-international armed conflicts

Recent decades have seen a tremendous increase in the number of treaty rules specifically addressing internal armed conflicts. However, none of these treaties attempted to supplement the Second Additional Protocol. In addition, none of them deals generally with the regulation of these conflicts, as they only address specific problems which occur in internal armed conflicts. 'Their application to internal armed conflicts is the result of the issues at stake and of the way those treaties were negotiated, and not the result of specific negotiations addressing internal armed conflicts *per se*.'[236] This change seems to follow from a change in the formative factors of the treaties, which having a situation-on-the-ground focus, did not distinguish between international and internal armed conflicts. A brief overview of these treaties will be given here.[237]

Weapons Treaties

Weapons treaties did not traditionally include non-international armed conflicts in their scope of application. However, there is a new developing trend whereby internal armed conflicts are included in treaties dealing with weapons.[238] During the Tehran Conference, in 1968, there was already interest shown by the United Nations in limiting the means and methods of warfare, both in international and internal armed conflicts.[239] The war in Vietnam was raging and the use of Napalm by the United States was generating an outcry in public opinion throughout the world. This led Sweden to call for a Conference to explore the possibility of concluding a treaty banning or restricting the use of certain weapons. This was the beginning of a process that led to the adoption by consensus, in 1980, of the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effect. The Convention on Certain Conventional Weapons and its Protocols were originally only applicable to

[236] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 114.
[237] For an extensive survey of the treaties that have been adopted from 1980 onwards, please see Ibid., at Chapter 5.
[238] La Haye, *War Crimes in Internal Armed Conflicts*, at 47.
[239] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 107.

international armed conflicts. Whilst the Convention provides the legal framework, its three annexed Protocols contain a ban and restrictions on specific weapons.[240]

The recent trend in treaty law is to make the same rules applicable in international and non-international armed conflicts. During the first Review Conference for the Convention on Certain Conventional Weapons, the Mines Protocol, Protocol II to the Convention on Certain Conventional Weapons, was amended to include internal armed conflicts within its scope.[241] The original limitation to international armed conflict was recognized as a shortcoming, given that the majority of casualties of land mines are to be found in states involved in an internal armed conflict.[242] The prohibition on directing attacks against civilians is also contained in the Amended Protocol II and Protocol III.[243]

Some years later, during its Second Review Conference in 2001, the framework Convention on CCW itself was amended, precisely so as to apply to internal armed conflict.[244] Amended Article 1 of the CCW made the Convention as a whole and therefore all its protocols applicable in both international and internal armed

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[240] In particular, Protocol I on Non-Detectable Fragments prohibits the use of any weapon the primary effect of which is to injure by fragments, which in the human body escape detection by X-rays. Protocol III prohibits in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons. It allows to attack military objectives with incendiary weapons only if the military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view of limiting the incendiary effects to the military objective. It also provides rules aimed at protecting forests from the damage caused by incendiary weapons. See Id. at 109.

[241] The amended scope of application reads: ‘This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’ (Art. 1(2)).

[242] See Matheson, M.J., “The Revision of the Mines Protocol”, 91 *American Journal of International Law* 158 (1997), at 159. Referred to by Sivakumaran, “Re-envisaging the International Law of Internal Armed Conflict”, at 226.

[243] Amended Protocol II to the CCW, Article 3(7). The prohibition of directing attacks against civilians is dealt in Chapter 8.

[244] Art. 1 of the framework Convention originally provided that the ‘Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions…including any situations described in paragraph 4 of Article 1 of Additional Protocol I to the Conventions’. This was amended during the second review conference to ‘also apply to situations referred to in Article 3 common to the 1949 Geneva Conventions.’ Amendments to the Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. No. CCW/CONF/II/2, 21 December 2001.

conflicts.[245] This amendment had broad support.[246] Indeed, certain states had taken the view that the Convention should apply to internal armed conflict even prior to the amendment.[247] Accordingly, Protocols I-IV to the framework Convention are applicable to internal armed conflict for states which ratify the amendment to the framework Convention.[248] More specifically, change had already been made with regard to the Protocol on Blinding Laser Weapons (Protocol IV).[249] As a result the 2001 amendment and the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices[250] was applicable in both international and internal armed conflicts from the start as a result of Article 1.2 of the Protocol. A subsequent Protocol on Explosive Remnants of War (Protocol V)[251] was applicable in both international and internal armed conflicts from the start.

The 1993 Chemical Weapons Convention prohibits all use of chemical weapons in warfare *under any circumstances.*[252] This has been interpreted as being applicable also in internal armed conflict.[253] The Ottawa Convention on the Prohibitions of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, prohibits state parties from using anti-personnel mines under any circumstances. This comprehensive instrument applies therefore to internal armed conflicts. The Convention on Cluster Munitions, 3 December 2008, prohibits the use of the weapons defined in this treaty in all circumstances, therefore in both international and internal armed conflicts. The two aforementioned treaties do

[245] Amended Article 1 provides that the 1980 Convention and its annexed protocols 'shall apply to situations referred to in Article 3 common to the 1949 Geneva Conventions.'

[246] There was no opposition to the extension; indeed numerous states spoke in favour of the amendment. See 'Second Review Conference of the State Parties to the Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects', CCW/CONF.II/2.

[247] When the President of the United States transmitted the Convention to the Senate for its advice and consent as to ratification, the President proposed that ratification should be accompanied by a declaration that the US would apply the Convention 'to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions of 12 August 1949' (reproduced at 88 AJIL (1994) 748, at 751). In turns, the Senate, in giving its advice and consent, stated as a priority for strengthening the Protocol '(a)n expansion of the scope…to include internal armed conflicts': Resolution of Ratification, at para. 3(c)(3), 141 Congressional Record S4568, S4569 (24 March 1995), cited in Matheson, *The Revision of the Mines Protocol*, at 160.

[248] The amendment entered into force on 18 May 2004. For the view that Protocol IV is applicable to internal armed conflict even outside ratification of the amendment see Doswald-Beck, L., *New Protocol on Blinding Weapons*, 312 International Review of the Red Cross, (1996), at 272.

[249] 13 October 1995, UN Doc. CCW/CONF.I/7, 12 October 1995.

[250] Amended Protocol II, 2 May 1996, S. Treaty Doc. No. 105-1, 1997.

[251] November 27, 2003, UN Doc. CCW/MSP/2003/2.

[252] Article 1.1 of the 1993 Chemical Weapons Conventions.

[253] See La Haye, *War Crimes in Internal Armed Conflicts*, at 48 with references.

not specify whether the type of internal armed conflict they refer to are Common Article 3 threshold or Second Additional Protocol II threshold.

Lastly, it is important to mention the 2000 Optional Protocol to the Convention on the Rights of the Child, on Involvement of Children in Armed Conflict. This protocol enjoins states to take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen do not take part in hostilities and are not compulsorily recruited into their armed forces.[254] Interestingly, article 4 prohibits, albeit in less strong wording, organized armed groups from recruiting or using in hostilities persons under the age of eighteen.[255]

The international law of internal armed conflicts is not, however, confined to international humanitarian law. As Sivakumaran observes, 'the law that governs internal armed conflicts is not simply a body of international humanitarian law; rather it is a body of international law. Aspects of international law other than international humanitarian law also play an important role in the regulation of internal armed conflicts.'[256] We therefore now turn our attention to consider the international criminal law regime that provides secondary norms for the regulation of internal armed conflicts.[257]

International Criminal Law

International criminal law is an important means by which IHL may be enforced, as the former has become inextricably linked with the latter. Cassese even held that it is *the* most important means of enforcement.[258] 'War crimes law comprises the

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[254] Article 4(2) reads as follow: 'States Parties *shall* take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.' (emphasis added).
[255] Article 4(1) reads as follow: 'Armed groups that are distinct from the armed forces of a State *should* not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.' (emphasis added).
[256] Sivakumaran, S., "The International Law of Internal Armed Conflict", 9 *Journal of International Criminal Justice*, (2011), at 286.
[257] The legal human rights framework applicable in internal armed conflicts is outside the scope of this dissertation, which focuses strictly on international humanitarian law and international criminal law.
[258] Cassese, A., "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", 9 *European Journal of International Law* 2 (1998), at p. 17.

secondary rules to the primary rules of international humanitarian law.'[259] Usually, there is relatively little interaction between the primary and secondary rules. However, in so far as international criminal law and IHL are concerned, there is an extremely close relationship between the two. 'In many instances, the primary and secondary rules have been treated as identical, and it has been through the secondary rules (war crimes) that the primary rules (international humanitarian law) have been developed and clarified.'[260] Indeed, it has been through the lens of war crimes that certain rules of humanitarian law were first shown to be applicable in internal armed conflicts. It has also been through the lens of war crimes that existing IHL rules applicable to internal armed conflicts have been fleshed out,[261] by bodies of international law other than international humanitarian law. Indeed, as we have seen above, the treaty regulatory framework is sketchy, giving only a skeletal regulation.[262]

'Just as human rights law gave international humanitarian law a new lease of life in the late 1960s,[263] international criminal law gave it a new lease of life in the 1990s.'[264] We therefore need a detailed consideration of the jurisprudence of international courts and tribunals to understand correctly the international law of internal armed conflicts. As of today, IHL can no longer be understood fully without recourse to the work of the International Criminal Tribunals and Court, in addition to national criminal courts. The establishment of the International Criminal Court (hereinafter ICC) should be regarded as the culmination of a development that started in Nuremberg and Tokyo in the aftermath of the Second World War, and continued with the *ad hoc* Tribunals that followed the atrocities committed in the Former Yugoslavia and Rwanda (hereafter ICTY and ICTR respectively).

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[259] Bothe, M., "The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY", 12 (2001), at 381.

[260] Sivakumaran, "The International Law of Internal Armed Conflict", at 287.

[261] See for instance *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-49-1-AR72 (2 October 1995) (hereinafter *Tadic* Interlocutory Appeal), paras 123 and 125.

[262] See generally Greenwood, C., "Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", 98 *Max Planck Yearbook of United Nations* 128, (1998).

[263] Meron, T., "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 239 (2000), at 247. See further below for a discussion of the applicability of human rights in internal armed conflicts. Referred to by Sivakumaran, "The International Law of Internal Armed Conflict", at p. 288.

[264] Sivakumaran, "The International Law of Internal Armed Conflict", at 288.

International criminal law is therefore accessorial to IHL, and its application through the international criminal justice system is increasingly important for the implementation of IHL. International criminal law concerning war crimes consists of 'the rules of procedure and substance about when and how violations of IHL can give rise to criminal responsibility.'[265] Criminal prosecutions happen after the commission of the violations, and accordingly, international criminal law is a body of law that is applied *ex post facto.* Accordingly, IHL and international criminal law differ in their objectives. The former 'aims to regulate warfare and thereby mitigate the suffering resulted from it, whilst the latter seeks to counter impunity of those having violated the rules of IHL in such a manner so as to give rise to individual criminal responsibility.'[266]

The fact that violations of the law applicable in case of armed conflicts not of an international character may also constitute war crimes under international law is of relatively recent origin. Until the decision on Interlocutory Appeal in the *Tadic* case, the traditional interpretation was that the 'grave breaches' provisions that we find in the Geneva Conventions and Protocol I only applied to international armed conflicts.[267] So there was no general acceptance of a body of customary norms applicable to internal armed conflicts. In addition, neither the Geneva Conventions of 1949 nor Protocol II of 1977 additional thereto contain a provision on grave breaches, constituting a system of mandatory prosecution, relating to this type of armed conflict. In other words, Article 3 common to the Geneva Conventions and Protocol II only contain primary rules, and no secondary rules concerning criminal sanctions for unlawful behaviour.[268] The concept of individual criminal responsibility for violations of the law of internal armed conflicts could not take root. This position was also confirmed by the final report of the Commission of Experts.[269] Even the ICRC,

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[265] Sassoli, M., "Humanitarian Law and International Criminal Law", in *The Oxford Companion to International Criminal Justice*, (Antonio Cassese ed., 2009), at 112.

[266] Bartels, R., "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", 46 *Israel Law Review* 1, (2013), at 11.

[267] See Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV, Article 11(4) AP I, and Article 85(2)-(4) AP I.

[268] Bothe, M., "War Crimes", in *The Rome Statute of the International Criminal Court*, (Antonio Cassese, et al. eds., 2002), at p. 381. In 1977, the drafters explicitly excluded any suggestions that there could be grave breaches during internal armed conflict. See Schabas, W., *An Introduction to the International Criminal Court* (Cambridge University Press. 2011), at 143.

[269] *Report of the Secretary-General Pursuant to paragraph 2 of the Security Council Resolution 808 (1993),* UN.S/25704 (3 May 1993).

expressing its opinion on the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993, stated that 'according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflicts.'[270] This is why the ICTY in the *Tadic* case[271], could not condemn an accused for grave breaches of the Geneva Conventions, according to Article 2 of the Statute, where the situation did not amount to an international armed conflict. Despite these conclusions, the Appeal Chamber in the *Tadic* case, in a groundbreaking move, stated that, provided certain conditions are fulfilled, violations of the laws and customs of war fall within the jurisdiction of the Tribunal, no matter whether such violations are committed in international or non-international armed conflicts.[272] The Chamber stated eloquently:

> 'Elementary considerations of humanity and common sense make it preposterous that the use by states of weapons prohibited in armed conflicts between themselves be allowed when states try to put down a rebellion by their own nationals on their own territory. What is inhumane and consequently proscribed in international wars, cannot but be inhumane and inadmissible in civil strife.'[273]

The Appeal Chamber therefore found that the scope of application of the 'laws or customs of war' under Article 3 of the Statute was not so limited, and it developed the concept of war crimes in internal armed conflicts on the basis of customary international law.[274] Two years after the *Tadic* breakthrough, the Statute of the ICTR expressly recognized violations of Common Article 3 and Additional Protocol II as crimes coming under the jurisdiction of the Tribunal.[275] And the International Criminal Court confirmed this view by declaring punishable violations of international humanitarian law in non-international armed conflicts.

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[270] *Some preliminary remarks by the International Committee of the Red Cross on the setting-up of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia.* DDM/JUR/422b, 25 March 1993. Referred to in Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at 150.
[271] *Tadic* Interlocutory Appeal, paras. 81-85.
[272] *Tadic* Interlocutory Appeal, para. 94.
[273] *Ibid.* para. 119.
[274] *Ibid.* paras. 81-85.
[275] Bothe, "War Crimes", at 417.

It is judicious here to look more closely at the *Tadic* decision, as this judgment 'stunned international lawyers by issuing a broad and innovative reading of the two war crimes of the ICTY'.[276] The judgment – reacting to the contention that the court did not have jurisdiction over crimes committed in internal armed conflicts – held that Article 3 of the ICTY Statute served as a residual clause 'designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal'[277] and that there existed a broad scope of humanitarian norms applicable to internal conflicts, violations of which incurred individual criminal responsibility under customary international law.[278] The Tribunal's finding that customary international law recognizes the criminalization of breaches committed in internal armed conflicts was therefore revolutionary. It has been argued that the judgment has been used by the Tribunal as a vehicle to 'humanize' international humanitarian law, by extending the regulatory framework of international armed conflict to its internal counterpart.[279] In so doing, the ICTY had to rely on customary international law in order to establish its competence with respect to internal armed conflict situations.[280]

The *ad hoc* Tribunals have interpreted various IHL provisions. In interpreting the relevant war crime, they have interpreted the underlying IHL provision upon which the war crime is based.[281] International criminal law has put flesh on the bones of treaty humanitarian law, and without the case law of the ICTY and ICTR the Rome Statute would probably have been very different. However, all the rules applicable to international armed conflicts do not automatically apply to an internal armed conflict and 'what may constitute a war crime in the context of an international armed conflict does not necessarily constitute a war crime if committed in an internal armed conflict'.[282] Indeed, 'the regulatory transfer that has taken place from the laws of war applying to international armed conflict into the body of rules regulating internal

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[276] Schabas, *An Introduction to the International Criminal Court*, at 42.
[277] *Tadic*, Interlocutory Appeal, para. 91.
[278] Hoffmann, T., "The gentle humanizer of humanitarian law – Antonio Cassese and the creation of the customary law of non-international armed conflict", in *Future Perspectives on International Criminal Justice*, (Carsten Stahn & Larissa van den Herik eds., 2010), at 6.
[279] See generally Ibid.
[280] For a discussion of how judicial decisions have identified the customary rules applying in internal armed conflicts, see Chapter 3.
[281] Sassoli, "Humanitarian Law and International Criminal Law", at pp. 114-117.
[282] *Hadzihasanovic* Command Responsibility Decision, para. 12.

armed conflicts has not been all-encompassing, in that only some of its rules and principles have extended to the internal arena.'[283] As the Appeals Chamber in *Tadic* noted, this limited legal transplant – from international armed conflicts to internal ones – did not take the place 'in the form of a full and mechanical transplant of those rules to internal armed conflicts, (but instead) the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.'[284] However, the acknowledgment by the ICTY and ICTR that much of the law of international armed conflicts does apply to internal armed conflicts 'may be one of their most significant jurisprudential achievements as far as war crimes are concerned.'[285]

Rome Statute of the International Criminal Court

The Rome Statute of the ICC constitutes the most recent comprehensive effort to codify violations of international humanitarian law of a criminal nature, extending as it does the class of war crimes to serious violations of international humanitarian law perpetrated in armed conflicts not of an international character. The Statute was adopted at the diplomatic conference in Rome on 17 July 1998 and entered into force on 1 July 2002. As of today, 122 States have ratified it.[286]

Sadly, the Rome Statute follows only partially the approach of the Appeals Chamber in *Tadic*, when the latter proclaimed that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'[287], by maintaining the distinction in principle between international armed conflicts and armed conflicts not of an international character.[288] Among many other flaws, the 'Statute exacerbates the problem of the split applicability of the Provisions of Common Article 3 and Protocol II by introducing additional categories and maintaining a distinction between Common Article 3 and other serious violations of

[283] Mettraux, G., *International crimes and the ad hoc Tribunals* (Oxford University Press. 2005), at 131.
[284] *Tadic* Interlocutory Appeal, para. 126.
[285] Mettraux, *International crimes and the ad hoc Tribunals,* at 132.
[286] See http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/4.aspx (accessed on the 7 December 2013).
[287] *Tadic* Interlocutory Appeal, para 119.
[288] See Article 8(2)(c)-(f)

international humanitarian law in armed conflicts not of an international character.'[289] Indeed, the Rome Statute distinguishes between two categories of crimes that occur during such conflicts. It differentiates serious violations of Common Article 3 from 'other serious violations of the laws and customs of war' that are applicable in those situations.[290] In addition, in both cases, the Statute indicates the lowest level of applicability of the relevant provisions by insisting upon the fact that they do not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[291]

It is important to mention here that the inclusion in the Rome Statute of provisions on war crimes in internal armed conflicts was one of the most controversial issues arising during the diplomatic conference. As identified by Sivakumaran, for some states, the inclusion of provisions on war crimes in non-international armed conflicts was considered crucial, going to the very relevance of the Court;[292] the '*raison d'être*',[293] 'credibility',[294] and 'integrity and rationale'[295] of the Court depended on it. Other states expressed reservations about the inclusion of such provisions in the Statute. Some did so as, in their view, the provisions did not reflect customary international law,[296] others in the fear that it would lead to interference in the domestic affairs of states.[297] Still others supported a provision based on Article 3 common to the four Geneva Conventions of 1949, but no-one did so based on Protocol II additional to the Geneva Conventions.[298] Therefore, the Conference, taking into accounts this reluctance, and in order to facilitate a consensus, had to resort to compromise[299] and

289 Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 106.
290 Rome Statute Article 8(2)(c) and (e) respectively.
291 Rome Statute, Article 8(2)(d) and (f) respectively.
292 A/CONF.183/C.1/SR.4, para. 72 (Denmark); A/CONF.183/C.1/SR.4, para. 74 (Sweden); A/CONF.183/C.1/SR.26, para. 123 (Greece).
293 A/CONF.183/C.1/SR.26, para 54 (Republic of Korea).
294 A/CONF.183/C.1/SR.26, para.72 (Togo)
295 A/CONF.183/C.1/SR.26, para. 97 (United States of America)
296 A/CONF.183/C.1/SR.26, para. 102 (Islamic Republic of Iran); A/CONF.183/C.1/SR.25, para. 36 (China)
297 A/CONF.183/C.1/SR.27, para. 5 (Algeria)
298 A/CONF.183/C.1/SR.4, para.76 (Sudan); A/CONF.183/C.1/SR.25, para. 59 (Azerbaijan); A/CONF.183/C.1/SR.25, para 64 (Mexico). Referred to in Sivakumaran, S., *Identifying an armed conflict not of an international character*, *in* The Emerging Practice of the International Criminal Court, (Carsten Stahn & Goeran Sluiter eds., 2009). at p. 363.
299 Momtaz, D., "War Crime in Non-International Armed Conflict under the Statute of the International Criminal Court", 2 *Yearbook of International Humanitarian Law* 177-192, (1999), at 179

split the provision.[300] The outcome was the compromised article above mentioned.[301] Despite these difficulties, Article 8(2)(c) and (e) of the Rome Statute contain a long list of war crimes committed in non-international armed conflicts,[302] and importantly, it was the first time that the concept of war crimes and individual criminal responsibility in internal armed conflict was embodied in an international treaty. However, as we will see in the following Chapters of this dissertation, important crimes such as direct attack against civilian objects, indiscriminate attack and disproportionate attack, have not been included for non-international armed conflicts.

Finally, Article 8(3) of the Statute constitutes a concession to those states that were scared that 'the inclusion of internal armed conflicts in the jurisdiction of the Court could be used as a tool for unjustified interference with domestic affairs.'[303] This provision states that 'Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means.'[304]

According to Bothe, 'the inclusion of secondary norms of criminal law in the (Rome) Statute can only be explained on the basis of the assumption that the corresponding primary norms (prohibitions) constitute rules of customary international law relating to non-international armed conflict.'[305] Therefore, care has to be taken, as it cannot be assumed that the interpretation of war crimes will always inform humanitarian law. Indeed, interpretations of the former could end up by narrowing the protections

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[300] For an extensive explanation of the negotiating history of Article 8(2)(c) and (d) and Article 8(2)(e) and (f) please see Fleck, D., "The Law of Non-International Armed Conflicts", *in The Handbook of International Humanitarian Law*, (Dieter Fleck ed., 2008), at p. 610 + 616. See also section 1201 § 5 and 1211; Cullen, A., "The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)", 12 *Journal of Conflict and Security Law* 419, (2008), at pp. 423-435; Moir, *The Law of Internal Armed Conflict*, at pp. 163-167; Sivakumaran, "Identifying an armed conflict not of an international character", at pp. 363-365 and 371-373; Robinson & Hebel, "War Crimes in Internal Conflicts: Article 8 of the ICC Statute", at pp. 197-200.

[301] Article 8(2)(c) and 8(2)(e) Rome Statute.

[302] Sixteen out of the fifty war crimes contained in Article 8 deal with internal armed conflicts.

[303] Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, at p. 156.

[304] This is without recalling Article 3(2) of the Second Additional Protocol which reads 'Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.'

[305] See Bothe, "War Crimes", vol. 1 p. 417. The question of the customary international law of internal armed conflict will be dealt with in the next Chapter of this dissertation.

afforded by the latter.[306] Indeed, given that international criminal law relates to 'the most serious crimes of international concern'[307] and that war crimes give rise to individual criminal responsibility, 'the war crime is sometimes drawn up or interpreted in a narrower fashion than its international humanitarian law equivalent. (…) This does mean that some care needs to be taken before transposing from international criminal law to international humanitarian law.'[308] It should also be recognized that secondary rules are being used to interpret primary rules, which represents a departure from the usual order of things. This has been criticized. For instance, Turns maintains that 'it would have been better, from a methodological point of view, to identify the norms applicable to conduct of hostilities in non-international armed conflicts first, before proceeding to criminalization.'[309]

Conclusion

In this Chapter, we have seen that the primary legal basis for the regulation of non-international armed conflicts are the treaty rules contained in Common Article 3 and in the Second Additional Protocol. These rules are pretty rudimentary. Furthermore, while nearly 160 states have ratified Additional Protocol II, several states in which internal armed conflicts are taking place have not done so, like Syria. In addition, there are other internal armed conflicts which do not reach the high threshold of application of Protocol II. Therefore, in these two situations, the only applicable humanitarian treaty provision is Common Article 3, which is doubtful that applies to the conduct of hostilities. And even if it does, it would not provide in enough details the necessary protection against hostilities to civilians.

Recent decades have seen a tremendous increase in the number of treaty rules specifically addressing internal armed conflicts. However, none of them deal

[306] On this issue, see for instance generally, Sassoli, "Humanitarian Law and International Criminal Law".
[307] Rome Statute, Article 1.
[308] Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", at 239.
[309] Turns, D., "At the Vanishing Point of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflicts", 45 *German Yearbook of International Law* 115, (2002), at 146. These difficulties will be analysed in due course throughout this dissertation.

generally with the regulation of these conflicts, as they only address specific issues at stake which occur in internal armed conflicts. For instance, we see a new developing trend whereby internal armed conflicts are included in treaties dealing with weapons. These treaties make the same rules applicable to international and non-international armed conflict alike.

International criminal law is an important means by which IHL may be enforced, as the former has become inextricably linked with the latter. The former comprises the secondary rules to the primary rules of international humanitarian law. As of today, IHL can no longer be understood fully without recourse to the work of the International Criminal Tribunals and Court, in addition to national criminal courts. International criminal law became accessorial to IHL, and its application through the international criminal justice system is increasingly important for the implementation of IHL. We have seen the great breakthrough of the *Tadic* Interlocutory Appeals Decision which ascertained the fact that violations of the law applicable in case of armed conflicts not of an international character may also constitute war crimes under international law.

And lastly, the Rome Statute of the International Criminal Court, in a comprehensive effort to codify violations of international humanitarian law in a criminal nature, extended the class of war crimes to serious violations of international humanitarian law perpetrated in armed conflicts not of an international character. However, important crimes such as the prohibition of direct attack against civilian objects, indiscriminate attack and disproportionate attack, have not been included for non-international armed conflicts.

Bearing in mind the sketchy nature of the treaty law that applies in internal armed conflict, the next Chapter will analyse whether, and how customary international humanitarian law, as another source of law, may add flesh on the bones of treaty law applicable to this type of armed conflict.

Chapter 3:

The Customary International Law of Non-International Armed Conflict

Theory of customary international law as a source of international law

Traditionally, treaties were regarded as the source *par excellence* of international law.[310] After the Second World War, customary law increasingly lost ground in two respects: existing customary rules were more and more eroded by fresh practice, and resort to custom to regulate new matters became relatively rare. Indeed, the insecurity inherent in its unwritten character and its protracted process of development rendered it disadvantageous, especially to the Third World. Accordingly, the majority of states turned to codification and progressive development of international law through treaties.[311]

However, since the 1970s, customary law has regained ground and become the cornerstone of the system. There is great potential for this source of law to universalize the body of international law, and this has led certain scholars to affirm that custom is the most important source of law.[312]

As we know, treaty law covers only a small area of the totality of international law, namely those areas where nations have got together and arrived at agreements. Treaties will deal with a certain matter, but will omit reference to other related matters. But via customary law, there is a vast mass of principles which can be brought into force, dealing with particular matters. 'As international law becomes more codified, the primary and the most obvious significance of a norm's customary

[310] Meron, T., *International Law in the Age of Human Rights* § 301 (Collected Courses ed., Martinus Nijhoff Publishers. 2003), at 377.
[311] Cassese, A., *International Law* (Oxford University Press. 2004), at 124.
[312] See for instance Weeramantry, "The Revival of Customary International Humanitarian Law", at 26.

character is that the norm binds States that are not parties to the instrument in which that norm is restated. It is of course not the treaty norm, but the customary norm with identical content that binds such States.'[313]

Another effect of the transformation of treaty norms into customary law is that parties cannot terminate their customary law obligations by withdrawal from the treaty. This principle is reflected in Article 43 of the Vienna Convention on the Law of Treaties which states that 'the invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.'[314] Disagreements as to other recognised or potential sources of public international law do not generally affect the understanding and the rank of custom as a primary source of international law.

A third effect of the customary nature of a norm is that reservations enacted by states with respect to a treaty cannot affect the obligations of the parties under provisions reflecting customary law to which they would be subjected independently of the treaty.[315] On this question, we shall mention two statements of the International Court of Justice in the *Nicaragua* case. Firstly, the judges stated that 'even if two norms belonging to two sources of international law appear identical in the content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence';[316] and secondly, the judges further observed that 'rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application.'[317] Obviously, the Vienna Convention's rules on treaty interpretation do not apply to customary law outside treaty context. The Court's cryptic reference to 'separate existence' is not illuminating though. The potential importance of interpretative practice by states parties is considerable: subsequent practice in the application of the treaty may establish the agreement of the parties

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[313] Meron, *International Law in the Age of Human Rights* at 374.
[314] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331
[315] Meron, *International Law in the Age of Human Rights* at 376.
[316] *Nicaragua* case, Merit, at para 178.
[317] Ibid.

concerning its interpretation. 'That new interpretation may in itself affect customary law, interpretation and practice may also introduce customary law into the interstices of the treaty, addressing matters which may have been left without regulation or which need regulations.'[318]

Described by some as a dynamic source of law for its flexibility and adaptability to the needs of the international community,[319] the 'determination of the existence and the content of customary norm is in practice a delicate process often left to academic debate.'[320] Whereas treaty law provisions are accessible in a fairly comprehensive way and are easy precisely to determine as a written text agreed on by the contracting parties, international customary rules are more difficult to grasp.

It is often argued that the method of customary law formation in the field of human rights and international humanitarian law is structurally different from the traditional method of customary law formation in public international law.[321] In the next section, we will look in the first place at the traditional way of identifying customary international law. The section after this one will be devoted to the analysis of the specificities related to the identification of customary law of international humanitarian law. But before, let us look at the interesting question of the existence of customary international law in internal armed conflicts.

[318] Meron, *International Law in the Age of Human Rights* at p. 376.
[319] Shaw, M., *International Law* (Cambridge University Press 3rd ed. 1997), at pp. 60-79.
[320] La Haye, *War Crimes in Internal Armed Conflicts*, at 49.
[321] Wouters, J. & Ryngaert, C., "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", *Katholieke Universiteit Leuven Institute for International Law, Working Paper No. 121*, (2008), at p. 3. See also Flauss, "La protection des droits de l'homme et les sources du droit international", in Société française pour le droit international, *La protection des droits de l'homme et l'évolution du droit international,* actes colloques SFDI de Strasbourg (Paris: Pedonne, 1998) 65; Meron, T., *The Humanization of International Law* (Martinus Nijhoff Publishers. 2006).

Is there any customary international law for non-international armed conflict?

Until recently, the existence of a body of customary rules pertaining to internal armed conflicts was generally held to be unlikely, or at least was contentious ground.[322] As we have seen in Chapter 2, the primary legal base for the regulation of internal armed conflicts are the treaty rules contained in Common Article 3 and in the Second Additional Protocol. These rules are pretty rudimentary.[323] While nearly 160 states have ratified Additional Protocol II, several states in which internal armed conflicts are taking place have not done so. In addition, there are other internal armed conflicts which do not reach the high threshold of application of Protocol II. Therefore, in these two situations, the only applicable humanitarian treaty provision is Common Article 3, and we have seen that it is doubtful that this Article does indeed apply to the conduct of hostilities. And even if it does, it would not provide the necessary protection. We have also seen the importance of customary international law as a source of international law. We may now wonder whether it is possible to speak of established custom with respect to such conflicts and, if so, what place the protection of civilians in the conduct of hostilities has in the system regulating internal armed conflicts.[324]

States have always been reluctant to have their internal strife regulated and they have tried to argue that there is no such thing as customary international law in internal armed conflicts. In the past, there were several grounds on which the objection to the development of customary rules in civil wars was based. This reluctance was first indicated by a rather strange issue. During the drafting process of Additional Protocol II there had been reluctance to accept that any customary rules existed regulating internal armed conflict. One of the recurring elements in nearly all the post-World War II IHL treaties has been the inclusion of the Martens Clause. All four of the 1949 Conventions,[325] as well as both the Protocols,[326] include the Martens Clause restating

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[322] Hoffmann, "The gentle humanizer of humanitarian law – Antonio Cassese and the creation of the customary law of non-international armed conflict", at 2.
[323] The Second Additional Protocol contains only 18 articles of substantive law applicable to internal armed conflicts.
[324] The second part of this question will be dealt with in Chapter 6 to 14.
[325] GC I, Article 63(4), GC II, Article 62(4), GC III, Article 142(4) and GC IV, Article 158(4).

and reaffirming the importance of the place of the principles of humanity, the dictates of public conscience, and the laws and customs of nations, in determining permissible conduct in armed conflicts. However, significantly, in Protocol II the 'traditional' version of the Martens Clause was modified, to exclude reference to 'the principles of international law derived from established custom'.[327] Therefore, in 1977, states were of the view that there had not been sufficient time for the development of customary rules in civil conflict and so they deleted any reference to it in the Preamble.

This is further evidenced by the wording of Article 13(1) of Additional Protocol II compared to Article 51(1) of Protocol I. Article 51(1) provides: 'The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances', whereas Article 13(1) of Protocol II omits the reference to 'other applicable rules of international law'. The Working Group of Committee III explained that 'these words were deleted in view of the fact that the only general international law with respect to non-international armed conflicts is Article 3 common to the Four Geneva Conventions of 1949, which contains no provisions pertinent to the subject-matter of this Article of Protocol II.'[328]

It has also been argued that state practice only grows out of the relationship between states and that in civil wars states cannot in any meaningful sense of the term be regarded as the real actors of the body of law.[329] But, as we will see, state practice is

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[326] Article 1(2) Protocol I and in the Preamble of Protocol II. The Martens Clause is also included in paragraph 5 of the Preamble to the CWC, and in the Preamble to the Cluster Munitions Convention.

[327] Compare for instance Article 1(2) Protocol I: 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience' with the Preamble of Protocol II: 'Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.' Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at p. 620. See also Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 4435.

[328] CDDH/III/275

[329] See Kalshoven, F., "Applicability of Customary International Law in Non-International Armed Conflicts", in *Current Problems of International Law, Essays on UN Law and on the Law of Armed Conflict*, (Antonio Cassese ed., 1975), at 269ff, while talking about international humanitarian law in internal armed conflicts he wrote: 'It is an obvious fact that its real implementation depends on those thousands or even millions of people who are involved in the armed conflict, whether as members of the armed forces, as irregular fighters, or as civilians. Indeed, in a certain measure it is their acts which

not necessarily restricted to actual physical acts and abstentions from acts. We will see that there is considerable scholarly and judicial support for the view that state practice includes a wide category of non-physical acts of States.[330]

As of today, of course, the argument that it is not possible to speak of established custom in internal armed conflicts cannot be sustained anymore, as the customary regulation of internal armed conflicts is a dynamic area of humanitarian law. It is true that the attempt to establish treaty rules in such types of armed conflicts is a relatively recent phenomenon. However, customary rules have their proper existence, as an independent set of rules, differentiated from treaty rules. It should not be forgotten that customary law lay at the basis of humanitarian law and continues to exist in parallel with treaty law. And, as we have seen in the first chapter, a body of customary principles and rules governing internal wars, as well as the conduct of hostilities, were in the process of development long before the 1949 Geneva Conventions.[331]

Firstly, doubts expressed by states in the 70's must be balanced against the unequivocal endorsement of the International Court of Justice in the *Nicaragua* case as to the status of Common Article 3, which, according to the majority of the judges, appears to have reached the status of custom.[332]

The 1990's presented a new opportunity for change. A second important contribution to the discussion on the existence of customary law in internal armed conflict was

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create the law, as their consistent patterns of conduct may lead to the formation of new customary law.' See also Gasser, H.-P., "The Sixth Annual American Red Cross – Washington College of Law Conference on Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", 2 *American University Journal of International Law and Policy* 477, (1987).

[330] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 164. By contrast a minority view, expressed for instance by d'Amato, regards State practice as restricted to acts and abstentions from acts. In his view, claims cannot constitute state practice as it is impossible to rely on a claim by a State as a predicator of what it will do. See D'Amato, A., *The Concept of Custom in International Law* (Cornell University Press. 1971). D'Amato, at 87ff. See the comprehensive criticism of this view by Akehurst, M., "Custom as a Source of International Law", 47 *British Yearbook of International Law*, (1975).

[331] Cassese argued that customary international law in civil war evolved as early as the 1930s. See Cassese, A., "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts", in *Current Problems of International Law. Essays on U.N. Law and on the Law of Armed Conflict*, (Antonio Cassese ed., 1975), at 287. It can also be argued that the Lieber Code was a set of rules reflecting customary law at that time.

[332] *Nicaragua* case, paras 218-220.

made through the ICTY *Tadic* decision on the Defence for Interlocutory Appeal on Jurisdiction. This Decision is of pivotal importance, as it constituted the first possibility for an international tribunal to lay down its interpretation of international criminal law in internal armed conflicts. Customary international law was found to be of special relevance in the determination of the subject matter jurisdiction of the tribunal. It was the first time a tribunal suggested that there is a body of customary international law applicable to internal armed conflict, and that the violation of these rules can involve individual criminal responsibility. The judges stated that '(t)he emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law.'[333]

Accordingly, the *Tadic* decision demonstrated that customary international law developed IHL for internal armed conflict by recognizing and identifying these rules. In order to derive customary international humanitarian law rules applicable to internal armed conflict, the general approach has been to analogize to the law of international armed conflict. In the *Tadic* decision, the Appeal Chamber eloquently stated that 'What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.'[334] In the area of the conduct of hostilities alone, various chambers have held that rules such as the prohibition on attacks against civilians[335] and attacks against civilian objects,[336] the prohibition of wanton destruction of property,[337] the protection of cultural property[338] and religious

[333] *Tadic* Interlocutory Appeal, para 98. For an in-depth discussion of the development of the customary law of international humanitarian law the *Tadic* Case, see Meron, T., "The Continuing Role of Customs in the Formation of International Law", 90 *The American Journal of International Law 238*, (1996). See also generally Hoffmann, "The gentle humanizer of humanitarian law – Antonio Cassese and the creation of the customary law of non-international armed conflict".
[334] *Tadic* Interlocutory Appeal, at para 119.
[335] See, e.g. *Tadic* Interlocutory Appeal, at paras 100-118; *Prosecutor v. Strugar,* Judgment, IT-01-42-T, 31 Jan 2005 (hereinafter *Strugar* Trial Judgment), at paras 220-222.
[336] See *Tadic* Interlocutory Appeal, at paras 223-226; *Prosecutor v. Hadzihasanovic and Kubura,* Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis, Motions for Acquittal, IT01-47-AR73.3, 11 March 2005 (hereinafter *Hadzihasanovic* Decision Rule98bis), at paras 26-30.
[337] See *Strugar* Trial Judgment, at paras 227-228; *Hadzihasanovic* Decision Rule98bis, at paras 26-30.
[338] See *Strugar* Trial Judgment, at paras 229-230; *Hadzihasanovic* Decision Rule98bis, at paras 44-48.

objects,[339] the prohibition of plunder and pillage,[340] and the prohibition on the use of chemical weapons were customary.[341] Although these decisions were initially criticized for going too far, such criticisms have since receded.[342]

Last but not least, the identification of customary rules in the context of internal armed conflicts was also one of the main objectives of the ICRC Study on customary international humanitarian law.[343] The ICRC Study affirmed the existence of customary norms in internal armed conflict. As stated by the ICRC President, 'Article 3 common to the Geneva Conventions and Protocol II additional to those Conventions represent only the most rudimentary set of rules. State practice goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to *all* armed conflicts.'[344] Accordingly, this Study shows the extent to which state practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. More specifically, 'the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through state practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts'.[345] There can be no doubt as to the existence of customary international law for internal armed conflicts.

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[339] *Hadzihasanovic* Decision Rule98bis, at paras 47-48.
[340] *Ibid*, at paras 37-38.
[341] See *Tadic* Interlocutory Appeal at paras 120-124.
[342] Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", at p. 229. The discussion on the conduct of hostilities in internal armed conflicts will be dealt with in Chapters 6 to 14.
[343] Henckaerts, J.-M., "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", 87 *International Review of the Red Cross*, (2005), at 178.
[344] "Foreword" by Dr. Jakob Kellenberger, Henckaerts, J.-M. & Doswald-Beck, L., *Customary International Humanitarian Law Volume I: Rules* (ICRC ed., Cambridge University Press 2005), at x. (original emphasis).
[345] Id. at xxix.

Why do we need customary international law for International Humanitarian Law?

A customary norm can reflect an existing treaty provision or represent a distinct source of obligations for all states. Why is customary international law so essential, especially for internal armed conflicts? Because first of all, as already explained, treaty law for internal armed conflicts is very poor, and customary international law will assist us to fill the gaps for the protection of civilians in internal armed conflicts. In addition to its paucity, those treaty norms, and in particular those with respect to the conduct of hostilities, would not apply to the conduct of hostilities in most of the internal armed conflicts that are going on today. Common Article 3 of the Geneva Conventions, the only provision of the Geneva Conventions that is formally applicable to internal armed conflicts, does not as such deal with the conduct of hostilities. In addition, Protocol II, to the extent that it does apply, in other words, to the extent that the country in question has ratified it and to the extent that the situation of violence fulfils the strict criteria of application, does not deal in sufficient detail with the conduct of hostilities, as well as some other important issues. For instance, it does not provide any of the concrete rules restricting the means and methods of warfare which would render the protections really effective.[346] Accordingly, the postulate here is that the regulation of internal armed conflicts is more detailed in customary law than in treaty law and it would be of great significance if some of the restrictions on warfare, which truly protect civilians in real terms, bound states as custom. This is what we are going to look for in the coming Chapters.

'Customary law is thus a major vehicle for alignment, adjustment and even reform of the law'[347], and it continues to be relevant today, in particular because a number of impediments affect the applicability of treaty law in practice. Therefore, the quest for existing customary law rules protecting civilians against the effects of hostilities in internal armed conflicts is especially important. What is true in any case is the difficulty of finding evidence of the existence of customary law in this field. As we will see, the identification of a customary norm is not an easy or an uncontroversial

[346] For the discussion on the conduct of hostilities in internal armed conflicts, please see Chapters 6 to 14.
[347] Meron, "The Continuing Role of Customs in the Formation of International Law", at 247.

exercise. It is very difficult to obtain evidence not only of state practice in armed conflicts, but also of *opinio juris* relating to that practice. However, over the last few decades, 'there has been a considerable amount of practice insisting on the protection of international humanitarian law in this type of conflict. This body of practice has had a significant influence on the formation of customary law applicable in internal armed conflicts.'[348]

It should be stressed that the process of establishing the customary norms applicable in internal armed conflicts is far more complicated than in international armed conflicts and this for several reasons. These reasons will be carefully analysed below in this Chapter. In order to appreciate the specificities and difficulties of the identification of customary rules in non-international armed conflict, it is necessary first to understand the traditional method. This is what we are going to do in the coming section.

Traditional method to ascertain customary international law

To understand what is customary international law, it is convenient to start with Article 38 of the Statute of the International Court of Justice, which spells out the sources of international law without giving any priority to any one of them. Article 38(1)(b) directs the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it'[349], to apply *inter alia*: 'international custom as evidence of a general practice accepted as law'.[350]

[348] Henckaerts, "Session 1: The ICRC Customary Law Study: An Assessment", in *Chatham House, Transcripts and summaries of presentations and discussions* (Chatham House ed., Chatham House 2005), at 5.
[349] Chapeau Article 38 ICJ Statute.
[350] The ICJ has confirmed in the *Nicaragua* case that custom is constituted by two elements, the objective one of a 'general practice', and the subjective one 'accepted as law', the so-called *opinio juris*. See *Nicaragua* case, at para 97. However, it must be stressed that the Court's description of custom as a 'constant and uniform usage, accepted as law' has long been quoted as a convenient and accurate formula. In the *Legality of Nuclear Weapons* case, the Court confirmed that the substance of customary rules is to be found 'primarily in the actual practice and *opinio juris* of states'. (ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Report 1996 (hereinafter *Nuclear Weapons* Advisory Opinion), at para. 64). See also *Continental Shelf (Lybian Arab Jamahiriya v Malta)* case (hereinafter *Continental Shelf* Case), 1985, at para 27.

Two elements are therefore required to converge in order to establish a customary rule: a general practice by states and the general recognition among states that a certain practice is obligatory. More precisely, according to the International Court of Justice, practice must be 'extensive' and 'virtually uniform.'[351] However, 'the frequency or even habitual character of the acts is not in itself enough.'[352] The second element, a sense of legal obligation, means that it is not enough for states to behave in a generally uniform pattern. It must be demonstrated that their actions have been accompanied by the conviction that they were bound by law to act that way and that such conduct was believed to be good and necessary. This subjective factor is often verbalized in the Latin expression *opinio juris sive necessitates.* In the *Continental Shelf* case, the International Court of Justice stated that the substance of customary international law must be 'looked for primarily in the actual practice and *opinio juris* of States.'[353] So the traditional view emphasizes state practice over *opinio juris* and does not tolerate contrary practice.[354] The International Law Association even went as far as saying that 'it is not always and probably not even usually *necessary* to prove the existence of any sort of subjective element in addition to the objective element.'[355] In their view, the *opinio juris* may even be sometimes dispensed with. However, when transposed to situations of armed conflict, such an approach would have a devastating effect. There are better views to attach to the identification of customary rules.

We will now look at what precisely constitute these two elements in the traditional approach to customary international law.

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[351] *North Sea Continental Shelf Cases Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*; International Court of Justice, Judgment of 20 February 1969 1969 (hereinafter *North Sea Continenal Shelf* Cases), para. 74.
[352] *North Sea Continenal Shelf* Cases, para. 77.
[353] *Continental Shelf* Case, at para 29. See also *Nuclear Weapons* Advisory Opinion, at para 64.
[354] Schachter, O., "New Custom: Power, Opinio Juris and Contrary Practice", in *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of K. Skubiszewski*, (Jerzy Makarczyk ed., 1996), at 531 and 538.
[355] *Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law*, Report of the 69th Conference. (2000), at 31.

Nature of the practice

As we have seen, the main evidence of customary law is to be found in the actual practice of states. One may therefore wonder what exactly constitutes state practice. Where should we look in order to find it? In an armed conflict, the identification of actual state practice is an arduous task, 'given the secrecy which generally surrounds the wartime activities of states, or to evaluate, since the nature of armed conflict means that the gulf between the principle and practice is likely to be particularly marked.'[356] In addition, what is really happening, in terms of conduct of hostilities in the field, is very rarely known, given the inherent difficulties involved in third parties gaining access and reliable information during hostilities.

State practice can be constituted by state acts and by inter-state acts. State acts are constituted by the diplomatic and governmental practice, by internal laws and domestic judicial decisions. Inter-state acts are acts constituted by states in international fora, such as the United Nations. It is sometimes suggested that state practice consists only of what states do, not of what they say. However, in the *Fisheries Jurisdiction* cases, the judges inferred the existence of customary rules from verbal acts, without considering whether they had been enforced.[357] In addition, the Nuremberg Tribunal referred to resolutions passed by the League of Nations Assembly and a Pan-American Conference as authority for its finding that aggressive war was criminal according to the 'custom and practices of states'.[358] Accordingly, the better view appears to be that state practice consists not only of what states do, but also of what they say.

The continuity of practice

In addition, there is no specified time-element: some time will inevitably elapse, because there has to be a certain quantity or density of practice on the part of a sufficiency of states. However, 'there is no prescribed amount of time, and it can in

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[356] Greenwood, C., "Customary Law Status of the 1977 Additional Protocols", in *Humanitarian Law of Armed Conflict Challenges Ahead*, (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991), at 99.
[357] *UK v. Iceland* case, ICJ 1974, at paras 47, 56-58, 81-88, 119-120, 135 and 161.
[358] *AJIL* 41, (1947), 172. 219-220. Referred to by Malanczuk, P., *Akehurst's Modern Introduction to International Law* (Routledge 7th edition ed. 1997), at 43.

fact be quite short.'[359] State practice has to be uniform and constant.[360] Substantial uniformity suffices, however, as long as the practice under scrutiny is widespread.

Opinio juris

But state practice alone does not suffice to infer a rule of customary law. It must be shown that it is accompanied by the conviction that it reflects a legal obligation.[361] Indeed, *opinio juris*, the second requirement ascertained by Article 38(1)(b) is 'necessary to distinguish a customary norm from a rule of international comity, which is a rule based upon a consistent practice in the relations of states which is not accompanied by a feeling of legal obligation.'[362] It is therefore necessary to examine not only what states do, but also why they do it.[363] The difficulty with this approach is that it requires states to believe that something is law before it becomes law. A solution would be not to look for what states actually believe, but for statements of belief. As stated by Gardam, 'practice creates a rule of customary law that particular conduct is obligatory if it is accompanied by statements on the part of states that such conduct is obligatory.'[364] Accordingly, the *Opinio juris* will be inferred indirectly from the behaviour of states, and may be gathered from states acts and omissions. In addition, 'it is necessary to examine not only what one state does or refrains from doing, but also how other states react. If conduct by some states provokes protests from other states that such conduct is illegal, the protests can deprive such conduct of any value as evidence of customary law. Accordingly, recognition of the obligatory character of particular conduct can be proved by pointing to an express acknowledgment of the obligation by the states concerned, or by showing that failure to act in the manner required by the alleged rule has been condemned as illegal by other states whose interests were affected.[365] States have the tendency to invoke customary rules against others but to contest them when they are invoked against

[359] Mendelson, "Session 1: The ICRC Customary Law Study: An Assessment", in *Chatham House, Transcripts and summaries of presentations and discussions*, at 18.
[360] *North Sea Continental Shelf* Cases, para 74.
[361] Malanczuk*, Akehurst's Modern Introduction to International Law*, at 44.
[362] Harris, D., *Cases and Materials on International Law* (Sweet and Maxwell 6th edition ed. 2004), at 38.
[363] *North Sea Continental Shelf* Cases, at para. 77.
[364] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 135.
[365] Malanczuk, *Akehurst's Modern Introduction to International Law,* at 44. See further below for an explanation of contrary state practice.

themselves. However, this is *rational* behaviour, and therefore, what counts is that a state has taken a position or revealed a sense of legal obligation, regardless of the underlying motivation. Generally, the views of a representative majority, including those especially affected and/or influential states, and/or the absence of significant protest by those states, are considered to be sufficient to form the relevant *opinio juris* for the creation of a new rule of customary international law.[366]

So the traditional method of ascertaining customary international law emphasizes dense state practice and *opinio juris*, while putting a high importance on physical state practice. With this method, a customary norm is only established when state consent, albeit tacit, can be identified.[367] It is argued here that this method serves the sovereign interests of states, in protecting them against intrusion in their *domaine réservé*. From an observational standpoint, this method will be privileged by persons working for their respective governments, as different functions may lead the persons performing them to adopt a certain attitude with respect to the sources.[368]

Specificity of the IHL methodology in the identification of customary norms *G*eneral

It is important at this point to devote our attention to the modern method of ascertaining customary international law. The classical positivist approach poses serious difficulties for the legal protection and promotion of IHL, as state practice in this field is often contradictory. We will see that the modern method, by emphasizing *opinio juris* over state practice, and verbal state practice over physical state practice, is the methodology that would best serve the protection of the rules of humanitarian law in a globalized world.

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[366] Schlütter, B., Developments in Customary International Law Theory and the Practice of the International Court of Justice and the International *ad hoc* Criminal Tribunals for Rwanda and Yugoslavia § 62 (Martinus Nijhoff Publishers. 2010). at p. 34.
[367] Wouters & Ryngaert, *The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law*. at p. 10.
[368] The question of the observational standpoint has been acknowledged by the ILA. See International Law Association, Committee on Formation of Customary (General) International Law, Report of the 69th Conference, 2000, London, at p. 2-3.

The considerable and enduring debate on customary international law as a source of international law can be generally summed up by determining the proportion of the influence on the existence of the customary rule of consistent practice, or of *opinio juris*, respectively. The general evolution of thinking in that respect has been in the direction of reducing the amount of time necessary for the formation of uniform practice and the increase of the influence of *opinio juris*.[369]

We have considered above the traditional method of customary formation of public international law. However, it is often argued that the method of customary law formation in the field of international humanitarian law is structurally different. Whereas the classical positivist method requires both consistent state practice and *opinio juris*, the specific method would allow *opinio juris* to play a more important role than state practice, which is often decisive as far as humanitarian law is concerned. If state practice is played down, humanitarian law rules may obviously be more easily identified as customary norms. This then 'widens the protective net cast by relevant treaty law.'[370] It is argued here that the more important the common interests of states or humanity are, the greater the weight that may be attached to *opinio juris* as opposed to state practice. 'If the stakes are high, inconsistent state practice may be glossed over, and a high premium may be put on states' statements and declarations, *inter alia* in multilateral fora, in identifying customary law combined with general principles of law.'[371] However, care needs to be taken with this specific method, in that it can lead to negative consequences also. Indeed, we may very well wonder who defines these 'common interests of states or humanity'. In the end, such an approach can also open the way for powerful states to have more weight in the formation of a customary rule that would suit better their interests. This is certainly not an outcome that is desirable in every situation.

The ingenuity of the two-element approach to custom formation 'lies in the fact that it is able to strike a balance between the world of the *is* and the world of the *ought.*'[372]

[369] Dimitrijevic, V., "Customary Law as an Instrument for the Protection of Human Rights", 7 *Working Paper Instituto per gli Studi di Politica Internazionale*, (2006), at 5.
[370] Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", at 3.
[371] Ibid. at 4. The problematic of general principles will be dealt with further below.
[372] Tomuschat, "Obligations Arising for States Without or Against Their Will", *Receuil des Cours,* 1993, vol. 241, pp. 195-374. Cited in Schlütter, *Developments in Customary International Law Theory*

The two-element approach does not require the tacit agreement of all states for the formation of a customary norm. Generally, the views of a representative majority, including those especially affected and/or influential states, and/or the absence of significant protest by those states, are considered to be sufficient to form the relevant *opinio juris* for the creation of a new rule of customary law.[373]

So the classic view has been that state practice is transformed into customary law by the addition of *opinio juris*. But recent trends often reverse the process: following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris*. 'In fields involving fundamental values of the international community, the tendency towards acquiescence by third States in the developing norms, and the readiness to condemn inconsistent conduct, facilitate the claim of the new norms for customary law status.'[374] An approach to custom based on *opinio juris* is almost always a value-based concept.[375] Indeed, the core of difficulties relating to the determination of IHL does not emerge from the inadequacy of the law, but from a lack of shared values in these fields.[376]

This primarily doctrinal construct draws support from the ICJ *Nicaragua* judgment. In a discussion on the *Nicaragua* case, Kirgis developed an interesting theory which concludes for the first time that there are different kinds of customary international law, depending on a different emphasis on the elements of custom reflected in Article 38 of the ICJ Statute. He argues that 'if one views the elements of custom not as fixed and mutually exclusive, but as interchangeable along a sliding scale, the cases can be reconciled.'[377] One end of the scale is home to those norms created by way of the dominant influence of *opinio juris*, and the other end is home to those created under the influence of state practice alone. Following Kirgis, the elements of custom are not

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and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia, at 34.

[373] See *North Sea Continenal Shelf* Cases, at para. 74.

[374] Meron, *International Law in the Age of Human Rights*, at p. 385.

[375] Schlütter, *Developments in Customary International Law Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, at p. 43.

[376] Meron, *International Law in the Age of Human Rights* at p. 110.

[377] Kirgis, F.L., "Custom on a Sliding Scale", 81 *American Journal of International Law* 146, (1987), at pp. 148-149.

without any dynamics and do not exclude one another.[378] Yet he finds that it is dependent on the activity in question, and on the 'adequacy' of the customary international law norm, how far *opinio juris* is capable of replacing the element of state practice.[379] On the sliding scale, very frequent, consistent state practice establishes customary rule without much (or any) affirmative showing of an *opinio juris,* so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. 'At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.'[380]

Accordingly, in IHL, emphasis on *opinio juris* helps to compensate for the frequent scarcity of supporting practice.[381] We will now have a look at the specific problem of what we call here contrary state practice, which means how to deal with acts that are committed in internal armed conflicts and that are in clear violation of basic humanitarian protection and the law on the conduct of hostilities. Do these acts constitute state practice?

Contrary state practice

The theory risks sliding down a slippery slope when trying to explain the formation of customary IHL in the traditional way, with the two-element approach, i.e. solely by reference to the elements of *opinio juris* and state practice, with emphasis on state practice. A rigid two-element approach to custom cannot cope with the particularities involved in the formation of custom in IHL. This is the reason why we need a more relaxed approach to its identification. There are almost no norms that every state consistently obeys. In addition, the specificities of international humanitarian law make it difficult to find positive, concrete state practice with respect to rules that are primary prohibitions. The reason for this is that such rules are primarily respected through abstention from violations, rather than through affirmative practice.

[378] Id. at 149.
[379] Ibid.
[380] Ibid.
[381] Meron, *International Law in the Age of Human Rights,* at p. 386.

In the area of humanitarian law, there is a high level of contrary or inconsistent practice, namely violations of existing rules. For instance, this is very striking on the specific issue of non-combatant immunity. Does that mean that there are no customary rules protecting civilians, because of the common practice of failing to distinguish between civilians and combatants? No, because normally states do not claim that they regard civilians as legitimate targets of attack. The state concerned will attempt to justify its breach of the rule. For instance, the government will explain such conduct in terms of the difficulty of applying the principle of distinction in guerrilla warfare. Therefore, when it comes to IHL rules, 'the difference between the stated norms and actual state practice is more marked.'[382]

Accordingly, to the extent that certain practices are seen as violations of existing rules, these contrary practices do not in fact negate the existence of customary rules, but in fact, reaffirm their existence.[383] In the *Nicaragua* case, the ICJ substantially strengthened customary international law by downplaying the normative significance of contrary or inconsistent practice. The Court was faced with a dire collection of contrary state practice in its attempt to establish a customary rule of the prohibition of the use of force and non-intervention. In an audacious move, the judges concluded that it would suffice that the conduct of states should, in general, be consistent for a given rule to exist as customary law and that instances of conduct inconsistent with a given rule must be judged on a subjective rather than an objective basis and therefore should generally be treated as breaches of that rule, not as indications of the recognition of a new rule.[384] That means that 'if a state attempts to justify its breach of the rule, the fact of justification may be regarded as a recognition of the rule by that state, albeit incorrect understanding of its operation.'[385] Therefore, state conduct inconsistent with a norm is to be treated as a breach of the norm rather than disproving the rule, a rule having crystallized primarily on the basis of a strong *opinio juris.*

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[382] Meron, T., "Geneva Conventions as Customary Law", in *War Crimes Law Comes of Age*, (Theodor Meron ed., 1998), at 363.

[383] Henckaerts, J.-M., "The ICRC Study on Customary International Humanitarian Law - An Assessment", in *Custom as a Source of International Humanitarian Law*, (Larry Maybee & Benarji Chakka eds., 2006), at 48.

[384] *Nicaragua* case, Merits, at para 186.

[385] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 134.

In the *Nicaragua* case the Court endorsed an approach to the formation and maintenance of customary rules which resulted in contrary state practice no longer having the impact it traditionally did.[386] Hence, the Court dealt with the problem of contrary state practice on the basis that 'it is what states say rather than what they do, that is significant.'[387] If actions contrary to existing norms can be characterized as a failure to comply with the norm, rather than a denial of its existence, then the norm remains unaffected. In extrapolating this analysis to armed conflict situations, states are extremely reluctant to admit that they are in breach of their IHL obligations and will attempt to justify their action on a number of grounds. Accordingly, the significance of contrary practice may also be discounted because offending states usually base their denial of having breached the law on the facts, rather than on claims of invalidity of the law itself.[388] Thus, 'a state's resort to factual or legal exceptions to justify a prima facie breach of a rule has the effect of confirming the general rule, rather than undermining it or creating an exception to it.'[389] As long as states confirm their acceptance of the rule, their practice of failing to abide by it 'can be regarded not as a denial of the rule but as a failure to abide by it.'[390]

In the *Nicaragua* Case, the Court's approach to contrary state practice is particularly important given the circumstances of the state practice in internal armed conflict. Indeed, in these types of armed conflicts, instances of breaches of the law are recurrent and quickly made public. We may wonder whether it is 'possible really to pinpoint a practice in general consistent with the rule in question'.[391] The manner in which the breaches to the IHL rules are justified will be of special importance. This method has clear advantages for the law of internal armed conflicts, as parties in these conflicts regularly ignore humanitarian restraints but are loath to concede that they consider these restraints inapplicable. This approach allows the argument that the principle of civilian immunity remains a customary norm despite flagrant contrary practice. For instance, despite the common practice of failing to distinguish between

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[386] *Nicaragua* case, at paras 202 and 203.
[387] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 138.
[388] See for example Human Rights Commission, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading treatment and Punishment, UN Doc. E/CN.4/1988/17, at 23 (1988).
[389] Roberts, A.E., "Traditional and Modern Approaches to Customary International Law: A Reconciliation", 97 *The American Journal of International Law*, (2001), at 783.
[390] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 142.
[391] La Haye, *War Crimes in Internal Armed Conflicts*, at 55.

civilians and fighters, a state facing an internal armed conflict in its territory will normally not claim that it regards civilians as a legitimate target. The government will more likely explain its conduct in terms of the difficulty of applying the principle of distinction in guerrilla warfare. Accordingly, the Court's approach to contrary state practice in the *Nicaragua* Case certainly allows scope for the argument that the principle of distinction remains a customary norm despite such practice.

In addition, if a state's battlefield behaviour differs from its earlier views, in the absence of justification, how can a principled departure from its earlier position be distinguished from a violation of it? There is no doubt that other states may react to battlefield practice which becomes public. But we may wonder whether this practice will be known with sufficient objectivity and in adequate detail for a principled assessment.[392] As the ICTY Appeals Chamber, in the *Tadic* jurisdiction decision held:

> 'When attempting to ascertain state practice, with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of states, military manuals and judicial decisions.'[393]

The Tribunal's approach in *Tadic* went one step further than Nicaragua, as not only did it play down contrary practice, particularly on the battlefield, in the face of verbal state practice and *opinio juris*, but it even seems to suggest that battlefield practice is

[392] Scobbie, I., "The approach to customary international law in the Study", in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Elizabeth Wilmshurst & Susan Breau eds., 2007), at 38.
[393] *Tadic* Interlocutory Appeal, para. 99.

methodologically irrelevant because of its discrepancy. Indeed, 'battlefield practice, which is often far less humane than may appear from the wording of official statements and military manuals, is not considered to substantially contribute to the formation of customary international law if contrary verbal or written practice is available.'[394] A study of customary international law has therefore to 'look at the combined effects of what states say (verbal acts) and what they actually do (physical acts). An examination of operational practice (physical acts) alone would not be enough.'[395] In armed conflicts, it is indeed difficult to identify what Georges Abi-Saab calls 'internally induced practice'[396], as it is difficult to have access to the battlefields and to check the exact behaviour of belligerents. It is also good to bear in mind that, generally, the only aspect of conflicts rendered public are often the many IHL violations, while compliance to the rules usually goes unnoticed.

Accordingly, in order to arrive at an accurate assessment of customary international law, 'one has to look beyond a mere description of actual military operations and examine the legal assessment of such operations. This requires an analysis of official positions taken by the parties involved, as well as other states.'[397] In considering the laws of armed conflicts, more weight needs to be placed on 'externally induced practice'[398], which is the 'indirect conduct' of states, their verbal acts, i.e. their legislation, the instructions they issue in military manuals, military codes, criminal codes or judicial decisions, rather than their 'direct conduct' on the battlefield.[399] In addition, we have also to look at the reactions of other states. Attacks against civilians, pillage and sexual violence remain prohibited, notwithstanding numerous reports of their commission. 'The conclusion that these acts are considered violations of existing rules can be derived only from the way they are received by the international community through the above-mentioned "indirect conducts" of states'

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[394] Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", at 7. In order to have a good overview of the dichotomy between the stated law and the reality of the battlefield practice, please see generally Anderson, B., *No Worse Enemy the Inside Story of the Chaotic Struggle for Afghanistan* (Oneworld Publications. 2011). Hedges, C. & Al-Arian, L., *Collateral Damage America's War Against Iraqi Civilians* (Nation Books. 2008), Weinstein, J.M., *Inside Rebellion the Politics of Insurgent Violence* (Cambridge. 2007), Lafrance, L., *Droit humanitaire et guerres déstructurées* (Liber 2006).

[395] Henckaerts, J.-M., "Customary International Humanitarian Law: Taking Stock of the ICRC Study", 78 *Nordic Journal of International Law*, (2010), at 444.

[396] Private discussion with Georges Abi-Saab.

[397] Henckaerts, "Customary International Humanitarian Law: Taking Stock of the ICRC Study", at 444.

[398] Private discussion with Georges Abi-Saab.

[399] La Haye, *War Crimes in Internal Armed Conflicts*, at 56.

verbal acts, and also through verbal acts such as resolutions of international organisations and official statements. These verbal acts provide the lens through which to look at operational practice.'[400] Thus battlefield practice should not be the only element taken into account for ascertaining a customary norm. Denials, objections and protests concerning those operational acts should also be taken into account to determine *opinio juris* or acceptance as law in this field.

Opinio juris

Furthermore, contrary state practice might be compensated by a strong *opinio juris*. Hence, the special methodology to identify customary international humanitarian norms places its emphasis on *opinio juris* over state practice. Emphasis on *opinio juris* to the detriment of actual state practice may be found in the practice of international courts and tribunal, as well as in progressive United States doctrine.[401] As we have seen, this alternative approach had its beginning in the *Nicaragua* case, in which the Court observed that 'the Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.'[402] Therefore, it is our understanding here that in the Court's opinion, the ascertainment of *opinio juris* foreshadows the analysis of state practice. This approach to *opinio juris*, in addition to the Court's approach with respect to contrary state practice studied above, creates the impression that, as long as *opinio juris* is not in doubt, the consistency of state practice, a cherished and arguably primordial element of a customary rule, is not the first consideration.

It is right that the Court developed this method to ascertain the customary norms with respect to the use of force. But it is argued here that the *Nicaragua* method may be applicable to the ascertainment of customary IHL norms. Indeed, 'international humanitarian law norms are, like the prohibition on the use of force, evidenced by strong *opinio juris*, enshrined in international conventions, and characterized by

[400] Henckaerts, "Customary International Humanitarian Law: Taking Stock of the ICRC Study", at 444.
[401] See Restatement (Third) of US Foreign Relations Law (1987) on the 'Customary Law of Human Rights', Section 701, Note 2.
[402] *Nicaragua* case, Merits, at para 184.

inconsistent practice.'[403] Emphasis should be placed on verbal, rather than physical state practice. In the different fora of the United Nations and other regional organisations, states will make statements whereby they deny targeting civilians, or apologize for any misbehaviour, as these are acts that are morally indefensible.

It is true that *opinio juris* and verbal state practice are difficult to separate. The same statement may count as evidence of state practice and *opinio juris*. If, in addition, emphasis is methodologically placed on verbal state practice, and physical state practice is played down, it may appear that invoking state practice as a separate element to prove the existence of a customary norm is mostly superfluous. Nonetheless, 'ascertainment of *opinio juris*, the first test of the ascertainment test under *Nicaragua,* might of itself imply ascertainment of state practice, as ascertaining *opinio juris* is mainly based on the statements of states. An ascertainment of such statements may satisfy the requirement of *opinio juris* and the requirement of state practice at the same time.'[404]

International Humanitarian Law methodology to ascertain Custom in the ICRC Study

The first purpose of the ICRC Study was to determine which rules of international humanitarian law were part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified treaties containing the same or similar rules. In view of the fact that humanitarian treaty law does not regulate in sufficient detail non-international armed conflicts, the second purpose of the Study was to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.[405] Therefore, one of the motivations behind the ICRC Study was a perceived need, or desire, to regulate internal armed conflicts in greater detail.[406]

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[403] Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", at 6.
[404] Ibid.
[405] Henckaert, "Session 1: The ICRC Customary Law Study: An Assessment", *in Chatham House, Transcripts and summaries of presentations and discussions*, at p. 4. See also Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", at 178.
[406] Scobbie, "The approach to customary international law in the Study", at 23.

It should be mentioned that the Study is not an 'official' or state sponsored codification of customary international humanitarian law. However, given the role and responsibilities of the ICRC in relation to IHL, 'it is undoubtedly a quasi-official codificatory text in a broad sense, inasmuch as it is an attempt to discern 'unwritten' rules and reduce them to an authoritative written form.'[407] The Study constitutes an inevitable and authoritative source for any further research and advancement of the law in future.

Importantly, although it represents the truest possible reflection of reality, the Study makes no claim to be the final word. It is not all-encompassing, as choices had to be made. Indeed 'the Study should not be considered as the end of a process but as a beginning. The Study reveals what has been accomplished but also what remains unclear and what remains to be done.'[408] We therefore should see it as an appropriate starting point in a review of state practice and *opinio juris* relevant to the crystallisation of custom. One thing is sure, in view of the reactions the publication of the Study yielded, is that it will not be the last word on the subject.

The Study provides evidence that many rules of customary international law apply in both international and internal armed conflicts, and shows the extent to which state practice has gone beyond existing treaty law and expanded the rules applicable to internal armed conflicts. In particular, the Study argues that the gaps in the regulation of the conduct of hostilities in Additional Protocol II have been largely filled through state practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.[409]

Since the 1990s and the *Tadic* case, there is a general tendency to bring the law of non-international armed conflicts closer to that of international armed conflicts, with a set of customary rules applying to internal armed conflict that has grown dramatically. The general approach has been to analogize to the law of international armed conflict, while using the traditional method in the ascertainment of customary norms via state practice and *opinio juris.* This rising convergence of the substantive rules for

[407] Id., at 17.
[408] "Foreword" of Dr. Yves Sandoz, in Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xvii.
[409] Id., at xxix.

international and non-international conflicts has been upheld not only by international criminal tribunals,[410] but also by the ICRC Study on customary law. 'Although there remains some debate as to precisely which rules have customary status, that there is a sizeable body of custom is no longer questioned.'[411] Most of the customary rules identified by the ICRC cover both types of conflict alike. Whether this is a good development or not, at least when it comes to questions related to the protection of civilians against the effects of hostilities in internal armed conflict, will be discussed throughout the remainder of this dissertation.

This gigantic work identified nearly 150 Rules that apply equally to international armed conflicts and internal armed conflicts based on a collection of an infinite variety of state practices that have been evaluated to determine whether they amount to customary international law. Although there has been some criticism over particular rules and aspects of the methodology[412], 'the general tenor of the study has not been criticized, nor has its conclusion that a large number of international humanitarian law rules are applicable to situations of internal armed conflict.'[413]

While it is said that the modern approach to customary law relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other 'soft law' instruments, making it more flexible and open to the relatively rapid acceptance of new norms, it is submitted that 'the ICRC approach to custom formation has been a comprehensive and rigorous traditional inductive approach.'[414] The Study does not take into account contemporary critical or revisionist accounts of custom formation and simply and traditionally

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[410] See *Tadic* case Interlocutory Appeal, para 97; *Prosecutor v. Delalic, Music, Delic and Landzo,* Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T (hereinafter *Delalic* Trial Judgment), para 172; *Prosecutor v. Halilovic* (Trial Judgement) IT-01-48-T (16 November 2005) (hereinafter *Halilovic* Trial Judgment), para 25; *Prosecutor v Galic,* (Trial Judgment) IT-98-29-T, (5 December 2003) ICTY (hereinafter *Galic* Trial Judgment), para 57.

[411] Sivakumaran, S., *The Law of Non-International Armed Conflict* (Oxford University Press. 2012), at 56.

[412] See in particular the criticism of the US relating to the application to internal armed conflict of Rule 31, 45 and 78 of the CIHL Study: Bellinger, J.B. & Haynes, W.J., *A US government response to the International Commottee of the Red Cross Study Customary International Humanitarian Law*, 98 International Review of the Red Cross, (2007). See also Henckaerts reply: Henckaerts, J.-M., "Customary International Humanitarian Law: A Response to US Comments", 89 *International Review of the Red Cross* 473-488, (2005).

[413] Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", at 230.

[414] Meron, T., "Revival of Customary Humanitarian Law", 99 *The American Journal of International Law*, (2005), at 817 and 833.

affirms that the existence of a customary rule requires two elements, state practice and *opinio juris*. The approach taken in the Study is the one that has been set out by the ICJ, in particular in the *North Sea Continental Shelf cases.*[415]

The Study's account of the concept of customary international law underlying its conclusions has been criticized as 'telegraphically concise'[416] and it has been said that 'the ICRC relied principally on *dicta* of the International Court to construct its account of the process of custom formation, and furthermore that it presents an incomplete and selective survey of the Court's ruling.'[417] Despite this criticism, 'the notion of custom formation that underpins the Study is ostensibly traditional, with the exception of the use of Kirgis's work.'[418] The modern approach relies principally 'on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other 'soft law' instruments, permitting a more flexible and relatively rapid acceptance of new norms.'[419] But the ICRC, rightly in my opinion, preferred to rely on a traditional approach, in order not to expose itself to further criticism for having taken a progressive stance to custom formation. It has been argued that what makes this study unique is its 'comprehensiveness and rigor' and 'the seriousness and breadth of the method used to identify practice'.[420]

However, it is true that the ICRC, while taking a traditional approach to the identification of customary international law, by relying on the *Nicaragua* and *Tadic* methods above mentioned, did not hide the influence of human and community values. Rightly, the study did not simply infer *opinio juris* from practice. 'The conclusion that practice established a rule of law and not merely a policy was never based on any single instance or type of practice but was the result of consideration of all the relevant practice.'[421] With respect to the identification of state practice and *opinio juris*, the Study found that 'it proved difficult and largely theoretical to strictly

[415] ICJ, *North Sea Continenal Shelf* Cases.
[416] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Introduction, xxxi-xlv.
[417] Scobbie, "The approach to customary international law in the Study", at 23.
[418] Id. at p. 24.
[419] Meron, "Revival of Customary Humanitarian Law", at 817.
[420] Id. at 833.
[421] Henckaerts, J.-M., "Customary international Law. a response to US comments", 89 *International Review of the Red Cross*, (2007), at 482.

separate elements of practice and legal conviction'.[422] More often than not, one and the same act reflects practice and legal conviction.[423] As the Study underlines, there is malleability at the heart of the custom formation process.

One therefore may wonder whether verbal acts, such as statements that certain acts are prohibited, constitute state practice, or do they constitute *opinio juris* because they express a state's legal opinion? Or can verbal acts be both simultaneously? The authors of the Study considered that the need to draw a strict line between practice and *opinio juris* was generally unnecessary. If practice was dense, *opinio juris* was largely enfolded within it, and there was no need to demonstrate the two elements separately. Generally, in order to identify customary IHL, emphasis is put on verbal state practice, which often at the same time reflects *opinio juris*, rather than physical or battlefield practice. '*Opinio juris* became significant where practice was ambiguous, in order to determine whether a customary norm had emerged.'[424] In this situation, the balance between state practice and *opinio juris* has been modified to place weight on humanitarian considerations in a manner that lessens the need for practice.

The Study has been challenged on a variety of grounds. Some have questioned the nature of some of the materials used as evidence of state practice. Others have questioned the sufficiency of the evidence used to establish the existence of a rule. Yet others accept the manner in which a rule is formulated but challenge the accuracy of the commentary.[425]

Assessment of state practice

The ICRC Study acknowledges the relevance of the *Nicaragua* findings for a number of IHL rules 'where there is overwhelming evidence of verbal state practice supporting a certain rule found alongside repeated evidence of violations of that

[422] Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", at 182.
[423] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xl.
[424] Id. at xl-xli.
[425] See Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 211, with attached references.

rule.'[426] Therefore, the study took an expansive view of what counts as state practice, including both physical and verbal practice. Indeed, as we have seen, in order to arrive at an accurate assessment of customary international law applicable in internal armed conflicts, one has to look beyond the mere description of actual military operations and examine the legal assessment of such operations. 'This requires an analysis of official positions taken by the parties involved, as well as by other States.'[427] While acknowledging that operational physical acts on the battlefield have weight, the ICRC attributed particular significance to denials, objections and challenges to acts in violation of the rules. The verbal acts that have been taken into account by the study include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences and government positions taken with respect to resolutions of international organizations.[428] With respect to physical acts, the ICRC study included, for example, battlefield behaviour, the use of certain weapons and the treatment provided to different categories of persons.[429]

In order to identify a general practice, the authors of the Study isolated state practice in the sphere of IHL that was uniform and consistent[430] as well as extensive and representative.[431] Thus, although the practice must be general, it need not be universal.[432] The first requirement was that state practice must be *virtually uniform*,[433] which means that different states must not have engaged in substantially different conduct. However, as stated by the ICJ, 'too much importance need not be attached to a few uncertainties or contradictions, real or apparent' in a given state practice.[434]

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[426] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xxxviii.
[427] Henckaerts, "Customary International Humanitarian Law: Taking Stock of the ICRC Study", at 444.
[428] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xxxii.
[429] Id., at xxxii.
[430] *The Asylum Case (Colombia v Peru)* (1950) ICJ Reports at para. 266.
[431] *Nicaragua* case, at para. 98.
[432] ILA Report 69th Conference, London 2000, Principle 14 at 734.
[433] *The Asylum Case (Colombia v Peru)* at 277. See also *The Fisheries Case (United Kingdom v. Norway)*, Judgment 18 December 1951, ICJ Reports (hereinafter *The Fisheries* case), at 131.
[434] *The Fisheries* case, at p. 138.

Therefore, it is not required to prove that the practice be universal, as this would be impossible to prove in most cases. This is important from the perspective of the law of armed conflicts, because it means that 'contrary state practice on the part of few states will not necessarily weaken the rule but instead could serve to confirm it.'[435] As long as the contrary practice is condemned by other states or denied by the government itself, it will not represent its *official practice*.[436] Even better, through such condemnation or denial, the rule in question will be actually confirmed. This is particularly relevant for a number of IHL rules for which there is overwhelming evidence of verbal state practice in support of a rule, alongside repeated evidence of violations of that rule. 'Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question.'[437]

The second requirement the Study used to identify a rule of customary law was that the state practice must be both *extensive* and *representative.* It does not need to be universal, a 'general' practice suffices.[438] The extent of participation required needs to be qualitative rather than quantitative, as in the words of the ICJ, the practice must 'include that of States whose interests are specially affected.'[439]

But this poses the question as to how to identify the special interest states in the sphere of armed conflicts? With respect to any IHL rule, countries that participated in an armed conflict are 'specially affected'[440] when their practice examined for a certain rule was relevant to that armed conflict. However, in the Study, it was felt that the

[435] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at viii.
[436] See Id. at xxxvii. See also *Nicaragua* case, para 186. Finally, see the discussion on contrary state practice above.
[437] Henckaerts, J.-M., "The ICRC Study on Customary International Humanitarian Law: Characteristics, Conclusions and Practical Relevance", 6 *Slovenian Law Review*, (2009), at 233.
[438] See Statute of the International Court of Justice, Article 38(1)(b); "Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law", *Report of the Sixty-Ninth Conference*. (2000). Principle 14, p. 734.
[439] *North Sea Continental Shelf* Cases, at para 74.
[440] On the notion of 'specially affected states' see Cowling, "International Lawmaking in Action - The 2005 Customary International Humanitarian Law Study and Non-International Armed Conflcts", at 72; Henckaerts, "Customary International Humanitarian Law: Taking Stock of the ICRC Study", at 446; Kälin, W., "The ICRC's Compilation of the Customary Rules of Humanitarian Law", in *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Second Hague Peace Conference*, (Thomas Giegerich ed., 2009), at 422; Schlütter, *Developments in Customary International Law Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, at 34.

concept of specially affected states was not applicable in the sphere of armed conflict because the latter is 'a phenomenon that impacts upon humanity as a whole and all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.'[441] In addition, it is true that 'all states can suffer from the means and methods of warfare deployed by other states which ultimately manifests itself in the form of suffering on behalf of humanity.'[442] Furthermore, as internal armed conflicts very often lead to displacement of entire populations fleeing the combats, this has also an impact, not only on bordering countries, but also, ultimately, on further countries that have to deal with extensive refugee flows and related violence.[443] Armed groups fighting an internal war also have the propensity to cross borders and bring violence to neighbouring countries. We can simply think about the impact the Lord Resistance Army, an originally Ugandan armed group, has in DRC, and Sudan.

A last argument against the concept of 'specially affected states' in armed conflict situations is that every state might, one day or another, potentially become involved in an armed conflict and become 'specially affected'. Therefore, rightly in my opinion, the ICRC chose to distance itself in effect from the emphasis placed by the *North Sea Continental Shelf Cases* on specially affected states. It emphasized that account should be taken of all forms of state practice, 'so as to permit all States – and not only those embroiled in armed conflict – to contribute to the formation of customary rule.'[444] In addition, the principle of sovereign equality of all states, as enshrined in Article 2(1) of the United Nations Charter, demands that the requirement of participation of the specially affected states is understood as a strictly numeric requirement, leaving no room for giving more weight to the practice of politically 'important' states. Thus, 'a country with more experience in warring activities may contribute more to the (non-) emergence of customary law in terms of quantity, but not in terms of quality.'[445] In any case, the Study acknowledges that there are states

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[441] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xxxix.
[442] Cowling, "International Lawmaking in Action - The 2005 Customary International Humanitarian Law Study and Non-International Armed Conflcts", at 72.
[443] See for instance the impact the Syrian armed conflict does have on Lebanon, Turkey and Jordan.
[444] Report on the Follow-Up of to the International Conference for the Protection of War Victims, 26th International Conference of the Red Cross and Red Crescent, Commission I, Item 2, Doc. 95/C.I/2/2, at 8 (1995).
[445] Kälin, "The ICRC's Compilation of the Customary Rules of Humanitarian Law", at 424.

that have contributed more practice than others because they have been affected by armed conflict. It has taken into account the above mentioned discussion, as it duly noted the contribution of states that have had ‘a greater extent and depth of experience’ and have ‘typically contributed a significantly greater quantity and quality of practice’.[446] Whether their practice counts more than the practice of other states is another question.

As we see, the ICRC has been cautious and conservative in its approach to customary law. A supplementary proof of the cautious approach taken by the ICRC in identifying the customary status of a specific norm was that particular attention was given to the practice of states who were not party to any treaty. If they conformed to a treaty provision, then it was treated as important positive evidence of custom. Conversely, their contrary practice was held to be important evidence that the provision did not have customary status.[447]

Opinio Juris

When it comes to *opinio juris*, it is argued that during the work of the Study it proved very difficult and largely theoretical to strictly separate elements of practice from legal conviction. Accordingly, the solution that has been found is that when there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris. Opinio juris* plays an important role, however, in certain situations where the practice is ambiguous, in order to decide whether or not that practice counts toward the formation of custom.[448] In the area of the law of armed conflict, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris,* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation.[449] Usually, such abstention is indicated in statements and documents, and the existence of a *legal* requirement to abstain from the conduct in question can usually be proved. However,

[446] Henckaerts, “Customary international Law. a response to US comments”, at 481.
[447] Study, Introduction, xliv. See also Henckaerts, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, at 83.
[448] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xl.
[449] Id. at xli.

this type of situation is more problematic in internal armed conflicts, as the process of claim and counterclaim does not produce as much clarity with respect to these armed conflicts as in this case only one state is directly affected. However, 'international courts and tribunals, on occasion, conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security, or for the protection of the human person, provided that there is no important contrary *opinio juris.*'[450] In addition, with respect to internal armed conflicts, the state practice within international organisations, notably the UN, is very important and will be helpful in the identification of customary norms.

Conclusion on the ICRC Study Methodology

The biggest contribution of the ICRC Study to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, as we will see, unlike Protocol I, Additional Protocol II does not contain specific rules and definitions with respect to the principles of distinction and proportionality. The gaps in the regulation of the conduct of hostilities in Additional Protocol II have, however, allegedly been largely filled through state practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to internal armed conflicts.[451] However, generally speaking, 'one should approach exercises of distilling customary international law in areas that are heavily regulated by treaty with caution. There are difficult methodological problems and questions of normative integrity to surmount. In some cases, one risks inadvertently diminishing rather than enhancing protection through such exercise.'[452] Given that the Study has already had an impact on courts both international and national[453] and been the subject of heavy, if not unpredictable, criticism from the United States,[454] it is

[450] Id. at xli.
[451] Henckaerts, "Session 1: The ICRC Customary Law Study: An Assessment", *Chatham House, Transcripts and summaries of presentations and discussions*, at 6.
[452] Bethlehem, D., "The methodological framework of the Study", in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Elizabeth Wilmshurst & Susan Breau eds., 2007), at 13.
[453] See *Hadzihasanovic* Decision Rule 98bis, paras 29-30, 38 and 45-46; *Prosecutor v Stakic,* Judgment, IT-97-24-A, 22 March 2006 (*Stakic* Appeal Judgment), para 296, and domestically, *Adalah and others v GOC Central Command, IDF and others,* Israel Supreme Court, 23 June 2005, HCJ, 3799, 02, paras 20, 21 and 24. Meron averts that the *Study* 'will be a significant aid to international criminal tribunals', Meron, *Revival of Customary Humanitarian Law*. at 833.
[454] On which see Malcolm Maclaren and Felix Schwendimann, "An Exercise in the Development of

important, even for those sympathetic to it, to appraise the Study as objectively as possible, even though its aims are unquestionably meritorious.[455]

The role of judicial decisions in the identification of customary rules for internal armed conflicts

When it comes to customary international law, courts play an essential role, as 'they identify and set out principles 'hidden' in the interstices of the normative network, thus considerably contributing to the enrichment and development of the whole body of international law.'[456] However, it is true that the recent proliferation of international tribunals and courts will require more attention in the future as it is likely to lead to conflicting decisions on international law, and 'there is no ultimate legal authority in the sense of a supreme court to harmonize such conflicts.'[457]

Evidence of customary international law may also be found in judgments of national and international tribunals, which are mentioned as subsidiary means for the determination of rules of law in Article 38(1)(d) of the Statute of the ICJ.[458] According to this article, the Court 'shall apply, subject to the provisions of Article 59, judicial decisions … as subsidiary means for the determination of the rules of law.' [459] According to Article 59 of the ICJ Statute, the Court's decisions have 'no binding force except between the parties and in respect of that particular case'. Decisions of international courts constitute subsidiary sources of international law. Judicial practice does not constitute state practice *per se*, because, unlike national courts, their international counterparts are not state organs. Accordingly, although judicial decisions are only mentioned as a subsidiary means for determining the law in

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International Law: The New ICRC Study on Customary International Law", (2005) 6 *German Law Journal* 1217 at 1237-1238. There has also been criticism from members of the US forces; see, e.g. W. Hays Parks, "The ICRC Customary Study: A Preliminary Assessment", (2005) 99 *Proceedings of the American Society of International Law* 208.

[455] Cryer, R., "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study" 11 *Journal of Conflict & Security Law* 239, (2006), at 241.

[456] Cassese, *International Law*, at 189.

[457] Malanczuk, *Akehurst's Modern Introduction to International Law,* at 51.

[458] Ibid.

[459] Cassese, *International Law*, at 194.

article 38(1)(d) of the ICJ Statute, this understates the practical effect that judicial decisions have on the ascertainment, of customary international law.[460]

There are two ways in which the tribunals may have affected the views of customary law: through their constituent treaties and through their jurisprudence. Neither is free from complexity or controversy. Before looking at these two different ways, it is necessary here to reiterate that Articles 38(1)(d) and 59 of the ICJ Statute have either codified customary international law or turned into customary rules. Hence, they apply to all decisions of international courts. 'It follows that judgments of such courts do not make law, nor is the common law doctrine of *stare decisis*, or binding precedents, applicable.'[461] Indeed it is important to mention that there is no formal *stare decisis* doctrine, as known in common law systems. 'In international law, international courts are not obliged to follow previous decisions, although they almost always take previous decisions into account.'[462] This is extremely important in the light of the latest ICTY Appeals Chamber decisions.[463]

Tribunals have affected the views of customary law through their Statutes

Courts and tribunals may have affected the views of customary law through their constituent texts. Indeed, 'the identification of customary law plays an important role in the interpretation and application of the *ratione materiae* provisions of their Statutes.'[464] For instance, the ICTY Statute, owing to the intention of its drafters, is very good evidence of customary law.[465] This is because the Secretary-General's report on the ICTY, which is analogous to the *travaux préparatoires* of a treaty, makes clear that the intention in drafting the Statute was to stay within the bounds of customary law: 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some

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[460] Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", at 245.

[461] Cassese, *International Law*, at 194; see also Clapham, A., *Brierly's Law of Nations An Introduction to the Role of International Law in International Relations* (Oxford University Press 7 ed. 2012). at 53.

[462] Malanczuk, *Akehurst's Modern Introduction to International Law*, at 51.

[463] See discussion on the *Gottovina* and *Perisic* ICTY decisions in Chapters 8, 9 and 12.

[464] Meron, *International Law in the Age of Human Rights,* at p. 376.

[465] Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", at 250.

but not all States to specific conventions does not arise'.[466] Accordingly, customary law provides a yardstick for assessing whether or not the material offences stated in the Statutes may be *ex post facto.*

When it comes to the Rome Statute of the International Criminal Court, there was a 'general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not create new law'.[467] However, it is argued here that, in some areas, Article 8 marks a retrograde step with respect to customary international law. For instance, the legal regulation of methods and means of warfare in internal armed conflict is clearly narrower than that laid down in customary IHL. Here the danger seems related to the problem of interpretative practice. 'Subsequent practice in the application of a treaty may establish the agreement of the parties concerning its interpretation. That new interpretation may in itself affect customary law.'[468] This problem created a dichotomy, which appears contrary to the fundamental object and purpose of international humanitarian law, and which might have undesirable effects on the development of customary international law applicable in internal armed conflicts.

In any case, the approach taken by these tribunals, and in the future by the ICC, is necessarily rigorous and, in a sense, conservative, as criminal courts are bound to respect the principle *nullum crimen sine lege.* 'If a criminal conviction for violating uncodified customary law is to be reconciled with this principle, it must be through the use of clear and well-established methods of identifying customary law.'[469]

Tribunals have affected the views of customary law through their jurisprudence

Decisions of Courts and Tribunals may also affect the views of customary law through their jurisprudence. This can be done in two ways. In the first place, judicial decisions may affect customary international law through their findings on the

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[466] *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808,* 1993, UN doc. S/25704, para. 34.
[467] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, quoting Philippe Kirsch, 'Foreword', in Knut Dormann (ed.), *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) xiii.
[468] Meron, *International Law in the Age of Human Rights* at p. 376.
[469] Meron, "Revival of Customary Humanitarian Law", at pp. 817-18.

existence of a given customary norm. They provide only an indirect indication of the formation of new customary rules. This is because, as stated above, unlike national courts, international courts are not state organs.[470] However, judicial decisions were included in the ICRC study, because, as the authors argued, 'a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect'.[471] The Study makes heavy use of the work of the ICTY and the ICC Statute.

Courts and Tribunals, especially the ICJ, have contributed in establishing the customary law status of treaty provisions. Once such a tribunal has decided that a particular provision has become part of customary law, its customary law status tends to be assumed in subsequent discussion. In the *Wall* Advisory Opinion, the Court suggested that 'the provisions of the Hague Regulations have become part of customary law'.[472] With respect to pronouncements by the ICJ, 'states has never objected to, or complained about these.'[473] Thus, states have implicitly accepted or at least acquiesced in the normative role sometimes played by the ICJ.

Secondly, because of the precedential value of their decisions, international courts can also *contribute* to the emergence of a rule of customary international law by influencing the subsequent practice of states and international organizations.[474] As Judge Shahabuddeen has noted, 'although a court decision cannot create law *per se,* by recognising the existence of a rule of customary international law, a court decision may essentially act as the final stage of the crystallization of that customary rule.'[475]

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[470] Decisions of national courts are also important for the indication of the existence of a norm of customary law.

[471] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xxxiv. See also Henckaerts, "The ICRC Study on Customary International Humanitarian Law: Characteristics, Conclusions and Practical Relevance", at 232. See also "Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study" at 240.

[472] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, (hereinafter *Wall* Case), p. 172, para. 89. This has been confirmed in the contentious case of *Armed Activities on the Territory of the Congo (DRC v. Uganda),* ICJ Judgment, December 2005 (hereinafter *DRC v. Uganda* case), at para. 217.

[473] Cassese, *International Law*, at 196.

[474] Henckaerts, "The ICRC Study on Customary International Humanitarian Law: Characteristics, Conclusions and Practical Relevance", at . 232.

[475] Mohammed Shahabuddeen, *Precedent in the World Court* (1995); at 72. Referred to by Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*"* at 246.

In some cases, considerations of the ICTY in particular seem to have been motivated by *de lege ferenda* alone. The findings of the *Kuperskic* judgment, for example, were 'influenced more by considerations of which customary norm was desirable than by a mere assessment of hard evidence available to support the existence of an *opinio juris* or state practice.'[476] The ICRC in its Study identified this as a trend in the case law of the *ad hoc* international criminal tribunals.[477] Indeed, it is true that international tribunals tend to rely on *opinio juris* or general principles of humanitarian law, distilled in part from the great humanitarian conventions as customary law. In addition, the study is also of the view that, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of states and international organisations.[478] Accordingly, the Study quite explicitly has sympathy for the decisions of the international criminal tribunals, as in its view, despite not constituting state practice, they are subsidiary sources of international law.[479] In addition, it should be mentioned that, after a time, many allegedly controversial determinations of customary international law by Tribunals become normalised. As observed by Clapham, 'our changing notions of what is considered humane can generate new binding rules in the field of international human rights and humanitarian law without recourse to the mysteries of evaluating state practice and *opinio juris*.'[480]

The truth is that the renewed vitality of customary law in the development of IHL has been demonstrated in the case law of the *ad hoc* international criminal tribunals. The most significant development in the tribunals' case law has been the recognition that customary rules apply to internal armed conflicts. This development ultimately led to the adoption of the Rome Statute, which, as we have seen in the preceding Chapter, applies specifically to internal armed conflicts. The ICC might rely less on customary international law, as the Rome Statute is very extensive and detailed. However, the role of customary international law in the ICC case law remains to be seen, despite

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[476] Schlütter, *Developments in Customary International Law Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, at 281-282
[477] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xlii.
[478] Id. at xxxiv.
[479] Ibid.
[480] Clapham, A., *Human Rights Obligations of Non-State Actors* (Oxford University Press. 2006), at 88.

the fact that for now, in the *Lubanga* and *Bemba* case, the judges have stuck to the Statute.

Conclusion on the Role of Judicial Decisions in the Customary International Law Process

Case law only interprets existing law. It does not invent rules out of nowhere. In addition, the persuasive nature of an international decision does, and ought to, depend upon its quality. Lastly, care must be taken 'not to take court decisions simply as correct restatements of custom.'[481]

With respect to the use of judicial decisions by the Study, it should be noted that although elements of the *Study* are subject to criticism, most of the considerable use made by the *Study* of the tribunals is not problematic. And generally, up until now, international criminal tribunals have taken an essentially conservative and traditional approach to the identification and application of customary international law principles.[482] The tribunals' rigorous approach in the ascertainment of customary norms results from the tribunal's obligation, as a criminal court, to respect the fundamental principle of *nullum crimen sine lege.*

The modern positivist approach to IHL: customary law wedding general principles

Another very useful concept to anchor norms essential to the protection of community and human values are general principles. They are 'sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant common points.'[483] Despite not constituting a primary source, they 'play the major role of forming the 'constitutional principles' of the world community, together with other norms of *jus cogens* and the

[481] Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", at 253.
[482] Meron, "Revival of Customary Humanitarian Law", at 821.
[483] Cassese, *International Law*, at 188.

rules on ‘primary sources’’.[484] They remained dormant until recently, when they have been revitalized in various areas such as international administrative law and, more interestingly for us, international criminal law. General principles can be conceived of as genuine principles of international law, irrespective of analogies at the municipal law level. Under this conception of general principles, ‘actual state practice is arguably not the main consideration, unlike with respect to the crystallization of customary rules.’[485] They are ‘primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice.’[486] Normally, they are spelled out by courts when adjudicating cases that are not entirely regulated by treaty or customary rules.

General principles serve two major functions. The first is to fill possible gaps in the body of treaty and customary rules. For instance, analysing what constitutes forced penetration, the ICTY dealt with the general principle of human dignity. It held that ‘the general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.’[487] The second function is to choose between two or more conflicting interpretations of a treaty or customary rule.[488]

These principles do not address themselves to states solely, but are binding on other international legal subjects as well, in particular insurgents and international organizations. ‘All the legal entities operating in the international community must abide by them.’[489]

Cassese observes that at present, in the world community, there exist *two distinct classes of general principles.* First, there are general principles of international law, namely those principles that can be inferred or extracted by way of induction and

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[484] Id. at 188.
[485] Wouters & Ryngaert, “The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law”, at 11.
[486] Bronwlie, J., *Principles of Public International Law* (Clarendon Press. 1990), at 19.
[487] Furundzia, Trial Chamber judgment, ICTY, Case No.: IT-95-17/1-T, 10 December 1998 (hereinafter *Furundzia* Trial Judgment), para. 183.
[488] Cassese, *International Law*, at 189.
[489] Id. at 64.

generalization from conventional and customary rules of international law. Some of these principles have been restated by states in international instruments designed to set out the fundamental standards of behaviour that should govern the relations among members of the international community. As instances of general principles of international law, one may mention the very well known 'elementary considerations of humanity'.[490]

The second class of general principles are those principles that are peculiar to a particular branch of international law (the law of the sea, humanitarian law, the law of state responsibility, etc.).[491] These principles are general legal standards overarching the whole body of law governing a specific area.[492] They 'may first belong to a particular branch of international law and then gradually come to impregnate the whole body of this law.'[493]

IHL norms can be viewed as general principles in their own right. General principles of international law are established top-down, from international practice. Under this conception, the practice of states is emphasized in and *vis-à-vis* international fora, organizations and institutions.[494] Alston and Simma rely on general principles to ground the legally binding character of international human rights law in the absence of treaty law. Their approach makes it possible to bypass state practice and to take into account verbal state practice in and *vis-à-vis* international fora, which leads to the emergence of another picture, coherent with the actual practice of states within international institutions.[495] They further explain that with this approach, the existence of a certain customary rule may then be 'established as a matter of international law on the basis of its statutes of and trials in international criminal tribunals (ICTR, ICTY, STSL), of the adoption of legislation criminalizing war crimes committed in

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490 See ICJ, *Corfu Channel* case, at para 22.

491 See for instance the European Court of Human Rights, which stated that 'Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict.' Application no. 38263/08, European Court of Human Rights, Judgment, 13 December 2011, para. 72.

492 See for instance article 21 ICC Statutes providing that the Court shall also apply general principles of international humanitarian law.

493 See *Furundzia* Trial Judgment, at para 183.

494 Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", at 13

495 Simma, B. & Alston, P., "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles", *Australian Yearbook of International Law* 82, (1988), at 102.

internal armed conflicts, of statements of states supporting (the norm under scrutiny), and of UN practice.'[496] This is for instance exactly how the ICRC established the customary law status of *individual criminal responsibility* for war crimes committed in internal armed conflicts in Rule 151 of its 2005 Study.

As instances of general principles peculiar to a particular branch of international law, one may mention the *Nicaragua* case in which the Court identified and applied 'the general principles of humanitarian law to which the (1949) Geneva Conventions merely give specific expression'.[497] The Court relied on general principles in order to identify rules of humanitarian law.[498] It argued that 'the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of (fundamental general principles of humanitarian law).'[499] It further stated that 'an obligation (to respect and to ensure respect for the Geneva Conventions in all circumstances) does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.'[500] It could be that, facing the difficulties that we know of the ascertainment of state practice, and of battlefield practice in particular, the Court decided to rely on general principles in order to buttress its discussion on contrary state practice. 'Humanitarian concerns and principles have informed the development of the conventional law of war, so that it is only logical to reach back to them in cases where there is no applicable treaty law, rather than to ascertain the existence of customary norms that are themselves based on these very concerns and principles.'[501]

For Cassese, the rights and claims deriving from the fundamental principles governing international relations accrue to all members of the international community, all of which are entitled to exact their observance (that is, these members possess rights *erga omnes* in addition to obligations *erga omnes*).[502] Judge Tanaka argues that, for the identification of general principles of law, we do not require 'the

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[496] Ibid.
[497] *Nicaragua* case, at para 219.
[498] *Ibid.*
[499] *Ibid*, para. 218.
[500] *Ibid*, para. 220.
[501] Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law" at 14.
[502] Cassese, *International Law*, at 64.

consent of States as a condition of the recognition of the general principles,'[503] adding that 'States which do not recognize this principle or even its validity are nevertheless subject to its rule. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say into the sphere of natural law, and assume an aspect of supra-national and suprapositive character.'[504] As a dynamic element in international law, general principles are important in that they reject the positivist doctrine, according to which international law consists solely of rules to which states have given their consent.[505]

About a decade after his article with Alston, Simma, co-authoring another article, with Paulus this time, slightly changed his approach. The two authors argue that the general principles method is not sufficient in itself to ground the binding character of humanitarian and human rights law. They write that 'on the basis of a modern positivism – hence also taking into account the practice of international institutions and accepting as *opinio juris* the legal views expressed by states in international organizations – one can defend the ICTY jurisprudence and the Rwanda Statute on the basis of a combination of developing customary law and existing general principles.'[506] The use by international tribunals of the traditional method to ascertain customary norms, via state practice and *opinio juris*, makes clear that general principles are used as a legal instrument to buttress the customary law method. Indeed, as we have seen above, the traditional method, which emphasizes state practice, would hardly bring the results we would like it to when it comes to internal armed conflict.

Accordingly, by a flexible application of customary international law and general principles, we can establish a rule as a 'higher law'.[507] This concept aims at doing justice to global values which the traditional bilateralism of international law and international relations fails to sufficiently protect.

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[503] Dissenting Opinion of Judge Tanaka, South West African Cases, ICJ, 1966.
[504] Ibid.
[505] Clapham, *Brierly's Law of Nations An Introduction to the Role of International Law in International Relations*, at 53.
[506] Simma, B. & Paulus, A., "The Reponsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", 93 *American Journal of International Law* 302, (1999), at 313.
[507] Wouters & Ryngaert, "The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law", at p. 16.

Conclusion

In conclusion, the method of ascertaining customary law in the IHL field may ultimately have an impact on general customary international law, in particular in cases where the stakes are high. As we have seen, in these cases, when it is undeniable that a rule of international law may further the common interests of humanity or the community of states, the traditional requirement of consistency of state practice when searching for a customary rule, may, if need be, justifiably be played down a bit, provided that a strong *opinio juris*, democratically informed by global state consent, has crystallized in international fora. However, this needs to be done with the caveat that only 'clear-cut and unequivocal' *opinio juris* may be taken into account, and substantial consistent state practice is identified. 'These caveats ensure respectively that *opinio juris* is widespread and beyond discussion among states, and that customary law norms do not become wholly utopian.'[508] Nevertheless, it is important to mention that state consent remains important in the modern approach to customary international law.

The progressive development of international law in forms of resolutions has given a new role to customary international law - a more democratic role, as this new variety of custom does not reflect only the practice of few powerful states, but the desiderata of the international community as a whole.[509] In addition, general principles can be referred to in order to buttress customary law findings. It is argued here that this phenomenon, far from being an anarchic phenomenon threatening to destroy the system, is a very organized and institutionalized procedure.

In today's internal armed conflicts, the formal legal reality needs to impose a reality related to the needs of human persons facing massive violations in situations of armed conflict, alongside a reality of belligerents whose conduct is only partially controlled. From here comes the pertinence of an efficient need of assumed obligation to 'respect and ensure respect of international humanitarian law', as well as fundamental human rights. The specific *démarche* related to the identification of the customary status of IHL norms, especially when it comes to the protection of civilians, should essentially

[508] Id. at 20.
[509] Georges Abi-Saab, G., "Cours Général de Droit International Public", 207 *Receuil de Cours de l'Académie de Droit International*, (1996), at 173.

be a deductive one, by downplaying contrary state practice and more generally state battlefield practice and by strengthening the weight of the *opinio juris*.[510]

[510] Despite the fact that the ICRC, for its Study on Customary International Humanitarian Law, chose to rely on a traditional inductive approach in order to counter criticism by powerful states. For an extensive discussion on the inductive and deductive approaches to the identification of customary international law, see Worster, W.T., "The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches", *SSRN* 1, (2013).

Chapter 4:

The Definition of an Armed Conflict Not of an International Character

Characterizing an armed conflict as international or non-international is the first, preliminary step in determining the applicable humanitarian law framework.[511] The qualification of the nature of an armed conflict is a major issue for the determination of the applicable rules of international humanitarian law and the protection of victims in situations of armed violence.

Scope of Common Article 3

As we have seen in Chapter 2, Common Article 3 was the first provision of its kind to deal with humanitarian protection in situations of internal armed conflicts. It is not the purpose of this section to make an extensive analysis of the drafting history of Common Article 3.[512] Suffice it here to mention that the question of what is meant by 'armed conflict not of an international character' was a burning issue at the Diplomatic Conference, because the provision was viewed by certain delegations as a danger to state sovereignty.[513] The drafters, in order to avoid a narrow reading of the applicability of Common Article 3, were prudent in not defining the term 'armed conflict not of an international character'. It is therefore fortunate that no definition of

[511] Pejic, J., "Status of armed conflicts", in *Perspectives on the ICRC Customary International Humanitarian Law,* (Elizabeth Wilmshurst & Susan Breau eds., 2007), at 77.

[512] For this, see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at pp. 25-48. See also Moir, *The Law of Internal Armed Conflict*, at pp. 22-29; Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum I, at pp. 38-49.

[513] See for instance the delegation of Burma. *Final Record*, vol. II-B, Minutes, 29 July 1949; See for instance the Swiss declaration in *Final Record*, vol. II-B, Minutes, 29 July 1949, p. 335. p. 335; Pictet, Commentary on the Geneva Conventions of 12 August 1949, Volum I. at p. 49; the Swiss declaration in *Final Record*, vol. II-B, Minutes, 29 July 1949, p. 335; Pictet, Commentary on the Geneva Conventions of 12 August 1949, Volum I. at p. 49.

‘armed conflict not of an international character’ has been included in Common Article 3, as ‘the positive effect of a lack of agreed distinctive criteria is the flexibility provided by such lacuna.’[514] However, the ambiguity around the field of applicability of Common Article 3 has allowed certain states to deny the applicability of international humanitarian law by not recognising the existence of an armed conflict. The interpretation of the field of application of Common Article 3 will be carefully studied below. First, however, we will look at the two criteria that we find in the wording of the provision.

Common Article 3 and its two Criteria

The chapeau of Common Article 3 states that it is applicable ‘in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. In this sentence, there are two separate criteria for the test being completed and Common Article 3 being applicable to a particular situation. The first element requires that there be an ‘armed conflict’. The second element is geographical and requires that the conflict takes place ‘in the territory of one of the High Contracting Parties’.

Existence of an Armed Conflict

The first criterion to complete the test in order for common Article 3 to be applicable to a particular situation is that there be an armed conflict. Common Article 3 simply assumes that ‘an armed conflict’ exists, without defining this concept. ‘Based on the premise that Common Article 3 contains only those limited principles which ought to be observed in all conflicts and other cases of violence, there have been suggestions that it should be applied as widely as possible.’[515] As of now, there is no universally accepted definition of the term ‘armed conflict’. Except at very low levels of violence, it is not normally a problem to determine whether an international armed conflict exists. ‘Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 (of the Geneva

[514] Spieker, H., “Twenty-Fifth Anniversary of Additional Protocol II”, 4 *Yearbook of International Humanitarian Law* 129, (2001), at 60.
[515] Moir, *The Law of Internal Armed Conflict*, at 36.

Conventions), even if one of the Parties denies the existence of a state of war.'[516] The ILA has, however, shown that armed clashes on too limited a basis, short in duration or entailing few or no casualties will not qualify as armed conflict.[517]

However, the problem that occupies us relates to the delineation of what is an armed conflict *not of an international character*. Common Article 3 of the Geneva Conventions does not clarify this notion. It only asserts negatively the conflicts to which it applies, asserting what they must not be, i.e. international. The provision does not offer further guidance as to their precise identification. The vital question is, therefore, what exactly is meant by 'armed conflict not of an international character'? That is, what is the threshold of applicability of Common Article 3? From a humanitarian perspective, because of the reluctance of states to admit the existence of an internal armed conflict, and in order not to leave the matter in the hands of national governments and their instincts for self-preservation, we need an objective method to make it clear what is an armed conflict not of an international character and when a Common Article 3 conflict exists.

What criteria might be used to this end? The ICRC Commentary has offered some guidance in order to interpret Common Article 3: 'the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.'[518] Furthermore, during the 1949 Diplomatic Conference, in order to clarify the armed conflict's elements, it was suggested that the term "conflict" should be defined, or that a certain number of conditions for the application of Common Article 3 should be enumerated. This idea was subsequently abandoned, but the ICRC, in its *Commentary I*, included some of the proposals discussed at the Diplomatic Conference as 'convenient criteria' to help in distinguishing situations of internal armed conflict.[519] These criteria seem to set a far higher threshold of application than Common Article 3 itself actually requires.

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[516] Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum I*. Pictet at p. 32.

[517] The Use of Force Final, Report on the Meaning of Armed Conflict in International Law (2010), at 16.

[518] Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum IV* (ICRC ed., International Committee of the Red Cross 1956), at 36.

[519] Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum I*, at pp. 49-50. These criteria have been reproduced in the *Commentary III and IV*. See Pictet, J., *Commentary on the Geneva*

However, as the drafters understood ‘armed conflict not of an international character’ in terms equivalent to civil war, it is held that ‘the Commentary is of little relevance to the contemporary threshold for the application of IHL to situations of internal armed conflicts.’[520] The intended scope of applicability of Common Article 3 was far narrower than that which is currently the case.[521] However, the use of the phrase ‘armed conflict not of an international character’ in the provision has allowed the scope of the provision to evolve beyond and expand from which was originally intended by the drafters.[522] The Commentary, stressing the descriptive character of this list, which obviously summarizes discussions at the diplomatic Conference, explicitly clarifies that the list is ‘in no way obligatory’ and is suggested merely as ‘convenient criteria’ to distinguish a genuine armed conflict from an act of banditry or an unauthorised or short-lived insurrection.[523] ‘There is no question of the application of Article 3 being dependent upon any criteria other than the existence of an armed conflict in the territory of a High Contracting Party.’[524]

Pictet’s point of view, according to which the scope of application of the Article must be as wide as possible, is nowadays not anymore interesting. This point of view is dangerous, as it seeks to expand the scope of Common Article 3 further than was intended. It should be mentioned that at the time when Pictet wrote the Commentaries, international human rights law was embryonic. Therefore, Pictet’s approach was to apply IHL to as many situations as possible in order to better protect the people caught in warfare. But today, the situation has drastically changed. International human rights law continues to apply during armed conflict and can even provide, in certain situations, more protection than IHL.

Conventions of 12 August 1949, Volum III (ICRC ed., International Committee of the Red Cross 1959), at 36; Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum IV*, at 36.

[520] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 27. See further below for a discussion on the criteria that have been put forward for the identification of a Common Article 3 non-international armed conflict, by the *ad hoc* Tribunals

[521] See *Final Record*, vol. II-B, Seventh Report, p. 121. See also Id. at p. 49.

[522] Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum IV*, at 36. See also Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 50-51.

[523] Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum I*, at 49.

[524] Moir, *The Law of Internal Armed Conflict*, at 36.

In the Territory of a High Contracting Party

The second element of the *Chapeau* of Common article 3 provides that it applies to armed conflict not of an international character 'occurring in the territory of one of the High Contracting Parties'. This second element is allegedly less problematic as the Geneva Conventions are ratified by 194 States, making them universally applicable. However, we may wonder, in a situation of war that would oppose for instance the Hamas to the Fatah in the Gaza Strip, whether Common Article 3 could apply or not as treaty law due to the unclear status of Gaza. The result is sure to be troubling. It can still be controversial as it can be interpreted in two ways. First, it could be understood as a condition excluding armed conflicts not of an international character taking place in two or more State territories. Second, it could be a simple reminder of the field of application of Common Article 3. But even in the case whereby Common Article 3 would be considered as non-applicable *qua* treaty law, it would still apply a customary law.

Based on the first interpretation, there is a body of commentary[525] and judicial opinion[526] which considers that the territorial reach of Common Article 3 is 'limited to an armed conflict taking place within the territory of a single state.'[527] This reading of the territorial scope of Common Article 3 is based on the plain language of the text of the provision.[528] It is, however, submitted here that the text of the provision can be given a different interpretation.

According to the second hypothesis, it is argued that this specific point was included in order to make it clear that common Article 3 may only be applied in relation to the territory of states that have ratified the 1949 Geneva Conventions,[529] and 'any armed

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[525] A major source cited in support of this view is the ICRC's Commentaries, in which Pictet unequivocally states that the Article applies to a NIAC occurring within the territory of a single state. See Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volum IV*, at 36: 'Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.'

[526] See for example *Prosecutor v. Musema*, Case No. ICTR-96-13-T (Trial Chamber), January 27, 2000 (hereinafter *Musema* Trial Judgment), paras. 247-248. It must be noted that this pronouncement is confusing given that the ICTR Statute clearly indicates in Article 1 that the Tribunal has jurisdiction over the spill-over aspects of the Rwandan conflict into the neighbouring states.

[527] Pejic, "The protective scope of Common Article 3: more than meets the eye", at 199.

[528] See Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 103.

[529] For this position, see Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", at 78. See also Melzer, N., *Targeted Killing in International Law*

conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.'[530] In addition, the drafting history does not indicate that the current wording of Common Article 3 is to be attributed to the express willingness of states to limit its application to the territory of a single country. 'It only allows the conclusion that the existing text was the result of negotiations in which the focus of debate was elsewhere.'[531] In addition, in view of the recognition by the ICJ of the provisions of Common Article 3 as an emanation of general principles of law, namely 'elementary considerations of humanity',' the territorial requirement of Article 3 can indeed be regarded today as less relevant for the applicability of the minimum rules of IHL.'[532] Accordingly, the territorial scope of Common Article 3 should nowadays be progressively interpreted in order to apply to any situation of organized armed violence that has been classified as internal armed conflict. As the conduct of warfare has evolved, so too has the interpretation of IHL, and the interpretation of what constitutes an armed conflict has changed significantly in the past sixty years.

Another advantage that we find in Common Article 3 is that nothing in the provision defines an internal armed conflict in terms of the parties involved. It does not require that armed groups are fighting against the government of the territory in which operations are conducted. Therefore, it is also applicable to an armed conflict between two or more armed groups, whether or not it involves government troops.[533] The conflict may be fought between armed groups or between an armed group and a state outside the territory of the latter, as is the case, for example, in Somalia, Lebanon or the Democratic Republic of Congo.

(Oxford University Press. 2008), at 258; ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armedconflict.pdf, (2008), at 3; "Transnational Armed Groups and International Humanitarian Law" (2006), at pp. 8-9.

[530] *ICRC Opinion Paper*, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law*",* (2008) at 3

[531] Pejic, "The protective scope of Common Article 3: more than meets the eye", at 200.

[532] Paulus, A. & Vashakmadze, M., "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", (2009). at pp. 118-119.

[533] To the contrary of the Second Additional Protocol. For the discussion on this instrument, please see further below in this Chapter.

A typology of internal armed conflict under Common Article 3

Internal armed conflict falling into the category of the Common Article 3 threshold can take different forms. Pejic has identified a brief typology of current and recent Common Article 3 internal armed conflicts.[534]

The first category is constituted by ongoing traditional or 'classical' Common Article 3 internal armed conflicts, in which government armed forces are fighting against one or more organized armed groups within the territory of a single state. These armed conflicts are governed by Common Article 3, and potentially the Second Additional Protocol, as well as by customary rules of IHL. We can think of the situations in Colombia, Sri Lanka or Syria, for instance.

The second category encompasses armed conflict that pits two or more organized armed groups against each other, and may be considered as a subset of 'classical' internal armed conflict when it takes place within the territory of a single state. Examples include both situations where there is no state authority to speak of (i.e. the failed state scenario) and situations where there is the parallel occurrence of an internal armed conflict between two or more organized armed groups alongside an international armed conflict within the confines of a single state. Somalia is a good example of this type of internal armed conflict.

Thirdly, certain internal armed conflicts, originating within the territory of a single state between government armed forces and one or more organized armed groups, have also been known to 'spill over' into the territory of neighbouring states. Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into neighbouring territory, Pejic submits that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of an internal armed conflict into adjacent territory cannot have the effect of absolving parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians

[534] See Pejic, "The protective scope of Common Article 3: more than meets the eye", at pp. 193-196. For a similar list, see also Kretzmer, "Rethinking the Application of IHL in Non-International Armed Conflict", at 41-42.

potentially affected by fighting and persons who falls into enemy hands. This situation is illustrated for example by the war waged by the Lord Resistance Army in the Great Lake region, in Africa.

Fourthly, Pejic present the case for so-called multinational internal armed conflicts. These are armed conflicts in which multinational armed forces are fighting alongside the armed forces of a 'host' state – in its territory – against one or more organized armed groups. As the armed conflict does not oppose two or more states (i.e. as all the state actors are on the same side), the conflict must be classified as internal, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan.

In the fifth place, she mentions a subset of multinational internal armed conflict in which UN forces, or forces under the aegis of a regional organization are sent to stabilize a 'host' government involved in hostilities against one or more organized armed groups in its territory. She explains that this scenario raises a wide range of legal issues and submits that when UN or forces belonging to a regional organization become a party to an internal armed conflict such forces are bound by the rules of international humanitarian law.

The last two types of internal armed conflicts are more controversial and continue to be the subject of legal debate. The sixth category is constituted by a cross-border internal armed conflict. This situation arises when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring host state without that state's control or support. A good example of this situation is the 2006 war between Israel and Hezbollah. Pejic observes that the classification of these hostilities may be encapsulated in three broad positions: that the fighting was an international armed conflict, that it was an internal armed conflict, or that there was a parallel armed conflict going on between the different parties at the same time: an international armed conflict between Israel and Lebanon, and an internal armed conflict between Israel and Hezbollah. I share the view of other commentators who consider that the 2006 armed conflict between Israel and Hezbollah was purely non-international, regardless of the fact that it was waged across an international border, between the armed forces of a state and a non-state armed group based in another

country's territory.[535]

A final, seventh type of internal armed conflict identified by Pejic is believed by some, almost exclusively in the US, to currently exist. This is the armed conflict between Al Qaeda and the United States. This view has been superseded by the US Supreme Court, which ruled in the 2006 *Hamdan* decision that the armed conflict in question was at least governed by Common Article 3 as a matter of US treaty law obligation.[536] Accordingly, the US Supreme Court in the *Hamdan* case gave to Common Article 3 extraterritorial effect as treaty law. This type of non-international armed conflict differs from the one opposing the Hezbollah to Israel in the fact that one of the parties, the non-state actor, is not based in any specific territory. Al-Qaida is a deterritorialised organization.

As we will see below, it is necessary to take a case-by-case approach to legally analyse and classify armed conflicts. Each situation of organized armed violence around the world must be analyzed on its own merits, based on the factual circumstances, in its specific context. Where the threshold of armed conflict, based on the facts, is reached, the conflict is classified as internal or international armed conflict and IHL is considered to be the applicable legal framework, in parallel with the continued applicability of international human rights law and domestic law. It should be borne in mind that IHL allows more flexibility than international human rights law, with respect to the taking of life for security reasons. Accordingly, it is both hazardous and counterproductive to apply this set of laws to situations that do not amount to armed conflict.

State practice relating to the applicability of Common Article 3

Despite the number of internal armed conflicts that have taken place since the drafting of Common Article 3, state practice relating to its application has been relatively

[535] See Kenneth Anderson, "Is the Israel-Hezbollah conflict an international armed conflict?", 14 July 2006, available at http://kennethandersonlawofwar.blogspot.com/2006/07/is-israel-hezbollah-conflict.html
[536] See *Hamdan v. Rumsfeld*, 548 US 557 (2006) (hereinafter *Hamdan* case), pp. 628-631.

scarce.[537] For various reasons, states are generally not inclined to acknowledge the applicability of this provision within their own territory.[538] The case of Chechnya, for example, demonstrates that states are still very reluctant to admit the existence of an internal armed conflict, even when it is obvious.[539] The ambiguity in the scope of application of Common Article 3 is cited by many commentators as allowing states the opportunity to evade the responsibility to adhere to its provisions.

The act of formally recognising the existence of an armed conflict is, from a state's point of view, disadvantageous for a number of reasons. Firstly, it is disadvantageous for a state to recognize the existence of an armed conflict as it highlights its failure in preventing such a situation. Secondly, the concern is based on uneasiness about the laws' implications for the status of parties to the conflict, as it contributes to the perceived recognition of insurgents as legitimate combatants and thus increases the authority of the insurgents. For most states it was not acceptable to erode their capacity to maintain internal order. This fear of 'giving a legal status to the armed group' is the origin of Common Article 3(4), which provides that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'. This final clause was included to verify that it serves a strictly humanitarian purpose and as such possesses no threat to the security of a state by compromising any of the legal means at its disposal to suppress insurgency.[540] A plain reading of this final clause makes it clear that the application of this provision has no effect on the legal status of organized armed groups and as such does not prevent a *de jure* government from treating them as criminals for their participation in hostilities. Despite the presence of this provision, the main problem with the implementation of Common Article 3 is the mere recognition of the existence of an armed conflict. In such circumstances, governments prefer to treat the conflict as 'internal disturbances', as they think this give them more leeway to suppress it aggressively. The third reason is

[537] For a survey of state practice on the application of common article 3, see Moir, *The Law of Internal Armed Conflict*, at pp. 67-88. See also The Use of Force Final Report on the Meaning of Armed Conflict in International Law; Forsythe, "The Legal Management of Internal War: The 1977 Protocol of Non-International Armed Conflicts", at 275-277.
[538] See Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* at 55; UK Ministry of Defence, *The Manual of the Law of Armed Conflict,* (Oxford: Oxford University Press, 2004), at 384.
[539] See for instance Abresch, "A Human Rights Law of Internal Armed Counflict: The European Court of Human Rights in Chechnya".
[540] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 56.

that for most states it is not acceptable 'to erode their capacity to maintain legal order, as acknowledging the existence of an armed conflict automatically brings into force the most basic provisions of international humanitarian law, limiting the state's use of repressive measures.'[541] So states are reluctant to acknowledge the existence of an armed conflict on their territory due to the fear of being restricted by international humanitarian law.[542] However, the fact that a situation does not reach the threshold of an armed conflict does not render governments free from any constraints. Indeed, as is known, 'in situations falling short of armed conflict, the state has the right to use force to uphold law and order, including deadly force, but human rights law restricts such usage to what is no more than absolutely necessary and is strictly proportionate to certain objectives.'[543]

Accordingly, the existence of an internal armed conflict is left to the discretion of the government of the state engaged in the armed conflict. Some states evade their responsibilities simply by denying its existence. The fact that the wording of Common Article 3 has left room for governments to contest its applicability to situations of internal violence inside their territory has also been recognized by the UN Secretary General in a report to the UN former Commission on Human Rights.[544]

How International Courts and Tribunals Interpreted the Field of Application of Common Article 3

Common Article 3 does not provide an indication of the degree of intensity required for a situation to qualify as an 'armed conflict not of an international character'. The two vague criteria the situation is supposed to meet are constituted by the requirement of the existence of an armed conflict in the territory of a High Contracting Party. We have seen that at the time of the drafting of Common Article 3, the material field of application associated with the provision was quite high, meaning that of a civil war.

[541] Id. at 57. See also Moir, *The Law of Internal Armed Conflict*, at 34.
[542] See Clapham, *Human Rights Obligations of Non-State Actors*, at pp. 112-113.
[543] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 128.
[544] Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87, para. 74.

Nowadays, however, the concept of internal armed conflict related to Common Article 3 has broadened significantly, mainly through the case law of international tribunals and domestic courts. The modern interpretation of a Common Article 3 armed conflict is now broader, and permits a wide range of situations to be encompassed and to be afforded the protection provided by IHL.

The ICTY was the first international tribunal to face the problem of the lack of a definition. It is in order to compensate for the drawbacks regarding the non-definition of an internal armed conflict in Common Article 3, as well as the problematic definition of Protocol II[545], that the Tribunal, in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadic* case has opted for new criteria. It proposed a comprehensive definition of armed conflicts, in both international and non-international armed conflicts. It defined the term 'armed conflict' in the following way:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under control of a party, whether or not actual combat takes place there.[546]

This description of armed conflict constituted a real revolution for the development of IHL. It was innovative in various respects. The *Tadic* definition 'covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly

[545] Which excludes from its application's field most of the contemporary armed conflicts not of an international character. See further below in this Chapter.
[546] *Tadic* Interlocutory Appeal, para 70.

encompasses a third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other.'[547]

In addition, it distinguishes broadly the conditions determining the existence of armed conflict, to be differentiated from situations of internal disturbances. Since 1995, the definition has been widely used as a formula for the characterization of internal armed conflict.[548] It has been applied to various situations to confirm the existence of armed conflict, in order to confirm the application of IHL.

Material Scope of application

While the concept of internal armed conflict created by the *Tadic* definition is distinctly broader in scope than that considered by the drafters of the Geneva Conventions, it is arguably now the most authoritative formulation of the threshold associated with Common Article 3.[549] We will first look at the material field of application of this definition. First of all, and very importantly, the Tribunal made clear that the existence of an armed conflict does not depend upon the views of the parties to the conflict.[550] In this respect, the *Tadic* definition establishes two criteria in order to define an armed conflict: the armed violence should be protracted and the armed groups organized. When the Trial Chamber came to apply the definition of the Appeals Chamber to the facts before it, it stated that 'the test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained

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[547] Boelaert-Suominen, S., "The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts", 13 *Leiden Journal of International Law* 619, (2000), at 632-633.

[548] For instance, it has been applied by the ICTY in *Delalic* Trial Judgment, para. 183; See also *Prosecutor v Tadic* (Trial Judgment) IT-49-1-T (7 May 1997) (hereinafter *Tadic* Trial Judgment), paras 561-571; *Prosecutor v. Zlatko Aleksovski* (Trial Chamber Judgment) IT-95-14/1-T (25 June 1999) (hereinafter *Aleksovski* Trial Judgment), paras 43-44; *Delalic* Trial Judgment, paras 182-192; *Prosecutor v Furundzija* (Trial Judgement) IT-95-17/1T (10 December 1998), para 59; *Prosecutor v. Blaskic* (Trial Chamber Judgement) IT-95-14-T (3 March 2000) (hereinafter *Blaskic* Trial Judgment), paras 63-64; *Prosecutor v. Kordic and Cerkez* (Trial Judgement) IT-95-14/2-T (26 February 2001) (hereinafter *Kordic* Trial Judgment), para 24; *Prosecutor v. Krstic* (Trial Judgement) IT-98-33-T (2 August 2001) (hereinafter *Krstic* Trial Judgement), para 481; *Prosecutor v. Milomir Stakic* (Trial Judgement) IT-97-24-T (31 July 2003) (hereinafter *Stakic* Trial Judgment), para 568 ; *Prosecutor v. Milutinovic et al.* (Trial Judgement) IT-05-87-T (26 February 2009), (hereinafter *Milutinovic* Trial Judgement), para 126.

[549] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 122.

[550] *Prosecutor v. Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998), (hereinafter *Akayesu* Trial Judgment), para 603; *Milutinovic* Trial Judgement, para 125.

in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.'[551]

With these two requirements, the Appeal Chamber took an inclusive approach, asserting that the threshold for the application of Common Article 3 is actually relatively low. 'No requirements that the insurgents exercise territorial control or meet their obligations under Common Article 3 were included, and it was also felt to be unnecessary that the government be forced to employ its armed forces (or even that the government be a party to the conflict at all), or that the insurgents be recognised as belligerents.'[552] Thus the Appeal Chamber sought to ensure that Common Article 3 has as broad an application as possible.

The interpretation of the criteria of intensity and organization

As we have seen, and according to the *Tadic* Trial Judgment, an armed conflict would fall within the threshold of Common Article 3 when the requirements for a certain intensity of armed violence and some level of organization of the non-state participants are fulfilled.[553] It is therefore a two-pronged test: a test for the existence of an armed conflict and also for the applicability of Common Article 3. After this ruling, each judgment of the ICTY as well as most of those of the ICTR and Special Court of Sierra Leone have taken as a starting point the definition of armed conflict of the *Tadic* case and examined these two criteria, 'solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.'[554]

[551] *Tadic* Trial Judgment, para 562. See also *Prosecutor v Limaj, Bala and Musliu*, (Trial Judgement) IT-03-66-T (30 November 2005) (hereinafter *Limaj* Trial Judgment), para 84; *Prosecutor v Slobodan Milosevic*, (Decision on Motion for Judgment Acquittal) IT-02-54-T (16 June 2004), (hereinafter *Milosevic* Motion for Acquittal), para 17.
[552] Moir, *The Law of Internal Armed Conflict*, at 43.
[553] *Tadic* Trial Judgment, para. 562
[554] *Ibid*. For an application of the test to the factual circumstances of each case, see for example *Tadic* Trial Judgment, paras. 561-568; *Aleksovski* Trial Judgment, paras 43-44; *Prosecutor v. Goran Jelisic* (Trial Judgement) IT-95-10-T (14 December 1999), (hereinafter *Jelisic* Trial Judgment), paras 29-31; *Furundzia* Trial Judgment, para 59; *Kordic* Trial Judgment, paras 22-31 and 160; *Prosecutor v. Kunarac* (Trial Judgement) IT-96-23-T (2 February 2001), (hereinafter *Kunarac* Trial Judgment), paras 402 and 567-69; *Delalic* Trial Judgment, paras. 183-192; *Stakic* Trial Judgment, paras 566-574; and *Limaj* Trial Judgment, paras 83-174; *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) IT-04-82-T (10 July 2008) (hereinafter *Boskoski* Trial Judgment), para 175-177; *Prosecutor v. Krnojelac*

These two aspects of internal armed conflict, a certain intensity of armed violence and some level of organization of organized armed groups, provide a basis for determining the existence of armed conflict and thus also the applicability of IHL. However, 'while helpful, the elements of organisation and intensity do give rise to a whole host of questions, relating for example, to the precise level of intensity of the violence needed and the exact degree of organisation required of the parties.'[555] In order to determine these two criteria, the Trial Chamber in *Tadic* expressly referred to the factors addressed in the ICRC Commentary of Common Article 3.[556] Nevertheless, the ICRC criteria are not more than 'convenient criteria'[557], which were rejected from the final text. For instance, the ICTR Trial Chamber in *Akayesu* referred to these criteria in its examination of whether an internal armed conflict existed in Rwanda in 1994.[558] However, as stated by the Trial Chamber in the *Boskoski* case, 'while these criteria give some useful indications of armed conflict, they remain examples only'.[559] Accordingly, 'they are by no means obligatory.'[560] Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved, depending on the facts of each case. For instance, the *Limaj* Trial Judgement found that the determination of intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.[561]

(Trial Judgement) IT-97-25-T (15 March 2002), (hereinafter *Krnojelac* Trial Judgement), para 51; *Prosecutor v. Kordic and Cerkez* (Appeal Judgement) IT-95-14/2-A (17 December 2004) (hereinafter *Kordic* Appeal Judgment), para 336; *Prosecutor v Naletelic and Martinovic* (Trial Judgement) IT-98-34-T, (31 March 2003), (hereinafter *Naletelic* Trial Judgment), para 225; *Prosecutor v. Haradinaj et al.* (Trial Judgment) IT-04-84-T (3 April 2008), (hereinafter *Haradinaj* Trial Judgment), paras 37-38; *Prosecutor v. Rutaganda* (Trial Judgement) ICTR-96-3-T (6 December 1999), (hereinafter, *Rutaganda* Trial Judgment), para 92 ; *Prosecutor v. Fofana and Kondewa* (Trial Judgement) SCSL-04-14-T (2 August 2007), (hereinafter *Fofana* Trial Judgment), para 124 ; *Prosecutor v. Brima, Kamara and Kanu* (Trial Judgement) SCSL-04-16-T (2 August 2007), (hereinafter *Brima* Trial Judgment), para 243; *Prosecutor v. Sesay, Kallon and Gbao* (Trial Judgement) SCSL-04-15-T (2 March 2009), (hereinafter *Sesay* Trial Judgment), para 95.

[555] Sivakumaran, "Identifying an armed conflict not of an international character".

[556] *Tadic* Trial Judgment, para 562.

[557] *Limaj* Trial Judgment, *supra note 62,* para 85.

[558] *Akayesu* Trial Judgment, paras 619-620.

[559] *Boskoski* Trial Judgment, para 176. See also *Milosevic* Rule 98*bis* Decision, where the Trial Chamber observed at para 19 that 'the ICRC Commentary is nothing more than what it purports to be, *i.e.,* a commentary, and only has persuasive value.'

[560] *Limaj* Trial Judgment, para 85. For a similar position, see also *Musema* Trial Judgment, para 251; *Boskoski* Trial Judgment, para 176; *Rutaganda* Trial Judgment, para. 93.

[561] *Limaj* Trial Judgment, para. 90.

Lastly, it should be stressed that whether a conflict meets the requirements of protracted armed violence and organization of the parties depends on objective evaluation and not on the conclusions of the parties to the conflict.[562] Importantly, if one of the two criteria does not meet the required threshold, then we have a situation that does not amount to an armed conflict. We will now see how to proceed to such an objective assessment of a situation. For this, an analysis of the facts on a case-by-case basis needs to be effectuated.[563]

The Objective Assessment of the Protracted Armed Violence criterion

The threshold of 'protracted armed violence' or, put another way, the intensity of hostilities, requires the interpretation of the facts on a case-by-case basis. 'While conditions evidencing the intensity of internal armed conflict are often similar to those of international armed conflict, it is worth noting that the threshold for the application of the former is distinctly different from that of the latter.'[564] It is not clear what level of violence must be reached and how protracted the hostilities must be in order for the protracted armed violence criteria to be fulfilled. However, what is clear is that the intensity required for the existence of an armed conflict is above that of internal disturbances and tensions.[565]

The actual wording used by the *Tadic* Appeal Chamber was 'protracted armed violence', the level of armed violence associated with 'protracted' determining the applicability of international humanitarian law. At first sight, the sentence seems to suggest that the violence be of some duration.[566] By including the 'protracted' criterion, the Appeal Chamber in *Tadic* seems to have retained the duration criterion in order to determine the material field of application of IHL. From this, the element of intensity, or the threshold of violence, would seem to have been omitted. It should

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[562] *Prosecutor v. Bagilishema*, (Trial Judgement), ICTR-95-1A-A (2 July 2002), (hereinafter *Bagilishema*, Trial Judgement), para 101. See also *Akayesu* Trial Judgment, para 624; *Prosecutor v. Semanza,* (Trial Judgement) ICTR-97-20 (15 May 2003), (hereinafter, *Semanza* Trial Judgment), para 357.

[563] *Rutaganda* Trial Judgment, para. 93.

[564] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 131.

[565] *Las Palmeras v Colombia*, Preliminary Objections, Ser C No 67, 4 February 2000, (hereinafter *Las Palmeras* case), para. 152. The question of internal disturbances and tensions will be dealt with in the next section related to the Second Additional Protocol.

[566] *Tadic* Interlocutory Appeal, para 70.

be stressed that, on the one hand, the duration criterion - as opposed to intensity – raises two issues. First, the drawback raised by a relative objectivity. The question is from what moment has an armed conflict lasted long enough to meet the ‘protracted’ criterion and qualify as an internal armed conflict, thereby triggering the attendant IHL provisions? The second issue is that, ‘by definition, the duration criterion excludes all ‘newborn’ armed conflicts in a given territory, even if they are of a notable intensity.’[567] Recent situations such as Libya or Syria, for instance, would have not been covered by the protection of Common Article 3, at least for the first months of fighting, which were very violent. However, the utilisation of the duration criterion could nowadays be justified in light of the fact that in contrast to their international counterparts, internal armed conflicts are often characterised by their stretching in time, interrupted by more or less respected ceasefires.

Thus, the level of armed violence required for the application of Common Article 3 must be ‘high enough to exclude isolated or sporadic acts of violence, but low enough to include situations of internal conflict where hostilities are not necessarily carried out on a continuous basis.’[568] Following the Appeal Chamber’s decision in *Tadic*, the ICTY case law shows us that the criterion of ‘protracted armed violence’ has been interpreted in practice, including by the *Tadic* Trial Chamber, as ‘referring more to the intensity of the armed violence than to its duration.’[569] This has been a constant refrain not only in the ICTY, but also in the ICTR[570] and the Special Court for Sierra Leone.[571] However, as we will see, duration will still be used as an indicative factor, among others, in order to assess the intensity requirement.

The element of ‘protracted’ armed violence has not received much explicit attention in the jurisprudence of the ICTY.[572] In order to identify the level of intensity required,

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[567] Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux*, at 52-53.
[568] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 128.
[569] *Haradinaj* Trial Judgment, para 49.
[570] *Akayesu* Trial Judgment, paras 620, 625; *Rutaganda* Trial Judgment, para. 93; *Musema* Trial Judgment, para. 256; *Bagilishema*, Trial Judgement, para. 101.
[571] *Brima* Trial Judgment, para. 244; *Fofana* Trial Judgment, para 124; *Sesay* Trial Judgment, paras. 971-977.
[572] See *Boskoski* Trial Judgment, para 186; *Tadić* Trial Judgement, paras 566-567; *Furundzija* Trial Judgement, paras 51-57; 59; *Delalic* Trial Judgment, para 186; *Kunarac* Trial Judgement, para 567; *Prosecutor v. Kunarac* (Appeal Judgement) IT-96-23-A (12 June 2002), (hereinafter *Kunarac* Appeal

Chambers have relied on *indicative factors* to identify, classify and analyze the facts relevant to the intensity of the conflict. These include: the number of battles and the level, location and duration of the violence;[573] the seriousness of attacks and whether there has been an increase in armed clashes;[574] the spread of clashes over territory and over a period of time;[575] the increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict;[576] whether the conflict has attracted the attention of the United Nations Security Council and whether any resolutions on the matter have been passed;[577] the number of civilians forced to flee from the combat zones;[578] the type of weapons used[579] (in particular the use of heavy weapons[580] and other military equipment, such as tanks and other heavy vehicles[581]); the blocking or besieging of towns and the heavy shelling of these towns[582]; the extent of destruction;[583] the number of casualties

Judgment), paras 2, 58; *Milošević* Rule 98*bis* Decision, para 28; *Strugar* Trial Judgement, paras 217, 26-78.

[573] *Tadic* Trial Judgment, paras 565-566; *Delalic* Trial Judgment, para 189; *Kordic* Appeal Judgment, paras. 337-340; *Milosevic* Motion for Acquittal, para 28; *Limaj* Trial Judgment, para 84; Juan Carlos Abella v. Argentina, Case 11.137, Report Nº 55/97, Inter-American Commission Human Rights, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), (hereinafter *La Tablada* case), paras 154-156.

[574] *Tadic* Trial Judgment, para 565; *Delalic* Trial Judgment, para 189; *Milosevic* Motion for Acquittal, para 28; *Kordic* Appeal Judgment, paras 340; *Haradinaj* Trial Judgment, paras. 91 and 99; *Boskoski* Trial Judgment, para 176.

[575] *Tadic* Trial Judgment, para 566; *Delalic* Trial Judgment, para 186; *Milosevic* Motion for Acquittal, para 29; *Kordic* Trial Judgment, para 30 ; *Kordic* Appeal Judgment, paras 340-341; *Halilovic* Trial Judgment, paras 163-166, 169; *Limaj* Trial Judgment, paras 168, 169. *See* also paras 136-163; *Prosecutor v. Hadzihasanovic* (Trial Judgement) IT-01-47-T (14 April 2005) (hereinafter *Hadzihasanovic* Trial Judgement), paras 20, 22; *Prosecutor v. Martic* (Trial Judgement) IT-95-11-T (12 June 2007), (hereinafter, *Martic* Trial Judgment), para 344; *Boskoski* Trial Judgment, para 176; *Kunarac* Trial Judgment, *para* 567; *Stackic* Trial Judgment, para 572.

[576] *Milosevic* Motion for Acquittal, paras 30-31. *See* also *Delalic* Trial Judgment, para 188; *Boskoski* Trial Judgment, para 176; *Limaj* Trial Judgment, paras 135-167. Indeed, the fact that a situation is discussed at the UN Security Council or at the General Assembly, despite the fact that such characterizations are political decision, has been taken into consideration by the ICTY and ICTR as an objective criterion, among others, to identify the existence of an internal armed conflict. (See *Tadic* Trial Judgment, para 567; *Delalic* Trial Judgment, para 190; *Martic* Trial Judgment, para 345; *Haradinaj* Trial Judgment, para 49; *Boskoski* Trial Judgment, para 176.)

[577] *Tadic* Trial Judgment, para 567; *Delalic* Trial Judgment, para 190; *Martic* Trial Judgment, para 345; *Haradinaj* Trial Judgment, para 49; *Boskoski* Trial Judgment, para 176.

[578] Because they have been evacuated (*Kordic* Appeal Judgment, para 340), expelled (*Tadic* Trial Judgment, para 565), threatened (*Limaj* Trial Judgment, para 139), or displaced (*Limaj* Trial Judgment, para 167, *see* also para 142); *Haradinaj* Trial Judgment, paras 49 and 97; *Boskoski* Trial Judgment, para 176.

[579] *Milosevic* Motion for Acquittal, para 31; *Limaj* Trial Judgment, para 166; *Haradinaj* Trial Judgment, para 49. ; *Boskoski* Trial Judgment, para 176 ; *Kordic* Appeal Judgment, paras 337-340.

[580] *Tadic* Trial Judgment, para 565 ("artillery bombardment"), *Limaj* Trial Judgment, para 166; *see* also paras 136, 138, 156, 158, 163. ; *Boskoski* Trial Judgment, para 176

[581] *Tadic* Trial Judgment, para 143 ("heavy shelling, followed by the advance of tanks and infantry"); *Halilovic* Trial Judgment, para 166 ("tank, artillery and infantry attack"); *Limaj* Trial Judgment, paras 136, 166. ; *Boskoski* Trial Judgment, para 176.

[582] *Tadic* Trial Judgment, para 143 (blockade of Kozarac); *Halilovic* Trial Judgement, paras 165-167

caused by shelling or fighting;[584] the quantity of troops and units deployed;[585] the existence and change of front lines between the parties;[586] the occupation of territory;[587] the occupation of towns and villages;[588] the deployment of government forces to the crisis area;[589] the closure of roads;[590] the cease fire orders and agreements;[591] the attempts of representatives from international organisations to broker and enforce cease fire agreements;[592] and the target of violence.[593] It is clear that intensity is a much broader notion, of which duration forms but a part. These are 'indicative factors' that 'make it possible to state whether the threshold of intensity has been reached in each case, and none of which are, in themselves essential to establishing that the criterion of intensity is satisfied.'[594] These are objective criteria.

The *Boskoski* case is very interesting as, after having looked at the various indicators within the Tribunal's case law, it went on to look at how national courts have qualified situations as internal conflicts to which Common Article 3 of the Geneva Conventions applies. Specifically, it looked at situations in Russia, Peru, Chile, the

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(blockade of Mostar), 168 (siege of Sarajevo); *see* also *Limaj* Trial Judgment, para 153; *Haradinaj* Trial Judgment, para 96. ; *Boskoski* Trial Judgment, para 176.

[583] *Tadic* Trial Judgment, para 565-566; *Kordic* Appeal Judgment, paras 337-338; *Limaj* Trial Judgment, para 142; *Haradinaj* Trial Judgment, para 49; *Boskoski* Trial Judgment, para 176.

[584] *Tadic* Trial Judgment, para 565; *Kordic* Appeal Judgment, paras 339; *Halilovic* Trial Judgment, paras 164; *Limaj* Trial Judgment, para 142; *Haradinaj* Trial Judgment, para 49; *Boskoski* Trial Judgment, para 176.

[585] *Halilovic* Trial Judgment, para 168; *Haradinaj* Trial Judgment, para 49; *Boskoski* Trial Judgment, para 176.

[586] *Halilovic* Trial Judgment, paras 161, 169, 172; *Boskoski* Trial Judgment, para 176

[587] *Halilovic* Trial Judgment, para 163; *Limaj* Trial Judgment, paras 146, 158; *Boskoski* Trial Judgment, para 176; *Delalic* Trial Judgment, para 187.

[588] *Halilovic* Trial Judgment, paras 162, 164; *Limaj* Trial Judgment, paras 143, 163; *Boskoski* Trial Judgment, para 176.

[589] *Limaj* Trial Judgment, paras 142, 150, 164, 169; *Boskoski* Trial Judgment, para 176. It should be stressed that the use of armed forces on the part of the government is of particular significance. Indeed, the use of force by organs of the state, such as the military, in order to identify a situation of armed conflict as opposed to one of law enforcement, is useful indicia of the existence of an armed conflict. The second of the ICRC Commentary's 'convenient criteria' is that the legal government is 'obliged to have recourse to the regular military forces against insurgents organized as military and possession of a part of the national territory'. Pictet, J., *Commentary on the Geneva Conventions of 12 August 1949, Volum II* (ICRC ed., International Committee of the Red Cross 1960), at p. 50.) But 'the emphasis here is that the state is *obliged or compelled* to use its armed forces. A purely subjective choice by a state to view a certain situation as armed conflict in order to use its armed forces to quell violence in the absence of other intensity or organizational factors would not suffice to trigger the application of IHL.' (Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 127.)

[590] *Limaj* Trial Judgment, para 144; *Boskoski* Trial Judgment, para 176.

[591] *Hadzihasanovic* Trial Judgement, para 23; *Martic* Trial Judgment, para 345; *Boskoski* Trial Judgment, para 176 ; *Kordic* Trial Judgment, paras 337-339

[592] *Hadzihasanovic* Trial Judgement, para 23; *Boskoski* Trial Judgment, para 176.

[593] *La Tablada* case, paras 154-156.

[594] *Haradinaj* Trial Judgment, at para 49.

United States and Israel,[595] and found that 'these cases demonstrate that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces, in deciding whether an armed conflict exists. The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed.'[596]

Therefore, the ICTY seemed, until recently, to have interpreted the protracted criterion as intensity, with duration as a subset of it. For instance, the *Haradinaj et al.* judgement confirmed the shift of emphasis from the duration of hostilities to their intensity in the 'protracted armed violence' criterion.[597] However, it seems that lately it raised the threshold. With the *Milutinovic* trial, the Chamber, in order to be satisfied as to the protracted armed violence criterion, considered duration *and* intensity together. It stated that 'an internal armed conflict need not be "generalised" in the sense that the entire territory is involved in the conflict; the requirement of protracted armed violence may be satisfied by evidence of localised areas in which *serious fighting for an extended period of time* occurred.'[598] It further stated that there is 'no doubt that the armed violence occurring from mid-1998 in Kosovo and continuing through to the commencement of the NATO air campaign on 24 March 1999, involving VJ and MUP forces fighting the KLA, was of sufficient duration *and* intensity to amount to the "protracted armed violence" envisaged by the first prong of the test for an internal armed conflict.'[599]

It remains to be seen what the interpretative developments of the criterion of protracted armed violence will be in the coming years. It is clear, however, that the approach taken by the ICTY is more restrictive than that suggested by Pictet in his Commentary and that the term 'protracted armed violence' in the *Tadic* case refers to a continuing situation, thus having a temporal element.

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[595] *Boskoski* Trial Judgment, at paras. 180-182.
[596] *Boskoski* Trial Judgment, para 183.
[597] *Haradinaj* Trial Judgment, para.
[598] *Milutinovic* Trial Judgement, para 126 (emphasis added) *See Kordić* Trial Judgment, para. 31 (affirmed by *Kordić* Appeal Judgment, paras. 333–341); *see also Tadić* Appeal Judgment, para. 70; *Naletilić* Trial Judgment, para. 177.
[599] *Milutinovic* Trial Judgement, para 820

The Objective Assessment of the Organisation Criterion

It is difficult to determine the necessary level or organization of an armed group. The consensus seems to support the proposition that, in order for an armed group to be a 'party' to an internal armed conflict, the level of organisation required probably must be such that they are capable of carrying out the various obligations imposed upon them by Article 3, which imposes duties and obligations on all sides to the conflict. For these obligations to be observed, non-state armed groups need to be 'organized (at least to a certain degree) along military lines, including a responsible command structure and controlling authority.'[600] This has been recognized by the ICRC in the analysis of situations that are unclear.[601]

However, the precise level of organization required is somewhat unclear and should not be overstated. The *Akayesu* trial judgment, for example, referred to armed forces that were 'organized to a greater or lesser extent',[602] while the *Limaj* trial chamber was of the view that 'some degree of organization by the parties will suffice'.[603] Commentators, too, opt for a 'degree of organisation', 'a modicum of organisation', or 'a minimum amount of organisation'.[604] What is crucial is that the armed group be organised at such a level as to be able to carry out military operations and meet 'minimal humanitarian requirements.'[605] At a specific level, particular factors suggesting the exact level of organisation required have been identified by courts and tribunals. For instance, in the *Haradinaj* case, in order to interpret the 'organization' criterion, the Trial Chamber distinguished between governmental authorities and armed groups. The judges noted that governmental authorities had, in ICTY practice, 'been presumed to dispose of armed forces that satisfy this criterion.'[606] In doing this,

[600] Moir, *The Law of Internal Armed Conflict*, at 36.
[601] ICRC, *Armed conflicts linked to the disintegration of State structures* (1998).
[602] *Akayesu* Trial Judgment, para 620.
[603] *Limaj* Trial Judgment, para 89.
[604] Sivakumaran, "Identifying an armed conflict not of an international character", at 368, referring to: G. Draper, 'The Geneva Conventions of 1949', (1967-I) 11 *Rec des Cours 63,* 89-90, Schindler, D., *The different types of armed conflicts according to the Geneva conventions and protocols*, 163 Collected Courses, (1979), at 121, 147; Mettraux, *International crimes and the ad hoc Tribunals* at 36.
[605] Sivakumaran, "Identifying an armed conflict not of an international character", at 368.
[606] *Haradinaj* Trial Judgment, para 60.

'the Trial Chamber probably followed preceding chambers in presuming that governmental authorities possessed sufficiently organized military forces.'[607]

Regarding armed groups, things become more complicated. Again, Trial Chambers have relied on several indicative factors, none of them in themselves essential, to establish whether the 'organisation' criterion is met. The *Boskoski* case is perhaps the most interesting with respect to how Trial Chambers have interpreted the criterion of organisation. Up until now, the aforementioned Chambers have put much greater emphasis on attempting to define the protracted armed violence criterion, with much less attention being put on the interpretation of 'organisation'. First, in the *Boskoski* case, the judges clarified that 'while the jurisprudence of the Tribunal requires an armed group to have "some degree of organisation", the warring parties do not necessarily need to be as organised as the armed forces of a State.'[608] However, Common Article 3 requires that parties be 'sufficiently organized to confront each other with military means' in order for an armed conflict to exist.'[609]

Secondly, in the *Boskoski* case, the Trial Chamber considered five categories in assessing the organisation of the group: factors signalling the presence of a command structure;[610] factors indicating that the group could carry out operations in an organised manner;[611] factors indicating a level of logistics;[612] factors relevant to determining whether an armed group possesses a level of discipline and the ability to implement the basic obligations of Common Article;[613] and factors indicating that the armed group was able to speak with one voice.[614]

[607] Cullen, A. & Oeberg, M.D., "Prosecutor v. Ramush Haradinaj et al.: The International Criminal Tribunal for the Former Yugoslavia and the Threshold of Non-International Armed Conflict in International Humanitarian Law", (2008). *ASIL Insight,* at 3.
[608] *Boskoski* Trial Judgment, para 197. See also *Prosecutor v. Oric* (Trial Judgment), IT-03-68-T, (30 June 2006), (hereinafter, *Oric* Trial Judgment), para 254.
[609] *Boskoski* Trial Judgment, para 198. See also *Haradinaj* Trial Judgment, para 60;
[610] *Boskoski* Trial Judgment, para 199; *Limaj* Trial Judgment, paras 46, 94-104, 110-111; *Haradinaj* Trial Judgment, paras 60, 65-68.
[611] *Boskoski* Trial Judgment, para 200; *Limaj* Trial Judgment, paras 95, 105-106, 108-109, 129, 158; *Prosecutor v. Mrkcic, Radic and Sljivancanin* (Trial Judgment) IT-95-13/1T (27 September 2007), (hereinafter *Mrkcic* Trial Judgment), paras 410, 417; *Haradinaj* Trial Judgment, paras 70-75, 87; *Martic* Trial Judgment, paras. 135, 344.
[612] *Boskoski* Trial Judgment, para 201; *Limaj* Trial Judgment, paras 118-124; *Haradinaj* Trial Judgment, paras 76-86; *Delalic* Trial Judgment, para 118.
[613] *Boskoski* Trial Judgment, para 202; *Limaj* Trial Judgment, paras 110, 113-117, 119; *Haradinaj* Trial Judgment, para 69.
[614] *Boskoski* Trial Judgment, para 203; *Limaj* Trial Judgment, paras 125-129; *Haradinaj* Trial Judgment, para 88; *Halilovic* Trial Judgment, para 164; *Hadzihasanovic* Trial Judgement, paras 20, 23.

Therefore, we see that Trial Chambers resorted again, as in the analysis of the protracted armed violence criterion, to indicative factors as a tool for identifying, classifying and analyzing the facts relevant to the organisation of the group. However, it should be stressed that in doing so, Chambers have taken a flexible approach. For instance, the Trial Chamber in *Haradinaj* took a flexible approach regarding the 'existence of a command structure'[615] in order to be satisfied that the KLA qualified as an organized armed group under the *Tadic* test.

Geographical Scope of Application

The geographical scope of Common Article 3 application addresses questions of the applicability of the provision to the territory of the belligerent states and further spaces where effective fighting takes place. The ICJ, in the *Nicaragua* case, while providing that the substantive provisions of Common Article 3 were reflecting elementary considerations of humanity, implied that the application of Common Article 3 was not restricted to the territory of a single state.[616] For the geographical scope of application, the 'principle of effectiveness' dominates. This means that IHL will apply in all areas covered by the state of war or by actual conflict,[617] as this set of laws is not truly spatially limited. State practice is consistent with this position and states rarely recognize armed conflict beyond the zone of intense fighting in non-international armed conflict.[618]

The Appeals Chamber held in *Tadic* that 'the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.'[619] Accordingly, IHL pertains not only to those areas where actual fighting is taking place, but it applies to the entire territory of the state involved in armed conflict. 'This position clearly strengthens the reach of international

[615] *Haradinaj* Trial Judgment, para 60 and 89.
[616] *Nicaragua* case, para 218.
[617] Kolb, R. & Hyde, R., *An Introduction to the International Law of Armed Conflicts* (Hart Publishing. 2008), at 94; The Use of Force Final Report on the Meaning of Armed Conflict in International Law, at 32.
[618] The Use of Force Final Report on the Meaning of Armed Conflict in International Law, at 32.
[619] *Tadic* Interlocutory Appeal, para 67.

humanitarian law'[620], and the ICTY has constantly followed this line in its case law.[621]

In the *Tadic* case, the Appeals Chamber further concluded that 'an armed conflict exists whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and organized armed groups or between such groups *within a State.* (…) Until (the moment a peaceful settlement is achieved) international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal armed conflict, *the whole territory under the control of a party, whether or not actual combat takes place there.*'[622] Bianchi and Naqvi argue that the ICTY definition therefore requires that violence take place 'within a State', suggesting that the violence is limited to the territory of one state and is not transnational in geographical scope. This is consistent, according to them, with the literal interpretation of Common Article 3.[623] However, I would suggest that a better view would be to take into account the second part of the definition which also refers, for internal armed conflicts, to the 'territory under the control of a party', which suggests that if an armed group controls a part of a territory that is trans-boundary, then Common Article 3 would also apply. This would avoid a gap in protection for victims of conflicts spilling over the territory of several states.

The prosecution of war crimes is thus dependent upon: (a) the existence of armed conflict; and (b) a nexus to armed conflict. The existence of a nexus to the armed conflict is an important requirement for the prosecution of war crimes. In order to hold a person responsible for such offences, the acts of the accused must be closely related to the hostilities.[624] 'While the geographical scope of the armed conflict concept is too broadly interpreted, the nexus requirement ensures a degree of balance

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[620] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 140.
[621] See for instance *Blaskic* Trial Judgment, para. 64; *Delalic* Trial Judgment, para. 185; *Kunarac* Trial Judgment, paras 402 and 567; *Prosecutor Naletilic and Martinovic,* (Trial Judgment) IT-98-34-T (31 March 2003), (hereinafter *Naletilic* Trial Judgment), para. 177; *Kordic* Appeal Judgment, para. 319; *Kunarac* Appeal Judgment, para 56.
[622] *Tadic* Interlocutory Appeal, para. 70 (emphasis added).
[623] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 111.
[624] *Delalic* Trial Judgment, para. 185; *Naletilic* Trial Judgment, para. 177.

in the applicability of international humanitarian law.'[625] In the *Naletilic* case, the Trial Chamber held that 'once it is established that an armed conflict occurred in a territory, the norms of international humanitarian law apply. It is not necessary to further establish that actual combat activities occurred in a particular part of the territory. The existence of an armed conflict nexus is established if the alleged crimes were closely related to the hostilities.'[626]

Temporal Scope of Application

The temporal scope of application addresses the questions of the continuing applicability of rules of IHL during an armed conflict and the cessation of applicability of those rules at the end of the conflict. The moment in time at which an armed conflict begins and ends must be defined. For international armed conflict this is quite easy as IHL 'will apply from the moment of the first hostile act in the armed conflict that puts at stake one of its protections.'[627] However, as far as internal armed conflicts are concerned, the question is trickier, as the threshold between internal disturbances and tensions and non-international armed conflict is not easy to evaluate. However, the two *Tadic* criteria – protracted armed violence and organized armed groups – should help us. These must be analysed by the judges through a factual assessment on a case-by-case basis. With respect to the assessment of the end of an internal armed conflict, the question is even more complex. Sassòli and Bouvier explain that

> 'Most frequently, contemporary armed conflicts result in unstable cease-fires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community. Hostilities or at least acts of violence with serious humanitarian consequences often break out again later. It is however difficult for humanitarian actors to plead with parties, having made declarations ending the conflict that in reality continues. The difficulty of defining the end of application of IHL also results from the texts, as they use

[625] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 142.
[626] *Naletilic* Trial Judgment, para. 177.
[627] Kolb & Hyde, *An Introduction to the International Law of Armed Conflicts*, at 101.

vague terms to define the end of their application, eg, 'end of the armed conflict' for non-international armed conflicts.'[628]

In the *Boskoski* case, the Trial Chamber specified that 'the temporal applicability of the laws and customs of war was described by the Appeals Chamber in the case of internal armed conflicts as lasting until a peaceful settlement is achieved.'[629] This finding is not to be understood as limiting the jurisdiction of the Tribunal to crimes committed until a peace agreement between the parties was achieved; rather, 'if armed violence continues even after such agreement is reached, an armed conflict may still exist and the laws and customs of war remain applicable.'[630]

Conclusion Common Article 3

Despite the vague nature of its content, it is submitted here that Common Article 3 represents one of the most important developments in the history of the law of internal armed conflicts. The types of internal armed conflict covered by Common Article 3 were originally those reaching the intensity of almost a civil war. However, the interpretation of this concept has evolved quite significantly throughout time since 1949, to encompass a wide range of situations of armed violence. The definition of internal armed conflict as 'protracted armed violence between governmental authorities and organized armed groups' has broadened the scope of 'armed conflict not of an international character'.

The case law related to the interpretation of Common Article 3 shows us that every chamber to have dealt with the issue expressly rejected internal disturbances and tensions from its ambit. In doing so they used the two-pronged test of the Appeal Chamber in the *Tadic* case. The two requirements of the *Tadic* definition would preclude isolated and sporadic acts of violence, such as riots or other internal disturbances, from amounting to internal armed conflict and so from being subject to

[628] M. Sassoli and A. Bouvier, *How Does Law Protect in War?* Vol. I, (Geneva, 2006) at 102.
[629] *Tadic* Interlocutory Appeal, para 70; *Kunarac* Appeal Judgement, para 57.
[630] *Boskoski* Trial Judgment, para 293; See also *Tadic* Interlocutory Appeal, *paras.* 67 and 70; *Prosecutor v. Šešelj*, (Appeals Chamber Decision on Jurisdiction) IT-03-67-AR72.1 (31 August, 2004), (hereinafter *Šešelj* Appeal on Jurisdiction), para 8; *Haradinaj* Trial Judgment, para 37; *Kunarac* Appeal Judgement, paras 56-57; *Kordić and Čerkez* appeal, paras 319, 336; *Milutinovic* Trial Judgement, para 791.

the relevant humanitarian regulation. However, in terms of obligations, it will not be humanitarian law and Common Article 3 that will place obligations on the state, but substantially human rights law, which is more protective.

Moreover, we have seen in this part that the international tribunals' case law has not only identified the two constituent elements of the concept of 'armed conflict not of an international character', but has also put forward a wide range of indicative factors making it possible to verify, on a case-by-case basis, whether each of these components has been achieved. Thus the determination of the existence of an armed conflict depends on an analysis of objective factors, irrespective of the conclusions of the parties involved in the conflict.

As a last point, it should be stressed that the *Tadic* test was not only subsequently endorsed by the aforementioned decisions of international tribunals and commissions, but also *inter alia* by the ICRC in its definition of the term 'armed conflict'[631], by the Rome Statute of the ICC,[632] independent experts and special rapporteurs of the United Nations Commission on Human Rights,[633] and the United Nations commissions of inquiry.[634] The *Tadic* definition of armed conflict allows for a wider scope than that contemplated by the drafters of Common Article 3.

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[631] See ICRC, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?", at 5. The ICRC definition of a non-international armed conflict reads as follow: 'Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*.' (original emphasis).

[632] Article 8(2)(f). On this please refer to the next section of this Chapter.

[633] Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996, E/CN.4/1997/88, para 54-55 (3 March 1997); Report of the Special Rapporteur on the human rights situation in the Sudan, E/CN.4/2006/111, para 8 (11 January 2006); Report of the Special Rapporteur of the Commission on Human Rights, Mr John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, A/56/440, para 13 and E/CN.4/2002/32, para 18 (6 March 2002); Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K Goldman, E/CN.4/2005/103, fn 14 (7 February 2005); See also Final Report of the Special Rapporteur, Kalliopi K. Koufa, on Terrorism and Human Rights, E/CN.4/Sub.2/2004/40 (25 June 2004).

[634] Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, para 51 (23 November 2006); Report of the International Commission of Inquiry on Darfur to the Secretary General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, S/2005/60 (1 February 2005), para. 74; Report of the human rights inquiry commission established pursuant to Commission resolutions S-5/1 of 19 October 2000, E/CN.4/2001/121 (16 March 2001), para. 39; Report of the Sierra Leone Truth and Reconciliation Commission, vol. 1, 5 October 2004, para 57; Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste, 31 October 2005, para. 141.

The 1977 Second Protocol Additional to the Geneva Conventions of 1949

As we know, internal armed conflicts are also regulated by the Second Protocol Additional to the Geneva Conventions.[635] In view of the non definition of internal armed conflict in Common Article 3, it was decided to clarify the concept of non-international armed conflict by selecting a number of concrete material elements, so that, when these elements are present, the authorities concerned could no longer deny the existence of a conflict.[636]

From 1969 onward, the ICRC convened meetings of various groups of governmental experts in order to study the development of humanitarian law in non-international armed conflicts. In these meetings, as well as during the Diplomatic Conference of 1974-1977 on the development of international humanitarian law, the ICRC lobbied to widen the definition of internal armed conflicts. The effort was unsuccessful, however, as the definition of Article 1 of the Second Additional Protocol was taken as relevant only to high-intensity internal armed conflicts.

The interpretation of the threshold contained in Protocol II is rather problematic. As we will see, not only does it apply to situations of armed conflict that possess a higher degree of intensity than Common Article 3 armed conflicts, but also 'the characterisation of such situations according to the conditions contained in the provision is exacerbated by the terms of their expression.'[637] The purpose of this section is to analyse the significance of the criteria contained in Article 1(1) for the qualification of a situation of internal armed conflict for the purpose of Protocol II.

Material field of application

The scope of application of Protocol II is outlined in its Articles 1 and 2. Article 2 deals with the personal field of application, asserting that 'this Protocol shall be applied without any adverse distinction to all persons affected by an armed conflict as

[635] See Chapter 2 for a survey of the treaty law applicable in internal armed conflicts.
[636] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 1348.
[637] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 102.

defined in Article 1'. Article 1 deals with the material field of application and defines the conditions which must be present for an internal armed conflict to be within the scope of Additional Protocol II. According to its paragraph 1, the Protocol:

> 'shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other 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.'

The most disappointing aspect of Protocol II relates to the 'split applicability' of the Provisions of Protocol II and Common Article 3, bearing in mind that the primary objective of the aforementioned Protocol was to improve the protection of civilians in armed conflicts not of an international character. The conclusion to be drawn from this shortcoming of the Additional Protocol II is that the Geneva Conventions' definition of armed conflict remains in place,[638] but 'for Protocol II to apply, internal armed conflicts must fulfil the additional requirements of Article 1 thereof.'[639] As a consequence, in updating the substantive law, Protocol II introduced stringent requirements for the applicability of its rules (article 1(1)) and a minimum threshold (article 1(2)) below which it should not apply. Accordingly, the additional restrictions provided for in Article 1(1) only define the field of application of the Protocol and do not extend to the entire law of internal armed conflict. Common Article 3 thus preserves its autonomy and covers a larger number of situations. Again, that is the reason why it was absolutely essential to conserve the autonomy of Common Article 3, as this ensured that the protection already afforded by Article 3 could not be diminished.

Protocol II further narrowed the scope of non-international armed conflict by establishing a much higher threshold of application than Common Article 3,

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[638] See Protocol II, Article 1(1), and Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4359.

[639] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 105.

throughout demanding requirements, such as requirements to be met by groups involved in it, and by specifying, in its paragraph 2, that such a conflict did not include 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.' However, even with more stringent requirements, Protocol II fails to provide guidance on the determination of whether an internal armed conflict exists. Its scope is clearly narrower and more restrictive than Common Article 3, which means that the instrument will apply only to the most intense and large-scale armed conflicts. The narrower scope of Protocol II set by the objective criteria in Article 1(1) may be viewed in a negative light for two reasons. First, all situations of armed conflict that do not reach a threshold of intensity approaching that of a civil war are excluded from its application. Given the rudimentary nature of the rules contained in the Protocol, and the clear potential for their applicability in situations short of civil war, this is an unfortunate restriction on the protection provided by the instrument. Secondly, 'situations of high-intensity armed conflict between organised armed groups, not involving the armed forces of a *de jure* government, are also excluded and this is very regrettable.'[640] However, on the positive side of the coin, the applicability of Protocol II is based on objective and identifiable criteria. Its application does not depend on the discretionary judgment of the parties, as the Protocol applies automatically as soon as the material conditions as defined in the article are fulfilled.[641] We will now look at each one of the four objective criteria set forth in Article 1(1) of Protocol II, for the Protocol to become operative. But before this, let us briefly deal with the Chapeau requirement of this provision.

The Parties to the conflict

The Chapeau requirement of Article 1(1) is that an internal armed conflict within the scope of Additional Protocol II must involve hostilities between the armed forces of a High Contracting Party and dissident armed forces or other organised armed groups. This means that the armed forces of a high contracting party must face either a faction of the army that has revolted or other organized armed groups. This assertion does not

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[640] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 106.

[641] See Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 4459.

extend to conflicts solely between non-governmental groups.[642] This represents, according to a significant part of the doctrine, one of the major deficiencies of the Protocol, in that, unlike Common Article 3 and the definition of non-international armed conflict offered by the ICTY, it does *not* apply where two or more separate groups confront each other in any state, with no active part in hostilities being played by government troops.[643] This situation was merely seen as a 'theoretical textbook example' by the delegations at the Conference.[644] It should be stressed that this 'theoretical textbook example' was illustrated at that moment by the civil war in Lebanon, for instance.

In addition, Protocol II only covers internal armed conflicts 'occurring in the territory of one of the High Contracting Party between '*its*' armed forces and opposition movements'[645]. This passage makes this instrument inapplicable to the troops of a government intervening abroad in support of the local authorities,[646] as the forces involved in that case are not those of the state in which the conflict is taking place. An interpretation in keeping with the spirit of humanitarian law indicates, however, that the expression 'its armed forces' should in this case cover not only the troops of the territorial State, but also those of any other state intervening on behalf of the government.[647]

We will now look at the four criteria organized armed groups are supposed to meet for Protocol II to be applicable in a given situation.

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[642] Ibid.; Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", at 80.

[643] Moir, *The Law of Internal Armed Conflict*, at 104. Conflicts such as in Lebanon, Somalia, Angola or Liberia would not be covered by the Protocol. On this major drawback of the Protocol II, please check Junod, "Additional Protocol II: History and Scope", at 36-37, Abi-Saab, "Non-International Armed Conflicts", at pp. 228-229, Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 4461.

[644] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4461. It should be mentioned that the International Law Institute, in its 175 Resolution, included in its definition of non-international armed conflict, without relying on Common Article 3, situations where, in the absence of an established government, several armed groups were fighting against each other. See *Annuaire de droit international,* vol. 56, 1975, pp. 544-546.

[645] Article 1(1) Protocol II (emphasis added).

[646] See for instance the situation whereby Rwanda intervened in DRC in December 2008, in order to help the government of Kinshasa to capture Laurent Nkunda, the chief of the RCD-Goma, an armed group that commits exactions in the North Kivu. We can also think on the situation in Afghanistan, whereby the Afghan government is fighting the Talibans with the help of ISAF.

[647] Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" at 80.

Responsible Command

The dissident armed forces or other organised armed groups must be under 'responsible command'. This criterion, listed in Article 1(1), constitutes a fundamental requirement for the implementation of the Protocol by insurgent armed groups, as it implies some degree of organization of the insurgent armed group or dissident armed forces. But this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations and, on the other, of imposing discipline in the name of a *de facto* authority.'[648] It should be stressed that, at the beginning of an armed conflict, armed groups seldom fulfil these conditions, for obvious reasons. A minimum period of time is usually necessary before the group reaches an organizational level at which they have at their disposal an appropriate chain of command.

Territorial Control

The main reason why Protocol II applies only to armed conflicts with such a high intensity is related to the condition of control by the armed groups over part of a territory. While the requisite size of territory that must be controlled by the armed group is not specified in the Protocol, the doctrine assumes that the requirement of territorial control by the insurgents in Protocol II is very restrictive, being based not on the proportion or duration of such control, but rather on its inherent quality, which must be sufficient, firstly, to allow the rebels to mount concerted and sustained military operations, and secondly, to allow the insurgents to implement the provisions of the Protocol.[649] According to the ICRC Commentary, 'there must be some degree

[648] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 4463

[649] See Junod, "Additional Protocol II: History and Scope", at 37; Moir, *The Law of Internal Armed Conflict*, at 105; Abi-Saab, "Non-International Armed Conflicts", at 228; Sandoz *Commentary on the Additional Protocols of 8 June 1977,* paras. 4464-67; Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux*, at 50; Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 152.

of stability in the control maintained over territory',[650] as this provides evidence of responsible command.

This requirement is too restrictive in view of the nature of modern, and particularly guerrilla, warfare, because it is virtually impossible for rebels to achieve such effective territorial control until the situation is one of civil war in the classic sense. 'In armed conflict situations characterised by high mobility, territorial control continuously changes hands, sometimes altering between day and night, to the point of becoming meaningless. Other forms of intense armed conflict, such as urban guerrilla armed conflict, would not fulfil the requirement of territorial control either.'[651] In addition, it should be stressed that nowadays, the level of equipment and training of any government's armed forces is usually so high that, in practical terms, insurgents have little or no ability to keep territory under their control on a long-term basis. They usually have to undertake guerrilla-type operations in order to gain sporadic control over some strategic areas.[652]

If a broad interpretation of the criterion of territorial control is adopted, the concept of non-international armed conflict within the meaning of Protocol II comes close to that of Common Article 3. Even temporary control that is geographically limited would suffice in that case to justify the application of Additional Protocol II. Furthermore, for those obligations that are related to the law on targeting, control of part of the territory could prove to be unnecessary. Having in mind the object and purpose of Protocol II, which is to protect people in internal armed conflicts, Abi-Saab suggested an interesting and more flexible approach 'whereby the quality of territorial control is assessed not in isolation, but in relation to the other party.'[653] Following this approach, it would be enough that 'insurgents undermine the territorial control of the government while controlling the population and commanding its allegiance but without necessarily exercising complete or continuous control over an area.'[654] The

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[650] See Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at pp. 1352-52, para. 4467.
[651] CDDH/I/SR.24; VIII, 229 at 235. Quoted by Moir, *The Law of Internal Armed Conflict*, at 106.
[652] See Chapter 5.
[653] Abi-Saab, G., "Wars of National Liberation in the Geneva Conventions and Protocols (1979-iv)", 165 *Receuil des Cours* 353, (1979), at 410-411.
[654] Moir, *The Law of Internal Armed Conflict*, at 106.

strength of this approach is that it takes into account the reality of contemporary armed conflicts.

Conversely, if the territorial control requirement of Article 1(1) is interpreted strictly, the situations covered are restricted to those in which the non-governmental party exercises similar control to that of a state, and the nature of the conflict is similar to that of an international armed conflict.[655] It should be stressed that an armed conflict rarely reaches this level of civil war. The most recent we can think of are Sri Lanka and Syria.

In its Commentary, the ICRC adopted an intermediate position, accepting that territorial control can sometimes be relative, for example, when cities remain in government hands while rural areas escape their authority.[656] We can think of the situation in Colombia or in DRC for instance. So, the territorial control criterion is difficult to understand and 'nothing is stated concerning the amount of territory armed groups must control, or for how long, nor who will ultimately judge whether the applicable conditions are fulfilled.'[657]

Sustained and concerted military operations

Furthermore, Article 1 establishes that dissident armed forces must 'exercise such control over a part of its territory as to enable them to carry out *sustained and concerted military operations*.'[658] This criterion is perhaps the most significant of those contained in Article 1(1) as it sets a particularly high threshold for the application of the Protocol and rules out all situations of low-intensity armed conflict.[659] According to the ICRC Commentary ''sustained' means that the operations are kept going or kept up continuously.'[660] An operation that is 'sustained'

[655] See Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", at 79 and Moir, *The Law of Internal Armed Conflict,* at 106.
[656] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4467.
[657] La Haye, *War Crimes in Internal Armed Conflicts*, at 9.
[658] Emphasis added.
[659] See further below for an analysis of the exclusion of internal disturbances and tensions.
[660] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4469.

suggests that there is a plan and a strategy.[661] This requirement suggests therefore a certain continuity in military attacks from the organized armed group, and the emphasis is on continuity and persistence. 'Concerted' means agreed upon, planned and contrived, done in agreement, according to a plan. 'Thus we are talking about military operations conceived and planned by organized armed groups.'[662] These criteria comply with an objective assessment of the situation.

Capacity to implement the Protocol II

The application of Protocol II to insurgents will also depend on their capacity to implement its provisions, unlike governmental armed forces, which are not subject to such a condition. The criterion requires that organized armed groups are *able* to implement the Protocol, suggesting that a group which has the organisational capability to implement Protocol II, but which chooses not to do so, would still qualify as a party to a Protocol II internal armed conflict.[663]

The capacity to implement the Protocol is the 'fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, the insurgents must be in a position to implement the Protocol.'[664] So the territorial control has to enable the organized armed groups to carry out sustained and concerted military operations, under a responsible command. However, as already mentioned, at the beginning of an armed conflict, insurgents rarely fulfil these conditions, for obvious reasons; a minimum period of time is usually necessary for an insurgent party to reach such an organizational level and adopt a settled chain of command.

Whereas states had been reluctant to apply Common Article 3 in the absence of *de facto* reciprocity[665], the requirement that rebels be able to implement the Protocol before it becomes operational seems to introduce *de jure* reciprocity – the state is

[661] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 154.
[662] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 4469.
[663] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 154.
[664] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 4470
[665] See Common Article 3 part of this Chapter.

required to observe the law only to the same extent as the insurgents.[666] This is highly controversial, because the principle of reciprocity is contrary to the Geneva Law, which is regarded as unilateral obligations applying automatically, and thus remaining unaffected by the conduct of the other party.[667] The Vienna Convention on the Law of Treaties should be recalled in this respect, as it affirms in its Article 60(5) that it is not possible for a government to terminate or suspend a treaty as a consequence of its breach for 'provisions relating to the protection of the human person contained in treaties of humanitarian character.'[668] Furthermore, the principle of reciprocity does not constitute a basis for the application of IHL, as such reciprocity would lead to a weakening and a progressive erosion of the IHL protection. Accordingly, it can be argued that the Protocol carries an implied expectation that organized armed groups would comply with the obligations. Nothing more. Indeed, the principle of reciprocity does not constitute a basis for the application of international humanitarian law. In this respect, the ICTY, in the *Kupreskic* case, rejected the suggestion that international humanitarian law is reciprocal.[669] The Chamber held that 'humanitarian law is not based on a system of bilateral relations, instead laying down a set of absolute and unconditional obligations, to which the principle of reciprocity is irrelevant.'[670] We should not look for the effective application of Protocol II by armed groups. To the contrary, based on the assessment of an armed group's degree of organisation and command, the reality of the sustained and concerted military operations carried out by it, and its control over some part of the territory, the insurgents would be permitted to implement the Protocol if they so wished.[671] This is probably the wisest approach to have with respect to this debatable criterion.

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[666] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 122.

[667] Lysaght, C., "The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments", 33 *American University Law Review* 9, (1983), at 22

[668] Vienna Convention on the Law of Treaties, 1969, article 60(5).

[669] *Prosecutor v. Kupreskic,* (Trial Judgment) IT-95-16-T (judgement of 14 January 2000), (hereinafter *Kupreskic* Trial Judgment), at para 511

[670] *Ibid.* at para 517

[671] On this, see Moir, *The Law of Internal Armed Conflict*, at 123.

Article 1(2) or the Explicit Exclusion of Internal Disturbances and Tensions

The principle that IHL generally does not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature was first enshrined in Article 1 paragraph 2 of Protocol II. Although Common Article 3 is not totally clear on this point, Article 1(2) unambiguously excludes these situations from the applicability of Protocol II, and forms a third type of conflict situation which is not regulated by IHL.[672] However, it is important here to remember that human rights law and domestic law will constitute the legal framework applicable to such situations. Contrary to Common Article 3, diplomats at the Diplomatic Conference decided that 'some cut-off point' was required to show that conflicts have reached a critical point before Protocol II applies.

But we may wonder whether Article 1(2) was really necessary, as the objective criteria laid down in paragraph 1, taken by themselves, are clearly sufficient to exclude internal disturbances and, *a fortiori*, internal tensions.[673] These criteria already establish a very high threshold of application. But, it is true that the inclusion of Paragraph 2 is significant as it demarcates the lower threshold of internal armed conflict and thus the applicability of Common Article 3.[674] So the distinction between situations of internal disturbances and armed conflict is not always very apparent. Suffice here to think about the beginning of the Arab Spring in Syria and Libya. Another problem is the fact that the meaning of 'internal disturbances and tensions' is unclear as no definition of these terms is given.

Notwithstanding their recurrence in the debate, the terms of '*internal disturbances*' and '*internal tensions*' have never been defined in law. However, internal disturbances are situations in which 'there exists a confrontation within the country, which is characterized by a certain *seriousness* or *duration* and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and

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[672] H. Spieker, H., "The International Criminal Court and Non-International Armed Conflicts", 13 *Leiden Journal of International Law* 395, (2000), at 407; Sandoz, et al., *Commentary on the Additional Protocols of 8 June*, para 4341.
[673] Sandoz, et al., *Commentary on the Additional Protocols of 8 June*, at 4472
[674] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 108.

the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.'[675] We can think on the situations in Yemen and Bahrain in 2011.

As for internal tensions, they cover less violent situations, such as serious tensions, as well as the sequels of armed conflicts or of internal disturbances. They normally involve large-scale arrests, a large number of 'political prisoners', the probable existence of ill-treatment or inhumane conditions of detention, the suspension of fundamental judicial guarantees and allegations of disappearances. Internal tensions can have one or more of these characteristics, even if not all at the same time.[676] Demonstrators are not normally armed or, if so, not with heavy weapons. Furthermore, they do not usually endanger the state's structures and can be pacified with a simple police operation. What is important here is the spontaneous and sporadic character of internal tensions, being normally not under the control of a political leader or leading to massive arrests.[677] For instance, the green wave revolution in Iran in 2009 could be qualified as internal tensions.

Lastly, *riots* are demonstrations without a concerted plan from the outset.[678] They correspond to 'all disturbances which from the start are not directed by a leader and have no concerted intent.'[679] *Isolated and sporadic acts of violence* are opposed to military operations carried out by armed forces or armed groups and *other acts of a similar nature*, including in particular, large scale arrests of people for their activities or opinions.[680]

While Protocol II has a range of application much smaller than Common Article 3, the principle stated in its Article 1(2) is generally applied to all non-international

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[675] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para 4475 (emphasis added).
[676] Id. at para 4476
[677] See Meron, T., *Human Rights in Internal Strife: Their International Protection* (Cambridge University Press. 1987), at 71 ss.
[678] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para 4474.
[679] Bothe, "War Crimes", at 419.
[680] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para 4474.

armed conflicts,[681] despite the fact that the distinction between internal armed conflict and internal disturbances and tensions is not expressly addressed in Common Article 3.

How International Courts and Tribunals Interpreted the Field of Application of Protocol II?

As we have seen, by establishing such a high threshold, in particular with the requirement of territorial control held by insurgents against a government, the exclusion of military operations against insurgents outside the state's own territory, and the exclusion of conflicts which do not involve governmental forces, the range of applicability of Protocol II is extremely narrow in contemporary armed conflicts. As a result, the related case law is also extremely limited, but does nonetheless provide some hints as to the interpretation of the criteria of the aforementioned Protocol.

The International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone case law is interesting with respect to the interpretation of the threshold of application of Protocol II, as both Common Article 3 and the Protocol were in force in 1994 in Rwanda and in Sierra Leone as from 1996. For instance, the case law of the ICTR made clear that Common Article 3 was not influenced by the criteria laid down in Protocol II.[682] Therefore, the classification of a conflict as one to which Common Article 3 and/or Protocol II apply depends on an analysis of the objective factors set out in the respective provisions.[683]

With respect to the qualification of the conflict, The ICTR and SCSL Trial Chambers developed an interesting approach in order to determine whether Protocol II was applicable or not. Where the Prosecution alleged an offence under Protocol II, the Chambers, acknowledging that the Protocol expands on Common Article 3, affirmed that the following conditions must be met in order to establish the element of armed conflict. First, the Chamber has to be satisfied that an armed conflict took place in the

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[681] Fleck, *The Handbook of International Humanitarian Law*, at 616. See also Moir, *The Law of Internal Armed Conflict*, at 102.
[682] *Rutaganda* Trial Judgment, para 94; See also *Akayesu* Trial Judgment, para 602; *Prosecutor v. Kayishema and Rudzindana* (Trial Judgement) ICTR-95-I-T (21 May 1999), (hereinafter *Kayishema* Trial Judgment), para 170; *Semanza* Trial Judgment, para 356.
[683] *Semanza* Trial Judgment, para 357

territory of a High Contracting Party. Then, it has to be satisfied that the dissident forces or other organized armed groups were under responsible command, were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations, and were able to implement Additional Protocol II.[684]

For Protocol II to be applicable to a certain situation, the Chambers divide their analysis in two. First, helped by the two-pronged *Tadic* test, they satisfy themselves of the existence of an armed conflict. As we have seen in Part I of this Chapter, they look carefully at the criteria of the nature of the violence, as well as at the organisation of the parties.[685] The ICTR further made clear that 'an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict',[686] and that internal disturbances constitute 'certain types of internal conflicts, which fall below a minimum threshold (and) are not recognised by Article 1(2) of Protocol II as non-international armed conflicts.'[687] In the *Brima* case, the Trial Chamber of the SCSL asserted that the two criteria of the *Tadic* test (organisation and intensity) are 'used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short lived insurrections, or terrorist activities, which are not subject of international humanitarian law.'[688] Second, once they are satisfied that the situation considered is an armed conflict, they have to be satisfied as to the higher threshold set by Article 1(1) of the Protocol II and that the four criteria are fulfilled.[689]

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[684] See *Akayesu* Trial Judgment, para 623, 625-626; *Rutaganda* Trial Judgment, para 95; *Musema* Trial Judgment, para. 254; *Prosecutor v. Kamuhanda* (Trial Judgment) ICTR-99-54A-T (22 January 2004), (hereinafter *Kamuhanda* Trial Judgment), para 724; *Fofana* Trial Judgment, para 126; *Kayishema* Trial Judgment, para 171; *Rutaganda* Trial Judgment, para 94; See also *Sesay* Trial Judgment, para 98; *Fofana* Trial Judgment, para 127.

[685] See for example the *Limaj* Trial Judgment, para 89, where the Chamber stated that 'the two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used "*solely for the purpose*, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short lived insurrections, or terrorist activities, which are not subject to international humanitarian law." See also *Tadic* Trial Judgment, para 562; *Akayesu* Trial Judgment, para 621.

[686] *Akayesu* Trial Judgment, para 625.

[687] *Kayishema* Trial Judgment, para 171. See also *Musema* Trial Judgment, para 248.

[688] *Brima* Trial Judgment, para 244.

[689] See for instance *Akayesu* Trial Judgment, para 623; *Kayishema* Trial Judgment, para 171; *Fofana* Trial Judgment, para 126; *Sesay* Trial Judgment, para 97.

With respect to the organisation of the parties to the conflict, the higher threshold of Protocol II was acknowledged by the Trial Chamber in the *Akayesu* case, which stated that 'under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups.'[690] With respect to the organised armed groups the Chamber simply repeated the four criteria that they should fulfil in order to impose discipline in the name of a *de facto* authority.[691]

With respect to the criterion of 'sustained and concerted military operations', the ICTR further specified that 'in essence, the *operations must be continuous and planned*.'[692] It also further stated that 'the territory in their control is usually that which has *eluded the control of the government forces*.'[693] Such an interpretation means that the initial use of force by such a group might not be covered by Additional Protocol II, but only by Common Article 3. However, the 'protracted' criterion, identified in the *Tadic* Interlocutory Appeal as necessary to identify an internal armed conflict, might also militate against Common Article 3 applying.[694] With respect to the distinction between the notions of 'sustained' and 'protracted', the former would appear to invoke a further element of military planning than the latter.[695] An operation that is 'sustained' suggests that there is a plan and a strategy. Violence which is 'protracted', on the other hand, might simply denote a continuous chaotic state of affairs with no definite military strategy involved, where control has yet to be established by one group or the other.[696]

Conclusion Protocol II

As we have seen, the restrictive definition of internal armed conflict contained in Article 1(1) of Protocol II is perhaps the greatest failing of the instrument, given that

[690] *Akayesu* Trial Judgment, para 625. See also *Sesay* Trial Judgment, para 98; *Fofana* Trial Judgment, para 127.
[691] *Akayesu* Trial Judgment, para 626; See also See also *Musema* Trial Judgment, para 257; *Sesay* Trial Judgment, para 98; *Fofana* Trial Judgment, para 127
[692] *Akayesu* Trial Judgment, para 626.
[693] *Ibid*. Here it seems that the Trial Chamber took the aforementioned intermediary approach to the territorial control requirement set up by the ICRC in its Commentary. See Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para 4467.
[694] Bianchi & Naqvi, *International Humanitarian Law and Terrorism,* at pp. 153-154.
[695] *Boskoski* Trial Judgment, para. 197.
[696] Bianchi & Naqvi, *International Humanitarian Law and Terrorism,* at 154.

it requires basically the same conditions as that stipulated by the recognition of belligerency in traditional international law, but without triggering the full application of all humanitarian rules for international armed conflicts. Thus, the scope of application of Additional Protocol II applies to a limited range of high-intensity internal armed conflicts and its applicability is dependent upon the fulfilment of four objective criteria.

Some of the requirements of Protocol II are also part of the definition of non-international armed conflict as contained in Common Article 3, but not all of them. For instance, Common Article 3 also presumes that armed groups are able to demonstrate a certain degree of organisation, but it does not stipulate that these groups should be able to control part of a territory. The control over territory requirement is problematic from a humanitarian perspective, as it would disregard humanitarian needs in conflicts in which insurgents vanish 'like a fish in the water'[697] within the local population, or in which control regularly switches from one day to the next. Furthermore, at the beginning of an armed conflict, it usually takes some time before armed groups reach the acceptable level of organization and possess an appropriately strong chain of command. However, it should be recalled that before this level of organisation is reached, measures from Common Article 3 as well as human rights law would be applicable nonetheless.

Furthermore, the principle established in Article 1(2) that it does not apply to situations of internal disturbances and tensions was, as we will see below, reaffirmed in Article 8 (2)(d) and(f) of the Rome Statute, which excludes violations committed in internal disturbances and tensions from the Court's jurisdiction for war crimes. We have also seen that the threshold between internal disturbances and an armed conflict is difficult to determine in practice, if one does not specify the character or the intensity of these hostilities and the organisational level of the parties.

We have seen that treaty IHL makes a distinction between internal armed conflicts within the meaning of Common Article 3 and those meeting the higher threshold of Protocol II. It should be recalled, however, that the ICRC Study on Customary

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[697] Mao Tse-Tung, M., *On Guerrilla Warfare* (Anchor Press. 1978).

International Humanitarian Law does not distinguish between the two categories of internal armed conflict, because it found that states did not make such a distinction in practice. In addition, the question of the threshold is irrelevant for those provisions of combat law which were adopted in the plenary. The actions prohibited in Protocol II, via articles 13-17, 'must be considered illegal under all circumstances, and can hardly be justified by the claim that the level of conflict has not reached the threshold of Article 1.'[698]

The Rome Statute of the International Criminal Court

We have seen that the concept of internal armed conflict evolved quite extensively in the finale decade of the twentieth century. In this context, the jurisprudence of the international criminal tribunals has been pivotal in establishing objective criteria for identifying it. As we will see, the Rome Statute of the ICC follows partially the approach of the Appeals Chamber in *Tadic*, when the latter proclaimed that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'[699], while maintaining the distinction in principle between international armed conflicts and armed conflicts not of an international character.[700] Furthermore, it took up the criteria elaborated by the Appeal Chamber in the *Tadic* case, in order to overcome the drawbacks of the Protocol II definition, creating an allegedly lower threshold of application than the aforementioned Protocol. But this is less clear and needs to be carefully looked at. The purpose of this section is therefore to look at the different possibilities in terms of interpretation of the concerned provisions of the Rome Statute of the International Criminal Court, dealing with the threshold of an internal armed conflict for the purpose of the Statute.

By introducing additional categories and maintaining a distinction between Common Article 3 and other serious violations of IHL in internal armed conflicts, the Rome

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[698] Eide, A., "The New Humanitarian Law in Non-International Armed Conflict", *in The New Humanitarian Law of Armed Conflict*, (Antonio Cassese ed., 1979), at 300.
[699] *Tadic* Interlocutory Appeal, para 119.
[700] See Article 8(2)(c)-(f)

Statute exacerbates the problem of the split applicability of the Provisions of Common Article 3 and Protocol II. The Statute distinguishes between two categories of crimes that occur during such conflicts. It differentiates serious violations of Common Article 3 from 'other serious violations of the laws and customs of war' that are applicable in those situations.[701] In addition, in both cases the Statute indicates the lowest level of applicability of the relevant provisions by insisting upon the fact that they do not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[702]

The Statute proscribes as war crimes serious violations of Common Article 3. The Statute also contains a host of other serious violations of the laws and customs applicable in internal armed conflicts. Despite the adoption of the Statute for the ICTR and the emergence of the jurisprudence of the ICTY, states involved in the drafting of the Rome Statute remained divided on the inclusion of jurisdiction over war crimes committed in internal armed conflicts.[703] The question of including a new threshold provision relating to situations of internal armed conflict arose as a means of facilitating consensus, in order to balance the concerns of states opposed to internal armed conflict clauses with others who had expressed support for the retention of these clauses.[704]

Ultimately, the definition of war crimes committed in internal armed conflicts has been divided in two: one subparagraph (Article 8(2)(c)) relates to violations of Common Article 3, and another paragraph (Article 8(2)(e)) relates to the sanction of other violations of the law applicable in internal armed conflict. There was a considerable debate in the legal literature as to whether the ICC Statute in fact created a third type of internal armed conflict as a result of the wording of Article 8(2)(f). For more clarity, we will now look at Article 8(2)(c) and (d) and Article 8(2)(e) and (f) separately.

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[701] Rome Statute Article 8(2)(c) and (e) respectively.
[702] Rome Statute, Article 8(2)(d) and (f) respectively.
[703] For an analysis of the drafting of the Rome Statute see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 161ff.
[704] Id., at 167.

Article 8(2)(c) and (d)

Article 8(2)(c) criminalizes explicitly the violation of Common Article 3, in referring to an 'armed conflict not of an international character', without clarifying further. But Article 8(2)(d), which contains the material scope of application of 8(2)(c), adds the minimum threshold of Protocol II for the existence of an armed conflict.[705] In providing that Article 8(2)(c) 'applies to armed conflicts not of an international character and *thus* does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature', it seems to infer that the minimum threshold of Protocol II is of general applicability,[706] whereas the additional elements of its Article 1 cannot be transferred to the interpretation of Common Article 3.[707] It is an important addition, as common Article 3 contains no such limitation. Accordingly, 'in repeating the negative definition of the armed conflict which is found in Article 1(2) of Protocol II, Subparagraph 2(d) has an effect which the drafters of Protocol II had wished to avoid, namely to modify the existing conditions of application of Common Article 3.'[708] Indeed, one of the advantages of Article 3 was its lower threshold of application.

The concept of 'internal disturbances and tensions' is not defined in Subparagraph (2)(d). But, generally speaking, 'one might say that internal disturbances do exist when a State uses armed force to maintain order without that use amounting to an armed conflict. Internal tensions might be said to exist when such force is used as a preventive measure.'[709] However, we have seen that the use of armed force by the government has been seen as an objective criteria for the existence of an armed conflict by the ICTY and ICTR. It is not as straightforward as we would like. In addition, it is important here to recall a further limitation contained in Article 8(3),

[705] In Article 8(2)(d), the inclusion of an 'or' instead of an 'and' seems to have been inadvertent; see Zimmermann, A., "Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character", in *Commentary on the Rome Statute of the International Criminal Court*, (Otto Triffterer ed., 2008), para. 299.

[706] In line with Fleck, "The Law of Non-International Armed Conflicts", at 616, section 1205.

[707] Paulus & Vashakmadze, "Asymmetrical war and the notion of armed conflict - a tentative conceptualization", at 106; Zimmermann, "Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character", para. 300 and Fleck, "The Law of Non-International Armed Conflicts", at 610, section 1201.

[708] Bothe, "War Crimes", at 419.

[709] Zimmermann, "Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character", at 495, para 301, referring to Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para 4477.

which reads that ‘nothing in paragraphs 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means’. But this does not give *carte blanche* to governments to crush a rebellion on their soil by any means, as, in effect, in situations of internal disturbances and tensions, not constituting a situation of armed conflict covered by the provision on war crimes, atrocities may still be punishable as crimes against humanity, under the Rome Statute.

Furthermore, we may wonder why Article 8(2)(c) of the Statute makes absolutely no reference to the *Tadic* definition of armed conflict. Indeed, this is awkward, as it constitutes the most prominent and widely used definition of an armed conflict. However, Article 8(2)(c) explicitly refers to Common Article 3, and we have seen in the *Tadic* Jurisdiction Decision, as well as in all the following jurisprudence of the ICTY, ICTR and SCSL, that the two principal elements of armed conflict are some sort of organization on the part of the armed group and a certain intensity of the violence.[710] Therefore, we can safely use the two *Tadic* criteria in order to interpret a situation within the ambit of Article 8(2)(c). However, as we have seen above, while helpful, the elements of organisation and intensity do give rise to a whole range of questions, relating for example, to the precise level of intensity of the violence needed and the exact degree of organisation required of the parties. These essentially factual matters are to be decided on a case-by-case basis. Lastly, unlike the second sentence of article 8(2)(f), article 8(2)(d) does not contain a reference to protracted armed conflict. It is therefore submitted that there is no minimum duration of the conflict required, in order for article 8(2)(c) to apply.[711]

As a matter of fact, the elements of Article 8(2)(c) do not raise too many difficulties, as the elements of an armed conflict not of an international character are well settled, even if the application of these elements to the facts of a particular conflict is rather more contentious. However, things become a little trickier in the context of Article 8(2)(e) of the Statute.

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[710] For instance, remind the *Tadic* Trial Judgment, at para 562.

[711] In line with Zimmermann, “Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character”, at 488 para 271.

Article 8(2)(e) and (f)

Article 8(2)(f) is the result of a harsh compromise that had to be reached during the Rome Conference. Some delegations wanted to establish the threshold of Article 1(1) of Additional Protocol II. This would have set such a high threshold that it would have excluded conflicts between armed groups and conflicts in which armed groups do not exercise territorial control. This would have excluded the majority of internal armed conflicts raging currently throughout the world, and would have represented a major step back from existing law.[712] Finally, the proposal that ultimately found its way into the Statute was presented by the delegate of Sierra Leone and reads as follows: 'It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'[713]

The first part of the first sentence of article 8(2)(f) of the Statute simply repeats the same requirement, as in article 8(2)(c), that an armed conflict not of an international character must exist before the prohibition contained in Article 8(2)(e) becomes applicable. The second sentence of Article 8(2)(f), classifies the notion of internal armed conflict in the case of 'other serious violations' and adds that the rules must apply 'to armed conflicts that take place in the territory of a State when there *is protracted armed conflict* between governmental authorities and organized armed groups or between such groups.'[714] It thus somewhat lowers the threshold for the existence of an armed conflict as compared with Article 1(1) of Protocol II, but it is not immediately clear whether the threshold is equivalent to that assumed for the application of Common Article 3. Article 8(2)(f) contains a positive definition as well as a negative one. The negative definition has been considered already in the context

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[712] For the drafting history of Article 8(2)(e) and (f), see Fleck, *The Handbook of International Humanitarian Law*, at 610 and 616. See also section 1201 § 5 and 1211; Cullen, "The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)", at pp. 423-435, Moir, *The Law of Internal Armed Conflict*, at pp.163-167; Sivakumaran, "Identifying an armed conflict not of an international character", at pp. 363-365 and 371-373; Robinson & Hebel, "War Crimes in Internal Conflicts: Article 8 of the ICC Statute", at pp. 197-200.

[713] A/CONF.183/C.1/SR.35. For a precise analysis of the drafting process for this provision, see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at pp. 159-174.

[714] Article 8(2)(f) (emphasis added).

of Article 8(2)(c).[715] Therefore, we will now consider the positive definition. It is argued here that there are two main reasons for the unintelligibility that lies in the positive definition.

The first one is related to the use of the concept ‘protracted armed conflict’. Aside from the substitution of the phrase ‘protracted armed violence’ with ‘protracted armed conflict’, Article 8(2)(f) took up the definition given by the ICTY Appeal Chamber in its *Tadic* Decision on Jurisdiction.[716] Accordingly, the *Tadic* definition is a useful starting point for an analysis of the ‘triggering mechanism’ of the aforementioned Article. The term ‘protracted’ seems to imply a certain time element, as in Protocol II. However, the Protocol refers to the term ‘sustained’ and Zimmermann argues that, in the case of the ‘protracted armed violence’ criterion, the operations need not be kept going continuously by the conflicting Parties.[717] However, if there was not this substitution of the term ‘violence’ with ‘conflict’ then we could say without controversy that Article 8(2)(c) and Article 8(2)(e) have the same material scope of application.[718] This question continues to be subject to controversy and the Court so far has managed to avoid it.[719]

Criticism has been voiced against this definition, because the reference to the length of the conflict – protracted armed conflict - would exclude isolated acts of war. Accordingly, this definition would, it is claimed, render early identification of an armed conflict impossible and thus endanger the protection of the victims.[720] It seems that this concern could be accommodated by a contextual interpretation of the

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[715] Meaning that the provision ‘applies to armed conflict not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.’

[716] This definition is based on the ICTY Appeal Chamber’s ruling in the *Tadic* case, which deemed, as a reminder, that ‘an armed conflict exists whenever there is a resort to armed forces between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State’ (*Tadic* Interlocutory Appeal, para 70) (emphasis added).

[717] Zimmermann, “Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character”, at 503, para 348.

[718] As the *Tadic* definition refers to serious violations of Common Article 3.

[719] *Prosecutor v Bemba Gombo*, ICC-02/05-01/09, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, (hereinafter *Bemba* Rule 61 Decision), para 235.

[720] Quéguinier, J.-F., “Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire”, 85 *International Review of the Red Cross* 271, (2003), at pp. 278–81; *Transnational Armed Groups and International Humanitarian Law*, at pp. 6–7.

‘protracted’ character of an armed conflict that also takes the intensity of a conflict into account. By itself, the word ‘protracted’ refers only to length, not intensity,[721] but in the relevant paragraph of its *Tadic´* jurisdiction decision[722], we have seen that the ICTY also speaks of the ‘intensity requirements applicable to both international and internal armed conflicts.’[723] Furthermore, the *Tadic´* ‘protracted armed violence’ criterion has been interpreted in the subsequent ICTY decisions as referring to the intensity of the conflict rather than to its duration only, the duration criterion being a subset of the intensity criterion.[724] In the *Lubanga* case, the Chamber, while acknowledging that the ICTY approach was an appropriate one, clarified that the element of duration was a criterion *among others*, to be used in order to assess the degree of intensity of violence in a given situation.[725] It is therefore argued here that Article 8(2)(d) and (f) do have the same threshold, that there is no material distinction between them and that their artificial separation is ‘merely a consequence of convoluted drafting.’[726] It is therefore argued here that Article 8(2)(f) should be interpreted as a reformulation of an existing threshold.[727]

Is it the Same Threshold as Tadic?

Accordingly, it is possible here to argue that Article 8(2)(f) must be read as a development of the threshold contained in Article 8(2)(d), thereby implying uniformity of applicability for both sections. In my view, Article 8(2)(f) is simply a restatement of the Tadic formula, which has been delineated in order to identify a

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[721] Catherine Soanes and Angus Stevenson (eds.), *Oxford Dictionary of English, Oxford University Press*, Oxford, 2005, at 1416, according to whom ‘protracted’ means ‘lasting for a long time or longer than expected or usual’.
[722] *Tadic* Interlocutory Appeal, para. 70.
[723] Paulus & Vashakmadze, “Asymmetrical war and the notion of armed conflict - a tentative conceptualization”, at 106.
[724] *Haradinaj* Trial Judgment, para. 49;
[725] *Prosecutor v Lubanga*, ICC-01/04-01/06, Judgment, (14 March 2012), (hereinafter *Lubanga* Trial Judgment), para 538.
[726] Milanovic, M. & Hadzi-Vidanovic, V., “A taxonomy of armed conflict”, in *Research Handbook on International Conflict and Security Law Jus Ad Bellum, Jus in Bello and Jus Post Bellum*, (Nigel White & Christian Henderson eds., 2013 (Forthcoming)), at 28. See also footnote 185.
[727] Meron, *The Humanization of Humanitarian Law*. p. 260; Cullen, “The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)”, at 445; Sivakumaran, “Identifying an armed conflict not of an international character”, at 373 ff; Bothe, “War Crimes”, at 423; Pejic, “The protective scope of Common Article 3: more than meets the eye”, at 193; Vité, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, at pp. 81-82.

Common Article 3 internal armed conflict threshold, with protractedness being related not only to duration, but also to the intensity of the armed violence.

Furthermore, this interpretation is the only one that is in keeping with the evolution of customary law, which makes no distinction between different types of non-international armed conflict. Besides, 'from a *lex ferenda* perspective, to create a new threshold between armed conflicts and protracted armed conflicts is inadvisable, for it is to discriminate within armed conflict not of an international character in addition to the more traditional discrimination that exists between non-international armed conflicts and their international counterparts.'[728] Such an approach would be awkward at a time in which it is starting to be recognised that what is prohibited in international armed conflicts should also be prohibited in non-international armed conflicts. In addition, this would introduce a criterion particularly hard to evidence, as the line between protracted and non-protracted is difficult to draw.[729]

The interpretation of a shared threshold of application between Article 8(2)(c) and 8(2)(e) is also supported by the customary status of the offences in these sections. It is arguable that their recognition as norms of customary international law applicable in all situations of armed conflict makes the interpretation of a new category of internal armed conflict in Article 8(2)(f) superfluous.[730] Accordingly, we can assume for now that the offences listed in relation to internal armed conflict do indeed have customary status.[731] This is further evidenced by the ICRC Customary International Humanitarian Law Study. The interpretation of a shared threshold of application between Article 8(2)(c) and 8(2)(e) is supported by the customary status of the offences in these sections, which is confirmed in the ICRC Study.[732] It is important here to recall that the ICRC Study on Customary International Humanitarian Law does not distinguish between different categories of internal armed conflict or

[728] Sivakumaran, "Identifying an armed conflict not of an international character", at 375, referring to the *Tadic* Interlocutory Appeal, para 119.
[729] Id. at 375.
[730] Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, at 183-184.
[731] This will be carefully analysed in the coming Chapters.
[732] The customary status of Article 8(2)(c) is provided in the following ICRC Study rules and related practice: Rules 87-90, 96, 99-100. For Article 8(2)(e), see Rules 1, 30, 33, 38-40, 52, 93-94, 136-137, 129, 65, 46, 92 and 50 and their related practice. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*.

different thresholds for the application of international humanitarian law to situations of internal armed conflicts. The reason for this is that it was found that states did not make such a distinction in practice. Accordingly, the Study uses the rules of customary international humanitarian law in Common Article 3 internal armed conflicts.[733] By providing a set of rules that are applicable in all circumstances of armed conflict, the result of the Study may help to overcome the separation between the two types of internal armed conflict. 'Given that the study does not distinguish different thresholds of applicability for internal armed conflicts, and that the prohibitions listed in Article 8(2)(c) and 2(e) are covered in rules applicable to international and internal armed conflict, it is evident that the interpretation of an additional threshold of applicability in 8(2)(f) would restrict the scope of the rules contained in 8(2)(e) contrary to customary international law.'[734] Accordingly, for an offence to fulfil the Article 8(2)(e) criterion of 'within the established framework of international law', and to respect existing standards of customary international law, it is coherent and necessary to interpret paragraphs 2(d) and 2(f) as implying the same threshold of application

After having reviewed all of these arguments, and bearing in mind the object and purpose of the Rome Statute, the correct view should be that Article 8(2)(f) merely classifies the terms of Article 8(2)(d) without creating a new category of armed conflict, and that the two provisions share the same threshold of application. We will now look at how the Court dealt with this issue throughout its nascent case law.

The Position of the Court Over this Doctrinal Debate

The proper scope of article 8(2)(e) has now been considered by the Pre-Trial Chamber of the ICC in the Confirmation of charges of the *Lubanga* case,[735] the *Katanga*

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[733] Private discussion with Jean-Marie Henckaerts. See also Pejic, "The protective scope of Common Article 3: more than meets the eye", at 191; Pejic, "Status of armed conflicts", at 88.

[734] Cullen, "The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)", at 444.

[735] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, (29 January 2007) (hereinafter *Lubanga* Confirmation of Charges).

case,[736] the *Bemba* case,[737] the *Bashir* Decision on the Prosecution's Application for a Warrant of Arrest,[738] and recently by the Trial Chamber in the first ever judgment of the ICC in the *Lubanga* case.[739] In order to confirm the charges of *Lubanga*, *Katanga* and *Bemba*, as well as in order to deliver an arrest of warrant for *Al Bashir*, the Pre-trial Chamber analyzed the part of Article 8 dedicated to armed conflict not of an international character. In order to move on the definitions of crimes, the Pre-Trial Chambers decided first to look at the contextual elements of the war crimes provision. Before assessing whether a particular offence has been committed, we need first to make sure that the contextual criteria are satisfied, in other words, whether it was committed during an armed conflict. If this condition is not met, the alleged crimes cannot be subject to the jurisdiction of the Court, under the war crimes provision. As we have seen, The Rome Statute excludes internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.[740] In addition, below a certain threshold of gravity, violence is not considered to be a matter for the Court.

Accordingly, the judges in the *Lubanga* judgment acknowledged and clarified that Article 8(2)(f) derives directly from the *Tadic* test of the ICTY. In doing so the Court, rightly in my opinion, scrutinized the case law of the ICTY, ICTR and SCSL on this issue. The judges did not consider control over territory as a necessary requirement for establishing the existence of an armed conflict.[741] In addition, on organization of the armed group, it took distance with the Protocol II criteria and seems to be back to *Tadic.*[742]

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[736] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of charges) ICC-01/04-01/07 (26 September 2008), (hereinafter *Katanga and Ngudjolo* Confirmation of Charges).
[737] ICC *Bemba* Rule 61 Decision.
[738] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009), (hereinafter *Al Bashir* Arrest Warrant).
[739] *Lubanga* Trial Judgment.
[740] Article 8(2)(d) and (f)
[741] *Lubanga* Trial Judgment, para 536.
[742] *Ibid*, para 536-537.

Conclusion on the Rome Statute

By introducing additional categories and maintaining a distinction between Common Article 3 and other serious violations of IHL in internal armed conflicts, the Rome Statute seems at first glance to exacerbate the problem of the split applicability of the Provisions of Common Article 3 and Protocol II. The Statute differentiates serious violations of Common Article 3 from 'other serious violations of the laws and customs of war' that are applicable in those situations.[743] There was a considerable debate in the legal literature as to whether the Rome Statute in fact created a third type of internal armed conflict as a result of the wording of Article 8(2)(f). Article 8(2)(c) of the Statute makes absolutely no reference to the *Tadic* definition of armed conflict, which is awkward, as it constitutes the most prominent and widely used definition of an armed conflict. However, Article 8(2)(c) explicitly refers to Common Article 3 and the *Tadic* definition relates to Common Article 3 armed conflicts.

Criticism has been voiced against Article 8(2)(e) definition of non-international armed conflict, because the reference to the length of the conflict – protracted armed conflict - would exclude isolated acts of war. But it could be accommodated by a contextual interpretation of the 'protracted' character of an armed conflict that also takes the intensity of a conflict into account. Article 8(2)(f) should be interpreted as a reformulation of an existing threshold. Accordingly, it is argued that Article 8(2)(f) must be read as a development of the threshold contained in Article 8(2)(d), thereby implying uniformity of applicability for both sections. In my view, Article 8(2)(f) is simply a restatement of the *Tadic* formula, which has been delineated in order to identify a Common Article 3 internal armed conflict threshold, with protractedness being related not only to duration, but also to the intensity of the armed violence.

This interpretation is the only one that is in keeping with the evolution of customary law, which makes no distinction between different types of non-international armed conflict. The interpretation of a shared threshold of application between Article 8(2)(c) and 8(2)(e) is also supported by the customary status of the offences in these sections. The correct view should be that Article 8(2)(f) merely classifies the terms of

[743] Rome Statute Article 8(2)(c) and (e) respectively.

Article 8(2)(d) without creating a new category of armed conflict, and that the two provisions share the same threshold of application.

As we have seen throughout this Chapter, the identification of what qualifies as a non-international armed conflict is a complex issue and has given rise to a wide range of discussions in the literature and the case law. However, for the sake of simplicity, and in order to capture the widest range of situations, I decided to consider as qualifying as a non-international armed conflict all conflicts opposing a state to one or several armed groups, in addition to all situations opposing organized armed groups between themselves. This encompasses the so-called transnational armed conflicts. For instance, in my view, the 2006 war between the Hezbollah and Israel was a non-international armed conflict. The next Chapter will be devoted to the analysis of the challenges these non-international armed conflicts pose to the application of IHL norms.

Chapter 5:

Characteristics of non-international armed conflicts at the turning point of the XXI Century

Introduction

Internal armed conflict is not a new phenomenon in military life.[744] From the beginning of human history, belligerents have developed capabilities to defeat their opponents and suppress them. Practically all the colonial wars of the late nineteenth and twentieth century were asymmetrical wars. Without going too far back in history, civil conflicts in the 1960s and 1970s witnessed the colossal sufferings of civilian populations in the Congo, Yemen, Nigeria, Cambodia and Vietnam,[745] as well as in Colombia and Argentina. In the 1980s, we can easily remember the atrocity of the attacks on the Palestinian populations in Beirut in 1982, attacks that prompted the Security Council to call for the respect of the rights of civilians and for the parties to restrain from all acts of violence against these populations.[746] We can also think of the civil wars in Peru and Nicaragua. In the 1990s, countries such as Colombia, ex-Yugoslavia, Rwanda, Liberia, Sierra Leone, Kosovo, Chechnya and more recently in the Darfur region of Sudan, have seen tremendous atrocities committed on civilians. Only thirteen years after its beginning, the 21st century has already been tainted by horrors committed during internal armed conflicts in Central African Republic, the Democratic Republic of the Congo, Uganda, Sri Lanka, East Timor, and more recently in Syria, to name but a few.

[744] See Münkler, H., "The wars of the 21st century", 85 *International Review of the Red Cross* 7, (2003), at pp. 7-21

[745] Veuthey, M., "Les conflits armés de caractère non-international et le droit humanitaire", in *Current problems of international law, essays on UN law and on the law of armed conflicts*, (Antonio Cassese ed., 1975), at pp. 179-266.

[746] See Security Council Resolutions 512 (19 June 1982) 513 (4 July 1982) and 521 (19 September 1982).

Most, if not all, internal conflicts opposing a government to organized armed groups are characterised by a considerable degree of asymmetry between state armed forces and insurgents. There is an evident chain of cause and effect between such power imbalances and what is called guerrilla warfare.[747] The term 'asymmetric warfare' is commonly being used to describe inequalities and imbalances between belligerents involved in modern armed conflicts that can reach across the entire spectrum of warfare. The inequalities are mostly related to a disparate distribution of military power and technological capacity.[748]

Technological innovations, from gunpowder and the napalm bomb to unmanned fighting systems, have always afforded some to gain asymmetric power over others. In internal armed conflicts, the state party, when there is one,[749] tends to have access to the full array of military power, whereas insurgents are likely to have significantly more limited resources. In order to face such inequality, insurgents are often forced to resort to guerrilla warfare, relying upon the civilian population for shelter and concealment.[750] It is therefore easy to understand that in these situations, distinguishing between civilians and fighters is very difficult. In addition, in recent decades, technology has also

> 'helped the weaker side that resorted to guerrilla warfare or terrorism. The spread of innovations like hand-held missiles, undetectable explosives, and increasingly improving communication tools offered loosely organized insurgents affordable and effective means of confronting mighty opponents. The democratization or privatization of the means of destruction provided novel opportunities for non-state actors to challenge not only their own governments but also the strongest of powers.'[751]

Thus asymmetry in itself is nothing revolutionary or new. It is a classic of international humanitarian law. But it is true that the current spread of technological

[747] Geiss, R., "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", 23 *Humanitäres Völkerrecht Informationsschriften* 122, (2010), at 122.
[748] Id., at 122.
[749] We can think for instance to the situation in Somalia, where there is not more 'state' whatsoever.
[750] Moir, L., "Conduct of Hostilities - War Crimes", in *The Legal Regime of the ICC: Essays in Honour of Prof. I. P. Blishchenko*, (José Doria, et al. eds., 2009), at 490.
[751] Benvenisti, E., "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", 339 *Duke Journal of Comparative & International Law* 339, (2010), at 339.

innovations ensures the persistence and the prevalence of asymmetric military conflict between regular armies and organized armed groups.

The Theory of the Principle of Distinction

In light of the above mentioned problems related to the realities of internal armed conflicts and the asymmetry they entail, IHL proposes a theoretical legal framework related to the necessity of distinguishing between persons not involved in war fighting activities, who should be protected, and persons waging the violence. In contrast to human rights law, under which people are not categorized, there are clear categories of people under the IHL of international armed conflict: combatants and civilians. However, as we will see, in internal armed conflicts, there is no combatant status and no definition of civilian. The lines of distinction between protected civilians and fighters, as well as between military objectives and civilian objects, are often blurred. Under IHL, the lawfulness of intentional deprivation of life depends primarily – but not exclusively – on whether the targeted person represents a legitimate military objective. The determination of whether a person represents a legitimate military objective is governed by the fundamental principle of distinction. As far as persons are concerned, this principle obliges all those involved in the conduct of hostilities to distinguish between persons who may be legitimately attacked, and those who are protected from direct attack. The principle of distinction is considered as part of *jus cogens* and must be read in conjunction with other provisions of conventional and customary IHL relevant to the conduct of hostilities in internal armed conflicts.

As categorization of a person as a civilian is a function of the definition of a fighter, it will be necessary to examine these different categories of persons. In order to determine whether an individual constitutes a lawful military objective in internal armed conflict, it must be clarified in the first place whether this person is a civilian, a member of armed forces (state armed forces or fighters), medical or religious personnel or a person *hors de combat*. Secondly, if the person is a civilian, or otherwise protected against direct attack, it must be determined whether he is directly participating in hostilities or engaged in ‘harmful’ or ‘hostile’ acts. It is therefore

necessary to determine how these various categories of persons are defined in treaty and customary IHL applicable to internal armed conflicts.

As we will see, treaty and customary law on the conduct of hostilities prohibit direct attacks against various categories of persons. This prohibition is based on the assessment that, 'since the persons concerned do not directly participate in hostilities, imperative considerations of humanity require their protection against direct attacks regardless of the potential military advantage that could be achieved by such attacks.'[752] It is therefore necessary to identify clearly these different categories of persons, the persons protected against direct attacks and belligerent reprisals, as well as the persons constituting legitimate military objectives.

Military operations against persons not entitled to protection against direct attack remain subject to additional restraints imposed by IHL, such as the prohibition of indiscriminate attack, the principles of proportionality and precaution, and the prohibition or restriction of certain means and methods of warfare.[753] It should also be specified that 'a lack of protection against direct attack is not equivalent to an unconditional 'licence to kill', but merely implies that force may be used against unprotected persons to the extent required by military necessity.'[754]

The Difficulty of Distinction in Practice

However, nowadays, and especially in internal armed conflicts, the principle of distinction seems more in danger than ever. The process of blurring the traditional distinctions seems inevitable. Is the traditional approach of IHL still working to stem the flood of escalating violence? Does it still 'create legal dams and try to channel all the potential forms of warfare into the bed of restricted, but legitimate means and methods of warfare'[755]? The reality is that the traditional rules on distinction and on means and methods of warfare are in great danger of erosion as a result of

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[752] Melzer, *Targeted Killing in International Law*, at 302.
[753] This will be dealt with further below, in the next sections.
[754] See Melzer, *Targeted Killing in International Law*, at 297.
[755] Oeter, S., "Comment: Is the Principle of Distinction Outdated?", in *International Humanitarian Law Facing New Challenges. Symposium in Honour of Knut Ipsen*, (Wolff Heintschel von Heinegg & Volker Epping eds., 2007), at 55.

asymmetries. In some places such as Somalia, Afghanistan or the Palestinian territories, parties fight against adversaries not easily distinguishable from the civilian population.[756] In other places, such as in Bosnia, Kosovo, Colombia or Sri Lanka, the distinction was easier, as parties to the conflict were identifiable through uniforms and other distinguishable signs. However, this did not impede parties from committing other IHL violations, of which civilians were the foremost victims. Violations of the principles related to the interdiction of indiscriminate attacks on civilians can be partly explained by the difficulty, in these types of armed conflicts, of distinguishing between fighters who do not carry their arms openly and the civilian population. But not wholly. There are a number of challenges that the regime of the protection of civilians against the effects of hostilities is facing in current internal armed conflicts.

Challenges

The principle of distinction has always belonged to the basic sets of rules which, in practice, were put into doubt by belligerents who were not willing to restrict their use of violence as soon as such restrictions were perceived as being harmful to their strategies.[757] Again, there is nothing new in the situations we are facing today, situations in which all sides of the conflict are in danger of neglecting the principle of distinction and have strong incentives to violate the law.

In addition, when it comes to the conduct of hostilities in internal armed conflicts, discussions focus on the impact of increasingly blurred lines of distinction and on the application and adequacy of the respective IHL norms. The constant evasion of direct military confrontation, the deliberate shifting of hostilities from one location to another and frequently into the proximity of urban and civilian neighbourhoods, as well as the fact that 'in modern armed conflicts many civilian activities and objects are of potential military value, aggravate the problem of distinction between those

[756] See Keck, T.A., "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare", *Bepress Legal Repository* 1, (2011), at 60; Rogers, A.P.V., *Law on the battlefield* (Juris Publishing Third ed. 2012), at 302-303.

[757] Oeter, "Comment: Is the Principle of Distinction Outdated?," at 56.

who fight and protected civilians.'[758] In these situations, it is especially difficult to distinguish enemy combatants from civilians, and organized armed groups often use civilians as human shields or occupy their places of worship, homes, and other civilian structures.[759] In practice, determining who or what may be attacked is increasingly difficult.

There are many challenges facing the application of the principles of distinction and proportionality. These will be considered in detail throughout the rest of this dissertation. But here, we will now briefly enumerate them in order to have a basic apprehension of the big picture related to the problems we are facing when it comes to the protection of civilians against the effects of hostilities in internal armed conflicts. The principal challenges that we can identify so far are: the campaigns against civilians; the problem of the battlefield; no military objective; military victory; the problem of equality of arms and the specific problems related to the strong and weak parties to the conflict.

Military Victory

In the traditional conception of international humanitarian law, war is governed by a military logic in the sense that the use of force is immediately instrumental only to military victory.[760] But in internal armed conflicts, belligerents rarely pursue their aims by attempting to defeat the military forces of the enemy. This is, first of all, because most of the time it is simply not possible. But also, the conduct of war itself is infused by a political or economic logic. In these conflicts, 'warfare is no longer an instrument of politics, but it is itself politics.'[761] We can think of wars such as in Yugoslavia, Rwanda, Burundi, and partly in the Iraqi civil war, Liberia, East Timor, the DRC and the Sudan, in which 'the use of force is not primarily, if at all, aimed at achieving military victory, but *immediately* serves the political goal of the displacement or extermination of part of the population,'[762] or the economic goal of

[758] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 123.
[759] Civilian Casualty Mitigation. No. ATTP 3-37.31, pt. (2012), at 1-21.
[760] See Preamble 1868 Saint Petersburg Declaration.
[761] Lamp, N., "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", 16 *Journal of Conflict & Security Law* 225, (2011), at 234 (original emphasis).
[762] Ibid. (original emphasis).

securing access to a given natural resource. In these contexts, it is increasingly unclear what can be considered a military gain, especially since control over enemy resources and territory often proves to be a liability rather than an asset.[763]

With respect to the concept of military victory, we can identify several scenarios. The first one relates to the situation in which parties do not try to defeat their enemy militarily nor seek a political solution in negotiations. They attempt, rather, to create "facts on the ground" by expelling or killing civilians, burning villages and thus reshaping the ethnic composition of a region or country.[764] In these situations, the targeting of civilians is no longer an inadvertent consequence of the pursuit of the goal of military victory, but becomes a goal in itself.[765]

A second scenario is illustrated by conflicts such as in Sierra Leone, Liberia, the DRC and Northern Uganda. In these conflicts, there is no quest for a military victory whatsoever. Parties to the conflict have the objective to profit economically or socially from an endemic state of war, and this is working very well. 'Violence against civilians in the form of sexual exploitation, kidnappings, slavery, looting and displacement is integral to the logic of these wars which have become a form of life for their protagonists.'[766]

A third scenario in which the aim of the parties is definitely not to achieve a military victory is related to the technological asymmetry context. Indeed, the power imbalances between the parties are often so pronounced that 'from the outset the inferior party is bereft any realistic prospect of winning the conflict militarily. Military victory in the classical sense may not even be the objective of the parties involved.'[767] In these situations, the ultimate aim of the weaker party in using armed force will be to exert pressure on the politics of the enemy rather than even attempt to

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[763] Benvenisti, "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", at 344.
[764] See The Secretary General, 'Report on the Causes of Conflict and the Promotion of Durable Peace in Africa', (13 April 1998), UN Doc A/52/871, para 3: 'In those conflicts the main aim, increasingly, is the destruction no just of armies but of civilians and entire ethnic groups'.
[765] See further below for an explanation of the notion of campaign against civilians.
[766] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 235.
[767] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 123.

achieve the latter's military submission.[768] We can think here of conflicts such as those with Al Qaeda, the Hezbollah or the Hamas.

In these three scenarios specific to internal armed conflicts, military victory is either not the most efficient strategy or not even a sufficient means to achieve the warring parties' aims. Indeed, massive shelling or ethnic cleansing 'will secure an area for an ethnic group much more firmly and lastingly than a military victory followed by negotiations.'[769] And when it comes to a war that is aimed at economic gain, it is much more efficient to tactically retreat than to risk a costly military confrontation.

Military Objectives

Another problem that we face in internal armed conflicts is that, originally, traditional international humanitarian law was based on the key premises that, firstly, it was possible to isolate military and civilian targets with sufficient clarity and, secondly, that there was a tangible military objective to be attained from the battle, such as hitting army bases or gaining control over territory.[770] Accordingly, compliance with the law was 'compatible with the interest of armies that sought to focus on military objectives and offer immunity to uninvolved civilians and enemy combatants who laid down their arms.'[771] However, it is far more difficult to apply these assumptions in situations where state armed forces fight organized armed groups (and even more where armed groups fight other armed groups). First, because organized armed groups will avoid attacking well-defended targets, preferring instead to strike weakly defended objectives. Secondly, because in internal armed conflicts there are very few purely military objectives, as most objects are used for both military and civilian purposes. 'City planners rarely pay heed to the possibility of future warfare. Military objectives are often located in densely populated areas and fighting occasionally occurs in such areas.'[772] This is so despite an obligation to avoid locating military objectives within or near densely populated areas, to remove civilians from the

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[768] See Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 194 ; Geiss, R., "Asymmetric Conflict Structures" 88 *International Review of the Red Cross* 757, (2006), at 767.

[769] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 235.

[770] Sassoli, M., "The Implementation of International Humanitarian Law: Current and Inherent Challenges", 10 *Yearbook of International Humanitarian Law* 45, (2007), at 58-9.

[771] Benvenisti, "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", at 343.

[772] Final Report to the Prosecutor (13 June 2000), at para. 51.

vicinity of military objectives, and to protect civilians from the dangers of military operations.[773] Very little prevention may be feasible in many cases, as in internal armed conflicts there are many dual use facilities and resources. The problem of the intermingling of military objectives within civilian centres dramatically limits the ability of a regular army to identify arenas where it can legitimately project its power.[774]

Campaigns against civilians

Internal armed conflicts can be characterised by campaigns directed against civilians *per se*. Civilians face growing hostilities from the parties, and these conditions challenge the realization of fundamental protections afforded to them by international law. In practice, during internal armed conflicts, violations of the principles related to the interdiction of direct and indiscriminate attacks, including instances where civilians are not incidental victims but the principal object of the attack, appear to be the rule far more than the exception. Today, civilians bear the burden of armed violence and the bulk of casualties in conflicts.[775] They are not only incidentally affected, but are often deliberately targeted by states and non-state actors. There are situations where violence is based on ethnicity, religion, and the struggle for power and/or resources. In these conflicts, cities and villages are the battlefronts and belligerents often use the civilian population as deliberate targets of their policies, with the notable examples of indiscriminate shelling, ethnic cleansing and mass rape campaigns, to name but a few.

As we have seen above, there are situations in which, for organized armed groups, military victory is not possible, either because of a lack of military resources, or because the other party avoids any military confrontation. This factor probably explains why a number of internal armed conflicts have transformed into counterinsurgency campaigns. We can think here of the recent situations in Darfur and Syria. In these cases, the regimes in place, due to the fact that they could not defeat their enemy militarily, engaged in campaigns against the civilian population.

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[773] On precautionary measures, see Chapter 10.

[774] See Chapter 7 for a discussion on military objectives.

[775] Kuwali, D., "Defending the Defenseless How to Protect Civilians in Contemporary Conflicts", in *Improving the Protection of Civilians in Situations of Armed Conflict*, (Paul Bonard, et al. eds., 2011), at 17.

We can also think of situations, such as in Bosnia Herzegovina,[776] in which war was directed not against opposing sides, and the displacement or extermination of the civilian population was among a warring party's goals. In that kind of situation, attacks against civilians are not a manifestation of lack of discipline from the attacker. They are often encouraged and even ordered. It is part of a military strategy to violate IHL. Moreover, it is also important to clarify that in many internal armed conflicts opposing different organized armed groups, such as in the DRC, military confrontations between armed groups are extremely rare. In these situations it is therefore obvious that the problem does not come from a lack of military discipline.

Battlefield

Internal asymmetric armed conflicts tend to evade clear-cut spatial and temporal demarcations. They are frequently confined within restricted and identifiable parts of the state territory where the armed conflict is taking place. The level of violence is 'fluctuating; hostilities erupt sporadically and potentially anywhere. Thus battle space is everywhere and traditional conceptions of a distinct "battlefield" often seem rather obsolete in such constellations.'[777] The more than twenty-year-long war in eastern regions of the Democratic Republic of the Congo, in the Kivus and in Ituri, for instance, is clearly constrained to this region. Violence rarely reaches the capital Kinshasa. The same situation pertains in Sri Lanka, where, up until February 2009, the civil war opposing the LTTE to the Sri Lankan government was mainly limited to the eastern and northern regions of the country. We can also refer, among many other examples, to the internal armed conflicts that oppose the LRA to the Ugandan government, Russian troops to the Chechen separatists, the Indian government to the Naxalites in diverse parts of the Indian territory, and the low intensity conflict opposing the South Thailand Insurgency to the Thai government. As we see, the existence of a non-international armed conflict in a given state does not necessarily mean that the entire territory of the state is engulfed in armed hostilities.

[776] Operation Storm in the Krajina region. See ICTYon this *Prosecutor v. Gotovina, Cermak and Markac* (Trial Judgment) IT-06-90-T (15 April 2011), (hereinafter *Gotovina* Trial Judgment).

[777] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 123 (footnotes omitted).

As we have seen in Chapter 4, IHL applies to the conduct of 'battlefield hostilities' between the parties to an armed conflict. However, 'the territorial parameters of the battlefield and the range of actions that fall within the remit of hostilities are neither defined in conventional IHL nor beyond debate.'[778] It is submitted here that, in situations of internal armed conflict where hostilities are confined to identifiable regions, to extend the application of IHL to the whole state territory would not only be unnecessary, but would also render IHL vulnerable to abuse. This is particularly relevant during non-international armed conflict, which 'often emerges against the backdrop of internal unrest and widespread violence, and where the shadow of armed conflict and the authority of IHL can be easily exploited to legitimize the otherwise unlawful uses of lethal force against individuals or during situations that are not directly related to the prevailing armed conflict.'[779]

It is argued here that the existence of an internal armed conflict in a delimited part of a state territory should not serve as a legal basis for the application of international humanitarian law and its permissive rules on the use of lethal force to every situation of violence within the whole territory of that state. The application of IHL should be constrained to those areas where hostilities are ongoing. But as we will see, discussions on this question are ongoing. Indeed, recently, states seem to have understood the desirability of having IHL apply to their situations of internal armed conflict, as it give them more margin of discretion than human rights law in their fight against their rebels. However, it is submitted that this is to the detriment of the protection of civilians against the effects of the hostilities, as IHL permits greater collateral damage than human rights law.

Equality of Arms

An important normative challenge is posed by the assumption of equality of arms, an unrealistic assumption in most internal armed conflicts. Under traditional IHL, once the hostilities have begun, IHL rules 'apply with equal force to both sides in the conflict, irrespective of who is the aggressor.'[780] All the parties to the conflict are

[778] Lubell, N. & Derejko, N., "A Global Battelfield? Drones and the Geographical Scope of Armed Conflict", 11 *Journal of International Criminal Justice* 65, (2013), at 68.
[779] Id., at 71.
[780] Fleck, *The Handbook of International Humanitarian Law*, at 101.7, p. 10.

supposed to be bound by the same obligations. This is a basic rule which has been put into question lately, some scholars even arguing for its complete abandonment. ‘Traditional laws of war did not address the relationship between a belligerent State and its own forces or civilians; under the prevailing concepts this relationship was not conceived as a matter of concern for international law.’[781] Furthermore, in internal armed conflicts, the notion of belligerent equality is merely a construct of international humanitarian law; or put it otherwise, a legal reality but not a factual reality, since insurgents remain criminals under domestic law. They are, therefore disadvantaged in this respect, as there is no combatant status in this type of armed conflict.[782] In addition, it is difficult to see how organized armed groups who possess very limited means and low levels of organization could respect the same obligations as state parties, rendering many IHL rules simply unrealistic for them to comply with. Accordingly, it is submitted here that, in the specific situation of internal armed conflicts, the principle of belligerent equality limits the impact of international humanitarian law on the conduct of organized armed groups and their compliance with its provisions,[783] which in turn leads to disrespect of IHL by both parties, which ultimately impacts on the protection of civilians.

Characteristics of the Strong Side

The principle of distinction was always perceived by state armed forces with superior firepower as too restrictive, as an annoyance hindering them from ending the war as soon as possible. The stronger party is often determined to end an indefinite state of insecurity caused by a handful of individuals whose access to an increasingly diverse and lethal arsenal of weapons threatens national interests.’[784] With this logic in mind, the stronger party feels that to ‘compel the enemy politically to abide again by the law, it should hit him where he is most vulnerable.’[785] Accordingly, military installations will not always be the best target of attacks, and the use of force will be

[781] Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflict”, at 12.
[782] See Chapter 6 for an analysis of the personal scope of the principle of distinction.
[783] Sassoli, M., *Critically examining equality of belligerents in non-international armed conflicts* (Program on Humanitarian Policy and Conflict Research ed., 2012). See also Sassoli, M. & Shany, Y., “Debate: Should the obligations of states and armed groups under international humanitarian law really be equal?”, 93 *International Review of the Red Cross* 425, (2011), at 426-431. For the opposite opinion, see Ibid at 432-436.
[784] Benvenisti, “The Legal Battle to Define the Law on Transnational Asymmetric Warfare”, at 339.
[785] Oeter, “Comment: Is the Principle of Distinction Outdated?”, at 55.

overwhelming.[786]

So, the stronger party has several incentives to violate the law. For instance, IHL favours the stronger party, that has 'the capacity of striking the military assets of its weaker adversary, while the adversary is unable to reciprocate in kind.'[787] So, the stronger does not have to worry about retaliation. This generates the 'temptation to strike hard and fast, to respond disproportionately and to end the conflict swiftly.'[788] And feelings of frustration and anger are prevalent when the weaker party perseveres. In addition, for democratic states such as the US, engaged in internal armed conflicts in Afghanistan or Iraq, public opinion exerts great pressure on the government in power to avoid casualties on their soldiers. In order to do so, states' armed forces are tempted to impose the collateral damage of combat on the opponent even if this strategy entails exposing civilians to greater risks.

Furthermore, 'the risks for civilians are further increased as militarily superior parties, in fighting an enemy that is often difficult to identify, respond with means and methods of warfare that may violate the principles of distinction and proportionality, giving rise to further civilian casualties.'[789] For instance, as the asymmetry between belligerents increases, the distinction between political and military objectives and necessities becomes more and more blurred, and the stronger party is likely to 'adopt a far more holistic approach, inseparably combining political and military efforts to bring about the entire political eradication or dissolution of the enemy and not just the enemy's military submission.'[790] This tendency will be exacerbated in situations where a government is combating an organized armed group that it categorizes as a terrorist organization. Also, as we will see, state armed forces can have a rather expansive reading of their duty to launch proportionate attacks. Regular armies fighting organized armed groups that operate from densely populated areas often view the ambiguous norm prohibiting "excessive" civilian losses as non-neutral and burdensome. This norm, which shifts the responsibility for civilian losses to the

[786] We will see further below the kind of new theories around the notion of military objectives.
[787] Benvenisti, "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", at 342.
[788] Id., at 344.
[789] Secretary General, 'Report of the Secretary General on the Protection of Civilians in Armed Conflict' (11 November 2010) UN Doc S/2010/578, para. 8.
[790] Geiss, "Asymmetric Conflict Structures", at 767.

attacker, is exploited by non-state armed groups.[791]

These difficulties often lead state armed forces, in particular modern armies having the best and most recent technologies and weapons in addition to efficient air warfare material, promising a short and decisive submission of their enemies, to regard their own safety as a relevant and even paramount consideration, interpreting their IHL obligations in this context in an extremely restrictive manner. Basically, they transfer the military risk to the combat zone, with the effect of further exposing the civilian populations to the effects of hostilities. By doing so, state armed forces often create even more enemies. Civilian casualties, 'whether caused by lethal action such as direct and indirect fire or aggressive security measures, can generate resentment and undermine popular support.'[792]

A different kind of situation is when an internal conflict takes place in the context of state failure. A state failure involves the implosion of national institutions, authority, law and order, in short the whole political body. It also implies 'the breakdown of a set of values on which the State's legitimacy is based, often resulting in a withdrawal of the population into a form of nationalism which is based on religious or ethnic affiliation and which becomes a residual and viable form of identity.'[793] In these circumstances, when state structures collapse, not only do states cease to be the only or even principal actors, but 'with the disintegration of institutional order, government armies tend to degenerate into loosely organized armed groups which are hardly distinguishable from non-state actors.'[794] The maintenance of law and order as well as other forms of authority fall into the hands of various factions. Soldiers who have not been paid for months resort to looting and pillage to survive. Indeed, due to the collapse of the criminal and military justice systems, soldiers are not necessarily more disciplined than insurgents. For example, in many instances they, too, recruit child

[791] See discussion on precautionary measures in Chapter 11.
[792] Civilian Casualty Mitigation, at Point 1-23.
[793] Armed conflicts linked to the disintegration of State structures. pt. available here (last access February 2013): http://www.icrc.org/eng/resources/documents/misc/57jplq.htm
[794] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 233.

soldiers, attack civilians and engage in economic transactions with the rebels.[795] In these situations, the state does not necessarily physically disappear, but gradually loses the capacity to carry out the normal functions of government.[796] In some internal armed conflicts, such as in Somalia, Afghanistan and parts of the DRC, state actors have at times totally vanished from the scene in certain part of the territory, and the loose structure characteristics of armed groups and militias render any distinction between combatants and civilians almost impossible.

A third situation is illustrated by those states in conflict situations whose military capacity is relatively weak. They have the tendency to 'adopt the strategies of the non-state militias, by supporting such groups as proxies or by turning their own forces into guerrilla or terrorist units.'[797] This phenomenon has been observed, for instance, in Iraq, when the Iraqi forces reverted to guerrilla tactics during the 2003 US invasion, or more recently in Syria with the Shahiba militias.

Characteristics of the Weak Side

In turn, the differences between military strengths induce the weaker party to adopt so-called guerrilla tactics so as to evade direct military confrontation with a superior enemy and to level out its inferiority. 'This simple logic is not new and has a long history in warfare.'[798] Because of this necessity to adopt guerrilla tactics for their very survival, organized armed groups rarely conform with the criteria stipulated in Additional Protocol II of 'organized armed groups which, under responsible

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[795] On the DRC, see for instance 'Congo's army accused of rape and looting as M23 rebels win image war', 26 November 2012, The Guardian, available here: http://www.guardian.co.uk/world/2012/nov/26/drc-army-accused-rape-murder-congo?intcmp=239

[796] Armed conflicts linked to the disintegration of State structures. pt. See the whole report for a thorough explanation on the concept of 'Anarchic conflict'.

[797] Benvenisti, "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", at 340.

[798] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 122. For a thorough examination of guerrilla tactics, written in Chine in 500 B.C., see for instance, Sun Tzu, S., *L'Art de la Guerre* (Flammarion. 1972). This essay is one of the most ancient treaty on the art of warfare and has been designated as the 'quintessence de la sagesse sur la conduite de la guerre.' (Ibid. at 5.) Furthermore, it has been argued that 'Bon nombre de dommages infligés à la civilisation lors des guerres mondiales de ce siècle auraient pu lui être épargnés si, à l'influence des tomes monumentaux de Clausewitz intitulés *De la Guerre*, lesquels ont modelé la pensée militaire de l'Europe pendant l'ère précédant la Première Guerre mondiale, s'était mêlée, en la tempérant, la connaissance de l'essai de Sun Tzu. Le réalisme et la modération de Sun Tzu contrastent avec la tendance de Clausewitz à mettre en relief l'idéal rationnel et "l'absolu", sur lesquels ses disciples ont achoppé en développant la théorie et la pratique de la "guerre totale" au delà de toutes limites du bon sens.' (Ibid.).

command, exercise such control over a part of territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[799] These groups are usually compelled to employ hit and run tactics, in order to avoid engaging governmental forces in open conflict, in which they are unlikely to succeed.[800] It is important to mention that such tactics are not unlawful *per se* in international humanitarian law, but merely part of guerrilla strategy.[801] Accordingly, 'not each and every strategy employed to circumvent superior military power by cunning, surprise, indirect approach or ruthlessness automatically constitutes prohibited conduct; it may, depending on the circumstances, amount to no more than good tactics.'[802]

In addition, it is important to mention that there are very few incentives for armed groups to comply with the rules of international humanitarian law. Because of the fact that there is no combatant status in internal armed conflict,[803] fighters are not entitled to participate in hostilities. Despite this mere action being not criminalized in international criminal law, they are likely to face prosecution for their participation in combat if they fall into the hands of the state armed forces.[804] Accordingly, a substantial number of the participants in internal armed conflicts 'operate from the outset in a sphere of illegality and are liable for prosecution for their participation in hostilities even if they *do not* violate any norm of IHL.'[805] Apart from not being forbidden by IHL to directly participate in hostilities and to be entitled to destroy military targets, these fighters do not enjoy any other privileges under IHL, such as the right to prisoner of war status. These are privileges which give regular combatants in international armed conflict an important incentive to comply with the law. Accordingly, the weaker party is expected to 'play by the rules that predetermine its defeat.'[806] The burden of obeying the law rests on their shoulders and they are likely

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[799] Article 1 Additional Protocol II.
[800] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 201.
[801] For instance, in *Haradinaj*, the ICTY Trial Chamber took note of the fact that the Kosovo Liberation Army (KLA) used tactics such as ambushes on police convoys, attacking police checkpoints using hit and run tactics, and widely dispersing throughout the province, trying to stretch the police forces so that a number of soft targets were created, para 87. Cited in Id. at 201.
[802] Geiss, "Asymmetric Conflict Structures", at 766.
[803] See Chapter 6 of this dissertation.
[804] This is the reason why in Additional Protocol II the drafters included Article 6(5) that recommends that 'at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible Amnesty to persons who have participated in the armed conflict.'
[805] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 234.
[806] Benvenisti, "The Legal Battle to Define the Law on Transnational Asymmetric Warfare", at 342.

to find such law 'morally questionable and certainly not worthy of compliance, all the more so if – as is often the case – the powerful side happens to be (or is regarded by the weak opponent as) the aggressor.'[807]

Accordingly, the weaker side has strong incentives to violate the law. One of these incentives is related to the procurement of a strategic gain in front of another party benefiting from military superiority. Very often, the weaker side fights from within urban centres and in these situations, 'the temptation always has been very great to use the civilian population as a kind of hostage, by hiding military installations amongst concentrations of civilians, and operating with the advantage of suspense from civilian camouflage.'[808] Fighters deliberately mingle with the civilian population or otherwise abuse the protection that the law grants to civilians, such as using them as human shields.[809] In addition, fighters waging guerrilla war, as well as child-soldiers, do not distinguish themselves from the civilian population, in order to be less easily targetable. The blurring of civilian and lawful military targets means that assessing the lawfulness of military operations in such a context is extremely challenging. In addition, as we have seen above, organized armed groups have the tendency to avoid attacking well-defended targets, preferring instead to strike weakly defended objectives. Indeed, if 'unable to identify any military weaknesses of a superior enemy, the weaker opponent may ultimately see no other alternative than to aim for the stronger state's soft underbelly and attack civilians or civilian objects directly, in outright violation of the principle of distinction.'[810] These attacks are made for the purpose of demonstrating that the state armed forces are 'incapable of providing security and are, therefore, illegitimate.'[811] Another objective may be to cause the state armed forces to respond disproportionately, causing extensive civilian casualties, and thus eroding their support from the people. In this way, rebels attempt to gain popular support for their efforts, internally and internationally, by delegitimizing the actions of the government armed forces, showing their incapacity in providing security to the civilian population. For instance, the 'constant attacks in

[807] Id., at 342.
[808] Oeter, "Comment: Is the Principle of Distinction Outdated?", at 56.
[809] On the question of the blending of fighters within civilians, see Smith, R., *The Utility of Force the Art of War in the Modern World* (Penguin Books. 2005). Especially Chapter 3 and the six trends that characterize what he calls 'war amongst people'.
[810] Geiss, "Asymmetric Conflict Structures", at 766.
[811] Civilian Casualty Mitigation, at. Point 1-22.

Afghanistan and Iraq show that this tendency is increasing. Avoiding the risks of attacking well-protected military installations, it enables the weaker opponent to wage an offensive war on the television screens and in the homes of the stronger state and to benefit from the repercussive effects of mass media coverage.'[812] In so doing, the organized armed groups often exploit civilian casualties for their propaganda purposes.

Also, as we have seen above, the weaker party can resort to perfidy or target civilians in order to harm its opponent. The temptation is big for them to disregard completely traditional concepts of distinction and make the civilian population the primary target of violence, 'in order to subvert the power and the authority of the party exercising control over a territory.'[813] Lastly, the targeting of the civilian population is also conducted sometimes in order to intimidate civilians into cooperating with organized armed groups.[814]

In addition, as briefly seen above, what has changed in present-day internal armed conflicts is related to the geopolitical and technological context in which non-state actors operate today. Globalisation has enabled non-state actors to engage states more effectively and also transnationally.[815] Improvements in transport technology, the information revolution and the globalisation of the economy have enabled them to move, communicate and transfer capital faster and more easily.[816] Ultimately, the hallmark of today's internal armed conflicts is their increasing fragmentation and the number of armed groups operating in a great number of regions throughout the world.[817] This is facilitated by the decentralization of the war economy, which is reliant on looting, the exploitation of natural resources, the trade in drugs and arms

[812]Geiss, "Asymmetric Conflict Structures*",* at 766.
[813] Oeter, "Comment: Is the Principle of Distinction Outdated?", at 56.
[814] See for instance the notable case of the Lord Resistance Army in Uganga.
[815] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 122.
[816] Keck, "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare", at 10; See also generally Holsti, K.J., *The State, the War and the State of War* (Cambridge University Press. 1996).
[817] The Secretary General, 'Report of the Secretary General on the Protection of Civilians in Armed Conflicts' (8 September 1999) UN Doc S/1999/957, para 8: 'In today's armed conflicts,… the violence is frequently perpetrated by non-state actors, including irregular forces and privately owned financed militias'; Report on the Protection of Civilians in Armed Conflicts' (30 March 2001) UN Doc S/2001/331, para 65: 'The forms of conflict most prevalent in the world today are internal and … involves a proliferation of armed groups'.

and other criminal activities.[818]

The Result

So today, state armed forces fighting organized armed groups find themselves in situations that have changed drastically in recent decades. We are witnessing a continuous shift of the battlefield into civilian population centres and this is leading to an increasing intermingling of civilians with armed actors, which facilitates their involvement in activities more closely related to military operations.[819]

This shift of the battlefield into urban centres means that people could appear to be civilians, but also appear to be involved in military activities. So, this blurring of the lines between those who participate in the fighting, and those who do not, renders the dividing line between combatants and civilians not readily visible, either on the ground or in the law. This in turn gives rise to confusion and uncertainty as to the distinction between legitimate military objectives and civilians protected against direct attacks.

This situation makes it difficult to apply any rules in the conduct of hostilities. It is therefore all the more necessary to find ways to distinguish civilians from the combating forces, as well as distinguishing civilians who directly participate in hostilities from the ones who do not, as blurring of the line of distinction between combatants and civilians means eroding the principle of distinction as such, with the civilian population as the unavoidable victim of any such strategy. Indeed, the ultimate result is that too often civilians fall victim to erroneous or arbitrary targeting, and state armed forces, being unable to properly identify their adversary, 'run an increased risk of being attacked by persons they cannot distinguish from the civilian

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[818] The Secretary General, 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (16 October 2002) UN Doc S/2002/1146.

[819] Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, at p. 11. See also Melzer, N., "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law", in *The Right to Life*, (Christian Tomuschat, et al. eds., 2010), at 152.

population.'[820] This in turn creates extreme tension for the soldiers who will have the tendency to shoot first and think later.

Accordingly, nowadays, modern military asymmetry threatens to brush aside the principle of distinction altogether. If the conflict is everywhere, the traditional spatial limitation of legitimate force vanishes, as force may be exercised anywhere where a military objective may be found. The concept of 'military objective' therefore becomes a cornerstone of limiting the use of force and a certain revisionism towards traditional concepts of 'military objective' is arising.[821]

The result of all of this is that the risks for civilians and the civilian population are significantly increased. Civilians are caught in the middle of violence; they are held hostage by all the parties to the conflict in which they find themselves. In this constellation, compliance with IHL norms related to the conduct of hostilities, in particular the principles of distinction, proportionality and the obligation to take precautions prior to an attack, is of the utmost importance.

Conclusion

Internal asymmetric conflicts differ in fundamental respects from the conception of war that is embodied in classic International Humanitarian Law. Instead of states and state-like entities that control territory and engage in sustained military action, these conflicts 'feature militias, paramilitaries and loosely organized armed groups for whom military victory is impracticable, inefficient or insufficient to achieve their aims.'[822] Accordingly, the failure of this branch of law to protect civilians lies in a fundamental disconnection between the reality of these conflicts and the conception of the law that should be applied to them. In light of all these problems, we may very well wonder whether we should accept the erosion of the principle of distinction as

[820] Melzer, "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law", at 152.
[821] See Chapter 6 section II.
[822] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 236.

something inevitable where the law cannot cope anymore with the reality. Can traditional IHL still stem the flood of escalating violence, 'create legal dams and try to channel all the potential forms of warfare into the bed of restricted, but legitimate means and methods of warfare?'[823] That is the question we are going to analyse throughout the rest of this dissertation.

In the coming Chapters, we will clarify the legal regime related to the principle of distinction under IHL. We will analyse the uncertainty that surrounds internal armed conflicts, as to who is a combatant, who is a civilian and when civilians lose their protection. It will be necessary, in the first place, to determine the different categories of persons that exist under the law of armed conflict. We have to find ways for parties to the conflict to determine who is targetable and who is protected, and in which circumstances a protected person loses that status. It would also be useful to understand how membership in an armed group can be distinguished from simple affiliation with a party to the conflict for which the group is fighting – in other words, membership in the political, educational, or humanitarian wing of a rebel movement.

After having determined the different categories of person created by IHL for the purpose of the principle of distinction, there are follow-up questions raised by the blurring of the lines of distinction. These centre on the identification of legitimate military objectives, the application of the proportionality principle and precautionary measures. These questions will also be analysed thoroughly. Ultimately, I will examine how IHL does regulate the actual conduct of hostilities of an attacker in order for this principle to be implemented in practice. To do so, I will look at the prohibition of direct attacks and indiscriminate attacks. I will also analyse the requirement of proportionality of attacks and the duty to take all feasible precautionary measures in attacks, before engaging in an analysis of disproportionate attacks. Ultimately, the question of when civilians lose their protection will be considered, before we question the pertinence of the law on the conduct of hostilities in non-international armed conflict. It will be submitted that the regulation of non-international armed conflicts having asymmetric features requires a different structure to have any effect on the parties. The emerging notion of a regime of gradation in the

[823] Oeter, "Comment: Is the Principle of Distinction Outdated?", at 55.

use of force will be proposed as an alternative solution. But in the first place, we are going to study how the principle of distinction is delineated in treaty and customary IHL.

Chapter 6:

Constitutive Elements of the Principle of Distinction – Personal Dimension

Introduction

Following from the fact that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'[824], the choice of means and methods of harming the enemy cannot be unlimited. As we know, the primary goal of international humanitarian law is to protect the victims of armed conflict and to regulate the conduct of hostilities according to a careful balance between military necessity and humanity.[825] According to the principle of humanity, war is to be waged against the enemy's armed forces, not against its civilian population. Attacks are to be directed at military targets, not at civilian objects. The principle of humanity requires the minimising of unnecessary suffering of combatants and incidental injury to civilians in armed conflict. It 'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.'[826] Military necessity is a constraining principle whose protective value forbids attacks that endanger civilians and that cannot be justified for any military purpose, such as attacks on undefended localities or the arbitrary destruction of civilian property.

The objective of this Chapter is to elucidate how the different categories of persons in the law of internal armed conflict are to be distinguished from each other. Unlike human rights law, IHL places crucial emphasis on the different categories of individuals, and enacts rules regulating the behaviour of each category. Military

[824] St Petersburg Declaration, Preamble.
[825] See Chapter 14 for an analysis of the principles of military necessity and humanity.
[826] UK, *Manual of the Law of Armed Conflict,* Section 2.4 (Humanity).

operations are to be conducted against the enemy's armed forces and its military objectives. Therefore, the principle of distinction between fighters, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are supposed not to participate directly in hostilities and must be protected against the dangers arising from military operations, constitutes the heart of IHL. This principle underpins all military operations, regardless of the nature of the conflict. The duty to distinguish between combatants and civilians is the most fundamental principle of the law of armed conflict,[827] upon which the edifice of international humanitarian law rests. For the purpose of operational facilitation, as well as for the protection of civilians, this fundamental principle of distinction must be clear. Under this principle, parties to an armed conflict must distinguish between combatants and civilians, and between military and civilian targets, and must not intentionally attack civilian persons and objects. This rule 'may seem straightforward and obvious, but complications arise on a number of fronts,'[828] and indeed the devil is in the detail. Generally speaking, civilians not engaged in the hostilities should be protected from the dangers arising from military operations. Therefore, as a rule, 'civilians who are not directly participating in hostilities must not be the subject of direct attack, and any deaths resulting from a direct intentional attack on them could be construed as arbitrary killings.'[829] It follows from this principle that civilians and civilian populations, comprising all persons who are civilians, are subject to protection.

Transposing this rule to the context of an internal armed conflict, fighting is a contention between armed parties through their respective armed forces. While IHL permits the targeting of combatants, it does not permit attacks on civilians unless and for such time as these individuals take a direct part in hostilities. But this rule is even less straightforward to apply in internal armed conflicts, where state armed forces are

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[827] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para. 1863. See also Kretzmer, D., "Civilian Immunity in War: Legal Aspects", in *Civilian Immunity in War*, (Igor Primoratz ed., 2007), at p. 88; McDonald, A., "The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation in Hostilities" (*Spotlight On Issues of Contemporary Concern In International Humanitarian Law and International Criminal Law* 2004), at 5.

[828] Lubell, N., "What's in a Name? The Categorisation of Individuals under the Laws of Armed Conflict", 86 *Journal of International Peace and Organization* 83, (2011), at 87.

[829] Jachec-Neale, A., "The Right to Take Life: Killing and Death in Armed Conflict", in *The Right to Life and the Value of Life, Orientations in Law, Politics and Ethics*, (Jon Yorke ed., 2010), at 129.

fighting against organized armed groups that seem to have no incentive to abide by this principle, let alone other relevant provisions of IHL.

In the coming section, we will examine the different categories of persons that we find in internal armed conflict, in order for the principle of distinction to be implemented. As we will see, it is a seriously challenging exercise to determine the status of persons in this type of conflict.

Historical aspect of the principle of distinction

As we have seen in Chapter 1, the development of the two categories of civilians, entitled to protection from attack, and combatants, permitted to participate directly in hostilities, has been heavily informed by the paradigms of war in which they have arisen. The twentieth century saw a blurring of the distinction between combatants and civilians in armed conflict.[830]

It was not until 1977 and the adoption of the Additional Protocols to the Geneva Conventions that the principle of distinction was codified in an international treaty. But despite its novelty, it has been recognized by the International Court of Justice as one of 'the intransgressible principles of international customary law.'[831] Indeed, in its *Nuclear Weapons Advisory Opinion,* the International Court of Justice, albeit with respect to a situation of international armed conflict, identified the principle of distinction as one of the two cardinal principles of international humanitarian law. It stated that this principle:

> '(…) is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants;

[830] See for instance Nurick, writing in 1945, who identified six factors contributing to the near obsolescence of the distinction: 'The immunity granted to noncombatants is being threatened by recent developments, namely, (1) growth of the number of combatants, (2) growth of number of noncombatants engaged in war work, (3) development of air warfare and the difficulty of confining air attack to military objectives, (4) difficulty of determining what constitutes a military objective, (5) economic measures against civilians in so-called "total" war , and (6) advent of totalitarian states. Nurick, L., "The distinction between combatant and noncombatant in the law of war", 39 *American Journal of International Law* 680, (1945), at 692. See Chapter 1 and 5 for discussions on this.

[831] ICJ, *Nuclear Weapons* Advisory Opinion, para. 79. The second is the principle of unnecessary suffering.

> States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.'[832]

But the reference by the Court to the fact that the principle of distinction constitutes a cardinal principle of IHL as a whole, should be interpreted as also applying to non-international armed conflict. Because of the fact that they constitute intransgressible principles of customary international law, the Court further stated that 'these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them.'[833] The adjective 'intransgressible' seems to imply that 'no circumstances would justify any deviation' from the principle.[834] Accordingly, in the words of the Court, the principle of distinction is a 'cardinal principle'[835] that constitutes the 'fabric of international humanitarian law'.[836] However, despite being a cardinal principle of IHL, the principle of distinction is facing a whole array of obstacles to its respect. Some of them will be carefully analysed in the coming sections.

The Different Categories of Persons in Non-International Armed Conflicts

Reasons for the difference between international and non-international armed conflicts

Absence of combatant status in non-international armed conflict

In internal armed conflicts, it is especially difficult to distinguish between civilians and fighters and between civilian objects and military objectives. Indeed, it is in the nature of these conflicts that 'ordinary civilians are relied upon for shelter, food, and

[832] ICJ, *Nuclear Weapons* Advisory Opinion, para. 78.
[833] ICJ, *Nuclear Weapons* Advisory Opinion, para. 79.
[834] Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press. 2010), at 9.
[835] ICJ, *Nuclear Weapons* Advisory Opinion, para. 78.
[836] Ibid.

water, particularly by non-state armed groups.'[837] This led Mao Tse-Tung to write that the relationship that exists between the people and the guerrilla groups is that 'the former may be likened to water, the latter to the fish who inhabit it.'[838] This, amongst a plethora of other issues, leads to great difficulties in the practical implementation of the principle of distinction. 'State armed forces, or groups associated with the state, sometimes take the view that civilians who feed and house members of the non-state armed group are taking part in hostilities.'[839] And conversely, 'members of non-state armed groups sometimes take the view that civilians who do not feed and house them are supporting the state forces.'[840] In this sense, both parties take the view that 'if you are not for us you are against us', and we can easily understand the difficulties civilians face in these types of contexts. This is why it is important to delineate clearly the different categories of persons in internal armed conflict, in order for the protection of civilians to be properly upheld.

In internal armed conflict, the identification of the principle of distinction is rendered more difficult for several reasons. First of all, from a practical point of view, it is difficult to distinguish between fighters and civilians and between military objectives and civilian objects, as armed opposition groups are generally not well organised and equipped and are conducting their operations with civilian support. Furthermore, from a legal perspective, the principle of distinction is difficult to evaluate because there is no definition of combatants, nor of civilians. Since there is no combatant status in internal armed conflicts, 'the principle of distinction cannot be conceptualised in the same way as in international armed conflicts. Indeed, the 'reference point' for making the distinction between the different categories of persons, the combatant status, is missing.'[841] Nevertheless, despite this disability, that affects the different types of internal armed conflict, the principle of distinction does indeed protect civilians from the effects of military operations.

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[837] Sivakumaran, *The Law of Non-International Armed Conflict*, at 357.
[838] Mao Tse-Tung, *On Guerrilla Warfare*, at 83.
[839] Sivakumaran, *The Law of Non-International Armed Conflict*, at 358.
[840] Id., at 358.
[841] Kleffner, J.K., "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", LIV *Netherlands International Law Review*, (2007), at 323.

Consequences of the absence of combatant status in internal armed conflict

The first and most important consequence of the absence of combatant status in internal armed is that there is no combatant privilege. Indeed, the status of combatant in IHL comes with both advantages and risks. In the first place, in international armed conflicts, the status of combatant entails the so-called combatant privilege, i.e. the right to directly participate in hostilities.[842] Therefore, the term 'combatant' does not describe persons who fight, but persons who are entitled to fight. This right granted to combatants entitles them to take part in hostilities and to kill other combatants or to launch attacks on military objectives which may result in potential civilian casualties.[843] By virtue of that status, combatants can also be lawfully killed anytime and anywhere, irrespective of what they are doing, until they are captured and/or rendered *hors de combat.*[844] Combatants considered to be military objectives can be attacked even if they pose no threat to an adversary.[845] Only combatants can be targeted by virtue of status alone. The only other people who can be the target of attack are persons who are taking a direct part in hostilities. Combatants who are thus privileged have what is referred to as 'combatant immunity', which is in effect a limited licence to take life and cause destruction.[846] Treaties dealing with non-international armed conflicts are silent about combatant status. 'It can be inferred from this silence that the status of persons who participate in internal armed conflicts is governed by the law of the state where the conflict is taking place.'[847]

Accordingly, because of the lack of combatant status in internal armed conflicts, fighters and any other person, other than the state armed forces, that participate actively in hostilities, do not enjoy the privilege to fight, and may be prosecuted domestically for doing so, even if no IHL norms have been violated. There is no legal requirement for fighters to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. They

[842] See Article 43(2) Additional Protocol I.
[843] See Article 43(2) Additional Protocol I. A combatant cannot be prosecuted for the fact of fighting or for killing opposing combatants.
[844] Article 41 Additional Protocol I.
[845] However, it should be noted that there is a recent move which refute this assertion. See for instance "Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", Part IX; See also Chapter 14.
[846] Fleck, *The Handbook of International Humanitarian Law*, at 613.
[847] Rogers, A., "Combatant Status", in *Perspectives on the ICRC Study on Customary International Humantiarian Law*, (Elizabeth Wilmshurst & Susan Breau eds., 2007), at 102.

are also not legally required to wear uniforms or distinctive insignia or to carry their weapons openly.[848] This makes it difficult to distinguish between fighters and civilians, and accordingly raises concern with regard to the respect of the principle of distinction, which in turn, inevitably endangers civilians.

In internal armed conflict, there is therefore no reference point for the principle of distinction akin to that in international armed conflicts, because in the latter it is the notion of 'combatant' that provides the key element for the principle of distinction. Civilians, in turn, are defined in contra-distinction to combatants: civilians are those who are not combatants.

After this short and general overview of the principle of distinction, we therefore may wonder now how is the distinction to be made in internal armed conflict in the absence of combatant-status? In order to identify clearly the ins and outs of this difficult question, we will first analyse the relevant treaty provisions related to the categories of persons in internal armed conflicts, before considering the customary norms that we can find.

The relevant treaty provisions: Common Article 3

No reference to 'combatants'

There is no reference to the term 'combatant' in Common Article 3 and the provision concentrates on the treatment of those who are not, or are no longer, taking part in hostilities. The provision has an extremely wide field of application and protects persons who do not take an active part in hostilities, as well as members of armed forces who have laid down their arms and those placed *hors de combat*.

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[848] Additional Protocol II does not mention the obligation for combatants to distinguish themselves from the civilian population when they are engaged in an attack or in a military operation preparatory to an attack. Furthermore, the CIHL Study, in its Rule 106, stipulates that the obligation to distinguish is only applicable in international armed conflict. See Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume I: Rules. at 384.

This means that members of organized armed groups do not enjoy immunity from prosecution for the mere fact of participating in the hostilities. From the fact that it is not clear whether Common Article 3 does deal with the conduct of hostilities[849], 'it is a consistent approach not to deal with civilian immunity or related problems in the provision relating to non-international armed conflicts.'[850] The fact that there is no reference to combatants means that in Common Article 3 armed conflicts, there are only persons who participate and persons who do not participate in hostilities. Accordingly, it appears that the differentiation should be made based on conduct.

No reference to civilian either

Common Article 3 does not employ neither define the term 'civilian' or 'civilian population'. The provision only speaks about persons taking no active part in the hostilities. This distinction is upheld by the Commentary, which qualifies the category mentioned as a person 'who does not bear arms.'[851] In addition, from the fact that there is no definition of the notion of combatant in Common Article 3, the opposite definition of civilian cannot stand, for lack of point of reference.

Interpreted broadly, Common Article 3 would preclude attacks on the civilian population as a whole. Article 3(1)(a), however, was largely intended to protect *individuals* in the power of an enemy party, rather than the civilian population as a whole.[852] According to the wording of the provision, it would seem uncontroversial that persons taking no active part in the hostilities are to receive the full protection of the Article. Despite the problems of asymmetry, that make it difficult to distinguish between persons who do and persons who do not participate in hostilities, and in view of the humanitarian thrust of Common Article 3, 'where insurgents have no

[849] See Chapter 2 for a discussion.
[850] Bothe, M., "Direct Participation in Hostilities in Non-International Armed Conflict", *Second Expert Meeting on the Notion of Direct Participation in Hostilities*, The Hague, 25-26 October 2004, (2004). at p. 5.
[851] See Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volum IV, at p. 40.
[852] See Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 667.

recognisable armed forces as such[853] the protection contained in the Article must be afforded to the entire civilian population.'[854]

Distinction between persons taking no active part in the hostilities, and those who do take an active part in the hostilities

With Common Article 3, everything turns around the notion of direct participation in hostilities. However, the Diplomatic Conference hardly discussed the issue of how to define those not taking part in hostilities. The wording of the provision suggests a distinction between, on the one hand, persons taking no active part in the hostilities, who are entitled to humane treatment and enjoy protection against certain acts and, on the other hand, those who do take an active part in the hostilities, who fall outside the protective reach of Common Article 3.[855] However, the article is silent on who exactly are the persons not taking part in hostilities, and who are those who do.[856]

Conclusion Common Article 3

To summarize, Common Article 3 is addressed to 'each Party to the conflict', but does not provide reference to 'combatants' or 'civilians'. Who are 'those not taking part in hostilities'? What does it mean exactly, to take part in hostilities? Are armed opposition groups considered as persons participating directly in hostilities or as members of the armed forces? The text of the provision does not help us here and is inconclusive as to where precisely the dividing line lies for the purpose of the principle of distinction.

[853] E.g. lack of uniform. Of course, they must still attain a certain level of organisation for there to be an armed conflict at all.
[854] Moir, *The Law of Internal Armed Conflict*. In general terms. The population in such circumstances would not, of course, be entirely 'civilian'. On the notion of the doubt as to the status of a person, see further below.
[855] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 324.
[856] See Chapter 13 for an analysis of the loss of protection.

Additional Protocol II

Reference to 'civilians' and 'civilian population' but no definition

Contrary to Common Article 3, Protocol II uses the terms 'civilians' and 'civilian population.'[857] Again, however, Protocol II offers no definition of who is to be considered a 'civilian' for the purpose of internal armed conflict. During the Diplomatic Conference of 1974-77, a more definite distinction between 'civilians' and persons directly engaged in hostilities was proposed. Draft Article 25(1) AP II, adopted by consensus in front of the Committee III of the Diplomatic Conference, defined the concept of civilian negatively in ways similar to Additional Protocol I. According to the draft Article, a civilian included 'anyone who is not a member of the armed forces or of an organized armed group'[858] and 'the civilian population comprises all persons who are civilians'[859]. Although this article was discarded along with draft Article 24 and most other provisions on the conduct of hostilities in a last minute effort to 'simplify' the Protocol,[860] it has been argued that the final text continues to reflect the originally proposed concept of civilian, as this deletion should not be understood to have done away with the basic distinction between members of organised armed groups, on the one hand, and civilians on the other hand.[861] 'The use of the words 'civilian' and 'civilian population', which do not appear in Common Article 3, strongly suggests that, as a matter of substance, not of terminology, the

[857] See for instance Article 5(1)(b) and Articles 13-18 Protocol II. Article 13 Protocol II merely states that '(t)he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. (…) The civilian population as such, as well as individual civilians, shall not be the object of attacks (…) unless and for such time as they take a direct part in hostilities.' As we have seen, Common Article 3 protects "persons taking no *active* part in hostilities".

[858] Draft article 25(1) Protocol II was adopted by consensus in the Third Committee on 4 April 1975 (O.R., Vol XV, p. 320, CDDH/215/Rev.1). See also the ICRC Commentary (October 1973) on the original version of Article 25(1) of the Draft Protocol II submitted to the Diplomatic Conference of 1974 to 1977: "(…) all human beings, who are on the territory of a High Contracting Party on which an armed conflict within the meaning of Article 1 is taking place and who do not form part of the armed forces or of other armed groups, are considered to be civilians. Civilians are protected against the effects of hostilities *vis-a-vis* all parties to the conflict."

[859] Draft Article 25(2). On the drafting history of proposed Article 25 of Protocol II see Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at p. 671.

[860] See for instance, Vol XV, Committee III Report, at § 13, CCDH/50/Rev.1 at p. 234, para. 13. On the simplification of the Protocol see Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 8.

[861] See Id., at 9. See also "Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", at 29, and Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 324.

deletions of Articles 24(1) and 25(1) did not involve a change in the regulatory content of what has become Part IV of Protocol II.'[862] Accordingly, the 'civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations' carried out by these forces 'unless and for such time as they take a direct part in hostilities'.[863]

Therefore, the Protocol, by still using the terms 'civilian population' and 'civilians', and by providing for a loss of their protection if 'they take a direct part in hostilities,' suggests that in internal armed conflicts, there exist two categories of persons (and the sub-category of unprotected civilians) whose treatment is different under IHL, similar to the situation in international armed conflict. 'It is a matter of legal logic: if there are civilians who may not be attacked, there must be non-civilians who may be attacked.'[864] The question, thus, is how to define these 'non-civilians', meaning the armed forces of the organized armed groups and civilians who directly participate in hostilities.

Civilians lose their protection 'if and for such time as they take a direct part in hostilities'

Article 13(3) AP II, by stipulating that civilians are protected 'unless and for such time as they take a direct part in hostilities' confirms the approach that armed forces and armed groups may be attacked at any time; and that civilians may be attacked only when they directly participate in hostilities.[865] Furthermore, a textual analysis of Article 13(3) suggests that the loss of protection under this provision is clearly temporary ('for such time as'). If the only status distinction between categories of persons was based on that formula, there would be no permanent 'non-civilians'.

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[862] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 9.

[863] Article 13(1) and (3) AP II. This interpretation is further supported by the respective contexts in which the Protocol refers to 'civilians' (Arts 13, 14, 17 Additional Protocol II) and the 'civilian population' (title Part IV Additional Protocol II; Arts 5(1)(b) and (e), 13, 14, 17 and 18 Additional Protocol II).

[864] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at p. 9.

[865] See Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 325. See also Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 9 and Y. Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* p. 1453 at para 4789.

Even the government armed forces would become protected civilians as long as they did not fight – certainly an odd conclusion.[866]

Reference to 'armed forces' and 'organized armed groups'

We must now turn to the question of how combatants are defined in the Second Additional Protocol. The solution lies in a systematic interpretation of the Protocol.[867] The existence of, and membership in 'armed forces' and 'organized armed groups' is stipulated in Article 1(1) of the Second Protocol.[868] In other words, the article presupposes as parties, on the one hand, the State with its military organisation (the armed forces) and, on the other hand, an entity which also possesses a high degree of administrative organisation, including its own military organisation.

Organized armed groups

Protocol II, as state practice and international jurisprudence have not unequivocally settled what constitutes an 'organized armed group', and whether or not organized armed groups are considered as being part of the armed forces category or the civilian category (i.e. the armed forces of non-state parties to an armed conflict). Protocol II does not use the term 'combatant'. But it can be argued that a systematic interpretation of the Protocol II, using Articles 1(1) and 13, means that a category of persons who are fighting, in contradistinction to civilians who are supposed not to, does exist. Indeed, Draft Article 25 defined a civilian as 'anyone who is not a member of the *armed forces* or of an *organized armed group*'[869], a terminology that is also used in Article 1(1) of the Protocol. The criteria contained in Article 1(1) are useful guidance for identifying an organized armed group.[870] In addition, it is necessary to stress that if the organized armed group does not meet the criteria as set out in Article

[866] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 9.
[867] Id., at 12.
[868] They have to be 'under a responsible command', have to exercise territorial control and have to be able to carry out 'sustained and concerted military operations'. See Chapter 4 for a detailed analysis of the Second Additional Protocol scope of application.
[869] O.R. XV, CDDH/215/Rev.1, at pp. 320 (emphasis added).
[870] See Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities (23-25 October 2005), at 48.

1 of the Second Additional Protocol this would mean that there is no organized armed group as such under the law and these people should be considered as civilians.

Despite the fact that civilians and combatants are not defined in Protocol II, its wording makes clear that a distinction must be made at all times between civilians and combatants and only combatants may be attacked. Neither the civilian population, nor individual civilians may be made the object of attack unless and for such time as they take a direct part in hostilities. Additional Protocol II provides therefore that those civilians who do unlawfully participate in hostilities shall lose their protection as civilians.[871] They lose their protection, but not their status. 'The classification of civilian under Protocol II applies also to those who take a direct part in hostilities, but they lose their immunity from attack under the provision of article 13(2).'[872]

Conclusion Treaty Law

As we have seen, in internal armed conflicts the main problem in applying norms relating to civilian immunity is that there is no recognized status of combatants. Neither Common Article 3 nor Additional Protocol II uses the term 'combatants.' In fact, combatants are not defined, with the consequence that civilians are not defined either. Furthermore, 'a conceptualisation of the principle of distinction is vitiated by ambiguity with respect to all those non-international armed conflicts which do not reach the relatively high threshold of Additional Protocol II.'[873]

While persons taking a direct part in hostilities in internal armed conflicts are frequently labelled 'combatants', this designation is only used to indicate that these persons do not enjoy the protection against attack accorded to civilians and that they may be attacked. Hence, in the context of an internal armed conflict the term combatant is rather used in its generic meaning and in this dissertation we will better

[871] Article 13(3) Additional Protocol II.
[872] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 672.
[873] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 325.

use the term 'fighter'.[874] Because of the treaty law failure to properly distinguish between combatants and civilians, it is crucial to elucidate the question of how to distinguish the various categories of persons having a different status in the law relating to internal armed conflicts.

Protocol II does not contain specific rules and definitions with respect to the principle of distinction. 'Common sense, at first sight, would suggest that such rules, and the limits they impose on the way war is waged, should be equally applicable in international and internal armed conflicts.'[875] The fact that in 2001 the Convention on Certain Conventional Weapons was amended to extend its scope to non-international armed conflicts is an indication that this notion is gaining currency within the international community. But when we think more thoroughly about this, we realize that the automatic extension of the law of international armed conflict to non-international armed conflict is maybe not a good idea with respect to the protection of civilians.

Common Article 3 and Protocol II have tried to use the notions of IHL to protect inoffensive persons whilst at the same time avoiding any allusion to combatant status. The result is confusing and, as we will see below, has caused controversy that is far from being settled.

Categories of Persons under Customary International Humanitarian Law

The Parties to the conflict must at all times distinguish between civilians and combatants

Rule 1 of the ICRC Study on Customary International Humanitarian Law sets forth the principle of distinction in internal armed conflicts as the necessity to 'distinguish between civilians and combatants. Attacks may only be directed against combatants.

[874] Applicable treaty provisions use different designations, including "persons taking *active* part in hostilities" (Common Article 3), "persons taking *direct* part in hostilities" (Additional Protocol II), "combatant adversary" (Rome Statute), "members of dissident armed forces or other organised armed group (Additional Protocol II), "civilians taking a direct part in hostilities (Rome Statute).

[875] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at xxix.

Attacks must not be directed against civilians.'[876] The simplicity of such a wording should not distract us from the extreme difficulty of applying such a rule in practice in internal armed conflict. Indeed, the ICRC Customary Law Study does not remedy the ambiguity left by treaty law of internal armed conflict on the issue of determination of fighter and civilian status. Rule 1 of the Study sets forth the principle of distinction for all armed conflicts, international and non-international, in language reminiscent of the law on international armed conflicts, in as much as it refers to '*civilians'* and '*combatants'*.[877]

Civilians

Contrary to treaty law, in the ICRC Study, the principle of distinction is formulated around the question of who is a civilian. According to the Study, state practice establishes the customary rule, applicable in international and internal armed conflicts, that 'civilians are persons who are not members of the armed forces', and that 'the civilian population comprises all persons who are civilians'.[878] The Study goes on to explain that this definition is set forth in Article 50 of the First Additional Protocol. However, the definition of 'civilian' and 'civilian population' in the customary law formulation is clearly weaker than its formulation in Additional Protocol I.[879] The ICRC draft Protocol II did not contain a similar provision, but the elements of doubt about a person's civilian character and the presence of persons who are not civilians within the civilian population were included in the draft which was the result of the negotiations at Committee level.[880] Ultimately, as we know, Draft

[876] Id., at 3.
[877] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 325
[878] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 5 at 17.
[879] Article 50 Additional Protocol I reads as follow: 1. A civilian is any person who do not belong to one of the categories of persons referred to in Article 4A(1)-(3) and (6) of the Third Convention and in Article 43 of this Protocol. *In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.* 2. The civilian population comprises all persons who are civilians. 3. *The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.* (Emphasis added to highlight what is missing in the customary rule.) On the question of 'doubt', see below.
[880] Article 25(1) reads as follow: 'A civilian is anyone who is not a member of the armed forces or of an organized armed groups.' Article 25(3) read as follow: 'The presence within the civilian population of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.' and 25(4): 'In case of doubt as to whether a person is a civilian, he or she shall be

Article 25 was not accepted in the plenary because of the reduced possibilities for a government to lawfully attack insurgents. Therefore, at least at first sight, it is not possible to interpret Protocol II in a way as if that rejected provision were still part of it. However, it is argued that the principle of distinction would become meaningless if an attacker was free to assume that persons appearing like civilians were in reality fighters who constituted a legitimate target.[881]

Generic meaning of 'combatant'

As we have seen, there is no treaty law provision for combatant status in the case of internal armed conflict. In an internal armed conflict the entities confronting each other differ and the legal status of the parties involved in the struggle is fundamentally unequal. The ICRC Study identified that state practice establishes that members of state armed forces, except medical and religious personnel, may be considered combatants in both international and non-international armed conflicts.[882] Nevertheless, the use of the term 'combatant' in the context of an internal armed conflict might cause confusion because, as the authors indicate, in those conflicts this designation does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.[883] Accordingly, in the Study, there is a difference between 'combatant', which denotes somebody taking an active part in hostilities, and 'combatant status', which implies more, but does not apply in internal armed conflicts. Therefore, the authors explain that the term 'combatant' is used in its generic meaning in the Study and indicates that these persons do not enjoy the protection against attack accorded to civilians.[884] Thus, in the Study, the term 'combatant' is used in contradistinction to 'civilian' and this is why the principle of distinction is formulated around the question of who is a civilian. It is argued here that in order to avoid confusion about their lacking the entitlement to combatant privilege, it is better to use the term 'fighter' for this category of person.

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considered to be a civilian.' ICRC Draft Article 25, OR XV, CDDH/215/Rev.1, at p. 320, paragraph 4/paragraph 1 last sentence.

[881] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 16.

[882] See Rule 3, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 11.

[883] Id., at 12.

[884] Ibid.

Practice is clear that members of state armed forces are not considered civilians

There are several rules in the Study dealing with combatant status. Therefore, we have to look at various Rules to try to distil some principles.[885] In order to simplify the analysis, we will start by looking at the question of members of state armed forces. Rule 4 establishes that '(t)he armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.'[886] The commentary to this Rule refers in particular to Article 43(1) of the First Additional Protocol, Article 1 of the Hague Regulations and Article 4 of Geneva Convention III, as well as to military manuals and official statements and practice.

The authors of the Study conclude that the process of assimilation of regular and irregular armed forces, as exemplified by Additional Protocol I, is 'now generally applied' and 'it is therefore no longer necessary to distinguish between regular and irregular armed forces. All those fulfilling the conditions in Article 43 are armed forces.'[887] More importantly for us, the commentary stipulates that for the purpose of the principle of distinction, Rule 4 may also apply to state armed forces in non-international armed conflicts.[888] However, it seems that in the absence of a recognition of belligerency or of an agreement to apply the law of armed conflict between state armed forces and insurgents, members of the armed forces of the state have no claim to prisoner-of-war status, their status being governed by domestic law.[889] In addition, according to this Rule, members of organized armed groups are not considered as members of the armed forces of a party to the conflict. Or at least, it is not clear.

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[885] We have seen that Rule 1 sets out the principle of distinction between combatants and civilians. Rule 3 defines combatants. Rule 4 defines armed forces. Rule 5 defines civilians. Rule 6 deals with civilian protection. Rule 106 deals with the requirement for combatants to distinguish themselves from civilians. The ICRC did not find Rule 106 to be applicable to non-international armed conflicts. Rules 107 and 108 deal with the special categories of spies and mercenaries.

[886] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 4 at 14.

[887] Id. at Rule 4 at 16.

[888] Id. at Rule 4 at 14.

[889] Rogers, "Combatant Status", at 125.

Practice is Ambiguous on the Status of Organized Armed Groups

Rule 5 of the ICRC Study states that 'civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.'[890] This Rule also applies to internal armed conflicts 'although practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians.'[891] More specifically, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities, being therefore subjected to Rule 6, or whether members of such groups are liable to attack as such, independently of the operation of Rule 6.[892]

We know that except in rare cases[893] states do not want to grant members of armed groups anything like the status and privileges of lawful combatants.[894] Members of armed opposition groups are simply subject to the domestic law of the state concerned and answerable for any violations of that law that they may have committed. 'Any claim that they are combatants legitimately engaged in an armed conflict will provide no defence unless the domestic law so provides or an amnesty is granted, which may occur if armed opposition groups form the new governments at the end of the conflict.'[895]

According to the ICRC[896] and some scholars, it could be argued that the terms 'dissident armed forces or other organized armed groups … under responsible command' in Article 1 of Additional Protocol II inferentially recognise the essential conditions of armed forces, as they apply in international armed conflict (see Rule 4),

[890] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 5, at 17.
[891] Ibid.
[892] Id. at 19.
[893] For instance on the 19 March 1958, General Salan, Commander-in-Chief of the French forces in Algeria applied a similar regime to the one foreseen for prisoner of war to the NLA combatants. We can also mention Article 2.4 of the agreement reached on 22 May 1992 between the three parties involved in the conflict in Bosnia and Herzegovina. This provision provided that captured combatants would be granted the treatment prescribed by the Third Geneva Convention. See Bugnion, F., "Jus ad bellum, Jus in Bello and Non-International Armed Conflicts", 6 *Yearbook of International Humanitarian Law* 167, (2003), at 195.
[894] Pejic, "Status of armed conflicts", at 94.
[895] Rogers, "Combatant Status", at 125.
[896] While highlighting that practice is ambiguous as to whether members of organized armed groups are considered members of armed forces or civilians. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 17.

and that it follows that civilians are all persons who are not members of such forces or groups.[897] The authors of the Study have chosen a status-based definition, considering that all members of the armed forces (except medical and religious personnel) are regarded as combatants; all others being civilians. Ultimately, the ICRC Study on CIHL identified issues that require clarification. 'Among these issues is the definition of civilians in non-international armed conflicts. This is related to the question as to whether the members of armed opposition groups are civilians who lose their protection from attack because they take a direct part in hostilities or whether they are something akin to armed forces. This has not been clarified by state practice.'[898] And consequently, the Study did not clarify this ambiguity either.

Judicial decisions lead to three different approaches

In internal armed conflict, the determination of who may legally be attacked and at which moment is a very delicate issue and has a direct impact on the protection of civilians against the effects of hostilities. Throughout judicial decisions, we can identify three different approaches to the conceptualisation of the personal dimension of the principle of distinction in internal armed conflicts. With respect to the categorization as 'civilian' or 'civilian population', the case law generally looked at whether those persons were not combatants or did not take a direct part in hostilities. In so doing, the Chambers were making sure those persons were not considered as a military objective. This in turn has a direct impact on the issue of targeting.

The specific acts approach

General

In internal armed conflict, at one end of the spectrum of considering the conditions under which individuals are legitimate object of attack, the distinction between protected persons and potential targets is made between those who do and those who do not actively/directly participate in hostilities. Those who do directly participate in

[897] Id. Rule 5, at 19. See also Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 672.
[898] Henckaerts, "The ICRC Study on Customary International Humanitarian Law - An Assessment", at 51

hostilities would include members of state armed forces and other attached militias, members of organized armed groups, as well as individual civilians who participate in hostilities on a sporadic basis. This is what we call the specific acts approach. This approach is based on the actual *conduct* of individual members of an organized armed group. All individuals that are not members of the state armed forces are therefore civilians. The principle of distinction would rely on the definition of 'direct participation in hostilities'[899], a concept that is highly controversial. This approach would make the legality of an attack upon members of organized armed groups dependent on the specific act of actually directly/actively participating in hostilities. This approach is 'unlikely to be popular with states, whose military personnel and equipment tend to be easily identifiable, legitimate military objectives throughout conflicts.'[900] Indeed, this approach makes any attack dependent of the conduct of the targeted persons. This means that state armed forces could not conduct any attack against known members of organized armed groups, as long as these fighters are not participating directly in hostilities.

Indeed, with the specific act approach, the loss of civilian protection against direct attack will last exactly as long as the specific act that amounts to direct participation in hostilities. This 'approach is based on a restrictive textual interpretation of the phrase 'unless and for such times' and essentially provides that the suspension of civilian protection against direct attack lasts exactly as long as each specific hostile act amounting to direct participation in hostilities.'[901] Prior to and after such direct participation, these persons 'would be entitled to protection, with the exception of the deployment and return from such participation, which is understood to fall within the notion of 'direct participation in hostilities.'[902]

Therefore, with this interpretation, *all* those who directly/actively participate in hostilities are subjected to the same regime: they may not be made the object of attack 'unless and for such time' as they take a direct/active part in hostilities.

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[899] The notion of the loss of protection due to direct participation in hostilities is dealt with in Chapter 13.
[900] Moir, "Conduct of Hostilities - War Crimes", at 491.
[901] Melzer, *Targeted Killing in International Law*, at 348.
[902] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 331.

Military manual and Judicial Decisions

The specific acts approach finds support in several decisions of international tribunals, as well as in some military manuals. With respect to military manuals, for instance, Colombia's Instructors' Manual (1999) explains that 'Civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict).'[903] The specific acts approach has also found some support in several judicial decisions. For instance, in the *Tablada* case, the Inter-American Commission of Human Rights determined that 'when civilians, such as those who attacked the Tablada base, assume the role of combatants, by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate targets. As such they are subject to direct individualized attack to the same extent as combatants.'[904] Then, the Commission further emphasized that 'the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting.'[905] Accordingly, we see that here the Inter-American Commission applied the rule on the loss of protection of civilians due to their active participation in hostilities.[906]

Caveats of the specific acts approach

The specific acts approach has been criticized as being too narrow. It has been argued that it allows civilians to abuse the phenomenon of the 'revolving door' of protection to an extent that makes it virtually impossible for the opposing armed forces to operate.[907]

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[903] Colombia, *Derechos Humanos & Derecho Internacional Humanitario – Manual de Instrucion de la Guia de Conducta para el Soldado e Infante de Marina*, Ministerio de Defensa Nacional, Officina de Derechos Humanos, Fuerzas Militares de Colombia, Santafé de Bogota, 1999, p. 16. See also Côte d'Ivoire, *Droit de la guerre, Manuel d'instruction, Livre I: Instruction de base,* Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 18-19; France, *Fiche didactique relative au droit des conflits armés,* Directive of the Minstry of Defence, 4 January 2000, annexed to the Directive No. 147 of the Ministry of Defence of Defence of 4 January 2000, p. 4; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), at 5.3.3.
[904] *La Tablada* case, para. 178.
[905] Ibid, para. 189.
[906] See also ICTY, *Blagojevic and Jokic* case, (Trial Judgment), IT-02-60-T (17 January 2005), (hereinafter *Blagojevic* Trial Judgment), para 544; *Strugar* Trial Judgment, para 2005; *Prosecutor v. Strugar,* Appeal Judgment, IT-01-42-A (17 July 2008), (hereinafter *Strugar* Appeal Judgment), para 178;
[907] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 60.

Another risk with the specific approach is that it can also undermine the protection of civilians against the effects of hostilities. Indeed, the military can have the tendency to be more inclined to broaden the definition in order to apply it to a wider range of civilians participating in hostilities, albeit not directly *per se*, than what the definition requires originally.

Advantages of the specific acts approach

According to one expert, the advantage of a pure conduct-based approach is that the civilian population remains protected.[908] It is argued that such an approach is better tailored for the protection of civilians in internal armed conflict as it permits mistakes and collateral damage to be reduced. In addition, the specific acts approach could be an interesting approach in the case of ordinary civilians who are unorganized and are not permanent members of a particular group, but who take part in the hostilities only occasionally, whether voluntarily or under coercion. As far as these persons are concerned, this approach is also preferable because their direct participation in the hostilities, and the duration of their activities, is often not a matter of choice but of coercion by an organized armed group.[909] Military action against these individuals would need to be based on actual and immediate hostilities

Furthermore, it is true that this reflects the existing IHL rule on direct participation in hostilities as settled by Article 13 of the Second Additional Protocol and is therefore the closest approach to the letter of the law. In addition, it is submitted here that it also is the best approach to ensure the protection of uninvolved civilians. Indeed, as we will see, what differs with the 'membership approach' is the fact that with the specific act approach, *all* those who directly/actively participate in hostilities are subjected to the same regime: they may not be made the object of attack 'unless and for such time' as they take a direct/active part in hostilities.

[908] Id. at 55.
[909] Id. at 61.

The membership approach

General

At the opposite end of the spectrum of considering the conditions under which persons become legitimate object of attack, the distinction between persons protected from direct attack and potential targets is made according to a status based approach. The membership approach is analogous to the law of international armed conflict. It makes the distinction between on one side, members of armed forces, a category including state armed forces, dissident armed forces, as well as organized armed groups, and on the other side all other persons, which means civilians. Accordingly, these 'fighters' 'would be legitimate targets, regardless of whether or not they are directly/actively[910] participating in hostilities at the time of being made the object of attack, much as combatants in international armed conflicts.'[911] Therefore, with the membership approach, the simple fact of belonging to an organized armed group is itself a direct participation in hostilities. It is a wide approach. Hence, the basic idea of this approach is that, from the perspective of their adversary, members of organized armed groups pose a continuing military threat comparable to the armed forces of an opposing state and could therefore be targeted in the same way as combatants. The assumption is that 'members are going to continue their hostile activities on a day to day basis; therefore the threat does not end and protection remains suspended even when they temporarily interrupt their activities, for example, in order to rest or sleep.'[912]

The membership approach is therefore related to permanent loss of immunity from direct attack that lasts as long as a person is considered as a member of an organized armed group. This approach allows members of the armed forces, both state armed

[910] The Common Article 3 formulation of taking an 'active' part in hostilities is similar to the Second Additional Protocol formulation of taking a 'direct' part in hostilities. The two terms of 'active' and 'direct' are synonymous. See ICTR, *Akayesu* Trial Judgment, para 629. See also Strugar Appeal Judgment, para 173. On difference active/direct see Goodman, R. & Jinks, D., "The ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: an Introduction to the Forum", 42 *New York University Journal of International Law and Politics* 637, (2010). at footnote 18.
[911] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 330.
[912] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 64.

forces and organized armed groups, to be made the object of attack for the duration of their membership. The simple fact of belonging to an organized armed group constitutes in itself a direct and continuous participation in hostilities.

Strengths

It has been argued that there are several strengths to the membership approach. First of all, this approach would be conceptually sound and would accommodate most clearly 'the notion that an armed conflict involves at least two *parties* with their own armed forces, which are equal before the laws of armed conflict. Members of organized armed groups do not act as atomized individuals, but as part of a structured collective whose very purpose is to use armed force.'[913]

Secondly, the advantage of the membership approach would reside in the fact that it does not treat members of organized armed groups as 'civilians'. During the discussions at the Asser/ICRC Experts meeting, several experts stressed that a 'membership approach' would not necessarily lead to an infringement of human rights protection. The logic behind the possible application of a 'membership approach' was to increase protection for, and not to expand lawful targeting of, peaceful civilians.[914]

However, in the third place, this approach would permit the state armed forces to target members of armed groups when they are 'off-duty' or otherwise not momentarily involved in ongoing hostilities. This means that individuals, members of state armed forces, as well as members of organized armed groups, can be targeted irrespective of the actual threat they are posing to those who are firing at them.

[913] Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", at 332.
[914] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 56.

Weaknesses

What is an organized armed group?

However, this approach does have several important weaknesses. One problem is related to how one defines the organized armed group. We have seen that there is no clear and generally accepted definition of this concept. Therefore, the practical identification of what exactly constitutes an 'organized armed group' under IHL governing internal armed conflict, as well as the exact identification of membership in such groups, are also seriously problematic.[915] During the Experts' discussion related to the drafting of the Interpretative Guidance on the notion of direct participation in hostilities, one group of experts suggested that the criteria of Article 1 Protocol II could be useful in identifying an 'organized armed group'.[916] However, such an approach would exclude *per se* all organized armed groups fighting in an armed conflict that does not fulfil the criteria as set by Article 1 of Protocol II. Practically, this would mean that the concept of organized armed group would only be recognized in high intensity armed conflict. Accordingly, this approach would be totally infeasible in situations that remain below the threshold of a full-blown internal armed conflict. In the first place, the fundamental legal distinction between fighters and civilians and between military objectives and civilian objects may be difficult to apply in low intensity internal armed conflicts, as armed opposition groups are often not well organised and equipped and they are conducting their operations with civilian support.[917] Secondly, as we have seen, contrary to Additional Protocol II, there are no criteria laid down in Common Article 3 to define what exactly constitutes an organized armed group. Accordingly, it is submitted here that the only reliable way of implementing the principle of distinction, at least in Common Article 3 armed conflicts, would be to base it on the criterion of 'conduct' and not of 'membership'.[918]

Another proposal has been that the determination of membership of an organized

[915] See above.

[916] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 47.

[917] Fleck, *The Handbook of International Humanitarian Law*, at section 1202, at p. 613.

[918] See further below for a discussion on this.

armed group has to be made according to the facts of each concrete context.[919] In internal armed conflicts there is a wide range of organized armed groups, from highly organized and identifiable groups to forces and factions that can hardly be distinguished from the civilian population. There are several dangers in allowing attacks on 'armed groups' without further specification. First of all, in many internal armed conflicts, membership of organized armed groups is often not permanent in any way comparable to combatants belonging to the armed forces of a state. As one expert argued, 'the fighting force is recruited locally and on an *ad hoc* basis, according to the needs at hand.'[920] In addition, despite the fact that being targetable as a member of an organized armed group has nothing to do with voluntarism and that those persons are targeted because they pose a military threat, it is worth mentioning that in many internal armed conflicts, especially in Africa, where armed conflicts are marked by tribal, communal or ethnic confrontations, membership in an organized armed group is often not on a voluntary basis. Very often, civilians have simply no choice but to join an armed group.

In addition, does the term 'organized armed group' encompass the broad organization involved in the fight (eg Hamas, Hezbollah, the IRA?) or only the armed forces of the group? It is important to realize that 'persons who are involved in the activities of armed groups, whether voluntarily or under pressure, vary, and most of them do not use force.'[921] Furthermore, it is 'not uncommon for governments to label an ethnic group as a whole as a "rebel group", when only some members are using force.'[922] Accordingly, if the mere fact of 'membership' becomes a sufficient justification for direct attacks, uninvolved civilians would inevitably be killed based on wrong presumptions or on mere suspicion, and this is simply not acceptable.

Consequently, one caveat of the membership approach relates to the type of members of organized armed groups who are to be considered legitimate objects of attack. Not every member of an organized armed group can be regarded as a legitimate target

[919] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 48.
[920] Id. at 54.
[921] Doswald-Beck, L., "The right to life in armed conflict: does international humanitarian law provide all the answers?", 88 *International Review of the Red Cross* 881, (2006), at 891.
[922] Ibid.

regardless of his or her personal conduct. In the same way as state armed forces, organized armed groups may include members devoted to functions other than fighting. For instance, non-combatant members of organized armed groups can be cooks, postmen, secretaries, religious or medical personnel, as well as members of the political wing. These persons are not directly participating in hostilities, committing no hostile acts whatsoever. Accordingly, the membership approach is unduly broad and would create an imbalance. Besides the restraints constituted by the presumption of doubt on civilian status and precautionary measures, it would impose almost no restraints on the targeting of members of organized armed groups. More specifically, this would put peaceful civilians at unduly high risk of being victims of collateral damage from attacks against a wide category of allegedly legitimate human targets.[923]

It is therefore submitted that the membership approach is dangerous in terms of protection of civilians against the effects of hostilities. This is so because in practice it is a very difficult exercise to identify membership reliably, 'especially in situations involving opposing armed groups, changing coalitions and the lack of territorial control on the part of the government.'[924] In addition, most organized armed groups have an organized structure, involving the participation of personnel committed to political, administrative, and logistical support. Should these staff members be compared to persons involved in combat functions? And how can one identify clearly who is a member of the fighting force as opposed to the political, administrative or logistical wing, in situations where organized armed groups are conducting their activities in the utmost clandestinity?

The membership approach does not resolve the sporadic participation of civilians

This approach not only leaves the problem of the sporadic participation of civilians

[923] It is to be noted that in a dangerous move in terms of protection of civilians, the San Remo Manual on the Law of Non-International Armed Conflict adopted a purely membership approach. The Manual uses the term 'fighter' (See Rule 1.1.2.), and decided that, for the purpose of the Manual, 'civilians who actively (directly) participate in hostilities are treated as "fighters".' So the Manual not only affirms that members of organized armed group can be targeted at any time, but it also includes into this category civilians who sporadically participate in hostilities. This is simply not convincing, in addition to the fact that this approach puts uninvolved civilians in higher danger of being victims of collateral damage. See Schmitt, M.N., et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary* (International Institute of Humanitarian Law ed., 2006).

[924] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at 54.

unresolved, but it also exposes peaceful civilians to increased risks. Civilians would lose their protection as soon as they take a direct/active part in hostilities. Once they have lost their protection, there is no going back. Accordingly, the membership approach does not solve the problem of civilians sporadically participating in hostilities. Indeed, 'if "membership" – whether in armed groups or in armed forces – was equated with "direct participation in hostilities", there would no longer be any difference between status and conduct.'[925] This problem is exacerbated especially in internal armed conflicts, where the principle of distinction has to be applied exclusively based on individual conduct, as the membership approach is essentially about status.

Conclusion

As we have seen, in internal armed conflict, the 'membership approach' could be based on two theoretical arguments: The first view is to say that members of organized armed groups fall outside the category of 'civilians', and therefore no longer benefit from civilian protection against direct attack. This is so regardless of their individual conduct. The second view considers that members of organized armed groups remain civilians, but that they lose protection against direct attack for the entire duration of membership, since membership as such constitutes a 'continuous form' of direct participation in hostilities. It has been argued that the first analysis more accurately reflects the logic, intention and texts of IHL.[926] However, with either view, the problem of an accurate identification stays the same. This is why the 'membership approach' cannot be applied in a broad and generalized manner, permitting direct attacks against all members of an armed group at all times irrespective of any circumstances. This has led several experts to formulate a 'restricted' or 'limited' membership approach,[927] that would be, according to them, a viable solution with regard to organized armed groups that could be relatively precisely identified.

[925] Id. at 50.
[926] Melzer, *Targeted Killing in International Law*, at 351.
[927] See Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, at pp. 63-65.

An intermediate approach, the ICRC Guidance on Direct Participation in Hostilities

Due to the grave consequences of loss of immunity from direct attack, a third way started to emerge during the Third meeting of Experts on the notion of direct participation in hostilities. During the ICRC/Asser expert meeting of 2005, as the discussion progressed, a comprehensive compromise solution, between the membership and the specific act approaches, began to emerge. The main idea was to restrict the membership approach so as not automatically to allow direct attacks against all members of organized armed groups at all times irrespective of any circumstances.

After a succession of several experts' meetings, and extensive consultations with these experts in their personal capacities, Nils Melzer drafted in 2008 the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.*[928] It is important here to specify that the document does not reflect a common agreement of the experts present, as it was not possible to find such agreement on several contentious issues. Accordingly, the ICRC adopted a document on 26 February 2009 that outlines its own interpretation. However, as noted in the Guidance, this document does not purport to change existing rules, rather to 'reflect the ICRC's institutional position as to how existing IHL should be interpreted.'[929]

The Guidance clarifies three important questions. Firstly, it shed some light on the concept of civilian. Secondly, the meaning of direct participation is carefully analysed and interesting solutions are proposed. And lastly, the document deals with the modalities governing the loss of protection from direct attack. Here we will first analyse the ICRC approach when it comes to the categorization of persons in non-international armed conflicts. Much of the content, particularly in relation to international armed conflicts, is relatively uncontroversial. However, in instances of non-international armed conflict situations, the Guidance is very controversial from

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[928] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. To consult the background papers and meeting reports, please see http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm

[929] Id. at 9.

various, and sometimes conflicting, standpoints.[930] In this section, we will examine the Guidance's withdrawal of civilian status from members of organized armed groups in internal armed conflicts. The Guidance has adopted an intermediate position between the membership and specific acts approaches.

A new notion: the Continuous Combat Function

According to the Interpretative Guidance, 'for the purpose of the principle of distinction in non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.'[931] The Guidance further states that in such type of armed conflict, 'organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ("continuous combat function").'[932] This is a totally new concept. The document further specifies that the 'term organized armed group refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense.'[933] The Interpretative Guidance, therefore, affirms the mutual exclusiveness of the concepts of civilian, armed forces and organized armed groups. By upholding this intermediate approach in such a way, the Guidance in effect withdraws civilian status from members of organized armed groups in internal armed conflicts.

Accordingly, this document constitutes a compromise solution, by creating a new

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[930] See Boothby, W.H., "'And for Such Time As': The Time Dimension to Direct Participation in Hostilities" 42 *New York University Journal of International Law and Politics* 741, (2010); Parks, W.H., "Part IX of the ICRC "Direct Participation in Hostilities" Study: No mandate, No Expertise, and Legally Incorrect", 42 *New York University Journal of International Law and Politics* 769, (2010); Schmitt, M., "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", 42 *New York University Journal of International Law and Politics* 697, (2010); Watkin, K., "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities Interpretative Guidance"", 42 *New York University Journal of International Law and Politics* 641, (2010). But see the careful and detailed reply of Melzer, N., "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities", 42 *New York University Journal of International Law and Politics* 831, (2010).
[931] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 27.
[932] Id. at 27.
[933] Id. at 32.

notion, *continuous combat function*.[934] The idea is the following: when an individual belongs to an organized armed group *and* has the continuous function of taking a direct part in the hostilities, he or she will not be a civilian anymore (in the sense of the principle of distinction) and can be the object of attack in the same way as a combatant, but without having the benefit of combatant privilege.[935] Here again, we see the problem of a supposed theoretical belligerent equality that in practice is non-existent.

With this approach, the ICRC suggests that states 'distinguish combatants from noncombatants by examining the individual's *functions or activities*.'[936] The notion of *functional combatancy* is a concept denoting the assumption by members of the armed forces of a state or non-state party to the conflict of a continuous function involving his or her direct participation in hostilities on a regular basis ('combatant function').[937] Melzer explains that

> 'in terms of personal scope, the concept of *functional* combatancy in non-international armed conflict does not exactly correspond to the concept of *privileged* combatancy in international armed conflict.[938] Under customary international humanitarian law applicable in non-international armed conflict, the notion of functional 'combatant' includes (1) members of regularly constituted State armed forces and dissident armed forces assuming combatant function and (2), because membership in irregularly constituted 'organized armed groups' already presupposes combatant function, all members of such groups. Civilians, including those directly participating in hostilities, do not qualify as functional combatants.'[939]

It is important here to mention that in internal armed conflict the legal consequences of functional combatancy do not imply immunity from prosecution for lawful acts of

[934] See Id. Commentary, at 33.
[935] See Id. Recommendation n°2, Commentary, at pp. 31-36.
[936] Keck, "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare", at 22 (original emphasis).
[937] Melzer, *Targeted Killing in International Law*, at 328.
[938] *Functional* combatancy is *narrower* than *privileged* combatancy in that it requires the actual assumption of combatant function for a party to the conflict. On the other hand, *functional* combatancy is *wider* than *privileged* combatancy in that it cannot be lost through individual conduct such as failure to distinguish oneself from the civilian population or qualification as a mercenary. (original emphasis).
[939] Melzer, *Targeted Killing in International Law*, at 328.

war. In addition, in contrast to civilians directly participating in hostilities, '*functional* combatants do not regain protection against direct attack between specific military engagements, but remain subject to direct attack for as long as they assume combatant function within the armed forces of a party to the conflict.'[940]

The whole idea of this approach is therefore to restrict the 'membership approach' so as not automatically to allow direct attacks against all members of an organized armed group at all times irrespective of any circumstances. Two types of restriction are related to this approach. The first restriction is related to organised armed groups that can be relatively precisely identified. Secondly, it is restricted to 'fighting members' of such groups. Accordingly, a member of an organized armed group having a continuous combat function could be attacked at any time, except if he is *hors de combat*, on account of his status 'as a presumed member of such a group and not on account of his *behavior* at the time he is targeted.'[941] However, an individual belonging to an organized armed group, but not having a continuous combat function, (not belonging to the military branch of the organized armed group, but belonging to the political wing for instance) would keep his civilian status and could not be attacked unless he is directly participating in hostilities, and for the duration of this participation.[942]

Withdrawal of civilian status

As just explained, with this new concept of continuous combat function, the ICRC Interpretative Guidance in effect withdrew civilian status from the organized armed groups in internal armed conflicts. According to the Guidance, 'members of an organized armed group constitute the armed forces of a non-State party to the conflict and consist only of individuals who exercise continuous combat functions.'[943] This clearly means that an individual can be targeted based on his presumed status rather than on his conduct.

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[940] Id. at 328.
[941] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 200 (emphasis added).
[942] *ICRC Guidance*, Recommendation n°2, commentary, at pp. 31.36.
[943] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 27.

The ICRC justified the withdrawal of civilian status from members of organized armed groups exercising continuous combat function, while not granting them combatant status, by the principle of distinction. According to the Guidance, to consider membership of an organized armed group as 'simply a continuous form of civilian direct participation in hostilities' and, consequently, to regard members of organized armed groups as 'civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership' would 'seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflict whose entire armed forces remain part of the civilian population.'[944] For the ICRC, there was therefore a 'need to distinguish between civilians and those who act like the armed forces of a party to the conflict.'[945]

Rogers disagrees with the move of including members of armed groups in the categories of those susceptible to attack, as he does not see any problem with the fact that entire armed forces would remain part of the civilian population. 'They would be civilians taking a direct part in hostilities. That would have the benefit of supporting the mutual exclusivity approach to combatant and civilian status adopted by Protocol I.'[946] For him, and rightly so in my opinion, it is not clear what the second sentence of Recommendation 2 is intended to achieve.[947] 'Does it qualify the first sentence, or does it convey a form of quasi-combatant status on those with a continuous combat function?'[948] He finds this 'unsatisfactory and would have preferred to see 'continuous combat function', in both international and non-international armed

[944] Id. at 28.
[945] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 200.
[946] Rogers, A.P.V., "Direct Participation in Hostilities: Some Personal Reflections", *48 Revue de Droit Militaire et de Droit de la Guerre* 143, (2009), at 158.
[947] Recommendation 2 reads as follow: 'For the purpose of the principle of distinction in *non-international* armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous combat function is to take a direct part in hostilities.' *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 27.
[948] Rogers, "Direct Participation in Hostilities: Some Personal Reflections", at 158.

conflicts, regarded as continuing specific acts.'[949] This idea is dismissed in the commentary on the grounds that it would create parties to an armed conflict whose entire armed forces remain part of the civilian population.

The Guidance further explains that persons fulfilling a continuous combat function must be distinguished 'from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat function.'[950] The difference is slight, albeit important. Individuals fulfilling a continuous combat function are 'recruited, trained, and equipped…to continuously and directly participate in hostilities' on behalf of an armed group, whereas civilians directly participating in hostilities on a spontaneous or sporadic basis are more akin to reservists, who retain civilian immunity 'until and for such time as they are called back to active duty.'[951] It is necessary here to stress that a civilian who is directly participating in hostilities loses his civilian protection for the duration of his participation. However, he does not lose his civilian status.

Critics of the notion of Continuous Combat Function

The denial of civilian status to members of organized armed groups has attracted several critics. Hampson for instance considers that 'superficially, it might appear that the proposal supports the principle of the equality of belligerents, in that both parties are recognized as having armed forces. In fact, however, the members of an organized armed group exercising continuous combat function lose civilian immunity from attack but do not gain the privileges of a combatant.'[952] It is indeed difficult to see how such a move can support belligerent equality.

In addition, the identification of who exactly constitutes the armed wing of an organized armed group is a difficult exercise. While specifying that the term

[949] Id. at 158.
[950] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at pp. 33-34.
[951] Keck, "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare", at 23.
[952] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 200-201.

organized armed group refers exclusively to the armed wing of such groups,[953] the Guidance acknowledges the difficulty of apprehending the concept of membership in groups other than dissident armed forces, as these are irregularly constituted groups having no basis in domestic law.[954] The decisive criteria presented by the Guidance, the concept of continuous combat function, is therefore 'whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.'[955] This function requires 'lasting integration into an organized armed group'[956] and excludes from this category civilians assuming support functions to the group.[957] Accordingly, in the opinion of the ICRC,

> 'in practice, the principle of distinction must be applied based on information which is practically available and can be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs or certain weapons.'[958]

However, first of all, as we have seen above, there is no legal obligation for members of organized armed groups to distinguish themselves in internal armed conflicts. Furthermore, the very survival of members of armed groups is based on the fact that we do not recognize them.[959] That is why the Guidance further acknowledges that the continuous combat function 'may also be identified on the basis of conclusive *behaviour'*.[960] So we are back to identification by conduct, rather than status. Indeed, it is difficult to see how continuous combat function can be established other than by conduct. Accordingly, ultimately the loss of status does not depend on membership of a party to the conflict, or even on membership of an armed group belonging to such a party, but rather on a behaviour test.

It is submitted here that the continuous combat function is not helpful to the discussion, for several reasons. In the first place, does this concept constitute a new

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[953] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 32.
[954] Ibid.
[955] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 33.
[956] Id. 34.
[957] Ibid.
[958] Ibid. at 35.
[959] See Chapter 5.
[960] Ibid. at 35. (emphasis added).

legal category of persons in internal armed conflicts?[961] The language used does not suggest such a thing, but the Guidance further states that these persons 'cease to be civilians'. So 'if they are not civilians, and if the concept of combatant is limited to state armed forces in international armed conflicts, then the ICRC approach comes remarkably close to promoting the creation of a third category of individuals under IHL.'[962] We have the same problem with the approach of considering members of organized armed groups as civilians participating in hostilities on a continuous basis, read with a wide interpretation of the temporal element to include the time between repeated acts of participation. The crucial difference between the two approaches is that 'the ICRC continuous combat function approach might be understood as creating a third category of individuals, whereas the other approach would see these fighters as civilians who lose their protection.'[963] But ultimately, the continuous combat function cannot be established otherwise than by conduct, and we are therefore back to a behaviour test. Indeed, 'the loss of status does not depend on membership of a party, or even of membership of an armed group belonging to such a party. It is also necessary to establish that the individual exercises a continuous combat function.'[964]

Another issue is whether this is a useful and necessary approach. In other words, 'could a similar result have been achieved without the questionable new labelling?'[965] It is submitted here that a similar practical effect could have been reached by adopting an approach which combines a narrow interpretation of the constitutive elements of direct participation, with a wider interpretation of the temporal element to include the time between repeated acts of participation. Essentially, both approaches require a determination of whether an individual is engaging in acts of hostilities, and thus entail 'similar challenges in determining whether an individual is indeed engaged in repeated acts / continuous combat, and remain in need of further clarification for a practical solution.'[966] We may think that, given the greater flexibility introduced as a result of the clarification of 'unless and for such time as' and 'direct participation', 'it

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[961] Lubell, What's in a Name? "The Categorisation of Individuals under the Laws of Armed Conflict", at 93.
[962] Ibid.
[963] Ibid.
[964] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 200.
[965] Lubell, "What's in a Name? The Categorisation of Individuals under the Laws of Armed Conflict", at 93.
[966] Id. at 94.

is not clear why it was thought necessary to address the status of a fighter in an internal armed conflict at all. After all, no change appears to have been introduced to the status of a civilian who takes a direct part in hostilities in international armed conflict.'[967] Indeed, the Interpretative Guidance states that 'in order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict.'[968]

The continuous combat function concept still suffers from 'similar challenges in determining whether an individual is indeed engaged in repeated acts / continuous combat (in the usually expected absence of published lists of card-carrying membership of armed wings of groups), and remains in need of further clarification for a practical solution.'[969] The continuous combat function invented a third category of persons in internal armed conflict; persons that are not entitled to combatant status, but who cease to be civilians. It should be recalled that the law does not define such a third category. It is submitted here that this approach may not have been the best and does not clarify the law in a way that enhances protection. Furthermore, this constitutes a licence to kill all persons suspected of being active members of an organized armed group.[970] How can we be sure that the targeted persons are indeed real fighters? It seems to me that such a licence creates incentives for governments to jump as soon as possible from the law-enforcement model, which restricts their actions because of the obligation to observe due process guarantees, to the conduct of hostilities model, which gives them legal ground to enjoy almost unrestricted discretion in targeting their suspected rebels. It would seem to me that these difficulties should lead us to the conclusion that the continuous combat function is simply unacceptable in terms of the protection of civilians against the effects of hostilities. The identification of members of an organized armed group is extremely

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[967] Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", at 200.

[968] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 23.

[969] Lubell, "What's in a Name? The Categorisation of Individuals under the Laws of Armed Conflict", at 94.

[970] See Philip Alston critiques on the challenges the continuous combat function entail in terms of erroneous targeting: Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum Study on targeted killings, Human Rights Council A/HRC/14/24/Add.6 (28 May 2010) at paras. 65-69.

difficult, as the situation in Afghanistan clearly demonstrates.[971] It is therefore submitted that this concept enhance arbitrariness, as no objectively ascertainable criteria were put forward in terms of the identification of a person's affiliation with an organized armed group.

The definition of civilian in the Guidance

As we have seen above, there is no definition of civilian in the law of non-international armed conflict. Accordingly, the identification of this category of persons has to be made in contra-distinction to the other categories. The ICRC Guidance states that 'for the purpose of the principle of distinction in *non-international* armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.'[972] In addition, civilians directly participating in hostilities, but not being integrated thereby into organized armed forces or groups, will keep their status of civilians, but will lose protection against attacks. Their status will not change, despite losing the protection granted to civilians for such time as their direct participation lasts. Accordingly, the benefit of civilian protection is subject to the exception of their non-involvement in the hostilities, at least directly.

Practically speaking, will be considered as civilians protected from direct attack the civilian population not directly participating in hostilities, even though some civilian activities may contribute to the war effort, persons who provide indirect support to a belligerent party by distributing or storing military material outside of combat zones, supplying labour and food, serving as messengers, or disseminating propaganda. As they are not posing any immediate threat to the enemy, these persons cannot be directly attacked. However, by their presence in or near military objectives, they are at risk of death or injury incidental to direct attacks against these military targets. It is to be noted that persons providing support to organized armed groups are subject to

[971] Geiss, R. & Siegrist, M., "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", 96 *International Review of the Red Cross* 11, (2011), at 23.
[972] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Recommendation No.2 at 27.

prosecution by the government party for giving aid to the enemy. Such prosecutions must conform to the obligatory fair trial guarantees set forth in Common Article 3.

But the story does not end here. Indeed, the prohibition of direct attack against civilians face difficulties in view of the specificities related to non-international armed conflict, whereby the shift of the battlefield in urban areas entails that people could appear to be civilians, but also appear to be involved in military activities. The blurring of the lines between those who participate in the fighting, and those who do not, renders the dividing line between combatants and civilians not readily visible, either on the ground or in the law. This is the reason why the notion of the doubt as to the status of person is unavoidable.

Doubt as to the status of a person

We have seen the difficulties linked to the determination of a person’s status in internal armed conflict. Indeed, the determination of membership in organized armed groups is very difficult because of the wide variety of groups that exist. A minority of them are relatively stable, possess clear organizational structure, are identifiable because they wear uniforms or other distinctive signs (at least occasionally), and occupy part of the territory of the state against which they fight.[973] ‘At the opposite end of the spectrum are armed groups, which meet the threshold of being considered ‘organised’ within the meaning of the laws of armed conflict, yet whose organisation is more amorphous, whose members do not distinguish themselves from the rest of the population, and who do not exercise control over territory.’[974] In between these two poles, there is a whole array of different types of organised armed groups. When it comes to the identification of the conduct of a person, the question of doubt arises also with respect to situations where belligerents are facing various degrees of civilian participation in hostilities.

[973] We can think, for instance, of the FARC in Colombia and the LTTE in Sri Lanka.
[974] Kleffner, “From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, at 334.

The determination of whether a person is a fighter, or a person currently directly participating in hostilities, will be more difficult in some armed conflicts than in others. It will depend on the availability of sufficient intelligence. Indeed, under IHL the rules on precautionary measures impose a duty to gather intelligence in order to establish the status of a person and to do everything feasible to verify that targets are military objectives.[975] The general presumption in favour of civilian status in case of doubt will be of utmost importance when the intelligence is ambiguous or unclear.

Element of doubt about a person's civilian character in internal armed conflict

The *sine qua non* condition for the upholding of any protection of a civilian in an internal armed conflict is the presumption of doubt on the civilian character of a person. However, the existence of this norm is not clear-cut for this type of armed conflict. For international armed conflicts, we find it in Article 50(1) of the First Additional Protocol, which reads that 'In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.'

Common Article 3

Despite no mention of the presumption of doubt in Common Article 3, it has been argued that because of the difficulty of distinguishing between civilians and guerrilla fighters in low intensity armed conflicts, and in view of the humanitarian thrust of this provision, 'the answer to this problem must be that where insurgents have no recognisable armed forces as such, the protection contained in the Article must be afforded to the entire civilian population.'[976]

Draft Additional Protocol II

The presumption of doubt about a person's civilian character was included in the draft which was the result of the negotiations at Committee level.[977] Ultimately, as we

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[975] See Chapter 11 for a discussion on precautionary measures.

[976] Moir, *The Law of Internal Armed Conflict*, at 59.

[977] Article 25(1) read as follow: 'A civilian is anyone who is not a member of the armed forces or of an organized armed groups.' And Article 25(4): 'In case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian.' ICRC Draft Article 25, OR XV, CDDH/215/Rev.1, at p. 320. paragraph 4/paragraph 1 last sentence.

know, Draft Article 25 was not accepted in the plenary because of the reduced possibilities for a government to lawfully attack insurgents. Therefore, it is not possible to interpret Protocol II in a way as if that rejected provision were still part of it. However, it has been argued that the principle of distinction would become meaningless if an attacker was free to assume that persons appearing like civilians were in reality fighters who constituted legitimate targets.[978] In addition, it is necessary to stress that, in the context of Article 13(3) of Protocol II, which deals with the notion that civilians shall enjoy the protection afforded by Part IV of the Protocol, 'unless and for such time as they take a direct part in hostilities', the ICRC Commentary to the Second Additional Protocol states that 'in case of doubt regarding the status of an individual, he is presumed to be a civilian.'[979]

The ICRC Customary IHL Study

The element of doubt about a person's civilian character, despite being addressed in Article 50 of AP I, is not addressed in Rule 5 of the Study. The authors of the Study might have followed the drafting history of Protocol II, and this could be the reason why Rule 5 does not address the element of doubt about a person's civilian character, even if this issue is addressed elsewhere in the Study.[980] 'The reason for omission from the customary law formulation of certain key elements of the Protocol I formulation are unclear; the omissions are likely to give rise to considerable normative uncertainty and may undermine civilian protection rather than advance it.'[981] Bothe proposes that, in the context of a non-international armed conflict, an interpretation of the rule of distinction based on the principle of the *effet utile* would require that precautions like those provided for in article 57(2) of Protocol I are taken – although no similar provision is contained in the actual text of Protocol II nor in any of the preceding drafts. This means that persons who plan or decide upon an attack shall 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects'.[982]

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[978] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 16.
[979] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para 4789.
[980] See for example Rule 6 which deals with the problem concerning civilians who take a direct part in the hostilities.
[981] Bethlehem, "The methodological framework of the Study", at 13.
[982] Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict", at 16.

Despite the fact that there are some doubts about the customary character of the presumption of doubt in internal armed conflict, generally, the doctrine is of the opinion that it is a 'highly desirable development'.[983] And despite being not found in Rule 5, the presumption of doubt is ascertained in Rule 6 of the Study. The authors explain that the issue of doubt in internal armed conflicts has hardly been addressed in state practice, 'even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack.'[984] The authors therefore propose a balanced approach, such as 'when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.'[985]

The ICRC DPH Guidance

The DPH Guidance recognizes that one of the main practical problems caused by various degrees of civilian participation in hostilities is that of doubt as to the identity of the adversary. Indeed, it is difficult for armed forces to 'distinguish reliably between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities.'[986] Accordingly, the Guidance ascertained the existence of the presumption of doubt as also applicable to internal armed conflict. Recommendation VIII states that 'all feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.'[987] The commentary related to the presumption of civilian protection explains that 'in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of

[983] Greenwood, "Customary Law Status of the 1977 Additional Protocols", at 109.
[984] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 6, at 24.
[985] Ibid.
[986] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 74.
[987] Id. Recommendation VIII, at 74. For Precautionary measures, see Chapter 11.

civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict.'[988] In practice, this determination will have to take into account, *inter alia,* the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision. This entails that attackers must have solid and verifiable intelligence before launching an attack on a dubious target.

However, it has been pointed out that the presumption of doubt as articulated in the second sentence amounts to the invention of a new rule: a rule of doubt, one concerning the loss of civilian protection rather than concerning status. According to Rogers, there is no presumption of non-participation in Protocol I and the nearest one gets to it is the presumption of non-use of civilian objects for military purposes.[989] He therefore considers that 'this recommended presumption goes beyond the letter of treaty law and is not, so far as (he is) aware, to be found in customary law.'[990] However, I disagree with this position, as, in my opinion, a civilian who is directly participating in hostilities does not lose his status, but only the protection that is granted to him because of his status of civilian. A civilian directly participating in hostilities is, accordingly, still a civilian, despite not benefiting anymore from protection.

Element of doubt as approached under international criminal law

In criminal proceedings the question of doubt works slightly differently. According to the *ad hoc* Tribunals, IHL provides for a presumption of civilian status so that 'a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.'[991] The ICTR went even further in ascertaining that Common Article 3 also protects civilians[992] and that 'in

[988] Id. at. 76 (original emphasis).
[989] Article 52(3) API.
[990] Rogers, "Direct Participation in Hostilities: Some Personal Reflections", at 156.
[991] *Galic* Trial Chamber Judgment, para. 50.
[992] On the concept of civilian, see *inter alia Rutaganda* Trial Judgment, paras 100-101; *Kayishema* Trial Judgment, paras 179-180.

case of doubt as to the status of the victim, that person should be presumed to be a civilian and should therefore be presumed to be protected by Common Article 3.'[993] However, when a person's criminal responsibility is at stake, the burden of proof as to whether the alleged victims were civilians rests on the Prosecution.[994] Accordingly, in criminal proceedings in which the Prosecution has charged a person with intentionally attacking civilians, 'the perpetrator must have known or considered the possibility that the victim of his crime was a civilian.'[995] Consequently, the Prosecutor will have to show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.[996] Also, the 'Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.'[997] And lastly, in making the assessment as to the status of the person, the 'Court must take into account all relevant factors, including the information at the disposal of the accused at the time in relation to the status of those caught in the middle of fighting.'[998]

The ICTY also affirmed that '(i)n order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly.'[999] However, despite the desirability of such an obligation in order for the principle of distinction to be practically applicable, we have seen that there is no such requirement in treaty law applicable to internal armed conflicts. However, still in *Galic*, the Trial Chamber identified useful factors of identification. Indeed, the Chamber acknowledged that '(i)n certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a

[993] See *Kunarac* Trial Judgment; *Galic* Trial Chamber Judgment
[994] *Prosecutor v. Blaskic* (Appeals Chamber Judgment) IT-95-14-A (29 July 2004) (hereinafter *Blaskic* Appeal Judgment), para. 111.
[995] *Kunarac* Trial Judgment, para 435
[996] Ibid.
[997] *Galic* Trial Chamber Judgment, para 50.
[998] Mettraux, *International crimes and the ad hoc Tribunals,* at 121.
[999] *Galic* Trial Chamber Judgment, para 50.

civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.'[1000]

Conclusion

As we have seen, the blurred lines of distinction in non-international armed conflicts has led to rather lenient and broad interpretations with respect to the delineation of membership in an organized armed group. With the notion of continuous combat function, the ICRC practically withdrew the civilian status from organized armed groups. Fighters may be directly attacked at any time, irrespective of any actual active participation in hostilities at the time of the attack. This in turn puts in great danger of collateral damage the civilians that are intermingled with them. Lately, states have been very keen to stress that the laws and customs of war relating to the conduct of hostilities as applicable to international armed conflict should apply to the situation of violence they are facing. This state-centred view is 'based on the advantage for the state of employing the conduct of hostilities model in a situation in which the enemy fighters enjoy neither combatant immunity from prosecution for fighting, nor POW statutes if apprehended.'[1001] Accordingly, 'it is in the very application of these laws and customs of war that states might be interested'[1002], and it is hard to understand why the ICRC took this path too. It obviously tried to balance the principle of military necessity with the principle of humanity. But in the end, it seems that the ICRC gave more weight to the former, to the detriment of the protection of civilians. Ultimately, bearing in mind that fighters in internal armed conflicts are most of the time intermingled within the civilian population,[1003] the ICRC approach in the Guidance is simply regrettable.

The presumption of doubt as to the status of a person is of the utmost importance in internal armed conflicts. See, for instance, the Palestinian-Israeli, Afghan or Iraqi contexts, where individuals are often targeted and shot and it is only when it is too

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[1000] *Ibid*, para 50.
[1001] Kretzmer, "Rethinking the Application of IHL in Non-International Armed Conflict", at 23.
[1002] Ibid.
[1003] See Chapter 5.

late that the attacker realizes that they were in fact non-combatants. Accordingly, this presumption is a *sine qua non* condition for the provision of any protection to civilian persons. In the midst of action, uncertainty is always present, and to legitimate any firing in every case of doubt would open the door to many abuses, and would increase the risk of mistaken targeting of civilians to an unacceptable degree.

Chapter 7:

Constitutive Elements of the Principle of Distinction – Material Dimension - Identification of civilian objects

Introduction

As we have seen up until now, parties to an internal armed conflict must distinguish between the civilian population and fighters, or to put it otherwise, between persons who actually participate in hostilities and those who do not. But another challenge related to the application of the principle of distinction concerns the identification of a civilian object. Parties must also distinguish between civilian objects and military objectives and direct their military operations exclusively against the latter. In order to have a viable body of law regulating combat operations and sparing civilians and the civilian population from hostilities and their effects, it is essential not only to define who but also what may be legally attacked. Indeed, to give effect to civilian immunity it is necessary to distinguish between persons and things it is specifically prohibited to attack. The concept of what constitutes a legitimate target or a military objective is therefore central to the principle of distinction.[1004] Civilian objects benefit from an analogous immunity as that of civilian persons. And like civilian persons, civilian objects are defined negatively: will be civilian what is not a military objective. Accordingly, the 'general protection of civilian objects is therefore simply the reverse side of the fundamental prescription to attack only military objectives.'[1005]

[1004] For the historical development of the concept of military objective, see Boivin, A., "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", 2 *Research Paper Series University Centre for International Humanitarian Law* 1, (2006), at pp. 8-15 ; Henderson, I., *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers. 2009), at pp. 45-49.
[1005] Sassòli, M. & Cameron, L., "The Protection of Civilian Objects - Current State of the Law and Issues delege ferenda", in *The Law of Air Warfare – Contemporary Issues*, (Natalino Ronzitti & Gabriella Venturin eds., 2006), at 36.

The first rule regarding attacks by acts of violence is that the intended target must be a military objective. Because only military objectives may legally be attacked, the definition of a military objective forms the starting point of any discussion on targeting. We therefore need here to determine what exactly differentiates a civilian object from a military objective, in order to better protect civilians. Indeed, armed attacks on objects involve many dangers for persons who are beyond doubt civilians. In this section, I will therefore clarify the criteria which make targets legitimate.

Objects which may be targeted - the definition of military objectives

Civilian persons and objects are protected from direct attack under IHL.[1006] We have seen that the civilian person can be identified in contra-distinction to who is a fighter. In IHL, only fighters, persons directly participating in hostilities and military objectives constitute legitimate targets. In the preceding Chapter we have already determined who is a fighter, as well as when civilians forfeit their protection due to their direct participation in hostilities. The objective of this Chapter will therefore be to identify what constitutes a civilian object in contra-distinction of what constitute a military objective. As the principle of distinction is practically worthless without a definition of at least one of the two categories between which the attacker has to distinguish, it is necessary to establish what constitutes a civilian object and what constitutes a legitimate target of attack.[1007] From a humanitarian perspective, it would be more satisfactory to define civilian objects and to provide them with comprehensive protection. However, 'because an object becomes a military objective by virtue of its use by the enemy or potential use by the attacker rather than by virtue of its intrinsic character, military objectives had to be defined.'[1008] This follows from the fact that, even with objects benefiting from special protection,[1009] all objects may

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[1006] See Chapter 8 for direct attacks.

[1007] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 8.

[1008] Sassoli, M., "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, (David Wippman & Matthew Evangelista eds., 2005), at 184-185.

[1009] However, 'this special protection consists mainly of rules facilitating the identification of such objects, of prohibitions of various extents to attack such objects when they turn into military objectives,

potentially become a legitimate target, provided that they cumulatively fulfil the respective criteria that we will analyze. Even schools, medical units or religious sites may temporarily become military objectives, provided they fulfil the test we are going to analyze. The focus has therefore to be on the definition of 'military objective', just as for the distinction between civilians and fighters, the focus was on the definition of the latter.[1010]

There is no definition of what constitutes a military objective in the Second Additional Protocol to the Geneva Conventions. However, the term is used in Article 15, which proves that the concept exists in the context of the Second Additional Protocol. In addition, it is worth mentioning that the distinction between civilian objects and military objectives was included in the draft of Additional Protocol II but was dropped at the last moment, like many other provisions, as part of a package aimed at the adoption of a simplified text. Draft article 24(1) reads as follow:

> 'In order to ensure respect for the civilian population the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.'[1011]

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and, in part, of prohibitions to use such objects for purposes related to the military effort.' Sassòli & Cameron, "The Protection of Civilian Objects - Current State of the Law and Issues delege ferenda", at 36. Protocol II Additional to the Geneva Convention provides for the protection of certain civilian objects, such as Article 11(1) which states that 'Medical units and transport shall be respected and protected at all times and shall not be the object of attack.' But para. 2 specifies that 'The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function.' See also Article 14: 'It is prohibited to attack, destroy, remove or render useless, *for the purpose of starving civilians*, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.' We may therefore wonder whether we can attack those objects, if the purpose is not the just above-mentioned (starvation of civilians); for instance, if there is a military objective in one of these places. See also Article 15 which states that 'Works containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.' Lastly, Article 16 provides that: 'Without prejudice of the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people, and to use them in support of the military effort.'

[1010] See CIHL Rule 9: 'Civilian objects are all objects that are not military objectives.' Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 32.

[1011] Draft Article 24(1) Draft Additional Protocol II submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols, Geneva, October 1973.

The ICRC Commentary to this provision further explained that 'unlike Draft Protocol I (Art. 47), the distinction " ... between civilian objects and military objectives" is not amplified by a special provision on the protection of civilian objects. But it is clear from the present rule that objects designed for civilian use shall not be made the object of attack, except if they are used mainly in support of the military effort, in which case they would be considered as military objectives.'[1012]

Despite the fact that a special provision on protection of civilian objects or on military objectives is not to be found *per se* in Additional Protocol II, it has been argued that the concept of general protection in Article 13(1) of the Protocol is broad enough to cover the principle of distinction between civilian objects and military objectives, as well as the prohibition on directing attacks against civilian objects.[1013] Furthermore, subsequent treaties applicable to internal armed conflicts have incorporated the notion. For instance, the Amended Protocol II to the Convention on Certain Conventional Weapons,[1014] the 1980 Protocol III to the Convention on Certain Conventional Weapons,[1015] and the Second Protocol to the Hague Convention for the Protection of Cultural Property[1016] provide for the same definition of military objective:

> '"Military objective" means, so far as objects are concerned, any object which by its *nature*, *location*, *purpose* or *use* makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

[1012] ICRC Commentary to the Draft Additional Protocol II submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols, Geneva, October 1973, at p. 156.
[1013] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 670 and 677. On the prohibition of direct attack against civilian objects, see further below.
[1014] Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996, Article 2(6)
[1015] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, Article 1(3)
[1016] Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Article 1(f).

In addition, the San Remo Manual on the Law of Non-International Armed Conflict has endorsed the same definition,[1017] as well as the ICRC Customary International Humanitarian Law Study, which affirms that it is applicable to non-international armed conflicts.[1018] Lastly, this definition is to be found with the same or similar wording in military manuals, some national legislations, as well as in official statements pertaining to internal armed conflicts.[1019]

The definition that we find in these treaties and other texts reflects the one provided for in Article 52(2) of the First Additional Protocol to the Geneva Convention.[1020] The fact that the same definition for military objectives is to be found in all these legal texts shows the extent to which states consider this definition applicable.[1021] The relevant provisions on targeting were drafted 'with the aim of creating a coherent normative edifice that would ensure that the principle of distinction could be translated into an operational reality.'[1022] Article 52(2) provides that

> 'Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

It has been argued that when it comes to persons constituting military objectives, the second sentence does not apply. 'It offers a definition of military objectives that apply only in so far as objects are concerned. Since the noun "objects" intrinsically relates to material and tangible things, the definition must be regarded as confined to

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[1017] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 1.1.4.
[1018] See Rule 8 applicable in non-international armed conflict, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 29.
[1019] See the related practice identified in the CIHL Study. Id. at 31, footnotes 40-43.
[1020] For an historical review of the development of the codification of the definition of military objective, see Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at pp. 8-15; Rogers, *Law on the battlefield*, at 97-103.
[1021] Indeed, except for the United States that strenuously objects to certain aspects of this definition, there is no objection to the definition of military objectives, which is now considered to be customary international law for non-international armed conflict. See Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 6; CIHL Rule 8, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 29.
[1022] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 14.

inanimate objects.'[1023] However, the first sentence refers to all military objectives, being members of state armed forces, fighters and civilians directly participating in hostilities, for the duration of their participation. Indeed, this can be identified in the beginning of the second sentence, via the words 'in so far as', which serve to accentuate the generality of the first sentence as encompassing persons who fight and objects.

The formula used 'constitutes a general criterion the existence of which can be judged *in abstracto.*'[1024] And the words 'nature, location, purpose or use' are rather wide in giving the military commander considerable room for manoeuvre. But as we will see, these words are subject to the further qualifications in the definitions of 'effective contribution to military action' and the offering of a 'definite military advantage'.

There are neither civilian objects nor military objectives *per se* or in essence. Everything depends on the effects of an object on the conduct of hostilities in military strategy terms. Taken literally, the definition of military objective can be seen as very restrictive because it forbids every *preventive* destruction. As long as it does not provide a real contribution to the military action of the adversary, it cannot in principle, be destroyed. On the other hand, the abstraction of the definition of military objective leaves a wide margin of interpretation, allowing belligerents to construe it with completely different results according to their particular interests.[1025]

Under this definition, which reflects customary international law[1026], for an object to be considered a military objective, it must fulfil two cumulative conditions. In the first place, the object has to make an *effective* contribution to military action of the enemy by virtue of its nature, location, purpose or use. And secondly, and cumulatively, the military objective's total or partial destruction, capture or neutralization has to provide the attacking party with a *definite* military advantage. The integrity of the principle of distinction rests upon this two-pronged test, whose criteria have to be met separately and cumulatively.

[1023] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 92.
[1024] Fleck, *The Handbook of International Humanitarian Law*, at 179.
[1025] See Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 90; Fleck, *The Handbook of International Humanitarian Law*, at 180.
[1026] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 8, at 29.

Let us turn our attention now to the specificities of the ingredients contained in the two-pronged test for a military objective to be identified. This two-pronged test is constituted first by an objective element, which is the military objective's capacity to contribute effectively to military operations to the defender, and secondly a subjective element, referring to the military purposes (the definite military advantage) of the attacking party.[1027] The objective aspect concerns conditions outside the attacker's control, and the subjective aspect concerns an assessment of how attacking the target might assist the attacker.

Effective contribution to the military action of the defender

The first part of the test is itself divided into two constituents. The first is that the target makes an *effective contribution* to the military action of the defender. And the second is related to the fact that this contribution be linked to the *nature, location, purpose or use* of the target under evaluation. But the true issue is whether an object is making an effective contribution to military action, as the words 'nature, object, purpose or use' should in fact be considered as a way of providing a *test* for determining what is a military objective.[1028] Accordingly, it should be considered far less important to pigeonhole how that contribution arises under one of the words 'nature, location, purpose or use'.[1029]

In the first place, we may wonder what exactly the expression 'effective contribution to the military action' means. According to Dinstein and Bothe, this requirement relates to military action in general. Therefore there need be no direct connection with any specific combat operations.[1030] However, 'for an object to qualify as a military objective, there must exist a proximate nexus to "war-fighting".'[1031]

[1027] Oeter, S., "Methods and Means of Combat", in *The Handbook of International Humanitarian Law*, (Dieter Fleck ed., 2008), at 171.
[1028] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 54.
[1029] Ibid.
[1030] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 95; Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 324.
[1031] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 96.

In addition, the targeted object has to be connected to the *military* action of the enemy (defending party). As explained by Boivin, 'without this criterion, it becomes easy to justify that civilians and civilian objects that politically, financially or psychologically support the war machine should fall into the category of military objectives.'[1032] Only a material, tangible thing can be a target.[1033] This rule is based on the principle that 'the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.'[1034] Immaterial objectives, such as winning the war or impacting on the morale of the civilian population, cannot be attacked, but only achieved. Indeed, 'if the intention directly to influence the enemy population's determination to fight were recognized as a legitimate objective for military force, then no limit to warfare would remain.'[1035]

As Sassoli acknowledges, it is true that acts of violence against persons or objects of political, economic, or psychological importance may sometimes be a more efficient way to overcome the enemy. But 'they are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralized, even the politically, psychologically, or economically strongest enemy can no longer resist.'[1036] Or, as the Israeli Supreme Court put it, 'not every efficient means is also legal.'[1037]

It is true that especially in non-international armed conflict, the support of the civilian population is critically important. But, as history tells us, attacks whose objective is to undermine the morale of the civilian population have most of the time had the opposite effect and are clearly counter-productive from a military perspective.[1038]

[1032] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 18.

[1033] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at paras. 2007-2008; Sassoli, M., "Legitimate Targets of Attacks under International Humanitarian Law" (*Program on Humanitarian Policy and Conflict Research at Harvard University ed., International Humanitarian Law Research Initiative* 2003), at 2.

[1034] Saint Petersburg Declaration, *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 1868, preamble para. 2.

[1035] Fleck, *The Handbook of International Humanitarian Law*, at 442, section 5, p. 180.

[1036] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 191.

[1037] *The Public Committee against Torture v. Israel,* HCJ 769/01 (13 December 2006) para 63.

[1038] Among the plethora of examples, we can think recently of the NATO intervention in Serbia or the situations in Iraq and Afghanistan. The US new military doctrine, the CIVCAS also acknowledges this reality. (See Civilian Casualty Mitigation. pt. at 1-19 to 1-23). We can also think about the internal armed conflicts in Sri Lanka and Colombia, in which state armed forces did not hesitate to launch

Nevertheless, such factors as destroying the morale of the civilian population ‘can never form the basis of an attack, being too far removed from the notion of contribution to military action. Furthermore, what is at issues is the *military* action and not the political objectives or strategic goals of the conflict, albeit the two may be linked.’[1039] States’ and organized armed groups’ practice shows us that they generally do not claim that a given attack was deliberately directed against civilians in order to impact on their morale. They tend to systematically justify their acts by maintaining that the target of a given attack was indeed military. This justification further ascertains the customary nature of this rule.[1040]

Accordingly, ‘attacks launched for the purpose of terrorizing the enemy civilian population, to break its determination to fight, are prohibited, as are attacks of a purely political purpose, whether to demonstrate military strength, or to intimidate the political leadership of the adversary.’[1041] However, civilians are not immune against fear and anxiety as a consequence of a legitimate attack against a military objective.

Nature, location, purpose or use of the target under evaluation

Let us turn now to the second constituent of the first part of the test to identify a military objective. As stated above, this second constituent is related to the fact that the contribution to the military action of the defender be linked to the *nature, location, purpose or use* of the target under evaluation.

The reference to the *nature* of the target is related to the intrinsic character of the object in question making an effective contribution to military action. To satisfy this component of the definition, an object must be endowed with some inherent attribute which *eo ipso* makes an effective contribution to military action. As such, the object

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attacks on civilian in order to weaken or pressure LTTE and FARC into capitulation. This had the contrary effect.

[1039] Sivakumaran, *The Law of Non-International Armed Conflict*, at 346 (original emphasis).

[1040] See ICJ, *Nicaragua* case, para 186. See generally Chapter 4 for a discussion on contrary state practice.

[1041] Fleck, *The Handbook of International Humanitarian Law*, at 442, section 6, p. 180 (footnotes omitted).

automatically constitutes a lawful target for attack in wartime.[1042] According to the ICRC Commentary, this category comprises all objects directly used by the armed forces, such as 'weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.'[1043] These are objects which 'are *usually* controlled and used by the military as opposed to objects that while being directly used are only under *temporary* military control.'[1044]

Temporarily controlled objects can be, for instance, temporarily occupied civilian houses.[1045] Indeed, as we know, in internal armed conflicts, military goods vary in terms of quality and quantity, depending on the parties. State armed forces will generally possess the latest military technologies such as automated and autonomous weapon system, cyber weapons and advanced communications for the conduct of warfare, with precise ammunitions. The weaker party, on the other hand, will possess very rudimentary material and weaponry. Furthermore, training camps, ammunition depots and warehouses, normally constituting military objectives by nature, will be hidden in civilian houses or religious monuments by the organized armed group, in order to shield these objectives. Accordingly, these objects will constitute military objectives not via their intrinsic nature, but more via their location, use or purpose.

When it comes to the notion of *location* of an object that makes it a military objective, this refers to the fact that there are some objects which by their location make an effective contribution to military action. This refers to the possibility of an object becoming a military objective if it is situated in an area that has been identified as a legitimate target.[1046] The ICRC Commentary gives as examples 'a bridge or other construction, or it could also be a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is

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[1042] See Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 96, for a non-exhaustive enumeration of military objectives by nature, which, according to the author, reflect the current legal thinking.
[1043] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* para. 2020, at 636.
[1044] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 54-55.
[1045] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at para 2020.
[1046] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 18.

a matter of forcing the enemy to retreat from it.'[1047] Accordingly, these are strategic objects whose military potential comes from the places where they are located on the battlefield. According to Dinstein the principal issue with respect to location is that, implicitly, a particular land area – although devoid of a military function by nature – can be deemed a military objective due to its special location, regardless even of use or purpose. But he temporises, arguing that 'the incidence of such locations cannot be too widespread. There must be a distinctive feature turning a piece of land into a military objective, e.g. an important mountain pass or defile; a trail in the jungle or in a swamp area; a bridge-head or a spit of land controlling the entrance of a harbour.'[1048]

For Rogers too, an area of land can be a military objective. He explains that 'a study of armed conflict reveals that areas of land have always featured very prominently in combat.'[1049] This view seems also to be shared by the authors of the ICRC Commentary, but they stress that this area can only be of a limited size.[1050] It has been corroborated by the ICTY Trial Chamber in the *Blaskic* case when it held: 'The Grbavica hill had certain strategic importance, which enabled the ABiH, if it occupied it, to block the HVO and the Croatian civilians' access to the main Travnik-Busovaca road.'[1051]

In internal armed conflict, especially in the context of urban warfare, there is a high risk of justification of unnecessary destruction via the criterion of *location*.[1052] This abuse can be very well illustrated by this Israeli soldier's testimony, talking about Cast Lead Operation:

> 'If you face an area that is hidden by a building – you take down the building. (…) As we began the offensive, there was a house there close to the one we occupied, so we took it down. The grounds for this was operational, it was a house that had strategic advantage over the one we were sitting in. We saw no

[1047] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at para. 2021, p. 636. See further below.
[1048] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 101.
[1049] Rogers, *Law on the battlefield,* at 108.
[1050] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* para 2026, at 637.
[1051] ICTY, *Blaskic* Trial Judgment, para. 551.
[1052] Rédalié, L., *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire* (Schulthess Verlag ed. 2013), at 50.

> one there and there were no weapons inside but we took it down because it controlled our own position.'[1053]

This problem was also identified in the Goldstone report, which recounted that 'the destruction of housing was carried out in the absence of any link to combat engagements with Palestinian armed groups or any other effective contribution to military action.'[1054] As the military objective must '*make* an effective contribution to military action' of the enemy, the location needs to be exploited by the enemy at the time of the attack.

The criterion of *purpose* refers to the belligerent's intended future use of an object.[1055] It is generally interpreted as indicating a future and intentional deployment, which would depend upon the identification of a belligerent. For Dinstein, as a separate ground from 'nature' and 'use' for classifying a military objective, 'purpose' can be 'deduced from an established intention of the enemy as regards future use.'[1056] It is hard to think of an example of a case where 'purpose' will be the deciding factor, especially given the limitation of 'in the circumstances ruling at the time'. 'If for example, 'a military commander received intelligence that the enemy were about to use a school as a munitions depot, it is unlikely that he would want to attack it until the munitions had been moved in.'[1057]

It is therefore crucial that purpose be 'predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a "worst-case scenario".'[1058] So, in Dinstein's view, an object cannot become a military objective simply because it could be converted into something useful for the military. Indeed, if an object can be qualified as a military objective simply because it *could potentially* be converted into something useful for the state armed forces or organized armed groups, nothing would remain as civilian and therefore no object

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[1053] Testimony of an Israeli soldier, collected by the NGO *Breaking the Silence*: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14_07_09_breaking_the_silence.pdf

[1054] *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, United Nations Human Rights Council, A/HRC/12/48 (15 September 2009), (hereinafter *Goldstone* Report), at para 53.

[1055] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para. 2022, at 636.

[1056] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 99.

[1057] Rogers, *Law on the battlefield*, at 106. See also Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 100.

[1058] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 100.

would be protected anymore. In addition, according to the text of Article 52(2), the object must 'make' an effective contribution to military action, in the present tense. Accordingly, for an object to become a military objective, an intended future use[1059] may be acceptable, but clearly not a possible future use.[1060] The inherent difficulty with the idea of 'intended use' is predicated on knowledge of the defending party's intention or *mens rea.* This introduces the need of a standard of proof for determining when and how an intention is established. 'The only standard of proof available is that of a reasonable belief in the circumstances ruling at the time.'[1061] There can be no presumption that something is a military objective, and 'those wishing to attack it must therefore first ascertain that it actually is.'[1062] In addition, destruction or the like must also offer a 'definite military advantage', and 'in the circumstances ruling at the time'. This is why 'the test should rarely turn solely on the purpose of the object.'[1063]

The main area of legal concern when it comes to *purpose* is related to civilian objects. A civilian object 'can be targeted not only while not being used by the military but even prior to its initial use due to the *purpose* to which the object may be put.'[1064] When it comes to internal armed conflict, a perfect example of military objective by purpose can be the tunnels that are dug between the Gaza strip and Egypt, but only when they contribute to the military action of the Hamas.[1065] Indeed, some tunnels are used for military functions. But others, are strictly used for bringing in goods that cannot enter the strip due to the Israeli blockade, and, accordingly, they cannot be categorized as military objectives through purpose.

The last criterion making an object a military objective is that of *use* and is concerned with the current function of the object under consideration. 'Actual use of an

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[1059] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para. 2022, at p. 636.
[1060] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 199.
[1061] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 19.
[1062] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 199.
[1063] Sivakumaran, *The Law of Non-International Armed Conflict*, at 344.
[1064] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 59.
[1065] Rédalié, *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire*, at 53.

objective may be at variance with its original nature.'[1066] The main area of legal interest with *use* is related to civilian objects. The difficulty here lies in the fact that most civilian objects can become useful objects to the armed parties, and be temporarily used for military ends in an internal armed conflict. Based on this premise, Article 52(2) limits the legality of their attack to the time during which they are held by armed forces. The ICRC Commentary gives the example of a school or a hotel that are civilian objects. 'If they are used to accommodate troops or headquarters staff, they become military objectives.'[1067] For instance, in the Goldstone report, the Commission of Inquiry looked at

> 'allegations that Palestinian fighters had launched attacks from within civilian areas and from protected sites (such as schools, mosques and medical units); used civilian and protected sites as bases for military activity; misused medical facilities and ambulances; stored weapons in mosques. (…) The Mission further sought information concerning allegations that Palestinian armed groups had booby-trapped civilian property.'[1068]

These objects, if meeting the two-pronged test, would have qualified as military objectives through their use. Ultimately, the Commission concluded that

> 'although the situations investigated by the Mission did not establish the use of mosques for military purposes or to shield military activities, it cannot exclude that this might have occurred in other cases. The Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities and that ambulances were used to transport combatants or for other military purposes.'[1069]

As we have seen above, the fact that certain objects benefit from special protection does not prevent them potentially becoming a legitimate target, provided that they cumulatively fulfil the respective criteria. The special protection consists mainly of rules facilitating their identification and of prohibitions of various extents to attack such objects when they turn into military objectives. For instance, it is prohibited to

[1066] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 97.
[1067] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para. 2022.
[1068] *Goldstone* Report, para 441.
[1069] Ibid, para 36.

use property ‘of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage, unless imperatively required by military necessity.’[1070] Furthermore, these objects ‘must not be the object of attack unless *imperatively* required by military necessity.’[1071] In addition, medical units and transports must be respected and protected in all circumstances. However, when used outside their humanitarian function, to commit acts harmful to the enemy, they lose their protection.[1072]

As other examples of objects that qualify as military objectives through their use, provided they fulfil the two-pronged test cumulatively, we can also think of civilian cars that are booby-trapped. These are weapons that are being used in internal armed conflicts such as in Afghanistan or in Iraq.[1073]

Definite military advantage

The second part of the two-pronged test established by Article 52(2) asserts that an object may fail to qualify as a military objective, even if it makes an effective contribution to military action, if, in the circumstances ruling at the time, its ‘destruction, capture or neutralization’ would not offer a definite military advantage. Therefore, the notion of ‘definite military advantage’ is the cornerstone of a ‘military objective’ and constitutes the benchmark for assessing both the legality of a target and military necessity with regards to an object’s destruction.

The term military advantage involves a ‘variety of considerations, including the security of the attacking forces.’[1074] For instance, the Report on US Practice states that ‘the foreseeable military advantage from an attack includes increasing the security of

[1070] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 39, at 131.
[1071] Id. Rule 38, at 127 (emphasis added).
[1072] Id. Rule 28, at 91 and Rule 29 at 98.
[1073] See Atkinson, 'The single most effective weapon against our deployed forces', available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092900750.html
[1074] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 324.

the attacking force.'[1075] However, the security of the attacking forces is a highly debated and delicate question and can be invoked only with respect to an objective threat those forces are facing.[1076]

The concept of military advantage generally encompasses

> 'destruction of enemy military facilities, killing or injuring enemy troops, destruction of enemy military structures, transports, resources, destruction or interruption of enemy communication, command, and control mechanisms, erosion of the of the morale of enemy military forces, forced withdrawal or retreat of the enemy troops and any decision by enemy troops, whether at the local, tactical level or at the strategic or grand strategic level, to abandon the fight.'[1077]

The adjective 'definite' modifies 'military advantage' in that it limits the discretion of the attacker by excluding 'potential' military advantage. The word 'definite' is therefore central in the assessment. 'It may be concluded that the adjective is a word of limitation denoting in this context a concrete and perceptible military advantage rather than a hypothetical and speculative one.'[1078] This wording is similar to what is found in the provisions codifying the principle of proportionality, where the military advantage anticipated from an attack is weighed against the prospect of civilian losses and damage. But at the stage of target selection, it can be argued that it is sufficient for an attacking Party to determine that the object is capable of yielding a definite military advantage.[1079] Accordingly, the standard to reach is high, and remote from hypothetical. Practically speaking, 'it requires the responsible commander[1080] to be

[1075] Report on US Practice, 1997, Chapter 1.3. CIHL Rule 8. For a discussion of the notion of force protection, see generally Geiss, R., "The Principle of Proportionality: 'Force Protection' as a Military Advantage", 45 *Israel Law Review* 71, (2012).

[1076] See Chapter 10 for a discussion on whether force protection amounts to military advantage that may be taken into consideration when assessing the proportionality in attack.

[1077] Boothby, W.H., *The Law of Targeting* (Oxford University Press. 2012), at 506.

[1078] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 326.

[1079] Whereas, as we will see Chapter 10, in the context of assessing proportionality, the military advantage anticipated must be established with more certainty and is also then qualified in relation to potential collateral damage.

[1080] On the notion of responsible commander, see Chapter 12.

able to clearly articulate the nature of the military advantage expected from the attack and to produce evidence supporting this expectation.'[1081]

Lastly, the requirement that the attack must offer a definite military advantage means that 'even an attack on an objective of a military nature would not be lawful if its main purpose is to affect the morale of the civilian population and not to reduce the military strength of the enemy.'[1082] 'The rule that only *military* objectives may be attacked is based on the principle that, while the aim of a conflict is to prevail politically, acts of violence for that purpose may only aim at overcoming the *military* forces of the enemy.'[1083] Furthermore, with respect to the situation of fighters constituting military targets, the core criteria for the assessment of military necessity, namely that military action must be reasonably expected to lead to a 'definite military advantage', can be generalized and applied also to action against persons.[1084]

Another question related to the second part of the two-pronged test seeking to define what exactly constitutes a 'definite military advantage' is whether it must emanate from a single attack. More specifically, 'must an attacking Party demonstrate that destroying, capturing or neutralizing the targeted object will provide it with a definite military advantage or is it sufficient for it to show that attacking the object will *contribute* to obtaining a definite military advantage?'[1085] According to several declarations of understanding[1086] the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.[1087] The term 'attack' has been defined in Article 49(1) of the First Additional Protocol as 'acts of violence

[1081] Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*. at 21.

[1082] Sassoli, *Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts*, *in*. at 186.

[1083] Id. at *in*. at 190.

[1084] Melzer, Targeted Killing in International Law. at 292.

[1085] Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*.At 21 (original emphasis).

[1086] See for instance statements made by Canada, Australia, Belgium, France, Germany, Italy, the Netherlands, New Zealand, Nigeria, Spain and the Untied Kingdom. They can be accessed on the ICRC CIHL database at Rule 8.

[1087] Sassoli, Legitimate Targets of Attacks under International Humanitarian Law At 3. See also Bothe, et al., New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949. at 325.

against the adversary, whether in offence or in defence.'[1088] The danger in having too broad an approach to what constitutes an attack, in that it can encompass a series of actions, is that 'it will become so broad as to dilute the concept of definite military advantage and the obligations deriving from this concept.'[1089] This is why 'in order for the requirement that an attack provides a definite military advantage to retain any meaning at all, it must correspond to a concrete situation on the ground.'[1090] However, it would go too far to argue that a military advantage justifying the classification of an object as a 'military objective' should result from the specific military operation which constitute the 'attack'. Such a construction, would ignore the problems resulting from modern strategies of warfare, which are invariably based on an integrated series of separate actions forming one ultimate compound operation. 'The separate action within an operation, that could be described as a specific 'attack', is hardly ever an end in itself.'[1091] Lastly, an attack as a whole is a finite event, and should not to be confused with the entire war.[1092]

Accordingly, the concept of definite military advantage is a relative criterion in essence. Its assessment will be modified according to the considered target and the operational context in which the attack is likely to be launched. As stated by Alston *et al.* 'the law in force imposes a test that requires an object-specific and context-specific assessment of each target rather than a test based on an object's generic classification.'[1093]

[1088] Article 49(1) Additional Protocol I.
[1089] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 22.
[1090] Ibid.
[1091] Fleck, *The Handbook of International Humanitarian Law*, at 185-6.
[1092] Hampson, F., "Means and Methods of Warfare in the Conflict in the Gulf", in *The Gulf War 1990-91 in International English Law*, (Peter Rowe ed., 1993), at 94; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 95. See Chapter 10 for a discussion on the concept of overall military advantage in the appraisal of the principle of proportionality.
[1093] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. No. A/HRC/2/7, pt. (2006) at para 50.

In the circumstances ruling at the time

Another important limitation on the discretion of the attacker is dictated by the requirement that the definite military advantage must be present 'in the circumstances ruling at the time'. This element therefore qualifies the definition of military objective and 'emphasizes that in the dynamic circumstances of armed conflict, objects which may have been military objectives yesterday, may no longer be such today, and vice versa.'[1094] This limitation is essential because without it, 'the principle of distinction would be void, as every object could *in abstracto*, under possible future developments, for example, if used by enemy troops, become a military objective.'[1095]

Accordingly, the objects classified as military objectives under the article 52(2) definition include much more than strictly military objects such as military vehicles, weapons, munitions stores or fuel and fortifications. Provided the objects meet the two-pronged test, *under the circumstances ruling at the time,* and not at some hypothetical future time, military objectives can include 'activities providing administrative and logistical support to military operations such as transportation and communication systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict.'[1096] For instance, if an electric plant provides energy that is being used by an organized armed group and contributes effectively to its military operations, its destruction would immediately and sensibly reduce the threat the group is posing to the state armed forces.[1097]

[1094] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 326; See also Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 91.
[1095] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 186. Sassoli, "Legitimate Targets of Attacks under International Humanitarian Law", at 3.
[1096] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 323-324.
[1097] Example given by Rédalié, *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire*, at 58.

On the necessity of cumulative fulfilment

To constitute a military objective, the object under consideration must fulfil the two criteria above mentioned, i.e. the fact that by its nature, location, purpose or use the object must make an effective contribution to military action, and the fact that its destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage. These two criteria need to be fulfilled cumulatively. 'Whenever these two elements are simultaneously present, there is a military objective.'[1098] The characterization of the contribution as 'effective' and the advantage as 'definite' prevents too wide an interpretation of what constitutes a military objective, in effect excluding *indirect* contributions and *possible* advantages. Indeed, 'without this restriction, the limitation to "military" objectives could be too easily undermined.'[1099]

Also, it has been argued that by paying due heed to the cumulative two-pronged test of the identification of a military objective, the commander 'will be in a better position to justify any resulting collateral damage (to persons and property) as legitimate in light of the precautionary measures taken and the proper application of the principle of proportionality.'[1100]

Doubt as to the civilian status of an object

The difficulty of identifying a military objective with certainty,[1101] led the drafters of Additional Protocol I to adopt another sub-paragraph attached to Article 52. Article 52(3) prescribes that

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[1098] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* para. 2018.

[1099] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 186 ; Sassoli, "Legitimate Targets of Attacks under International Humanitarian Law", at 3.

[1100] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 18. On collateral damage and precautionary measures, see Chapter 10 and 12.

[1101] This difficulty is even more obvious in internal armed conflicts, where enemies are indistinguishable and combat operations are conducted into unclear urban settings.

> 'In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.'[1102]

It is a presumption that can be reversed, but that obliges armed forces to be cautious and to show some restraint in their operations. It should be noted that the presumption applies only to objects which normally do not have any significant military use or purpose.[1103] This provision, as we have seen above, has its counterpart relating to civilian persons in international armed conflicts.[1104]

The question we may ask is whether the situation of doubt as to the civilian character of an object also applies to internal armed conflicts. I would say so, as this presumption is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons, which is, as we know, applicable to non-international armed conflicts.[1105] However, it is important here to mention that nowadays, Article 52(3) 'continues to be the subject of controversy with combat often taking place in urban environments where there is much commingling of civilian and military objects, and therefore, where it is particularly difficult for an attacker to establish with any degree of certainty the military character of a target.'[1106]

According to the CIHL Study, the issue of how to classify an object in case of doubt is 'not entirely clear'.[1107] However, the authors of the Study assert that Article 52(3) AP I provides an answer, and that no reservation has been made to this provision. In addition, this presumption of civilian character is also contained in numerous military

[1102] Article 52(3) Additional Protocol I.
[1103] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 326.
[1104] Article 43 Additional Protocol I.
[1105] Amended Protocol II to the CCW, Article 3(8)(a): 'In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.'
[1106] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 19.
[1107] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 10, at 35.

manuals.[1108] Nevertheless, two states seem to refute this rule. First, in the context of an international armed conflict, the US[1109] Department of Defence commented in 1992, in its final report to Congress on the conduct of the Gulf War, on the language of Article 52(3) and stated that:

> 'This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e. from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.'[1110]

Noting that the US Naval Handbook does not refer to such a presumption, the Report on US Practice concludes that the US government does not acknowledge the existence of a customary principle requiring a presumption of civilian character in case of doubt.[1111] But as David wrote, 'la naïveté du raisonnement ferait sourire si elle ne débouchait sur des conséquences dramatiques; il suffirait que l'attaquant présume qu'un objectif est militaire pour qu'il le devienne, quitte à l'attaqué à prouver les contraire!'[1112] In addition, it is worth mentioning here that the US Air Force Pamphlet does contain this rule.[1113]

The second rebutter, Israel, in its Report on the Practice, states that:

> 'In principle, in cases of *significant* doubt as to whether a target is legitimate or civilian, the decision would be to refrain from attacking the target. It should be stressed that the introduction of the adjective "significant" in this context is

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[1108] See related practice at footnote 75 at p. 35, Rule 10, Id. at
[1109] Which is not part to Additional Protocol I.
[1110] United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix o, The Role of the Law of War, *ILM,* Vol. 31, 1992, p. 627.
[1111] Report on US Practice, 1997, Chapter 1.3.
[1112] David, E., Principes de Droit des Conflits Armés (Bruylant. 1994), at 238.
[1113] United States, *Air Force Pamphlet* 110-31 *International Law – The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976, § 5-3(a)(1)(b).

aimed at excluding those cases in which there exists a slight possibility that the definition of the target as legitimate is mistaken. In such cases, the decision whether or not to attack rests with the commander in the field, who has to decide whether or not the possibility of mistake is significant enough to warrant not launching the attack.'[1114]

Accordingly, the US and Israel disagree with the customary character of this rule, in international and internal armed conflicts. These two states dissentions are upheld by Greenwood, who is also of the opinion that it is very doubtful whether the rule of doubt represents customary law.[1115] These two exceptions led the authors of the Study to ascertain that 'it is clear that, in case of doubt, a careful assessment has to be made, under the conditions and restraints governing a particular situation, as to whether there are sufficient indications to warrant an attack. It cannot automatically be assumed that any object that appears dubious may be subject to lawful attack.'[1116]

The problem for these states (and for the mainstream of military people in new discussions of new wars) is the fact that, at least in urban warfare, the reality of the intermingling of civilian and military objects is too often exploited by the defending party, in order to prevent the attacking party from carrying out an attack. Accordingly, they believe that the rule of doubt imposes an unfair burden on the attacker. But this problem has to be divided into two parts. It is true that the defending party has the legal obligation to separate civilian persons and objects from military objectives.[1117] However, this obligation for the defending party does not relieve the attacking party from its obligation to do everything feasible to verify that the objectives to be attacked are neither civilians persons nor civilian objects and are not subject to special protection but are military objectives.[1118] Indeed, the reality is that civilians are often trapped in between the parties to the conflict. So if every party is saying that it is for

[1114] Report on the Practice of Israel, 1997, Chapter 1.3.
[1115] Greenwood, C., "Customary international law and the first Geneva protocol of 1977 in the Gulf conflict", in *The Gulf War 1990-91 in International and English Law*, (P. J. Rowe ed., 1993), at 75.
[1116] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 10, at 36.
[1117] See Chapter 11 for an analysis of the obligation to take precautions against the effects of attack.
[1118] See Article 57(a)(i). See also ICTY, *Galic* Trial Chamber Judgment, para 61. See Chapter 10 for the analysis of the duty to take precautions in attacks.

the other to take steps for their protection, we will see the total destruction of the already fragile system of protection civilians are supposed to enjoy.

The argument presented by the US tries to establish as a legal rule a behaviour that in every trial, the most elementary principles related to defence rights (notably the presumption of innocence) would challenge. As written by David,

> 'leurs discours conduit à ériger en règle de droit un comportement que dans tout procès, les principes les plus élémentaires récusent même pour l'infliction d'une simple peine disciplinaire, un comportement qui en temps de guerre – à en croire les auteurs – justifierait pourtant le massacre ou la mutilation de centaines ou de milliers de personnes! C'est non plus *re judicata* mais *praesumptio pro veritate habetur*! L'absurdité du raisonnement en trahit la vanité.'[1119]

In addition, the lines of the argument presented by the US and Israel, appear to suggest that Article 52(3) requires a certain certainty on the part of the attacker. But this is not the case. What the law requires is a "reasonable belief" that the target under consideration is a military objective, a standard of proof that was recently confirmed, for internal armed conflict, by the ICTY in the *Galic* case when it stated

> 'In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used.' [1120]

The Chamber further held that:

(…) an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.[1121]

As to the objects covered by the presumption, there is compliance with the rule stated in para. 3: 'whenever a commander or other person responsible for planning, deciding upon or executing an attack *honestly* concludes, on the basis of information

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[1119] David, *Principes de Droit des Conflits Armés*, at 238.
[1120] *Galic* Trial Chamber Judgment, at para. 51.
[1121] *Ibid*, at para. 51.

reasonably available to him at the time, that the object is a military objective as defined in para. 2.'[1122] Importantly, this interpretation 'allows a decision maker to have an honest but mistaken belief as to the identity of the military objective without having to argue, as the United States does, that it is the defending Party that has the burden of clarifying the character of objects under its control, or to introduce, as Israel does, new adjectives such as "significant" and "slight" in one's interpretation of the rule.'[1123] In addition, the words 'nature, location, purpose or use' are already sufficiently wide to give the military commander considerable leeway, despite being also subject to the further qualifications of 'effective contribution to military action' and the offering of a 'definite military advantage'.

Good Faith

It is to be noted that the article 52(2) definition is useful for the civilian population itself, as 'it is in the latter's interests to know whether or not it should avoid certain points that the adversary could legitimately attack.'[1124] However, this definition constitutes one of the most heavily debated provisions of the Additional Protocol and, in particular, military circles in Western countries have been extremely hostile to it.[1125] This hostility is quite interesting though, as the definition is still, in my opinion, very much in the interests of the belligerents, as, due to its abstraction, it leaves a wide margin of interpretation, allowing belligerents to construe it according to their particular interests.

As it is for those who plan and decide an attack to assess, on a case-by-case basis, whether the chosen target fulfils the criteria constituting a military objective, needless to say that such assessments can lead to controversy. Furthermore, belligerents often

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[1122] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 326 (emphasis added).
[1123] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 21.
[1124] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at para. 1015.
[1125] See Fleck, *The Handbook of International Humanitarian Law*, at 179 with references.

adopt hypocritical justifications for their choice of targets.[1126] However, we can challenge this hypocrisy by insisting on limiting the list of legitimate military objectives to those that pass the two-prong test of effectively contributing to the other side's military action and providing a definite military advantage when attacked. 'Only then it is possible to draw the line between targets that concretely benefit military action – while incidentally affecting civilian morale or political will – and those that do not qualify because their contribution to the enemy's war-fighting capacity is too remote.'[1127] Failing to do so, and allowing the law to be shaped to what some argue is a new battlefield reality in challenging the rule that only strictly military objects can be targeted, amounts to repudiating the principle of distinction.

Special problem related to non-international armed conflicts

Challenges related to the identification of military objectives is an acute question in internal armed conflict due to the shift of the hostilities into urban centres and the expanding possibilities of using civilian objects to make an effective contribution to the military action of the defender. So in modern-day internal armed conflicts, the extent to which belligerents consider the two-pronged test of effective contribution to military action and definite military advantage is worrying. Indeed, 'civilian objects are making their way into the category of military objectives with little of justification.'[1128] First of all, as we have seen above, the two key premises on which IHL was originally based, - i.e. that it was possible to isolate military and civilian targets with sufficient clarity and that there was a tangible military objective to be attained from the battle, such as hitting army bases or gaining control over territory – are highly difficult to apply in situations where state armed forces are fighting organized armed groups, and even more where armed groups are fighting other armed groups. First, because organized armed groups will avoid attacking well-defended

[1126] See Meyer, J.M., "Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine", 51 *Air Force Law Review* 143, (2001), at 170.
[1127] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 29.
[1128] Id. at 23.

targets, preferring instead to strike weakly defended objectives, and secondly, because in internal armed conflicts, there are very few purely military objectives.

This dramatically limits the ability of state armed forces and organized armed groups to identify arenas where they can legitimately project their force. The distinction between political and military objectives is more and more blurred. Especially in conflicts between a state and an organized armed group, the insurgents' ultimate objective in using military force is often to exert pressure on the politics of the state, to influence the public opinion, rather than even to attempt to achieve the state's military submission.[1129] On the other hand, state armed forces fighting an organized armed group have the tendency to adopt 'a far more holistic approach, inseparably combining political and military efforts to bring about the entire political eradication or dissolution of the enemy and not just the enemy's military submission.'[1130]

From the fact that the identification of a military objective requires reconnaissance and precise information with respect to the exact nature, purpose, and use of the target, military intelligence becomes a key element of lawful warfare. Accordingly, in an internal armed conflict, the state armed forces could potentially easily manage these requirements, especially in light of the latest development and use of new military technologies. But when it comes to the organized armed group, which might not have such efficient means of reconnaissance and intelligence, it might be much more difficult for its members to meet these requirements.

Military action vs. war-sustaining capability

The current asymmetries in military technology and resources and their repercussions on military strategies have led to an intense debate on the definition of 'military objectives'. We can see this quite clearly in the context of the US doctrine of 'effects based-operations'. One of the main points of divergence concerning this interpretation of the definition of military objectives is related to the notion of 'war-sustaining capability', a notion brought in by the United States. Indeed, this is the only country which openly challenges the criterion that the effective contribution be related to the

[1129] See Chapter 5 for a discussion on the challenges related to non-international armed conflicts.
[1130] Geiss, "Asymmetric Conflict Structures", at 769.

defendant party's *military action,* arguing that this notion pays too little attention to the problem of war-sustaining capability, including economic targets such as export industries.[1131] This analysis comes from an extended formulation that has been recently adopted by a US military manual. According to this document, 'Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's *war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.'[1132]

In their doctrine, the US have substituted the words 'military action'[1133] by 'war-fighting or war-sustaining capability'.[1134] This position has been reiterated in the Report on US Practice which states that

> 'The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include areas of land, objects screening other military objectives, and war-supporting economic facilities as military objectives.[1135]

For Dinstein, this substitution goes too far.[1136] With respect to the term 'war fighting' it is not so problematic, as this is similar to 'military action'.[1137] However, when it comes to the term 'war-sustaining capability' things are very different. This concept, which is, according to Dinstein, 'untenable'[1138], entails a considerable departure from the definition that we find in Article 52(2) AP I. The US position, still according to the above-mentioned military manual, and following this line of thought, is that

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[1131] See for instance, Parks, W.H., "Air War and the Law of War", 32 *Air Force Law Review* 1, (1990), at 30-36.

[1132] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Newport, Rhode Island, US Naval War College, 1997, Chapter 8.2: The Law of Targeting at 8.1.1. (emphasis added), available online : http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/454610/NWP_1-14M-1.pdf

[1133] Article 52(2) Additional Protocol I.

[1134] See for instance the US Commander's Handbook on the Law of Naval Operations, *Annotated Supplement,* 402.

[1135] Report on US Practice, 1997, Chapter 1.3. CIHL Study Rule 8.

[1136] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 95.

[1137] See Id. at 95 ; Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 30.

[1138] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 95.

'economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.'[1139] But this notion expands the concept of military objective in an unacceptable way, as 'for an object to qualify as a military objective, there must exist a proximate nexus to "war-fighting".'[1140]

According to the US approach, the military effort of the enemy is no longer the target of military operations. It is the political command and control system and its resource basis that become the objective. 'The requirement of a close nexus between the target and on-going military operations is given up in this approach.'[1141] In addition, it seems that this new US approach opened a door that the Israeli Defence Forces very easily went through.[1142] We can also mention the internal armed conflict in Colombia, where the growth in peasant participation in coca and poppy cultivation, and FARC taxation of such crops, has financed the increase in size and military capacity of the FARC. The Colombian armed forces saw this as a war-sustaining activity. The 1990's counternarcotics operations consisted primarily of the use of force against civilian farmers growing coca. These persons could not be considered as military objectives and this strategy ultimately proved counterproductive. Indeed, it gave the FARC the opportunity to increase their territorial control and political legitimacy *viv-à-vis* the villagers, by attacking both fumigation aircraft and the soldiers providing ground support, in defence of peasant coca growers.[1143]

This doctrine of war-sustaining activities is indeed convenient when it is in the interest of the attacker. But I am not sure the US would still be happy in the event of this doctrine being applied to them. Such an approach would render legal any attack against, for instance, the Twin Towers or the New York Stock Exchange in Wall Street. Accordingly, it is submitted here that such a broad interpretation of the concept

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[1139] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Newport, Rhode Island, US Naval War College, 1997, Chapter 8.2: The Law of Targeting at 8.2.5.
[1140] Ibid.
[1141] Fleck, *The Handbook of International Humanitarian Law*, at 185 (footnotes omitted).
[1142] See for instance the bombing of the Jiyyeh power plant in Lebanon by the Israeli Defence Forces. Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*. pt. (2006), at paras 23, 209-10, 220.
[1143] See Vargas, R., *The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade*, Transnational Institute on Drugs and Democracy, available at http://www.tni.org/briefing/revolutionary-armed-forces-colombia-farc-and-illicit-drug-trade, (7 June 1999).

of military objective is very dangerous as it calls into question the entire differentiation between military objectives and civilian objects.[1144]

Linked to the notion of war-sustaining activities, the term 'war-sustaining capability' is not defined precisely either. The ICRC has clarified that such a notion would include political, economic or media activities supporting the general war effort, such as political propaganda, financial transactions, production of agricultural or non-military industrial goods.[1145] The ICRC makes clear that war-sustaining activities are activities that constitute *indirect* participation in hostilities. They are part of the general war effort, which could be said to include all activities objectively contributing to the military defeat of the adversary. But they do not reach the threshold of direct causation. They only indirectly cause harm and are therefore excluded from the conduct of hostilities.[1146]

This notion of 'war-sustaining' is indeed attractive for state armed forces fighting organized armed groups, because as we have seen, in internal armed conflicts, the weakening of military forces is more difficult. 'Economic targets prove particularly attractive because they may shape an opponent's cost-benefit analysis more effectively than strikes against the military.'[1147] So the logic here is that in order to end the conflict swiftly, it is better to hit the enemy where it is most vulnerable. In this sense, purely military objectives might not always be the best targets. Targets of military operations are in this approach the political command and control system and its resources basis. The requirement of a close nexus between the target and on-going military operations is given up.[1148]

It is submitted here that such a broad interpretation of the notion of (military) objectives puts into question the very notion of the distinction between military and civilian objects. As Sassòli writes, including 'war-sustaining capability' effectively

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[1144] Fleck, *The Handbook of International Humanitarian Law*, at 185.
[1145] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 51.
[1146] Id. at 51-53.
[1147] Schmitt, M.N., "The Law of Targeting", in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Elizabeth Wilmshurst & Susan Breau eds., 2007), at 149.
[1148] See Oeter, "Comment: Is the Principle of Distinction Outdated?", at 56.

means 'removing civilian protection where it can be determined that an object or person influences the possibility or the decision of the enemy to continue the war.'[1149]

Dual-Use Objects

A problem related to the notion of military objectives that is particularly preeminent in internal armed conflict is the question of so-called 'dual-use objects'. These objects have a special place in the list of military objectives in internal armed conflict. In these situations, objects of a purely civilian character may be appropriated also to serve a military function. 'Others may have both functions to begin with.'[1150] These objects 'have some civilian uses and some actual or potential military uses',[1151] rendering the application of the definition of military objective all the more difficult.

The shift of hostilities into the proximity of urban population centres and the 'increasing possibilities of using civilian objects to make an effective contribution to military action are pushing this particular problematic more and more to the fore.'[1152] Discussions about which objects constitute a legitimate military objective, especially with respect to 'dual-use' and 'war-sustaining objects', are ongoing.[1153] However, it must be mentioned that the notion of 'dual-use' is not to be found in the law governing the conduct of hostilities. It is a concept that has been invented by the military in order to refer to objects that serve both civilian and military purposes. Boivin warns us, explaining that

> 'in reality, the label is primarily applied to essential civilian infrastructure such as electricity-generating installations and oil-refining facilities, which

[1149] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 196
[1150] Sivakumaran, *The Law of Non-International Armed Conflict*, at 347.
[1151] Fenrick, W.J., "Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives", 27 *Windsor Yearbook of Access to Justice* 271, (2009), at 275.
[1152] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 26.
[1153] See generally Parks, W.H., "Asymmetries and the identification of legitimate military objectives", in *International Humanitarian Law Facing New Challenges,* (Wolff Heintschel von Heingedd & Volker Epping eds., 2007). Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 26-29.

produce energy that is used by civilians and combatants alike. It is rather more the *purpose* of the facility that is dual than its use.'[1154]

More widely, these 'dual-use' objects include, among other things, 'communications systems, transportation systems, petrochemical complexes and certain manufacturing plants.'[1155] These objects are capable of military use, but are not necessarily used for military purposes. There is no special category of 'dual-use' objects in IHL,[1156] as every civilian object could theoretically become a military objective. Even 'religious sites, schools, or medical units may temporarily become military objectives if 1) they make an effective contribution to military action by being used as a firing position, to detonate improvised devices, or to take cover; and 2) their total or partial destruction offers a definite military advantage.'[1157] The definition of a military objective remains the same. If the object under consideration satisfies the two-pronged test for a military objective, it becomes a military objective regardless of its importance for civilians. Thus, with dual-use objects, 'the problem is not whether such objects can theoretically become military objectives, but under what circumstances (and for how long) an attacker may conclude that they are legitimate military objectives.'[1158] Therefore, when it comes to the identification of a dual-use object, the requirement to identify a definite military advantage associated with attacking a particular target is extremely important. And the crux of the problem will lie in the 'inevitability of affecting the civilian population because the two purposes are inseparable.'[1159]

Despite not existing in the law, the Goldstone report asserted that IHL recognizes a category of civilian objects that nonetheless may be targeted in the course of armed

[1154] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 23. See also Schmitt that describes these as targets 'with both civilian and military functions, such as a factory that makes both civilian and military products or an airfield from which both civilian and military aircraft fly.' Schmitt, M., "Precision Attack and International Humanitarian Law", *International Review of the Red Cross* 445, (2005), at 453.
[1155] NATO Report, at para 37.
[1156] Sivakumaran, *The Law of Non-International Armed Conflict*, at 347 ; Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 24.
[1157] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 27.
[1158] Ibid.
[1159] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 24.

conflict to the extent that they have a 'dual use'.[1160] The Goldstone mission investigated several incidents involving the destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing, to see whether these were indeed dual-use targets.[1161] Despite the fact that the issue of whether dual-use targets may be attacked in the first place is not resolved, the Goldstone report accepted 'the Israeli position on this issue' and conducted 'the analysis of targeting in that perspective.'[1162] Each target was assessed as to whether it had a military purpose. 'This adds to the perception of fairness of the report, although the military community does not accept dual-use targets universally.'[1163] Ultimately, the mission found that there was a 'deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations'.[1164] The general conclusion was that 'it could not be argued that the targets were dual-use targets and the campaign was to deny the basics of sustaining life to the civilian community.'[1165]

Conclusion

We have seen that there is no definition of 'civilian object' in treaty law for non-international armed conflict. Each and every civilian object can become a military objective, provided it fulfils the respective criteria. However, no objects, including straightforward military objects, can be directly classified as a military objective. Every object must be assessed against the two-pronged test for a military objective, namely that the object makes an effective contribution to military action of the offender and that its partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time. Accordingly, there is no

[1160] Breau, S., "An Assessment of the Gaza Report's Contribution to the Development of international Humanitarian Law", in *Protecting Civilians During Violent Conflict : Theoretical and Practical Issues for the 21st Century*, (David W. Lovell & Igor Primoratz eds., 2012), at 286.
[1161] *Goldstone* Report, para 50.
[1162] See, for e.g., W. Clark, *Waging Modern War* (New York : Public Affairs 2001), in which, as Supreme Allied Commander Europe, he criticized other governments being unwilling to agree to certain dual-use targets in the campaign concerning Kosovo.
[1163] Breau, "An Assessment of the Gaza Report's Contribution to the Development of international Humanitarian Law", at 287.
[1164] *Goldstone* Report, para 54.
[1165] Breau, "An Assessment of the Gaza Report's Contribution to the Development of international Humanitarian Law", at 287.

civilian object or military objective *per se*. Everything depends on the effect the object has on the conduct of hostilities in terms of military strategy. The condition of an object is therefore dynamic and can change very quickly, especially in non-international armed conflict.

It takes time and effort for a military commander to make the distinction between military objectives and civilian objects. It has been pointed out that 'if it calls for a disproportionate consumption of men, ammunitions, or loss of time as a tactical factor, commanders, especially at lower levels, may be inclined to be less careful in their selection of targets.'[1166]

But the limitation of legitimate military objectives is highly important for the implementation of the protection of civilians against the effects of hostilities in internal armed conflict. Indeed, this protection is insured by the subjective definition of military objectives together with the rule of doubt as to the status of the object. However, as we will see, controversy about what is a legitimate target is not the only reason why civilians suffer from armed attacks in non-international armed conflict. It seems that the definition of military objective is flexible enough to encompass many objects, and is not as protective for civilians as we would like it to be. Indeed, few declared targets are controversial, except, of course, when civilians or civilian objects are directly and intentionally targeted. The next Chapter will be devoted to this question. Then, the discussion will continue on the other rules that govern the lawful attack of military objectives, namely the principle of proportionality and precautionary measures. These rules are maybe even more important than the rule on the definition of a military objective.

[1166] Rogers, *Law on the battlefield*, at 107.

Chapter 8:

The Prohibition of directing attacks against civilians and civilian objects

Prohibition of direct attacks against civilians

The first and foremost inference from the obligation of distinction between the different categories of persons and objects is that direct or deliberate attacks against civilians or civilian objects are forbidden. This is an absolute prohibition reflecting the current customary international law principle of protection of civilians in situations of conflict and the implications of the principle of distinction are clear: any attack on civilians as such is prohibited. And this is so also in non-international armed conflict.

However, in the specific context of a non-international armed conflict, the character of the principle in the eyes of the belligerents seems to have changed dramatically. In traditional armed conflicts, the principle of distinction merely outlaws violence that is not essential to the warring parties' aim to militarily weaken or defeat their adversary. However, in internal armed conflicts, in which often the targeting of civilians and civilian objects, and displacement or sexual exploitation of the civilian population can be among the objectives of the belligerents, the principle of distinction ceases to be a compromise between the belligerents' interests and humanitarian concerns. Instead, 'it amounts to a *total prohibition* of the kind of warfare which the warring parties want to pursue.'[1167] The objective here is to understand how the law is supposed to apply to these types of situations, in order to mitigate the above-mentioned problems.

The rule forbidding any deliberate attack against civilians and civilian populations is grounded on the principle of distinction, which authorizes an attack only if it is

[1167] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 245 (emphasis original).

directed against a military objective, be it a fighter, a person directly participating in hostilities or a military object. The absolute prohibition of direct attacks against protected persons and objects is therefore a direct emanation of the principle of distinction. We will see that the concept that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'[1168] is found in several treaties applicable to internal armed conflicts. This wording prohibits the deliberate targeting of civilians, so if a targeted person does not represent a legitimate military objective, or is a civilian who is not directly participating in hostilities, then an attack on this person will constitute a direct attack against a protected civilian.

Prohibition of attacks against civilians in treaty law

The prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts.[1169] As we have seen, categorization of a person as a civilian is a function of the definition of a fighter. It has therefore been necessary to examine these different categories of persons. In order to determine whether an individual constitutes a lawful military objective in internal armed conflict, it must be clarified in the first place whether this person is a civilian, a member of state armed forces, a fighting member of an organized armed group, medical or religious personnel or a person *hors de combat*. Secondly, if the person is a civilian or otherwise protected against direct attack, it must be determined whether he is directly participating in hostilities or engaged in 'harmful' or 'hostile' acts. It was therefore necessary to determine how these various categories of persons are defined in treaty and customary IHL applicable to internal armed conflicts. Now that the analysis of the personal and material scope of application of the principle of distinction has been conducted,[1170] we will proceed to the analysis of the first and foremost obligation related to the principle of distinction,

[1168] Additional Protocol II, article 13(2); Convention on Certain Conventional Weapons, Amended Protocol II Article 3(7) ; Convention on Certain Conventional Weapons, Protocol III, Article 2(1).
[1169] See Rome Statute Article 8(2)(2)(e); International Institute of Humanitarian Law, *Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts*, Rule A2 and Commentary, IRRC, No. 278, 1990, pp. 388–389; The commentary on this rule notes that it is based on Article 25 of the Hague Regulations, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV), and Article 13(2) of the 1977 Additional Protocol II. It adds that attacks against civilians are also incompatible with the rule on the protection of the life and person of those taking no active part in hostilities as set out in common Article 3 of the 1949 Geneva Conventions.
[1170] See Chapters 6 and 7.

that is the prohibition of directing attacks against civilians.

The Principle of distinction under Common Article 3

As we have seen in Chapter 2, Common Article 3 was the first attempt at developing the principles of humanitarian law to internal armed conflicts, and the provision is the only article of the four 1949 Geneva Conventions that applies to armed conflicts not of an international character.

Common Article 3 is, at first sight, of little help in the study of the principle of distinction, as the principle is not explicitly defined in this article, nor does the provision explicitly prohibit attacks on the civilian population. Rather, the wording of Common Article 3 only distinguishes between persons taking part in hostilities and those who do not. More specifically, it indicates that during armed conflicts not of an international character, the persons who enjoy protection against the various forms of violence are '(p)ersons taking no active part in 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, without any adverse distinction founded on race, colour, religion, sex, birth or wealth, or any other similar criteria.'[1171] The provision requires that these 'persons taking no active part in hostilities' shall be treated humanely in all circumstances, prohibiting violence to the life and person of those individuals at all times.

The reason for the fact that the principle of distinction is not explicitly mentioned in Common Article 3 might be that in 1949, when the four Conventions were adopted, there was a clear demarcation line between the laws of war, dealing with the conduct of hostilities, (the law of the Hague), and the emerging principles of humanitarian law, dealing with the protection of victims, (the law of Geneva). Therefore, at that time, an interpretation of a humanitarian document so as to affect the laws of warfare proper was hard to maintain.[1172] However, the same might not be true today, as the distinction between the two sources of the law of armed conflict is no longer so rigid, although it is not without significance.[1173] As we have seen in Chapter 2, the extent to which Common Article 3 regulates the conduct of hostilities is debated. The

[1171] Common Article 3 to the four Geneva Conventions of 1949.
[1172] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 27.
[1173] See Chapter 2 for a discussion on whether Common Article 3 does cover the conduct of hostilities.

vulnerability of civilians in internal armed conflicts arises from all belligerent parties from the mere fact of fighting. ‘Any measures to improve their protection will have a direct impact on the conduct of hostilities. In other words, rules on targeting and opening fire form part of Hague law, even if part of their object is the protection of the civilian population.’[1174] Anyway, despite the two different views on the application of the Common Article 3 provision to the conduct of hostilities, the provision suggests a distinction between, on the one hand, persons taking no active part in the hostilities who are entitled to humane treatment and enjoy protection against certain acts (violence to life and person, taking of hostages etc.), and, on the other hand, those who do take an active part in the hostilities, who fall outside the protective reach of the article.[1175] Accordingly, we could argue that despite the fact that Common Article 3 does not deal in detail with the conduct of hostilities, we can find in the provision the prohibition on attacking civilians or the civilian population. This view seems to be shared by the experts who drafted the San Remo Manual when, in the Commentary, they write that ‘Common Article 3(1)(a) of the Geneva Conventions requires humane treatment of those taking no active part in hostilities and includes a prohibition on violence to life and person.’[1176] The ICTY also interpreted Common Article 3 as comprising rules on the conduct of hostilities that amount to the prohibition of ‘violence to life and person’[1177] and the prohibition of attacking civilians not directly participating in hostilities, as well as members of the armed forces who have laid down their arms and those *hors de combat*.[1178]

The prohibition of directing attacks against civilians under AP II

The principle of distinction is confirmed in Article 13 of the Second Additional Protocol, despite the fact that, as we have seen, in internal armed conflicts the distinction as to who is a combatant and who is a civilian, for the purposes of who is

[1174] Hampson, “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law”, at 195.

[1175] Kleffner, “From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, at 324.

[1176] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.1.1, Commentary 2.

[1177] Common Article 3(1)(a)

[1178] See for instance ICTY *Martic* Trial Judgment, para 14; *Blaskic* Trial Judgment, para 170: ‘The specific provisions of Common Article 3 also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II.’

liable to lawful attack, is still far less clear than in international armed conflict. Article 13 of Protocol II sets out the rule for the protection of the civilian population and can be seen as a restatement of the first three paragraphs of Article 51 of Protocol I.[1179] However, it does not contain specific limitations on the means and methods of combat, as contained in the other paragraphs of Article 51.[1180] Originally, the 1973 Red Cross draft of Article 13 was almost identical to the draft of Article 48 of Protocol I.[1181]

Despite its rudimentary aspect, it has been argued that it might not be necessarily such a problem. As Eric David wrote:

> 'Observons cependant que la simplification d'un texte ne conduit pas nécessairement à une limitation de la protection juridique qu'il offre. C'est parfois le contraire qui se produit. Ainsi, les trois paragraphes de l'art. 13 consacrés à la protection de la population civile assurent à celle-ci une meilleure immunisation juridique contre les effets directs des hostilités que les huit paragraphes de l'art. 51 correspondant du 1er Protocol additionnel, qui par les nuances et les distinctions parfois subtiles qu'ils établissent ouvrent davantage la porte à des actions susceptibles d'affecter la population civile!'[1182]

In addition, Paragraph 1 of Draft Article 24, entitled Basic Rules, was a verbatim copy of Article 48 of the First Additional Protocol, which restates in abstract and somewhat ambiguous terms the principle of distinction. It has been deleted.[1183] However, as Bothe et al. explain, 'as the basic principle of general protection of

[1179] Article 51 of the First Additional Protocol deals with the protection of the civilian population.
[1180] Article 13 contains no prohibition against indiscriminate attacks or any requirement as to proportionality, no prohibition on the civilian population being used as a shield against military operations and no prohibition against reprisals.
[1181] The draft submitted by the ICRC, and adopted in Committee, had three provisions: Article 24: Basic rules; Article 25: Definitions; Article 26: Protection of the civilian population. Ultimately, only the first paragraphs of Article 26 of the draft were retained and became Article 13 in its present form. See O.R.XV, pp. 319-321, CDDH/215/Rev.1. See also Sandoz, et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. para. 4763. On Article 26 draft see in Volume I of the *Official Records of the Diplomatic Conference*, at p. 33. For a discussion of the circumstances under which the simplified version of Protocol II was formulated and adopted, see the Bothe, et al., New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, at pp. 604-608.
[1182] David, *Principes de Droit des Conflits Armés*, at 344.
[1183] CDDH/SR.52, paras. 29-78.

civilians is stated in less abstract terms in the first paragraph of Article 13,[1184] the elimination of para. 1 of draft Article 24[1185] does no harm insofar as the protection against direct attack against civilian persons is concerned.'[1186] This position is shared by the ICRC Commentary, which states that 'this radical simplification does not reduce the degree of protection which was initially envisaged, for despite its brevity, Article 13 reflects the most fundamental rules.'[1187] However, as we will see in the next Chapter of this dissertation, the elimination of the prohibition against indiscriminate attacks[1188] in Article 13 leaves the protection of civilians against the effects of attacks in a primitive condition, particularly in light of the high threshold provided in Article 1.

Non-combatant immunity being not expressly protected in Protocol II, the effect of the deletions may have the unfortunate effect that parties to civil conflicts regard themselves as free to take actions that were forbidden under the original draft. For example, they could feel free to launch indiscriminate attacks. But, as observed by Gardam, 'it is not enough for the effective protection of civilians that the principle of non-combatant immunity may be implied from other provisions of Protocol II, especially as the *travaux préparatoires* reveal that such a requirement was in fact deliberately deleted from the original draft of the Protocol.'[1189] However, the principle of non-combatant immunity can still be implied from Article 13(1), which reads 'the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations'. Despite admitting that the clause does not spell out the principle of distinction in detail, we can consider as 'permissible to construe it as recognizing at least implicitly the validity of this principle for internal armed conflicts as well'.[1190]

[1184] See CDDH/SR.52, paras 38, 49, 53, 59-73.
[1185] Draft article 24(1) read as follow: 'In order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.' In *Draft Additional Protocols to the Geneva Conventions of August 12. 1949*, *Commentary,* October 1973, at p. 155.
[1186] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at p. 670.
[1187] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para. 4764.
[1188] See Chapter 9 an analysis on indiscriminate attacks.
[1189] Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, at 130.
[1190] Kalshoven, F., "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part I: Combatants and Civilians", 8 *Netherlands Yearbook of International Law* 107, (1977), at p. 119.

Article 13(2) of Additional Protocol II prohibits making the civilian population as such, as well as individual civilians, the object of attack. Achieving the reinforcement of the principle of distinction through Article 13 means that this Article 'can be considered innovative, having as its object the prevention of growth in the number of victims, rather than, as under the existing law, the protection of those who have already fallen into enemy hands.'[1191] In addition, the preamble of Protocol II defines what may be regarded as the basic purpose of the Protocol, which is 'the need to ensure a better protection for the victims of internal armed conflicts. As recalled by Kalshoven and Zegveld, these 'victims' 'are, in large measure, civilians not participating in the hostilities.'[1192] Furthermore, the simplified version of the Martens Clause, that we find in the preamble, states that 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.'[1193]

Other Treaties prohibiting attacks against civilians

The prohibition of attacking civilians in internal armed conflict is also contained in other recent treaty texts. For instance, Article 4(7) of the Amended Protocol II to the Convention on Certain Conventional Weapons reads that '(i)t is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.'[1194] The Third Protocol to the Convention on Certain Conventional Weapons, which deals with the prohibitions or restrictions on the use of incendiary weapons and which has been made applicable to internal armed conflicts, also prohibits 'in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons'.[1195]

Also, the Ottawa Convention on Anti-Personnel Mines is applicable to internal armed

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[1191] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 676.

[1192] Kalshoven, F. & Zegveld, L., *Constraints of the Waging of War, an Introduction to International Humanitarian Law* (ICRC ed., ICRC. 2001), at 132.

[1193] See Chapter 14 for an in-depth discussion of the principle of military necessity.

[1194] Protocol on Prohibitions or restrictions on the Use of Mines, Booby-Traps and other devices, also known as Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(7).

[1195] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, also known as Protocol III to the Convention on Certain Conventional Weapons, article 2(1).

conflicts,[1196] and affirms in its Preamble that State Parties recognize, *inter alia*, 'the principle that a distinction must be made between civilians and combatants.'[1197] Furthermore, recently, the General Assembly adopted the Arms Trade Treaty by 154 votes in favour, 3 against, and 23 abstentions.[1198] This treaty is 'not only a treaty about prohibiting weapons or disarmament, it is also a treaty about human rights, a treaty about preventing violations of international humanitarian law, and a treaty which aims at halting terrorist offences and the worst atrocity crimes.'[1199] Importantly, Article 6(3) forbids a state to authorize

> 'any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949**,** *attacks directed against civilian objects or civilians protected as such*, or other war crimes as defined by international agreements to which it is a Party.'[1200]

The sentence 'attacks against civilian objects or civilians protected as such' is different to the traditional sentence that we find under IHL, as the provision encompasses both attacks against individual civilians *and* objects.[1201] Indeed, 'it is often assumed that by speaking of prohibiting attacks on the "civilian population as such" one does not prohibit attacks on military objectives which cause excessive damage to the civilian population'[1202] In the case of disproportionate attack, the civilian population is maybe part of the attack but is not attacked as such. Accordingly, we may wonder what should be the interpretation of Article 6(3) of the

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[1196] See Malsen, S., *Commentaries on Arms Control Treaties* (Oxford University Press. 2005), at pp. 74-77.

[1197] Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, Preamble.

[1198] General Assembly Resolution, 2 April 2013, A/RES/67/234 B.

[1199] Clapham, A., "The Arms Trade Treaty: A Call for an Awakening", 2 *European Society for International Law*, (2013).

[1200] Arms Trade Treaty, Article 6(3) (emphasis added).

[1201] See Article 51(2) of Additional Protocol I (API) which states that 'The civilian population as such, as well as individual civilians, shall not be the object of attack.' See also Rule Rule 1 on the prohibition of directing attacks against civilians, Rule 7 on the prohibition of directing attacks against civilian objects, and Rule 14 on the prohibition of launching disproportionate attacks. See also Rule 156 for the related war crimes. All these rules apply in non-international armed conflicts. Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*.

[1202] Clapham, "The Arms Trade Treaty: A Call for an Awakening". See Chapter 10 for an analysis of the rule of proportionality, and Chapter 12 for disproportionate attacks.

Arms Trade Treaty. Does this wording mean that it does not encompass indiscriminate and disproportionate attacks? I share Clapham's view in this respect when he argues it this would seem 'absurd if a state party to this new treaty could argue that there is no prohibition under this treaty to arm the Syrian Government or anyone else with arms that would be used in an indiscriminate or disproportionate way against the civilian population.'[1203]

The prohibition of directing attacks against civilians as customary law applicable in internal armed conflict

There is no doubt that in internal armed conflict, the prohibition on attacks against civilians and the civilian population is a norm of customary international law. The targeting of civilians is an absolute prohibition. The customary character of the principle of distinction and the prohibition of directing attacks against civilians in internal armed conflict is well established and has been confirmed by the ICRC Study on Customary International Humanitarian Law. Rule 1 is aimed at specifying who may legitimately be attacked. It reads as follow:

> 'The Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.'[1204]

As explained by Henckaerts,

> 'the formulation of "attacks directed against civilians" – rather that "making civilians the object of attack" – was chosen following the final experts' consultations to indicate more clearly than the language of Additional Protocol I that the prohibition concerns attacks that *intentionally* target civilians and does not cover the incidental effects of attacks directed against military objectives.'[1205]

[1203] Id. at

[1204] Rule 1, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 3. Hampson has suggested that a better formulation might have been: 'attacks must not be directed against persons entitled to protection as civilians' and that, in considering combatant status, there are three related questions: who is entitled to take part in hostilities, who can be targeted, and what is their treatment? (Meeting on combatant status at the British Institute of International and Comparative Law on 13 December 2005.)

[1205] Henckaerts, J.-M., "Customary International Humanitarian Law - A Rejoinder to Judge Aldrich", 76 *British Yearbook of International Law*, (2005), at 526 (emphasis added). The language of Article

This formulation has thus been chosen in order to separate the issue of collateral damage from the evaluation of the principle of distinction.[1206] The same formulation has been used in the Statute of the International Criminal Court,[1207] and the Elements of Crimes specifies that 'the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.'[1208] The Elements further states that 'the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack'.[1209] Accordingly, under the Rome Statute, it is a war crime to intentionally attack civilians in internal armed conflict.

It is argued that no official contrary practice was found with respect to either international or non-international armed conflicts.[1210] Accordingly, the fact that in customary law the principle of distinction is equally applicable in non-international armed conflict is beyond dispute as shown by the abundant evidence gathered by the ICRC.[1211] This principle is applicable, as '(t)he basic rule of protection and distinction (…) is the foundation on which the codification of the laws and customs of war rests.'[1212]

The prohibition of targeting civilians has also been upheld by the UN General Assembly. In Resolution 2444 (1968), it unanimously stated that: 'it is prohibited to launch attacks against the civilian population as such' and specified that all governmental and other authorities responsible for action in armed conflicts are to observe this rule.[1213] A similar provision is set forth in paragraph 4 of Resolution 2675 (XXV), in which the General Assembly re-affirmed this fundamental principle, stating that 'civilian populations as such should not be the object of military

51(2) Additional Protocol I reads as follow: 'The civilian population as such, as well as individual civilians, shall not be the object of attack.'

[1206] See Chapter 10 for an analysis of the notion of collateral damage.

[1207] See Article 8(2)(e)(i) of the Rome Statute.

[1208] See *Elements of Crimes*, Article 8(2)(2)(i), Element 2 and 3.

[1209] Ibid.

[1210] However, the Study explains that this rule is sometimes expressed in other terms, in particular as the principle of distinction between combatants and non-combatants, whereby civilians who do not take a direct part in hostilities are included in the category of non-combatants. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 6 and footnote 27.

[1211] See CIHL Rule 1 at pp. 5-8.

[1212] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* para 1863.

[1213] UN General Assembly Resolution 2444 (1968).

operations.'[1214]

We will now consider how international courts and tribunals have dealt with the prohibition of directing attacks against civilians. But before that, I would like to briefly mention the fact that the notion of directing attacks against civilians has also been dealt with in various reports of Commissions of Inquiry. For instance, the Report of the International Commission of Inquiry on Darfur first asserted that the prohibition on deliberate attacks against civilians was customary in internal armed conflict.[1215] Then, the Commission investigated the scene of an attack in and around a village in North Darfur and established that

> 'At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. (…) Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. (…) The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment. After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock.'[1216]

This is a clear example of a direct attack against civilians. The Commission of Inquiry analyzed several case studies of attacks and then proceeded to the legal appraisal of them. It asserted that 'international law prohibits any attack deliberately directed at civilians, that is, persons that do not take a direct part in armed hostilities.'[1217] It further stated, by referring to Article 8(2)(e)(i) of the Rome Statute, that 'Intentionally directing attacks against the civilian population as such, or against civilians not taking direct part in hostilities, is a serious violation of international humanitarian law and amounts to a war crime.'[1218]

[1214] UN General Assembly Resolution 2675 (1970), para 4.
[1215] *Report of the International Commission of Inquiry on Darfur to the Secretary General*, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, S/2005/60 (1 February 2005), (hereinafter *Darfur* Report)., para 166.
[1216] Ibid, para 252.
[1217] Ibid, para 258.
[1218] Ibid, para 261.

The Commission of Inquiry on the Syrian Arab Republic documented a great number of cases of snipers.[1219] Snipers are used by all parties to the conflict.[1220] In Annex XI, devoted to unlawful attacks, the Commission noted that

> 'Aleppo has been divided between Government forces and anti-Government armed groups, with both parties positioning snipers on top of buildings and at the entry to main roads to control the movement of people. The majority of interviewees injured by sniper fire stated that they had been hit by Government snipers. This belief stemmed from their having been struck by bullets that were fired from the direction of visible military bases and, in one instance, from snipers on top of a government hospital. In such instances, the conduct of the persons was such that they should have been presumed to be civilians.'[1221]

Then the Commission further ascertained that

> 'the firing on an individual by a sniper is inherently deliberate and targeted. There is a reasonable basis to believe that the firing on civilians by snipers constitute attacks that are, at the very least, indiscriminate as to their target, and were carried out recklessly, or the deliberate targeting of civilians as the object of the attack. Patterns of sniping continue to be investigated.'[1222]

It is necessary to clarify here that the use of snipers is not forbidden *per se* under IHL. Indeed, 'snipers are frequently employed to target commanders and other high-value individuals in the opposing force. Equally they may be used to target individual combatants of much lower prestige with the intent of causing surprise, uncertainty and fear.'[1223] However, snipers cannot be used to target civilians. This is strictly prohibited. The very specific act of sniping means that the holder of the weapon knows the civilian nature of his target, as he must see and identify the person he is about to shoot. Accordingly, attacks by snipers on civilians can be categorized as

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[1219] *Report of the independent international commission of inquiry on the Syrian Arab Republic*, Human Rights Council A /HRC/22/59 (5 February 2013), (hereinafter CoI *Syria*), para. 9.

[1220] CoI *Syria*, para. 33.

[1221] CoI *Syria*, Annex XI, para 15.

[1222] Ibid, para 16.

[1223] Riordan, K., "Shelling, Sniping and Starvation: the Law of Armed Conflict and the Lessons of the Siege of Sarajevo", 41 *Victoria University of Wellington Law Review* 149, (2010), at 166.

direct and intentional attacks against civilians.

We will now proceed to the analysis of how the war crime of directing attack against civilians has been dealt with by the *ad hoc* Tribunal and by the International Criminal Court. It is to be noted that this dissertation only deals with the law of non-international armed conflict, namely IHL and the international criminal law on war crimes. The notion of crimes against humanity will therefore not be analyzed.

The War Crime of Directing Attacks against Civilians

In 1952, Sir Hersch Lauterpacht wrote: 'it is in (the) prohibition, which is a clear rule of law, of intentional terrorization – or destruction – of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force.'[1224]

The prohibition of attacks directed against civilians and civilian objects is a logical implication of the principle of distinction and an essential component of international humanitarian law.[1225] However, due to the fact that the substantive IHL rules on the conduct of hostilities are purposely loose and unclear, up until now very few cases have been brought before national or international courts concerning alleged violations of the rules on the conduct of hostilities entailing the criminal liability of the perpetrators. Despite this paucity of cases, especially in the context of non-international armed conflicts, it is widely accepted that the prohibition against attacks on civilians and attacks against civilian objects are now part of customary international law and that any serious violation thereof would constitute a war crime and entail the individual criminal responsibility of the violator.[1226]

[1224] Lauterpacht, H., "The Problem of the Revision of the Law of War", 29 *British Yearbook of International Law* 360, (1952), at 369.

[1225] Fenrick, W.J., "The Prosecution of Unlawful Atack Cases Before the ICTY", 7 *Yearbook of International Humanitarian Law* 153, (2004), at 154.

[1226] See for e.g. See also *Tadic* Interlocutory Appeal, para. 125. See also *Kordic and Cerkez* Article 2 and 3 Jurisdiction Decision, para. 31 (footnotes omitted): 'It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to

The War Crime of Attacking Civilians under the ICTY Statute

The ICTY has been the first international body since the Second World War to investigate and adjudicate direct attacks against civilians in non-international armed conflict. Direct attack against civilians is not an offence that is enumerated *per se* in the ICTY Statute. However, as it has been held in *Galic*, the formulation of 'unlawful attack' embraces direct, indiscriminate and disproportionate attacks.[1227] Accordingly, all counts of unlawful attacks against civilians must be charged as unenumerated offences under Article 3 of the Statute, which relates to violations of the laws or customs of war. As a result of the *Tadic* Appeals on Jurisdiction, to qualify as an unlawful attack, all unenumerated offences need to meet the following four criteria:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature;

(iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim (…);

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[1228]

This section will now focus strictly on the question of direct attacks against civilians.[1229] Article 3 of the ICTY Statute grants the tribunal jurisdiction over the following crimes:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

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the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as *applying to all armed conflicts, whether intended to apply to international or non-international conflicts.*' (emphasis added). See also *Prosecutor v. Strugar,* (Prosecution's Response to Defence Brief on Interlocutory Appeal on Jurisdiction), IT-01-42-AR72, (22 August 2002), (hereinafter *Strugar* Interlocutory Appeal), para. 10; See also *Kupreskic* Rule 61 Decision, para. 47-48; *Prosecutor v. Martic* (Review of the Indictment) IT-95-11-R61 (8 March 1996), (hereinafter, *Martic* Rule 61 Decision), para. 10.

[1227] *Galic* Trial Chamber Judgment, paras 57-61.

[1228] *Tadic* Interlocutory Appeal, para 143.

[1229] The question of direct attack against civilian objects will be deal with further below.

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;[1230]
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and
(e) plunder of public or private property.

However, the first problem we face with respect to those crimes expressly provided for in article 3 of the ICTY Statute is that these crimes are found only in treaties applicable to international armed conflicts. Accordingly, the contemplation of such crimes in relation to internal armed conflicts is dependent on the extension of their scope of application to this type of conflict by customary international law existing before the advent of the facts contained in the indictment.

Then, and this is what interests us, article 3 of the ICTY Statute grants the Tribunal jurisdiction over all those other serious violations of international humanitarian law which, under international customary law, give rise to the individual criminal responsibility of the perpetrator at the time when the acts referred to in the indictment took place. As a result, this provision 'functions as a residual clause to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction'[1231] of the ICTY. Accordingly, violations of the Second Additional Protocol have been prosecuted under Article 3 of the ICTY Statute. Interestingly, the Appeals Chamber in the *Tadic* Jurisdiction decision further concluded that the violations of the principles contained in General Assembly Resolutions 2444 and 2675 that apply to all conflicts, could also be charged as crimes under Article 3 of the ICTY Statute.[1232] Taking into account this statement, Resolution 2675 provides, for instance, that:

[1230] It is worth mentioning that the criteria for this attack are so restrictive that to date no Chamber has made a conviction based upon it. Indeed, an undefended or 'open' town has to be completely undefended and belligerents have to enter it without incurring any casualties on their side or on the side of the citizens.

[1231] *Tadic* Interlocutory Appeal, para 51. See also *Prosecutor v Galic,* (Appeal Judgment) IT-98-29-A, (30 November 2006) ICTY (hereinafter *Galic* Appeal Judgment), para 118; *Kordic* Appeal Judgment, paras 40-45; Kunarac Appeal Judgment, paras 67-9; *Delalic* Appeal Judgment, para 420; and *Tadic* Interlocutory Appeal, para 91.

[1232] *Tadic* Interlocutory Appeal, paras 59-61.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations…

7. Civilian populations, or individual members thereof, should not be the object of reprisals…[1233]

Accordingly, these prohibitions could be charged as offences in a criminal trial at the ICTY.

It should be noted that, originally, the Prosecution at the ICTY charged civilian deaths and injuries via the crime of wanton destruction not justified by military necessity. Olasolo explains that

> 'due to the fact that attacks against civilians or civilian objects or disproportionate attacks are not expressly included in art. 3 ICTYS and that the ICTY subject matter jurisdiction over such crimes is, in principle, conditioned on the crimes being part of international customary law at the time of the conflict in the former SFRY, the first ICTY judgements regarding behaviours taking place during the conduct of hostilities have improperly resorted to the crime of wanton destruction not justified by military necessity provided for in art. 3(d) ICTYS.'[1234]

However, as the crime of wanton destruction not justified by military necessity does not allow for the prosecution of civilian deaths and injuries resulting from unlawful military operations whenever they are justified by military necessity, the Office of the Prosecutor and the Chambers have later resorted to the residual clause of Article 3, to prosecute direct attacks against civilians.[1235]

In addition, thanks to the *Tadic* Jurisdiction Appeal Decision, the prosecution for unlawful attacks is said to have a similar legal content both in international and non-international armed conflicts.[1236] Accordingly, the Office of the Prosecutor has developed and defended the practice of alleging unlawful attack charges, which are

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[1233] UNGA Resolution 2675.

[1234] Olasolo, H., Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute (Martinus Nijhoff Publishers. 2008). at 69. See further below for an extensive explanation of this point. The cases in which the Prosecution relied on this charge are *Kordic* Trial Judgment and *Blaskic* Trial Judgment.

[1235] See further below for a discussion related to the problems this offence has raised.

[1236] See *Tadic* Interlocutory Appeal, paras 96-127.

common to all conflicts. 'In order to evade the conflict classification issue, the ICTY OTP has rooted its unlawful attack-on-civilians charges in identically worded provisions of AP I and AP II.'[1237] For instance, **i**n the *Galić case*, the accused, a senior officer in the Army of the Republika Srpska (VRS), was charged, *inter alia*, with 'attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949', 'punishable under Article 3 of the Statute of the Tribunal' as a violation of the laws or customs of war, for his alleged role in events in Sarajevo in 1992–1994.[1238] In the *Martic* case the ICTY Trial Chamber found that

> 'there exists, at present, a corpus of customary international law applicable to all armed conflicts, irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, (…) the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law.'[1239] The Appeals Chamber, in the *Strugar* Jurisdiction Decision held that 'the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in (…) Article 13 of Additional Protocol II are principles of customary international law.'[1240]

Constitutive elements of the crime

As a criminal offence, 'attack on civilians' has been said to consist of the following elements:[1241]

(i) acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population;

(ii) the offender *wilfully* made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

[1237] Fenrick, W.J., "Riding the Rhino: Attempting to Develop Usable Standards for Combat Activities", 30 *Boston College of Interrnational and Comparative Law Review* 111, (2007). at 128.

[1238] ICTY, *Galic case*, Indictment, 26 March 1999, Counts 4 and 7.

[1239] ICTY, *Martic* Rule 61 Decision, para. 11

[1240] *Strugar* Interlocutory Appeal, para. 13.

[1241] *Galic* Trial Chamber Judgment, para. 56.

Accordingly, under Article 3 of the Statute, the crime of attack on civilians must share the elements common to offences falling under that Article. To these chapeau elements, *actus reus* and *mens rea* elements of the particular crime need to be added.[1242]

Actus Reus

The crime of attacks on civilians or civilian populations is, as to actus reus, an attack directed against a civilian population or individual civilians, causing death and/or serious injury within the civilian population. The equivalent war crime to the provisions on deliberate targeting of civilians in internal armed conflicts has been interpreted in a narrower manner than under IHL. Indeed, the ICTY has taken the view that the war crime of unlawful attacks against civilians requires the attack to result in death, serious bodily injury, or equivalent harm.[1243] Accordingly, 'whether or not an attack would constitute a deliberate attack on civilians or civilian objects would be a question of fact. Civilian casualties, civilian property damage, and the absence of military objectives or of significant military objectives in the area attacked would be of prime importance.'[1244] However, it is important to note that the international criminal law standard should not be equated with the IHL standard, which prohibits the attacks themselves, and thus operates irrespective of any ensuing harm.[1245]

Mens Rea

The protection of civilians will be suspended when they abuse their rights or when, although the object of a military action is comprised of military objectives, belligerents cannot avoid causing collateral damage.[1246] Accordingly, in addition to proving that the attack was not based on a reasonable belief that one of the two above mentioned exceptions applied,[1247] 'the special challenge is to show that the

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[1242] *Galic* Appeal Judgment, paras 121-140.
[1243] See *Galic* Trial Chamber Judgment, para 27. But see *Strugar* Trial Judgment, which notes that 'the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities. The Chamber is of the opinion that the experiencing of such a risk by a civilian is in itself a grave consequence of an unlawful attack, even is he or she, luckily, survives the attack with no physical injury.'
[1244] Fenrick, W.J., "Attacking the Enemy Civilian as a Punishable Offense", 7 *Duke Journal of Comparative & International Law* 539, (1997), at 560.
[1245] See generally Sivakumaran, *The Law of Non-International Armed Conflict*, at 78-81.
[1246] *Kupreskic* Trial Judgment, para 55.
[1247] The third one is highly controversial and will be discussed below.

perpetrator knew that the people he attacked were civilians.'[1248] To do so, the Prosecution must establish that the perpetrator wilfully made the civilian population or individual civilians the object of acts of violence.[1249] 'Wilful' denotes the criminal intent, the intention to bring about the consequences of the act prohibited by the international rule. The perpetrator pursues a certain result and knows that he will achieve it by his action. This intention is hard to prove in court. Those who plan an attack would wilfully launch an attack on civilians or civilian objects if they were aware of the presence of civilians or civilian objects, and intentionally attacked them, or if they recklessly failed to have such information.

For the *mens rea* to be proven, 'the prosecution must therefore demonstrate that the perpetrator was aware in the circumstances[1250] or should have been aware[1251] of the civilian status of the persons attacked.'[1252] This raises two important elements for the prosecution of the crime of directing attacks against civilians. In the first place, there is the expression 'should have been aware of the civilian status', which lowers the mental requirement of knowledge about the civilian nature of the target. As explained by Wuerzner, 'this can be justified, because the ICTY requires the attack to have resulted in serious consequences.'[1253] In addition, the ICTY establishes that the standard of proof must be that of a 'reasonable person'. With respect to the evidence relevant to show that an attack was *wilfully* directed against a civilian population, in the *Strugar* case, the Trial Chamber relied on the fact that the commander knew or should have known that there was a large civil population in Dubrovnik.[1254] The Chamber maintained that

> 'the existence of the Old Town as a living town was a renowned state of affairs which had existed for centuries. The residential situation in the wider Dubrovnik was, in many respects quite similar and a renowned state of affairs. The wider Dubrovnik was a substantial residential and commercial centre with

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[1248] Wuerzner, C., "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", 90 *International Review of the Red Cross* 907, (2008), at 912.
[1249] *Milosivic Dragomir*, Trial Chamber, Judgment, 12/12/2007, para. 952
[1250] Article 7(1) ICTY Statute.
[1251] Article 7(3) ICTY Statute.
[1252] *Galic* Trial Chamber Judgment, para. 55; *Milosivic Dragomir*, Trial Chamber, Judgment, 12/12/2007, para. 952.
[1253] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 913.
[1254] *Strugar* Trial Judgment, para 286.

> a large resident population the numbers of whom had been swelled by refugees who had been displaced from other towns and villages by the JNA advance.'[1255]

The Chamber further stated that 'Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian and that many civilian inhabitants had sound reasons for movement about Dubrovnik during the 10 1/2 hours of the attack.'[1256] Other Chambers have also dealt with the relevant evidence that an attack was wilfully directed against a civilian population. For instance, in the *Galic* case, the Trial Chamber acknowledged the difficulty of identifying the civilian character of persons and stated:

> 'in certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.'[1257]

In the *Galic* case, other factors taken into account to determine whether the perpetrator could have reasonably ascertained the non-combatant status of the individuals targeted were 'the distance of the victim(s) from the alleged perpetrator(s),[1258] the visibility at the time of the event[1259] and the proximity of the victim(s) to possible military targets.'[1260] In the *Dragomir Milosevic* case, the Appeals Chamber explained that 'the intent to target civilians can be proved through inferences from direct or circumstantial evidence.'[1261] The Chamber further ascertained that

> 'the determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used

[1255] *Ibid*, para 285.
[1256] *Ibid*, para 287.
[1257] *Galic* Trial Chamber Judgment, para 50.
[1258] *Ibid*, paras 355-6.
[1259] *Ibid*, paras 522.
[1260] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 913-14, referring to *Galic* Trial Chamber Judgment, para. 428.
[1261] *Prosecutor v. Dragomir Milosevic*, (Appeal Judgment) IT-98-29/1-A (12 November 2009) ICTY, (hereinafter *Dragomir Milosevic* Appeal Judgment), para 66.

in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack'[1262]

Accordingly, with respect to the *mens rea*, IHL imposes obligations on those who plan an attack to gather and assess intelligence concerning the location to be attacked and to verify that it is in fact a military objective, to take all feasible precautions to avoid or minimize collateral civilian casualties or damage to civilian objects, and to refrain from or cancel attacks which may be expected to cause disproportionate civilian casualties or damage to civilian objects.[1263] It is reasonable to impose these same obligations on those who plan attacks in internal conflicts as well. If it can be proved that these measures were not taken prior to an attack, this is an indication that civilians were indeed targeted intentionally or recklessnessly. However, 'if good faith efforts are made to gather information but the available information is wrong no criminal liability should be assigned.'[1264] The difficulty lies here in the fact of proving that real efforts were made in good faith.

In order to ascertain the rule on the deliberate nature of the attack on a civilian population, the Trial Chamber in *Galic* when considering the mental element of the offence, referred to the Commentary to Article 85 of Additional Protocol I which explains the term *wilfully*:

'the accused must have acted consciously and with intent, *i.e.,* with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts

[1262] Ibid.
[1263] Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", referring to article 57 Additional Protocol I. See further below for the analysis on precautionary measures.
[1264] Ibid.

without having his mind on the act or its consequences.'[1265]

The Trial Chamber accepted this explanation, according to which the notion of 'wilfully' incorporates the concept of recklessness,[1266] whilst excluding mere negligence.[1267] The perpetrator who recklessly attacks civilians acts 'wilfully'.[1268] The Chamber further affirmed that 'for the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.'[1269]

Lastly, 'in case of doubt as to the status of a person, that person shall be considered to be a civilian.'[1270] However, the rule that 'in case of doubt' an individual should be presumed to be a civilian does not apply in the context of a criminal trial where the burden to establish that fact remains at all times upon the Prosecution.[1271] Accordingly, in such cases, 'the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.'[1272]

Irrelevance of military necessity

The ICTY originally had an erroneous approach to the principle of military necessity. Such determination shows 'a clear discrepancy between the (retrospective) international criminal law approach to alleged criminal conduct in an armed conflict situations and IHL, the law applicable at the time of the crime alleged.'[1273] In *Blaskic*,

[1265] *Galic* Trial Chamber Judgment, para 54.
[1266] The concept of recklessness, or *dolus eventualis*, entails that the author of the crime knowingly took the risk. For instance, when the perpetrator, although aware of the pernicious consequences of his conduct, knowingly took the risk of bringing about such consequences. He was aware that undertaking a given attack carried with it an unjustifiable risk of producing harmful consequences.
[1267] When it comes to negligence, the author of the crime although aware of the risk involved in his conduct, is nevertheless convinced that the prohibited consequence will not occur.
[1268] *Galic* Trial Judgment, para 54.
[1269] *Ibid*, para 55.
[1270] *Ibid*, para. 55.
[1271] Mettraux, *International crimes and the ad hoc Tribunals*, at 122, referring to *Blaskic* Appeal Judgment, para. 111.
[1272] *Galic* Trial Judgment, para. 55. See Chapter 6, the Section on doubt as to the status of a person for more detailed explanation.
[1273] Bartels, R., "Discrepancies between international humanitarian law on the battlefield and in the courtroom: the challenges of applying international humanitarian law during international criminal trials", in *International Law between Conflict and Peace Time: in Search of the Human Face (Liber Amicorum Avril McDonald)*, (Marcel Brus & et. al. eds., Forthcoming), at 25.

the Trial Chamber considered that the targeting of civilians was a violation only when it was not possible to justify it by military necessity.[1274] However, this was a clear error of law that was reiterated by the Trial Chamber in the *Kordic* case.[1275] In these two cases, the Chambers simply ignored the rules of IHL that measures adopted under the cover of military necessity have to be legal, in clear conformity with international humanitarian law. Fortunately, this error has been corrected by the Appeal Chamber in these both cases,[1276] and upheld by the *Galic* Trial Chamber.[1277]

In addition, the *Galic* Appeals Chamber reiterated that customary international law imposes an absolute prohibition on directing attacks against civilians or civilian objects, that this rule is not subject to any exceptions, and that military necessity cannot be invoked as a justification.[1278] Indeed, only civilians who are directly participating in hostilities can be targeted for as long as it is proven that they did so. This was well explained in the *Kupreskic* case when the Chamber stated that '(t)he protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law. The protections of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in (the) exceptional circumstance(s of) (…) when civilians abuse their rights (…)'[1279]

It is interesting (and worrying) to note here that the drafters of the Rome Statute committed the same error of law related to military necessity when drafting Article 31. This provision excludes the criminal responsibility of a person who, in order to defend objects essentials to the accomplishment of a military mission, commits any of the crimes within the competence of the International Criminal Court. As affirmed by Momtaz, this provision has to be discarded as it reconsiders the whole balance established by international humanitarian law between military necessity and

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[1274] See *Blaskic* Trial Judgment, para. 180.
[1275] *Kordic* Trial Judgment, para. 328.
[1276] *Blaskic* Appeal Judgment, para 109 and *Kordic* Appeal Judgment, para 54.
[1277] *Galic* Trial Chamber Judgment, para. 44.
[1278] *Ibid*, para 130. See also *Prosecutor v. Momcilo Perisic,* (Trial Judgment) IT-04-81-T (6 September 2011) ICTY, (hereinafter *Perisic* Trial Judgment), para 96.
[1279] *Kupreskic* Trial Judgment, para 521-522.

humanity.[1280] In addition, David further and rightly argues that this rule negates the principle of distinction, a *jus cogens* norm, and thereby has to be considered as invalid.[1281]

The War Crime of Attacking Civilians under the Special Court of Sierra Leone Statute

The Special Court for Sierra Leone is a hybrid institution applying international and national law. It a subject matter jurisdiction inspired by the statutes of both the ICTR and the ICC, but at the same time it addresses the specificities of the Sierra Leonean conflict. 'Recognising the internal nature of the conflict which entangled Sierra Leone in the 1990s, the judges are able to try individuals for violations of common Article 3 and Protocol II,[1282] as well as three other offences, characterised as other serious violations of international humanitarian law and largely inspired by the ICC Statute.'[1283] One of the three other offences is: committing an attack against a civilian population.[1284] Article 4(a) of the 2002 Statute of the Special Court for Sierra Leone provides:

> 'The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.'[1285]

Interestingly enough, the Prosecution, in any of the four cases prosecuted by the Court, did not go for the charge related to Article 4(a) of the Statute. Accordingly, there was no discussion of the crime of intentionally directing attacks against the civilian population. The only reference to this question can be found in the Taylor

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[1280] Momtaz, D., "Les défis des conflits armés asymétriques et identitaires au droit international humanitaire", in *Les règles et institutions du droit international humanitaire à l'épreuve des conflits armés récents*, (Michael J. Matheson & Djamchid Momtaz eds., 2010), at 57;
[1281] David, E., *Principes de Droit des Conflits Armés* (Bruylant. 2008), at 693.
[1282] Article 3 of the statute gives jurisdiction over serious violations of common Article 3 and Protocol II. The article then gives an illustrative list of such violations. Article 3 is identical to Article 4 of the ICTR Statute.
[1283] La Haye, *War Crimes in Internal Armed Conflicts*, at 145-146.
[1284] An offence that has been directly borrowed from the Rome Statute.
[1285] Statute of the Special Court for Sierra Leone, annexed to the 2002 Agreement on the Special Court for Sierra Leone, Freetown, 16 January 2002, annexed to Letter dated 6 March 2002 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/2002/246, 8 March 2002, p. 29, Article 4(a).

case. For instance, the judges stated that

> 'During operations such as 'Operation No Living Thing', 'Operation Spare No Soul' and 'Operation Pay Yourself', AFRC and/or RUF fighters were explicitly ordered to kill civilians by commanders, burn their settlements and take their property, demonstrating a clear intention to direct attacks against civilians and to terrorise the population. The latter is demonstrated by the pattern of conduct of the attacks that were conducted with the aim of spreading fear amongst the population in order to control them and with the aim to call on the attention of the international community.'[1286]

They further held that 'the brutality and the vengeful nature of the attacks further indicate a specific focus on the civilian population.'[1287]

The Rome Statute of the International Criminal Court

Constitutive elements of the war crime of intentionally directing attacks against civilians

In addition to the war crimes as defined in the ICC Statute's Article 8(2)(c)[1288], which covers violations of Common Article 3 to the four Geneva Conventions, the definition of crimes in Article 8(2)(e) covers '(o)ther serious violations of the laws and customs applicable in armed conflicts not of an international character'. The norms contained in the provision are derived from various sources, including the Hague Regulations, the Geneva Conventions, and Additional Protocol II.

The first four clauses of Article 8(2)(e) deal with intentionally directing attacks at certain protected targets. Clause (i), the wording of which is similar to Article

[1286] *Prosecutor v. Charles Ghankay Taylor* (Trial Judgement) SCSL-03-01-T (18 May 2012), (hereinafter *Taylor* Trial Judgment), para 549.

[1287] Ibid, para 550.

[1288] Sub-paragraph (c) prohibits the following acts against persons taking no active part in the hostilities: (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; and (iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

8(2)(b)(i), protects civilians and the civilian population.[1289] Therefore, it is submitted that reference to the elements of this provision can accordingly be made.[1290] 'It was the view of States that there is no difference in substance between the elements of war crimes in an international armed conflict and those in a non-international armed conflict.'[1291] Dörmann even argues that the conclusion the Trial Chamber reached in the *Tadic* case[1292] might be an indication that the following conclusions, drawn for international armed conflicts, apply also in non-international armed conflicts.[1293] However, it is submitted here that the Rome Statute formulates the offence of unlawful attacks in a more restrictive way than customary law or pre-existing treaty law. In addition, on the difference with the ICTY Statute, 'unenumerated offences may not be charged under the ICC Statute.'[1294]

Article 8(2)(e)(i) has the same formulation as in the CIHL Study, and the Elements of Crimes specifies that 'the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.'[1295] The Elements further states that 'the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack'.[1296] Accordingly, under the Rome Statute, it is a war crime to intentionally attack civilians.

Actus Reus

There are important differences between the definition of the crime of directing attacks against the civilian population or civilian persons in the Rome Statute and in

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[1289] Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities: Article 8(2)(e)(i). This provision is identical to Article 8(2)(b)(i) (international armed conflict), which is based on Additional Protocol I, Article 51 and 85(3)(a), but is also supported by Additional Protocol II, Article 13(2).

[1290] Zimmermann, "Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character", at 494.

[1291] Dörmann, K., "Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts", 83 *International Review of the Red Cross* 461, (2001), at 483.

[1292] *Tadic*, Interlocutory Appeal, para 127: 'it cannot be denied that customary rules have developed to govern internal strife. These rules … cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks'.

[1293] Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary* (Cambrige ICRC ed. 2003), at 445

[1294] Fenrick, "The Prosecution of Unlawful Atack Cases Before the ICTY", at 167.

[1295] See *Elements of Crimes*, Article 8(2)(2)(i), Element 2.

[1296] Ibid. Element 3. See just below for an explanation of the *mens rea.*

the ICTY's case law. One important difference is that the Rome Statute, as specified under the Elements of Crime, does not require any kind of damaging result from the attack in order for the crime to have been committed. This brings the international criminal law standards in accordance with international humanitarian law standards. The International Criminal Court has confirmed in the *Katanga and Chui* case, that for the purpose of the Rome Statute, a specific material result is not required for the crime of launching an attack on civilians to be committed.[1297] Indeed, 'when a premeditated attack is directed against civilians or civilian objects as such, but does not achieve the specific result intended, the act would still amount to a war crime under the Rome Statute.'[1298] Accordingly, in the Rome Statute, this crime is a crime of mere action that takes place by simply launching the attack – an act of violence – with the intention to impact the civilian population or civilian persons who are not under the control of the party to the conflict to which the perpetrator of the attack is affiliated.[1299]

Mens Rea

As we have seen above, according to the Elements of Crime, the requirement is that the perpetrator intended to direct an attack and that he or she intended civilians to be the object of the attack. The intent requirement is explicitly stated in the elements of the crime and also appears to be an application of the default rule codified by Article 30. Accordingly, in order to prove the *mens rea* for the crime of intentionally directing attack against civilians, because the word 'intentionally' is contained in the Article 8(2)(e)(i), the Prosecution will only have to prove the intent, as referred to in Article 30(2).[1300] If the word 'intentionally' was not contained in the provision, the Prosecution, in order to prove the *mens rea,* would need to prove intent *and* knowledge, i.e Article 30(2) and (3). In the *Lubanga* case, the Trial Chamber applied

[1297] ICC *Katanga and Ngudjolo* Confirmation of Charges, para 270.
[1298] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 125.
[1299] Concurring, D. Franck, "Attacking civilians" in *The International Criminal Court : Elements of Crimes and Rules of Procedure and Evidence* 143 ; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary*, at 130
[1300] The relevant parts of Article 30 read as follows: '(1) *Unless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge. (2) For the purpose of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' (emphasis added).

the language of Article 30 with respect to the crime of 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.'[1301] Due to the fact that this crime does not specifically mention 'intentionally', unlike Article 8(2)(e)(i), the Chamber held that the prosecution was obliged to establish that Thomas Lubanga committed the above mentioned crime 'with the necessary intent *and* knowledge.'[1302] With respect to the notion of intent, the Chamber further held that 'it is necessary, therefore, for the prosecution to establish that Thomas Lubanga intended to participate in implementing the common plan.'[1303]

Going back to the crime of intentionally directing attack against civilians under the Rome Statute, in order to prove the necessary *mens rea*, the prosecution will need to prove that the accused 'means to engage in the conduct'[1304] or the accused 'means to cause that consequence or is aware that it will occur in the ordinary course of events.'[1305]

As stated by Dinstein, 'the intention to target civilians (emphasised in the Rome Statute) is a crucial element in the relevant war crimes, and so is the phrase 'as such' (incorporated in 8(2)(e)(i)).'[1306] Dinstein is of the view that these modifiers are of great importance since 'there can be no assurance that attacks against combatants and other military objectives will not result in civilian casualties in or near such military objectives.'[1307] Accordingly, these modifiers were inserted in the Rome Statute as an entry point for the notion of lawful collateral damage, 'derived from the prospect that civilians are likely to get injured as an unintended by-product of an attack directed against a lawful target.'[1308] However, as we will see further below, the notion of collateral damage is encompassed in another type of attack, namely indiscriminate

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[1301] Article 8(2)(e)(vii).
[1302] ICC *Lubanga* Trial Judgment, para 1273.
[1303] Ibid. para 1274.
[1304] Article 30(2)(a).
[1305] Article 30(2)(b). Concurring Dörmann, "Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts", at 468.
[1306] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 125.
[1307] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 300.
[1308] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 125.

and disproportionate attacks.[1309] And indeed, it is the intent to target directly civilians that constitutes the *mens rea* of the crime of direct attack. As put by Knoops, 'the mental element of *'intention'* ensures a differentiation with the situation of so-called *collateral damage,* that is non-deliberate attack against civilians by causing indirect damage to individual civilians or civilian objects.'[1310] Recalling the approach of the ICTY with respect to the *mens rea* of the crime of unlawful attack, especially in the *Blaskic* case, Dörmann suggests, rightly in my opinion, that in the context of the Rome Statute, 'the required *mens rea* may be inferred from the fact that the necessary precautions were not taken before and during an attack.'[1311]

However, I consider that there is a disturbing loophole for the prosecution of the crime of directing attacks against civilians under the Rome Statute. It is related to the fact that 'this *mens rea* leaves open the possibility that individual military personnel can resort to the defence of mistake of fact, in that, caused by human error or technical default, artillery fire causes civilian casualties.'[1312] This has also been noted by Dinstein when he argues that 'civilian casualties are also liable to emanate from human error or mechanical malfunction, and when that occurs there is no stigma of a direct attack against them. The same applies to civilian objects.'[1313] In these circumstances, we may very well wonder what is left as to the protection of civilians against direct attacks. Article 32(1) has been criticized by Triffterer who submitted that this provision is not to be found in any other international tribunal statute and that 'because of the generally required mental element in the sense of article 30', there was 'no practical need' for it.[1314] Furthermore, he submits that 'an error, the belief that the attack launched (…) will not cause incidental loss of damage, is a false value judgment and, therefore, does not relieve from criminal responsibility.'[1315]

[1309] See respectively Chapters 9 and 12.
[1310] Knoops, G.-J.A., "The Duality of the Proportionality Principle within Asymmetric Warfare and Ensuing Superior Criminal Responsibilities", 9 *International Criminal Law Review* 501, (2009), at 528.
[1311] Dörmann, "Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts", at 469.
[1312] Knoops, "The Duality of the Proportionality Principle within Asymmetric Warfare and Ensuing Superior Criminal Responsibilities", at 528.
[1313] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 125.
[1314] Triffterer, O., "Article 32", in *Commentary on the Rome Statute of the International Criminal Court*, (Otto Triffterer ed., 2008), at 909.
[1315] Id. at 912, para 53.

In addition, despite the fact that proof of the effect of the unlawful attacks is not an element of the offence, 'as a purely practical matter, it would be unlikely that the offence would ever be charged unless the effect occurred and it would usually be necessary to prove the effect as part of the circumstantial evidence for proof of the mental element.'[1316] However, 'just as absence of intention to attack civilians or civilian objects relieves the actor of criminal accountability for the targeting of civilians, presence of such intention would tilt the balance in the opposite direction, despite the fact that no injury/damage to civilians has actually occurred.'[1317] Indeed, as we have seen, under the Rome Statute, for the war crime of attacks against civilians there is no specific material result required.

To date, there has been no decision in which a Chamber has examined the elements of the offence of intentionally directing an attack against civilians. In the *Ngudjolo Chui* case, the accused was charged with this offence under Article 8(2)(e)(i). However, Mathieu Ngudjolo Chui was acquitted on the bases of a facts analysis, and the legal aspects of the offence were not analysed.[1318] However, a close eye should be kept on the coming judgment of German Katanga, as he was charged, *inter alia* with the crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities, under Article 8(2)(b)(i) or (e)(i) of the Rome Statute.

Prohibition of Direct Attacks against Civilian Objects

Prohibition of attacks against civilian objects in treaty law

An associated prohibition to the prohibition of directing attacks against civilian persons is the prohibition of attacks against civilian objects. Despite the fact that the

[1316] Fenrick, *The Prosecution of Unlawful Atack Cases Before the ICTY*. at 167.
[1317] Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict. at 125.
[1318] *Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/12, Trial Judgment, (18 December 2012), (hereinafter *Ngudjolo Chui* Trial Judgment).

Second Additional Protocol does not prohibit attacks on civilian objects, it is submitted here that the prohibition is part of the law of non-international armed conflict and applies through the principle of distinction.[1319] In addition, in order for the protection of civilians against the effects of hostilities to be truly effective, the prohibition of attacking civilian objects has to be part of this system of protection. As stated by the Trial Chamber in *Strugar*, 'a prohibition against attacking civilian objects is a necessary complement to the protection of civilian populations.'[1320]

The customary law character of the war crime of making civilian objects the object of attack, as applicable in non-international armed conflict, has been confirmed by the ICRC Customary Law Study.[1321] Indeed, the ICRC has identified the prohibition of direct attack against civilian object in a great number of military manuals applicable in internal armed conflicts, as well as in a number of national legislations making it an offence to attack civilian objects during armed conflict.[1322] Accordingly, it is submitted that direct attacks against civilian objects dedicated to civilian purposes, such as towns, villages, dwellings, or buildings, where no military objective is present, are prohibited in the conduct of hostilities in internal armed conflict.

The prohibition of directly attacking civilian objects in internal armed conflicts has also been upheld by several Commissions of Inquiry. For instance, the United Nations Fact Finding Mission on the conflict in Gaza undertook an impressive and detailed analysis of the targeting by the Israeli Defence Forces of hospitals as specially protected objects, and whether they could have been used for military purposes and accordingly lose their protection.[1323] For instance, the Mission considered the attack on AL-Quds hospital on the 15 January 2009 which was hit by a high-explosive shell and by white phosphorous shells. The Mission ascertained that 'even in the unlikely

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[1319] Indeed, the prohibition on directing attacks against civilian objects has been included in more recent treaty law applicable in non-international armed conflict, such as the Amended Protocol II to the Convention on Certain Conventional Weapons, article 3(7); Protocol III to the Convention on Certain Conventional Weapons, article 2(1); The Hague Convention for the Protection of Cultural Property, article 6(a).

[1320] *Strugar* Trial Judgment, para. 225. Or put it otherwise in the *Hadzihasanovic* Decision Rule98bis, para. 98: 'The protection of civilian property may therefore be the necessary corollary to the protection of the civilian population in certain cases.'

[1321] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 156 (iv)(i), at 597.

[1322] Id. See related practice at 597-8.

[1323] *Goldstone* Report, paras 36 and 40.

event that there was any armed group present on hospital premises, there is no suggestion even by the Israeli authorities that a warning was given to the hospital of an intention to strike it.'[1324] Among many other findings, the Mission examines an 'incident in which a mosque was targeted with a missile during the early evening prayers, resulting in the death of fifteen people, and an attack with flechette munitions on a crowd of family and neighbours at a condolence tent, killing five.'[1325] The Mission found that both the attacks mentioned constituted intentional attacks against the civilian population and civilian objects.

The Commission of Inquiry on the Syrian Arab Republic also investigated a great number of attacks directed against civilian objects. For instance, the Report mentions that the armed conflict has deeply affected health services. 'Hospitals have come under direct attack A worker at Dar Al-Shifa hospital in Aleppo said that a Government helicopter had fired nine missiles at the hospital in August.'[1326] Among many examples, the Commission also collected accounts of Government attacks on at least 17 schools. It acknowledged that 'in some cases, schools were reportedly being used as bases for anti-Government armed groups, thereby losing their status as protected civilian objects. However, there are reasonable grounds to believe that other attacks on schools were unlawful and in some cases deliberate.'[1327] What the findings of these reports show us is that deliberate attacks against civilian objects are prohibited in non-international armed conflict, and this is so despite the fact that Additional Protocol II does not contain a specific rule dealing with this issue. We will now analyze how this prohibition has been approached by the *ad hoc* Tribunal.

Direct Attack against civilian objects as a war crime in non-international armed conflict in the ICTY case law

Despite no mention of civilian objects in the Second Additional Protocol, the ICTY seems to accept that attacks on civilian objects are also prohibited in non-international armed conflicts. However, this recognition is not straightforward, as the case law has relied rather on the crime of intentionally directing attacks against the civilian

[1324] Ibid. para 624.
[1325] Ibid. para 45.
[1326] CoI *Syria,* Annex X, para 21.
[1327] Ibid, Annex X, para 19.

population or individual civilians. This might be related to the fact that the Second Additional Protocol does not allow, as we have seen, for the definitive conclusion that attacks directed at objects that are not military objectives are serious violations of the Protocol in the context of internal armed conflict. Accordingly, 'if there are doubts about the conventional criminalisation of these attacks in non-international armed conflicts, it is only logical that there are also doubts about their criminalization under customary international law.'[1328] Doubts were raised also on the consideration of their existence as customary international law. However, with the *Tadic* Jurisdiction Decision, this finally changed.[1329]

As with the crime of direct attacks against civilians, the crime of attacking civilian objects has been charged under the residual clause of Article 3 ICTYS. In addition, the specific elements of this charge are, *mutatis mutandis*, the same as those for unlawful attacks on civilians spelled out in the *Galic* Trial Judgment:

1. Acts of violence directed against civilian objects causing damage to civilian objects; and
2. The offender wilfully made civilian objects the object of these acts of violence.[1330]

In addition, it has been argued that the term 'wilful' has the same meaning here as it does for attacks on civilians.[1331]

In order to fulfil the *actus reus* of the crime, it is first necessary to identify the object that was subjected to the attack. In accordance with IHL, the Trial Chamber, in *Blaskic*, interpreted the notion of civilian property as 'any property that could not be legitimately considered a military objective.'[1332] In the preceding Chapter, we have

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[1328] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 74.
[1329] See *Tadic* Interlocutory Appeal, para 127: 'Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, (…) cover such areas as protection of civilians from hostilities, (…) protection of civilian objects, in particular cultural property (…).'
[1330] *Galic* Trial Chamber Judgment, para 56. See also the *Strugar* Trial Judgment, para 280, where the Trial Chamber indicated that it was unclear whether the damage to civilian objects must be extensive but noted that, in any event, the damage was extensive in the particular case.
[1331] Fenrick, "Riding the Rhino: Attempting to Develop Usable Standards for Combat Activities", at 133.
[1332] *Blaskic* Trial Judgment, para. 180.

seen the difficulties related to the identification of what constitutes a military objective in internal armed conflict. We have seen that almost every object can become a legitimate military objective, provided it fulfils, 'in the circumstances ruling at the time' of the attack, the two cumulative criteria: that the contribution to the military action of the defender be 'effective', and that the military advantage gained by its destruction be 'definite'. Accordingly, it is necessary for the Prosecution to determine in the first place whether the object constitutes an effective contribution to the military action of the defender, according to its nature, location, purpose or use. In order to do this, the Prosecution 'needs to know what the nature, purpose, location or use of the object was at that time and what information the military had about the object.'[1333]

Secondly, the Prosecution will have to determine the subjective element of the *actus reus*, i.e. whether the destruction, capture or neutralization of the object granted the attacker a definite military advantage, in the circumstances ruling at the time.[1334] In order to determine whether the destruction offered a definite military advantage, the Prosecutor must reconstruct the assessment carried out by the military commander with respect to the military necessity of destroying the target. 'This requires knowledge of the tactical and strategic goals of the belligerents at the time, as the determination of what is militarily necessary may be relative to the goals of the warring party concerned.'[1335] As we may understand, such reconstruction *ex post facto* is all the more difficult for a criminal trial, especially as the tactical and strategic goals of the warring parties usually change throughout the conflict and are confidential. Then, it is only if the two-pronged test is negative, that the Prosecution will be able to conclude, as to the *actus reus* of the crime, that the targeting of a civilian object has occurred.

Very often, situations are far from being clear and doubt arises as to the status of a potential target. In the *Galic* case, the Trial Chamber held in this respect that

[1333] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 917.
[1334] *Galic* Trial Chamber Judgment, para 51.
[1335] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 917.

> ‘(i)n case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.’[1336]

However, as we have seen above,[1337] in an international criminal trial, the burden of proof, as to the doubtful status of an object, is upon the Prosecution.

With respect to the *mens rea* of the crime of directing an attack against civilian objects, it is basically the same as for the crime of directing an attack against civilians. The Trial Chamber in the *Blaskic* case held that the attack must have been conducted ‘intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted (…).’[1338] Accordingly, the crime of directing an attack against civilian objects can be established by proving that only civilian objects have been destroyed as a result of an attack. However, the difficulty in proving this element is obvious given the fact that, as we have seen above, in internal armed conflicts, it is frequent that objects of a military value are intermingled with civilian objects.

In order to determine the civilian or military status of the targets, the Trial Chamber in *Galic* looked at circumstantial evidence on a case-by-case basis and found that ‘with regard to the attacks at Grbavica there was no military activity in the vicinity.[1339] For Scheduled Sniping Incident number 24, the attack of a tram near the Holiday Inn Hotel, the Trial Chamber determined that the tram ‘could not have been confused for a military objective’,[1340] and that ‘there was neither military activity nor military

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[1336] *Galic* Trial Chamber Judgment, para 51.
[1337] See Chapter 7, section 3.
[1338] *Blaskic* Trial Judgment, para 180.
[1339] *Galic* Trial Chamber Judgment, paras 230-231.
[1340] *Ibid*, para. 255.

objectives in the area.'[1341] The Trial Chamber thus concluded that 'a civilian vehicle was deliberately targeted from SRK-controlled territory.'[1342]

The Trial Chamber in *Galic* has also acknowledged the likelihood of having dual use objects. For instance, the Appeal Chamber stated that

> 'With regard to Galić's arguments that the Trial Chamber ignored the issue of "dual use" objects, the Appeals Chamber notes that, for the attack on the front-end loader collecting garbage on Brace Ribara Street (Scheduled Sniping Incident 15), for example, the Trial Chamber considered the arguments of the Defence that this vehicle could have been used for a military purpose but rejected them based on the circumstances of the incident.'[1343]

Direct Attack against civilian objects as a war crime in the ICC Statute

The Rome Statute does not explicitly define attacks on civilian objects as a war crime in non-international armed conflict, despite the fact that this crime exists for international armed conflict[1344] and despite the extensive case law provided by the ICTY.[1345] It seems that this is mainly due to the fact that there is no provision similar in nature to article 52(1) of Protocol I in the Second Additional Protocol, and that accordingly 'the customary law nature of such a prohibition in *internal* armed conflict seemed to be doubtful.'[1346] As some have highlighted, 'the drafters made this choice because they intended to criminalize a broader range of conduct in relation to international armed conflicts given the higher degree of protection that international humanitarian law grants in this kind of armed conflict.'[1347] Accordingly, under the Statute, criminal liability in non-international armed conflict will arise only if the damage caused by the attack amounts to a crime listed under article 8(2)(c) and (e) RS.

[1341] *Ibid,* para. 256.
[1342] *Ibid*, para. 258.
[1343] *Galic* Appeal Judgment, para 194.
[1344] Article 8(2)(b)(i) Rome Statute.
[1345] See for instance *Tadic* Interlocutory Appeal, para 127 and 134; *Strugar* Interlocutory Appeal, paras 9, 10 and 13; *Kordic* Appeal Judgment, para 54.
[1346] Zimmermann, "Article 8: War Crimes Preliminary Remarks on para. 2(c)-(f) and para 3: War crimes committed in an armed conflict not of an international character", at 177.
[1347] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 28 (footnotes omitted).

The ICTY case law has pointed out that contemporary IHL extended the basic protection rendered to civilians and civilian objects by the principle of distinction to internal armed conflicts and therefore does not allow unlawful attacks in these types of armed conflicts to be considered lawful either. Furthermore, despite not containing the crime of 'intentionally directing attacks against civilian objects, that is, objects which are not military objectives'[1348] for non-international armed conflicts, it is interesting to see that the Statute does mention the notion of civilian objects in internal armed conflicts in the crime of 'intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or *civilian objects* under the international law of armed conflict.'[1349] We see here that despite no mention *per se* of the crime on attacks on civilian objects, the Statute does recognize the existence of this prohibition for this particular category of objects in international law. Therefore, the Rome Statute is more specific and forbid attacks against certain types of objects, such as, in addition to the crime above mentioned, attacks against buildings, material, medical units and transport (…) using the distinctive emblems of the Geneva Conventions[1350] and attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places were the sick and wounded are collected, provided they are not military objectives.[1351]

The fact that directing attacks against civilian objects has not been criminalized on its own in relation to internal armed conflicts is all the more worrying when added to the fact that the Rome Statute, unlike the ICTY, does not allow for the possibility of unenumerated crimes to be included in the jurisdiction of the Court, which would allow for an extensive interpretation of the crime of directing attacks against civilians. However, it can be argued that this does not necessarily mean that launching such attacks does not give rise to criminal responsibility under the Rome Statute when they take place in the context of a non-international armed conflict. For instance, Olasolo submits that 'all those attacks directed against civilian objects in non-international

[1348] Article 8(2)(b)(ii) Rome Statute.
[1349] Article 8(2)(e)(iii) Rome Statute (emphasis added).
[1350] Article 8(2)(e)(ii) Rome Statute.
[1351] Article 8(2)(e)(iv) Rome Statute.

armed conflicts that result in damage to such objects may give rise to criminal responsibility for the war crime of 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.'[1352]

We have seen, however, the problems the ICTY originally faced with respect to the crime of wanton destruction not justified by military necessity, as this charge does not allow for the prosecution of civilian deaths and injuries resulting from unlawful military operations whenever they are justified by military necessity. The Appeals Chambers in the *Blaskic* and *Kordic* cases have corrected this error in law. As the Trial Chambers simply ignored the rules of IHL that measures adopted under the cover of military necessity have to be legal, in clear conformity with international humanitarian law, they reversed the findings of the Trial Chambers on this question.[1353] In addition, the *Galic* Appeals Chamber reiterated that customary international law imposes an absolute prohibition on directing attacks against civilians or civilian objects, that this rule is not subject to any exceptions, and that military necessity cannot be invoked as a justification.[1354]

Accordingly, we see the potential pitfalls that the prosecution of direct attacks against civilian object under the charge of 'destroying the property of an adversary unless such destruction…be imperatively demanded by the necessities of the conflict' will entail. Indeed, with this approach, under the Rome Statute, an attack against a civilian object in a non-international armed conflict will constitute a war crime, provided that the attack as such is not imperatively demanded by the necessities of war.

[1352] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 88, referring to Article 8(2)(e)(xxii). See also Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 156, at 597; referring Article 8(2)(e)(xii) of the Rome Statute.
[1353] See *Blaskic* Trial Judgment, para. 180 and Appeal Judgment para 109 and 111; *Kordic* Trial Judgment, para. 328 and Appeal Judgment para 54.
[1354] *Galic* Appeal Judgment, para 130.

Conclusion

The principle of distinction, with its attached absolute prohibition of attacking civilians, is the most fundamental principle of international humanitarian law. It is the corner stone of the protection of civilians against the effects of hostilities in non-international armed conflicts. Parties to such conflicts are under the unequivocal obligation to distinguish between military objectives, such as objects fulfilling the two-pronged test, fighters and civilians directly participating in hostilities and civilian objects and civilians not directly participating in hostilities. Attached to this obligation is the absolute prohibition of directing attacks against civilian objects and civilians. This prohibition is to be found under treaty and customary international humanitarian law applicable to non-international armed conflict.

It would be dangerous to see IHL only from the perspective of international criminal law, as this branch of law is to be applied during the non-international armed conflict and has to guide the belligerents in their attack for the protection of civilians to be implemented. However, *ex post facto* prosecutions of the violations of direct attacks against civilians are essential for the implementation of IHL, the deterrent effect they entail and the right to hear the truth for the victims. It is now widely accepted that the prohibition against attacks on civilians and attacks against civilian objects are now part of customary international law and that any serious violation thereof would constitute a war crime and entail the individual criminal responsibility of the perpetrator. The ICTY has been the first international body since the Second World War to investigate and adjudicate direct attacks against civilians in non-international armed conflict. The crime of directing attack against civilians is not an offence that is enumerated *per se* in the ICTY Statute but can be as unenumerated offences under Article 3 of the Statute, which relates to violations of the laws or customs of war. The special challenge in proving this crime is that the Prosecution must establish that the perpetrator wilfully made the civilian population or individual civilians the object of acts of violence. In order to do so, it must be demonstrated that the perpetrator was aware in the circumstances or should have been aware of the civilian status of the persons attacked.

Under the Rome Statute, it is an offence to intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. In order to prove the necessary *mens rea*, the prosecution will need to prove that the accused 'means to engage in the conduct' or the accused 'means to cause that consequence or is aware that it will occur in the ordinary course of events.'

An associated prohibition to the prohibition of directing attacks against civilian persons is the prohibition of attacks against civilian objects. Despite the fact that no treaty IHL applicable to internal armed conflict prohibits attacks on civilian objects, it is submitted here that the prohibition is part of the law of non-international armed conflict and applies through the principle of distinction. Furthermore, the customary law character of the war crime of making civilian objects has been recognized and it has also been upheld by several Commissions of Inquiry. The ICTY seems to accept that attacks on civilian objects are also prohibited in non-international armed conflicts albeit the fact that this recognition is not straightforward. In turn, the Rome Statute does not explicitly define attacks on civilian objects as a war crime in non-international armed conflict, despite the fact that this crime exists for international armed conflict and despite the extensive case law provided by the ICTY. The fact that directing attacks against civilian objects has not been criminalized on its own in relation to internal armed conflicts is all the more worrying.

The absolute prohibition of directing attacks against civilians and civilian objects is not the only layer of protection civilians benefit from under IHL. Indeed, many atrocities do not equate with this prohibition as especially in non-international armed conflicts, civilians and civilian objects are intermingled with military objectives. This problem is addressed by the prohibition of indiscriminate attacks and will be the subject of the next chapter.

Chapter 9:

Prohibition of indiscriminate attacks in Non-International Armed Conflict

Introduction

The preceding Chapters focused on identifying the different categories of persons and objects created by the law of armed conflict for the purposes of the principle of distinction in non-international armed conflict. We have also analysed the question of the prohibition of direct attack against civilians and civilian objects in this type of armed conflict. But this is not the end of the story. The definition of fighters, civilians directly participating in hostilities and military objectives does not render them as clearly distinguishable on the battlefield as we would like them to be. Especially in non-international armed conflicts, civilians and civilian objects are intermingled with military objectives. This problem is addressed by the prohibition of indiscriminate attacks. The objective of the present section is to examine how, in internal armed conflict, IHL regulates the actual conduct of hostilities by an attacker, be it a member of state armed forces, a fighting member of an organized armed group, or a civilian directly participating in hostilities, in order for the prohibition of indiscriminate attack to be implemented in practice.

Under international humanitarian law, uninvolved civilians as well as the civilian population do not enjoy complete immunity from attack, at least in international armed conflicts. Indeed, the legal regime established by the Hague Convention IV and its Annexed Regulations[1355], as well as by Additional Protocol I, 'acknowledges the

[1355] Article 27 which provides that 'In sieges and bombardments *all necessary steps must be taken to spare, as far as possible*, buildings dedicated to religion, art, science, or charitable purposes, historic

fact that incidental civilian damage is almost unavoidable in the conduct of military operations when civilians or civilian objects are in the vicinity of the theatre of operations.'[1356] As we know, the aim of the law of armed conflict is not to make impossible the conduct of hostilities by prohibiting any damage to civilians or civilian objects, as such rules would be so utopian that they would never be respected by any parties. In order for the law to be respected, we need a realistic legal framework. Accordingly, international humanitarian law only obliges parties to a non-international armed conflict to carry out their military operations with the necessary care to minimise collateral damage, which is the loss of civilian life, injuries to civilians and harm to civilian objects. Collateral damage, if not excessive, is legally acceptable.

This permission for lawful collateral damage is, for instance, set forth in Additional Protocol I, which despite imposing an absolute prohibition on attacking civilians or civilian objects,[1357] declares lawful any incidental civilian damage that is not excessive in relation to the military advantage anticipated from the attack.[1358] Hence, in the law of international armed conflicts, the principle of distinction acknowledges the existence of lawful collateral damage, but, in addition to direct attacks against civilians and civilian objects, prohibits also indiscriminate and disproportionate attacks affecting civilians. Attacks against civilians and civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate or disproportionate. As we will see, the prohibition of indiscriminate attacks, which are those attacks that are not directed against military objectives, limit the methods and means used for attacking legitimate military objectives located, for instance, in the midst of a high concentration of civilian population.

But first of all, what exactly is an indiscriminate attack? And, more importantly, do we find this prohibition in the law of non-international armed conflict? As we have seen in the preceding sections, IHL treaty law regulating internal armed conflicts does not elaborate much on the principle of distinction.

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monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.' (emphasis added).

[1356] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 14 (footnotes omitted).

[1357] Additional Protocol I, Article 51(2) and 52(1).

[1358] Additional Protocol I, Article 51(5)(b) and 57(2)(b).

Definitions of indiscriminate attack

Indiscriminate attacks are acts of violence not specifically directed against military objectives. 'These attacks are of a nature to strike military objectives and civilian persons and objects without distinction.'[1359] These violations are committed by a party to the conflict against protected civilians and objects and they mostly affect civilians or civilian objects. Moreover, within the last group, it is generally possible to distinguish between:

(i) general violations of the principle of distinction in the conduct of hostilities;

(ii) violations committed against specially protected civilians, objects or areas, such as violations against medical or religious personnel and equipment, personnel and equipment involved in humanitarian assistance or peacekeeping missions, journalists, safety zones, cultural property, works or installations containing dangerous forces or the natural environment;

(iii) violations committed by the use of weapons or ammunitions which are inherently indiscriminate. These are weapons and ammunitions that are not able to be properly targeted or that have uncontrollable effects; and

(iv) violations committed by using certain methods of warfare, such as declaring that no quarter will be given, or attacks that are not targeted at military objectives, or attacks treating an area with similar concentrations of military and civilian objectives as a single military objective.

Accordingly, indiscriminate attacks differ from direct attacks against civilians in that 'the attacker is not actually *trying* to harm the civilian population': the injury or damage to civilians is merely a matter of 'no concern to the attacker'.[1360] However, it is necessary to stress that under IHL an indiscriminate attack is not better than a premeditated attack against civilians or civilian objects. Both of them are equally irreconcilable with the cardinal principle of distinction. But how is the prohibition of indiscriminate attack found in the law of non-international armed conflict?

[1359] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para. 1950; Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 13, at 43.

[1360] Hanke, H.M., "The 1923 Hague Rules of Air Warfare", 33 *International Review of the Red Cross* 12, (1993), at 26.

Common Article 3

As we have seen above, Common Article 3 does not *per se* deal directly with the conduct of hostilities and therefore does not govern the means and methods of warfare. Accordingly, it does not explicitly protect civilians and civilian populations from attack. However, a close reading of the explicit prohibition of 'violence to life and persons' against 'persons taking no active part in the hostilities' may encompass attacks against civilians in areas under the control of an adverse party in an internal armed conflict, inferring thereby the principle of civilian immunity from this provision,[1361] and so suggesting the prohibition of indiscriminate attack.

Additional Protocol II

As we have seen above, unlike Common Article 3, the Second Additional Protocol expressly protects individual civilians against direct attacks. In addition, according to Goldman, it 'inferentially protects them and civilian objects from indiscriminate or disproportionate attacks.'[1362] More specifically, Article 13 asserts that:

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited.
> 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

So, while Article 13 of Protocol II provides the civilian population and individual civilians with general protection against attack, it does not provide express or specific

[1361] See for instance Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 667: 'It is arguable that the prohibition in Article 3 common to the Conventions of « violence to life and person » against « persons taking no active part in the hostilities » is broad enough to include attacks against civilians in territory controlled by the adverse party in a non-international conflict.'

[1362] Goldman, R.K., "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", 9 *American University Journal of International Law and Policy* 49, (1993), at 63.

protection to civilians or civilian objects from an indiscriminate or disproportionate attack.[1363]

According to Bothe's Commentary, the absence of an explicit prohibition against indiscriminate attacks in Article 13 of Protocol II is due merely to the simplification of the text of that article.[1364] The prohibition of indiscriminate attacks was included in the Draft Article 26(3) of Additional Protocol II. Article 26(3) was submitted by the ICRC to the CDDH and provided that

> '(t)he employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited.
>
> In particular it is forbidden:
>
> *(a)* to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other;
>
> *(b)* to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.'[1365]

This provision was adopted in Committee III of the CDDH by 29 votes in favour, 15 against and 16 abstentions.[1366] However, ultimately, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.[1367]

Nevertheless, Bothe's Commentary argues that 'the concept of general protection is broad enough to cover protections which flow as necessary inferences from other

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[1363] See further below for disproportionate attacks. We will now concentrate on the question of indiscriminate attacks.

[1364] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 676.

[1365] CDDH, Official Records, Vol. I, Part 3, Draft Additional Protocols, June 1973, p. 40.

[1366] CDDH, Official Records, Vol. XIV, CDDH/III/SR.37, 4 April 1975, pp. 390-391, § 14-15.

[1367] CCDH, Official Records, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

provisions of Protocol II.'[1368]

It is therefore submitted that indiscriminate attacks can inferentially be found in some provisions of Protocol II. For instance, Article 14, which prohibits the starvation of civilians as a method of combat, and therefore prohibits attacks against objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works;[1369] or Article 15, which prohibits the targeting of works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, if such attacks may cause the release of dangerous forces and consequently severe losses among the civilian population[1370]; and Article 16, which protects historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.[1371] This last provision expressly prohibits the use of historic monuments, works of art or places of worship in support of the military effort.

In addition, the *Martens Clause,* included in the Preamble of Protocol II, recalls that 'in cases not covered by the law in force, the human person remains under the protection of the principle of humanity and the dictates of the public conscience'.[1372] Accordingly, in cases not specifically protected under Protocol II, the principle of humanity complements and limits the doctrine of military necessity by proscribing direct and indiscriminate attacks against the civilian population and the use of violent acts which result in unnecessary suffering. As affirmed by Goldman, 'Protocol II refers to the principle of humanity in order to bolster the relevance of the customary law principle of civilian immunity and the principle of distinction in United Nations Resolution 2444, to internal armed conflicts.'[1373] Accordingly, the *Martens Clause*

[1368] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 676.
[1369] Article 14 Second Additional Protocol.
[1370] Article 15 Second Additional Protocol.
[1371] Article 16 Second Additional Protocol.
[1372] Preamble, Second Additional Protocol.
[1373] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at 65.

implicitly prohibits direct, indiscriminate and disproportionate attacks against the civilian population in internal armed conflict.[1374]

Furthermore, we can find some wording in Protocol I. 'The more specific rules in Protocol I that protect civilians and civilian objects from such attacks are appropriate referents for determining the extent of similar protection to these persons and objects under Protocol II.'[1375] As explained by Bothe, the deletion of the prohibition against indiscriminate attacks in the simplified Protocol II suggests that article 13(2) be examined carefully to determine whether it covers any type of indiscriminate attacks covered by paras. 4 and 5 of Art. 51 of Protocol I.[1376] It has been submitted by Bothe that 'attacks against densely populated places which are not directed at military objectives, those which cannot be so directed, and the area bombardments prohibited by paragraph 5(a) of Article 51 of Protocol I are inferentially included within the prohibition against making the civilian population the object of attack.'[1377]

Accordingly, even if Protocol II does not contain a rule on indiscriminate attacks as such, it is argued that the prohibition is included by inference within the prohibition against making the civilian population the object of attack contained in Article 13(2).[1378]

[1374] On this, see Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at paras 4419-35. See also La Haye, *War Crimes in Internal Armed Conflicts*, at 37-38. For a discussion on the Martens Clause, see Chapter 14.

[1375] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at 77.

[1376] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 677. Article 51(4) Additional Protocol I reads as follow: 'indiscriminate attacks are prohibited. Indiscriminate attacks are (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effect of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian object without distinction. Article 51(5) reads as follow: 'Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'

[1377] Id. at 677.

[1378] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 39. See also Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 677.

Other treaties applicable in non-international armed conflicts

Other international instruments applicable to internal armed conflict, have also dealt with the prohibition of indiscriminate attacks. Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, as well as the 1996 Amended Protocol, expressly prohibits 'in all circumstances, to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.'[1379] The Protocol also prohibits the indiscriminate use of such weapons.[1380] The indiscriminate use is defined as being 'any placement of such weapons: (a) which is not on, or directed against, a military objective; or (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[1381]

The prohibition of indiscriminate attacks has also been included in other instruments pertaining to internal armed conflicts, as well as in numerous military manuals, state legislations and official statements.[1382]

Customary International Humanitarian Law Study

Whether the prohibition of indiscriminate attacks constituted customary international law is a debatable question, especially when it comes to non-international armed conflict. 'Probably only blind attacks were prohibited under customary law since they would have violated the principle of distinction.'[1383] What seems to call into question the customary nature of this rule is the practice of aerial bombardments during the

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[1379] Article 3(7) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on May 1996) Annexed to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996.
[1380] Mines, booby-traps and other devices.
[1381] Ibid, Article 3(8).
[1382] For an extensive review, see the Practice related to Rule 11, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, footnotes 14-17.
[1383] Rogers, *Law on the battlefield*, at 27.

Second World War. However, more than sixty years later, customary international law has had the time to develop and crystallize new rules.

Despite not being explicitly prohibited by Additional Protocol II, the ICRC study has found that state practice establishes the customary character of the prohibition of indiscriminate attacks in internal armed conflicts. The authors of the Study identified, as part of customary law applicable in internal armed conflicts, that 'indiscriminate attacks are prohibited'.[1384] The authors of the Study did not find any official contrary practice with respect to internal armed conflicts and identified numerous condemnations by States of the violation of this rule.[1385] According to the Study, 'Indiscriminate attacks are those:

> (a) which are not directed at a specific military objectives;
>
> (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and which consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.'[1386] This rule is also said to be applicable in non-international armed conflict.

The definition of indiscriminate attacks set forth in this Rule is a verbatim copy of Article 51(4)(a) of the First Additional Protocol and represents an implementation of the principle of distinction and of international humanitarian law in general. Indeed, paragraph (a) of Article 51(4) AP I is related to the principle of distinction itself and the prohibition to attack civilian objects and persons. Rule 12(a) is an application of the prohibition on directing attacks against civilians[1387] and the prohibition on directing attacks against civilian objects[1388] which are applicable in non-international armed conflicts.[1389] Rule 12(a) would for instance prohibit the deliberate and

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[1384] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 11.
[1385] See Id. at pp. 39-40 and related practice.
[1386] Id. Rule 12, at 40.
[1387] See Rule 1.
[1388] See Rule 7.
[1389] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 43.

indiscriminate targeting of certain cities and towns in Syria by the Syrian government using inaccurate weaponry.[1390]

Sub-paragraph (b) of Article 51(4) API prohibits the use of weapons and methods which are inherently indiscriminate. The example of the 'Syrian military airplanes and helicopters (that) were reported as having indiscriminately dropped "barrel bombs" on civilian objects causing loss of life and significant destruction of civilian property'[1391] could fulfil the requirements for being a violation of IHL under Rule 12(b), which is also an application of the prohibition on directing attacks against civilians or against civilian objects.[1392] 'The prohibition of weapons which are by nature indiscriminate[1393], which is applicable in (…) non-international armed conflicts, is based on the definition of indiscriminate attacks contained in Rule 12(b).'[1394] So for an attack not to be indiscriminate, three requirements must be fulfilled, namely that '(i) targets must be *identified* with some certainty as military objectives; (ii) attacks must be *directed* to such identified targets, and (iii) the weapons and methods must be such that the target may be hit with some degree of *likelihood*.'[1395]

Lastly, Rule 12(c), which is based on Article 51(4)(a) and (c) is based on the logical argument that means and methods of warfare whose effects cannot be limited as required by international humanitarian law should be prohibited. But this reasoning begs the question as to what those limitations are. The ICRC has shown that 'practice in this respect points to weapons whose effects are uncontrollable in time and space and are likely to strike military objectives and civilians or civilian objects without distinction.'[1396] The US Air Force Pamphlet gives the example of biological weapons.[1397] Even though biological weapons might be directed against military

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[1390] CoI *Syria*, at para 123.
[1391] CoI *Syria,* Annex XI, para 7.
[1392] See Rules 1 and 7.
[1393] See Rule 71.
[1394] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 43.
[1395] Blix, H., "Area bombardment: rules and reasons", 49 *British Yearbook of International Law* 31, (1978), at 48.
[1396] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules,* at 43.
[1397] The US Air Force Pamphlet (1976) states: "Some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian

objectives, 'their very nature means that after being launched their effects escape from the control of the launcher and may strike both combatants and civilians and necessarily create a risk of excessive civilian casualties.'[1398] It is submitted here that the same argument should be applied to chemical weapons and cluster munitions.

As we have seen above, the Second Additional Protocol does not contain a direct reference to indiscriminate attacks. However, it has been argued that the subsections (a) and (b) of the above mentioned definition in Rule 12 are included by inference within the prohibition contained in Article 13(2) on making the civilian population the object of attack.[1399] In addition, except for subsection (c), this definition has also been included in the Amended Protocol II to the Convention on Certain Conventional Weapons.[1400]

The prohibition contained in Rule 13 is particularly important in non-international armed conflicts. The Rule, which is applicable to this type of conflict states that 'attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.'[1401] This rule relates specifically to the so-called 'area-bombardments', which are clearly indiscriminate attacks, and as such prohibited. This rule is particularly important for internal armed conflict because 'the presence of members of an armed group in a particular area can lead to the destruction of the entire area, even in situations in which the members could be targeted in isolation and on an individual basis.'[1402]

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population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects." (United States, *Air Force Pamphlet 110-31, International Law – The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976, § 6-3(c).

[1398] Henckaerts & Doswald-Beck*, Customary International Humanitarian Law Volume I: Rules*, at 43.

[1399] See Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 677.

[1400] Amended Protocol II to the CCW, Article 3(8)(a) defines the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons 'which is not on, or directed against, a military objective'.

[1401] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 43.

[1402] Sivakumaran, *The Law of Non-International Armed Conflict*, at 348.

The prohibition of area-bombardments was originally included in Protocol II, but was dropped at the last moment as part of the package aimed at the adoption of a simplified text. Article 26(3)(a) of the draft Additional Protocol II submitted by the ICRC to the CDDH provided that it was forbidden 'to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other.'[1403] Committee III of the CDDH amended this proposal and adopted the amended proposal, by 25 votes in favour, 13 against and 24 abstentions, while Article 26 as a whole was adopted by Committee III by 44 votes in favour, none against and 22 abstentions.[1404] The adopted text provided:

> 'An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects is to be considered as indiscriminate.'[1405]

Ultimately, however, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.[1406]

However, despite its deletion, it has been argued by Bothe that the prohibition of area bombardment 'is included by inference within the prohibition contained in Article 13(2) on making the civilian population the object of attack.'[1407] In addition, more recently, the prohibition has been included, for instance, in the Amended Protocol II to the Convention on Certain Conventional Weapons.[1408] Rule 13 is a verbatim copy of Article 51(5)(a) API which provides some guidance on which types of attacks are to be considered as indiscriminate.[1409] However, Article 51(4) was criticized in the Diplomatic Conference and subsequently. 'The criticism was directed particularly at

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[1403] CDDH, *Official Records,* Vol I, Part Three, Draft Additional Protocols, June 1973, p. 40.
[1404] CDDH, *Official Records,* Vol XIV, CDDH/III/SR.37, 4 April 1975, pp. 390 and 391, §§ 14-15.
[1405] CDDH, *Official Records,* Vol XV, CDDH/215/Rev.1, 3 February-18 April 1975, p. 321.
[1406] CDDH, *Official Records,* Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.
[1407] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at p. 677.
[1408] Amended Protocol II to the CCW, Article 3(9) reads as follow: 'Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians and civilian objects are not to be treated as a single military objective.'
[1409] Article 51(5)(b) considers as indiscriminate and therefore forbidden 'an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.'

the imprecise wording and terminology.'[1410] It has been pointed out that 'while "bombardment" was understood to mean bombardment by artillery as well as from the air, the meaning of "clearly separated and distinct" was far less certain.'[1411] This led the authors of the ICRC Commentary to acknowledge that putting these provisions into practice 'will require complete good faith on the part of belligerents, as well as the desire to conform with the general principle of respect of the civilian population.'[1412] More than thirty years later, we are still facing the problem of required good faith on the battlefield.

So what is the practical significance of this prohibition? The ICRC Commentary explains that the words 'clearly separated and distinct' in subparagraph (a) 'leaves some degree of latitude to those mounting an attack; in case of doubt they can refer to sub-paragraph (b) and assess whether the attack is of a nature to cause losses and damage which would be excessive in relation to the military advantage anticipated.'[1413] However, sub-paragraph (b) is not found in Rule 13 but in Rule 14, which deal with the requirements of proportionate attacks.[1414]

As stressed by Goldman, 'an assault on a single military target within that locale would not be an unlawful, indiscriminate attack. However, if a party attacks a populated area to eliminate several military objectives that could have been attacked separately, such action would be indiscriminate.'[1415] For instance, the Israeli strategy in South Lebanon in 2006 has been pointed to as carpet bombing, as forbidden by Article 51(5)(a). Carpet bombing 'destroys all life in a specific area and razes to the ground all buildings situated there.'[1416] The ICRC asserts that in a 'village or any other area where there is a (…) concentration of civilian persons and objects, the military objectives in that area may only be attacked separately without leading to

[1410] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 1977.
[1411] Rogers, *Law on the battlefield*, at 29.
[1412] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para. 1978.
[1413] Id. at para 1972.
[1414] See Chapter 9 on the principle of proportionality and Chapter 12 on Disproportionate attack.
[1415] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at 78.
[1416] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* para 1968.

civilian losses outside the military objectives themselves.'[1417] This finding is all the more important in the context of a non-international armed conflict, where, as we have seen, the comingling of civilians with military objective is a reality with which the belligerents need to comply.

The conclusion that the prohibition of area bombings is customary in non-international armed conflicts is also supported by the argument that, because they have been considered to constitute a type of indiscriminate attack, and because indiscriminate attacks are prohibited in non-international armed conflicts, it must follow that 'area bombardments' are prohibited in non-international armed conflicts.[1418] This is also supported by the fact that the authors of the Study did not find any official contrary practice with respect to internal armed conflict and identified numerous condemnations by States of the violation of this rule.[1419]

Lastly, the ICRC Study found that launching an indiscriminate attack resulting in death or injury to civilians constituted a war crime in non-international armed conflict.[1420] The authors are of the opinion that 'launching indiscriminate attacks in non-international armed conflicts has been so frequently and vigorously condemned by the international community as to indicate the customary nature of this prohibition.'[1421] The Study also identified some State practice on this point. For instance, numerous states adopted legislation criminalizing this type of attack.[1422]

[1417] Id. at para. 1973.
[1418] Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume I: Rules. at 44-45.
[1419] See Id. at pp. 39-40 and related practice.
[1420] Id. at Rule 156, at 600-1.
[1421] Id. at at 601.
[1422] See, e.g., the legislation of Belarus (cited in CIHL Study, Vol. II, Ch. 3, § 35), Belgium (*ibid.*, § 36), Bosnia and Herzegovina (*ibid.*, § 37), Colombia (*ibid.*, § 40), Croatia (*ibid.*, § 42), Estonia (*ibid.*, § 45), Georgia (*ibid.*, § 46), Indonesia (*ibid.*, § 47), Lithuania (*ibid.*, § 51), Niger (*ibid.*, § 55), Slovenia (*ibid.*, § 57), Spain (*ibid.*, § 58), Sweden (*ibid.*, § 59), Tajikistan (*ibid.*, § 60) and Yugoslavia (*ibid.*, § 62); see also the draft legislation of Argentina (*ibid.*, § 32), El Salvador (*ibid.*, § 44), Jordan (*ibid.*, § 49), Lebanon (*ibid.*, § 50) and Nicaragua (*ibid.*, § 54) in Henckaerts, J.-M. & Doswald-Beck, L., Customary International Humanitarian Law Volume II: Practice (ICRC ed., Cambridge University Press 2005). Practice related to Rule 11.

San Remo Manual

The San Remo Manual for the Law on Non-International Armed Conflicts is not a legal source and is not legally binding. However, it may serve as a source of guidance for behaviour in action during internal armed conflicts. The document does not pretend to be a comprehensive restatement of the law applicable in such conflicts, but it has a provision on indiscriminate attacks. The corresponding rule reads as follow: 'Indiscriminate attacks are forbidden. Indiscriminate attacks are those that are not specifically directed against fighters or military objectives.'[1423] In the Commentary attached to the San Remo Manual, the authors further write that indiscriminate attacks are 'those that are of a nature to strike military objectives and civilians or civilian objects without distinction.'[1424] In addition, the authors stated that despite the fact that we do not find the prohibition of indiscriminate attacks *per se* in Protocol II, the concept, in that it 'lies at the core of the principle of distinction, is clearly equally applicable to non-international armed conflict.'[1425]

The San Remo Manual identified two types of indiscriminate *methods* of combat. The first is 'the carrying out of attacks where no attempt is made to identify specific military objectives.'[1426] The second method is 'an attack that treats a number of clearly separate and distinct military objectives collocated with civilians or civilian objects as a single entity, such as carpet-bombing an entire urban area containing dispersed legitimate targets.'[1427] The Manual further specifies that 'this prohibition only applies where it is militarily feasible to conduct separate attacks on each of the objectives. If it is not, then the issue is proportionality, not discrimination.'[1428]

HPCR Manual on International Law Applicable to Air and Missile Warfare

The Manual on International Law Applicable to Air and Missile Warfare is an informal guide for actual use by air forces and policy-makers in time of armed

[1423] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.1.3.
[1424] Id. at p. 20.
[1425] Ibid.
[1426] Id. at Rule 2.1.1.3, para. 3.
[1427] Id. at Rule 2.1.1.3, para. 4.
[1428] Ibid.

conflict.[1429] This Manual is allegedly a restatement of existing law applicable to air or missile operations in international armed conflict. But it further specifies that it is possible to apply some of the Rules to internal armed conflict.[1430] The Rules incorporated in it do not by themselves create or develop legal obligations. It is not the Manual *per se* that is applicable to States but the existing law reflected in the Rules.[1431] Rule 13(a) of this Manual simply ascertains that 'indiscriminate attacks are prohibited.' The Commentary related to this Rule further specifies that this Rule is also applicable to non-international armed conflict.[1432] Rule 13(b) establishes that 'indiscriminate attacks are those that cannot be or are not directed against lawful targets or the effects of which cannot be limited as required by the law of international armed conflict, and which therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction.'

General Explanation

We have seen that, generally speaking, the prohibition of indiscriminate attacks is related to three distinct cumulative duties on the part of the belligerent: (i) the duty to direct attack to an identified military target; (ii) the duty to employ means and methods of attack that are capable of hitting the identified military target with sufficient reliability and (iii) the duty to employ means and methods of attack the effects of which can be limited to the attacked military target. In considering whether there has been a breach of this rule, it suffices that one of the three above mentioned duties 'is violated provided the attack is of a nature to strike military objectives and civilians or civilian objects without distinction.'[1433]

Accordingly, strictly speaking, 'it is the *lacking focus* on a legitimate target or the *lacking capability* of means and methods to respect the principle of distinction which

[1429] HPCR Manual on International Law Applicable to Air and Missile Warfare, Bern, 15 May 2009, *Program on Humanitarian Policy and Conflict Research at Harvard University*.
[1430] Ibid., Section B :2(a), at p. 6-7.
[1431] Commentary to the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Rule 2(a), para. 3, p. 57.
[1432] Commentary to the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Rule 13(a), para. 3, p. 89.
[1433] Rogers, *Law on the battlefield*, at 29.

makes an attack indiscriminate, while the actual *effects* of such attacks must be evaluated by reference to the requirement of proportionality.'[1434] However, it is difficult to lay down clear rules since so much depends on the facts of each case. For example, if the military objective consists, as in Mali, of widely scattered jeeps with fighters heading to their caches in the mountains, without anyone around, it would be clearly permissible to use weapons having a wider range of effect than would be possible were the attack to be directed at fighters disseminated in the centre of densely populated area. Military objectives dispersed in densely populated areas have to be treated as separate military objectives, thereby requiring separate attacks. If fighters are located in several locations within the city centre, an attack by bombardment treating them as single military objective would constitute a blatant indiscriminate attack. This situation has been identified in the report of the International Commission of Inquiry on Darfur: 'The (Sudanese) Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, "it is no longer a civilian locality, it becomes a military target". In his view, "a village is a small area, not easy to divide into sections, so the whole village becomes a military target.'[1435] Such an approach constitutes a blatant violation of the prohibition of indiscriminate attack.

When we refer to 'methods and means' of combat which cannot be directed at an identified military objective or the effects of which cannot be limited, the term 'means of combat' or 'means of warfare' generally refers to the weapons being used, while the expression 'methods of combat' generally refers to the way in which such weapons are used.[1436] However, the prohibition of indiscriminate attacks 'does not suggest that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances, as the rule requires regard to be had to all the circumstances. It is the *use* of such means and methods rather than the means and

[1434] Melzer, *Targeted Killing in International Law*, at 355 (emphasis original). On proportionality, see Chapter 10.
[1435] *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, S/2005/60, 1 February 2005, para 249.
[1436] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, para. 1957.

methods themselves that tend to violate the prohibitions.'[1437] With the exception of some weapons, such as bacteriological or nuclear weapons, which by their very nature have an indiscriminate effect, in most cases the categorization of an attack as indiscriminate will not depend on the nature of the weapons under consideration, but on the way they are used. We can cite for instance the use and firing of Katyusha rockets by the Hezbollah against Israel. These rockets are not indiscriminate by nature *per se.* But due to their inaccuracy, and the fact that the Hezbollah normally launches them from a far distance, they very rarely hit the targeted objective, and will land in civilian towns. They are weapons that have indiscriminate effect due to the way they are used.

With respect to methods that can be characterized as indiscriminate, despite the difficulties of establishing clear-cut parameters to identify them, we can identify the following specific acts as constituting indiscriminate attacks:[1438] to fire blindly – namely without a clear idea of the nature of the target – into a territory controlled by the enemy; jettisoning bombs at random over enemy territory – prior to landing – after a mission has been aborted; to conduct bombing raids at night, in inclement weather or from extremely high altitude – when visibility is impaired – in the absence of adequate equipment for target identification. Of course, target identification does not depend solely on visibility, as sophisticated munitions can be accurately aimed at military objectives beyond-visual-range and even over the horizon. A last indiscriminate method is the firing of imprecise missiles against military objectives located near, or intermingled with, civilian objects.[1439]

In terms of means whose use causes indiscriminate attacks, we can think of the use of any remotely delivered mine that is not effectively marked and has no self-activating or remotely controlled mechanism to cause destruction or neutralization of the mine once its military purpose has been served. Such mines are 'blind weapons' and their use is indiscriminate in terms of time, for instance the use of hand-delivered mines, such as those of the Claymore variety, and booby-traps in or near a civilian locale

[1437] Sivakumaran, *The Law of Non-International Armed Conflict*, at 347 (emphasis added; footnotes omitted).
[1438] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at pp. 127-128.
[1439] On this last action, see Schmitt, M., "Future war and the principle of discrimination", 28 *Israel Yearbook on Human Rights*, (1999), at 55.

containing military objectives, if those devices are deployed *without* any precautions, markings or other warnings or do *not* self-destruct or are *not* removed after their military purpose has been served. Other indiscriminate uses include the use of booby-traps designed to cause superfluous injury or unnecessary suffering, such as hidden pits containing poisoned objects.[1440] The indiscriminate nature of a weapon has been reported for instance by the Goldstone report, when it determined that the rockets and the mortars fired by the Palestinian armed groups were incapable of being directed towards specific military objectives having been fired into areas where civilian populations were based. The mission concluded that these attacks constituted 'indiscriminate attacks upon the civilian population of southern Israel'.[1441] I would also add to the list of indiscriminate means the following weapons that have, in my view, indiscriminate effects. They are bacteriological and certain chemical weapons,[1442] as well as nuclear weapons,[1443] cluster munitions and white phosphorus.

Lastly, it is important not to confuse the prohibition of *indiscriminate* attacks with the requirement of proportionality in *discriminate* attack. As showed by Melzer, it is indeed 'systematically unsatisfactory that conventional IHL qualifies the proportionality requirement as a subset of indiscriminate attack.'[1444] There are three different stages in the ascertainment of the legality of an attack. The military commander will have to ask himself three questions: 1) Is the target under consideration a military objective? 2) Is the attack indiscriminate? and 3) Is the rule of proportionality likely to be offended? As we know, an attack will be indiscriminate if it does not target a military objective. But, as we will see in the next Chapter, a disproportionate attack will hit a legitimate military objective but will entail excessive damage in relation to the military advantage anticipated. Accordingly, as long as the use of overwhelming force is directed against a specific military objective, and employs methods and means the effects of which are limited as required, the resulting

[1440] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at 85-86.
[1441] *Goldstone* Report, para 108.
[1442] Certain of these weapons are already banned by the Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, Geneva, 17 June 1925.
[1443] See ICJ, *Nuclear Weapons* Advisory Opinion, paras 92ff ; See also Dissenting Opinion of Judge Higgins at para 24 ; Sandoz, et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Para 1966.
[1444] Melzer, *Targeted Killing in International Law*, at 356, footnote 247.

collateral damage will not constitute an indiscriminate attack. 'Failure to actually limit the collateral effects of means and methods of attack may constitute a violation of the duty of precaution and, depending on the results, of the principle of proportionality, but less accurately described as an indiscriminate attack.'[1445] Accordingly, the confusing language of Additional Protocol I has been imported into the Rule of the Customary Law Study, thereby importing the confusion between the distinction and proportionality principles.[1446]

Case law on indiscriminate attacks in non-international armed conflicts

The International Court of Justice

The International Court of Justice in the Nuclear Weapons case in 1996 also confirmed the fact that an indiscriminate attack amounts in practice to an attack on civilians.[1447] With regard to the obligation of states not to make civilians the object of attack, the ICJ in its *Legality of the Use of Nuclear Weapons* Advisory Opinion stated that 'they must consequently *never* use weapons that are incapable of distinguishing between civilians and military targets.'[1448] The use of the term 'never' should be interpreted as also applying to situations of non-international armed conflict.

In its judgement in the *Armed Activities on the Territory of the Congo* case in 2005, albeit in the context of an international armed conflict opposing the Democratic Republic of the Congo to Uganda and Rwanda, but with fighting opposing organized armed groups to state armed forces, the ICJ stated:

> 'The Court … finds that there is sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the

[1445] Id. at 357.
[1446] For a discussion of this problem, see Rogers, Law on the battlefield. at 30-31, with attached references. See Chapter 10 for a discussion on the principle of proportionality.
[1447] ICJ, *Nuclear Weapons* Advisory Opinion, paras. 78-79 (emphasis added). See also Dissenting Opinion of Judge Higgins, paras 23-24.
[1448] *Nuclear Weapons* Advisory Opinion, para. 78.

course of fighting against other troops, especially the FAR. According to the report of the inter-agency assessment mission to Kisangani … the armed conflict between Ugandan and Rwandan forces in Kisangani led to "fighting spreading into residential areas and indiscriminate shelling occurring for 6 days … Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests." MONUC's special report on the events in Ituri, January 2002–December 2003 … states that on 6 and 7 March 2003, "during and after fighting between UPC and UPDF in Bunia, several civilians were killed, houses and shops were looted and civilians were wounded by gunshots … Stray bullets reportedly killed several civilians; others had their houses shelled." … In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.'[1449]

Ad hoc Tribunals

By way of introduction, it should be noted that although the International Tribunals have on occasion touched upon the law relating to the conduct of hostilities, thereby opening the door of internal armed conflicts to Hague law,[1450] it has been rare. Insofar as the law of internal armed conflicts is concerned, the ICTR and the ICTY have focused their attention almost exclusively on those serious violations of common Article 3 and Additional Protocol II which are designed more directly to protect civilians or civilian objects from armed hostilities. However, despite the paucity of cases, the jurisprudence of the ICTY provides strong evidence of the customary nature of the prohibition of indiscriminate attacks in internal armed conflicts. It is important here to recall that the consideration of war crimes contained in Article 3 of

[1449] ICJ, *Armed Activities on the Territory of the Congo case* (Democratic Republic of the Congo v. Uganda), Judgement, 19 December 2005, para 208.
[1450] See *Tadic* Interlocutory Appeal, paras 96-127 and 53-68: protection of civilians, general duty to avoid unnecessary harm, certain limitations on the means and methods of warfare, including a ban on chemical weapons and perfidious means of warfare, and the protection of certain categories of objects and properties.

the ICTY Statute in relation to internal armed conflicts has been dependent on the extension of their scope of application by customary international law.[1451] Indeed, the Statute only provides an illustrative list of serious violations of the laws of war contained in Article 3. As we have seen, such crimes do not exist in a black letter form for internal armed conflicts.

In addition to this illustrative list, Article 3 of the ICTY Statute also grants the Tribunal jurisdiction over all those other serious violations of international humanitarian law which, under international customary law, give rise to the individual criminal responsibility of the perpetrator at the time when the acts referred to in the indictment took place.[1452] As a result, article 3 of the ICTY Statute 'constitutes a residual clause'[1453] designed to guarantee that no serious violation of international humanitarian law escapes the jurisdiction of the Tribunal.[1454] By providing the Tribunal with an illustrative list of crimes, 'the Security Council implied that other serious violations of the law of war could fall within the tribunal's jurisdiction and that it would be for the judges to determine which those were, as well as establishing the constitutive elements of each offence prosecuted.'[1455] This clause opened the door to the possibility of a great development of international criminal law applicable to non-international armed conflict through customary law interpretation by the Chambers of the Tribunal.

In its groundbreaking Decision on jurisdiction in the *Tadic* case, the Appeals Chamber of the Yugoslav Tribunal indicated that there exists a basic core of

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[1451] Article 3 of the ICTY Status grants the tribunal jurisdiction over the following crimes: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and plunder of public or private property.

[1452] *Tadic* Interlocutory Appeal, para 143. See *Strugar* Interlocutory Appeal, paras 9, 10 and 13; *Ojdanic* Decision *(Prosecutor v. Milan Milutinovic, Nikola Sainovic and Dragoljub Ojdanic)*, (Decision on Interlocutory Appeal) IT-99-37-AR72.2, (12 May 2004), (hereinafter *Ojdanic* Decision), para 9; *Hadzihasanovic* Case, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereinafter *Hadzihasanovic* Command Responsibility Decision), para 32.

[1453] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 72-73.

[1454] *Galic* Appeal Judgment, para 118; *Kordic* Appeal Judgment, paras 40-45; *Kunarac* Appeal Judgment, para 67-69; *Delalic* Appeal Judgment, 420; *Tadic* Interlocutory Appeal, para 91.

[1455] La Haye, *War Crimes in Internal Armed Conflicts*, at 328.

principles and norms of international humanitarian law, including the different manifestations of the principle of distinction, that is applicable to international and non-international armed conflicts.[1456] It is in this decision that the application of the prohibition of indiscriminate attacks in internal armed conflicts was first confirmed by the Appeals Chamber. The judges held that

> 'it cannot be denied that customary rules have developed to govern internal strife. These rules (…) cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.'[1457]

However, it is important to bring to attention another less quoted part of the judgment, where the Appeal Chamber noted that the extension of the rules applicable in international armed conflict to internal armed conflict 'has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal armed conflicts.'[1458]

The fact that the Second Additional Protocol does not contain any express reference to the notions of 'indiscriminate attacks' might be the reason why indiscriminate attacks are not considered as separate crimes in the case law of the ICTY. Indeed, the *ad hoc* Tribunal's case law has not found that launching indiscriminate attacks was a behaviour criminalized as such by international customary law at the time of the conflict in the former SFRY. This might be the reason why 'the Trial Chambers understood from the very beginning that acts of violence not specifically directed against military objectives (indiscriminate attacks) could be in fact considered as attacks directed against civilians or civilian objects.'[1459] It has been considered that when 'the attacking forces fail to discriminate between civilians or civilian objects on

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[1456] *Tadic* Interlocutory Appeal, paras 111, 126, 127, 134 and 143.
[1457] *Tadic* Interlocutory Appeal, para 127.
[1458] *Tadic* Interlocutory Appeal, para 126.
[1459] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 77.

the one hand and military objectives on the other, their attack might qualify, all other conditions being met, as a direct attack against civilians which might be regarded as a war crime.'[1460] Among the other conditions, indiscriminate attacks may be linked to attacks on civilians, 'when the perpetrator was aware that this would be the effect of the attack in the ordinary course of events.'[1461] Accordingly, for the crime of indiscriminate attack to be linked to the crime of unlawful attack against civilians, the ICTY considers that 'the perpetrator must undertake the attack "wilfully", which it defines as wrongful intent, or recklessness, and explicitly not "mere negligence".'[1462] The Appeals Chamber in *Galic* distinguished the notion of recklessness, 'the attitude of an agent who, without being certain of a particular result, accepts the possibility of its happening', from negligence, which describes a person who 'acts without having his mind on the act or its consequences'.[1463] The fact that the perpetrator may not have 'wished' the outcome of the attack is irrelevant.[1464] Essentially, the *mens rea* can be established by demonstrating that civilian terror is a reasonable consequence of an indiscriminate attack. Hence, indiscriminate attack has not been treated as an autonomous offence, and the ICTY has merely considered indiscriminate attacks as evidence of the crime of directing an attack against civilians or civilian objects.[1465]

The Trial Chamber in the *Galic* case found that the military forces had directed their shelling at civilians who were engaged in day-to-day activities such as tending vegetable plots, queuing for bread and collecting water[1466], and confirmed that the prohibition of indiscriminate attacks was an emanation of the principle of distinction, thereby noting that the prohibition against attacking civilians stems 'from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilians objects and military objectives and

[1460] Mettraux, *International crimes and the ad hoc Tribunals*, at 123. Referring to *Galic* Trial Chamber Judgment, para. 57.
[1461] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 156, at 601.
[1462] *Galic* Appeal Judgment, para 140.
[1463] *Ibid*, para 140.
[1464] *Ibid*, para 139-40.
[1465] See for instance *Dragomir Milosevic* Appeal Judgment, para 66; *Strugar* Appeal Judgement, para. 275, referring to *Galić* Appeal Judgement, para. 132 and fns 101, 706; *Kupreskic* Trial Judgment, para 513.
[1466] Vallentgoed, D., "The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Against Buil-up Areas", 18 *Journal of Conflict & Security Law* 25, (2013), at 29.

accordingly to direct their operations only against military objectives.'[1467] The Trial Chamber further noted that 'indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.'[1468] It further specified that 'indiscriminate attacks are expressly prohibited by Additional Protocol I' and that 'this prohibition reflects a well-established rule of customary law applicable in all armed conflicts.'[1469] The Appeal Chamber in the *Galic* case clarified that one cannot 'conflate' the crime of direct attacks against civilians with indiscriminate attack, but it added that the finding 'that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians (…) rather supports the view that a direct attack can be inferred from the indiscriminate character of the weapon used.'[1470]

An indiscriminate attack can also be identified according to the indiscriminate character of the weapons that have been used. For instance, in its review of the indictment in the *Martic* case in 1996, the ICTY examined the legality of the use of cluster bombs according to customary international law, including the prohibition of indiscriminate attacks involving a means or method of warfare which cannot be directed at a specific military objective.[1471] Then, in its 2007 judgment, the Trial Chamber stated that

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[1467] *Galic* Trial Chamber Judgment, para. 45.

[1468] *Ibid*, para 57. Referring to the fact that '(o)ther Trial Chambers have found that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians. For example, the *Blaskic* Trial Chamber inferred from the arms used in an attack carried out against the town of Stari Vitez that the perpetrators of the attack had wanted to target Muslim civilians, since these arms were difficult to guide accurately, their trajectory was "irregular" and non-linear, thus being likely to hit non-military targets. *Blaskic* Trial Judgement, paras 501, 512. In the *Martic* Rule 61 Decision, the Trial Chamber regarded the use of an Orkan rocket with a cluster bomb warhead as evidence of the intent of the accused to deliberately attack the civilian population. The Chamber concluded that 'in respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military target but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law'. The Trial Chamber based this finding on the fact that the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city, *Martic* Rule 61 Decision, paras 23-31. It is relevant to note that the International Court of Justice has stated, with regard to the obligation of States not to make civilians the object of attack, that 'they must consequently never use weapons that are incapable of distinguishing between civilian and military targets', ICJ *Nuclear Weapons* Advisory Opinion, para. 78.' See also *Galic* Appeal Judgment, paras 132-33.

[1469] Ibid.

[1470] *Galic* Appeal Judgment, para 132.

[1471] *Martic* Rule 61 Decision, para18.

'[I]ndiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.'[1472]

For instance, the Trial Chamber concluded that the M-87 Orkan was used as an indiscriminate weapon.[1473] It found that the distance from which the rockets were fired was close to the maximum range (50 km) of the M-87 Orkan, at which the dispersion error is about 1,000m in every direction, with the area of the dispersion of the bomblets on the ground being about 2 hectares.[1474] The Trial Chamber reasoned that the M-87 Orkan, 'by virtue of its characteristics and the firing range in the specific instance' was 'incapable of hitting specific targets.'[1475] Using the M-87 Orkan from such a range in a densely populated area like Zagreb 'will result in the infliction of severe casualties.'[1476] This approach has been confirmed by the Appeal Chamber.[1477]

The Trial Chamber in the *Kupreskic* case, recognizing that 'attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians,'[1478] acknowledged that the wording of these two types of indiscriminate attacks was unclear. It stated that

'admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party. Nevertheless this is an area where the "elementary considerations of humanity", rightly emphasised by the International Court of Justice in the *Corfu Channel*, *Nicaragua* and *Legality of the Threat or Use of Nuclear Weapons* cases, should be fully used when interpreting and applying

[1472] *Martic* Trial Judgment, para 69.
[1473] *Ibid*, paras 462-463.
[1474] *Ibid*, paras 462.
[1475] *Ibid*, paras 463.
[1476] Trial Judgement, paras 462-463.
[1477] *Prosecutor v. Martic* (Appeal Judgement) IT-95-11-A (8 October 2008), (hereinafter, *Martic* Appeal Judgment), para 247.
[1478] *Kupreskic* Trial Judgment, para 524.

> loose international rules, on the basis that they are illustrative of a general principle of international law.'[1479]

The Trial Chamber then suggested that in this type of situation, one should resort to the Martens Clause, which is, in the authoritative view of the Tribunal, part of customary international law.[1480] While acknowledging that the 'principles of humanity' and 'dictates of public conscience' have not been 'elevated to the rank of independent sources of international law, for this conclusion is belied by international practice', the Tribunal recalled that this Clause 'enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.'[1481] Accordingly, the Trial Chamber ascertained that the rules of precautions in attacks and against attacks 'must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.'[1482]

Indiscriminate attacks as a war crime under the Rome Statute

The Rome Statute, in contradiction with the general tendency to apply the law of international armed conflict to internal armed conflict, upheld the distinction between international and internal armed conflicts, with certain crimes that were considered as customary at the time of the adoption of the Statute being not included into the war crime provision for non-international armed conflict. Indeed, the Rome Statute criminalized for international armed conflicts the three crimes of attacks against the civilian population and civilian persons,[1483] attacks directed against civilian objects[1484] and disproportionate attacks,[1485] while in the context of non-international

[1479] *Ibid,* para 524 (footnotes ommitted).
[1480] *Ibid,* para 525.
[1481] *Ibid,* para 525.
[1482] *Kupreskic* Trial Judgment, para. 525. See Chapter 11 for a detailed analysis of precautionary measures.
[1483] Article 8(2)(b)(i) Rome Statute.
[1484] Article 8(2)(b)(ii).
[1485] Article 8(2)(b)(iv).

armed conflict it only expressly criminalizes attacks directed against the civilian population or civilian persons.[1486] Despite the fact that the prohibition of indiscriminate attacks is, as we have seen, part of customary international law, and also that launching an indiscriminate attack constitutes an offence under the legislation of numerous States,[1487] the Rome Statute does not list as such the crime of launching an indiscriminate attack resulting in loss of life or injury to civilians, whether in international or non-international armed conflicts. There is no such crime as indiscriminate attacks under the Rome Statute, except in the case of international armed conflict with respect to the specific crime of 'employing weapons, projectiles and material and methods of warfare which are (…) inherently indiscriminate in violation of the international law of armed conflict, *provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.*'[1488] However, there is not such an annex for now. So, as we see, the conditions provided by this provision are so stringent that, even in the context of an international armed conflict, it is very unlikely that any commander will be held accountable for an indiscriminate attack in the near future. This is further proof that the drafters of the Statute did their utmost in order to shield their servicemen from being prosecuted for crimes on the conduct of hostilities *per se.*

This situation is particularly astonishing taking into account the case law of the ICTY and ICTR, which, as we have seen above, has consistently upheld the existence of a core part of international humanitarian law applicable in any kind of armed conflict,

[1486] Article 8(2)(e)(i).

[1487] See, e.g., the legislation of Armenia (cited in CIHL Study, Vol. II, Ch. 3, § 33), Australia (*ibid.*, § 34), Belarus (*ibid.*, § 35), Belgium (*ibid.*, § 36), Bosnia and Herzegovina (*ibid.*, § 37), Canada (*ibid.*, § 38), China (*ibid.*, § 39), Colombia (*ibid.*, § 40), Cook Islands (*ibid.*, § 41), Croatia (*ibid.*, § 42), Cyprus (*ibid.*, § 43), Estonia (*ibid.*, § 45), Georgia (*ibid.*, § 46), Indonesia (*ibid.*, § 47), Ireland (*ibid.*, § 48), Lithuania (*ibid.*, § 51), Netherlands (*ibid.*, § 52), New Zealand (*ibid.*, § 53), Niger (*ibid.*, § 55), Norway (*ibid.*, § 56), Slovenia (*ibid.*, § 57), Spain (*ibid.*, § 58), Sweden (*ibid.*, § 59), Tajikistan (*ibid.*, § 60), United Kingdom (*ibid.*, § 61), Yugoslavia (*ibid.*, § 629) and Zimbabwe (*ibid.*, § 63); see also the draft legislation of Argentina (*ibid.*, § 33), El Salvador (*ibid.*, § 44), Jordan (*ibid.*, § 49), Lebanon (*ibid.*, § 50) and Nicaragua (*ibid.*, § 54) in Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume II: Practice. Practice related to Rule 156(iv).

[1488] Article 8(2)(b)(xx).

in addition to customary international law and extensive state practice related to the criminalization of indiscriminate attacks as identified by the CIHL Study.[1489]

However, the fact that indiscriminate attacks have not been criminalized specifically in the Rome Statute does not necessarily mean that launching such attacks does not give rise to individual criminal responsibility under the Rome Statute when they take place in the context of an internal armed conflict. This would be a pure nonsense. First of all, the international or non-international character of armed conflicts has become a material contextual element of all war crimes covered by the Rome Statute.[1490] And this material contextual element includes the normative element of the protected status granted by IHL to the persons or objects subject to the forbidden conduct. Accordingly, this author shares the view of Olasolo when he writes that this,

> 'Along with the reference in (…) article 8(2)(e) RS to the 'established framework of international law' and the reference in article 21(1)(b) RS to 'the established principles of the international law of armed conflict', make international humanitarian law a key tool in the interpretation of such normative elements[1491] - particularly if one considers that the Elements of Crime, despite being a relevant source for interpretation, are not binding on the Chambers of the Court.'[1492]

Accordingly, the role of Article 21 has the potential to be central when it comes to the adjudication of crimes committed in non-international armed conflict and the Court might resort to this provision in order to refer to subsidiary sources. If we follow this line of thinking, treaty IHL, as well as customary IHL, as reflected in the case law of the *Ad hoc* Tribunals will continue to play a central role in the interpretation of these material contextual elements. In addition, we can consider that the fact that the interpretation of these material contextual elements has to be consistent with

[1489] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 156, at 601 and related state practice.
[1490] See Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 55.
[1491] Article 21(1)(b) provides that the Court shall apply 'in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict'.
[1492] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 26, referring to Article 9(1) Rome Statute.

‘internationally recognized human rights’, without any distinction based on any of the grounds provided for in article 21(3) RS[1493], constitutes a good safety net.

It is therefore submitted here that, despite the fact that the Rome Statute does not include the crime of indiscriminate attack against civilians *per se,* it would be possible to include this crime in the crime of directing attacks against the civilian population or civilian persons.[1494] Practically speaking, it is argued that it would be possible to follow the line that has been held by the ICTY. I share Olasolo’s view that the concept of launching indiscriminate attacks gives rise to criminal responsibility, because the argument that such attacks amount to attacks directed against civilians seems reasonable, if one takes into account that in the ICTY’s case law such crimes are crimes causing a result which can be committed with *dolus eventualis.*[1495] Olasolo submits that article 8(2)(e)(i) of the Rome Statute ‘allows for the interpretation adopted by the ICTY’s case law because the crimes provided for in this provision can also be committed with *dolus directus* in the second degree and *dolus eventualis*, provided that the attack has not been specifically directed at a concrete military objective.’[1496] *Dolus eventualis* is how civil law systems characterize the mental element in order for an actor to be held criminally responsible. A Paper prepared by the ICRC related to the mental element in the common law and civil law systems explains that with *dolus eventualis* ‘the actor foresees the result as being reasonably probable or at least possible as the consequence of his acts. And he simply accepts this event in the case it occurs. He does not desire the result, but condones it in the case it happens.’[1497] It is the same concept as *recklessness* for common law systems. Cassese explains that

> ‘Recklessness or *dolus eventualis* is a state of mind where a *person foresees that his or her action is likely to produce its prohibited consequences,* and nevertheless *willingly takes the risk of so acting*. In this case the degree of

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[1493] Article 21(3) RS includes that following grounds : ‘gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

[1494] Article 8(2)(e)(i).

[1495] See Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 78.

[1496] See generally Id. at section X.2.1.1.

[1497] Preparatory Commission for the International Criminal Court Working Group on Elements of Crimes, PCNICC/1999/WGEC/INF.2/Add.4, 15 December 1999, Annex: *Paper prepared by the International Committee of the Red Cross relating to the mental element in the common law and civil law systems and to the concepts of mistake of law in national and international law, point II. b).*

> culpability is less than intent. There, the actor anticipates and pursues a certain result and in addition knows that he will achieve it by his action; here instead he only envisages that result as *possible* or *likely* and deliberately takes the risk; however, he does not necessarily will or desire the result. Recklessness, thus, is made up of foresight and a volitional act (deliberately taking the risk).'[1498]

The ICTY Trial Chamber in the *Stakic* case explained that 'the technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide.'[1499] Accordingly, if we follow this line of thinking, a person who directs an attack against an enemy communications centre adjacent to a hospital, knowing the absolute inaccuracy of the weapon used, must be considered to have accepted the total or partial destruction of the hospital. This conclusion derives from the fact that the attacker proceeds to launch the attack despite being conscious of the impossibility of directing the attack against the communications centre only, as well as from the high probability that the projectiles will impact on the hospital instead of on the communication centre.

Within the framework of the Rome Statute, Article 30(1) establishes the mental element required for the crime to be committed and states that 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.' For the purpose of this article, in light of our problematique, a person will have 'intent' where '(b) In relation to a consequence, that person means to cause that consequence or *is aware that it will occur in the ordinary course of events.*'[1500] With respect to 'knowledge', the provision establishes

[1498] Cassese, A., *International Criminal Law* (Oxford University Press 2 ed. 2008), at 66-67 (original emphasis).
[1499] ICTY, *Stakic* Trial Judgment, para 587.
[1500] Article 30(2)(b) Rome Statute (emphasis added).

that 'knowledge means awareness that a circumstance exists or *a consequence will occur in the ordinary course of events.'*[1501]

But in the context of indiscriminate attacks under the Rome Statute, for them to be considered as direct attacks according to Article 8(2)(e)(i), at first sight the problem seems to relate to the word 'intentionally' directing the attack. The Elements of the Crimes further specifies that, for the crime of intentionally directing attacks against the civilian population, 'the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack'.[1502] However, in view of the above analysis, the correct view should be that the expression 'intentionally' not only includes cases in which an attack is launched specifically against civilians or civilian objects but also includes cases in which an attack is indiscriminate. In this case

> '(i) the perpetrator does not direct the attack at a specific military objective or is aware that, due to the lack of precision of the weaponry used, the attack cannot be directed at a specific military objective and (ii) the perpetrator is aware that civilians or civilian objects will be necessarily hit (*dolus directus in the second degree*) or, at the very least, he is aware of the likelihood that, instead of hitting a military target, he will end up hitting civilians or civilian objects and he is reconciled with such a result.'[1503]

This position is also shared by Dörmann, who explains that the word 'intentionally' contained in Article 8(2)(e)(i) and its respective Elements of Crime simply restates the general subjective element provided for in article 30 of the Statute, which includes *dolus directus* in the first degree, *dolus directus* in the second degree and *dolus eventualis*.[1504]

However, for now, the Court seems to reject Olasolo's thesis on *dolus eventualis* based on Article 30 of the Statute. In the *Bemba* Decision on the confirmation of charges, the Pre-trial Chamber discussed Article 30 and held that

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[1501] Article 30(3) (emphasis added).
[1502] Elements of the Crimes, Article 8(2)(e)(i), Point 3.
[1503] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 218.
[1504] Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary*, at 148.

> 'the general element of a crime is fulfilled (a) where the suspect means to engage in the particular conduct with the will (intent) of causing the desired consequence, or is at least aware that a consequence (undesired) "will occur in the ordinary course of events" (article 30(2) of the Statute); and (b) where the suspect is aware "that a circumstance exists or a consequence will occur in the ordinary course of events" (article 30(3) of the Statute).'[1505]

The Pre-Trial Chamber recognized that 'generally, dolus can take one of three forms depending on the strength of the volitional element vis-à-vis the cognitive element - namely, (1) dolus directus in the first degree or direct intent, (2) dolus directus in the second degree - also known as oblique intention, and (3) dolus eventualis - commonly referred to as subjective or advertent recklessness.'[1506] But it then held that, in its view, 'article 30(2) and (3) of the Statute embraces two degrees of dolus: Dolus directus in the first degree (direct intent) and dolus directus in the second degree.[1507] It further held that 'Dolus directus in the second degree does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, i.e., the suspect "is aware that [...] [the consequence] will occur in the ordinary course of events" (article 30(2)(b) of the Statute).'[1508]

However, the Chamber considered that the notion of dolus eventualis as the third form of dolus, recklessness or any lower form of culpability, was not captured by article 30 of the Statute. It supported its argument by explaining that this is captured by 'the express language of the phrase "will occur in the ordinary course of events", which does not accommodate a lower standard than the one required by dolus directus in the second degree (oblique intention).'[1509] In its view, the words 'will occur' serve as an expression for an event that is 'inevitably' expected. And these words, 'read together with the phrase "in the ordinary course of events", clearly indicate that the required standard of occurrence is close to certainty.'[1510] In this respect, the Chamber defined this standard as 'virtual certainty' or 'practical certainty', namely that 'the

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[1505] *Bemba* Rule 61 Decision, para 356.
[1506] Ibid. para 357.
[1507] Ibid. paras. 358-359.
[1508] Ibid, para 359.
[1509] Ibid, para 361.
[1510] Ibid, para 362.

consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.'[1511] It therefore rejected the standard of dolus eventualis, namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility,[1512] as well as recklessness or any lower form of culpability, from within the ambit of Article 30.[1513] Accordingly, for now, the Court does not seem to accept Olasolo's thesis.

It is anyway argued here that despite the fact that launching indiscriminate attacks against civilians has not been criminalized specifically in the Rome Statute in relation to internal armed conflict, and despite the fact that for now the Court seems to reject the mental element of dolus enventualis, this does not mean that launching such attacks does not give rise to criminal responsibility under the Statute. It would be possible to prosecute the crime of indiscriminate attack against civilians in non-international armed conflict via direct attack for the material element of the crime under Article 8(2)(e)(i) of the Rome Statute, and via the notion of recklessness for the mental element of the crime. However, resorting to recklessness would require a very broad interpretation of the Rome Statute, as dolus eventualis does note exist *per se* under article 30.

However, it is submitted here that there is another way for us to prosecute the crime of indiscriminate attack under the provision of Article 8(2)(e)(i), namely via Article 28 which deals with the responsibility of commanders and other superiors. Indeed, the specificity of the crime of indiscriminate attack is that decisions to launch such acts are normally taken by superiors, be they from state armed forces or organized armed groups. Accordingly, Olasolo's thesis on recklessness or dolus eventualis could be totally worked out under the above-mentioned provision. Indeed, in my view, one could argue that the specific mental element foreseen under article 28 'should have known' may cover negligence (recklessness) by derogation of article 30. Article 28(a) not only provides for *dolus directus*, but also for *dolus eventualis.* The relevant part of the provision asserts that

[1511] Ibid.
[1512] Ibid, para 363.
[1513] Ibid, para 369. See also the concurring opinion of Judge Van Wyngaert in the *Ngudjolo Chui* Trial Judgment who rejects the notion of *dolus eventualis*.

> ‘(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes (…) where (ii) that military commander or person either *knew* or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes.’[1514]

Accordingly, this could be a way for use to prosecute commanders for the crime of indiscriminate attacks in non-international armed conflict. It is to be noted however, that article 28 is a responsibility of second degree, which is less satisfactory. However, it is better than nothing.

The future will tell us how the Court will deal with the issue of indiscriminate attack in non-international armed conflict. This question might very well arise sooner rather than later, if the Court decides to proceed on the situation of Palestine or/and if the Security Council manages to find a consensus in order to refer the situation of Syria to the Court. These are situations where, as investigated by the United Nations Fact Finding Mission on the Gaza Conflict and the Commission of Inquiry on the Syrian Arab Republic, a great number of indiscriminate attacks against civilians have allegedly been committed.

Conclusion

The prohibition of indiscriminate attacks addresses the situation of the intermingling of civilians and fighters, and of civilian with military objectives, which is an acute problem in non-international armed conflict. IHL regulates the actual conduct of hostilities by an attacker in order for the prohibition of indiscriminate attack to be implemented in practice.

Attacks against civilians and civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate, which are those attacks that are not directed against military objectives. This prohibition limits the methods and

[1514] Article 28(a) (emphasis added).

means used for attacking legitimate military objectives located, for instance, in the midst of a high concentration of civilian population. Indiscriminate attacks differ from direct attacks against civilians in that the attacker is not actually *trying* to harm the civilian population, but is not concerned by the potential injury or damage to civilians. This prohibition is not to be found directly in treaty law. However, the Second Additional Protocol expressly protects individual civilians against direct attacks and inferentially protects them from indiscriminate attacks. Furthermore, this is a rule of customary law applicable in internal armed conflict.

We have seen that, generally speaking, the prohibition of indiscriminate attacks is related to three distinct cumulative duties on the part of the belligerent: (i) the duty to direct attack to an identified military target; (ii) the duty to employ means and methods of attack that are capable of hitting the identified military target with sufficient reliability and (iii) the duty to employ means and methods of attack the effects of which can be limited to the attacked military target. Accordingly, strictly speaking, 'it is the *lacking focus* on a legitimate target or the *lacking capability* of means and methods to respect the principle of distinction which makes an attack indiscriminate.'[1515]

The violation of the prohibition of indiscriminate attack during conflict can give rise to criminal responsibility for a war crime, despite the fact it does not exist in black and white form for internal armed conflicts. Despite the paucity of cases, the jurisprudence of the ICTY provides strong evidence of the customary nature of the prohibition of indiscriminate attacks in internal armed conflicts. However, the *ad hoc* Tribunal's case law did not find that launching indiscriminate attacks was a behaviour criminalized as such by international customary law at the time of the conflict in the former SFRY.

This is why it considered that indiscriminate attacks could in fact be considered as attacks directed against civilians or civilian objects. And for this linkage to exist, the *ad hoc* Tribunal considered that the requisite *mens rea* of this crime must be linked with wrongful intent, or recklessness, and explicitly not 'mere negligence'.

[1515] Melzer, *Targeted Killing in International Law*, at 355 (emphasis original). On proportionality, see Chapter 10.

Importantly, the fact that the perpetrator may not have 'wished' the outcome of the attack is irrelevant. Hence, indiscriminate attack has not been treated as an autonomous offence in the ICTY case law and indiscriminate attacks have been considered as evidence of the crime of directing an attack against civilians or civilian objects.

Despite the fact that the prohibition of indiscriminate attacks is, as we have seen, part of customary international law, and also that launching an indiscriminate attack constitutes an offence under the legislation of numerous States, the Rome Statute does not list as such the crime of launching an indiscriminate attack resulting in loss of life or injury to civilians, whether in international or non-international armed conflicts. However, the fact that indiscriminate attacks have not been criminalized specifically in the Rome Statute does not necessarily mean that launching such attacks does not give rise to individual criminal responsibility under the Rome Statute when they take place in the context of an internal armed conflict. It has therefore been submitted that it would be possible to include this crime in the crime of directing attacks against the civilian population or civilian persons.[1516] Practically speaking, it has been argued that it would be possible to follow the line that has been held by the ICTY.

[1516] Article 8(2)(e)(i).

Chapter 10:

Proportionality

Introduction

Despite being protected against direct and indiscriminate attacks, civilians face the general dangers of war, as attacks on military personnel and military objectives may cause incidental damage. The truth is that it is often not possible to limit the effect of an attack strictly to the objective to be attacked, due to the reverberating effects of an explosion. Furthermore, a weapon may not function properly or may be deflected by defensive measures, or a civilian object may be attacked by mistake because of inaccurate intelligence. Similarly, civilians finding themselves in military objectives, though not themselves legitimate targets, are at risk if these objectives are attacked. This problem, termed 'incidental collateral damage', is regulated by the rule of proportionality.

The rule of proportionality in attack derives from the general principle of distinction. Although the doctrine of proportionality has a long history in the *jus in bello*,[1517] 'its application to non-international conflicts is of more recent and, in some respects controversial, origin.'[1518] The rule has been criticized for 'comparing two things for which there is no standard of comparison', [1519] but as we will see, no serious alternative has been proposed so far.[1520]

[1517] See Chapter 1.
[1518] Sylvester & Fellmeth, "Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife", at 4.
[1519] Cassese, A., "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict", in *The New Humanitarian Law of Armed Conflict*, (Antonio Cassese ed., 1979), at 478.
[1520] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 122.

The law on the conduct of hostilities requires a proportionality assessment with regarded to damage and injury caused to civilian persons and objects. The fact that only military objectives and fighters may be attacked does not mean there will be no loss of civilian life, injury to civilians or damage to civilian objects, or that such loss of life, injury or damage are *per se* illegal. In addition, as we have seen above, as almost every object can be transformed into a military objective through use, purpose or location, 'the requirement of identification of an object as a military objective is, consequently, outstripped (and in some sense eclipsed) by the need to comply with the principle of proportionality.'[1521] The principle of proportionality is therefore an important extrapolation of the principle of distinction. 'The rules governing attacks on lawful military objectives may therefore be more important than those defining military objectives.'[1522] Indeed, as long as it is not excessive in relation to the concrete and direct military advantage anticipated from the attack, IHL allows for certain loss of civilian life, injury to civilians and damage to civilian objects which is incidental to an attack upon a legitimate military objective with lawful means and methods of warfare.[1523] The fact that a lawful military objective has been properly identified, however, is not on its own sufficient as a targeting process. It is not enough that an attack is carried out against fighters or military objectives. Additional rules have to be taken into account, as the attack may still become illegal if excessive collateral damage affecting civilians or civilian objects can be expected. Accordingly, all attacks must be conducted bearing in mind the principle of proportionality. This principle will only intervene when it is not possible to ensure the total immunity of the population,[1524] which means that the rule of proportionality is the true guarantee of robust civilian protection from the effects of attacks in wartime.[1525]

[1521] Id. at 130.
[1522] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 204.
[1523] Henckaerts, J.-M., *The Conduct of Hostilities: Target Selection, Proportionality and Precautionary Measures under International Humanitarian Law* (The Netherlands Red Cross ed., Willem-Jan van der Wolf 2000), at p. 16.
[1524] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para 4772.
[1525] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 130.

Proportionality as the link between military necessity and humanity

The principle of proportionality 'is the inevitable link between the principles of military necessity and humanity, where they lead to contradictory results.'[1526] It helps to draw the line at which necessity should give way to humanity, or, in other words, 'when the effect on the civilian population outweighs the military advantage.'[1527] The principle of proportionality is inherent in the principles of both necessity and humanity upon which the conduct of hostilities is based.[1528] Military necessity permits only destruction which is not prohibited by the law of armed conflict, and which is relevant and proportionate to the military advantage anticipated, while the principle of humanity also prohibits destruction which is not so relevant and proportionate.[1529] Correctly understood, the principle of military necessity requires an assessment as to whether the kind and degree of force used in an operation is proportionate or objectively corresponds to what is reasonably necessary to achieve the legitimate purpose of that operation.

The principle of humanity was made explicitly applicable to Additional Protocol II under the fourth clause of the Preamble. The combination of the principles of military necessity and humanity will prevent attacks unless there is a legitimate military purpose to be achieved.[1530]

Governing the conduct of hostilities, the principle of proportionality is also referred to as the principle of 'proportionality in attack'.[1531] It is important not to confuse the principle of necessity with the principle of proportionality. The principle of proportionality *(stricto sensu)* requires a value judgement according to which the damage likely to be caused by the force used in an operation is proportionate,

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[1526] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 204. See also Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 309; *Nuclear Weapons* Advisory Opinion, Judge Higgins Dissident Opinion, para 20.

[1527] Rogers, A.P.V., "The Principle of Proportionality", in *The Legitimate Use of Military Force The Just War Tradition and the Customary Law of Armed Conflict*, (Howard M. Hensel ed., 2008), at 203.

[1528] *Galic* Trial Judgment, para. 58, footnote 104.

[1529] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 309.

[1530] Id. at p. 670. See also Art 3(b)-(e) ICTY Statute. See Chapter 14 for an analysis of the principles of military necessity and humanity.

[1531] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 14, at 46.

meaning justified, in view of the expected military advantage. The principle of proportionality *stricto sensu* establishes absolute limits at which the necessities of war ought to yield to the requirements of humanity, and prohibits attacks against legitimate military objectives that are likely to inflict excessive incidental death, injury or destruction on protected persons or objects.

Treaty law relative to the principle of proportionality

Not to be found in Common Article 3 and Protocol II

As we have seen above, Common Article 3 does not deal *per se* with the conduct of hostilities and therefore the provision does not contain any mention of the principle of proportionality. Neither does Additional Protocol II contain any explicit reference to the principle of proportionality in attack. The simplified Article 13 does not contain any essential provisions intended to protect civilians against the collateral effects of armed violence, including the explicit application of the principle of proportionality.

Originally, Draft Article 26 provided protection for civilians and civilian objects in the fact that it included a statement of the rule of proportionality. Draft Article 26(3)(b) submitted by the ICRC to the CDDH provided that it was forbidden 'to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.'[1532] This provision was deleted from the proposal adopted by Committee III of the CDDH.[1533]

As Bothe argues, some of the specific protections thus omitted in the final Protocol II may 'be inferred from the general protection provided in Para. 1, but the construction of a balanced protection for civilians from the abbreviated Article 13 places a heavy burden on the term "general protection".'[1534] In addition, he acknowledges that it is

[1532] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.
[1533] CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.
[1534] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 676.

‘more difficult to load (…) the principle of proportionality on the provision of general protection.’[1535] However, ‘the reference to the principle of humanity in the Martens Clause of the Preamble inherently prohibits the destruction of values which are not relevant and proportionate to the military advantage anticipated. Thus, the principle of proportionality as part of the principle of humanity cannot be ignored in construing the provisions of Part IV.’[1536] This view is also shared by the ICRC Commentary which labelled this principle as one of the ‘general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or internal one.’[1537] Accordingly, the absence of express mention of proportionality in Additional Protocol II should not be construed as meaning that it is inapplicable in internal armed conflict.[1538]

Other treaties

The rule on proportionality finds expression in other treaties applicable in internal armed conflicts. The 1980 Protocol II on the Use of Mines, Booby Traps and Other Devices[1539] and the 1996 Amended Protocol II[1540] cite proportionality in relation to the indiscriminate placement of weapons. These two treaties prohibit any placement of mines, booby traps and other devices ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. The 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict forbids attacks that may cause incidental damage to cultural property protected under the Convention that would be ‘excessive in relation to the concrete and direct military advantage anticipated.’[1541]

[1535] Id. at 670.
[1536] Id. at 671.
[1537] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at para. 4772.
[1538] However, certain authors argue that the principle does not apply to non-international armed conflict. See Gardam, J., *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press. 2004), at 125 ; Moir, *The Law of Internal Armed Conflict*, at 117 ; Sivakumaran, *The Law of Non-International Armed Conflict,* at 349.
[1539] Article 3.3(c)
[1540] Article 3.8(c)
[1541] Article 7(c)

Additional Protocol I

The first codification of the customary rule of proportionality as it relates to collateral civilian casualties and damage to civilian objects, is to be found in article 51(5)(b) and 57(2)(iii) of Protocol I, which is applicable in international armed conflict. But as the wording of the customary rule on proportionality is based on Protocol I, we will briefly analyze what this document provides with respect to this rule. Article 51(5)(b) envisages an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. According to the *New Rules:*

> 'The Rule of proportionality clearly requires that those who plan or decide upon attack must take into account the effects of the attack on the civilian population in their pre-attack estimate. They must determine whether those effects are excessive in relation to the concrete and direct military advantage anticipated. Obviously this decision will have to be based on a balancing of:
> (1) the foreseeable extent of incidental or collateral civilian casualties or damage, and
> (2) the relative importance of the military objective as a target.'[1542]

Article 51(5)(b) is based on the wording of Article 57 which deals with precautionary measures. This provision requires commanders to cancel attacks if they may be expected to have disproportionate effects. Thus, reference may be made to Article 57 for further details. Article 57(1)(a)(iii) AP I can be seen to represent customary international law.[1543]

[1542] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 310.
[1543] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 14. See Chapter 11 for an analysis of precautionary measures.

Customary international law

Originally, the principle of proportionality was not recognized under customary international law.[1544] Nowadays, there is an ongoing debate as to whether or not the principle as expressed in Additional Protocol I is customary in nature, with proponents pointing to the fact that proportionality is inherent in the principle of distinction and opponents arguing that there is an absence of consensus regarding what the concept of proportionality means.[1545] However, the debate seems 'pointless'[1546] to the extent that whether or not one agrees with the way in which the principle has been codified in the First Additional Protocol, 'proportionality is a necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict.'[1547]

Today, the principle of proportionality has been recognized as part of customary international humanitarian law applicable in both international and internal armed conflicts.[1548] The Customary International Humanitarian Law Study establishes that:

> 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'[1549]

This wording reflects the treaty law approach to the principle of proportionality in international armed conflict, as stated in Article 51(5)(b) of Protocol I as part of the prohibition of indiscriminate attacks.[1550] This rule confirms the precept that an attack against military objectives expected to cause disproportionate collateral damage to

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[1544] See Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 129 ; Rogers, "The Principle of Proportionality", at 195-203.

[1545] See Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 42, with related references.

[1546] Id. at 42.

[1547] Fenrick, W.J., "The Rule of Proportionality and Protocol I in Conventional Warfare", 98 *Military Law Review* 91, (1982), at 125.

[1548] See for example, *Kupreskic* Trial Judgment, para 524. Generally on the customary nature of the principle in internal armed conflict, see Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules,* Rule 14, at 46ff and the related state practice.

[1549] Id. Rule 14.

[1550] As a reminder, Article 51(5)(b) considers as indiscriminate 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'

civilians or civilian objects in relation to the military advantage anticipated is unlawful. The ICRC did not find any contrary state practice with respect to non-international armed conflicts.[1551] In addition, the customary nature of the principle of proportionality has been recognized by a number of recent decisions of international criminal tribunals and human rights courts.[1552]

However, there is reason to doubt whether the legal regime governing the principle of proportionality in internal armed conflict is similar to that applying in international conflicts. While it is beyond question desirable for international law to protect civilians, merely wishing something were law does not make it so. Evidence of state practice and *opinio juris* is needed to determine whether states do in fact consider proportionality as an operative principle in internal armed conflicts. As explained by Sylvester and Fellmeth, 'assuming that the principle is applicable in non-international conflicts, it does not necessarily follow that its dictates will be exactly the same as those applicable to international conflicts.'[1553] So 'the main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.'[1554] This remark is all the more pertinent in the context of a non-international armed conflict where, in practice, the principle of proportionality is more easily stated than applied.[1555]

It is surprising that the ICRC Study used almost the same wording as Article 51(5)(b) of the First Additional Protocol. This provision has been criticized as being too subjective and as requiring a comparison of values which cannot be compared.[1556] 'As both sides of the equation are variables, and as they involve a balancing of

[1551] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 49.
[1552] See for instance Nuclear Weapons case para 30; DO Judge Higgins para 20; *Martic* Trial Judgment, para 69; *Kupreskic* Trial Judgment, para 524; *Galic* Trial Judgment, paras 58-60; *Galic* Appeal Judgment, paras 190-192; *Prosecutor v. Dragomir Milosevic*, (Trial Judgment) IT-98-29/1-T, (12 December 2007) ICTY, (hereinafter *Dragomir Milosevic* Trial Judgment), para 949. See Chapter 12 for a discussion on the war crime of disproportionate attacks in internal armed conflict.
[1553] Sylvester & Fellmeth, "Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife", at 7.
[1554] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 14 June 2000, § 48.
[1555] For an analysis of the practice of Colombia with respect to proportionality see generally Sylvester & Fellmeth, "Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife".
[1556] CDDH/III/SR.6, para. 42; SR.7, para. 48 ; SR.8, paras 9, 13, 79, 82 and 83.

different values which are difficult to compare the judgment must be subjective.'[1557] In addition, at the Diplomatic Conference, 'several states expressed the view that the principle of proportionality contained a danger for the protection of the civilian population but did not indicate an alternative solution to deal with the issue of incidental damage from attacks on lawful targets.'[1558] In the opposite position, there were states that resisted the inclusion of the principle of proportionality for a variety of reasons. One of them was that the substance and scope of the rule expanded beyond customary law and could result in criminal liability for military commanders acting in good faith and with reasonable care to achieve legitimate military objectives.[1559]

Ultimately, the provision found its way into the First Additional Protocol, which in its turn crystallized into a norm of customary international law applicable in internal armed conflicts, with all the pitfalls it encompasses.

Manuals

The San Remo Manual on the Law of Non-International Armed Conflict has also dealt with the principle of proportionality. The corresponding rule reads as follow:

> 'An attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is recognized that incidental injury to civilians and collateral damage to civilian objects may occur as a result of a lawful attack against fighters or military objects.'[1560]

[1557] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 310.

[1558] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 47, see related state practice.

[1559] For an extensive explanation of the objections raised by states, see Schmitt, M.N., "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Vanderbilt Journal of Transnational Law* 795, (2010).

[1560] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.1.4. at 22.

In addition, the Commentary to this rule specifies that 'despite the unique character of non-international armed conflicts, it is clear that the advantage against which incidental injury and collateral damage are assessed must be military in nature.'[1561]

The HPCR Manual on International Law Applicable to Air and Missile Warfare also states that 'an attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.'[1562] The Commentary to this Manual affirms that this Rule also applies to non-international armed conflict.[1563] According to this Manual, the term 'collateral damage' means 'incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target.'[1564] The Commentary further specifies that this concept 'does not include inconvenience, irritation, stress, fear or other intangible conditions caused to the civilian population. It is limited to death/injury to civilians, or to damage/destruction of objects.'[1565]

What is the scope of 'concrete and direct military advantage'

We have seen that the customary principle of proportionality as applicable in non-international armed conflict encompasses two concepts that need to be balanced against each other, the expected collateral damage and the concrete and direct military advantage. In order to understand the content of this principle we will in the first place assess the notion of 'concrete and direct military advantage' which is the cornerstone of the principle of proportionality. The concept of collateral damage will be analyzed in the next section.

Indeed, the wording 'concrete and direct military advantage' needs clarification. For Bothe, this wording refers to the 'advantage anticipated from the specific military operation of which the attack is a part taken as a whole and not from isolated or

[1561] Id. at Rule 2.1.1.4, Commentary point 9, at 24.
[1562] *Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research ed., Harvard University 2009). Rule 14.
[1563] Id. at Rule 14, Commentary point 17, at 94.
[1564] Id. at Rule 1(l) at p. 3.
[1565] Id. at see Commentary to Rule 14, point 2, at 91.

particular parts of that operation.'[1566] This view is shared by the San Remo Manual, which explains that this wording requires a 'rather broad interpretation.'[1567] This view is also shared by a number of states, as highlighted by the declarations they lodged on signature of Additional Protocol I.[1568]

In addition, the rule is not clear as to the degree of care required of the soldier and the degree of risk he must take. For Rogers, 'the risk to the attacking forces is a factor to be taken into consideration when applying the proportionality rule.'[1569] At the diplomatic Conference, some states even included the security of their armed forces into this definition.[1570]

Military advantage

Before an attack is launched, the expected military advantage has to be defined. But what exactly constitutes a military advantage? The ICRC Commentary provides for a wide margin of appreciation of this concept (narrow construction), but it also notes that:

> 'even in a general attack the advantage anticipated must be a military advantage and it must be concrete and direct; there can be no question of creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population. A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces.'[1571]

The San Remo Manual has a rather wide position on the question, rejecting the ICRC Commentary position as untenable under customary international law. Their position

[1566] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 311.
[1567] United Kingdom, Statement Made on Ratification of Additional Protocol I, January 28, 1998, reprinted in Documents on the Laws of War (Adam Roberts and Richard Guelff eds., Oxford UP, 3rd ed., 2000), at 511.
[1568] See for instance the declarations of UK, Australia, Germany, Italy, Netherlands, New Zealand in Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume II: Practice*, Rule 14, Section B.
[1569] Rogers, *Law on the battlefield*, at 24.
[1570] See Australia and Canada, in Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume II: Practice*, Rule 14, Section B.
[1571] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at 365.

emphasises the concept of military advantage over collateral damage. According to the Commentary of the Manual:

> 'military advantage includes a broad range of issues extending from "force protection" to diverting the attention of the enemy from an intended site of invasion. In any event, restrictive references to controlling ground and weakening the enemy armed forces, if taken literally, are unsuited for application by analogy to non-international armed conflicts. In many such conflicts, there will be no ground to be gained or enemy "armed forces". This is particularly so in conflicts that do not meet the threshold requirements of Additional Protocol II, but may nevertheless constitute an armed conflict within the definition of Common Article 3.'[1572]

The Commentary of the Air Warfare Manual has the same view as the San Remo Manual. The Commentary clearly rejects the narrow construction of military advantage as presented by the ICRC Commentary.[1573] However, it downplays its argument a bit by warning that the term 'military advantage' must not be interpreted too broadly. 'It is limited to impact on the enemy's military tactical or operational level.'[1574] The Commentary gives the example that 'even if striking military objectives weakens the morale of the enemy civilian population, this effect is not in itself a relevant "military advantage" for the purpose of Rule 14.'[1575]

Force protection as part of the military advantage?

The question of whether an attacker can count the risk to its own forces into the proportionality equation is a burning one, albeit under-discussed. Indeed, there are almost no discussions on the extent to which a military commander is obligated to expose his own forces to increased risk in order to limit civilian casualties or damage

[1572] *San Remo Manual on the Law of Non-International Armed Conflict*, Rule 2.1.1.4, Commentary para. 8.
[1573] *Manual on International Law Applicable to Air and Missile Warfare*, Commentary to Rule 14, at p. 92, point 10.
[1574] Id. at Commentary to Rule 14, at p. 92, point 10.
[1575] Ibid.

to civilians.[1576] It is to be noted that the principle of proportionality 'offers little guidance on this matter except to prescribe that the protection of civilians requires a *willingness* to accept some own-side casualties.'[1577]

Despite the fact that we do not find any guidance under IHL, 'force protection' is a central concern of military commanders. From a military perspective, it may seems obvious that when interpreting military advantage, 'the lives of the soldiers must be taken into account, and that an operation in which some soldiers will die will give the commander less military advantage, because he would be left with less soldiers for subsequent operations than an operation that will do the same to the enemy with no casualties to his soldiers.'[1578] This view is also shared by Bothe arguing that the proportionality balancing test may involve a variety of considerations including the security of the attacking force.[1579] Accordingly, it seems that the doctrine is generally of the opinion that IHL does not oblige military commanders to expose their own forces to danger in order to limit civilian casualties.

However, recently, the debate bumped-in on the forefront for several reasons. In the first place, the problems of asymmetries in armed conflicts and urban warfare have put this discussion on the table, due to the situations in Afghanistan and Iraq where the fog of battle render the combats difficult. The second reason might be related to the new concept of *zero-casualty warfare.* It is to be noted that such discussions are ongoing especially within democratic countries, where governments are responding to the pressure of the public opinion. The *no body bags* policy does indeed poses a moral dilemma and the obsession with zero casualties, leads to grotesque results. This is best illustrated by this commander starting in the first sentence with his intent: 'Force

[1576] Neuman, N., "Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality", 7 *Yearbook of International Humanitarian Law* 79, (2004).At 92.
[1577] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 45 (original emphasis) ; concurring Fenrick, W.J., "The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside", *Yearbook of International Humanitarian Law* 53, (2003), at 78.
[1578] Neuman, "Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality", at 91.
[1579] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 324. Concurring Rogers, *Law on the battlefield*, at 17.

protection is my top priority' or a senior commander telling his officers that 'there's not one thing here worth dying for'.[1580]

It is submitted here that this zero-casualty policy represents an abuse of the proportionality principle. 'By factoring the preservation of one's own forces into the evaluation of the military advantage anticipated from an attack, an attacking party justifies a greater likelihood of collateral damage, thereby unfairly skewing the proportionality calculation in favour of military considerations.'[1581] Accordingly, the actual issue with force protection is not whether it can be considered as a military advantage, as it seems it can, but 'when it may be factored into the proportionality assessment as a military advantage that is sufficiently "concrete and direct".'[1582]

It is therefore submitted here that force protection is related to the obligation to take all feasible precautions. When the technological superiority of an army renders its final victory doubtless, it is argued that even greater attention should be paid to precautionary measures. Indeed, this superiority that enables the attacking party 'to provide greater safety to its armed forces also broadens the range of precautions that can feasibly be implemented.'[1583]

Due to space constraints, the objective of this section is not to enter into a lengthy discussion on the extent to which force protection can be factored into the proportionality calculation as part of the military advantage.[1584] Suffice here to briefly mention that the problem is that whenever force protection is at issue, self-preservation is at stake, and this is where all the difficulty lies. Accordingly, 'a willingness to accept some own-side casualties in order to limit civilian casualties may indicate a greater desire to ensure compliance with the principle of

[1580] Quoted in Neuman, "Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality", at 79.
[1581] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 46.
[1582] Geiss, "The Principle of Proportionality: 'Force Protection' as a Military Advantage", at 79.
[1583] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 48.
[1584] For a good overview of this question, see generally Neuman, "Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality"; Geiss, "The Principle of Proportionality: 'Force Protection' as a Military Advantage"; Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 45-48.

proportionality.'[1585] Albeit maybe being not a clear legal obligation, it is certainly a moral obligation to risk soldiers' lives in order to reduce risk to uninvolved civilians. As argued by Neuman, 'the moral issue in relation to this is under what circumstances innocent civilians may be killed or injured in order to achieve some military advantage. The other issue is whether the military commander has a duty to expose his own soldiers to danger in order to limit civilian casualties.'[1586]

Indeed, in view of the object and purposes of IHL that is the protection of civilians, with the interpretative help of the Martens Clause that is applicable to non-international armed conflict, the concept of force protection should be extremely narrowly construed. The Martens Clause can 'provide the mechanism to interpret the law of armed conflict in such a way that no contradiction will exist between the current law of armed conflict and the moral aspects underpinning it.'[1587] Civilians have a right that 'due care' be taken[1588] and attacks that would cause excessive civilian casualties and damage should not be carried out even in a situation in which the attack would save one's own forces. 'This is a logical and indisputable consequence of the humanitarian proportionality principle',[1589] and it is a moral duty.

Concrete and Direct

However, once a military advantage has been identified, before launching an attack it is necessary to ascertain whether it is a concrete and direct military advantage. Although the requirements of 'concrete and direct' give the appearance of strict requirements, in practice these requirements remain highly subjective, leaving wide discretion to military decision makers.[1590] According to the ICRC Commentary, the expression 'concrete and direct' was intended to show that 'the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be

[1585] Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", at 549.
[1586] Neuman, "Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality", at 96.
[1587] Id. at 96.
[1588] Walzer, M.L.-. *Just and Unjust Wars: a moral argument with historical illustrations* (Basic Books 3 ed. 2000), at 156.
[1589] Geiss, "The Principle of Proportionality: 'Force Protection' as a Military Advantage", at 89.
[1590] Sylvester & Fellmeth, "Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife", at 5.

disregarded.'[1591] Accordingly, compared to the wording of Article 51(5)(b)[1592], 'should an attack be expected to cause incidental civilian casualties or damage, the requirement of an anticipated "definite" military advantage under article 52[1593] is elevated to the more restrictive standard of a "concrete" and "direct" military advantage in article 51(5)(b).'[1594] 'Concrete and direct' impose stricter conditions on the attacker than those implied by the criteria defining military objectives in Article 52. Indeed, the words of limitation that are 'direct' and 'concrete' raise the standard of article 52 in cases where civilians may be affected. More specifically, the term 'concrete', means 'specific, not general; perceptible to the senses. Its meaning is therefore roughly equivalent to the adjective "definite" used in the two-pronged test prescribed by Article 52(2).'[1595] The term 'direct', on the other hand, means 'without intervening condition of agency.'[1596] Taken together the two words of limitations raise the standard set by Article 52 in those situations where civilians may be affected by the attack. 'A remote advantage to be gained at some unknown time in the future would not be a proper consideration to weigh against civilian losses.'[1597] However, as we have seen above,[1598] the fact that the rule on proportionality has been defined as a subset of indiscriminate attacks in Additional Protocol I is disturbing, because it confounds the prohibition of indiscriminate attacks with the duty to ensure that discriminate attacks do not cause excessive collateral damage.

Consequently, the expression 'concrete and direct' has the implication that the military advantage be 'clearly identifiable and, in many cases, quantifiable.'[1599] Upon

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[1591] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977* at para. 2209.

[1592] Article 51(5)(b) which deals with the definition of military objective, reads as follow: is considerate indiscriminate: 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the *concrete* and *direct* military advantage anticipated.' (emphasis added).

[1593] Article 52(2) reads as follow: 'Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite* military advantage.' (emphasis added).

[1594] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at 80.

[1595] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 365.

[1596] Id. at 365.

[1597] Id. at 365.

[1598] See Chapter 9.

[1599] *Manual on International Law Applicable to Air and Missile Warfare*, Rule 14, Commentary at p. 92, point 9.

ratification of the First Additional Protocol, many states have pointed out that those responsible for planning, deciding upon or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.[1600] Furthermore, recently there seems to be a move from states and some authors trying to further enlarge the concept of military advantage. They base their argument on Article 8(2)(b)(iv) of the Rome Statute, which is applicable to international armed conflict. This provision considers the *overall* military advantage anticipated from the attack. This overall military advantage 'would encapsulate military advantages derived from temporally and geographically distant occurrences.'[1601] This new concept seems to depart greatly from the wording of Article 51(5)(b) and this led the ICRC to enact a Statement clarifying that the insertion of the word 'overall' in the definition of the crime of disproportionate attack should not be interpreted as changing existing law.[1602]

Non-international armed conflict situations are too often characterized by 'claims of broad military advantage'[1603] as a result of attacks against organized armed groups or isolated fighters. And civilians are bearing the brunt of this. I fundamentally disagree with the San Remo approach asserting that the concept of military advantage should be emphasised over collateral damage due to the peculiarities of non-international armed conflict situations. It is true though that in non-international armed conflict the gain of territory over the enemy is something that is almost non-existent, except in cases of full-blown civil war, like the Spanish civil war. As we have seen in chapter 5 of this dissertation, non-international armed conflicts have many characteristics that challenge the application of the principle of distinction. The blurring of the traditional distinctions endangers the application of the principles related to the interdiction of indiscriminate attacks on civilians. Direct military confrontations are rare, hostilities shift from one place to another, and often occur in urban areas. It is true that there are very few purely military objectives, as most objects are used for both military and civilian purposes, which makes them of potential military value. But

[1600] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 14, at 50.
[1601] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 31.
[1602] Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1/L.53, Document A/CONF.183/INF/10, at point 2.
[1603] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 195.

all these reasons render, in my opinion, the principle of proportionality unavoidable, as it is the best solution to deal with these problems. And this is why the concept of military advantage needs to be understated, and not emphasised over collateral damage.

What is the meaning and scope of civilian losses

We have seen that the principle of distinction establishes an absolute prohibition on the targeting of civilians in international law.[1604] However, this principle does not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. On the other hand, through the principle of proportionality, the legitimacy of a military target does not provide an unlimited licence to attack it. 'Civilian casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack.'[1605]

Accordingly, once the military character of a target has been ascertained, commanders must consider whether striking this objective will result in loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that is excessive. The immunity of civilians and the civilian population is not absolute, in that civilian casualties are not necessarily unlawful *per se.* Belligerents are 'permitted to attack legitimate military objectives, even where this will cause collateral or incidental harm to civilians, provided certain requirements are met.'[1606] In *Galic* the Trial Chamber considered that:

> '(o)nce the military character of a target has been ascertained, commanders must consider whether striking this target is expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[1607]

[1604] *Galic* Appeal Judgment, para 109.
[1605] *Ibid,* para. 190
[1606] Moir, "Conduct of Hostilities - War Crimes", at 491.
[1607] *Galic* Trial Chamber Judgment, para. 58, citing Article 51(5)(b) of Additional Protocol I (footnote omitted).

The Appeals Chamber confirmed the Trial Chamber assessment of the legality of the incidents.[1608] Accordingly, civilian casualties will be legally acceptable provided the attack is aimed at military objectives within a populated area which are not clearly distinguishable, and provided the basic principle of proportionality is respected.[1609] However, if excessive civilian casualties are expected to result from the attack, it should not be pursued. 'The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack.'[1610]

While the literature has extensively dealt with the concept of military advantage, the term collateral damage has not really been discussed in case law and doctrine. Accordingly, what is and what is not legally considered as collateral damage is unclear, thereby contributing to the non-clarity of the rule and ultimately to the detriment of civilians.

The concept of collateral damage represents: (a) incidental losses or injury to civilians; (b) destruction of or damage to civilian objects; or (c) a combination of both. Proportionality in collateral damage is strictly limited to injury/damage to civilians or civilian objects and has nothing to do with injury to combatants or damage to military objectives.[1611] However, as we will see further below, the notion of collateral damage to civilians or civilian objects is not simply determined by numbers of casualties and destruction on both sides. 'The yardstick of proportionality is more complex, requiring a balance between the anticipated gain (in military terms) and pain (to civilians who fall prey to collateral damage) or destruction (of civilian property).'[1612]

Consequently, the damage envisioned is only defined as having to be caused by the attack. 'Causality is a key legal concept that involves a relationship between an action and its effects. The more factors intervene in the chain of events, the less one can

[1608] *Galic* Appeal Judgment, para 192
[1609] Dörmann, "Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts", at 136-137.
[1610] *Galic* Trial Judgment, para. 58
[1611] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at pp. 129-130.
[1612] Id. at pp. 129-130.

argue that the effects are caused by the initial action or omission. Time and space are factors that mitigate causality by multiplying the chance that contingency of events intervenes to break the causal link, rendering the damage remote.'[1613] Traditionally limited to the immediate effects of an attack, it has been argued by Sivakumaran that 'it is now accepted that longer-term effects have to be taken into account, such as deaths resulting from the impact of the destruction of civilian infrastructure.'[1614]

Indeed, the word 'incidental' is unquestionably broader than the terms 'concrete and direct' related to the notion of military advantage. It is therefore odd that certains argue for the notion of concrete and direct military advantage to be given a 'broad interpretation'[1615] and this should be firmly opposed. Furthermore, Geiss argues convincingly that 'the conception of what "may be expected" (incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof) from an attack is broader than what is actually "anticipated" (military advantage)'.[1616]

Some examples of damages that materialise over time and space are damage to the environment, or the risk posed by unexploded remnants of war, and belligerents have to be held accountable for acts committed by them and posing a long-term threat to civilians. The use of certain weapons also can be expected to almost inevitably lead to civilian deaths and injuries in the long term. For instance, the use of white phosphorous and depleted uranium by US troops in Fallujah during the war in Iraq can totally fall into this category. Indeed, more than ten year later, the effects of those weapons on the people in Fallujah are dreadful.[1617] This is why 'respect for the

[1613] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 48.
[1614] Sivakumaran, *The Law of Non-International Armed Conflict*, at 350.
[1615] United Kingdom, Statement Made on Ratification of Additional Protocol I, January 28, 1998, reprinted in Documents on the Laws of War (Adam Roberts and Richard Guelff eds., Oxford UP, 3rd ed., 2000), at 511. For a same approach see also *San Remo Manual on the Law of Non-International Armed Conflict*, Rule 2.1.1.4, Commentary para. 8.
[1616] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 31.
[1617] In addition to a massive increase of cancer rates, 14.7 percent of Fallujah's babies are born with a birth defect, 14 times the documented rate in Hiroshima and Nagasaki. Fallujah's babies have also experienced heart defects 13 times the European rate and nervous system defects 33 times that of Europe. That comes on top of a 12-fold rise in childhood cancer rates since 2004. Furthermore, the male-to-female birth ratio is now 86 boys for every 100 girls, indicating genetic damage that affects males more than females. Source: *http://cavnews.wordpress.com/2013/04/10/iraqi-birth-defects-worse-than-hiroshima/*. See also *http://www.guardian.co.uk/commentisfree/2012/oct/25/fallujah-iraq-health-crisis-silence*.

proportionality principle extends beyond the battlefield, entailing an obligation to minimize future casualties after the war is ended.'[1618] Accordingly, in view of the object and purpose of IHL, which is, lets not forget it, the protection of civilians, it is argued here that long-term repercussion that can obviously be expected from attacks should be taken into account in the assessment of the principle of proportionality.

Which may be expected

The foreseeability of excessive collateral damage is highlighted by the term *may be expected.* An attack is forbidden if it *may be expected* to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof. Accordingly, we might also need to explain what *may be expected* is supposed to mean. This wording raises the issue of requisite knowledge of those who plan and carry out the attack. The test is objective in nature. In other words, 'if the attacker knew *or should have known* that the civilian damage or injury caused would be excessive relative to the anticipated military advantage, the rule will have been violated.'[1619]

What is the meaning of 'excessive'

The principle of proportionality requires the comparison of two non-comparable concepts, military advantage and civilian suffering. Once the two opposing criteria of 'direct and concrete military advantage' and 'excessive collateral damage' have been identified, the test is whether or not the expected damage would be 'excessive' in relation to the concrete and direct military advantage anticipated. The criterion of excessiveness is relative by essence. The term 'excessive' applies not to the actual outcome of the attack but to the initial expectation and anticipation. It is only if the foreseeable collateral damage is deemed to be excessive that an attack will be considerate disproportionate.[1620] Accordingly, the interpretation of the term

[1618] Boivin, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", at 49.
[1619] *San Remo Manual on the Law of Non-International Armed Conflict*, Rule 2.1.1.4, Commentary para. 6.
[1620] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 360 (stating that Article 51 of Protocol I prohibits

‘excessive’ is the key question with respect to proportionality, as this term is capable of turning a legitimate military operation into a disproportionate attack constituting a war crime.[1621]

Since excessive damage is a relative concept, it is not quantifiable to a fixed number of civilian casualties or injuries, or houses destroyed. The decisive criterion in the assessment of the proportionality of a given attack is therefore not the achievement of a strict numerical balance of some sort, but the relative military importance of a target, its military target value.[1622] As stated by Dinstein, ‘whether a bridge is worth five or 50 lives will be dependent upon the attendant values placed on the destruction of that particular bridge in those particular circumstances. But surely, it is disallowed to level an entire urban area merely in order to hit a bridge.’[1623]

It is important to clarify that while the requirement of proportionality is absolute, the standard of excessiveness is relative. In other words, ‘the rule of proportionality in attack does not establish a qualitative or quantitative threshold above which collateral damage would be excessive regardless of considerations of military necessity.’[1624] This is why the proportionality calculation between losses and damages caused and the military advantages anticipated raises a plethora of sensitive problems. It is true that in some situations there will be no room for doubt. But in many other situations, especially in urban warfare, there may be good reasons for hesitation. It has been argued that ‘in such situations, the interests of the civilian population should prevail.’[1625] However, as we know, this is all too often not the case.

Despite the difficulty of estimating what constitutes excessive damage, the ICRC Commentary makes clear that civilian casualties can never be justified. It states that:

> ‘The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of

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attacks in which the civilian casualties foreseeably will be greater than the expected ‘direct military advantage’.

[1621] See Chapter 12 for the notion of disproportionate attacks in international criminal law as applicable in non-international armed conflict.

[1622] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 310.

[1623] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 138.

[1624] Melzer, *Targeted Killing in International Law*, at 360.

[1625] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977,* at para. 1979.

great importance. *This idea is contrary to the fundamental rules of the Protocol;* in particular it conflicts with Article 48 *(basic rule)* and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause *extensive* civilian losses and damages. Incidental losses and damages should never be extensive.'[1626]

This remark can be applied in the same manner in the context of customary IHL for non-international armed conflict, as, as we have seen above, the rule on proportionality does apply to this type of armed conflict.

But this argument is rejected by many scholars.[1627] For instance, Melzer is of the opinion that 'the ICRC goes too far when it replaces the word 'excessive' with that of 'extensive'.[1628] For this author, 'while *extensive* collateral damage will always require a very high standard of justification, the *excessiveness* of collateral damage never depends on the extent of collateral damage alone, but always on whether, in the concrete circumstances, the expected collateral damage is outweighed by the importance of the "concrete and direct military advantage anticipated".'[1629]

I strongly disagree with such an approach. Such an approach would for instance render legally acceptable the use of the nuclear bombs on Hiroshima and Nagasaki, based on the argument that, as this allegedly ended the Second World War,[1630] it constituted a very important military advantage. However, it is difficult to argue, in my view, that the civilian casualties, in addition to the long-term effects these bombs had on the two cities and their people, have not been clearly excessive, despite the allegedly very high importance of the military advantage anticipated.[1631] I admit,

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[1626] Id. at para 1980 (emphasis added).

[1627] Id. at (Art. 51 AP I) para 1980. Rejecting this: Rogers, *Law on the battlefield*, at 25, Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 120ff.

[1628] Melzer, *Targeted Killing in International Law*, at 360

[1629] Id. at 360.

[1630] Even if ultimately, historical research have proved that the Japanese emperor had already requested the armistice before the US dropped the bombs. The US government, in agreement with the UK decided to proceed anyway, in order to test the bomb and to set the political balance for the coming peace negotiations.

[1631] Which have ultimately been proved wrong. Here again we see the problem related to the good faith and hypocritical justifications in armed conflict. As underlined by David 'dans le cas d'Hiroshima, on s'est demandé si les Américains et les Britanniques ne voulaient pas ainsi rendre inutile l'entrée en guerre de l'URSS avec le Japon pour ne pas devoir partager avec elle les fruits de la victoire finale.' David, *Principes de Droit des Conflits Armés*, at 252-3.

however, that this example clearly refers to international armed conflict, and that it is difficult to envisage a state using a nuclear bomb against its own population. However, we might very well be proved wrong on this. Suffice here to think about the latest developments in Syria, where the government and the rebels have been accused of using chemical weapons in urban settings. So maybe we are not so far from that eventuality. It is true that the 'test for what is excessive is not black and white.'[1632] But the lack of precision in the rule of proportionality always operates in the interest of the military, not in the interests of civilians.

So everything turns on whether civilian losses are considered excessive. As explained by Sivakumaran, 'some gloss has been put on this test, but care needs to be taken not to distort the intended meaning.'[1633] We have seen that 'excessive' has been described as meaning 'extensive' by the ICRC. Fenrick described excessiveness as meaning 'severe'.[1634] However, we have to be careful, as 'all these descriptors modify the balance inherent in the test. A consequence can be severe or extensive without being excessive, as excessive is a comparative concept while extensive is an absolute one.'[1635]

Accordingly, the guiding principle in a proportionality assessment is reasonableness and good faith. 'Excessiveness indicates unreasonable conduct in light of the circumstances prevailing at the time.'[1636] However, the concept of reasonableness is also a highly subjective concept and does not really help us here. The subjective value placed on civilian lives and damages may vary. What would seem reasonable collateral damage to the Tamil civilian population, in the eyes of the Singhalese military commander of the Sri Lankan army, compared to the military advantage of killing Prabhakaran, the supreme leader of the LTTE in Sri Lanka, will surely not be considered reasonable in the eyes of the UN Special Rapporteur investigating the end of the civil war in this country. So how do we calculate objectively, in the midst of the high levels of violence that characterize internal armed conflicts, the relative weight

[1632] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 221.
[1633] Sivakumaran, *The Law of Non-International Armed Conflict*, at 350.
[1634] Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare", at 111.
[1635] Sivakumaran, *The Law of Non-International Armed Conflict*, at 350 (references omitted).
[1636] *San Remo Manual on the Law of Non-International Armed Conflict*, Rule 2.1.1.4, Commentary para. 5.

of a given military advantage in terms of human casualties? As stated by the Israeli Supreme Court, 'this balancing is difficult when it regards human life. It raises moral and ethical problems. (…) Despite the difficulty of that balancing, there's no choice but to perform it.'[1637]

The problems related to reasonableness and good faith are also well illustrated by the following example during the 2006 Lebanon war, concerning the bombings by the IDF of civilian convoys fleeing villages in the South as a result of IDF warnings, including one which killed 21 civilians. 'Israel has generally not disputed that these strikes occurred or that deaths resulted, but it has argued that if civilian convoys were attacked it was justified by Hezbollah's abuse of civilian convoys to move around fighters and materiel.'[1638] Accordingly, Israel justified the collateral damage that occurred on the basis that there were military objectives within the convoy. However, this was not considered as sufficient by the Special Rapporteurs, who proposed a frame in order to calculate objectively, the test of proportionality. The mission requested the government to 'detail how many fighters were estimated to be among the civilians, the kind of materiel they were transporting, what precautions were taken to limit the impact of the strike on the civilians in the convoy, the concrete and direct military advantages anticipated at the time of attack and how they outweighed the expected civilian casualties, and whether full consideration was given to other options designed to obtain the desired military effect.'[1639]

On the question of the extent to which extensive collateral damage could be deemed to be lawful, Judge Higgins, albeit in the context of international armed conflict, argues that collateral damage can be extensive, and would not be deemed excessive, *only* when the military advantage would be related 'to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target is available.'[1640] It can therefore be inferred that, knowing the characteristics of non-international armed conflict, firstly, this situation

[1637] *The Public Committee against Torture in Israel v The Government of Israel* HCJ 769/02 (13 December 2006), para 46.
[1638] A/HRC/2/7, para 48.
[1639] Ibid.
[1640] *Nuclear Weapons* Advisory Opinion, Dissenting Opinion Judge Higgins, para 20-21.

would be extremely rare. Indeed, in these types of armed conflict, the very survival of a state is almost never put into question. Secondly, from this perspective, extensive civilian collateral damage is constrained within a very specific frame, and could not be advocated in each and every situation of balancing military advantage with collateral damage.

The concept of *excessive* was recognized by the Trial Chamber in the *Kunarac* case, when it held that customary international law obliges the parties 'not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage.'[1641] Accordingly, the margin of discretion enjoyed by the attacking party when carrying out an attack, should be restricted as narrowly as possible. Kalshoven has wondered whether there is an 'upper limit beyond which collateral damage that is not excessive in view of the absolutely imperative military necessity of the attack, will by its terrible scale become unacceptable nonetheless?'[1642] In 1992, his answer was that he did not identify such an obligation in treaty and customary law. However, in view of the rapid developments of customary international humanitarian law during the last twenty years, in addition to the modern theories of identification of these customary norms, and to the states' obligations under human rights law when it comes to their citizens, such an approach might be on the way to crystallization. It is necessary here, in order to fully apprehend the rule on proportionality in attack, and its deficiencies, to understand the different elements constituting the targeting process. The next section will be devoted to this.

Information required for judging the proportionality of an attack

We have seen that the principle of proportionality in attack corresponds to a careful balance between the two above explained concepts: the 'anticipated collateral damage' and the 'anticipated concrete and direct military advantage'. A military attack will become unlawful once the expected collateral damage is deemed to be excessive in relation to the anticipated military advantage. We may therefore wonder

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[1641] *Kunarac* Appeal Judgment, para. 426. See also IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para 77.
[1642] Kalshoven, F., "Remarks" (*ASIL Proceedings* ed., 1992), at 44.

how the interpretation of the balance between 'anticipated collateral damage' and 'anticipated concrete and direct military advantage' should be effectuated. It is difficult to identify objective standards determining the exact turning point where a lawful attack becomes unlawful.

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acknowledged that there was no doubt about the existence of the principle of proportionality, but that it was difficult to assess how it should be applied.[1643] This report 'raised an array of instructive questions relevant for the application of humanitarian proportionality principle.'[1644] *Inter alia* the Report asked: 'a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects? b) What do you include or exclude in totalling your sums? c) What is the standard of measurement in time or space?'[1645] The report was published in June 2000 but even ten years later, the questions it raised remain as pertinent as they were at the time. '*De lege lata* IHL's answer to these questions are abstract at best.'[1646]

Numerous states have pointed out that those responsible for planning, deciding upon or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. These statements were generally made with reference to Articles 51-58 of Additional Protocol I, without excluding their application to the customary rule.[1647]

We have to recognise the difference between the assessment of the situation by the military commander before launching his attack, and the assessment *ex post facto* by a criminal court. With respect to a criminal trial process, in its judgment in the *Galić*

[1643] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 14 June 2000, § 48.
[1644] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 128.
[1645] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 14 June 2000, (hereinafter NATO Report) para. 49.
[1646] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 128.
[1647] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 14, at 50, with related practice.

case in 2003, the ICTY Trial Chamber stated, *inter alia,* that: 'In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[1648]

Subjective decision of the military commander – good faith

The weighing up of what constitutes excessive collateral damage, or more generally the compliance with the rule of proportionality, depends ultimately on the subjective decisions of military commanders.[1649] The Bothe Commentary recognizes that these subjective decisions are made in battle conditions 'under circumstances when clinical certainty is impossible and when the adversary is striving to conceal the true facts, to deceive and to confuse.'[1650] Accordingly, Bothe recommends that

> 'the standard for judging the actions of commanders and others responsible for planning, deciding upon or executing attacks, must be based on a reasonable and honest reaction to the facts and circumstances known to them from information reasonably available to them at the time they take their actions and on the basis of hindsight.'[1651]

Targeting is a delicate and important task. It 'must be realized that decisions are based on reasonable expectations rather than results. In other words**,** honest mistakes often occur on the battlefield due to the "fog of war" or when it turns out that reality does not match expectations.'[1652] But how do you draw the line between an honest mistake happening in the fog of war, and a flagrant disregard for potential collateral damage, *ex post facto* argued as a mistake? This is where the difficulty lies.

[1648] *Galic* Trial Judgment, para. 58. See Chapter 12 below for the analysis on disproportionate attacks.
[1649] Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at p. 82.
[1650] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 279.
[1651] Id. at 279-80.
[1652] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.1.4, Commentary point 4, at 23.

The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia has highlighted that,

> ‘the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.’[1653]

This reality is very well illustrated, for instance, by the approach to the principle of proportionality that was taken by the ICTY Trial Chamber in the *Gotovina* case and the criticism of the Trial Chamber interpretation that was made by a group of military operational experts in their report.[1654] It can also be demonstrated by a comparison of the UN Mission report on the Gaza war of 2009 with the Israeli Ministry of Foreign Affairs Paper on ‘The Operation in Gaza - Factual and Legal Aspects’[1655] or the report of the Israeli Defence Forces ‘Conclusion of Investigations into Claims in Operation Cast Lead’.[1656]

In order to counter this problem of value-judgement the NATO Committee suggested that the determination of relative values must be that of the "reasonable military commander". The Committee argued that ‘although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.’[1657] The concept of a ‘reasonable military commander’ is interesting, as it ‘does not curtail a soldier’s margin of

[1653] NATO Report, para. 50.
[1654] See *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law*, (2012) at pp. 7-10.
[1655] Israeli Ministry of Foreign Affairs Paper on ‘The Operation in Gaza-Factual and Legal Aspects’, 29 July 2009, Part V.A(2).
[1656] Available here : http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/pages/idf_conclusion_of_investigations_operation_cast_lead_part1_22-apr-2009.htm.aspx
[1657] NATO Report, para. 50.

discretion in the assessment of situational realities but simply forestalls arbitrariness in the exercise of this discretion.'[1658]

The discretion of combatants in deciding whether an object is a military objective is almost total[1659] and it is very difficult to establish clear guidelines for this. It has been suggested that one way of helping to solve the problem of the subjective aspect of targeting decisions is to 'curtail the limits within which commanders or operating units exercise their discretion by issuing rules of engagement tailored to the situation prevailing in the area of conflict involved.'[1660] In addition, international humanitarian law does impose some constraints on the discretion of commanders by providing that reasonable care must be taken when attacking military objectives. This is done through the obligation to take measures of precautions in attacks and precautions against the effects of attacks.

Precautionary measures are the necessary corollary of the principle of proportionality.[1661] The duty to take precautions was upheld by the Trial Chamber in the *Kupreskic* case when it stated that, 'international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.'[1662] The Chamber further explained that this principle 'has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional)[1663] damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.'[1664] These measures, as we will see, restrain the right of the commander in his decision to launch an attack.

Effects of the activities of the other party to the conflict

[1658] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 34. See also Chapter 12 for a discussion on the concept of reasonable commander as approched by the *ad hoc* Tribunal.
[1659] Despite being constrained by the legal requirement of fulfilling the criteria of constituting a military objective. As we have seen in Chapter 7, almost everything can be turned into a military objective.
[1660] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 310-311.
[1661] For a discussion on precautionary measures in internal armed conflict, see Chapter 11.
[1662] *Kupreskic* Trial Judgment, para 524.
[1663] On the *mens rea* in international criminal law, see further below.
[1664] *Kupreskic* Trial Judgment, para 524.

More often than not, state armed forces 'interpret the law as granting them wide discretion.'[1665] Indeed, state armed forces 'fighting irregular forces that operate from densely populated areas often view the ambiguous norm prohibiting "excessive" civilian losses as non-neutral.'[1666] It is true that organised armed groups often exploit the proportionality requirement, in that it shifts the responsibility for civilian losses to the attacker. We can think for instance of the Viet Cong during the Vietnam war, the Hamas during the 2009 Israeli Operation Cast Lead in Gaza or more recently in the Israeli November Pillar of Defence Operation. These armed groups do not hesitate to launch rockets and shield themselves in the centres of villages, in hospitals, mosques and private houses owned by civilians. But does this make civilians legitimate targets of attacks? Very often civilians are trapped in the midst of the violence and do not have any choice; they are held hostage between the different parties fighting against each other.

What we see is that these difficulties lead state armed forces, in particular armies that have airborne and long-range artillery capabilities, 'to regard their own safety as a relevant and even paramount consideration, interpreting their obligations in this context rather narrowly.'[1667] For these reasons, state armed forces have the tendency to interpret the rule of proportionality as granting them wide discretion. As Benvenisti writes, armies 'wish to limit the commander's responsibilities rather than increase protection to civilians.'[1668]

Accordingly, we see a strong tendency from the state armed forces to highlight the obligations imposed on the defending party, in order to hide from their responsibility in causing excessive collateral damage. As Benvenisti writes,

> 'In applying the test of proportionality, they stipulate that the means used should be measured against the overall aim of winning the military conflict rather than against the particular aim of winning a specific battle.[1669] And this overall aim is defined subjectively. The army's position, therefore, views the

[1665] Benvenisti, E., "Human Dignity in Combat: the Duty to Spare Enemy Civilians", 39 *Israel Law Review* 81, (2006), at 95.
[1666] Ibid.
[1667] Ibid.
[1668] Ibid.
[1669] As we have seen in the discussion of what constitutes a military advantage anticipated from an attack.

> duty to spare civilians as implying a prohibition on "wilful intent" to inflict civilian casualties or, at most, as synonymous with "wanton disregard for the safety of the civilian population" or with "recklessness". Otherwise, the (…) civilians are exposed to the risk of error.'[1670]

This approach is also held by certain scholars. For instance, according to Rogers, the activities of defenders should be taken into consideration as part of the proportionality rule. For him, and for Parks, the attacking commander should not be blamed for any civilian casualties caused through the failure of the defenders to take adequate precautions against the effects of attack.[1671] But Rogers qualifies the rather harsh approach of Parks in explaining that there would still be an obligation on the attacker to take feasible precautions to minimize the risk to civilians working within the military target.[1672] Interestingly, Schmitt is doubtful of the legitimacy of the failure of the defenders being taken into consideration as part of the proportionality equation.[1673] We may well wonder whether all of this is bound to be to the detriment of civilians that are caught in the middle of belligerents.[1674]

The ICTY has made clear that 'although parties to a conflict are under an obligation to remove civilians to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas', their failure to abide by such a standard 'does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.'[1675]

Accordingly, under international criminal law, 'an accused could not argue that his conduct may not constitute an attack on civilians merely because the other side failed

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[1670] Benvenisti, "Human Dignity in Combat: the Duty to Spare Enemy Civilians", at 96.
[1671] Rogers, *Law on the battlefield*, at 25 ; Parks, "Air War and the Law of War", at 174. See Article 57(2)(a)(ii). See further below for the analysis on precautionary measures.
[1672] Rogers, *Law on the battlefield*, at 25.
[1673] Schmitt, M.N., "Book Review: Law on the Battlefield", 8 *Journal of Legal Studies*, (1998), at 261-2.
[1674] See Chapter 11 for an in-depth discussion on defenders duties against attacks.
[1675] See *Galic* Trial Judgment, para. 61. See also *Dragomir Milosevic* Trial Judgment, para 949.

to clearly separate its civilians and its combatants.'[1676] Furthermore, it is doubtful that IHL would permit such an argument.

Specificities related to the principle of proportionality in non-international armed conflict

As we have seen in the preceding chapters of this dissertation, the principle of distinction seems to be in great danger especially in the context of non-international armed conflict, and civilians are the primary victims of such a development. A comparable development seems to be happening with the principle of proportionality and the prohibition of disproportionate collateral damage. To apply the principle of proportionality in an international armed conflict is already challenging, despite the fact that this rule has been delineated for this setting, where it principally relies on voluntary compliance. Indeed, the understanding of the rule on proportionality is based on the old conception of war. When it comes to its application in non-international armed conflict, the theory on proportionality seems far removed from the reality on the ground. Indeed, we have seen that in this type of armed conflict, the 'aim of military victory ceases to be the only or even a primary motivation for fighting'[1677] and the principle of proportionality changes its character in terms of its factual relevance for the conduct of hostilities.[1678]

Implicit in the principle of proportionality is 'the notion that causing injury and targeting civilians is not in itself an aim of warfare. It is only with respect to an aim *other* than inflicting injury and suffering that the latter can be "superfluous" and "unnecessary"; and it is only when displacing or harming civilians is not itself a goal of warfare that civilian harm can be balanced against military advantage.'[1679] In addition, the risk we face in internal armed conflict is that state armed forces, facing an adversary who is constantly misusing the principle of distinction by, for instance,

[1676] Mettraux, *International crimes and the ad hoc Tribunals*, at 120. See Chapter 11 for an analysis of the notion of precautionary measures.
[1677] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 243. See Chapter 5 on characteristics of non-international armed conflicts.
[1678] In addition to the changing character of the principle of distinction with respect to its compatibility with the interests of the warring parties. On this see Chapter 5.
[1679] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 243-4.

hiding among the civilian population or concealing military equipment among civilian compounds, 'could feel compelled gradually to lower the proportionality barrier.'[1680] These new battlefield realities mean that some are pushing for changes in the approach to the principles of distinction and proportionality. Some are even arguing that proportionality should be measured against the war aims themselves, rather than merely the military advantage expected against the damage likely to be caused by a particular attack.

Accordingly, in response to a systematic misuse of the principle of distinction by organized armed groups, and the resulting inability of state armed forces to tackle their enemy efficiently, strong parties have the tendency to lower the barrier of proportionality, thereby destroying the delicate balance this formula encompasses. Among a plethora of examples, we saw this trend quite clearly in the violent suppression of the insurgency in parts of Iraq, 'especially in Fallujah, where a number of reports suggest that a very loose 'metric' of proportionality was used by the US military in conducting the campaign, particularly with regard to civilian protection.'[1681] Also, for instance, Israel justified its targeting of populated civilian centres in Lebanon in 2006 by saying that Hezbollah had deployed their missiles pointing towards Israeli cities in populated areas.[1682]

The non-state side also has the tendency to manipulate the principle of proportionality in order to protect their military objects. 'In order to manipulate the adversary's proportionality equation, immobile military objects are shielded by civilians, while mobile military equipment is intentionally sited close to civilian installations or other specifically protected locations.'[1683] For example, in the 2006 Lebanon war, the

[1680] Geiss, "Asymmetric Conflict Structures", at 766.
[1681] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 194.
[1682] 'Israel regrets the loss of innocent lives. Israel does not target civilians, yet is forced to take decisive action against Hezbollah, a ruthless terrorist organisation which has over 12'000 missiles pointing towards its cities. Israel, like any other country, must protect its citizens, and had no choice but to remove this grave threat to the lives of millions of innocent civilians. Had Hezbollah not established such missile force, Israel would have no need to take action, and had Hezbollah chosen to set up its arsenal away from populated areas, no civilians would have been hurt when Israel did what it obviously had to do.' Cited in Id. at 194, footnote 185.
[1683] Geiss, "Asymmetric Conflict Structures", at 765.

Hezbollah hid its rockets and military equipment in civilian neighbourhoods,[1684] and the UN Under-Secretary-General's statement clearly points to the vicious circle that might be triggered by such a practice.[1685] Ultimately civilians are trapped between the parties to the conflict, with no possibility to escape the fighting.

The whole concept of military advantage encompassed in the proportionality equation can only be derived from attacks on lawful military objectives, as an unlawful attack would not provide a legal military advantage. And it seems that the interpretation of the concept of 'military advantage' in IHL diminishes the relevance of the principle of proportionality in internal armed conflicts 'almost to the vanishing point'.[1686] Indeed, since most of the measures parties are using are themselves unlawful, the question of proportionality for the most part does not arise in the first place.

As a result, in internal armed conflicts, the principle of proportionality does not have a lot of factual relevance to the regulation of the conduct of hostilities. When attacks are not directed at lawful military targets, there is simply no application for it. Once the obligation to distinguish between lawful military objectives and civilians and civilian objects has been violated, there is no necessity anymore to proceed to the evaluation of the proportionality of an attack on a lawful military target. Accordingly, in such a situation, 'the principle can no longer function as a mechanism to balance the interests of the parties with humanitarian objectives.'[1687]

However, the principle of proportionality does still have relevance in so far as, despite the fact that organized armed groups often violate the principle of distinction per se,

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[1684] See Human Rights Watch, *Fatal Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon,* 18 Human Rights Watch 3(E), 2006, at p. 5: http://www.hrw.org/reports/2006/lebanon0806/index.htm

[1685] See the Statement of Jan Egeland to the Security Council on the humanitarian situation in the Middle East, 28 July 2006, p. 3: 'I urged the Foreign Minister and the Defence Minister of Israel in my meetings to review the conduct of the air strikes and bombardments to avoid excessive use of force that inflicts disproportionate suffering on the civilian population. When there are clearly more dead children than actual combatants, the conduct of hostilities must be reviewed. At the same time, I repeatedly and publicly appealed from within Lebanon that the armed men of Hezbollah must stop their deplorable tactic of hiding ammunitions, arms, or combatants among civilians. Using civilian neighbourhoods as human camouflage is abhorrent and in violation of international humanitarian law'. Cited in Geiss, "Asymmetric Conflict Structures", at 765.

[1686] Lamp, "Conceptions of War and Paradigms of Compliance: the 'New War' Challenge to International Humanitarian Law", at 244.

[1687] Id. at 244.

most of the time state armed forces will respect the duty to distinguish, at least on their own terms, because, as we have seen, states rarely acknowledge the direct targeting of civilians and civilian objects. However, they will react to these guerrilla tactics by adopting a very wide approach to proportionality.

Conclusion

The principle of proportionality is important because, especially in internal armed conflicts, 'civilians and civilian objectives are too frequently located in the same area as military objectives. A military objective does not cease being a military objective only because its attack would be expected to cause disproportionate collateral damage to civilians or civilian objects. The point is that, notwithstanding the unambiguous identification of an object as a military objective, its attack will still be illegal if the incidental injury to civilians or damage to civilian objects is expected to be disproportionate. The principle of proportionality provides 'a further restriction' by disallowing attacks against impeccably lawful targets owing to the envisaged disproportionate injury/damage to civilians or civilian objects.[1688]

The application of the principle of proportionality requires military commanders to strike a balance between the expected damage to civilians and civilian objects and the anticipated military advantage of the attack. In order to respect the obligation of proportionality in attack, we need to have belligerents acting in complete good faith and we need them to truly desire to comply with the general principle of protection of civilians in combat operations. However, as we have seen, state armed forces have the tendency to interpret the law as granting them wide discretion.[1689] Rather than trying to increase civilian protection, they do everything in order to limit the commander's responsibilities. They emphasize the obligations imposed on organized armed groups. In applying the test of proportionality, they argue that the means used should be measured against the *overall* aim of winning the armed conflict rather than against the particular aim of winning a specific battle. Furthermore, this overall aim is defined

[1688] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at 129-130.
[1689] An emphasis on the discretion of the 'reasonable military commander' is also evident in the *Final Report of the Committee to Review the NATO bombing*.

subjectively, with an undue amplification on the *mens rea* as a paramount component of the commander's duty toward civilians. Indeed, the tendency is that the strong party's position considers the obligation to spare civilians as 'implying a prohibition of "wilful intent" to inflict civilian casualties or, at most, "wanton disregard" for the safety of the civilian population, or with "recklessness". Otherwise, the enemy civilians are exposed to the risk of error.'[1690] There is always an excuse for collateral damage, and it will rarely be deemed as excessive, as the concept of definite military advantage will always be well argued, thanks to the wide margin of discretion the military commander enjoys. The 'notoriously obscure application and subjective interpretation'[1691] of the principle of proportionality is a sad and grim reality in which the latitude of the law seems to benefit the decision-makers, in total denial of the protection of civilians. Especially in non-international armed conflicts, disparities of means and methods between the parties impact on the ultimate objective of the principle of proportionality, which is, let us not forget, the protection of civilians.

Notwithstanding the deficiencies related to the principle of proportionality in internal armed conflict we have just surveyed, a better alternative, based on IHL, has not yet been proposed. However, it is submitted here that the application of this principle to field realities can still be much improved. The concepts of military advantage and collateral damage can be further clarified, in addition to the values that must be assigned to them. One of the solutions lies with public oversight and accountability for decisions to engage in military operations that are likely to result in extensive civilian collateral damage. Judicial supervision prior to and after engagement in operations is also likely to help. Indeed, these 'may serve as necessary checks against abuses of the latitude the law seems to give to decision-makers in this respect.'[1692] These sorts of solutions can of course be applied to state armed forces fighting an insurgency. It is, however, more difficult to envisage when it comes to organized armed groups.

[1690] Benvenisti, "Human Dignity in Combat: the Duty to Spare Enemy Civilians", at 95-6 (footnotes omitted).

[1691] Fellmeth, A., "The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency", at 125.

[1692] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 195-6.

Before proceeding to an analysis of the war crime of disproportionate attacks in non-international armed conflict, in order to see whether international criminal law can be of any help in the clarification of this difficult principle, we need to analyse the concept of precautionary measures, as they are a necessary part of the evaluation of the proportionality of a given attack. The next Chapter will be devoted to this.

Chapter 11:

Precautionary measures

Introduction

The principles of distinction, proportionality and the prohibition of indiscriminate attacks are complemented by the principle of precaution in attacks and the principle of precaution against attacks. The practical and efficient application of the principle of distinction and proportionality requires measures of precautions. We have seen that for an attack to be lawful it has to be directed at a military objective and should not be expected to cause excessive civilian losses. However, a belligerent must take precautionary measures to spare civilians and civilian objects, as there would be no relevance whatsoever for the principle of distinction if no precautions were be taken in the identification of which object or person were to be targeted. Indeed,

> 'collateral injury to the civilian population must be minimized by the operational arrangements under which the attack is performed, either by an exact delimitation of the targets of the attack, by the use of precisely targetable weapons in the 'weapons mix' used for the attack, or by other precautionary measures in planning or implementing the military operations.'[1693]

Accordingly, the principle of precaution aims to prevent erroneous targeting and to avert or minimize incidental injury to civilians and civilian objects. The corollary to this is the 'fundamental maxim that the civilian population must be spared as far as possible.'[1694] For this maxim to be implemented, it is crucial that 'all those launching attacks take all feasible measures to minimize incidental civilian harm or mistakes, for example, by verifying targets, selecting tactics, timing and ammunition and giving the civilian population an effective warning, although a violation of that obligation is not

[1693] Fleck, "The Law of Non-International Armed Conflicts", at 189.
[1694] Ibid.

a war crime.'[1695] However, again, the armed forces of belligerent parties retain considerable discretion. This wide margin of discretion is exercised primarily according to military considerations, in the framework of operational priorities. Sadly, humanitarian considerations are not the primary preoccupation of a commander when launching an attack.

However, despite these difficulties, an interpretation of the rule of distinction and proportionality based on the principle of *effet utile* requires that precautions be taken also in the context of internal armed conflict, despite the fact that no similar provision is contained in the Second Additional Protocol. As we will see, the rule of precaution in non-international armed conflict consists of two basic rules and various distinct obligations, which have been codified in treaty IHL applicable to international armed conflicts and have reached customary status in non-international armed conflicts.

As we have seen in the preceding chapters of this dissertation, the blurred lines of distinction in non-international armed conflicts render the application of the principles of distinction and proportionality not straightforward. However, at least in respect of the state armed forces in such a conflict, it is argued that they have technological capabilities that can help them in complying with the law. Despite the difficulties inherent in asymmetric warfare, they are equipped to detect and identify legitimate targets. Furthermore, surveillance drones 'can monitor a given area without interruption over a significant period of time and they can provide real-time visual footage to those who plan and decide upon an attack.'[1696] These are factors that can facilitate the application of precautionary measures in internal armed conflict.

As most of the precautionary measures are to be applied *to the extent of feasibility,* when it comes to non-international armed conflict this presupposes that the strong side, which has better military and technological capacities, will obviously have more duties under the law. This is not to say that the weak side is relieved of taking precautionary measures. But 'a feasibility assessment is necessarily contextual and what is feasible also hinges on the reconnaissance resources available to the attacker.

[1695] Sassoli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges", at 54-55. See also *Galic* Trial Judgment, para 58.

[1696] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 130.

It is therefore generally accepted that, in practice, technologically advanced parties may be bound to a higher standard than those parties who lack similarly advanced reconnaissance means.'[1697] The notion of feasibility will be dealt with throughout this Chapter.

Precautions in attack

There is no rule on precautions in planning and carrying out attacks in the Second Additional Protocol, nor obviously in Common Article 3. The Rome Statute does not contain rules on precautions for non-international armed conflicts. However, it is argued here that this omission does not mean that the requirement to take precautions in non-international armed conflicts is inapplicable. For instance, Green considers that one of the aims of AP II was to require precautions to be taken to avoid unnecessary or excessive injury to civilians.[1698]

First of all, the duty to take precautions to minimize incidental losses is implicit in the general conception of Article 13(1), as this provides for the obligation to protect civilians against the dangers arising from military operations.[1699] Indeed, 'it would be difficult to comply with this requirement without taking precautions in attack.'[1700] This implicit requirement implies a duty to take precautions to minimize incidental losses, not only from attacks but also from other military operations and means, for example, that 'military installations should not be intentionally placed in the midst of a concentration of civilians with a view to using the latter as a shield or for the purpose of making the adverse party abandon an attack.'[1701] Secondly, we find the requirement to take all feasible precautions to protect civilians in non-international armed conflicts in Article 3.10 of Amended Protocol II to the Conventional Weapons

[1697] ICRC, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1974-1977), Vol XV, p. 285.
[1698] Green, L.C., *The Contemporary Law of Armed Conflict* (Juris Publishing 3 ed. 2008), at 354.
[1699] Rogers, *Law on the battlefield*, at 311; Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 671 ; Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 26.
[1700] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 52.
[1701] Rogers, *Law on the battlefield*, at 311.

Convention, Article 3.4 of the Protocol II to the Conventional Weapons convention and in Article 7(b) of the Second Protocol to the Hague Cultural Property Convention. And lastly, the requirement of taking precautions in attack, as applicable to non-international armed conflict, is also recognized by customary international law.[1702]

We will now proceed to a more detailed analysis of the seven precautionary measures in attack, as established in customary international law applicable in non-international armed conflicts.

The Principle of Precaution in Attack

The basic rule on precaution in attack has been worded by the San Remo Manual on the Law of Non-International Armed Conflict as: 'All feasible precautions must be taken by all parties to minimise both injuries to civilians and damage to civilian objects'[1703] The ICRC Study stated this basic rule in a more detailed manner: 'in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to *avoid, and in any event* to minimise, *incidental loss of civilian life,* injury to civilians and damage to civilian objects.'[1704]

It seems that the San Remo Manual does not consider as customary law the necessity to take feasible precautions in order to avoid *incidental* loss of civilian life, injury to civilians and damage to civilian objects. Neither does it consider as custom the necessity to minimise incidental loss of civilian life. The San Remo Manual does not therefore uphold in a clear manner the rule on ensuring respect for the principle of proportionality. However, by asserting that measures have to be taken to minimise injuries and damage, the Manual implies that *all* damages and injuries have to be included.

[1702] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para. 4761; General Assembly Resolution 2444 (XXIII) (1968); General Assembly Resolution 2675 (XXV)(1970) ; Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume I: Rules. Rules 15-21, pp. 51-67; *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, S/2005/60, 1 February 2005, para 166.

[1703] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.1. a).

[1704] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 15, at 51 (emphasis added to see the differences with the wording of the San Remo Manual).

The customary nature of this rule for internal armed conflict has also been confirmed by the United States in its report on Sri Lanka, when it stated that 'parties must take all practicable precautions, taking into account military and humanitarian considerations, to minimize incidental death, injury and damage to civilians.'[1705]

The notion of 'feasible precautions' has been interpreted as 'those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.'[1706] This definition can be, and has been, applied outside the confines of Protocol II.[1707] The notion of feasibility is inherently a 'variable concept and what is feasible will depend on such factors as the quantity and quality of territorial control exercised.'[1708] Accordingly, what is feasible for one party may not be feasible for another, with one party possessing advanced technical capabilities and another not.[1709] In addition, 'what is feasible in one conflict may not be feasible in another; and what is feasible at one stage of a conflict may not be feasible at another.'[1710]

In terms of concrete examples of 'feasible' precautions, the San Remo Manual mentions that the most evident are 'the review of intelligence and other forms of information concerning the target and surrounding area.'[1711] The Commentary further specifies that the 'assessment of information should be based on all sources that are reasonably available at the relevant time.'[1712] With respect to the information required for deciding upon precautions in attack, numerous states have expressed the view that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the

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[1705] US Department of State, Report to Congress on Incidents During the Recent Conflict in Sri Lanka, 2009, at p. 7.
[1706] Convention on Certain Conventional Weapons, Protocol II, Article 1(5); Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(10). See also Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume I: Rules.Rule 15, at 54. See related practice.
[1707] See Sivakumaran, *The Law of Non-International Armed Conflict*, at 353 ; US Report on Sri Lanka, at 7.
[1708] Id. at 353.
[1709] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977*, at para 682.
[1710] Sivakumaran, *The Law of Non-International Armed Conflict*, at 353.
[1711] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict*, with Commentary, at 27.
[1712] Ibid.

information from all sources which is available to them at the relevant time.[1713] But as stressed by the authors of the Customary Study, 'at the same time, many military manuals stress that the commander must obtain the best possible intelligence, including information on concentrations of civilian persons, important civilian objects, specifically protected objects, the natural environment and the civilian environment of military objectives.'[1714]

The general rule on the principle of precaution in attack is the basic rule from which all the other rules have been derived.

Target verification

The precautionary rule on target verification requires that parties to the conflict should 'do everything feasible to verify that the objectives to be attacked are military objectives.'[1715] This Rule is not to be found in the San Remo Manual, but the ICRC Study found that state practice establishes this rule as a norm of customary international law applicable in non-international armed conflicts.[1716] Indeed, we find this rule in recent treaty law applicable to this type of armed conflicts, such as the Second Protocol to the Hague Convention for the Protection of Cultural Property,[1717] in addition to numerous military manuals applicable in non-international armed conflicts.[1718]

The rule on the obligation of the parties to do everything feasible to verify that targets are military objectives has also been confirmed in international jurisprudence. In the *Galic* case, the Trial Chamber held that '(t)he practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian

[1713] See related state practice, in Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 50, footnote 33.
[1714] Id. at 54-55. These remarks have been made in the context of the rule on proportionality in attack. See chapter 4.
[1715] Second Protocol to the Hague Convention on Cultural Property, Article 7(a) ; Id. Rule 16, at 55; *Darfur Commission Report*, para 166.
[1716] Id. Rule 16, at 55.
[1717] Second Protocol to the Hague Convention on Cultural Property, Article 7.
[1718] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 16, at 56, footnote 34.

objects, so as to spare civilians as much as possible.'[1719] On a national level, we can think, for instance, of the Constitutional Court of Columbia, which stated in 2007 that '(t)he precautionary principle is the cornerstone of a number of specific rules which are all considered to have attained customary status and to be applicable in internal armed conflicts … Among these rules is … the obligation of the parties to a conflict to do everything feasible to verify that targets are military objectives.'[1720]

It is difficult to see how the principle of distinction, which is customary, could be implemented in internal armed conflicts without any obligation to respect the rule on target verification. Commanders in organized armed groups are evidently also bound by this rule. Importantly, in case of doubt, a commander planning an attack must, 'even if there is a slight doubt (…) call for additional information and if need be give order for further reconnaissance.'[1721] Henderson has criticized the standard set by the ICRC Commentary as being too high.[1722] However, allowing an attack in spite of remaining doubt about an object's status amounts to an attack into the blue, and would significantly undermine the principle of distinction.[1723] This is why a commander is bound by customary law to *verify* with as much as certainty as possible that the object or person under consideration for attack is indeed a military objective. The rule on the presumption of doubt exists also for persons, as confirmed by the ICRC Guidance on Direct Participation in Hostilities.[1724] Especially in non-international armed conflict, 'while the fog of battle may not always allow "clinical accuracy" in decision-making, it may well be argued that it is precisely because of the fog of battle, precisely because conflicts are highly dynamic and circumstances change rapidly, that IHL requires target verification and disallows attack into the blue.'[1725] The practice of organized armed groups also shows the importance of this rule. For instance in an interview conducted with the spokesperson of the Popular

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[1719] ICTY*, Galic* Trial Judgment, para 58.
[1720] Colombia, Constitutional Court*, Constitutional Case No. C-291/07,* Judgement of 25 April 2007, p. 99.
[1721] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 2195.
[1722] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 163.
[1723] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 131.
[1724] *See Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Recommendation VIII. See Chapter 13 for a discussion.
[1725] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 131.

Front for the Liberation of Palestine (PFLP) Rédalié shows that this groups does have an intelligence capacity clearly sufficient to fulfil the conditions attached to the obligation of target verification.[1726]

Assessment of the Effects of Attacks in order to minimise collateral damage

The customary nature of the obligation of assessment of the effects of attacks is established. The ICRC Study has found that 'Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage.'[1727] In the context of the protection of cultural property, this rule is to be found in practically the same wording in the Second Protocol to the Hague Convention on Cultural Property.[1728] However, this rule is not to be found in the San Remo Manual on the Law of Non-International Armed Conflict, something that is quite surprising when we think that 'the principle of proportionality, which is customary in international and non-international armed conflicts, inherently requires respect for this rule.'[1729]

The ICTY Trial Chamber in the *Galić* case has confirmed the customary status of the obligation to assess the effects of attacks. In 2003, it stated:

> 'One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to

[1726] See Rédalié, *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire*, at 240-242.
[1727] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 18, at 58.
[1728] Second Protocol to the Hague Convention on Cultural Property, Article 7(b) and (c): 'Parties should do everything feasible to establish whether or not the attack may be disproportionate'.
[1729] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 18, at 60.

> civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[1730]

Control during the Execution of Attacks

Another more specific rule related to the general rule of taking precautions in attacks is the one requiring control of the execution of attacks. This step comes after the determination that a target is subject to lawful attack. The San Remo Manual establishes that 'an attack must be cancelled or suspended if it becomes apparent that the target is not a fighter or military objective or is subject to special protection or if the expected injury to civilians and/or the expected damage to civilian objects would be excessive in relation to the concrete and direct military advantage anticipated.'[1731] The Commentary to the San Remo Manual explains that this Rule 'has been drawn from Article 57(2)(b) of Additional Protocol I and, with regard to cultural property, Article 7(d)(ii) of the Second Hague Protocol.'[1732]

The ICRC Study establishes a similar rule, albeit formulated in a less stringent manner, requiring that each party to the conflict 'must do everything feasible' to cancel or suspend the above mentioned type of attack.[1733]

The requirements of control during attacks apply primarily to those executing or controlling attacks. It applies to members of state armed forces and organized armed

[1730] ICTY, *Galić* Trial Judgement, para 58.
[1731] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.2. c); Second Protocol to the Hague Convention on Cultural Property, Article 7(d).
[1732] Id. at 28.
[1733] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 19, at 60.

groups alike, independently of their military grades and at every stage of the military operation. The San Remo Manual gave the following examples of situations in which an attack should be cancelled:

> 'the receipt of new target intelligence may reveal that the intended target is in fact not (or no longer) a military objective; initial intelligence might have been faulty or the military activities that previously occurred at the targeted facility may have ceased. The attacker may even come to realize that the target is an object that enjoys special protection under the law. Perhaps most commonly, an attacker may become aware of the presence of unexpected civilians in or near the target that would alter the proportionality equation.'[1734]

The Trial Chamber in the *Kupreškić* case, stated that 'Article 57 of the 1977 Additional Protocol I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.'[1735] In addition, the Chamber, referring to the Martens Clause, held that: 'The prescriptions of … [Article 57 of the 1977 Additional Protocol I] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.'[1736]

As the principles of distinction and proportionality are customary in non-international armed conflict, it is perfectly arguable that they inherently require respect for the rule of control during attack. 'Disregard for this rule would lead to an attack in violation of the principles of distinction and of proportionality and would be illegal on that basis.'[1737] The rule on control during attack is derived from the two above mentioned rules of assessment of the effects of attacks and target verification. It also emanates from the prohibition on attacks against civilians and civilian objects and the prohibition of disproportionate attacks.

[1734] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 28.
[1735] ICTY, *Kupreškić* Trial Judgement, para 524.
[1736] ICTY, *Kupreškić* Trial Judgement, para 525.
[1737] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 19, at 62.

Choice of Means and Methods of Warfare

The customary rule on precautions in the choice of means and methods of warfare has been recognized by the San Remo Manual and the ICRC Study. The Manual enacts it in the following wording: 'When a reasonable choice between methods or means used in an attack exists for obtaining a similar military advantage, the methods or means expected to minimise the danger to civilians and civilian objects must be selected.'[1738] The correlative ICRC Study reads as follow: 'each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to *avoiding*, and in any event to minimising, *incidental loss of civilian life*, injury to civilians and damage to civilian objects.'[1739] Accordingly, we see that the Study included the requirement of feasible precautions also with respect to incidental loss of civilian life, but makes clear that this Rule must be applied independently of the simultaneous application of the principle of proportionality. This obligation is included in the Second Protocol to the Hague Convention for the Protection of Cultural Property,[1740] as well as in a number of military manuals applicable in non-international armed conflicts.[1741]

With respect to the practical consequences that this obligation entails, we can think of the 'duty to promote, as far as possible, the accuracy of bombing raids conducted against military objectives situated in densely populated areas.'[1742] But this provision can also serve to impose restrictions on the timing of an attack, and, more specifically, requires that the timing of the attack be chosen with a view to limiting collateral damage. 'It can also serve to impose restrictions on the location of an attack by requiring, where circumstances permit, that parties avoid attacking a densely populated area if the attack is likely to cause heavy civilian losses. And lastly, it also imposes caution in choosing the angle of attack.'[1743] With respect to the means, the

[1738] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.2. b); See also *Darfur* Report, para 166.
[1739] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 17, at 56 (emphasis added).
[1740] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 7.
[1741] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 17, p. 58, footnote 45 for related state practice.
[1742] Bothe, et al., *New Rules for Victims of Armed Conflicts a Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 364.
[1743] See Quéguiner, J.-F., *Precautions under the law governing the conduct of hostilities*, 88 International Review of the Red Cross 793, (2006). at 800-801.

application of this rule can, for instance, include the selection of means of warfare proportionate to the target, and the use of precision weapons and target selection.[1744] However, again, it should be stressed that the 'capacities of the parties to the conflict have to be borne in mind, as not all parties to conflicts will be able to engage in detailed assessments.'[1745] However, if other means are available to the attacking party, and these means would give the same military advantage but would result in less collateral damage, the attacking party has to use them. If it does not, 'an attack that would otherwise have resulted in proportionate collateral damage, can be considered disproportionate.'[1746]

The rule on the choice of methods or means expected to minimise the danger to civilians and civilian objects has been confirmed by the Plenary Chamber of Colombia's Constitutional Court in the *Constitutional Case No. C-291/07*.[1747]

Interestingly, this rule has been referred to by the European Court of Human Rights in the interesting case of *Ergi v. Turkey,* in which the Court participated in the progressive development of international humanitarian law for internal armed conflict. In its judgment, the European Court, referring to IHL, held that: '(t)he responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life.'[1748]

This obligation to choose means and methods of Warfare, so as to minimize the collateral damage, has to be read together with the previously mentioned obligations which set out the specific requirements related to target selection.

[1744] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 17, at 58.
[1745] Sivakumaran, *The Law of Non-International Armed Conflict*, at 354.
[1746] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 6.
[1747] *Colombia, Constitutional Court, Constitutional* Case No. C-291/07, Judgment of 25 April 2007, p. 99 (footnote omitted).
[1748] European Court of Human Rights, *Ergi v. Turkey*, Judgment, 28 July 1998, (hereinafter *Ergi* case), para 79; see also para 80.

This rule is extremely important in urban warfare within densely populated areas, where the state armed forces will be impeded from projecting their force overwhelmingly. These forces are therefore under legal obligation to use precision weapons, if they have them. For instance, the use by Israel of White Phosphorous during Operation Cast Lead in 2009, was a clear contravention of the obligation to choose a means expected to minimise the dangers to civilians. It is submitted that they had in their arsenal other weapons, such as precise guided weapons, that could have give them a similar military advantage. Accordingly, this legal obligation is applied on a sliding scale with respect to the capacities of each party to the conflict.[1749]

Target Selection

The rule on target selection is worded more or less in the same manner in the San Remo Manual and in the ICRC Study. The Manual states that: 'when a reasonable choice is available between several military objectives for obtaining a similar military advantage, the objective expected to minimise the danger to civilians and civilian objects must be selected.'[1750] With respect to the specific context of the protection of cultural property, we also find this rule in the Second Protocol to the Hague Convention for the Protection of Cultural Property.[1751]

This requirement is absolutely necessary to minimise danger to civilians and civilian objects whenever a similar military advantage will result from attack on more than one target. It is drawn from Article 57(3) of Additional Protocol I, and the ICRC Study ascertains that it can be seen as a further specification of the Rule on the precautions to be taken in the choice of means and methods of warfare. 'Some States indicate that target selection is a means of complying with that requirement, and this

[1749] It should be noted that this rule has been extensively criticized. See for instance Schmitt, M.M., "Asymmetrical Warfare and International Humanitarian Law", in *International Humanitarian Law Facing New Challenges*, (Wolff Heintschel von Heinegg & Volker Epping eds., 2007), at 42.
[1750] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.1.2. d); See also Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 21, at 65. However, Schmitt disagree with the customary character of this rule. See Schmitt, "The Law of Targeting", at 167.
[1751] Article 6.

rule describes a way in which target selection can operate as a precautionary measure.'[1752]

As an example of the application of this rule, it has been argued, for instance, that 'it may be possible to achieve the same military advantage by destroying railway bridges away from populated areas rather than attacking railway stations in such areas.'[1753] However, the San Remo Manual has made clear that 'there is no requirement to select an objective if doing so would be militarily 'unreasonable'.'[1754] The Commentary gives the following examples of situations where it would not be 'reasonable' to apply this rule:

> 'One of the possible objectives may be so much more heavily defended than others, that it would be unreasonable to select it as the target. Risk to the attacker is a relevant factor. Munitions availability is another. Aside from the fact that certain systems may be unavailable, the attacker will need to take into account future requirements and replenishment. For instance, when the number of precision-guided munitions is limited, it would be imprudent for the attacker to expend them early in the conflict without considering possible future needs and capabilities.'[1755]

The necessity to take precautionary measures with respect to target selection has also been endorsed by the Plenary Chamber of Colombia's Constitutional Court.[1756]

Furthermore, this rule is generally accepted by states as customary law. However, the United States has clarified that the obligation to select an objective for attack which may be expected to cause the least danger to civilian lives and to civilian objects was not an absolute obligation, as in their view 'it only applies "when a choice is possible" and thus "an attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make

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[1752] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 21, at 67.
[1753] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 28, point 8.
[1754] Id. at 28, point 9.
[1755] Id. at at 28, point 9.
[1756] Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment of 25 April 2007, p. 99 (footnote omitted).

such a determination".'[1757] Despite the US clarification with respect to their own practice, the rule on the precautions to be taken in the choice of means and methods of warfare and the one on target selection are 'specific manifestations of the rule on precautions, namely minimizing death and injury to civilians and damage to civilian objects. They are also linked to the rule on proportionality albeit one step removed.'[1758]

Advance Warning

The ICRC Study on customary international law found that state practice establishes the rule of advance warning as a norm of customary international law applicable in non-international armed conflict: 'Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.'[1759] This rule is not to be found in the San Remo Manual, despite existing in treaties applicable in non-international armed conflicts,[1760] as well as in the 1899 and 1907 Hague Regulations, that are nowadays considered as customary law for non-international armed conflicts. Article 26 of the 1899 Hague Regulations provides that 'the commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.' In addition, we find the requirement of warning is applicable to internal armed conflicts, as far back as in the Lieber Code.[1761] Accordingly, it is safe to affirm that the requirement of giving effective advance warnings is an old rule of customary law in non-international armed conflicts.[1762]

In addition, the ICRC Study has made clear that 'while this rule deals with the requirement to give warning of attacks which may affect the civilian population, it is nevertheless relevant to point out that the concept of warnings has also been extended to non-international armed conflict in the context of the protection of cultural

[1757] Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, para 8(H), Report on US Practice, 1997, ch.1.6.
[1758] Sivakumaran, *The Law of Non-International Armed Conflict*, at 354.
[1759] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 20, at 62.
[1760] See Second Protocol to the Hague Convention on Cultural Property, Article 6(d) ; Convention on Certain Conventional Weapons, Amended Protocol II, Article 3(11).
[1761] See Lieber Code, Article 18.
[1762] See also *Darfur* Commission Report, para 259.

property.'[1763] Examples of warnings can include radio and television broadcasts informing of the intention to attack, the dropping of leaflets, or communication through local leaders.

The reference to the terms *'unless circumstances do not permit'* is linked to 'the element of surprise that might be essential to an attack',[1764] and allows the commander a measure of discretion.[1765] With respect to the reference to 'effective', this term is not defined and 'must be a matter of common sense.'[1766] Obviously, 'a broadcast in a language that the population does not understand would not be effective.'[1767] Another ineffective warning, for instance, would be the warnings made by Israel during Operation Cast Lead. From the fact the people in Gaza could not go anywhere, as they were trapped in the Strip, these were clearly ineffective warnings. And also, 'the warning should, if circumstances permit, give enough time for the civilian population to take the necessary measures, for example to evacuate the area.'[1768] Importantly, it should be highlighted that the mere fact of warning civilians does not relieve the belligerents from their obligations under the principles of distinction or proportionality. As the ICRC Study has clarified,

> 'state practice indicates that all obligations with respect to the principle of distinction and the conduct of hostilities remain applicable even if civilians remain in the zone of operations after a warning has been issued. Threats that all remaining civilians would be considered liable to attack have been condemned and withdrawn.'[1769]

The Plenary Chamber of Colombia's Constitutional Court has clarified that among the rules constituting the precautionary principle is: 'the obligation of the parties to a conflict to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.'[1770] We also find reference to the

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[1763] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 63.
[1764] Rogers, *Law on the battlefield*, at 140.
[1765] Id. at 140.
[1766] Id. at 139.
[1767] Id. at 139.
[1768] Sivakumaran, *The Law of Non-International Armed Conflict*, at 354.
[1769] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 20, at 65.
[1770] Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment of 25 April 2007, p. 99 (footnote omitted).

requirement of advance warning, albeit in the context of occupation, in the *Adalah (Early Warning Procedure)* case. In the judgment, Israel's High Court of Justice stated that:

> 'An army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security. In this framework – and to the extent that it does not frustrate the military action intended to arrest the wanted person, the army is permitted – and at times even required – to give the wanted person an early warning. Thus it is possible to ensure the making of the arrest without injury to the civilian population.'[1771]

In view of the increasingly blurred lines of distinction, the obligation to warn civilians is constantly growing in importance and humanitarian impact. Geiss submits that 'the criterion of "attacks which may affect the civilian population" should be interpreted broadly. Unless it can be ruled out that an attack will affect the civilian population, the obligation to warn is triggered.'[1772] Nevertheless, commanders still keep their considerable margin of discretion in the determination of whether the circumstances permit a warning or not. It is therefore submitted that this rule is not burdensome for an attacker.[1773]

Precautions against the effects of attacks

In addition to the precautions required of the attacking party, the defending party is also required to take precautions against the effects of attacks. The extent to which the protection of the civilian population from indiscriminate attacks is a shared responsibility between the belligerents launching attacks against military objectives and the belligerent subject of the attack is probably the issue on which there is the greatest controversy about the applicable legal standards.[1774] In addition, up until

[1771] Israel, High Court of Justice, *Adalah (Early Warning Procedure)* case, Judgment, 6 October 2005, para 20 (footnotes omitted).
[1772] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 39.
[1773] For an extensive discussion on the notion of warning civilian prior to attack, see Baruch, P.S. & Neuman, N., "Warning Civilians Prior to Attack Under International Law - Theory and Practice", 41 *Israel Yearbook on Human Rights* 137, (2011).
[1774] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 206: 'While the United States has always claimed

recently 'little attention has been given to the responsibilities of national authorities to ensure the security of their civilian population from the effect of armed attacks.'[1775] We may even wonder whether any attention has been given to the responsibilities of organized armed groups to ensure the security of the civilians under their control.

The Principle of Precautions against the effects of attacks

The general duty of precautions against attacks provides that a defending party must take basic precautions to protect civilians against the effects of attacks against military objectives. Again, the Second Additional Protocol does not contain a rule on precautions against the effects of attacks, although a provision was part of the package that was dropped at the last moment. However, it would be difficult to comply with the requirements of Article 13(1) without taking precautions against the effects of attacks. In addition, we find this requirement in the Second Additional Protocol for the Protection of Cultural Property, which is applicable to non-international armed conflicts,[1776] as well as in a plethora of military manuals applicable to this type of armed conflicts.[1777] We can mention here, for instance, the UK Manual which states that 'Military commanders and the civilian authorities should do everything that they feasibly can do to protect civilians and civilian objects in their area of control from the effects of war.'[1778]

This rule enacts a positive obligation for the parties to the conflict to take necessary precautions to protect civilians under their control. The ICRC Study found the rule of precaution against the effects of attacks to be applicable in non-international armed conflicts. The corresponding rule reads as follows: 'The parties to the conflict must

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that both sides have an equal responsibility, the text, legislative history, and context of Protocol I indicate that the main responsibility is conferred upon the "attacker" as understood in *jus in bello*, that is, the belligerent committing acts of violence against the adversary, whether in attack or in defense, whether in self-defense or in violation of the *jus ad bellum* prohibition of the use of force.'

[1775] Nasu, H., "The Protection of Civilians from Violence and the Effects of Attacks in International Humanitarian Law", in *Protecting Civilians During Violent Conflict : Theoretical and Practical Issues for the 21st Century*, (David W. Lovell & Igor Primoratz eds., 2012), at 80.

[1776] Second Additional Protocol for the Protection of Cultural Property, Article 8.

[1777] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Practice related to Rule 22, at 69, footnote 9.

[1778] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004), at 395. The San Remo Manual drafted the rule on the same wording. See Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict*, with Commentary. Rule 4.1. a), at 55.

take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.'[1779] From this general duty of precautions against attacks, more content is given by other specific obligations that will be discussed below.[1780]

Specific examples of this general duty of precautions against attacks can be, for instance, construction of shelters, digging of trenches, distribution of warnings and information, withdrawal of the civilian population to safe places, direction of traffic, guarding of civilian property and mobilisation of civil defence organisations.[1781]

The rules on precautions against the effect of attacks 'apply to non-international armed conflicts through customary international law and as a matter of common humanity.'[1782] However, again, the rule is subject to the concept of 'feasibility'. The sentence 'to the maximum extent feasible' has been interpreted by states as meaning that the obligation is limited to those precautions which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.[1783] Parks, writing with respect to international armed conflicts, has gone as far as arguing that this provision is not compulsory.[1784] However, the wording could also be simply seen as an illustration 'of the fact that no one can be required to do the impossible.'[1785]

It is true that the violation of this rule does not give rise to international criminal responsibility, under the charge of war crime. For instance, the Rome Statute does not criminalize the failure to take precautions against attacks in non-international armed conflict, thereby denying an important deterrent effect to the belligerents, as well as reducing the requirement of protection of the civilian population. However, since the

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[1779] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 22, at 68.
[1780] The obligation to avoid locating military objectives within or near densely populated areas and objects under special protection, to the extent feasible; and the obligation to remove protected persons and objects under their control from the vicinity of military objectives, to the extent feasible.
[1781] See generally, Rogers, *Law on the battlefield*, at 164 and 170.
[1782] Sivakumaran, *The Law of Non-International Armed Conflict*, at 356.
[1783] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 70.
[1784] Parks, "Air War and the Law of War", at 159.
[1785] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 2245; see also Quéguiner, "Precautions under the law governing the conduct of hostilities", at 809-10, 820.

Statute criminalizes neither attacks against civilian objects, nor disproportionate attacks, it is difficult to see how the drafters would have included any rule on precautionary measures, as these are linked to the prohibition of these two types of attack. However, despite not being criminalized, the duty to take precautions against attacks requires parties to the conflict to 'take positive steps to achieve good outcomes or to prevent bad ones.'[1786]

The decision to attack has to be based on an assessment of the information from all sources which is available to the attacker at the relevant time. In addition, state practice shows that an attacker is *not* prevented from attacking military objectives if the defender fails to take appropriate precautions. 'The attacker remains bound in all circumstances, however, to take appropriate precautions in attack and must respect the principle of proportionality.'[1787] Indeed, as explained by the ICTY in the *Galic* case,

> 'although parties to a conflict are under an obligation to remove civilians to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas, their failure to abide by such a standard does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.'[1788]

Accordingly, an accused could not argue that 'his conduct may not constitute an attack on civilians merely because the other side failed to clearly separate its civilians and its combatants.'[1789]

The obligation for the defendant to take precautions to protect civilians under its control from the effects of attacks was dealt with by the Plenary Chamber of Colombia's Constitutional Court in 2007. The Court stated that the principle of precaution is 'among the essential principles of international humanitarian law with *jus cogens* status applicable in internal armed conflicts'[1790] and that one of the specific

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[1786] Nasu, "The Protection of Civilians from Violence and the Effects of Attacks in International Humanitarian Law", at 81.
[1787] Henckaerts, *The Conduct of Hostilities: Target Selection, Proportionality and Precautionary Measures under International Humanitarian Law*, at p. 20.
[1788] *Galic* Trial Judgment, para 61.
[1789] Mettraux, *International crimes and the ad hoc Tribunals*, at 120.
[1790] Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment of 25 April 2007, p.

rules attached to this principle, applicable in internal armed conflicts, is 'the obligation of the parties to a conflict … to protect the civilian population against the effects of attacks.'[1791]

Location of Military Objectives outside Densely Populated Areas

One of the main deriving obligations related to the precautionary measures defenders have to take against attack, is the duty to avoid locating military objectives within or near densely populated areas. 'Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.'[1792] It must be understood, however, that this rule is not always easy to implement, particularly in the case of non-international armed conflicts. 'For example, ministries of defence are often located in the centre of capital cities.'[1793] In addition, the meaning of 'densely populated' is not defined. 'Interpretation is left to the good sense of the authorities concerned, whether military or civil.'[1794] Furthermore, the wording of this obligation clearly indicates that it is weaker than the obligations of an attacker. It has to be taken only 'to the extent feasible', and the defender has only to 'avoid' locating military objectives nearby densely populated areas. Again, the key term here is 'feasible'. We find the following interpretation in treaty law: 'Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.'[1795] The authors of the ICRC Study have found that

> 'while some practice refers to the duty to locate military bases and installations outside densely populated areas, practice in general limits this obligation to what is feasible. It is possible, as several reports on State practice

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[1791] Colombia, Constitutional Court, *Constitutional Case No. C-291/07*, Judgment of 25 April 2007, p. 99.

[1792] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 23 at 71; see also Second Additional Protocol to the Convention on the Protection of Cultural Property, Article 8; Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.3.7, at 44.

[1793] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 44.

[1794] Rogers, *Law on the battlefield*, at 163.

[1795] See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 15 at 54 with related state practice; Article 3(4) Protocol II of the 1980 Convention on Certain Conventional Weapons; Article 1(5) of Protocol III of the 1980 Convention on Certain Conventional Weapons ; Article 3(10) of Amended Protocol II CCW.

> point out, that demographic changes cause military bases to be located within or near cities where this was originally not the case. When such objectives involve immovable property, it is less feasible to move them than in the case of movable property.'[1796]

Accordingly, the term 'feasibility' makes a significant allowance for considerations of military necessity,[1797] but 'the flexibility of the standard of "feasibility" cannot be misconstrued as justifying violations of IHL based on the argument that precautionary measures were not "feasible" in the concrete circumstances.'[1798]

The obligation for the parties to an internal armed conflict to avoid locating military objectives in densely populated areas was confirmed in the *Galic* case. In the judgment, the Trial Chamber stated: 'as suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas.'[1799] However, the Trial Chamber made clear that 'the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.'[1800]

The rule on the necessity to avoid locating military objectives within or near densely populated areas is related to the prohibition of human shields.[1801] ' (E)verything feasible must be done to separate military objectives from the civilian population, but in no event may civilians be used to shield military objectives.'[1802] Indeed, 'military installations should not be intentionally placed in the midst of a concentration of civilians with a view to using the latter as a shield or for the purpose of making the

[1796] Id. at Rule 23 at 73-74.
[1797] Melzer, *Targeted Killing in International Law*, at 365. See also Greenwood, "Historical Development and Legal Basis", at footnote 132.
[1798] Melzer, *Targeted Killing in International Law*, at 366.
[1799] ICTY, *Galić* Trial Judgement, para 61.
[1800] Ibid.
[1801] For a discussion on the question of human shields, see Chapter 13.
[1802] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 23, at 72.

adverse party abandon an attack.'[1803] The San Remo Manual also states that 'the use of civilians to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary's operations.'[1804] It is interesting to note here that the interdiction to use human shields is the only precautionary rule that does not depend on feasibility.[1805]

Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives

The other specific rule linked to the obligation to take precautions against the effects of attacks is the obligation on each party to the conflict, to the extent feasible, to remove civilian persons and objects under its control from the vicinity of military objectives. This rule is particularly relevant where military objectives cannot feasibly be separated from densely populated areas according to the above-mentioned rule.[1806] Indeed, 'although the first priority must be to avoid locating military objectives in populated areas, where that is not possible, efforts have to be made to evacuate civilians and civilian objects from the vicinity of obvious military objectives.'[1807] However, such a rule may be difficult to apply in practice, since, as we have seen, the concept of military objective is fluid, especially in non-international armed conflicts, and a military objective today might very well not be one anymore tomorrow. Furthermore, as for the provision on the prohibition on locating military objective in densely populated areas, the wording of this obligation clearly indicates that it is weaker than the obligations of an attacker. It has to be taken by the defending party only 'to the extent feasible'. This obligation has been confirmed by the ICTY in the *Galic* and *Dragomir Milosevic* cases.

[1803] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 4772.
[1804] Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, Rule 2.3.8, at 44.
[1805] See Chapter 13 for a discussion on the notion of so-called human shields.
[1806] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 24, at 74.
[1807] Rogers, *Law on the battlefield*, at 162.

Conclusion

Precautions in attack and against attacks are those precautions that each party in a non-international armed conflict must take with respect to civilians and civilian objects which are present in or near the areas under attack. We have seen that all *feasible precautions* must be taken to avoid or at the least minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Despite the number of pitfalls present in internal armed conflict, the prescriptions of the customary rules on precautionary measures must be 'interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.'[1808] The drawing of the precautionary rules from treaty law of international armed conflict to customary law of internal armed conflicts is indeed not without difficulties. However, 'the inferences are legitimate ones, for some of them are closely related to other rules, for example the prohibition on disproportionate attack, and many of them would need to be satisfied in order to respect these other rules.'[1809] The question that these detailed rules raise is whether they are 'legitimate derivations of the general rule that feasible precautions must be taken.'[1810] After all, the ICTY Appeals Chamber in the *Tadic* Interlocutory Appeal noted that it is the essence of the rules that have been transplanted into the law of non-international armed conflicts and not the detail of the law of international armed conflict.[1811]

But what is certain is that the basics of the rule on precautions in attacks are clear and undebatable. With respect to the rule on choosing means and methods minimizing incidental injury and damage to civilian life and objects, we may wonder what that means exactly in practice. Indeed, with this rule, 'the technologically advanced force is under more stringent legal requirements to minimize potential collateral damages by choosing the right weaponry than the archaic third world army possessing only old-fashioned guns, mortars and rockets.'[1812] State armed forces possessing weapons such as precision-guided weapons and munitions, even if they are not required by the

[1808] *Kupreskic* Trial Judgment, para 525.
[1809] Sivakumaran, *The Law of Non-International Armed Conflict*, at 355.
[1810] Id. at 355.
[1811] *Tadic* Interlocutory Appeal, para 126.
[1812] Oeter, "Comment: Is the Principle of Distinction Outdated?", at 59.

law to use them in all cases where civilian losses might thereby be minimized, should use them. Indeed, 'they can in fact meet higher requirements concerning the precautionary measures than lower developed belligerents.'[1813] Again here we see that the notion of belligerent inequality is a concept that maybe does not or should not have its place in the law of internal armed conflict.

We have seen also the tendency that military considerations are taken into account almost exclusively when it is determined what precautionary measures are feasible. 'These rules are more operational and precise than the proportionality principle, though it is even harder to assess objectively whether they were respected.'[1814] Normally, commanders should take precautions which are practical or practicable, taking into account all circumstances ruling at the time, including humanitarian and military considerations. However, as the planning and decision-making process of a commander is by definition secret, it is almost impossible to know what he knew or what alternatives he had. As showed by Sassoli,

> 'numerous "friendly fire" incidents in Afghanistan and Iraq and the repeated bombing of duly notified and marked Red Cross compounds far away from possible military objectives in Kabul are evidence that even when a belligerent can be presumed to do everything possible to avoid mistakes, the latter happen. On the other hand, every TV viewer was stricken during the recent war in Iraq by the question how so many apparent mistakes could happen and whether serious inquiries will be conducted into such incidents even if they do not affect "friendly forces" but "enemy civilians".'[1815]

One solution to this problem could be 'to ask belligerents to keep records, although it may be even more difficult to ask for those records to be made subsequently public.'[1816] The ultimate idea would be for military experts from different countries to compare practical examples of best practice and exchange them with IHL experts, in order to strengthen a deeply needed protection for civilians against the effects of hostilities.

[1813] Fleck, "The Law of Non-International Armed Conflicts", at 190.
[1814] Sassoli, "Targeting: the Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", at 205.
[1815] Ibid.
[1816] Id. at 205-6.

In these last two chapters we have seen that the principles of proportionality and precautions are closely related. Precautionary measures have to be taken in order to limit anticipated collateral damage to civilians and civilian objects. An attack has to be cancelled or suspended if it may be expected to cause incidental damage that would be excessive in relation to the concrete and direct military advantage anticipated. Precautions must be taken regarding the manner in which the strike is going to be conducted. This includes the choice of weapons used to carry out the attack. When there is a choice of different methods or means of attack, the attacker is obliged to choose the way that would avoid or minimize collateral damage. Ultimately, the failure to take precautions will determine the outcome of the calculation as to whether an attack complied with the principle of proportionality. The next Chapter will be devoted to a discussion on whether or not international courts and tribunals dealt with the principle of proportionality, and how they did so.

Chapter 12:

Prohibition of disproportionate attacks

Introduction

After having reviewed the principle of proportionality and its attached precautionary measures, we will deal in this chapter with the question of whether, and if so when, an ostensible violation of the principle of proportionality constitutes a war crime. Disproportionate attacks are indiscriminate attacks which violate the principle of proportionality. An attack can be disproportionate, and therefore unlawful, even if the attack was directed at a concrete military objective. Criminal responsibility will arise from the fact that it is expected that excessive collateral damage to civilians and civilian objects will result from attacks against a legitimate military objective. However, the question of what constitutes incidental damage is one of the most controversial issues when assessing the legality of possible disproportionate attacks.[1817] The difficulty lies in the fact that objective standards for the appraisal of the intended military advantage and the expected collateral damage are nearly non-existent.[1818] Furthermore, 'it is very difficult to apply the principle of proportionality in retrospect: to prosecute alleged violations of the principle and to judge whether in certain operations the principle was, or was not, adhered to.'[1819] What will make a disproportionate military action a war crime of disproportionate attack is the criminal intent. This is, as we will see, the most difficult aspect to prove in a court-room.

As we have seen in the preceding chapters, the object and purpose of international humanitarian law is to protect persons who are not or no longer taking part in

[1817] Kleffner, J.K. & Boutruche, T., "The Use of Depleted Uranium and the Principle of Distinction, Proportionality and Precautions", in *Depleted Uranium Weapons and International Law: a precautionary approach*, (Avril McDonald, et al. eds., 2008).
[1818] Oeter, "Methods and Means of Combat", at 120.
[1819] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 8.

hostilities. It is a body of *preventive* law that is normally applied on the battlefield by persons that are not lawyers. This body of law 'defines when those rules are violated by a state or an armed group.'[1820] When an IHL norm is violated, this engages the state responsibility for unlawful military operations. This branch of law was therefore not originally created for appraising the individual criminal responsibility of soldiers and commanders, but to guide states in their conduct of hostilities. This is very well illustrated by the abstraction and subjectivity of notions such as 'military necessity', 'excessive damage', and 'military advantage'.[1821] These are notions that are difficult to apply during combat. In has been argued that 'the fact that they are hard both to qualify and quantify provides the flexibility required to enable their use during hostilities.'[1822] However, to apply them before a court of law is an extremely difficult task. First, because of the difficulties of gathering reliable evidence from the field, due to the secrecy of the targeting process, and second, because the identification of intent, in order to prove the perpetrator guilty, is one of the more difficult tasks the prosecution has to comply with. The evidence needed in order to prove the *mens rea* of the accused includes 'knowledge of the orders given, the weapons used, the strategic goals of each party, the information available to them at that time and the decision-making process within the military.'[1823] All of this makes the prosecution of violations during the conduct of hostilities extremely arduous, especially for violations of the principle of proportionality. One of the main problems of the international criminal law approach to the crime of disproportionate attack is that 'the analysis must be taken in a prospective manner from the perspective of the commander at the time of the attack.'[1824] And this means that an alleged disproportionate attack has to be analysed from the subjective perspective of the commander. It is necessary to know whether he expected, or should have expected, excessive civilian casualties relative to the anticipated military advantage based on the

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[1820] Sassoli, "Humanitarian Law and International Criminal Law", at 112.
[1821] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 929.
[1822] Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials*. at 9.
[1823] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 930.
[1824] *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, at 5.

information available at the time of the attack decision. These are difficult answers to get in a court room.

Although Additional Protocol II does not explicitly incorporate the principle of proportionality, it appears that the ICTY has regarded the principle as applying to all contexts, regardless of the nature of the armed conflict, and that disproportionate attacks would therefore be regarded as criminal whether committed in the context of international or internal armed conflicts.[1825] However, 'the prohibition on causing disproportionate injury, death or damage is very difficult to apply before a court of law, as it implies a value-based judgement.'[1826] Although the Statute of the ICTY does not address proportionality *per se*, a case law has developed around the notion of disproportionate attack, based on what the Tribunal has deemed to be grave violations of accepted customary international humanitarian law. However, when dealing with the principle of proportionality, the ICTY has until quite recently merely set out the law. No evidentiary findings had been made.[1827]

Disproportionate attacks as direct attacks in the ICTY case law

Accordingly, the ICTY has not examined serious violations of the principle of proportionality, as a separate crime, but as 'mere evidence of attacks directed against civilians or civilian objects.'[1828] Indeed, it can be argued that the general prohibition against attacks on civilians and civilian objects subsumes other categories of prohibited attacks, in particular 'disproportionate attacks' and 'indiscriminate attacks' the conduct of which may entail criminal consequences for those involved. Having already dealt with direct and indiscriminate attacks, this chapter will deal with disproportionate attacks.

[1825] *See Galic* Trial Judgment, para. 58-60.

[1826] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 921.

[1827] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 2. The *Gotovina* case constitutes the unique application of the principle of proportionality by the ICTY to date. See further below for a discussion of this case.

[1828] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 157.

The ICTY Trial Chambers understood from the very beginning that acts of violence that cause excessive incidental damage to civilians or civilian objects could be in fact considered as attacks directed against civilians or civilian objects. But in order to show that a civilian or a civilian object was targeted, the possibility of that person or object being 'collateral damage' justified by military necessity must be excluded.[1829] As the assessment of what constitutes collateral damage is part of the proportionality equation, the ICTY chambers proceeded with some proportionality assessments.[1830]

Bartels has shown that the ICTY has addressed the principle of proportionality in three different ways:

> 'Firstly, those cases where a legal analysis of what constitutes the principle was made but, due to the facts of the case, the principle was not actually applied to the evidence.[1831] Secondly, the cases that make reference to disproportionate or excessive use of force, but contain no explanation of how the chamber arrived at this conclusion, or, where a finding was made, do not appear to have appropriately balanced the expected military advantage against the expected collateral damage. Lastly, the *Gotovina* case, in which the Trial Chamber applied the principle to the evidence, and in which a form of evaluation of the balancing test was carried out, but which judgment was then quashed by the Appeals Chamber.'[1832]

The *Tadic* case was the first to recognize the customary character of the different manifestations of the principle of distinction, including the crime of launching disproportionate attacks,[1833] and that their violation entails individual criminal responsibility.[1834] However, the subsequent ICTY case law has not found that launching disproportionate attacks was a behaviour criminalized as such by international criminal law and consequently considered these attacks as evidence of

[1829] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 919. See also Fenrick, "The Prosecution of Unlawful Atack Cases Before the ICTY", at 157.
[1830] See for instance *Galic* Trial Judgment, para 60.
[1831] Here Bartels means that the balancing test between the military advantage and the expected incidental damage has not been considered by the judges in the discussion of the concerning attack.
[1832] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 16-17.
[1833] *Tadic* Interlocutory Appeal, paras 111, 118, 126, 127, 134.
[1834] *Ibid*, paras 129 and 134.

the crime of directing attack against civilians or civilian objects. Indeed, the ICTY placing an extensive emphasis on the crime of intentionally directing attacks against the civilian population or individual civilians is related to the fact that the Second Additional Protocol does not allow, as we have seen, the definitive conclusion that attacks directed at military objectives which cause disproportionate incidental civilian damage are serious violations of the Protocol in the context of internal armed conflict. Accordingly, doubts were raised also as to the consideration of their existence as customary international law.

This is why after *Tadic* the consecutive case law has been notably more cautious in this regard. For instance, in the *Blaskic* case, disproportionate attacks have not been considered as a separate crime, but have been dealt with under the crime of attacks directed against civilians or civilian objects. Indeed, the proportionality analysis of the attack against Donja Veceriska was carried out for the purpose of determining whether the attack had been directed against civilians.[1835] In practice, the criteria for disproportionate attack have been dealt with in a similar manner as the criteria of indiscriminate attack, as indicia of direct attack against civilians.

In the *Galic* case, the Trial Chamber discussed the principle of proportionality in relation to 23 different incidents.[1836] However, the Trial Chamber used the incidents to prove that there was an ongoing 'campaign of sniping and shelling against civilians'[1837] rather than prosecuting the accused for violation of the principle of proportionality *per se.* In this case, the ICTY stated and clarified the principle of proportionality but did not apply it to the facts. The Chamber found that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements: '1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population. 2. The offender *wilfully* made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.'[1838] It

[1835] *Blaskic* Trial Judgment, para 543.
[1836] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 179.
[1837] *Galic* Trial Judgment, para 594.
[1838] *Galic* Trial Judgement, para. 56.

then considered that certain apparently disproportionate attacks *may* give rise to the inference that civilians were actually the object of attack and that this is to be determined on a case by case basis in light of the available evidence.[1839]

In the *Strugar* case, the Appeals Chamber was more cautious, stating that the Trial Chamber did not pronounce on the legal status of the provisions of the First and Second Additional Protocols as they did not form the basis of the charges, but 'rather examined whether the *principles contained in* the relevant provisions of the Additional Protocols have attained the status of customary international law.'[1840] In doing so, it took into account the developments that happened in the *Blaskic*, *Galic* and *Kordic* Appeals.

Accordingly, despite the fact that one might have expected the Tribunal to scrutinize the rule of proportionality in the *Strugar* case, which concerned the shelling of the old town of Dubrovnik on the 6 December 1991, the Trial Chamber did not find it necessary to determine whether attacks incidentally causing excessive civilian damage may qualify, in the circumstances at hand, as attacks directed against civilians or civilian objects.[1841] After rejecting the defence claim that the old town was a military objective because of the absence of Croatian artillery positions in it or in its surroundings,[1842] the Chamber found that 'there were no military objectives in the Old Town on 6 December 1991'[1843] and considered, rightly, that there was no need to deal with the question of proportionality. However, the Chamber underscored that, had the old town been a military objective, it would have been necessary to carry out a proportionality analysis between the incidental civilian damage caused to the old town and the military advantage anticipated from the attack before finding the accused criminally liable for the destruction of the old town.[1844] Accordingly, despite not addressing the question of proportionality in detail, the Trial Chamber reaffirmed its former position that attacks incidentally causing excessive damage can qualify as attacks directed against civilians or civilian objects. Furthermore, the *Strugar* case

[1839] Ibid, para. 60.
[1840] *Strugar* Interlocutory Appeal, paras 9 (emphasis added). See also paras. 10 and 13.
[1841] *Strugar* Trial Judgment, para 281.
[1842] *Ibid*, para 214.
[1843] *Ibid*, para 295.
[1844] *Ibid*, paras. 194-195 and 214.

determined that 'even a small number of civilian casualties and damage to protected civilian objects caused in pursuit of high value military targets can be disproportionate, even when unavoidable given the accuracy and blast radius of the shells.'[1845] Among other charges, the Appeals Chamber condemned *Strugar* for failing, as a commander, to take the necessary and reasonable measures to have stopped unlawful attacks on civilian objects and destruction done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works and science, having knowledge of the high risks of these acts.[1846]

In the *Dordevic* case, the ICTY made reference to an excessive or disproportionate use of force but did not explain how it arrived at this conclusion. More specifically, the Trial Chamber did not apply the test of balancing civilian casualties and damage to civilian objects against the military advantage anticipated. Indeed, the Chamber was of the view that 'the evidence weighs convincingly against a finding that these attacks were either proportionate or militarily necessary, even in those areas where there was a KLA presence.'[1847] Accordingly, the *Dordevic* case is of little help in better understanding the application of the principle of proportionality.

In the *Galic* case, the ICTY Trial Chamber applied the principle of proportionality to an incident related to a football match in Sarajevo. The scene encompassed civilians and Bosnian Muslim forces that were intermingled together. No one was directly participating in hostilities. The fighters themselves remained legitimate targets, but the circumstances were such that it was not possible to see who was and who was not a legitimate military objective. The other armed party, the Bosnian-Serb forces, were not able to distinguish between civilians and fighters due to the means that they were using[1848] and due to the fact that they could not see the area that was targeted.[1849] Accordingly, Bartels rightly argues that the Trial Chamber wrongly applied the criteria of disproportionate attack as this type of situation would be covered by the

[1845] Vallentgoed, "The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Against Buil-up Areas", at 31.
[1846] *Strugar* Appeal Judgment, paras 297-310.
[1847] *Dordevic* case, Trial Judgment, para 2065.
[1848] *Galic* Trial Judgment, para 377.
[1849] *Ibid*, para 387.

charge of indiscriminate attack.[1850]

However, the Trial Chamber applied to this situation the law related to the principle of proportionality. It held that

> 'had the SRK troops been informed of this gathering and of the presence of the ABiH soldiers there, and had (they) intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage.'[1851]

So again, here the Trial Chamber stated the principle of proportionality, but did not apply it. Furthermore, it used the findings on disproportionate attack to prove that under certain circumstances, certain manifestly disproportionate attacks may give rise to the inference that civilians were actually the object of attack. In *Galic*, the Appeals Chamber rightly clarified that one cannot 'conflate' the crime of attacks directed against civilians with disproportionate attacks.[1852] However, it further made clear that *Galic* was judged for the offence of direct attacks against the civilian population, and that no reference was made to indiscriminate or disproportionate attacks as the basis for conviction.[1853] At the same time, the Appeals Chamber acknowledged that the Trial Chamber's finding that certain manifestly disproportionate attacks may, depending on the circumstances of the case, give rise to the inference that civilians were actually the object of attack is a 'justified pronouncement on the evidentiary effect of certain findings, not a conflation of different crimes.'[1854] These findings depend on factual circumstances which could for instance include the 'means and methods used in the course of attack, (…) the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary

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[1850] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 20.
[1851] *Galic* Trial Chamber Judgment, para 387.
[1852] *Galic* Appeal Judgment, para 132.
[1853] *Ibid,* para. 134.
[1854] *Ibid,* para. 133.

requirements of the laws of war.'[1855]

Accordingly, the Appeals Chamber decisions in *Strugar*[1856] and in *Galic*[1857] were more cautious in their approach. While attesting that already at the time of the conflict in the former Yugoslavia international customary law did impose criminal responsibility for directing attacks against civilians or civilian objects, the judges did not deal expressly with the question of 'whether criminal responsibility also arises pursuant to international custom from grave violations of the proportionality rule in any type of armed conflict.'[1858] Accordingly, these decisions confirmed that directing attacks against civilians or civilian objects was a crime under international customary law at the moment of the conflict in the former Yugoslavia, but do not cover the question whether launching attacks against military objectives which incidentally cause excessive civilian damage or casualties also gives rise to criminal liability under international customary law.

Contrary to indiscriminate attacks, that can give rise to criminal responsibility because they amount to attacks directed at civilians or civilian objects, the consideration of attacks directed against military objectives that incidentally cause excessive civilian damage should ideally not be used as evidence of the crime of directing attack against civilians or civilian objects. Such treatment would

> 'disregard the difference between the serious violations of the two most important manifestations of the principle of distinction: (i) failure of the parties to the conflict to abide by their duty to direct their attacks against military objectives and by the consequent prohibition to make civilians or civilian objects the object of attack, and (ii) failure of the parties to the conflict to abide by the prohibition to launch an attack against military objectives which may be expected to cause incidental civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated.'[1859]

[1855] *Galic* Appeal Judgment, para 132.
[1856] *Strugar* Interlocutory Appeal, paras. 9, 10 and 13.
[1857] *Galic* Appeal Judgment, paras 87, 132-34.
[1858] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 22.
[1859] Id. at 78-79.

Accordingly, Olasolo has submitted that, 'as it is the case in article 8(2)(b)(iv) RS, the ICTY's case law should have considered serious violations of the principle of proportionality as a crime unto itself.'[1860] Indeed, as we have seen in the preceding chapters related to unlawful attacks,[1861] they are different acts. In direct attacks, the perpetrator is actually trying to harm civilians. This is his objective. In indiscriminate attacks, the injury to civilians is merely a matter of no concern to the perpetrator. An indiscriminate attack will be committed when there is a lack of *focus* on a legitimate military objective or when the methods and means being used lack the *capability* for the principle of distinction to be respected. And lastly, the actual *effects* of such attacks should be evaluated by reference to the requirement of proportionality.

The third and last way the ICTY addressed the principle of proportionality was in the *Gotovina* case. In this case, the ICTY finally applied the principle of proportionality to the evidence and carried out the balancing test above mentioned. It is the first ever case that has dealt with the principle of proportionality. The Trial Chamber was tasked with assessing the legality of the artillery attacks on the Four Towns of Knin, Benkovac, Obrovac and Gracac. Ante Gotovina and his co-accused were charged with the shelling of civilians and cruel treatment and unlawful attacks on civilians and civilian objects.[1862]

In this case, the Trial Chamber dealt with the question of proportionality only once, when it considered the attack directed against the residence of Milan Martic, the Croatian Serb President and supreme commander of the SVK forces. However, once again, the Trial Chamber ultimately used the incident to prove that there were unlawful attacks against civilians and civilian objects in Knin. The Trial Chamber 'found that firing at Martic's apartment could disrupt his ability to move, communicate, and command and so offered a definite military advantage, such that

[1860] Id. at 78-79.
[1861] See Chapters 8 and 9.
[1862] *Prosecutor v. Gotovina, Cermak and Markac* (Appeal Judgment) IT-06-90-A (16 November 2012), (hereinafter *Gotovina* Appeal Judgment), para 2. Although the situation in the *Gotovina* case has been characterized as an international armed conflict, the Article 3 of the ICTY Statute charges in this case are 'based on rules applicable in both international and non-international armed conflict.' (*Prosecutor v. Gotovina, Cermak and Markac* (Trial Judgment) IT-06-90-T (15 April 2011), (hereinafter *Gotovina* Trial Judgment) para 1680). We will therefore analyse how this case contributed or not to the clarification of the principle of proportionality.

his residence constituted a military target.'[1863] The Chamber further noted that Martic's apartment was situated in a civilian residential area.[1864]

Then, the Chamber proceeded in the evaluation of the incidental damage. It considered that

> 'Martic's apartment was located in an otherwise civilian apartment building and that both the apartment and the area were in otherwise predominantly civilian residential areas. The Trial Chamber has considered this use of artillery in light of the evidence on the accuracy of artillery weapons reviewed above and the testimony of expert Konings on the blast and fragmentation effects of artillery shells.'[1865]

It further stated that 'at the times of firing, namely between 7:30 and 8 a.m. and in the evening on 4 August 1995, civilians could have reasonably been expected to be present on the streets of Knin near Martic's apartment and in the area.' The Chamber thus concluded that 'firing twelve shells of 130 millimetres at Martic's apartment and an unknown number of shells of the same calibre at the area, from a distance of approximately 25 kilometres, created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects.' Accordingly, the Trial Chamber considered that 'this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martic to have been present.'[1866]

This is the only proportionality analysis of an attack on a legitimate military objective conducted by an international criminal court to date. It has been used as an indicative example to support the Chamber's conclusion that 'the attack was disproportionate and showed that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target on a least three occasions on 4 August 1995.'[1867]

[1863] *Gotovina* Trial Judgment, para 1910.
[1864] Ibid.
[1865] Ibid.
[1866] Ibid.
[1867] Ibid.

Military and academic experts, in a report that was published before the Appeals Chamber's decision, criticized this finding.[1868] It has also been held that the Trial Chamber, when applying the principle of proportionality, did not assign sufficient value to the military advantage to be gained from the attack on a such a high value target as Martic constituted, as the supreme commander of SVK forces.[1869]

However, the Appeals Chamber reversed this finding, like most of the findings of the Trial Chamber. The Appeals Chamber considered that the Trial Chamber's analysis of the attacks on Martic involved a lawful military target, but 'was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.'[1870] And ultimately the Appeals Chamber 'considered this finding, in view of the Trial Chamber's errors with respect to the Impact analysis, of limited value in demonstrating a broader indiscriminate attack on civilians in Knin.'[1871] It was therefore rejected, without any clarification on what should have been a correct proportionality assessment. It is true that the attacks on Martic's house could not, on their own, change the nature of the operation as a whole into an indiscriminate attack. The errors seem to lie with the fact that the Trial Chamber did not apply a proportionality analysis to more strikes.

It is necessary here to recall the uproar that the Appeals Chamber decision created. The Appeals Chamber reversed the Trial Chamber's judgement and acquitted both generals by majority of 3 to 2, with judges Pocar and Agius dissenting very strongly. It is disappointing, as the *Gotovina* judgment had the potential to become the 'Tadic of targeting law'[1872] by clarifying many important issues related to the conduct of hostilities. But by acquitting Gotovina without articulating a new, proper legal standard for testing the facts established in the record, we are left with nothing. Unfortunately, 'the opportunity to clarify the use of the principle of proportionality in

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[1868] See *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, at 10.

[1869] Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm, IT-06-90-A, 13 January 2012, para 24-26.

[1870] *Gotovina* Appeal Judgment, para. 82.

[1871] *Ibid*.

[1872] Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Finding of Unlawful Artillery Attack During Operation Storm, IT-06-90-A, 13 January 2012, para. 2.

international criminal trials was not seized; neither by the Trial Chamber nor by the Appeals Chamber.'[1873]

Judge Agius strongly dissented the Majority finding, which was not based on a concrete assessment of comparative military advantage, and the lack of any findings on resulting damages or casualties.[1874] Judge Agius further explained that the Trial Chamber, without doubting the legitimacy of targeting Martic's residence, 'came to the conclusion that the attack was disproportionate because of the number of shells fired, the kind of artillery used, the distance from where the shells were fired, the location of both residences within a residential area, and the times when the shells were fired.'[1875] In his view, given these findings, 'the Trial Chamber did not necessarily need to tie its finding that the shelling was disproportionate to any findings on resulting damages or casualties.'[1876]

In the same vein, the *Gotovina* case does not help us in its assessment of the comparative military advantage. One of the unresolved questions related to the principle of proportionality that were raised in the Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign was indeed 'what are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?'[1877] The assessment of the weight to give to the relative importance of a target with respect to the anticipated collateral damage is very difficult. Indeed, some targets may have an exceptionally high military value. As explained by Melzer, 'arguably, depending on the circumstance, even the death of a single sniper occupying a decisive tactical position or of a radio operator transmitting targeting data to the approaching air force may justify significant collateral damage.'[1878] However, despite agreeing that belligerents need to have a *marge de manoeuvre* in their targeting moves, we need to be aware that the proportionality equation also entails the consideration of the expected collateral damage. In the latest case law of the ICTY this point seems to be

[1873] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 29.
[1874] Dissenting Opinion of Judge Agius, para. 34.
[1875] Dissenting Opinion of Judge Agius, para. 44.
[1876] Ibid.
[1877] *NATO Report*, para 49.
[1878] Melzer, *Targeted Killing in International Law*, at 363.

disregarded.

In the *Kuperskic Case,* after admitting that IHL left belligerents a wide margin of discretion in the application of the principles of proportionality and precaution, the Trial Chamber argued that 'this is an area where the 'elementary considerations of humanity' (…) should be fully used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law.'[1879] The Chamber further explained that in doing so recourse might be had to the Martens Clause.[1880] The Martens Clause should be used for instance when asserting whether the cumulative effect of attacks should be taken into consideration, a further uncertainty related to the assessment of proportionality. The Trial Chamber held:

> 'As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Article 57 and 58 (or of the corresponding customary rules). However, in cases of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.'[1881]

Sadly, the Appeals Chamber in *Gotovina* seems to have disregarded this decision in its evaluation of the principle of proportionality. The Appeals Chamber in the *Gotovina* case reversed almost all the findings of the Trial Chamber and acquitted *Gotovina* of all charges. However, the judges were deeply divided on several issues

[1879] *Kupreskic* Trial Judgment, para 524.
[1880] *Ibid,* para 525. See also Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts", at p. 81 clarifies that, in order for collateral damage to be excessive, 'such damage need not « shock the conscience » of the world'.
[1881] *Kupreskic* Trial Judgment, para 526.

and Judges Pocar and Agius wrote unusually strong and disdainful dissenting opinions. The Appeals Chamber criticized the Trial Chamber's finding on the attacks on Martic's apartment that had been deemed disproportionate. However, it did not overturn it, nor clarified how the proportionality assessment should have been applied in its opinion. According to the Appeals Chamber, 'the attacks on Martic involved a lawful military target, was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.'[1882] Accordingly, the Majority of the Appeals Chamber, Judges Pocar and Agius dissenting, found that the Trial Chamber's assessment fell short of what is required in terms of the application of a methodology in its proportionality analysis. For instance, the relative value of Martic as a military target was, according to military experts, under-valued by the Trial Chamber.[1883] However, as showed by Bartels, 'in other cases, the Appeals Chambers (and academic and/or military community) did not consider it problematic that the judges did not really quantify, or did not explain how they quantified, a non-legal notion that forms a critical part of the legal assessment.'[1884]

Furthermore, the Appeals Chamber in *Gotovina* found that 'this finding of a disproportionate attack was of limited value in demonstrating a broader indiscriminate attack on civilians in Knin.'[1885] It is true that it was difficult to prove the indiscriminate nature of the operation as a whole on Knin only via the attacks on Martic's house. Maybe the error here was first that the Prosecution raised the issue of proportionality only with respect to Martic's house and secondly that the Trial Chamber did not apply a proportionality analysis to more strikes and thereby missed the opportunity to clarify the concept of disproportionate attacks in international criminal law. On the 16th November 2012, 'more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful consideration of the

[1882] *Gotovina* Trial Judgment, para 82.
[1883] *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, at 10.
[1884] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 28. Referring to the *Galic* and *Dragomir Milosevic* cases in which it was not considered problematic that the Trial Chambers, without being experts on the matter, determined whether conducting certain attacks on civilians and civilian objects resulted in the population of Sarajevo experiencing the 'extreme fear' that was be necessary for it to be considered as terrorised.
[1885] *Gotovina* Appeal Judgment, para 82.

trial record and a proper explanation.'[1886] The *Gotovina* judgment will therefore not become the *Tadic* of the conduct of hostilities, as it had the potential to be. However, it must be acknowledged that despite all the above-mentioned drawbacks, the *Gotovina* judgment, by dealing with the question whether launching attacks against military objectives which incidentally cause excessive damage or casualties could give rise to criminal responsibility, confirmed that this crime exists under international customary law.

Regardless of this decision, what the scarce case law on disproportionate attacks shows us is that 'an attack which, on its face, may appear to have been in compliance with the principle of proportionality may give rise to an inference that civilians were in fact being targeted as such (i) because of the manner in which it was carried out or (ii) because of the duration or intensity of the attack.'[1887] Indeed, 'although a single or limited number of attacks on military objectives causing incidental damage to civilians would not amount in principle to "attack on civilians", the cumulative effect of such attacks on military objectives could under certain circumstances render it criminal.'[1888] As we have just seen above, this view was upheld by the Trial Chamber in the *Kupreskic* case,[1889] but was reversed in the *Gotovina* decision by the Appeals Chamber.

It should be stressed that the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia criticized this finding of the *Kupreskic* case, considering that this point constitutes 'progressive statement of the applicable law with regard to the obligation to protect civilians.'[1890] Instead, the Committee considered that 'where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of

[1886] *Gotovina* Appeal Judgment, Judge Pocar Dissenting Opinion, para 14.
[1887] Mettraux, *International crimes and the ad hoc Tribunals,* at 124.
[1888] Id. at 125.
[1889] *Kupreskic* Trial Judgment, para. 526.
[1890] *NATO Report*, para. 52.

the military campaign.'[1891]

The standard of a 'reasonable military commander'

The value judgment inherent in the proportionality analysis is difficult to scrutinize. 'Controversy continues as to whether this judgment is to be evaluated on the basis of a subjective or an objective standard.'[1892] Furthermore, the assignment of the relative values of the proportionality test may differ depending on the background and values of the decision maker. For instance, a human rights lawyer and a combat commander would most likely not assign the same relative values to military advantage and to injury and damage to civilians. Furthermore, 'it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.'[1893] This situation led the NATO Committee to suggest that

> 'the determination of relative values (of military advantage and injury to civilians) must be that of the "reasonable military commander". Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.'[1894]

According to the Committee, 'attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack (as a violation of the laws and customs of war).' [1895]

The standard of reasonableness was been upheld by the Trial Chamber in *Galic*. 'In determining whether an attack was proportionate it is necessary to examine whether a *reasonably* well-informed person in the circumstances of the actual perpetrator, making *reasonable* use of the information available to him or her, could have

[1891] Id. at para. 52.
[1892] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 128.
[1893] *NATO Report*, para 50.
[1894] Ibid.
[1895] Id. at para 28. See further below for a discussion of the *mens rea* of the crime of disproportionate attack.

expected excessive civilian casualties to result from the attack.'[1896] But again, the term 'reasonable' is a highly subjective concept and it is difficult to see how it can help us in the assessment of excessive collateral damage. As stated by Wuerzner, 'in fact, it is mainly this subjectivity that makes it so hard to charge individuals for disproportionate attacks.'[1897]

Disproportionate attacks 'can be likened to attacks on civilians if the perpetrator was aware that this would be the effect of the attack in the ordinary course of events.'[1898] And it is important to remember that 'the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words "expected" and "anticipated".'[1899] These two words, 'expected' and 'anticipated', manifest the requirement that the analysis must be made in a prospective manner from the perspective of the commander at the time of the attack. Furthermore, the definition of proportionality entails the anticipated military advantage to be 'concrete' and 'direct', whereas there is no such limiting word for the expected incidental damage. Thus, the 'expected' incidental damage from an attack is certainly broader than the 'anticipated' military advantage and should be given more weight by the military commander. Bearing in mind these qualifiers, the prospective analysis from the perspective of the commander is the following: 'did the commander expect, or should he have expected, excessive civilian casualties relative to the military advantage he anticipated gaining, based on what he knew at the time of the decision to attack the target?'[1900]

Accordingly, commanders are obligated to make reasonable decisions based on the information available at the time of the attack. The law does not judge their action based only on the outcome of their decision to target a given object. Rather, the decision to launch the attack under consideration needs to be 'objectively reasonable, based on the information available at the time of the decision, including the full range

[1896] *Galic* Trial Chamber Judgment, para 58 (emphasis added).
[1897] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 922.
[1898] *CIHL Study*, Rule 156 at p. 601.
[1899] *Galic* Trial Chamber Judgment, para 58.
[1900] *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, at 8.

of operational execution variables that influence the actual effects of an attack.'[1901] The reasonableness of a commander's decision-making process can be assessed through variables such as the quality and quantity of intelligence (about both enemy and civilian locations), the quality of equipment, the training and capability of crews, the quality of munitions, terrain, timing, weather, fatigue and location of fire support assets.[1902] Ultimately, these relative values of military advantage and civilian damage will be gauged by a 'reasonable military commander', who will estimate and anticipate in good faith the outcome of a given operation. Accordingly, the standard of 'reasonable military commander' constitutes an objective decision making standard that limits arbitrariness in the exercise of the commander's margin of discretion.

Mens rea of the crime of disproportionate attack

Few cases have dealt with the specific and difficult question of the *mens rea* for the crime of disproportionate attack, surely due to the obvious difficulties this exercise entails. The result of the comparison between the anticipated concrete and direct military advantage and the anticipated collateral damage may assist in inferring the intent of the attacker, but what counts is what was in the mind of the decision-maker when the attack was launched.[1903] As with the general prohibition against attacks on civilians and civilian objects, when it comes to the *mens rea,* the Prosecution would have to establish that the allegedly disproportionate attack was launched 'wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.'[1904] In the *Galic* case, the Trial Chamber further affirmed that certain manifestly disproportionate attacks may give rise to the inference that civilians were actually the object of attack, depending on the circumstances of the case.[1905] Such circumstances, which influence the danger incurred by civilians, can 'include the location of the military objective (vicinity of civilian objects), the accuracy of the weapon (its dispersion, range, ammunition used, etc.), the weather conditions (wind or low visibility), the specific nature of the military objective (fuel tanks, main roads,

[1901] See at 6-7.
[1902] Id. at pt. at 13.
[1903] Fenrick, "The Prosecution of Unlawful Attack Cases Before the ICTY", at 175.
[1904] *Galic* Trial Judgment, para. 59. See also para. 54.
[1905] *Ibid*, para 60.

etc.), technical skills of the combatants and so on.'[1906] The same Chamber then clarified that where the intent, or *mens rea*, cannot be proven directly, it may be 'inferred from the nature, manner, timing, frequency and duration of the shelling and sniping of civilians.'[1907]

More specifically, in *Galic*, the Trial Chamber had to face the question of Galic's *mens rea* when he ordered the shelling of the Dobrinje football match of 1 June 1993. In this attack six combatants and five civilians were killed and fifty-five combatants and thirty-two civilians were wounded.[1908] The Trial Chamber elaborated a requirement to assess the proportionality of the result by focusing on the *mens rea* of the perpetrators and the fact that there were civilian casualties. It held that 'although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete advantage anticipated.'[1909] Here the Chamber used the incidental damage as circumstantial evidence that Galic knowingly disregarded the possibility of disproportionate collateral damage.

The NATO Committee, following the trend set by military lawyers of over-emphasizing the role of the *mens rea* in the identification of the crime of disproportionate attacks, ascertained that the *mens rea* for the offence of attacks which cause disproportionate civilian casualties or civilian property damage was intention or recklessness, not simple negligence.[1910] Military experts are of the view that any assessment of the targeting must be based on the commander's intent and whether the decision to launch the attack under consideration was objectively reasonable.[1911] It has for instance been held that 'the Commander does not violate the LOAC when he orders an attack with knowledge that civilians will likely become casualties of the attack, *so long as he does not act with the purpose (conscious*

[1906] Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", at 922.
[1907] *Galic* Trial Judgment, para. 72.
[1908] *Ibid*, para 377.
[1909] *Galic* Trial Judgment, para 383.
[1910] *NATO Report*, para 28.
[1911] See *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, at 6-7.

objective) to cause such casualties.'[1912] This approach unduly amplifies the *mens rea* as a paramount element of the commander's duty toward civilians. If the commander does not 'wish' to cause civilian casualties, he cannot be held responsible for a disproportionate attack. It is submitted that this view is incompatible with the object and purpose of IHL, which is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The better and correct view, in terms of protection of civilians against the effects of hostilities, would be that when the commander's actions show a wanton disregard for civilian lives, a criterion that could be adhered to is that of 'serious criminal negligence', that would suffice to convict an accused for infringement of the principle of proportionality. Cassese has argued that for the crime of disproportionate attacks, knowledge can be a condition of criminal liability. In his view, 'knowledge' must be interpreted to mean 'predictability of the likely consequences of the action' (recklessness or dolus eventualis). Therefore, for disproportionate attack to be regarded as a war crime,

> 'evidence must be produced not only of the intention to launch an attack, for instance an attack on a military objective normally used by civilians, but also the foreseeability that the attack was likely to cause excessive loss of life or injury to civilians or civilian objects. In other instances, international rules require knowledge in the sense of awareness of a circumstance of fact, as part of criminal intent (dolus).'[1913]

Recklessness or dolus eventualis is a lower threshold for the Prosecution to prove. With this approach, *unforeseen* civilians casualties cannot be perceived as intentional direct attacks, but *foreseen* civilian casualties can be.

The Rome Statute and disproportionate attacks

As we know, the Rome Statute contains a list of war crimes far more restricted for internal armed conflicts than for international armed conflicts. Among the important provisions that were not included is the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life to civilians, damage to

[1912] Corn, G.S. & I, L.C.G.P.C., "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens", 47 *Texas International Law Journal* 337, (2012), at 363 (emphasis added).
[1913] Cassese, *International Criminal Law*, at 93.

civilian objects, or widespread, long-term and severe damage to the natural environment. The prohibition of attacks which cause disproportionate incidental civilian damage was however included in the draft Statute but was 'ultimately sacrificed'.[1914]

The war crimes provided for by Article 8(2)(e) of the Rome Statute can only be committed against those persons and objects protected by the specific norm of international humanitarian law whose serious violation amounts to the war crime in question. Under the Rome Statute, the crime of disproportionate attack belongs to this group of war crimes but does not exist for non-international armed conflicts. Contrary to the fundamental object and purpose of the Rome Statute, the drafters took due account of states' concerns and were eager to shield their servicemen as much as possible from being brought to trial for war crimes committed in internal armed conflicts. Is this the end of the story? It is true that this restriction severely limits this war crime. Does that means that no military commander will ever be brought to trial at the ICC for the crime of disproportionate attacks committed in a non-international armed conflict? This is to be sure a highly troubling result.

The question we may therefore ask ourselves is whether a similar approach to that of the ICTY could be adopted. It should be mentioned here that the jurisprudence of the *ad hoc* tribunals is not part of the applicable law under Article 21 of the Rome Statute. The *ad hoc* Tribunals case law can, however, provide guidance if relevant.[1915] However, there are important differences between the definition of the crime of directing attacks against the civilian population or civilian persons in the Rome Statute and in the ICTY case law. First of all, in the context of international armed conflict, an important difference is that neither the Rome Statute nor the Elements of Crimes require any kind of damage result from the attack in order for the crime to have been committed. In the Rome Statute, the crime of disproportionate attack is a crime of mere action, that occurs by simply intentionally launching an attack against a military objective in the knowledge that such attack will have an impact on the

[1914] La Haye, *War Crimes in Internal Armed Conflicts*, at 144.
[1915] See Bitti, G., "Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC", in *The Emerging Practice of the International Criminal Court* (Carsten Stahn & Göran Sluiter eds., 2008), at pp. 296-298.

civilian population or civilian persons which would be clearly excessive in relation to the concrete and direct military advantage.[1916]

But more importantly, as cases coming before the ICC will most likely encompass high levels of violence, another question could be whether, following the approach of the ICTY, an extensive interpretation of the crime of directing attacks against civilians would be possible, in order to include disproportionate attacks. First of all, the Statute's definition of the crime of directing attacks against the civilian population or civilian persons might prevent extending its scope to cover instances of disproportionate attacks, which are characterised by the intention to attack a concrete military objective. The Elements of Crimes for this charge requires that the perpetrator intended the civilian population or civilians to be the object of the attack.[1917] And, as we know, a disproportionate attack is an attack on a lawful military objective which may be expected to cause injury or damage excessive in relation to the concrete and direct overall military advantage anticipated. Accordingly, as submitted by Olasolo, such an approach would

> 'run contrary to one of the most positive elements of the RS for many commentators, namely the separate criminalization, at least in international armed conflicts, of those attacks that most seriously violate the basic core of norms elaborating on the principle of distinction in the conduct of hostilities, thereby avoiding any confusion between: (i) the obligation of the parties to the conflict to direct their attacks against military objectives, and the consequent prohibition to direct attacks against civilians or civilian objects and (ii) the prohibition to launch attacks against military objectives when it may be expected that such attacks will incidentally cause excessive civilian damage in relation to the concrete and direct overall military advantage anticipated.'[1918]

[1916] Concurring, D. Franck, "Attacking civilians", in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, at 143; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary*, at 130.
[1917] *Elements of Crimes*, Article 8(2)(e)(i), point 3.
[1918] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 87.

For these reasons, it seems that the ICTY's case law on this matter cannot be followed.[1919] In addition, under the ICTY Statute, what permitted the jurisdiction of the Tribunal to be expanded was the residual clause contained in Article 3 of the Statute. However, the Rome Statute, via Article 22(2), expressly obliges a strict construction. According to this provision, 'the definition of a crime shall be strictly construed and shall not be extended by analogy.' Furthermore, the same provision makes clear that 'in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' So at first sight, it seems that with a situation in which alleged disproportionate attacks occurred in a non-international armed conflict, the prosecution would only be able to use factual findings of disproportionate use of force as factual evidence to bring charges for 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.'[1920]

Does this mean that launching disproportionate attacks in internal armed conflicts is not criminalized under the Rome Statute, with flagrant disregard for the customary law developments and the case law of international and national tribunals? Olasolo has an interesting theory on this. To bypass this pitfall, he considers that the war crime provision of 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict'[1921] could cover 'incidental damage caused to civilian objects as a result of disproportionate attacks against military objectives, whereas the deaths of or injuries caused to civilians by disproportionate attacks directed against military objectives will be considered a war crime of murder or cruel treatment.'[1922] With this interpretation, any civilian damage arising from disproportionate attacks in internal armed conflicts could still give rise to criminal responsibility under the Rome Statute. However, as we have seen in a preceding chapter,[1923] the prosecution of the crime of 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively

[1919] See Id. 87; Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 34.
[1920] Article 8(2)(e) Rome Statute.
[1921] Article 8(2)(e)(xii) Rome Statute.
[1922] Olasolo, *Unlawful Attacks in Combat Situations From the ICTY Case Law to the Rome Statute*, at 88.
[1923] See Chapter 8, section II.

demanded by the necessities of the conflict' is not an easy task, and is severely handicapped by the reference to the necessities of the conflict.

Up to now, no case has been brought to the Court entailing disproportionate attacks. However, due to the latest development at the United Nations with respect to the status of Palestine, we might see in the coming years the situation of Palestine, for instance, coming before the judges and questions related to disproportionate attacks would most likely arise. Furthermore, questions related to disproportionate attacks might come before the ICC with respect to the situation of Syria if the Security Council finds a consensus to defer the situation to the Court. It would be really disappointing if, for instance, the attacks committed by the Syrian armed forces against rebels, which caused enormous civilian casualties and damages in the middle of cities, fall outside the ambit of Article 8.

A second solution that could constitute a last safety net could be to prosecute those acts via Article 8(2)(c)(i) of the Rome Statute, under the charge of murder.[1924] However, in my view, this solution, albeit being better than nothing, cannot encapsulate the reality and extent of attacks such as in Syria, where the government is launching operations which cause immense amount of civilian casualties. To prosecute Bachar el Asad for murder would seem in my opinion totally derisory, as it does not bear the same psychological weight.

Conclusion

Disproportionate attack is one of the most difficult offences to prosecute in international humanitarian law. One of the main problems of the international criminal law approach to the crime of disproportionate attack is the necessarily prospective manner of the analysis undertaken and the fact that it has to be analysed from the subjective perspective of the commander. The *Gotovina* case, albeit not the long awaited *Tadic* of the targeting law, was the first case to confirm that launching attacks against military objectives which incidentally cause excessive civilian damage

[1924] Article 8(2)(c)(i).

or casualties could potentially give rise to criminal liability under international customary law.

When it comes to the International Criminal Court, in a case qualifying as a non-international armed conflict and involving alleged crimes committed during the conduct of hostilities, the Prosecution will not be able to bring charges for disproportionate attack as a war crime *per se.* Cassese has called it questionable to have excluded recklessness as a culpable *mens rea* under the Statute for war crimes, in breach of current international law that allows for it. 'Persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC.'[1925] So in this respect, the Rome Statute marks a step backwards with respect to *lex lata* and creates a loophole. This is one more proof, in my opinion, of the shielding of the military by the drafters of the Statute.

[1925] Cassese, *International Criminal Law*, at 93.

Chapter 13:

Loss of Civilian Protection

Introduction

We have seen that uninvolved civilians are entitled to protection from direct attack. However, they are still liable to suffer from lawful collateral damage, despite being also protected from indiscriminate and disproportionate attacks. The thin remaining protective veil civilians are supposed to enjoy from direct attack is removed, as we will see, as soon as they are considered to participate directly in hostilities. This Chapter will discuss this question of loss of civilian protection.

Civilians are protected against direct attacks unless and for such time as they do not directly participate in hostilities. So in addition to the distinction between civilians and members of the state armed forces and fighters of organized armed groups, a second distinction needs to be drawn, namely between uninvolved civilians and civilians who take a direct part in hostilities. Indeed, it is necessary to understand the limit of the protection civilians are supposed to enjoy against direct attacks. Accordingly, the question is the following: when does a civilian participate directly in hostilities and consequently lose his immunity? The purpose of the present Chapter is to identify the criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities, thereby leading to the loss of protection for a particular civilian engaged in such action.

The concept of 'direct participation in hostilities' has not been defined in any relevant treaties and there is no clear interpretation emerging from state practice or international jurisprudence. This has give rise to an extensive number of discussions and debates. Indeed, recent internal armed conflicts illustrate the present need for a clear distinction of the different categories of persons and a yardstick for the grey

areas. Suffice here to think about situations such as those in which 'members of the Taliban do not dissociate themselves from civilians by their clothing; the Hamas is supported throughout the territories by civilians who sometimes hide fighters; in Iraq, a child standing by the road can suddenly pull a gun; or in Colombia, farmers by day become *guerrilleros* by night.'[1926] We can also think of situations such as in Uganda/DRC where the LRA is moving around with a cohort of sexual slaves and cooks, very often children. Accordingly, we can fully understand the dire need for clarification in such situations, among many others. But as we have seen, these kinds of situations illustrate the very essence of non-international armed conflicts, where the non-state party is intermingled with civilians, lives with them, exploits them and upon which their very survival depends. Civilians and organized armed groups in a non-international armed conflicts are like 'fish in the water.' This is a reality from which we cannot escape.

The result is that, more often than not, uninvolved civilians find themselves in those situations with no other choice than to live within this reality. They are trapped between the different belligerents. States fighting insurgencies have the tendency to consider that civilians who are helping the guerrillas are in a way collaborating with them, and therefore do not deserve any protection. Members of organized armed groups will have the same suspicions and reactions with respect to civilians collaborating with the government. The situation is so entrenched, that it is difficult to see anything clearly. This is why it is all the more important to find a way to protect uninvolved civilians from the effects of armed violence. And in order to do so, we need to clarify what exactly non-involvement in the hostilities means.

As we have seen above, under treaty and customary IHL applicable to internal armed conflicts, civilians enjoy protection from attack 'unless and for such time as they take a direct part in hostilities'.[1927] Treaty IHL does not define direct participation in hostilities, and neither does a clear interpretation of the concept emerge from state practice or international jurisprudence.[1928] The notion of taking a 'direct'[1929] part in

[1926] Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century*, at 36.
[1927] Article 13(3) Additional Protocol II; Customary International Humanitarian Law, Rule 6; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, at 389.
[1928] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 41.

hostilities was up until recently considered to be synonymous with the notion of taking an 'active'[1930] part in hostilities.[1931] However, in its first judgment ever, the Trial Chamber of the International Criminal Court ascertained that 'active participation' was not the same as 'direct participation. It stated that

> 'The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Convention) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word "direct".'[1932]

Ultimately, the Trial Chamber did not go as far as concluding that girls used as sex slaves were considered as actively participating in hostilities, but it did not pronounce on the matter.[1933] It did, however, broaden the scope of active participation to include acts normally considered as indirect participation. For instance, it considered that 'the boys or girls who are involved in a myriad of roles that support the combatants', such as 'finding and/or acquiring food', were actively participating in hostilities.[1934] It is to be hoped that this erroneous reasoning will be corrected at the Appeals Chamber, as it is legally wrong.[1935] Accordingly, it is submitted here that in line with doctrine and the *pre*-Lubanga case law, the better view is to consider 'active' and 'direct' participation in hostilities as synonymous, and antonymous of 'indirect' participation.

[1929] Article 13(3) AP II.
[1930] Common Article 3(1).
[1931] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 43. See also Schmitt, et al., *The San Remo Manual on the Law of Non-International Armed Conflict, with Commentary*, at 4; ICTR See also *Akayesu* Trial Judgment, para 629; *Fofana* Trial Judgment, para 131; *Juan Carlos Abella v Argentina*, Case 11.137, OEA/Ser.L/V/II.98, doc. 6 rev, 13 April 1998, para 176. We will therefore use these two terms interchangeably.
[1932] *Lubanga* Trial Judgment, para 627.
[1933] Ibid, paras 629-630.
[1934] Ibid, para 628.
[1935] For an explanation of this odd finding, see Bartels, "Discrepancies between international humanitarian law on the battlefield and in the courtroom: the challenges of applying international humanitarian law during international criminal trials", at 25-28.

In addition, it is necessary to clarify that the mere action of directly participating in hostilities is not itself unlawful under international law, nor does it constitute a crime under international criminal law. However, it can be an offence under domestic law.

The Interpretative Guidance

Despite the importance of the circumstances surrounding each case, attention should be focused on the fact that the notion of direct participation in hostilities 'remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of IHL.'[1936]

Types of Acts Constituting Direct Participation in Hostilities

The ICRC Guidance asserts that 'the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.'[1937] This notion comprises two elements, namely 'hostilities' and 'participation'. While the concept of 'hostilities' refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy, 'participation' in hostilities refers to the (individual) involvement of a person in these hostilities.[1938] Accordingly, the notion of direct participation does not refer to a person's status, function or affiliation, but to his or her engagement in specific hostile acts. 'Whether individuals directly participate in hostilities on a spontaneous, sporadic, or unorganized basis or as part of a continuous function assumed for an organized armed group belonging to a party to the conflict may be decisive for their status as civilians, but has no influence on the scope of conduct that constitutes direct participation in hostilities.'[1939] The notion of direct participation is based on *conduct* and not on *status.*

[1936] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 42.
[1937] Id. at 43.
[1938] See Ibid with attached references.
[1939]Id. at 44.

It has been argued that where civilians engage in hostile acts on a persistently recurrent basis, one approach would be to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the future.[1940] However, in accordance with the object and purpose of IHL, the 'concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts.'[1941] Indeed, any extension of the concept beyond specific acts 'would blur the distinction made in IHL between *temporary, activity based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).'[1942]

Guidance can also be discerned with respect to specific acts. First of all, it is extremely important and necessary to clarify, and this is well accepted, that 'support for, or participation in, the war effort does not constitute taking a direct part in hostilities.'[1943] In addition, it is also accepted that expressing sympathy for the cause of one of the parties does not constitute taking a direct part in hostilities.[1944] We can find guidance with respect to specific acts constituting direct participation in hostilities in the jurisprudence of international courts and tribunals. These organs, due to the difficulties attached to the definition of this concept, have considered it on a case-by-case basis.[1945]

Rogers considers that 'taking a direct part in hostilities' should be narrowly construed both in terms of the activity and its duration as otherwise civilian protection would be placed severely at risk. He has provided a list of civilian activities that he considers to constitute direct participation in hostilities.[1946] He considers that attacking or trying to capture members of the enemy armed forces; attacking or trying to capture the weapons, equipment or locations of members of the enemy armed forces; laying

[1940] See for instance *Public Committee against Torture*, para 39. See further below for an analysis of the temporal scope of the notion of direct participation in hostilities.
[1941] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 45.
[1942] Ibid.
[1943] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 619; Rogers, *Law on the battlefield*, at 12.
[1944] See ICTY, *Strugar* Appeal Judgment, para 56.
[1945] ICTY, *Tadic* Trial Judgment, para 616; *Strugar* Appeal Judgment, para 179; *Lubanga* Trial Judgment, para 628.
[1946] See generally Rogers, *Law on the battlefield*, at 14-15.

mines, planting or detonating bombs and sabotaging military lines of communication, including when deploying to or recovering from places where the above-mentioned activities were carried out, would constitute direct participation in hostilities, and civilian protection would therefore be lost for the duration of these activities. With respect to the situation of becoming a member of a guerrilla group or armed faction that is involved in attacks against enemy armed forces and having combat, command or operational-planning function in that group, he considers that civilian protection would be lost as long as participation in the activities of the group continued. He then refers to borderline cases such as the actions of throwing petrol bombs or stones at enemy military patrols, situations in which he considers soldiers would, at the very least, have the right to use force in self-defence. With respect to the situation where civilians are acting as armed guards at military installations, he is of the view that the protection would be lost only if the civilian guards tried by force to prevent attacks on, or attempts to capture, the military installation by members of the opposing armed forces. He then mentions the case of people collecting weapons on behalf of a party to the conflict, action that would not result in loss of protection, though members of the opposing armed forces would be entitled to prevent them doing so, by force if necessary. He further explains that the civilians involved in this action would also run the risk of being mistaken for combatants.

Rogers then proceeds with a list of actions that would *not* result, in his opinion, in a loss of protection. They are the following: carrying and using small arms for the purpose of defending themselves or their families against banditry, rape and pillage; driving ammunition trucks to supply enemy armed forces; hiding weapons on behalf of a party to the conflict; providing the armed forces with technical assistance in the maintenance of weapons systems or military transportation; providing assistance in the gathering and processing of intelligence data, for example, assessing aerial photography for likely targets; working in scientific laboratories developing new weapons; working in depots and canteens providing food and clothing for the armed forces; working as a civilian official in the Ministry of Defence; working in factories producing weapons platforms, weapons and ammunitions; working in factories producing components that directly assist the enemy's war effort and working in commercial institutions that indirectly support the war effect by financing the government through taxation. All these actions would not result in forfeiture of

civilian protection against direct attack, although the trucks, caches, workshops and installations in question would constitute legitimate targets. Accordingly, the civilians concerned run the risk of death or injury resulting from attacks on those targets.[1947]

I would like to briefly go back on Rogers argument that the action of throwing stones at enemy military patrols are situations in which soldiers would, at the very least, have the right to use force in self-defence. First here it is necessary to mention the fact that during the Experts meeting, this action was held not to constitute 'direct participation in hostilities' by the majority of the experts.[1948] Secondly, according the Part V of the ICRC Interpretive Guidance, the answer depends on the context and on the exact factual situation and will, in my opinion, hinge on the third element identified by the ICRC which is the "belligerent nexus".[1949] Have the stones been thrown in support of one party and to the detriment of another? If we take the situation in the Occupied Territories in Palestine, most of the stone throwers are kids. Therefore, as asserted by McDonald, 'the presumption vis-à-vis every minor should be that they are not direct participants unless there is a preponderance of evidence to the contrary (which the use of weapon could signify).'[1950] Furthermore, the type of weapon, a stone, should be taken into account and in the likelihood of a response by the armed forces, this response needs to be absolutely proportionate and cannot involve the use of live ammunitions.

Constitutive elements of the notion of direct participation in hostilities

In order to shed some light on this obscure notion, the ICRC Guidance established a test whereby three constitutive elements must meet cumulatively in order for a specific act to qualify as direct participation in hostilities.[1951]

[1947] See Rogers, *Law on the battlefield*, at 14-15; for a similar listing, see also *Strugar* Appeal Judgment, para 177; Sivakumaran, *The Law of Non-International Armed Conflict*, at 364.

[1948] Expert Meeting of 25 - 26 October, 2004, Direct Participation in Hostilities under International Humanitarian Law, Background paper, available here: http://www.icrc.org/eng/assets/files/other/2004-03-background-doc-dph-icrc.pdf at p. 7.

[1949] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 46ff.

[1950] McDonald, "The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation in Hostilities".

[1951] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Recommendation V, at 46.

The first element is that a certain *threshold of harm* must be likely to result from the relevant act. 'The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.'[1952] The Commentary further explains that 'the qualification of an act as direct participation does not require the *materialization* of harm reaching the threshold but merely the objective *likelihood* that the act will result in such harm.'[1953] This 'likely' harm must adversely affect the military operations or military capacity of a party to the conflict,[1954] or inflict 'death, injury or destruction on persons or objects protected against attack'.[1955] In both cases, acts reaching the required threshold of harm would amount to direct participation in hostilities only if they satisfy the other two requirements, namely direct causation and belligerent nexus. According to the ICRC, the acts reaching the threshold of harm might include the following:

> 'killing or wounding military personnel, damaging military objects, or interfering with military deployments, logistics or communication. Clearing mines placed by an adversary, interference with military computed networks and transmitting tactical targeting information for an attack are also examples of acts meeting the threshold of harm. The threshold of harm can also be met by attacks directed against civilians, civilian objects or military hospitals, all of which are entitled to protection against direct attack. For example, the sniper attacks on civilians in Sarajevo during the conflict in the former Yugoslavia would meet the threshold.'[1956]

The second constitutive element is that 'there must be a *direct causal link* between the act and the harm.[1957] Phrased differently, the immediate consequence of the act should be 'the harm done to the enemy at the time and the place where the activity

[1952] Id. at 41, Recommendation V.1.
[1953] Id. at 47 (emphasis original).
[1954] Ibid.
[1955] Id. at 49.
[1956] Fenrick, W.J., "ICRC Guidance on Direct Participation in Hostilities", 12 *Yearbook of International Humanitarian Law*, (2009), at 293.
[1957] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 51-55. For an older statement to similar effect, see Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 1453.

takes place.'[1958] A 'useful working test is thus to assess the criticality of the act to the direct application of violence against the enemy.'[1959] With this criterion, the Guidance thus distinguishes the mere action of direct participation in hostilities from 'indirect' participation. According to the Guidance[1960], indirect participation generally comprises the general support of the war effort[1961] and participation in war-sustaining activities.[1962] Fenrick has criticized the fact that the Guidance provided this criterion with concrete examples. According to him, these examples of categories of excluded persons will create substantial difficulties for military IHL experts, especially with respect to the examples of those involved in recruitment and training of personnel and those involved in the assembly or storage of improvised devices (IEDs). In his opinion, persons involved in such activities are likely to be considered particularly important targets and he doubts that attacks on such persons should be regarded as unlawful. For him it is

> 'counter-productive to conclude that recruiters and trainers, because they did not meet the direct causation requirement, would not be considered to be engaging in DPH. Similarly, those involved in the production and storage of IEDs might better be regarded as belonging in the same category as those providing tactical intelligence instead of equating them with workers in munitions factories.'[1963]

However, I disagree on this. Persons involved in the assembly or storage of IEDs cannot be considered to be directly participating in hostilities, first and foremost because these actions do not cause harm directly, and therefore do not fulfil the second criteria for an act to constitute direct participation in hostilities. Furthermore, in non-international armed conflicts these actions are often conducted in urban

[1958] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 516. See also Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", at 712.
[1959] Sivakumaran, *The Law of Non-International Armed Conflict*, at 363.
[1960] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 51-52.
[1961] The general war effort is considered to include activities objectively contributing to the military defeat of the adversary, such as design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations.
[1962] War sustaining activities would include political, economic or media activities supporting the general war effort, such as political propaganda, financial transactions, production of agricultural or non-military industrial goods.
[1963] Fenrick, "ICRC Guidance on Direct Participation in Hostilities", at 293.

settings, within civilian houses in which families often have no other choice than to collaborate with the organized armed group,[1964] if they do not want to suffer reprisals. Accordingly, to consider persons involved in the assembly or storage of IEDs as directly participating in hostilities would make uninvolved civilians more likely to fall victim to collateral damage. With respect to the protection of civilians against the effects of hostilities, such an approach should not be accepted. Furthermore, as we will see in Chapter 14, this situation does not mean that the state armed forces are left with no solution.

Despite the criticism from the military community, the Guidance does take into account the complexity of military operations. It is even argued that, in establishing the concept of *continuous combat function*, it takes military considerations a bit too much into account to the detriment of the protection of uninvolved civilians.[1965] Indeed, 'it regards conduct which causes harm in conjunction with other acts, such as target identification and marking, or the analysis of tactical intelligence, as satisfying the threshold of harm.'[1966] In these circumstances, the Guidance gives us two selected examples, one on the action of driving an ammunition truck and the other on so-called voluntary human shields. With respect to the first example, the Guidance ascertains that a civilian delivering ammunition at the front line would certainly have to be considered as directly participating in hostilities. However, the same civilian transporting ammunitions 'from a factory to a port for further shipping to a storehouse in a conflict zone'[1967] would not be considered as directly participating in hostilities, as this action is too remote from the use of that ammunition on the battlefield. However, the Guidance specifies that the ammunition truck would still constitute a military objective in these circumstances, and accordingly, the potential death of the driver should be taken into account in the proportionality assessment. A better view would seem to be that 'in the example of the ammunition truck, it is the truck that is the target.'[1968] If the truck driver is killed, it will be incidental to the attack on that

[1964] See for instance how in the Gaza Strip the Hamas compel civilians to host their fighters, ammunition depots or the entrance of a tunnel.
[1965] See Chapter 6 for a discussion of the notion of continuous combat function.
[1966] Fenrick, "ICRC Guidance on Direct Participation in Hostilities", at 294.
[1967] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 56.
[1968] Rogers, *Law on the battlefield*, at 13.

target and the death will be submitted to the calculation of the proportionality equation.

The other example tackled by the Guidance is the question of so-called voluntary human shields, a highly contention issue. This refers to the situation where civilians endeavour to shield military objectives by placing themselves around the military objective. Some, particularly in the military, are pushing for a rather generous interpretation of the notion of direct participation in hostilities and of its temporal scope, to consider that these 'voluntary' human shields are *per se* directly participating in hostilities, thereby losing their protection against direct attack.[1969] However, the Guidance has a more nuanced approach and differentiates two situations. The first situation is related to ground operations, such as in urban warfare where civilians *voluntarily* and *deliberately* attempt to give physical cover to fighters or military objectives or to inhibit the movement of the opposing party. The Guidance acknowledges the fact that these civilians 'could directly cause the threshold of harm required for the qualification as direct participation in hostilities.'[1970] The extreme difficulty here lies in the ascertainment of whether these civilians are really acting voluntarily and deliberately. Secondly, the Guidance differentiates this situation from situations in which operations involve more powerful weaponry, such as artillery or air attacks. Here indeed, the presence of civilians around the targeted objective cannot be considered as directly causing the threshold of harm, as no harm is done to the enemy. The only effect the presence can have is to constitute a mere legal obstacle to military operations. Here 'the causal relation between their conduct and the resulting harm remains indirect'[1971] and therefore does not fulfil the criteria to constitute direct participation in hostilities.

The guidance accepts that 'civilians would be incurring an increased risk of incidental death or injury because of their voluntary presence near military objectives.'[1972] Indeed, it states that

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[1969] See for instance, Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", at 737 and footnote 123.
[1970] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 56.
[1971] Id. at 57.
[1972] Fenrick, "ICRC Guidance on Direct Participation in Hostilities", at 294.

> 'the fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective. Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.'[1973]

This approach to the problem of human shields is all the more necessary, as in internal armed conflicts it is very difficult to ascertain whether the person under consideration is acting as a human shield on a voluntary basis or under pressure or threat. This is almost impossible to know in the fog of war, and accordingly, a more protective approach is essential.

The third and last constitutive element is the *belligerent nexus*. In order to meet this requirement, 'an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.'[1974] In other words, 'in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another.*'[1975] This criterion seeks to separate out an act that takes advantage of the background of armed conflict from an act that is connected to the armed conflict. It does not relate to the subjective intent and hostile intent of the relevant actor, as these relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act.[1976] 'Violent crimes committed for reasons unrelated to the conflict lack belligerent nexus as do acts of inter-civilian violence.'[1977] According to the ICRC, the following activities lack the belligerent nexus: i) individual self-defence or defence of others

[1973] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 57.
[1974] Id. at 58.
[1975] Ibid.
[1976] Id. at 59.
[1977] Fenrick, "ICRC Guidance on Direct Participation in Hostilities", at 294.

against violence prohibited under IHL;[1978] (ii) exercise of power or authority over persons or territory, from lawful exercise of administrative, judicial or disciplinary authority, and the perpetration of war crimes or other violations of IHL outside the conduct of hostilities;[1979] (iii) participation in political demonstrations, riots, and other forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities[1980] and (iv) inter-civilian violence, which is the use of force by civilians against civilians. In order to become part of the conduct of hostilities, these acts of violence will reach the belligerent nexus in situations where inter-civilian violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.[1981]

With respect to activities related to the exercise of power or authority over persons or territory, the Goldstone report examined the attacks against six police facilities, four of them during the first minutes of the military operations on 27 December 2008, resulting in the death of 99 policemen.[1982] The Mission found that the policemen were deliberately targeted and killed on the grounds that the police as an institution, or a large part of the policemen individually, were in the Government of Israel's view part of the Palestinian military forces in Gaza.[1983] The Mission endorsed the ICRC's view as to the status of these policemen when it found that:

> 'while a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups, the Gaza police were a civilian law enforcement agency. The Mission also concludes that the policemen killed on 27 December 2008 cannot be said to have been taking a direct part in hostilities and thus did not lose their civilian immunity from direct attack as civilians on this ground.'[1984]

[1978] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 61.
[1979] Id. at 61-62.
[1980] Id. at 63.
[1981] Id. at 63.
[1982] *Goldstone* Report, para 33.
[1983] Ibid.
[1984] Id. para 34.

Accordingly, the three constitutive criteria identified by the ICRC permit a convincing distinction between acts amounting to direct participation in hostilities and others which, despite occurring in the context of the armed conflict, are not part of the conduct of hostilities and therefore do not entail loss of protection against direct attack.[1985]

As civilians lose protection against attack 'for such time' as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation must be determined clearly. It is agreed that civilians preparing for and returning from combat operations are considered to be participating in hostilities. Pursuant to the Interpretative Guidance, direct participation includes 'preparatory measures' for combat, deployment and return from combat.[1986] Recommendation VI ascertains that 'measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.'[1987] With respect to preparatory and deployment acts, it has been held that 'civilians should be liable to direct attack exclusively during recognizable and proximate preparations, such as the loading of a gun and during deployments in the framework of a specific military operation.'[1988] In addition, the identification of the end point of the return from the location of the act of direct participation in hostilities 'would be a question of fact but could include considerations of such things as physically separating from the operation, the storing or hiding of the weapons used, and the resumption of normal civilian activities.'[1989]

Temporal Scope of Loss of Protection

Apart from the substantive scope of the notion of direct participation in hostilities, another extremely important question is the determination of the temporal scope of the ensuing loss of protection against direct attack. According to the Guidance,

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[1985] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 64.

[1986] Id. at 65-68. See also Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1453; *Public Committee against Torture*, para 34.

[1987] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 65.

[1988] See Report DPH 2006, at 55 and 60ff.

[1989] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 295.

persons who participate in hostilities on an entirely ad hoc basis are treated in a different manner from members of the armed forces or of the military wing of the armed group. Indeed, Recommendation VII of the Guidance, that needs to be read in parallel with Recommendation II, enacts that 'civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities.'[1990] This includes the preparatory phase, the deployment, as well as withdrawal.

As we have seen above, treaty and customary international law grant protection to civilians 'unless and for such time as' they take a direct part in hostilities.[1991] The phrase 'unless and for such time' clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities.[1992] Ultimately, this entails that civilians may lose and regain immunity from direct attack on a number of occasions, in parallel with the intervals of their engagement in direct participation in hostilities. This is called the 'revolving door' of civilian protection.

Conscious of the difficulties that such a concept entails, the Commentary further states that

> 'although the mechanism of the "revolving door" of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.'[1993]

[1990] Whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function. Id. Recommendation VII, at 70.

[1991] Article 13(3) Protocol II; Rule 6 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, at 19. See also *Blaskic* Trial Judgment, para 157.

[1992] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 70.

[1993] Id. at 71.

The revolving door of civilian protection 'is not a malfunction of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat.'[1994] Indeed, as we have seen above, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts, as it is a temporary, activity-based loss of protection. In addition, civilians regaining immunity after the hostile act remain liable under domestic law for taking up arms.

This is not a view that is shared by everyone. Watkin goes as far as suggesting that these persons should be regarded as having lost their immunity and can be targeted at any time, even after concluding their participation in the hostilities. He argues that this has the advantage of preventing the 'farmer by day, guerrilla by night', the so-called 'revolving door' approach.[1995] But this interpretation simply goes against the very wording of Protocol II with its reference to 'for such time as', in addition to weakening the protection of civilians against the effects of hostilities in an unacceptable manner. Boothby has proposed another approach, according to which civilians participating in hostilities would lose their immunity until such time as they demonstrate that they are no longer taking a direct part in hostilities.[1996] However, this suffers from a clear problem related to the evidential difficulty that would be required for such a showing. Sivakumaran is of the view that the ICRC approach, combining continuous combat function for members of organized armed groups,[1997] with the revolving door for civilians participating in hostilities in a sporadic basis is the most satisfactory.[1998] In addition, the losing of immunity 'for such time as' follows the letter of Protocol II and finds support in the jurisprudence. For example, the Israeli Supreme Court has indicated that

> '(a) a civilian who…commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian…He is a civilian performing the function of a combatant. As long as he performs that function,

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[1994] Id. at 70.

[1995] See Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities Interpretative Guidance'", at 661.

[1996] Boothby, W.H., "'And for Such Time As': The Time Dimension to Direct Participation in Hostilities" see at 759-761.

[1997] See Chapter 6 for a discussion on the notion of continuous combat function.

[1998] Sivakumaran, *The Law of Non-International Armed Conflict*, at 367.

he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack".'[1999]

Melzer argues that the ICRC approach in the DPH Guidance is based on operational reality. He explains that the restriction, on the basis of the specific acts approach, of the duration of loss of civilian protection against direct attack to the duration of each hostile act amounting to direct participation in hostilities, would not be realistic with respect to situations where parties to the conflict are conducting large scale hostilities against each other. Interpreting the temporal scope of civilian loss of protection based on the 'specific acts' approach is only practicable, in his view, if the notion of 'civilian' excludes fighting members of organized armed groups. However, he acknowledges that subject to this caveat, 'the strict textual interpretation of "unless and for such time" is the most appealing solution, because it avoids mistaken or arbitrary targeting to the maximum extent possible.'[2000] So the ICRC approach limits the risk of abuse of the 'revolving door' of civilian protection to individuals whose involvement in the hostilities is merely unorganized, spontaneous or sporadic and, therefore are supposed to pose no substantial military threat to the organized armed forces of the parties to the conflict.

Accordingly, in the ICRC's view, the temporal scope of the loss of protection of civilians directly participating in hostilities has to be clearly distinguished from the one of fighting members of organized armed groups, as these last persons lose protection against attack for as long as they assume their continuous combat function.[2001] In non-international armed conflicts, only persons who participate in hostilities on a spontaneous, sporadic or unorganized basis will benefit from the 'revolving door' of protection and will qualify as civilians, albeit directly participating in hostilities. Faced with the significant danger that the general application of a more liberal approach would have entailed for the uninvolved civilian population, the ICRC accepted this restricted version of the 'revolving door' of protection combined with the continuous combat function.

[1999] Public Committee against Torture, para 31. See also *Strugar* Trial Judgment, para 282; *Blagojevic* Trial Judgment, para 533; *Hallilovic* Trial Judgment, para 34; *Abella* case para 189.
[2000] Melzer, *Targeted Killing in International Law*, at 348.
[2001] See Chapter 6 for a discussion of the notion of continuous combat function.

Conclusion

Ultimately, the effects on civilians of the loss of their protection due to their direct participation in hostilities is twofold. They are not protected anymore from direct attack for the duration of their participation and secondly they do not have to be taken into account in the balancing test of proportionality as collateral damage.

In order to have a meaningful protection of uninvolved civilians against direct attack, the concept of direct participation in hostilities needs to be clearly distinguished from indirect participation. General contribution to the war effort does not make civilians targetable as such. Their presence near or within military targets, being persons or objects that have a high value in term of military advantage, will not prevent the targeting. Nevertheless, the risk to their lives needs to be taken into account when planning the attack. To not consider these civilians in the proportionality analysis, would have the 'absurd consequence that no precautions could have to be taken that could prevent the death of these persons, which might be wholly unnecessary.'[2002]

[2002] Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: the Application of the Principle in International Criminal Trials", at 44.

Chapter 14:

Toward a gradation in the use of force in non-international armed conflicts in IHL

Part IX of the DPH Guidance, a new conception of proportionality through military necessity?

It is argued here that the ICRC, in establishing the Guidance, moderated the negative impact of the creation of a third category of persons in internal armed conflicts, via the continuous combat function, by including an additional Section in the document. This final Recommendation is entitled 'Restraints on the use of force in direct attack'. It is submitted that the ICRC downplayed the negative impact of the concept of continuous combat function for organized armed groups, via the argument of military necessity and humanity. The ICRC submitted that 'even where a specific act amounts to direct participation in hostilities … the kind and degree of force used in response must comply with the rules and principles of IHL and other applicable international law.'[2003] Indeed, Section IX embodies an allegedly 'new' conception when it states that

> 'in addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons *not* entitled to protection against direct attack must not exceed what is *actually necessary* to accomplish a legitimate military purpose in the prevailing circumstances.'[2004]

[2003] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 64.
[2004] Id. Recommendation 9, at 77 (emphasis added).

The main idea turns around the fact that fighting members of organized armed groups should not be attacked on sight if they can easily be arrested without undue risk for the attacking forces. 'Such situations do occur in reality',[2005] especially in non-international armed conflicts. It should be noted that this clause is supposed to apply to the use of force against all legitimate targets. It is not limited to the use of force against civilians engaged in DPH. Here, the basis for Section IX of the Guidance is the principles of military necessity and humanity. We have seen above how the principle of proportionality delineates itself in modern international humanitarian law applicable to internal armed conflicts.[2006] However, this part of the Guidance seems to suggest the evolution of an additional conception of proportionality, which draws on the relationship between the amount of force used against a legitimate military objective on the one hand, and what is militarily necessary on the other hand, and requires the former to be no more harmful than the latter.

Part IX: restraint on the use of force by military necessity

In the Commentary on Recommendation IX, the ICRC argues that restraint on the use of force is based on the principles of military necessity and humanity. It states that

> 'In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire framework of IHL and, therefore, shape the context in which its rules must be interpreted. Considerations of military necessity and humanity neither derogate from not override the specific provisions of IHL, but constitute *guiding principles* for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.'[2007]

The Commentary further states that

> 'the principle of military necessity is generally recognized to permit only that degree and kind of force, not otherwise prohibited by the law of armed

[2005] Doswald-Beck, "The right to life in armed conflict: does international humanitarian law provide all the answers?", at 891.
[2006] See Chapter 10.
[2007] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 78-79 (emphasis added).

> conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.'[2008]

In order to fully understand Recommendation IX of the Guidance, it is necessary to analyse the ins and outs of the IHL principle of military necessity.

Toward a gradation in the use of force via the restrictive function of military necessity

The way we understand military necessity will have an extensive impact on important issues such as the relation of IHL to human rights law, the targeting of individuals and the operation of IHL in asymmetric conflict scenarios. In this context, we may wonder whether and how the principle of military necessity under IHL can be used to close potential loopholes in the legal framework. Despite the fact that 'the right of belligerents to adopt means of injuring the enemy is not unlimited,'[2009] there are no provisions under IHL with respect to the permissible degree of force used against unprotected persons, fighters and civilians directly participating in hostilities. Indeed, 'IHL is commonly understood to grant an unfettered 'license to kill' vis-à-vis these categories of persons. Military necessity, however, only warrants the enemy's defeat, ie. his rendering *hors de combat*.'[2010] Accordingly, it has been argued that depending on the circumstances, IHL could oblige a belligerent to capture or injure rather than kill his adversary.[2011] Before going further, it is necessary to understand clearly what exactly the principle of military necessity is, and the two aspects it encompasses.

[2008] Id. at 79 (footnotes referring to several Military Manuals omitted). See also the ICJ *Nuclear Weapons* Advisory Opinion, para 78 which contends that states are precluded from inflicting 'harm greater than that unavoidable to achieve legitimate military objectives.'

[2009] Article 22 Regulations, Hague Convention IV.

[2010] Geiss, R., "Military Necessity: A Fundamental 'Principle' Fallen Into Oblivion" in *Select Proceedings of the European Society of International Law* (Hélène Ruiz Fabri, et al. eds., Hart Publishing 2010).

[2011] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 77.

The permissive function of military necessity

Commonly known as military exigencies, operational requirements or realities of war, the concept of military necessity is often considered as a synonym of realism in war. 'Military necessity in this sense encapsulates the *realpolitik* necessity for the military to break some eggs when the going gets tough.'[2012] However, its original conception was not seen as in opposition to humanitarian values, in fact quite the contrary. But with the extensive number of armed conflicts that had raged by the end of the 19th Century, as well as the two World Wars, in addition to the consequent discussions related to the norms leading to their adoption (many treaties in IHL had been adopted by that time) the permissive aspects of the principle of military necessity, embodied in the infamous doctrine of 'Kriegreason', gained greater prominence, and so eclipsed the principle's restrictive function. The idea of the infamous doctrine of Kriegreason, advocating that when certain means were necessary to secure the surrender of the enemy they were justified, finds its roots even before the Hague Convention. Indeed, the principle of military necessity has been used as a military *carte blanche* in Wilhelmina Prussia, Nazi Germany and even by the Allied Forces in the bombing campaign of Germany, in a startling misunderstanding of its true scope and aim. 'Though the idea nominally required the assessment of necessary means against the end sought, it easily led to the argument that "the end justifies all means".'[2013] In fact, seen through this prism, military necessity has been used as an unlimited justification for violations of the laws of war. The doctrine of *Kriegreason* was advanced by belligerents in order to 'justify their failure to comply with the applicable rules of armed conflict in situations of pressing military necessity.'[2014]

The principle of military necessity embodies, it is true, a permissive function, through which it justifies the resort to a kind or degree of force, 'which is reasonably required for the accomplishment of a legitimate military purpose with a minimum expenditure of time, life and physical resources, and which is not otherwise prohibited by

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[2012] Geiss, "Military Necessity: A Fundamental 'Principle' Fallen Into Oblivion", at 557.
[2013] Hayashi, M.N., "The Martens Clause and Military Necessity", in *The Legitimate Use of Military Force The Just War tradition and the Customary Law of Armed Conflict*, (Howard M. Hensel ed., 2008), at 137.
[2014] Gardam, *Necessity, Proportionality and the Use of Force by States*, at 7.

IHL.'[2015] However, far from being a *carte blanche,* the permissive function justifies only those measures which are indispensable for securing the ends of the war, and which are *lawful* according to the modern law and usages of war.[2016] Due to the exceptional circumstances of an armed conflict, the 'justifying factor inherent in all rules of IHL (…) permits the resort to measures meeting the needs of the extreme circumstances prevailing in situations of armed conflict.'[2017] Accordingly, the permissive aspect of the principle of military necessity justifies the resort to armed force. However, this resort to force is restricted by the law, and the principle of military necessity cannot be invoked as a justification to violate IHL.

The restrictive function of military necessity

Legally speaking, military necessity occurs as a statutory prescription in a number of IHL provisions. The principle of military necessity is an old concept that we find in almost all the ancient legal texts, as it is a bedrock principle of the law of armed conflict. Article 14 of the Lieber Code defines 'military necessity' to 'consist in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.'[2018] According to this definition, 'the principle of military necessity requires that measures taken in times of war fulfil both the *factual* requirement of being *necessary for the achievement of the ends of the war,* and the *juridical* requirement of being *lawful*

[2015] Melzer, N., "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", 9 *Yearbook of International Humanitarian Law* 87, (2006), at 113.
[2016] See *Blaskic* Appeal Judgment, para 109; *Kordic* Appeal Judgment, para 54; *Galic* Appeal Judgment, para 130.
[2017] Summary Report of the Fourth Expert Meeting on the Notion of Direct Participation in Hostilities. pt. (27-28 November 2006), at 104.
[2018] This definition is complemented by Article 15 which stipulates: 'Military necessity admits of all direct destructions of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.' See also Article 16 which spell out that 'Military necessity does not admit of: cruelty – that is, the infliction of suffering for the sake of suffering or for revenge; maiming or wounding except in fight, torture to extort confessions; use of poison in any war; wanton devastation of a district; acts of perfidy; in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.'

according to the modern law and usages of war.'[2019] A few years later, the Saint Petersburg Declaration famously ascertained that the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.'[2020] This definition does not, however, explain or narrow down the understanding of 'measures which are indispensable for securing the ends of the war'.

The Hague Conventions refer explicitly to military necessity twice. In the first place, the Preamble to the Hague Convention on Land Warfare of 1899, as reiterated and reaffirmed in 1907, affirms that the wording of the Regulations 'has been inspired by the desire to diminish the evils of war, *as far as military requirements permit.*'[2021] The principle of military necessity is here part of the Martens Clause.[2022]

The reference to the 'considerations of humanity' is a direct reference to the Clause. The Martens Clause has attracted so much comment throughout the century that it is worth reproducing it here in its entirety, before any discussion about it. It reads as follows:

> 'According to the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military necessities permit, are intended to serve as general rules of conduct for belligerents in their relations with each other and with population.
> It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.
> On the other hand, it could not be intended by the High Contracting parties that the cases not provided for should, for want of a written provision be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established

[2019] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 101 (original emphasis).
[2020] 1868 Saint Petersburg Declaration, Preamble (emphasis added).
[2021] Preamble The Hague Regulations.
[2022] See further below for an explanation of the Martens Clause.

> between civilised nations, from the laws of humanity, and the requirements of the public conscience.'[2023]

Because of the 'reference to the idea of military necessity in the same preamble, the protection professed in the Martens clause was seen to offer a counterbalance to the excess of violence to which military necessity might lead.'[2024] However, as shown by Cassese, legal literature confirms that the Clause was intended to have a limited scope in a particular context.[2025]

Differing views have been put forward with respect to the significance of the Hague Convention Preamble, with respect to the principle of military necessity. As showed by Hayashi,

> 'some authors of this period saw the codification of the law of war in the Hague as an important step towards moving away from the logic of military necessity as an unlimited justification. According to them, since the preamble of the Hague Convention explicitly claims that military necessity had been taken into account in this codification, it could no longer be invoked to justify breaches of the codified rules. On the other hand, there were also authors who continued to emphasize the legitimizing role of military necessity in the Hague Convention: military necessity expressed in the preamble was a clear and general statement that when there was military necessity, violence was permitted.'[2026]

However, the better view is that the insertion of these words implies that 'in drafting the rules as they did, the authors have taken the element of military necessity fully into account.'[2027] Accordingly, in my view, the general principle enounced by the Martens Clause is that under IHL everything that is not prohibited does not mean that

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[2023] Preamble, Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, July 29, 1899.
[2024] Hayashi, "The Martens Clause and Military Necessity", at 136.
[2025] See Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", at pp. 193-198.
[2026] Hayashi, "The Martens Clause and Military Necessity", at 137, with attached references.
[2027] Kalshoven & Zegveld, *Constraints of the Waging of War, an Introduction to International Humanitarian Law*, at 32.

it is authorized.[2028] It is to be noted that the Clause is today considered as a rule of customary law.[2029]

The second explicit reference to the principle of military necessity in the Hague Regulations is contained in Article 23(g) which stipulates that 'in addition to the prohibitions provided by special Conventions, it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.' Neither reference appears to have been controversial *per se* in the 1899 Peace Conference, nor at the 1907 Peace Conference where the provisions were maintained.

Nowadays, military necessity is generally misleadingly characterised as in conflict with humanitarian values rather than as a general limitation on the use of force in armed conflict. But what has been almost entirely forgotten, is that 'the concept of military necessity is not only of a permissive nature, but also provides the oldest and perhaps most effective restraint that has ever been imposed on warfare.'[2030] As explained by Melzer, 'although a fundamental principle underlying and informing the entire normative framework of IHL, the restrictive aspect of military necessity is, within the parameters of positive IHL, also a determining factor of the kind and degree of force, which is permissible in direct attack against combatants and civilians directly participating in hostilities.'[2031] It should be recalled that in armed conflict, the primary aim is not to *kill* an enemy, but to *defeat* him.[2032] The killing can happen in the process, but it should not be the purpose *per se.* Consequently, the principle of military necessity 'has never really developed its potential, and arguably has no

[2028] Concurring: Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at p. 39. The Martens Clause has been included in many subsequent IHL texts. With respect to non-international armed conflict, we find the Clause in the Preamble of the Second Additional Protocol.
[2029] Boogaard, J.C.v.d., "Contribution to Liber Amicorum Avril McDonald 'International Law Between Conflict and Peacetime, in Search of the Human Face?", in *International Law between Conflict and Peace Time: in Search of the Human Face (Liber Amicorum Avril McDonald)*, (Marcel Brus & et. al. eds., Forthcoming), at 12.
[2030] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 100-1.
[2031] Id. at 111.
[2032] See the famous words of Jean Pictet: 'if we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.' Pictet, J., *Development and Principles of International Humanitarian Law* (Nijhoff Publishers. 1985), at 75.

substantive content, other than where it is incorporated specifically in the provisions of IHL.'[2033] In order to understand the delicate balance encompassed in the concept of military necessity, it is therefore necessary to understand that the concept is constituted by two aspects, a permissive and a restrictive one. These two aspects assume a complementary function within the principle of military necessity. 'While the *restrictive* aspect of military necessity relates exclusively to conduct that IHL does not prohibit in the abstract, its *permissive* aspect relates exclusively to conduct that would be prohibited under international law in situations other than armed conflict.'[2034]

We have briefly considered the permissive aspect, the one that is the most commonly known. However, with regard to the lawfulness of conduct in situations of armed conflict, the restrictive aspect is surely more important in terms of the protection of civilians against the effects of hostilities. In its restrictive dimension, the principle of military necessity is by no means 'contrary to humanitarian, cultural, religious, environmental and other protective values, but, on the contrary, is the very expression of their priority over the political liberty of states.'[2035] Far more restrictive than any of those values by themselves, the principle of military necessity 'reduces the sum of total lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto.*'[2036] Consequently, an IHL rule cannot be derogated by invoking military necessity unless this possibility is explicitly provided for by the rule in question.

Put more plainly, in its *restrictive* function, the principle of military necessity prohibits the employment of any kind or degree of force which is not indispensable for the achievement of 'the ends of the war', or in excess of what is required for the accomplishment of a legitimate military purpose in the concrete circumstances, even if such force would not otherwise be prohibited by IHL.[2037] So in this respect it can be

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[2033] Gardam, *Necessity, Proportionality and the Use of Force by States*, at 8.
[2034] Melzer, *Targeted Killing in International Law*, at 286.
[2035] Id. at 286-7.
[2036] Ibid.
[2037] See Melzer, *Targeted Killing in International Law*, at 286-7. See also Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 108 with references.

summarized by the maxim 'necessity is the limit of legality'.[2038] With this angle of approach, ultimately, the restrictive aspect of military necessity is very similar to the 'elementary considerations of humanity', also known as the principle of humanity. In fact, both of them 'constitute complementary expressions of the same principle of moderation imposed on all military action.'[2039]

The ICRC Guidance shares the approach that the principle of humanity complements and is implicit in the principle of military necessity.[2040] According to the Guidance, this principle, 'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.'[2041] The Commentary further states that 'considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.'[2042] Accordingly, the Martens Clause constitutes an enduring reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or regulated in treaty law. Van den Boogaard submits that the Martens Clause is basically to IHL what article 38 of the ICJ Statute is to international law as a whole. 'Both provisions enumerate the sources of the legal framework. The Martens Clause enumerates the sources of international humanitarian law and underlines that as a matter of law, one should not only look for rules of international humanitarian law in treaties and customary international law, but also in its principles that apply as a matter of law.'[2043] As such, the Clause is extremely important as it points to the IHL principles that fill the gaps left by customary and treaty law. It is therefore submitted that the Clause is fundamental with respect to non-international armed conflicts.

[2038] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 1395.
[2039] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 108.
[2040] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 79.
[2041] Ibid.
[2042] Id. at 80. See also for instance the UK *Manual of the Law of Armed Conflict*, Section 2.4, according to which the principle of humanity 'forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.'
[2043] Boogaard, "Contribution to Liber Amicorum Avril McDonald 'International Law Between Conflict and Peacetime, in Search of the Human Face?", at 14.

However, Kleffner is doubtful about the fact that the references in the Martens Clause to the principles of humanity and dictates of public conscience can function as an independent basis for the restraints asserted in Part IX of the ICRC Guidance. He is of the view that

> 'an expansive interpretation, to the effect that the Martens Clause references to principles of humanity and dictates of public conscience provide restraints on the action of parties to an armed conflict, even though a given course of conduct is not explicitly prohibited by a rule of positive international law, is neither borne out by state practice that could establish an agreement between states on such an interpretation, nor can one deduce such an understanding from the case law of international courts and tribunals. It is therefore submitted that as long as, and to the extent that, the principle of humanity and dictates of public conscience mentioned in the Martens Clause have not found their expression in a treaty provision, a rule of customary law, or other source of positive international law, they do not provide a basis for the restraints contemplated in Section IX. Principles of humanity and dictates of public conscience may be driving forces for the development of the law, but they do not constitute the law.'[2044]

Van de Boogaard is also of the view that the notion of military necessity is not a principle, but merely a policy that can be used as an interpretative tool to explain specific rules of international law.[2045]

For Geiss, the principle of military necessity 'seems to be widely accepted as a general, somewhat Janus-faced, principle of IHL, which may potentially unfold permissive as well as restrictive functions.'[2046] Guiding parameters for the application of the principle of military necessity on the ground, and ex post juridical review are scarce. 'This is somewhat surprising, given that military necessity, as a statutory prescription, has featured relatively often even in more recent jurisprudence.'[2047]

[2044] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?", at 40.
[2045] Boogaard, "Contribution to Liber Amicorum Avril McDonald 'International Law Between Conflict and Peacetime, in Search of the Human Face?", at 20.
[2046] Geiss, "Military Necessity: A Fundamental 'Principle' Fallen Into Oblivion", at 557-8.
[2047] Id. at 558. For a review of the contemporary jurisprudence on military necessity, see Hayashi, "The Martens Clause and Military Necessity", at 138-142.

Furthermore, the essence of the Lieber Code's two-pronged interpretation of the principle of military necessity has not only been adopted in numerous modern military manuals, but has also been confirmed in international jurisprudence and in legal doctrine.[2048] The International Law Commission has also clarified that, in the specific context of IHL, military necessity may never be invoked as a justification for violations of the laws of war.[2049] Indeed, a given IHL rule 'can only be set aside on grounds of military necessity when its text expressly so permits.'[2050]

IHL as a whole is a balance between military necessity and humanity

Generally, IHL is described as being constituted as a corpus of compromise rules based on a balance between considerations of military necessity and the requirement of humanity.[2051] Accordingly, the 'various provisions of IHL which permit a particular conduct in armed conflict constitute the result of equations which already include the necessity factor.'[2052] Consequently, we cannot derogate from an IHL rule by invoking military necessity unless this possibility is explicitly provided for by the rule in question. For example, the ICTY made this error in the *Blaskic* case, where the Trial Chamber considered that the targeting of civilians was a violation only when it was not possible to justify it by military necessity.[2053] However, this was a clear error of law that was ultimately corrected by the Appeals Chamber and upheld in the subsequent cases.[2054] It has been held that, conversely, when IHL does not provide for any prohibition, the Parties to the conflict are supposedly free, albeit within the constraints set by customary law and general principles.[2055]

[2048] See Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 102-103 with attached references.

[2049] ILC, Draft Article of State Responsibility and Commentary, *Report of the International Law Commission on the work of its Thirty-second Session,* (United Nations, A/35/10, 1980) 45: 'The principal role of « military necessity » is not that of a circumstance exceptionally precluding wrongfulness…'.

[2050] Kalshoven & Zegveld, *Constraints of the Waging of War, an Introduction to International Humanitarian Law*, at 32.

[2051] See 1868 St Petersburg Declaration referring to the 'necessities of war' and the 'requirements of humanity'. See also Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 1389.

[2052] Melzer, *Targeted Killing in International Law*, at 287.

[2053] See *Blaskic* Trial Judgment, para. 180.

[2054] *Blaskic* Appeal Judgment, para 109. See also *Kordic* Appeal Judgment, para 54; *Galic* Trial Judgment, para. 44.

[2055] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 1389 (emphasis added).

With respect to internal armed conflicts, this is specified in the Preamble of Additional Protocol II, when it recalls that 'in cases not covered by the law in force, the human person remains under the protection of the principle of humanity and the dictates of public conscience.'[2056] It is interesting to note that in the Preamble of Protocol II, the Martens Clause is mentioned, albeit in a shortened version, as no reference is made about customary international law. As we have seen in Chapter 3, this is due to the fact that at the time of the adoption of this document, states were reluctant to accept that any customary rules existed regulating internal armed conflict. One of the recurring elements in nearly all the post-World War II IHL treaties has been the inclusion of the Martens Clause. All four of the 1949 Conventions,[2057] as well as both the Protocols,[2058] included the Clause, restating and reaffirming the importance of the place of the principles of humanity, the dictates of public conscience, and the laws and customs of nations, in determining permissible conduct in armed conflicts. However, significantly, in Protocol II the 'traditional' version of the Martens Clause was modified, to exclude reference to 'the principles of international law derived from established custom'.[2059] Therefore, in 1977, states were of the view that there had not been sufficient time for the development of customary rules in civil conflict and so they deleted any reference to it in the Preamble.

We find the explicit provision for exception due to military necessity in very few rules in non-international armed conflict. The only provision specifically addressing the exception of military necessity in non-international armed conflict is Article 17 of the Second Additional Protocol which prohibits the forced movement of civilians unless 'imperative military reasons so demand.' Interestingly, Article 54(5) of the First Additional Protocol, which is applicable in international armed conflict, provides the possibility to derogate from the prohibition to 'attack destroy, remove or render useless objects indispensable to the survival of the civilian population'[2060] where required by imperative military necessity. However, Article 14 of the Second Additional Protocol, which deals with the same prohibition, does not permit any

[2056] Preamble, Protocol II.
[2057] GC I, Article 63(4), GC II, Article 62(4), GC III, Article 142(4) and GC IV, Article 158(4).
[2058] Article 1(2) AP I and in the Preamble of AP II. The Martens Clause is also included in paragraph 5 of the Preamble to the CWC, and in the Preamble to the Cluster Munitions Convention.
[2059] Article 1(2) Protocol I and Preamble of Protocol II.
[2060] Article 54(2) Additional Protocol I.

derogation from it, even when required by military necessity. Accordingly, we do not find reference to the permissive aspect of the principle of military necessity in provisions dealing with non-international armed conflict to the same extent as in international armed conflict. Indeed, it has been argued that 'no state would accept that "imperative military necessity" is a principle that the forces fighting to overthrow the state's government may in any way benefit from.'[2061] This could therefore be the reason why the principle is almost absent in the Second Additional Protocol.

When it comes to customary laws, the ICRC has found four rules that specifically refer to the exception of military necessity. First, 'the use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity'.[2062] This rule is applicable in non-international armed conflict. Secondly, state practice and *opinio juris* have confirmed that the rule prohibiting the destruction or seizure of the property of an adversary is dependent on the exception that this is so 'unless required by imperative military necessity.'[2063] The Study also found that the above-mentioned prohibition, with its exception, also applies to the natural environment.[2064] All other rules, being treaty or customary law as applicable to non-international armed conflict, already contain the delicate balance between military necessity and humanity, and therefore they cannot be derogated from in the name of imperative military necessity.

The entire challenge is to find this delicate balance. As Terry Gill explained once in a Conference, the law of war cannot be

> 'all military necessity or all humanity *tout court.* It must be humane enough to serve its purpose in preventing unnecessary loss of life and destruction and alleviating suffering *and* it must be realistic enough to be operable and capable of being adhered to. Overemphasizing the one over the other as a matter of

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[2061] Zahar, A., "Civilizing Civil War: Writing Morality as Law at the ICTY", in *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (Bert Swart, et al. eds., 2011), at 467, 500.
[2062] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 39. See related state practice.
[2063] Id. Rule 50, applicable to non-international armed conflict.
[2064] Id. Rule 43, applicable to non-international armed conflict.

principle only risks having the law become either redundant or unworkable.'[2065]

Now that we have understood the ins and outs of the permissive and restrictive aspects of military necessity, it is necessary to understand how the concept of military necessity works out in IHL.

Military necessity subjects all military actions to (a) be necessary and (b) not prohibited

It is submitted here that, due to the necessity of protecting civilians against the effects of hostilities, the restrictive aspect of military necessity needs to be recognized and further ascertained as a binding principle informing the interpretation of positive IHL. This position is proposed, for instance, by Melzer, who argues that 'as a concept of modern IHL, therefore, the principle of military necessity can be said to subject all military action undertaken in situations of armed conflict to the dual requirement, first, of being necessary for the accomplishment of a legitimate military purpose and, second, of not otherwise being prohibited by IHL.'[2066] He acknowledges that the two principles may enter into conflict, but only in the situation where 'considerations of humanity demand a restriction of military action below the level of what is reasonably required for the accomplishment of a legitimate military purpose in the concrete circumstances.'[2067] In these cases, international humanitarian law generally already provides a balanced response, which cannot be derogated from unless expressly so foreseen by the specific provision in question.

So for instance, contrary to a position that appears in a large part of the doctrine, mainly put forward by military lawyers, as well as powerful states, it is not because IHL does not prohibit direct attacks against combatants, as long as they are not *hors de combat*, that we can conclude that they are legally entitled to kill them at any time and any place. The principle that unarmed combatants only indirectly participating in military operations 'should be taken under fire only when there is no other way of

[2065] Gill, T., "Military Necessity" (Asser ed., 2006).
[2066] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 103.
[2067] Id. at 108.

neutralizing them'[2068] is implied in the St. Petersburg Declaration, where, in the Preamble, it is stated that in order to 'weaken the military forces of the enemy (…) it is *sufficient* to disable the greatest possible number of men.'[2069] It is submitted that an approach on the gradation in the use of force against legitimate targets can have a positive impact on the limitation of collateral damage, in addition to the rules on proportionality, thereby enhancing the protection of civilians against the effects of hostilities. Indeed, as we have seen in the preceding chapters, the objective of the principle of proportionality is to limit collateral damage to uninvolved civilians, while recognizing that an operation can be carried out if this damage will not be considered as excessive in relation to the concrete and direct military advantage anticipated. But as we have seen, this principle is difficult to apply and is far from protecting civilians in an acceptable manner. We are therefore going to see now whether by graduating the use of force on legitimate military targets, it is possible to enhance the protection of civilians against the effects of hostilities.

Toward a least harmful requirement via the restrictive aspect of military necessity

It has been argued that military necessity, in its restrictive aspect, could be used as a determining factor of the kind and degree of force permissible in direct attack. There is a growing tendency in the legal doctrine to consider that the fact that IHL does not prohibit a specific act does not necessarily mean that this act is permitted.[2070] Especially when it comes to the law of non-international armed conflict, it has been held that this set of laws does not provide the parties to the conflict with a right to take certain action. Rather, it prohibits certain actions and regulates other conducts should the parties choose to engage in particular endeavours[2071]. Melzer argues that 'while positive prohibitions may restrict the extent to which military necessity can justify military action, the absence of a prohibition does not liberate parties to the

[2068] Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at para 1694.
[2069] 1868 St. Petersburg Declaration, Preamble.
[2070] See for instance generally Goodman, R., "The Power to Kill or Capture Enemy Combatants", 24 *European Journal of International Law*, (2013).
[2071] Sivakumaran, *The Law of Non-International Armed Conflict*, at 71.

conflict from the fundamental constraints imposed by the principle of military necessity.'[2072] In another article, he clarifies that the essence of this argument is based on the idea that 'the restrictive aspect of the principle of military necessity does not *override* or *derogate* from positive rules of IHL, but merely *informs* their interpretation to the extent that they leave certain questions not or not sufficiently regulated.'[2073] The restrictive aspect of military necessity does so 'in reducing the sum total of lawful military action from that which IHL does not prohibit *in abstracto* to that which is reasonably required *in concreto*.'[2074] Melzer's approach has been taken up in the ICRC Guidance. Indeed, the Commentary to the Guidance explains that 'in conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.'[2075]

In its Part IX, the Guidance is not trying to put in question the whole delicate balance of IHL. According to the document, a proper interpretation of the principles of military necessity and humanity, which underlie IHL, neither grants fighters an unfettered right to kill nor imposes 'a legal obligation to capture rather than kill regardless of the circumstances.'[2076] In other words, 'decisions to kill or capture a target should be driven by context, or what is reasonable in the prevailing circumstances.'[2077] Such decisions should be taken on a case-by-case basis.

The requirement of necessity, as contended by the Guidance in its Recommendation IX, imposes an obligation to capture rather than kill if *reasonably* possible. Indeed, it is submitted that the restrictive aspect of military necessity 'simply requires that, within the parameters of positive IHL, the parties to the conflict cause no more death, injury or destruction than the circumstances reasonably require for the accomplishment of a lawful military purpose, whether on the strategic, operational or

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[2072] Melzer, *Targeted Killing in International Law*, at 287.
[2073] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 108 (emphasis added).
[2074] Id. at 108 (emphasis original).
[2075] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 79.
[2076] Id. at 78.
[2077] Keck, "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare", at 43.

tactical level.'[2078] This is the essence of a 'least-harmful-means-requirement'. The corresponding 'least harmful means' requirement is to be found in customary IHL and has been invoked by the Israeli High Court in the *Targeted Killings* judgment, as a direct expression of the restrictive aspect of the principle of military necessity.

In a cautious manner, the Commentary to the Guidance explains that 'the aim cannot be to replace the judgement of the military commander by inflexible or unrealistic standards'[2079] It rather suggests a standard that can be applied 'contextually, taking due account of the circumstances in which the use of lethal force is being contemplated.'[2080] With this approach, the Guidance is endorsing a move that we find in doctrine and certain judgements as well as the human rights law approach of a gradation in the use of force. Indeed, the Commentary explains that

> 'the practical importance of (the) restraining function (of the principle of military necessity) will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing.'[2081]

It is submitted that in practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control in non-international armed conflict.

The Guidance finds support for its approach in the Israel High Court in its 2006 *Public Committee Against Torture* judgment. It especially refers to the part where the Court states that

> 'a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. (…) Arrest, investigation, and trial are not means which can always be used. At times the

[2078] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 111.
[2079] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 80.
[2080] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?", at 38.
[2081] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 80-1.

possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required. (…) It might actually be particularly practical under the conditions of belligerent occupation, *in which the army controls the area in which the operation takes place*, and in which arrest, investigation, and trial are at times *realizable possibilities*. (…) Of course, given the circumstances of a certain case, that possibility may not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.'[2082]

According to this approach, the significance of the restrictive aspect of military necessity has to be established on a case-by-case basis. It is submitted that it therefore increases with the possibility for a party to the conflict to control the territory and the circumstances where the military operation is conducted.

Captured rather than killed through military necessity

The rule that has been proposed by the ICRC in Part IX of the Guidance and by the Israel High Court mirrors human rights law by requiring a gradation on the use of force, but by reference to the IHL legal framework, namely that killing someone when he or she could be arrested does not respect the principle of military necessity. In addition, responding to criticisms, Melzer explains that

> 'to recognize the restrictive aspect of military necessity as a binding principle informing the interpretation of positive IHL has nothing to do with imposing unrealistic restrictions or unacceptable risks on armed forces operating against civilians directly participating in hostilities. Nor does it prohibit the targeting of members of organized armed forces or groups while they are not taking a direct part in hostilities, prevent parties to the conflict from achieving legitimate military purposes by resort to overwhelming military force, or

[2082] HCJ 769/02 *Public Committee Against Torture in Israel and Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others* ILDC 597 (IL 2006) (2006) ('*Public Committee Against Torture')* para 40 (emphasis added).

> imply the international criminalization of excessive use of force against legitimate military targets.'[2083]

So how is this gradation in the use of force supposed to work in practice? The question that needs to be clarified is in what circumstances *may* a fighter use deadly force, and when *must* he attempt to capture and detain a target? This difficult question will be best illustrated via some examples. But first, it is necessary to understand that the concept of the gradation on the use of force is based on a concrete assessment of the situation by the military commander. The restraint on the use of force will increase with the attacker's ability to control the area and the circumstances where the action is taking place. It may become 'decisive where armed forces operate against selected individuals in situations comparable to peacetime policing',[2084] which will often occur in an asymmetrical internal armed conflict, where a party exercises effective territorial control. Accordingly, the notion of the gradation in the use of force is not static and will depend on the context and the circumstances of a given situation, such as the intensity of the violence, the mapping of the territorial control, in addition to the reasonability of a given action against persons having lost their civilian protection.

Examples best illustrate this approach. We can think, for instance, of the situation of a member of an organized armed group who is spotted on territory under the effective control of the government, where the intensity of armed violence is low. If this person does not carry any weapon, and is visiting his family or engaged in political activities, the approach of the least harmful means, through military necessity, would entail that in the circumstances that he can reasonably be apprehended without endangering the armed forces, this should be done in such a way and his intentional killing could not be justified. Furthermore, in terms of the protection of uninvolved civilians, such an approach permits the potential collateral damage borne by the family the fighter is visiting, and the surrounding neighbours to be reduced.

[2083] Melzer, "Targeted Killing or Less Harmful Means? - Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Miltiary Necessity", at 111.
[2084] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 80-81.

Another situation could relate to an unarmed civilian sitting in a restaurant in the centre of Kabul in Afghanistan, a zone under ISAF control. If this person is using his phone to transmit tactical targeting information to the Taliban, his act would amount to direct participation in hostilities and he would lose his civilian protection. But from the fact that the restaurant is located in an area under the firm control of ISAF, 'it may be possible to neutralize the military threat posed by the civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.'[2085] To do otherwise and employ overwhelming force on this person would defy basic notions of humanity as it would create extensive, albeit maybe not excessive, civilian collateral damage in a setting where there is manifestly no necessity to use lethal force. Well trained armed forces could perfectly easily apprehend him.

A last example could be a situation where patrolling soldiers observe an unarmed civilian who, whether voluntarily or under pressure from the other party to the conflict, is planting booby-traps in territory under their control. In such a situation, the state armed forces having control of the territory, it can be possible to intercept and capture this civilian without undue risk to the soldiers and the uninvolved civilians around. If this person can reasonably be apprehended rather than killed, and if this situation does not further endanger the state armed forces, again, such a solution should be chosen.

As we see via these examples, the requirement of the least harmful means imposes a gradation in the use of force when it is reasonably possible. It does not impose impossible standards on the attacking party. The Guidance Commentary acknowledges this when stating that

> 'in sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of military necessity and of humanity play an important role in

[2085] Id. at 81.

> determining the kind and degree of permissible force against legitimate military targets.'[2086]

Some situations are more characteristic of those whereby it will be possible to arrest the targeted persons, and others are characterized more by facts whereby it will only be possible to use lethal force. There is a sliding scale between the unarmed civilian sitting in a restaurant in Kabul and using his phone to transmit tactical targeting information to the Taliban and the LTTE fighter during the battle of Chalai in Sri Lanka. This needs to be evaluated on a case-by-case basis. In addition, it is submitted that such an approach to the targeting of lawful military objectives would have a tremendous impact on the reduction of collateral damage for uninvolved civilians.

The conclusion of a necessity to rely on the use of force in a graded way makes perfect sense, especially in the context of a non-international armed conflict, where civilians and fighters are intermingled in populated areas. It would defy all logic and principles of humanity if an unarmed person in an area firmly under the control of the attacking force could be lawfully targeted even if capture could be a reasonable option in the specific case under consideration. Furthermore, it is argued that non-international armed conflicts are situations where it can be envisaged, for policy reasons, that military personnel be directed to take risks in order to ensure proper target identification and to limit incidental civilian damage and casualties.

The ICRC proposed such an approach via the prism of the IHL legal framework and a progressive interpretation of the principles of military necessity and humanity that play an important role in determining the kind and degree of force permissible against legitimate military targets. However, the Guidance further clarifies that its conclusions 'remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law, such as, most notably, international human rights law.'[2087] While acknowledging this, it would have been helpful that if Guidance had indeed analysed the relationship between IHL and human rights law in terms of targeting, rather than simply looking at the IHL framework. States have obligations under both legal frameworks, especially in non-

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[2086] Id. at 82.
[2087] Id. at 82.

international armed conflicts, and it would have been interesting to see whether, especially in low-intensity internal armed conflicts not reaching the threshold of application of Protocol II, a better approach could not have been found.

The concept of the least harmful means in the use of force is extremely appealing, especially for situations of non-international armed conflict where uninvolved civilians are intermingled with fighters. However, the approach whereby IHL imposes, via the principle of military necessity, an obligation to capture rather than kill has been virulently criticized for diverse reasons. This is what we are going to look at in the coming section.

Criticism of the gradation of the use of force via the principle of military necessity

As just explained, the fact that the DPH Guidance considers, as a basis for Section IX, international humanitarian law and, more specifically, the principles of military necessity and humanity has been criticized in the literature.

Rogers, for instance, contends that 'there is no such restraint in the law of armed conflict as that advocated in recommendation IX.'[2088] The most virulent criticisms come from Hay Parks, who claims that 'there is no "military necessity" determination requirement for an individual soldier to engage an enemy combatant or a civilian determined to be taking a direct part in hostilities, any more than there is for a soldier to attack an enemy tank.'[2089] He further contends that such an approach imposes an overly restrictive 'law-enforcement paradigm' aiming at subjecting war time military operations 'to an unrealistic use-of-force continuum beginning with the least-injurious action before resorting to grave injury in attack of an enemy combatant or a civilian taking a direct part in hostilities.'[2090] However, as affirmed by Geiss, this critique is based on a misconception. He explains that

[2088] Rogers, "Direct Participation in Hostilities: Some Personal Reflections", at 158.
[2089] Parks, "Part IX of the ICRC "Direct Participation in Hostilities" Study: No mandate, No Expertise, and Legally Incorrect", at 804.
[2090] Id. at 815.

> 'the obligation to employ the least harmful among equally effective means or methods does not amount to an extension of a "law enforcement paradigm" or in other words the application of the human rights principle of proportionality vis-à-vis fighters in an armed conflict. The principle of distinction already entails the prescription that during an armed conflict the relative "value" inherent in the rendering *hors de combat* of enemy combatants/fighters or civilians directly participating in hostilities outweighs the right to life, physical integrity and liberty of these persons.'[2091]

Accordingly, for him, the necessity-restraint does not interfere with any value judgement but merely 'implies that there is no categorical relaxation of the purely factual and in any case situational assessment whether less harmful measures of equal effectiveness are available in a given situation.'[2092] He therefore agrees that if an enemy can be rendered *hors de combat* by way of capture he must not be killed. Indeed, it is relatively clear and concise that the aim of war is to defeat the other party[2093], be it combatants, fighters or civilians directly participating in hostilities, and that a person will be defeated if he is rendered *hors de combat.* This can be achieved via capture, injury or death. But he further contends that 'a risky capture is not equally suitable to achieving the defeat of the enemy as a secure killing. Faced with such obligation, there would be no indication that a military commander is obliged to accept any increased risk for his own troops when attacking legitimately assailable persons.'[2094] Geiss therefore acknowledges that the principle of military necessity encompasses the necessity of restraint when possible.

Kleffner too has criticized this Part of the Guidance, albeit for different reasons. In his opinion, the grammar of the law of armed conflict relating to the conduct of hostilities is in line with the fact that we should approach this law 'in its entirety as one that provides restraints on what parties to an armed conflict may do, but leaves everything that is not expressly regulated to the discretion of those parties.'[2095] He further argues

[2091] Geiss, "The Conduct of Hostilities in Asymmetric Conflicts - Reciprocity, Distinction, Proportionality, Precautions", at 126.
[2092] Ibid.
[2093] See Preamble, St Petersburg Declaration.
[2094] Geiss, "Military Necessity: A Fundamental 'Principle' Fallen Into Oblivion", at 562.
[2095] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?", at 39.

that 'couched as they are in terms of prohibitions, the overwhelming majority of the rules and principles in the area of conduct of hostilities suggest that actions that are *not* prohibited are permissible.'[2096] Accordingly, the conduct of hostilities logic seems to be at the opposite end of the spectrum from international human rights law, with respect to the structural difference that this branch of law, by and large, follows the logic of states being prohibited from restricting human rights unless permitted to do so. Kleffner explains that 'there are good reasons for maintaining that, in the area of the law governing the conduct of hostilities, any restriction on what parties to an armed conflict may do when using force against military objectives in their quest to overcome the adversary must derive from an express restriction stipulated in a rule or principle of positive international law.'[2097]

Accordingly, he criticizes the DPH Guidance suggestion that the principles of humanity and military necessity 'constitute guiding principles for the interpretation of the rights and duties of belligerents.'[2098] For him, these principles are simply 'considerations'[2099] between which states have struck the balance to build the law of armed conflict. 'Each and every legal rule and principle of the law of armed conflict therefore manifests and incorporates that balance.'[2100] In his opinion, the ICRC approach as settled in the Guidance is therefore dangerous, as it can make the case for a different understanding of how considerations of humanity and military necessity operate in the realm of international humanitarian law. For him, this approach opens the door to the doctrine of *Kriegsraison*. 'It would allow superimposing humanitarian requirements where the positive legal rules and principles of the law of armed conflict are permissive. Rather, it would also lead to a re-introduction of military necessity that allows for military actions that are otherwise prohibited.'[2101] More specifically, for him, 'to view the two fundamental principles of humanity and military necessity as not being fully incorporated into the law of armed conflict may hence lead to a

[2096] Id. at (original emphasis). See also Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 1389.
[2097] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?", at 39.
[2098] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 79.
[2099] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?" at 41.
[2100] Id. at 41.
[2101] Ibid. For a similar argument, see also Fenrick, "ICRC Guidance on Direct Participation in Hostilities", at 298-299.

reintroduction of concepts that strongly resemble the doctrine of *Kriegraison.*'[2102] He is of the opinion that nothing would stand in the way of 'interpreting an absolute prohibition in the law of armed conflict into one that can be modified by considerations of military necessity.'[2103] A crystallization of this fear can be illustrated by the approach that was taken, as we have seen above, by the Trial Chamber in the *Blaskic* judgment,[2104] but was reversed by the Appeals Chamber.[2105]

A conceivable example of Kleffner's fear could be illustrated by the following example. Suppose a very high-level Al-Qaida commander is known to be currently plotting a widespread terror attack in the US. This man is currently celebrating the wedding of one of his sons in his house. There are more than 200 guests and the party is ongoing. The house is situated in a populated suburban area under the control of the Taliban. The US has very reliable intelligence that the commander is currently at home, which is rare as he is very often travelling and knows that he is being watched. He has come secretly in order to be present for the wedding of his son. The US forces do not want to go for a ground operation as this would most likely seriously endanger their armed forces. Neither do they want to cancel the attack, as it is maybe the only opportunity for them to kill him. The intelligence also estimates that the bombing of the house would result in clearly excessive collateral damage. However, due to the extremely high value of the target and due to the fact that it is known with certainty that this man is currently planning a wide and deadly terror attack at the New York Stock Exchange, such an approach could in theory allow the US commander to interpret the absolute prohibition on disproportionate attacks into one that can be modified by considerations of military necessity. Therefore, the US Commander might very well drop a one-ton bomb on the house in the name of military necessity and kill not only the target but the guests and the neighbours around. This would be to be sure, an extremely worrying and dangerous development of IHL. And it is suggested here that this example, albeit a bit exaggerated in order to make my point, is not so far from the current reality.

[2102] Kleffner, "Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?", at 42.
[2103] Id. at 43.
[2104] *Blaskic* Trial Judgment, para 180.
[2105] *Blaskic* Appeal Judgment, para. 109.

So Kleffner's fear with the Guidance approach is that IHL retrogresses towards the devastating effects of the doctrine of *Kriegsraison.* Accordingly, after having analysed whether Section IX would form part of the *lex lata* as it currently stands, despite its usefulness and desirability, he concludes that it does not, at least presently.

For Doswald-Beck too,

> 'there is a difficulty relying on a reference to military necessity, since this notion is usually an underlying *principle* rather than a rule, unless it is specifically referred to in a rule. The provisions under IHL that state that a civilian loses immunity from attack when taking a direct part in hostilities do not mention such an exception. However, it is clear that attacking a person when he can be arrested is indeed not necessary from a military point of view.'[2106]

She acknowledges that IHL treaties do not provide a rule that, in addition to the recognized case of combatants *hors de combat*, a combatant may not be attacked if he may be arrested. However, in her opinion, 'the reason for this absence should be looked at more carefully, in particular in the light of the old rule concerning the prohibition of assassination, in order to see whether the human rights rule is so very different from the original rules and philosophy of IHL.'[2107] Therefore, in Doswald-Beck's view, 'either such a rule should be proposed, or the definition of taking "a direct part in hostilities" be very narrowly defined to include only persons (whether belonging to an armed group or not) who are in the very process of shooting, firing a missile or similar, or by reference to the parallel application of human rights law.'[2108] She finally submits that the last option makes more sense as it reflects existing law. She therefore considers that Part IX of the Interpretative Guidance respects both international humanitarian law and human rights in that they would 'allow government forces to deal with the insurrection but at the same time require the

[2106] Doswald-Beck, "The right to life in armed conflict: does international humanitarian law provide all the answers?", at 903.
[2107] Id. at 900. For an extensive explanation of the prohibition of assassination Under IHL, see id. at pp. 900-903.
[2108] Id. at 903.

government to take the necessary measures to plan for an arrest where possible rather than use lethal force.'[2109]

However, we have seen that in the ICRC Guidance, the definition of taking a direct part in hostilities has not been defined as narrowly as we would like it to be, in terms of the protection of uninvolved civilians. Furthermore, and more importantly, with the concept of continuous combat function, the Guidance practically withdraws civilian status from members of organized armed groups. According to this approach, fighters may be directly attacked at any time, irrespective of any actual active participation in hostilities at the time of the attack. It is submitted here that the ICRC, perfectly aware of the dangers the continuous combat function encompasses, tried to moderate the effects of this lifting of protection via the drafting of Recommendation IX. The Guidance therefore provides that 'the kind and degree of force which is permissible against persons not entitled to protection against attack must not exceed what is actually necessary to accomplish a legitimate military purpose'[2110]

The insertion of the notion of a gradation in the use of force is a commendable exercise, in addition to being extremely desirable, especially in non-international armed conflicts. However, to argue for it via the restrictive function of military necessity has dangers. Indeed, if we follow Kleffner's line of reasoning, the danger of Recommendation IX is that the principle of military necessity may very well be used in the contrary direction to that intended by the ICRC. It is true that even the permissive function of military necessity only justifies the resort to a degree of force which is reasonably required by the situation and which is not prohibited by IHL. But, knowing how history unfolds, we cannot be certain that the opening of this door will not lead us on a slippery slope right up to the disgusting aspects of *Kreigraison,* that are not so old after all.

In some respects, we may feel that we are going back to a sort of *kriegsraison* way of waging war. With the fight against terrorism, the use of unmanned aerial vehicles and actions such as targeted killings, it seems that some, at least, are trying to promote the

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[2109] Id. at 891.

[2110] *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 89.

permissive aspect of military necessity as a principle that supersedes the specific norms of IHL.

The US is using targeted killings as a method and drones as means in their anti-terrorist strategy and are systematically killing ‘terrorists’, without even trying to capture them. Drones are a means of decreasing the risk to one’s own forces and of reaching even the most remote locations in areas that are beyond reach, such as the mountainous regions of Afghanistan.[2111] The problem with this approach is the associated incidental collateral damage that drones strikes create, which questions their legality.

Since 11/09, the legal framework in the fight against terrorism has developed extensively and has led to the establishment of a legal framework permitting the use of lethal force in targeted killings and other clandestine interventions. The fact that these operations occur in countries where the US is not at war makes their legal basis is all the more shadowy. A confidential Justice Department memo, commonly called the DOJ White Paper, was leaked in February 2013 in the US and provides the judicial foundations of the circumstances in which the US Government is authorized to use lethal force in a foreign state, outside the battlefield. This document sheds some lights on the US practice of targeted killings.[2112]

It is not the purpose of this section to enter into a lengthy discussion on the question of targeted killings. However, I would like to raise some questions that are interesting with respect to our discussion. Putting aside a whole range of interesting questions, let us start by assuming that IHL applies, at least when the drone strikes happen in internal armed conflicts such as in Yemen or Afghanistan.

[2111] For an explanation of the technical advantages of drone technology, see Geiss & Siegrist, “Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?”, at 44-45. Here we see the dangerousness of the concept of force protection when used in a way that supersedes the whole IHL framework.

[2112] See ‘Lawfulness of Lethal Operation Directed Against a US Citizen Who Is a Senior Operational Leader of Al-Qaida or An Associated Force’, Department of Justice White Paper, available here: http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf It is to be noted that this paper is overly US centered, with the main issues dealing with the targeted killing of US citizens, with regard to constitutional law and powers, and the implications with regard to US citizens.

What interests us here are the questions related to the status of individuals killed by drone strikes and the rules on indiscriminate attacks and proportionality in attacks. Indeed, the distinction between civilian and military objectives in the context of a drone strike is difficult to implement, as it is very challenging to gather reliable intelligence from the ground. How is a civilian directly participating in hostilities to be distinguished from one engaging in other types of civilian activities that can be confused with hostile acts? For instance, 'can a person digging in the vicinity of a road really be distinguished as a person planting an IED solely based on a video analysis?'[2113]

The debate is ongoing as to which rules apply to these situations and whether and how certain *status* or *conducts* preclude certain persons from civilian protection. If we apply the membership approach, most members of the organized armed group under consideration will be considered as legitimate targets for the whole duration of their membership in the group, with no discontinuation. If we consider that, due to the fact that there is no combatant status in non-international armed conflict, the best approach would be to apply the specific acts approach, based on *conduct*, the attacks on the individuals finding themselves on these targeting lists would be subjected to the rule on loss of protection for such time as they take a direct part in hostilities. Here the interpretation of the notions of 'for such time' and 'direct participation in hostilities' becomes central to the discussion. And lastly, if we apply the ICRC approach, namely that fighting members of organized armed groups are considered as having a continuous combat function and therefore cease to be civilians, these persons would not have any protection from attack. Furthermore, with the ICRC approach, persons having a continuous combat function will need to be separated from civilians directly participating in hostilities merely on a spontaneous basis. These last persons would lose their protection for such time as their direct participation lasts, but would regain their protection as soon as this was over. Whatever solution we decide to adopt, all of them require the recognition of the person as being engaged in the hostilities. It is to be noted that the geographical scope becomes relevant to the identification of these persons, in so far as 'the location of the individual might exclude him/her from being

[2113] Geiss & Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", at 45.

considered as directly participating in the hostilities (or carrying out a continuous combat function).'[2114]

With this in mind, the very notion of a pre-determined targeting list is all the more worrying. It is difficult to see how the identification of a person in accordance with the principle of distinction and the criteria IHL provides in this respect can be upheld in such a manner. These lists are compiled in an obscure manner far away from the battlefield. The consequences of bad ground intelligence can be tragic.[2115] The Joint Integrated Prioritized Target List is the Pentagon's roster of approved terrorist targets, in which individuals targeted are alleged terrorists or other persons deemed dangerous. 'Their inclusion on what are known as kill/capture lists is based on undisclosed intelligence applied against secret criteria.'[2116] Furthermore, the U.S. government keeps broadening the definition of acceptable high-value targets,[2117] by including targets that are clearly not military objectives. For instance, a 2009 August report by the Senate Foreign Relations Committee disclosed that recently the targeting list was expanded to include some fifty Afghan drug lords who are suspected of giving money to help finance the Taliban. As we have seen above in various contexts, the financing of an organized armed group cannot be considered as direct participation in hostilities. This is a clear act of indirect participation and accordingly the targeting of these persons does not comply with IHL.

The second issue that preoccupies us here is related to the automatism of killing over capture. The DOJ White Paper suggests that, according to IHL, enemy fighters can be killed instead of captured anytime, anywhere, unless and until they surrender.[2118] Accordingly, the White Paper takes the majority view analyzed above that there is no such a thing as an obligation of gradation in the use of force. It is indeed not considered unlawful, at least yet, to target an individual who is not a protected

[2114] Lubell & Derejko, "A Global Battelfield? Drones and the Geographical Scope of Armed Conflict", at 85.
[2115] For instance, in September 2009, a NATO air strike in Afghanistan killed between seventy and a hundred and twenty-five people, many of them civilians, who were taking fuel from two stranded oil trucks; they had been mistaken for Taliban insurgents. Mayer, J., "The Predator War What are the risks of the C.I.A.'s covert drone program?", The New Yorker, (26 October 2009).
[2116] Alston, P., "The CIA and Targeted Killings Beyond Borders", *Harvard National Security Journal*, (2011), at 4.
[2117] Mayer, "The Predator War What are the risks of the C.I.A.'s covert drone program?".
[2118] Goodman, R., "The Power to Kill or Capture and the DOJ White Paper" (*European Journal of International Law* 2013).

civilian, provided that all the other IHL rules on methods and means have been respected. So first, in order for the law to not be violated, the targeted person must indeed constitute a legitimate military objective. And we have seen that the US practice in this respect is far from obvious. In addition, the compliance with the principles of precautions in attack and proportionality can legitimately be called into question, despite the fact that some argue that the drones' technology, via its enhanced aerial surveillance and the precision of its attack, can enhance compliance with these two principles. The argument remains to be proved, especially in view of reports putting such affirmation seriously in doubt.[2119] Furthermore, the number of civilian deaths that are considered as justified in each of these targeted killing is not clear and seems rather lenient.

This tendency towards drone strikes is in a certain manner going against the new counterinsurgency theories that have been developed in the context of Afghanistan and Iraq by Army Generals who have understood that they can never win the war if in their targeting decisions they are creating more 'terrorists' due to extensive civilian casualties.[2120] Our point here is not to discuss this 'win the hearts and minds' approach. But what is interesting is that the very notion of trying as far as possible to limit civilian collateral damage is taking off in military doctrine, at least in the US and the UK. The transfer of the targeted killing program from the CIA to the Defense Department could promote this tendency, by at least enhancing transparency and accountability.

A gradation in the use of force via Precautionary measures?

We have seen the dangers that may potentially ensue from the use of the principle of military necessity in arguing for a gradation in the use of force. These dangers are in a way illustrated by the way the US is waging its war on terror with its policy of targeted killing and the use of drones.

[2119] See Alston, "The CIA and Targeted Killings Beyond Borders", *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston, UN Human Rights Council, A/HRC/14/24/Add.6, 28 May 2010. See also HRW, 'US: Move Drone Strike Program to Military', 21 March 2013, available here: http://www.hrw.org/news/2013/03/21/us-move-drone-strike-program-military

[2120] See generally US Headquarter Army, Civilian Casualty Mitigation CIVCAS.

However, the notion of a gradation in the use of force is not only a good thing for targeted persons in non-international armed conflicts, but is certainly essential in terms of the protection of civilians against the effects of hostilities. And this is this very question that preoccupies us in this dissertation.

Actually what the guidance says is that it tries to apply the principle of proportionality vis-à-vis fighters. However, if one examines precisely the contours of the obligation to take precautions in attack, a conceivable argument for the notion of a gradation in the use of force that would impact on fighters *and* on uninvolved civilians can be articulated. Perhaps, another way to insert the notion of the least harmful requirement into IHL can simply be found in the obligation to take precautionary measures in attack, as a principle of moderation imposed on military action?

As we have seen, the principle of proportionality refers to the effects on the surrounding civilians of the use of lethal force against a legitimate military objective. The correct statement of the rule of proportionality is that 'the prohibition is on the *effects* from the force used and not on the amount of the force itself.'[2121] So once a legitimate military objective has been identified, IHL provides for the obligation on the attacking side to take precautionary measures.[2122] Fighters and civilians directly participating in hostilities lose their protection from direct attack and thereby become legitimate military objectives. However, having once identified a legitimate target, the attacking side is further obliged to respect the principle of proportionality and in order to do so, it has to take precautionary measures in the attack on the legitimate target. Indeed, 'any targeted killing must comply with the principle of proportionality, so that any benefit to soldiers and civilians must be proportionate to the collateral damage caused by the act.'[2123] This has been, for instance, confirmed by the Israeli Supreme Court that held: 'The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportional to the military advantage in harming the combatants and terrorists.'[2124] So, even where a military objective has been identified, it cannot be attacked if the attack is expected to

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[2121] Henderson, *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, at 230.
[2122] See Chapter 11 for a detailled discussion on precautionary measures in non-international armed conflict.
[2123] Bianchi & Naqvi, *International Humanitarian Law and Terrorism*, at 185.
[2124] *Public Committee against Torture v Israel* HCJ 769/02 (14 December 2006) para 46.

cause excessive collateral damage in relation to the concrete and direct military advantage anticipated.

Accordingly, it is submitted here that via the obligation of taking the necessary precautions in attack, the notion of gradation in the use of force is already present and quite clear in the law. However, as we have seen in Chapter 11, too often the attention on precautionary measures is distracted by the rule on proportionality. The tendency is to downplay the importance of these precautionary measures in taking into account almost exclusively military considerations when determining which precautionary measures are feasible.

However, precautionary measures are a necessary part of the evaluation of the proportionality of a given attack and many of these measures need to be satisfied in order to respect the prohibition of disproportionate attack. Due to the notion of *feasibility,* precautionary measures insert a sort of sliding scale into the obligations of the parties to a non-international armed conflict. Depending on the context and the capacities, it is normal to hold the strong party to the conflict to a higher level of expectations than the weak party. These measures find their greatest pertinence in asymmetric combats fought in urban areas where fighters are intermingled with the civilian population. The military superiority of the strong party to the conflict, coupled to the military advantage it possesses in terms of territorial control, mean that state armed forces normally have more alternative options in order to obtain a similar military advantage. Accordingly, commanders, when practical and practicable, should take precautions, taking into account all circumstances ruling at the time. Those circumstances do not include only military considerations, but also and importantly humanitarian considerations.

We will discuss briefly how precautionary measures in attack can minimise recourse to lethal force. In the first place, the attacking side needs to plan and control its operation in such a manner as to minimise recourse to lethal force. As we have seen, although there is no treaty based requirement to take precautions in non-international armed conflict, this rule is now enshrined in customary law applicable to this type of

conflict.[2125] In other words, as stated by Gardam, 'the conduct of the attack itself must not be negligent and involve unnecessary civilian casualties.'[2126] Another rule that is important for the establishment of a gradation on the use of force is related to the obligation to do everything feasible to verify that targets are military objectives, fighters or civilian directly participating in hostilities. Here the customary rule of doubt as to the status of the object is, of course, very important. Furthermore, the obligation to take all feasible precautions in the choice of means and methods, with a view to avoiding or minimising collateral damage, is essential.[2127] Methods are generally understood to mean the manner in which weapons are used, such as tactics, strategies, etc. Tactics and strategies which employ force against legitimate targets that could be avoidable, would violate the prohibition. It is submitted here that when it comes to human targets, we find in this rule the obligation to choose the method that will minimise incidental loss of life, which is, when feasible, to try to capture rather than kill. In addition, the concept of the least harmful means to be used in an attack against a legitimate target can also be found in the obligation to take all feasible precautions in the choice of means. And lastly, the obligation to cancel or suspend an attack when it becomes apparent that the attack may be expected to cause collateral damage can also participate in the establishment of a gradation in the use of force against legitimate targets.[2128]

So, *via* the obligations to take the above-mentioned precautionary measures in attack, it is argued here that the ultimate result would be a gradation in the use of force. Precautionary measures constitute an important yardstick to determine whether the use of force against a legitimate military target is no more than absolutely necessary. Arguments for using overwhelming force against a legitimate objective, without more, cannot stand in the face of these obligations that are applicable in non-international armed conflicts. What is not prohibited under IHL is permitted, *but* within the constraints of IHL. We therefore arrive at a sort of 'sliding-scale' approach,

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[2125] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 15.

[2126] Gardam, J.G., "Proportionality and Force in International Law", 87 *American Journal of International Law* 406, (1993). at 407.

[2127] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 17.

[2128] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Rule 19.

according to which the choice and application of the use of lethal force would be based on the situation prevailing at the time of the resort to the force.

The very notion of having a gradation in the use of force in non-international armed conflict should be applied to the use of force against all legitimate targets, which means immobile military objectives, fighters, members of the state armed forces and civilians directly participating in hostilities. If such an approach could be accepted by parties fighting a non-international armed conflict, it is submitted that it would constitute a powerful tool to reduce not only civilian casualties related to direct attacks, but also civilian collateral damage.

However, while writing the above paragraph, I already hear criticism coming from the IHL community. And indeed, IHL might not be the best tool ultimately to deal with all situations of armed violence in non-international armed conflict. Other solutions exist, and IHL should not be read in isolation, as if no other legal frameworks would apply, such as human rights law. For instance, during the Right to Life meeting,[2129] the experts warned that 'in helping to develop IHL rules on direct participation in hostilities, lawyers should be careful to take note that human rights law provides this clarity on the issue of targetability in NIAC.'[2130] It is submitted here that despite the interest of the approach via the restrictive function of military necessity, it would have maybe been clearer to enter this notion of gradation in the use of force via the human rights law framework, or via a complementary approach of human rights law and IHL.

Having examined the norms of international humanitarian law for the protection of civilians against the effects of hostilities, applying in non-international armed

[2129] The purpose of the meeting was to examine the difference between how IHL and international human rights law govern the taking of life in situations of occupation and non-international armed conflict. On this, see also generally the last ICRC experts meeting report on those questions. In this meeting, the objective was to clarify how and when law enforcement rules, as against the rules governing the conduct of hostilities, apply to the use of force by the occupying power. Albeit devoted to the law of occupation, the report does mention the law of non-international armed conflict too. See *Expert Meeting: Occupation and Other Forms of administration of Foreign Territory* (2012). It is to be noted that another ICRC report will be released in the coming weeks on the specific issue of the use of force in non-international armed conflict. Due to confidentiality reasons I could not have access to the draft report, nor to the discussions. However, I have had the chance to discuss this report informally with Gloria Gaggioli, the rapporteur.

[2130] Expert *Meeting on the Right to Life in Armed Conflicts and Situations of Occupation* (2005), at 40.

conflicts, in addition to the role of international criminal law, it would have been necessary here to consider the protection afforded by human rights law to civilians in this type of armed conflict. A detailed study of the law enforcement regime under international of human rights law is however outside the scope of this dissertation.

General Conclusion

The issue of the protection of civilians against the effects of hostilities in non-international armed conflicts is more pressing than ever because civilians are increasingly bearing the brunt of the armed violence, as shown on a daily basis by the media. Civilians continue to account for the vast majority of the victims of acts of violence committed by parties to armed conflicts, due to several factors, including the continuous shift of the battlefield into civilian population centres, deliberate targeting, indiscriminate and excessive use of force, use of civilians as human shields, as well as other acts that violate applicable international law.

This dissertation has focused on the numerous challenges that the protection of civilians against the effects of hostilities in non-international armed conflicts poses to international humanitarian law. Some are due to the non-clarity of certain notions, while some are due to the very characteristics of internal armed conflicts.

Non-international asymmetric conflicts differ in fundamental respects from the conception of war that is embodied in classic international humanitarian law, and the objective was therefore to clarify these differences in order to identify the clear protective regime that IHL provides for this category of persons. Since war crimes in international criminal law are grounded in IHL, these were also carefully analysed. Indeed, international criminal law constitutes an essential contribution to the clarification of the IHL notions which constitutes the protective regime for civilians against the effects of hostilities.

In this general conclusion, I will summarise the different challenges to the protection of civilians against the effects of hostilities that have been identified throughout this dissertation, and discuss some proposals to overcome them.

Sketchy treaty law

We have seen that the primary legal basis for the regulation of non-international armed conflicts, the treaty rules, were rather rudimentary and unsatisfactory in terms of the protection of civilians against the effects of hostilities. Many non-international armed conflicts currently raging in the world are not covered by all their rules, leaving many situations under the strict ambit of Common Article 3, which is not really helpful in terms of protection when it comes to the conduct of hostilities. Recent decades have seen a tremendous increase in the number of treaty rules specifically addressing internal armed conflicts. But these treaties do not deal with the regulation of combat operations in a general manner, as they only address specific issues, like the use of certain weapons or the protection of cultural property.

Customary law as a tool

Thanks to the *Tadic* decision, which demonstrated that customary international law developed IHL for internal armed conflicts, this source of law assists us to fill the gaps for the protection of civilians in such conflicts. State practice has gone beyond existing treaty law and expanded the rules applicable to international armed conflict to non-international armed conflicts as customary law too. Customary IHL is particularly relevant for internal armed conflicts, as it is the existing customary law rules that better protect civilians against the effects of hostilities in these conflicts. The specificity of the IHL methodology in the identification of customary norms turns mainly around the downplaying of contrary state practice, as it does not in fact negate the existence of customary norms. For instance, normally states do not claim that they regard civilians as legitimate targets of attack, but rather justify their breach of the rule via justifications or denials and so an IHL customary norm can be identified. Accordingly, in order to arrive at an accurate assessment of customary IHL law in non-international armed conflict, one needs not only to look at the description of actual military operations, but also to examine the legal assessment of such operations. This requires an analysis of official positions taken by the parties involved, as well as other states and actors of the international community. We have also to look at the reactions of other states. Attacks against civilians, pillage and

sexual violence remain prohibited, notwithstanding numerous reports of their commission. Thus it is essential that battlefield practice be not the only element taken into account for ascertaining a customary norm. Denials, objections and protests concerning those operational acts also need to be taken into account to determine *opinio juris* or acceptance as law in this field. Contrary state practice will also be compensated by a strong *opinio juris*. General principles are also used to fill possible gaps in the body of treaty and customary rules and to choose between two or more conflicting interpretations of a treaty or customary rule.

Accordingly, the specific *démarche* related to the identification of the customary status of IHL norms, especially when it comes to the protection of civilians, should be effectuated by a flexible application of customary international law and general principles. This allows us to establish a rule as a higher law. Accordingly, when it is undeniable that a rule of international law may further the common interests of humanity or the community of states, the traditional requirement of consistency of state practice when searching for a customary rule, may, if need be, justifiably be played down a bit, provided that a strong *opinio juris*, democratically informed by global state consent, has crystallized in international fora. General principles can be referred to in order to buttress customary law findings.

Definition of non-international armed conflict

The identification of what qualifies as a non-international armed conflict is a complex issue and has given rise to a wide range of discussions in the literature and the case law. It is the preliminary step in determining the applicable humanitarian law framework for the protection of civilians against the effects of hostilities. The qualification of the nature of an armed conflict is a major issue because it determines whether and which IHL rules will be applicable to a given situation of violence, in order for civilians to be protected.

The types of internal armed conflict covered by Common Article 3 were originally those reaching the intensity of almost a civil war. However, today it encompasses a wide range of situations of armed violence. The *Tadic* definition of internal armed

conflict as 'protracted armed violence between governmental authorities and organized armed groups' has broadened the scope of 'armed conflict not of an international character'. The restrictive definition of non-international armed conflict contained in Article 1(1) of Protocol II renders this instrument *not* applicable where two or more separate groups confront each other in any state, with no active part in hostilities being played by government troops. Furthermore, it does not cover non-international armed conflict situations where the troops of a government intervene abroad in support of the local authorities of another government, against an organized armed group. For instance, Protocol II did not apply to the situation whereby Rwanda intervened in DRC in December 2008, in order to help the government of Kinshasa to capture Laurent Nkunda, the chief of the RCD-Goma, an armed group that was committing exactions in North Kivu. We have seen that treaty IHL makes a distinction between internal armed conflicts within the meaning of Common Article 3 and those meeting the higher threshold of Protocol II. However, the ICRC Study on Customary International Humanitarian Law does not distinguish between the two categories of internal armed conflict, because it found that states did not make such a distinction in practice. By introducing additional categories and maintaining a distinction between Common Article 3 and other serious violations of IHL in internal armed conflicts, the Rome Statute seems at first glance to exacerbate the problem of the split applicability of the Provisions of Common Article 3 and Protocol II. There was a considerable debate in the legal literature as to whether the Rome Statute in fact created a third type of internal armed conflict as a result of the wording of Article 8(2)(f). However, ultimately, it has been argued that the correct view should be that Article 8(2)(f) merely classifies the terms of Article 8(2)(d) without creating a new category of armed conflict, and that the two provisions share the same threshold of application.

Ultimately, for the sake of the clarity of this dissertation, and in order to capture the widest range of situations, I decided to consider as qualifying as a non-international armed conflict all armed conflicts opposing a state to one or several armed groups, in addition to all situations opposing organized armed groups to each other. This encompasses the so-called transnational armed conflicts.

Characteristics

The real structures of non-international armed conflicts differ in fundamental respects from the conception of war that is embodied in classic IHL. Instead of states and state-like entities that control territory and engage in sustained military action, these conflicts feature loosely organized armed groups, militias and paramilitaries, for whom military victory is impracticable, inefficient or insufficient to achieve their objectives. The current spread of technological innovations ensures the persistence and the prevalence of asymmetric military conflict between regular armies and organized armed groups. All sides to the conflict are in danger of neglecting the principle of distinction and have strong incentives to violate the law.

Direct military confrontations are rare, and hostilities shift from one place to another, often in, or in proximity to, urban areas and civilian surroundings. The gain of territory over the enemy is something that is almost non-existent, except in cases of full-blown civil war. This shift of the battlefield to urban areas means that people could appear to be civilians, but also appear to be involved in military activities. There is a blurring of the lines between those who participate in the fighting, and those who do not, which renders the dividing line between combatants and civilians not readily visible, either on the ground or in the law. This in turn gives rise to confusion and uncertainty as to the distinction between legitimate military objectives and civilians protected against direct attacks. Furthermore, the problem of distinction is aggravated by the fact that there are very few purely military objectives, as most civilian objects can potentially have a military value. Organized armed groups often use civilians as human shields or occupy their places of worship, homes, and other civilian structures. In practice, determining who or what may be attacked is increasingly difficult. All these characteristics challenge the application of the principles of distinction and proportionality and there is a fundamental disconnection between the reality of these conflicts and the conception of the law that should be applied to them.

Who are civilians?

Under IHL, the lawfulness of intentional deprivation of life depends primarily – but not exclusively – on whether the targeted person represents a legitimate military objective. This determination is governed by the fundamental principle of distinction. As far as persons are concerned, this principle obliges all those involved in the conduct of hostilities to distinguish between persons who may be legitimately attacked, and those who are protected from direct attack. However, in addition to the problems related to the realities of internal armed conflicts and the asymmetries they entail, IHL for internal armed conflicts does not propose clear rules related to the identification of persons not involved in war fighting activities, who should be protected, and of persons waging the violence. It is not clear when fighters may be targeted. It has been necessary to determine the different categories of persons that exist under the law of non-international armed conflict. However, due to the fact that there is no combatant status in internal armed conflicts, there is no definition of civilians either. From the fact that there is no formal category of combatant, it is difficult to target a rebel fighter on the basis of his or her belonging to a category that does not exist (status) and it is difficult to know with certainty when civilians lose their protection.

However, we have seen that some solutions have been proposed with respect to the identification of the different categories of persons in internal armed conflicts; each of them with its advantages, but all of them vitiated with problems. If we interpret the law via the membership approach, the effect is that force can automatically be used against members of organized armed groups. This is why membership in an armed group as a fighter needs to be distinguished from simple affiliation with a party to the conflict for which the group is fighting – in other words, membership in the political, educational, or humanitarian wing of a rebel movement. But we have seen that the blurred lines of distinction in non-international armed conflicts has led to rather lenient and broad interpretations with respect to the delineation of membership in an organized armed group.

If we interpret the law via the direct participation in hostilities approach, the legality of the use of force will turn entirely on what this concept signifies. An act which

constitutes 'direct participation in hostilities' will render a fighter targetable for such time as that individual is committing that act. However, as we have seen, other than the direct use of force, the notion of what exactly constitutes direct participation in hostilities is far from clear, and is hotly debated.

The ICRC adopted an intermediary position and proposed a new notion, the continuous combat function. With this notion the ICRC practically withdrew civilian status from members of organized armed groups. Fighters may be directly attacked at any time, irrespective of any actual active participation in hostilities at the time of the attack. This in turn puts in greater danger of collateral damage the civilians that are intermingled with them. Indeed, the continuous combat function has the effect that it widens the legal categories of persons who may be legitimately attacked. By constituting a legitimate military target on a continuous basis, these fighters ultimately put uninvolved civilians in greater danger. Secondly, if a person is not considered as exercising a continuous combat function, it must also be determined whether he is directly participating in hostilities or engaged in 'harmful' or 'hostile' acts on a sporadic basis.

Lately, states have been very keen to stress that the laws and customs of war relating to the conduct of hostilities as applicable to international armed conflict should apply to the situations of violence they are facing. This state-centred view has the advantage for the state of allowing it to employ a conduct of hostilities model in which fighters, due to the fact that there is no combatant status, do not benefit from combatant immunity from prosecution for fighting, nor prisoner of war status if they are captured. Accordingly, it is understandable that states are interested in the application of this model, as they receive all its benefits, without having to be compelled by its disadvantages. However, when we consider the very notion of the protection of civilians against the effects of hostilities, it is difficult to understand why the ICRC took this path too. It was obviously trying to balance the principle of military necessity with the principle of humanity. But in the end, it seems that it gave more weight to the former, to the detriment of the protection of civilians. Ultimately, bearing in mind that fighters in internal armed conflicts are most of the time intermingled within the civilian population, the ICRC approach in the Guidance is regrettable.

Definition of military objective

The identification of military objectives in non-international armed conflicts is not an easy task either and is fraught with many problems. We have seen that there is no definition of 'civilian object' in treaty law for non-international armed conflicts. But under customary international law, each and every civilian object can become a military objective, provided it fulfils the respective criteria. However, no objects, including straightforward military objects, can be directly classified as a military objective. Every object must be assessed against the two-pronged test for a military objective, namely that the object makes an effective contribution to the military action of the offender and that its partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time.

This definition is very wide in that can encompass, with a good legal argumentation, almost every civilian object. Furthermore, it depends on the determination of the attacker as to whether such property is used for the military action of the adversary and if its capture, or an attack made against it, will give the attacker a definite military advantage in the circumstances ruling at the time. We have seen that a certain part of the IHL community is pushing for an even further widening of the definition, in light of the changing character of warfare, with new notions such as including war-sustaining activities into the evaluation of a military advantage. In addition, it takes time and effort for a military commander to make the distinction between military objectives and civilian objects and it has been pointed out that often, because of this, low-level commanders have the tendency to be less careful in their target selection.

Ultimately, in non-international armed conflict, there is no civilian object or military objective *per se*. Everything depends on the effect the object has on the conduct of hostilities in terms of military strategy. The status of an object is therefore dynamic and can change very quickly, especially in this type of armed conflict. In addition, the possibilities of defining military targets with clarity, or proving that there are tangible military objectives to be attained from the battle, such as hitting army bases or gaining control over territory, are not clear cut in situations where state armed forces are fighting organized armed groups, and even more so where armed groups are fighting other armed groups.

However, despite all these pitfalls, the limitation set by the definition of legitimate military objectives is highly important for the implementation of the protection of civilians against the effects of hostilities in internal armed conflicts. Indeed, this protection is ensured by the subjective definition of military objectives together with the rule of doubt as to the status of the object. However, this definition is flexible enough to encompass many objects, and is not as protective for civilians as we would like it to be. Indeed, few declared targets are controversial, except, of course, when civilians or civilian objects are directly and intentionally targeted.

That said, controversy about what is a legitimate target is not the only reason why civilians suffer from armed attacks in non-international armed conflict. But as almost every object can be transformed into a military objective through use, purpose or location, the requirement of identification of an object as a military objective is in a way surpassed by the obligation to comply with the principle of proportionality and precautionary measures. These rules are maybe even more important than the rule on the definition of a military objective.

Doubt presumption

The presumption of doubt as to the status of a person or an object is of the utmost importance in internal armed conflicts. In term of persons, suffice to think for instance of the Palestinian-Israeli, Afghan or Iraqi contexts, where individuals are often targeted and shot and it is only when it is too late that the attacker realizes that they were in fact non-combatants. This presumption is a *sine qua non* condition for the provision of any protection of civilians against the effects of hostilities. In the midst of action, uncertainty is always present, and to legitimise any firing in every case of doubt would open the door to many abuses, and would increase the risk of mistaken targeting of civilians to an unacceptable degree. The presumption of doubt for civilian objects is also extremely important. The commander, in planning, deciding upon or executing an attack on a given object, must *honestly* conclude, on the basis of information reasonably available to him at the time, that the object under consideration is indeed a military objective. Here the military commander has a wide

margin of discretion but is under an obligation to take precautions in order to verify the nature of the target.

The first and foremost inference from the obligation of distinction between the different categories of persons and objects under IHL is that direct or deliberate attacks against civilians or civilian objects are forbidden. This is an absolute prohibition reflecting the current customary international law principle of protection of civilians in situations of non-international armed conflict. However, in these specific contexts, the character of the principle in the eyes of the belligerents seems to have changed dramatically. In present day armed conflicts, the targeting of civilians and civilian objects is often among the objectives of the belligerents. This means that the principle of distinction ceases to be a compromise between the belligerents' interests and humanitarian concerns, as the whole objective of the parties is in fact to deliberately target civilians.

Proportionality

The principle of proportionality is important because, especially in internal armed conflicts, civilians and civilian objectives are all too frequently intermingled with military objectives. A military objective does not cease being a military objective only because its attack would be expected to cause disproportionate collateral damage to civilians or civilian objects. The point is that, notwithstanding the unambiguous identification of an object as a military objective, its attack will still be illegal if the incidental injury to civilians or damage to civilian objects is expected to be disproportionate. On the other hand, the fact that only military objectives and fighters may be attacked does not mean there will be no loss of civilian life, injury to civilians or damage to civilian objects or that such loss of life, injury or damage are *per se* illegal. The principle of proportionality provides a supplementary restriction by requiring military commanders to strike a balance between the expected damage and injury to civilians and civilian objects and the anticipated military advantage of the attack, and to disallow attacks that would cause excessive collateral damage.

The principle of proportionality helps to draw the line where necessity should give way to humanity. It is inherent in the principles of both necessity and humanity upon which the conduct of hostilities is based. However, a similar endangering development seems to be happening with respect to the application of the principle of proportionality in non-international armed conflicts. Here again the theory on proportionality seems far removed from the reality on the ground.

In the first place, the whole concept of military advantage encompassed in the proportionality equation can only be derived from attacks on lawful military objectives, as an unlawful attack would not provide a legal military advantage. The interpretation of the concept of 'military advantage' in IHL diminishes the relevance of the principle of proportionality in internal armed conflicts to vanishing point when attacks are not directed at lawful military targets. Here there is no objective to gain any *military* advantage. It is only when harming civilians is not in itself a goal of a given operation, that civilian prejudice can be balanced against military advantage. So in situations where most of the measures parties are using are themselves unlawful, the question of proportionality for the most part does not arise in the first place. Secondly, organized armed groups also have the tendency to manipulate the principle of proportionality in order to protect their military objects. They thereby manipulate the other party's proportionality equation, by shielding their immobile military objects with civilians, while hiding their ammunition, arms, or fighters close to or within civilian neighbourhoods as human camouflage.

It is, however, submitted that the principle of proportionality still has relevance in non-international armed conflicts in so far as, despite the fact that organized armed groups violate the principle of distinction *per se*, most of the time state armed forces will respect the duty to distinguish, at least on their own terms, because, as we have seen, they rarely acknowledge the direct targeting of civilians and civilian objects. However, they will react to these guerrilla tactics by adopting a very wide approach to proportionality. Indeed, when facing an adversary who is constantly misusing the principle of distinction by, for instance, hiding among the civilian population or concealing military equipment among civilian compounds, state armed forces, as a result of their inability to tackle their enemy efficiently, have the tendency to feel

constrained to gradually lower the proportionality requirement barrier, thereby destroying the delicate balance this formula encompasses.

The application of the principle of proportionality requires military commanders to strike a balance between the expected damage to civilians and civilian objects and the anticipated military advantage of the attack. In order for the obligation of proportionality in attack to be respected, we need to have belligerents acting in complete good faith and we need them to truly desire to comply with the general principle of protection of civilians in combat operations. But due to the above-mentioned reasons, state armed forces have the tendency to interpret the law as granting them wide discretion. Rather than trying to increase civilian protection, they do everything in order to limit the commander's responsibilities and to emphasize the obligations imposed on organized armed groups. In applying the test of proportionality, they argue that the means used should be measured against the *overall* aim of winning the armed conflict rather than against the particular aim of winning a specific battle. Furthermore, this overall aim is defined subjectively, with an undue amplification on the *mens rea* as a paramount component of the commander's duty toward civilians.

The tendency is that the strong party's position considers the obligation to spare civilians as prohibiting 'wilful intent' in the infliction of civilian casualties, or 'wanton disregard' or recklessness for the security of surrounding civilians or the civilian population. And when such excuses cannot cope with a given situation, they will argue that it was an error. Ultimately, there is always an excuse for collateral damage, and it will rarely be deemed excessive, as the concept of definite military advantage will always be well argued, thanks to the wide margin of discretion the military commander enjoys. Finally, the vicious circle that is triggered by such practices is that civilians are trapped between the parties to the conflict, with no possibility to escape the fighting. These new battlefield realities mean that some are pushing for changes in the approach to the principles of distinction and proportionality, arguing that proportionality should be measured against the war aims themselves, rather than merely the military advantage expected against the damage likely to be caused by a particular attack.

The application of the principle of proportionality is obscure, and related to subjective interpretation. The proportionality equation can all too easily be manipulated and for a given attack to reach the threshold of *excessive*, in comparison to a military advantage anticipated that is not so much concrete and direct, is quite common. The latitude of the law, and the lack of precision in the rule of proportionality operate in the interests of the military, not in the interests of civilians. Especially in non-international armed conflicts, disparities of means and methods between the parties impact on the ultimate objective of the principle of proportionality, which is, let us not forget, the protection of civilians. Notwithstanding the deficiencies related to the principle of proportionality, a better alternative, based on IHL, has not yet been proposed.

However, it is submitted here that the application of this principle to field realities can still be much improved. The concepts of military advantage and collateral damage can be further clarified, in addition to the values that must be assigned to them. One of the solutions lies with public oversight and accountability for decisions to engage in military operations that are likely to result in extensive civilian collateral damage. Judicial supervision prior to and after engagement in operations is also likely to help. Indeed, what is needed are checks against abuses of the latitude the law seems to give to commanders. These sorts of solutions can of course be applied to state armed forces fighting an insurgency. They are, however, more difficult to envisage when it comes to organized armed groups, despite being worth considering.

Precautions

Bearing in mind the pitfalls related to the application of the principles of distinction and proportionality in non-international armed conflicts, it seems that, finally, precautionary measures are the means by which the protection of civilians against the effects of hostilities can best be implemented. The rule on proportionality has the tendency of distracting attention from the fundamental precautionary rule, which is the requirement to take precautions, in order to avoid or minimize the impact of armed violence on civilians. Precautionary measures are a necessary part of the evaluation of the proportionality of a given attack and many of them would need to be

satisfied in order to respect the prohibition of disproportionate attack. Accordingly, the principles of proportionality and precaution are closely related.

Measures of precaution have to be taken in order to limit anticipated collateral damage to civilians and civilian objects. An attack has to be cancelled or suspended if it may be expected to cause incidental damage that would be excessive in relation to the concrete and direct military advantage anticipated. Precautions must be taken regarding the manner in which the strike is going to be conducted. This includes the choice of weapons used to carry out the attack. When there is a choice of different methods or means of attack, the attacker is obliged to choose the way that would avoid or minimize collateral damage. Ultimately, the failure to take precautions will determine the outcome of the calculation as to whether an attack complied with the principle of proportionality.

It is submitted that precautionary measures are also best adapted to situations of non-international armed conflict because the rules require parties to do the maximum feasible according to each party's possibilities. All *feasible precautions* must be taken to avoid or at the least minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Despite the number of pitfalls present in internal armed conflict, the prescriptions of the customary rules on precautionary measures must be 'interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.'[2131] However, there is a tendency towards downplaying the importance of these precautionary measures and taking into account almost exclusively military considerations when determining which precautionary measures are feasible. This should not be the case. The notion of incidental loss and damage to civilians should also be fully incorporated into the determination of the precautionary measures. Due to the fact that the measures have to be taken to the extent feasible, these rules are more operational and precise than the proportionality principle. The difficulty lies in the objective assessment of whether they have been respected in a given attack. Normally, commanders should take precautions which are practical or practicable, taking into account all circumstances ruling at the time, including humanitarian and

[2131] *Kupreskic,* Trial chamber Judgment, para 525.

military considerations. However, as the planning and decision-making process of a commander is by definition secret, it is close to impossible to know what he knew or what alternatives he had.

Due to the notion of *feasibility,* precautionary measures insert a sort of sliding scale into the obligations of the parties to a non-international armed conflict. Accordingly, depending of the context and the capacities, it is normal to hold the strong party to the conflict to a higher level of expectations than the weak party and to impose on the former a higher degree of responsibility. It is even submitted that precautionary measures find their greatest pertinence in asymmetric combats fought in urban areas. The military superiority of the strong party to the conflict, coupled to the military advantage it possesses in terms of territorial control, mean that state armed forces normally have more alternative options in order to obtain a similar military advantage. The basics of the rule on precautions in attacks are clear and undebatable. With respect to the rule on choosing means and methods minimizing incidental injury and damage to civilian life and objects, a party to the conflict which has advanced technological material, such as precision-guided weapons and ammunition, will have more a compelling obligation to minimize potential collateral damage. Even if they are not legally required to use them in all cases where civilian losses might be minimized, they should do so, due to the fact that they have the capacity to meet higher requirements concerning the precautionary measures.

Furthermore, the fact that the strong party to the conflict can be held to higher standards does not relieve the weak party from their obligations. Indeed, the general duty of precautions against attacks provides that a defending party must take basic precautions to protect civilians against the effects of attacks against military objectives. This rule enacts a positive obligation for the parties to the conflict to take necessary precautions to protect civilians under their control. One of the main deriving obligations related to the precautionary measures defenders have to take against attack, is the duty to avoid locating military objectives within or near densely populated areas. This rule is related to the prohibition of human shields. The rule on the prohibitions to use human shields is the only precautionary measure that is termed in an absolute wording. There are no situations whatsoever that justify such practice. In addition, each party to the conflict has the obligation, to the extent feasible, to

remove civilian persons and objects under its control from the vicinity of military objectives. Ultimately, the weak party to the conflict cannot invoke its technological and military inferiority to justify dubious practices. Organized armed groups are also required by the law to do everything feasible to reduce civilian collateral damage to the minimum.

Loss of protection

In non-international armed conflicts, civilians are under the hazardous risk of suffering from lawful collateral damage, despite being protected from indiscriminate and disproportionate attacks. But they are entitled to protection from direct attack. The thin remaining protective veil civilians enjoy from direct attack is removed as soon as they are considered to participate directly in hostilities. The effects on civilians of the loss of their protection due to their direct participation in hostilities is twofold. First, they are not protected anymore from direct attack for the duration of their participation and secondly, they do not have to be taken into account in the balancing test of proportionality as collateral damage. Accordingly, the question of loss of civilian protection and the signification of the concept of 'direct participation in hostilities' is also a burning issue for the protection of civilians.

In order to have a meaningful protection of uninvolved civilians against direct attack, the concept of direct participation in hostilities needs to be clearly distinguished from indirect participation. General contribution to the war effort does not make civilians targetable as such. Their presence near or within military targets, i.e. persons or objects that have a high value in term of military advantage, will not prevent the targeting of the military objective. Nevertheless, the risk to their lives needs to be taken into account when planning the attack. To consider these civilians in the proportionality analysis entails taking the necessary precautions in order to prevent the death of these persons.

Critique of the tendency to bring the law of international armed conflict to non-international armed conflict

We have seen that since the 1990s and the *Tadic* case, the general tendency is to bring the law of non-international armed conflicts closer to that of international armed conflicts. With respect to the law on the conduct of hostilities, almost a total analogy has occurred, with a set of customary rules applying to internal armed conflict that has grown dramatically. This rising convergence of the substantive rules for international and non-international conflicts has been upheld not only by international criminal tribunals, but also by the ICRC Study on customary law. The consequent existence of a body of customary international humanitarian law applicable to this type of conflict is no longer challenged, albeit discussions continue with respect to which rules exactly have attained this customary status. Most of the customary rules identified by the ICRC cover both types of conflict alike. With this perspective, the substantive rules governing attacks in international and non-international armed conflicts are now similar, except for the status of combatant, that is not to be found in non-international armed conflicts.

The sceptics do not call into question the general analogy being made between the two types of armed conflict, agreeing with the majority that when the law of internal armed conflict is unclear, reference should be made to the law of international armed conflict. Their scepticism lies merely in the idea that maybe the transfer does not occur entirely, and that with respect to cases where the very nature of internal armed conflicts does not allow for such an analogy, such as the lack of combatant status and its attached immunity from prosecution, it is more difficult.

I submit here that the application of the law on the conduct of hostilities by analogy from international armed conflict is workable with respect to situations reaching the level of full scale civil war, such as the internal armed conflicts that opposed up until recently the LTTE to the Government of Sri Lanka in the north of the Island. However, I argue that applying, without further adaptations, the laws on the conduct of hostilities that have been delineated for international armed conflict to low intensity internal armed conflicts endangers civilians more than it protects them. Accordingly, it is suggested that it is pertinent to question the appropriateness of

applying the legal framework of international armed conflicts to internal armed conflicts, and for several reasons.

In the first place, in many internal armed conflicts, organized armed groups are often not well structured or organized. It is seldom that they comply with the criteria of Article 1 of the Second Additional Protocol. In these conditions, where these groups, for their very survival, do not distinguish themselves from the civilian population, it is extremely difficult in practice to determine whether a given individual belongs to an armed group, is part of its fighting branch or merely engaged in political or administrative tasks. Furthermore, as we have seen, IHL for non-international armed conflict does not impose on these fighters any obligation to distinguish themselves from civilians, as there is no combatant status. It is also extremely difficult to know with exactitude who is still a member of the organized armed group and who has left, as for obvious reasons these things are done covertly and secretly. Accordingly, the argument that these fighters can be targeted on sight and in a continuous manner puts many civilians in danger of falling victim to collateral damage. Indeed, as we have seen, and especially in low intensity internal armed conflict, fighters and civilians are intermingled and often live together in urban areas or in villages or camps. The fact that these civilians are sympathetic to the cause of the group, that some are part of the political or administrative wing or belong to the same ethnic group should not distract us from the fact that they are persons who are not directly participating in hostilities, and therefore should be protected. Arguments such as that these civilians were at the wrong place at the wrong time, and that they are therefore simply collateral damage, should also be totally rejected.

In the second place, the pertinence of applying directly the regime of the conduct of hostilities to low intensity non-international armed conflicts is also not deemed to be appropriate in terms of the blurring of the line that this generates between the model of the conduct of hostilities that is normally used for combat settings, and the law enforcement model that is used by the police against civilians for law and order. All acts of violence that occur in an internal armed conflict are not *per se* related to the armed conflict. And with the analogizing approach, the distinction between the two sets of laws becomes blurred. Criminals should not be subjected to extrajudicial

execution or targeted killings, but should be apprehended, whenever possible and tried in front of a court of law.

Thirdly, ambiguities inherent in the principle of proportionality or related to the definition of what constitutes a military objective further complicate the simple application, without more, of the law on the conduct of hostilities to internal armed conflict. The margin of discretion left to the commander is extremely wide, and this is so in a civil war context, where it is known that the scale of slaughter and horrors are exacerbated by ideologies and practices of organized violence and slaughter as 'rightful' punishment, based on ethnicity, religion and political ideology. In such contexts, the very notion of military advantage is subjectively influenced by the perception of the enemy, whose defeat can be obtained more efficiently via other routes than strictly targeting its *military* forces. With respect to the qualification of an object as a military objective the tendency to downplay the effective contribution to military action and amplify the notion of military advantage by including political, economic and psychological considerations is exacerbated in non-international armed conflict. This revision of the concept of military necessity puts many civilians in danger of falling victim to collateral damage.

All these reasons challenge the pertinence and appropriateness of applying the conduct of hostilities legal framework of international armed conflicts to internal armed conflicts with no adaptation to the specific characteristics that these armed conflicts have.

Good faith and reasonability

In order to counter-balance the extreme subjectivity of the rules on the conduct of hostilities, legal doctrine and case law refer to notions such as reasonability and good faith. For instance, Recommendation IX of the ICRC Guidance imposes an obligation to capture rather than kill if *reasonably* possible. We find also the need for reasonableness with respect to the identification of a lawful military objective. For instance, in order to identify such an object in terms of 'purpose' the difficulty lies

with the fact that this is predicated on knowledge of the defending party's intention or *mens rea*. Accordingly, the only standard of proof that is available to us is the one of a reasonable belief in the circumstances ruling at the time. In addition, the ICTY establishes that the standard of proof must be that of a 'reasonable person'.

Accordingly, the implementation of the norms on the conduct of hostilities requires complete good faith and reasonability on the part of the parties to a non-international armed conflict. One of the greatest challenges is to ensure that the belligerents are indeed acting in good faith and with reasonableness in their targeting decisions and are genuinely tasked with providing for the protection of civilians against the effects of hostilities, a presumption that is sometimes difficult to maintain in the type of precarious and volatile situations that non-international armed conflicts constitute. Indeed, as we have seen throughout this dissertation, reasonableness is rarely present on the battlefield, in the heat of the action. Due to the blurring of the lines of distinction, many reckless decisions are taken, that are argued *ex post facto* by stretching the terms of the different tests and formulas. And this is always at the expense of civilian casualties, that are, let us not forget, rising more and more each year. The object and purpose of IHL is supposed to be the prevention of avoidable death and destruction, not the reverse. And the direct application, without further thought put into it, of the law of international armed conflict to non-international armed conflict, at least when it comes to the conduct of hostilities, seems to have the reverse effect.

Toward a gradation in the use of force?

It has been submitted that an approach on gradation in the use of force against legitimate targets can have a positive impact on the limitation of collateral damage, in addition to the rules on proportionality, thereby enhancing the protection of civilians against the effects of hostilities.

The ICRC, in establishing the DPH Guidance, moderated the negative impact of the creation of a third category of person in internal armed conflict, via the continuous combat function, by including a section recommending that fighting members of

organized armed groups should not be attacked on sight if they can easily be arrested without undue risk to the attacking forces. This clause is supposed to apply to the use of force against all legitimate targets. The ICRC grounded its argument on the principle of military necessity. In its restrictive aspect, it could be used as a determining factor of the kind and degree of force permissible in direct attack. The rule that has been proposed mirrors human rights law by requiring a gradation on the use of force, but via the prism of the IHL legal framework and a progressive interpretation of the principles of military necessity and humanity that play an important role in determining the kind and degree of permissible force against legitimate military targets. However, we have seen the potential pitfalls that such an approach via the principle of military necessity can have, as it could open the door to the infamous doctrine of *Kriegsraison*.

A gradation in the use of force via precautionary measures

However, the desirability of a gradation in the use of force is not only a good thing for targeted persons in a non-international armed conflict, but is also certainly essential in terms of the protection of civilians against the effects of hostilities. It has been suggested that, via the obligation of taking the necessary precautions in attack, this notion of a gradation in the use of force is already present and quite clear in IHL. The tendency to downplay the importance of these precautionary measures and to take into account almost exclusively military considerations when determining which precautionary measures are feasible should be countered. Indeed, the principle of proportionality is the inescapable link between the principles of military necessity and humanity and helps to draw the line where military necessity should give way to humanity. It has been suggested that another way to insert the notion of the least harmful requirement into IHL could simply be by strengthening the obligation to take precautionary measures in attack, as a principle of moderation imposed on military action. Furthermore, due to the notion of *feasibility,* precautionary measures insert a sort of sliding scale into the obligations of the parties to a non-international armed conflict that would hold the strong party to the conflict to a higher level of expectations than the weak party. With this ‘sliding-scale’ approach the choice and

application of the use of lethal force would be based on the situation prevailing at the time of the resort to the force.

The sliding scale in the use of lethal force is also related to the question of the geographical scope of the application of IHL in a non-international armed conflict, which is extremely challenging. It has been argued that the existence of an internal armed conflict in a delimited part of a state territory should not serve as a legal basis for the application of international humanitarian law and its permissive rules on the use of lethal force, analogized from international armed conflict law, to every situation of violence within the whole territory of that state. The application of IHL rules on the conduct of hostilities should be constrained to those areas where hostilities are ongoing. Discussions on this question are ongoing. Furthermore, we should be careful in applying customary IHL to all types of internal armed conflict. Having analyzed the rules relating to the protection of civilians against the effects of hostilities in non-international armed conflict, it is argued that, although *a priori* attractive, this is not the best development from this perspective.

Recently, states seem to have understood the desirability of having IHL applying to their situations of internal armed conflict, as it gives them a greater margin of discretion than human rights law in their fight against their rebels. Indeed, a perfect analogy with IHL applicable to international armed conflicts does not yet exist due to the non existence of combatant status, which gives them the best of IHL without the constraints. It is submitted that this analogy is to the detriment of the protection of civilians against the effects of the hostilities, as IHL permits greater collateral damage than human rights law. We therefore need a system that is adapted to the specificities of non-international armed conflict in order for the protection of civilians against the effect of hostilities to be implemented in practice.

In addition, the rules on the conduct of hostilities of international armed conflict should not be applicable to internal armed conflicts not reaching the threshold of application of the Second Additional Protocol, as they are not adapted to these situations of low intensity violence and further endanger the civilian population. This is simply contrary to the object and purpose of international humanitarian law. It is suggested that for low intensity armed conflicts, such as those covered by Common

Article 3, or where the armed forces of a party to the conflict control the territory, the most protective regime for all actors could be the human rights law framework.

This dissertation has focused strictly on international humanitarian law, in order to have the space to analyze thoroughly all the difficult questions related to this specific branch of law in terms of the protection of civilians in non-international armed conflict. However, having done so, the conclusion that I reach is that we also need to analyze other possibilities. Among them is the legal framework of human rights law. In contrast to IHL, under human rights law, there is no necessity to establish the existence of an armed conflict. Indeed, this legal framework is applicable at all times, including in armed conflict. This has been formally confirmed on several occasions by the International Court of Justice.[2132] Accordingly, in internal armed conflicts, both legal frameworks apply in a 'complementary' way. In addition, human rights law does not categorize people. This is an essential aspect in order to understand the differences between these two legal frameworks. With respect to the lawfulness of the use of force, human rights law legislates through what is called a law enforcement model. As under IHL, the use of potentially lethal force is governed by the principles of necessity and proportionality, principles albeit different than under IHL. Human rights law requires that arrests be made when possible and operations be planned in order to increase the possibility of being able to arrest persons. On the other hand, in cases where there is not sufficient control of the situation or area, human rights law does not impose such a requirement. Accordingly, human rights law provides for the least-harmful requirement. For instance, in the case of a car approaching a check-point, the use of force under human rights law could only be used if the approaching car constituted an imminent threat under the circumstances. The use of force must be strictly necessary to protect the armed forces at the check-point and the surroundings persons.[2133] Furthermore, in the event of force being used, this use must be proportionate to the threat posed by the car. A deprivation of life will be considered

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[2132] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, I.C.J. Reports 1996 (I), p. 226, at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, I.C.J. Reports 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, para. 219 (finding substantive violations of human rights law during an armed conflict).

[2133] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, above note 64, para. 32; HRC, Suarez de Guerrero v. Colombia, No. 45/1979, 31 March 1982, CCPR/C/15/D/45/1997, para. 13.2.

‘arbitrary’ if no reasonable precautionary measures have been taken in order to avoid or minimize the use of force.[2134] These precautions include, for instance, warnings and giving the opportunity to surrender.[2135] It is submitted here that, at least at first sight, in the context of an internal armed conflict, these rules, which provide for the escalation of force, could provide greater clarity and precision than under IHL.

Unlawful attacks under international criminal law

In order to better capture the protection framework for civilians, this dissertation has also analyzed the war crimes related to the primary rules protecting them on the ground. International criminal law is an important means by which IHL may be enforced, as the former has become inextricably linked with the latter. The former comprises the secondary rules to the primary rules of international humanitarian law. As of today, IHL can no longer be understood fully without recourse to the work of the International Criminal Tribunals and Court, in addition to national criminal courts. International criminal law has become accessorial to IHL, and its application through the international criminal justice system is increasingly important for the implementation of IHL. We have seen the great breakthrough of the *Tadic* Interlocutory Appeals Decision which ascertained the fact that violations of the law applicable in cases of armed conflicts not of an international character may also constitute war crimes under international law. These last 20 years have seen a spectacular rise of this branch of law via the creation of international criminal courts. Their work constitutes a precious and essential contribution to the IHL applicable to non-international armed conflict and its effective implementation.

The *ad hoc* International Tribunals have on occasion touched upon the law relating to the conduct of hostilities, thereby opening up internal armed conflicts to Hague law, but this has been rare. The object and purpose of IHL is to protect persons who are not or no longer taking part in hostilities. It is a body of *preventive* law that is normally applied on the battlefield, *during* armed conflicts, by persons that are not

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[2134] See, e.g., HRC, Suarez de Guerrero v. Colombia, above note 147, paras. 13.2–3. See, also ECtHR, Case of Ergi v. Turkey, No. 66/1997/850/1057, 28 July 1998, paras. 79–81.

[2135] HRC, Suarez de Guerrero v. Colombia, above note 147, para. 13.2.

lawyers. This body of law defines when those rules are violated by belligerents and it was therefore not originally created for appraising their individual criminal responsibility, but to guide them in their conduct of hostilities. This is very well illustrated by the fact that notions such as ‘military necessity’, ‘excessive damage’, and ‘military advantage’ are rather abstract and subjective notions which are difficult to apply during combat. The difficulty of qualifying and quantifying them provides the flexibility required for their use during hostilities. They are, however, much more difficult to apply in court. This is why it is wrong and dangerous to consider IHL only from the perspective of criminal law. *Ex post facto* prosecution of violations is essential for the implementation of IHL but so is IHL essential in the prevention of those violations and the protection of civilians against the effects of hostilities. This is why these two sets of law are intrinsically linked to each other, but should always be seen as different.

With respect to the protection of civilians against the effects of hostilities in non-international armed conflict, this dissertation has resolutely focused on three types of unlawful attacks as war crimes. I have examined the war crimes of intentionally directing attack against civilians, indiscriminate attacks and disproportionate attacks.

Direct attack

The principle of distinction, with its attached absolute prohibition of attacking civilians, is the most fundamental principle of international humanitarian law. It is the cornerstone of the protection of civilians against the effects of hostilities in non-international armed conflicts. Parties to such conflicts are under the unequivocal obligation to distinguish between military objectives, such as objects fulfilling the two-pronged test, fighters and civilians directly participating in hostilities and civilian objects and civilians not directly participating in hostilities. Attached to this obligation is the absolute prohibition of directing attacks against civilian objects and civilians. This prohibition is to be found under treaty and customary international humanitarian law applicable to non-international armed conflict.

It would be dangerous to see IHL only from the perspective of international criminal

law, as this branch of law is to be applied during non-international armed conflicts and has to guide the belligerents in their attacks, in order for the protection of civilians to be implemented. However, *ex post facto* prosecutions of violations of direct attacks against civilians are essential for the implementation of IHL, both for the deterrent effect they entail and the right to hear the truth for the victims. It is now widely accepted that the prohibition against attacks on civilians and attacks against civilian objects are now part of customary international law and that any serious violation thereof would constitute a war crime and entail the individual criminal responsibility of the perpetrator. The ICTY has been the first international body since the Second World War to investigate and adjudicate direct attacks against civilians in non-international armed conflict. The crime of directing attacks against civilians is not an offence that is enumerated *per se* in the ICTY Statute but can be treated as an unenumerated offence under Article 3 of the Statute, which relates to violations of the laws or customs of war. The special challenge in proving this crime is that the Prosecution must establish that the perpetrator wilfully made the civilian population or individual civilians the object of acts of violence. In order to do so, it must be demonstrated that the perpetrator was aware in the circumstances or should have been aware of the civilian status of the persons attacked.

Under the Rome Statute, it is an offence to intentionally direct attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. In order to prove the necessary *mens rea*, the prosecution will need to prove that the accused 'means to engage in the conduct' or 'means to cause that consequence or is aware that it will occur in the ordinary course of events.'

An associated prohibition to the prohibition of directing attacks against civilian persons is the prohibition of attacks against civilian objects. Despite the fact that no treaty IHL applicable to internal armed conflict prohibits attacks on civilian objects, it has been submitted here that the prohibition is part of the law of non-international armed conflict and applies through the principle of distinction. Furthermore, the customary law character of the war crime of directing attacks against civilian objects has been recognized and has also been upheld by several Commissions of Inquiry. The ICTY seems to accept that attacks on civilian objects are also prohibited in non-international armed conflicts albeit that this recognition is not straightforward. In turn,

the Rome Statute does not explicitly define attacks on civilian objects as a war crime in non-international armed conflict, despite the fact that this crime exists for international armed conflict and despite the extensive case law provided by the ICTY. The fact that directing attacks against civilian objects has not been criminalized on its own in relation to internal armed conflicts is very worrying.

The absolute prohibition of directing attacks against civilians and civilian objects is not the only layer of protection civilians benefit from under IHL. Indeed, many atrocities do not equate with this prohibition as especially in non-international armed conflicts, civilians and civilian objects are intermingled with military objectives.

Indiscriminate attacks

The prohibition of indiscriminate attacks addresses the situation of the intermingling of civilians and civilian objects with military objectives, which is an acute problem in non-international armed conflict. IHL regulates the actual conduct of hostilities by an attacker, be it a member of state armed forces, a fighting member of an organized armed group, or a civilian directly participating in hostilities, in order for the prohibition of indiscriminate attack to be implemented in practice.

Attacks against civilians and civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate, which are those attacks that are not directed against military objectives. This prohibition limits the methods and means used for attacking legitimate military objectives located, for instance, in the midst of a high concentration of civilian population. Indiscriminate attacks differ from direct attacks against civilians in that the attacker is not actually *trying* to harm the civilian population, but is not concerned by the potential injury or damage to civilians. This prohibition is not to be found directly in treaty law. However, the Second Additional Protocol expressly protects individual civilians against direct attacks and inferentially protects them from indiscriminate attacks. Furthermore, this is a rule of customary law applicable in internal armed conflicts.

We have seen that, generally speaking, the prohibition of indiscriminate attacks is related to three distinct cumulative duties on the part of the belligerent: (i) the duty to direct an attack to an identified military target; (ii) the duty to employ means and methods of attack that are capable of hitting the identified military target with sufficient reliability and (iii) the duty to employ means and methods of attack the effects of which can be limited to the attacked military target. Accordingly, strictly speaking. An indiscriminate attack will be committed when there is a lack of *focus* on a legitimate military objective or when the methods and means being used lack the *capability* for the principle of distinction to be respected.

The violation of the prohibition of indiscriminate attack can give rise to criminal responsibility for a war crimes, despite the fact this crime does not exist in black letter for internal armed conflicts. Despite the paucity of cases, the jurisprudence of the ICTY provides strong evidence of the customary nature of the prohibition of indiscriminate attacks in internal armed conflicts. However, the *ad hoc* Tribunal's case law did not find that launching indiscriminate attacks was a behaviour criminalized as such by international customary law at the time of the conflict in the former SFRY. This is why it considered that indiscriminate attacks could in fact be treated as attacks directed against civilians or civilian objects. And for this linkage to exist, the *ad hoc* Tribunal considered that the requisite *mens rea* of this crime must be linked with wrongful intent, or recklessness, and explicitly not 'mere negligence'. Importantly, the fact that the perpetrator may not have 'wished' the outcome of the attack is irrelevant. Hence, indiscriminate attack has not been treated as an autonomous offence in the ICTY case law but has been considered as evidence of the crime of directing an attack against civilians or civilian objects.

Despite the fact that the prohibition of indiscriminate attacks is, as we have seen, part of customary international law, and that launching an indiscriminate attack constitutes an offence under the legislation of numerous States, the Rome Statute does not list as such the crime of launching an indiscriminate attack resulting in loss of life or injury to civilians, whether in international or non-international armed conflicts. However, the fact that indiscriminate attacks have not been criminalized specifically in the Rome Statute does not necessarily mean that launching such attacks does not give rise to individual criminal responsibility under the Rome Statute when they take place in

the context of an internal armed conflict. It has therefore been submitted that it would be possible to include this crime in the crime of directing attacks against the civilian population or civilian persons.[2136] Practically speaking, it has been argued that it would be possible to follow the line that has been held by the ICTY.

Disproportionate attack

In the case of disproportionate attacks, criminal responsibility arises from the fact that it is expected that excessive collateral damage to civilians and civilian objects will result from attacks against a legitimate military objective. It is very difficult to apply the IHL principle of proportionality in retrospect in a court of law. One of the main problems is that an alleged disproportionate attack must be analysed from the subjective perspective of the commander at the time of the attack. It is necessary to know whether he expected, or should have expected, excessive civilian casualties relative to the anticipated military advantage based on the information available at the time of the attack decision. This is difficult, as it implies a value-based judgement. The assignment of the relative values of the proportionality test may differ depending on the background and values of the decision maker. For instance, a human rights lawyer and a combat commander would most likely not assign the same relative values to military advantage and to injury and damage to civilians.

Although Additional Protocol II does not explicitly incorporate the principle of proportionality, the ICTY has regarded the principle as applying to non-international armed conflicts. Disproportionate attacks are therefore considered as criminal also in this type of armed conflict. Although the Statute of the ICTY does not address proportionality *per se*, a case law has developed around the notion of disproportionate attack, based on what the *ad hoc* Tribunal has deemed to be grave violations of accepted customary international humanitarian law. However, when dealing with the principle of proportionality, the ICTY, until the *Gotovina* case, only set out the law and did not make any evidentiary findings. The long-awaited *Gotovina* judgment has not become the *Tadic* of the conduct of hostilities, but it must be acknowledged that, despite all its numerous drawbacks, the judgment, by dealing with the question of whether launching attacks against military objectives which incidentally cause

[2136] Article 8(2)(e)(i).

excessive damage or casualties could give rise to criminal responsibility, confirmed that this crime exists under international customary law.

The ICTY generally considered that acts of violence that cause excessive incidental damage to civilians or civilian objects could be in fact considered as attacks directed against civilians or civilian objects. Contrary to indiscriminate attacks, that can give rise to criminal responsibility because they amount to attacks directed at civilians or civilian objects, the consideration of attacks directed against military objectives that incidentally cause excessive civilian damage should ideally not be used as evidence of the crime of directing attacks against civilians or civilian objects under criminal law. Such treatment disregards the differences under IHL of these two prohibitions. The prohibition of indiscriminate attacks against civilians is related to the failure to distinguish between military objectives and civilian objects and persons. The notion of disproportionate attack is related to the prohibition of launching an attack on an impeccable military objective which is expected to cause incidental civilian damage that would be excessive in relation to the concrete and direct military advantage anticipated. The evaluation of the disproportionate aspect of an attack should be effectuated by the actual *effects* of the attack.

The question of what constitutes incidental damage is one of the most controversial issues when assessing the legality of possible disproportionate attacks. Despite agreeing that belligerents need to have a margin of discretion in their targeting moves, we need to be aware that the proportionality equation also entails the consideration of the expected collateral damage. In the latest case law of the ICTY this point seems to be disregarded.

Criminal intent is the most difficult aspect to prove in a court-room. In order to curtail the margin of discretion of the commander, the *ad hoc* tribunal has upheld a standard of the reasonable commander. This standard has been considered as constituting an objective decision-making standard that limits arbitrariness in the exercise of the commander's margin of discretion. However, this approach unduly amplifies the *mens rea* as a paramount element of the commander's duty toward civilians. With this approach, if the commander does not 'wish' to cause civilian casualties, he cannot be held responsible for a disproportionate attack. It is submitted that this view is

incompatible with the object and purpose of IHL, which is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The term 'reasonable' is a highly subjective concept and it is difficult to see how it can help us in the assessment of excessive collateral damage.

A better view, in terms of protection of civilians against the effects of hostilities, would be that when the commander's actions show a wanton disregard for civilian lives, a criterion that could be adhered to is that of 'serious criminal negligence', which would suffice to convict an accused for infringement of the principle of proportionality. In such situations, 'knowledge' must be interpreted to mean 'predictability of the likely consequences of the action' (recklessness or dolus eventualis). Recklessness or dolus eventualis is a lower threshold for the Prosecution to prove. With this approach, *unforeseen* civilians casualties cannot be perceived as intentional direct attacks, but *foreseen* excessive civilian casualties can be.

When it comes to the International Criminal Court, in a case qualifying as a non-international armed conflict and involving alleged crimes committed during the conduct of hostilities, the Prosecution will not be able to bring charges for disproportionate attacks as a war crime *per se.* Furthermore, the Statute's definition of the crime of directing attacks against the civilian population or civilian persons might prevent extending its scope to cover instances of disproportionate attacks, which are characterised by the intention to attack a concrete military objective. Indeed, at least for now, the judges do not seem to consider recklessness as being part of the jurisdiction of the court. In this perspective, the Statute marks a step backwards with respect to *lex lata* and creates a loophole. This is one more proof, in my opinion, of the shielding of the military by the drafters of the Statute, which is contrary to the fundamental object and purpose of the Rome Statute.

Concluding Remarks

In today's non-international armed conflicts, the formal legal reality needs to impose a reality related to the needs of civilians facing massive violations, alongside a reality of belligerents whose conduct is only partially controlled. IHL's failure to protect

civilians is obvious and lies in a fundamental disconnection between the reality of these conflicts and the conception of the law that should be applied to them. The erosion of the principle of distinction and the stretching of the principle of proportionality lead to a feeling that the law cannot cope anymore with the reality. IHL alone, elaborated with international armed conflicts in mind, cannot stem the flood of escalating violence and protect civilians against the effects of hostilities in non-international armed conflicts. The disregard of the law by all parties to the conflict leads to a vicious circle that seems difficult to stop. Ultimately, we arrive at the end of this research with a sort of bitter taste in the mouth.

The latest developments at the International Criminal Tribunal for Yugoslavia in the *Gotovina, Perisic, Stanisic and Simatovic* cases, in addition to the latest acquittal of *Mathieu Ngudjolo Chui*, do not give us further hope with respect to the role of international criminal law in the enforcement and clarification of the primary rules protecting civilians against attacks. As I see it, international justice's ambition to bring justice for victims is currently pathetically failing and starts instead to exonerate high-level politicians and military commanders who have directed and ordered large attacks on civilians. As Judge Michele Picard stated in her dissenting opinion to the *Stanisic* decision 'we have come to a dark place in international law.' And this sadly confirms the last discussion that I had with the great Antonio Cassese, who simply told me that the Golden Age of international criminal justice was over.

However, this negative conclusion on the current state of affairs on the protection of civilians against the effects of hostilities in non-international armed conflicts should not stop us trying to find other ways to strengthen and achieve the strongest protection possible for those who need it.

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