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Sources, Scope, and Application of the Law on Legitimate Targets in Armed Conflicts

1.1 FRAGMENTATION OF INTERNATIONAL LAW ON LEGITIMATE TARGETS IN ARMED CONFLICT

Several branches of international law must be consulted to establish which targets are considered legitimate in armed conflict.[1] First, we must consider not only international humanitarian law, specifically designed to regulate the methods and means of warfare and the protection vested in persons and objects in armed conflict, but also international human rights law, the purpose of which is to protect human rights and freedoms both in the time of peace and in armed conflict.

These two branches of law differ significantly. Their roots and origins are different, as is the scope of their regulation (geographical, temporal, material, and personal), method of enforcement, formulation of norms,[2] fundamental principles, and the essential approach to the very existence of armed conflict.[3] It is therefore a challenge to find a conceptual area where both international humanitarian law and international human rights law concede that certain specific persons and objects are legitimate targets in armed conflict.

[1] See ILC, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (2006), § 104; Patrycja Grzebyk, 'Fragmentation of the law of targeting – a comfortable excuse or dangerous trap' in Andrzej Jakubowski, Karolina Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (Routledge, 2016) 132 ff.

[2] More in Robert Cryer, 'The interplay of human rights and humanitarian law: The approach of the ICTY' (2010) 14:3 JC&SL 511, 523.

[3] See *ICTY, Prosecutor* v. *Dragoljub Kunarac et al.* (2001) § 470–1; *ICTY, Prosecutor* v. *Milorad Krnojelac* (2002) § 181; Jean Pictet, *Humanitarian Law and the Protection of War Victims* (A. W. Sijthoff, Henry Dunant Institute 1975) 14; Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict' (2007) 40:2 IsrLR 310, 312 ff; Michelle Hansen, 'Preventing the emasculation of warfare: Halting the expansion of human rights law into armed conflict (2007) 194 MLR 1, 6 ff.

Fragmentation of the law on legitimate targets in armed conflict goes beyond IHL and IHRL. International criminal law is also relevant because it defines war crimes (which include attacking illegitimate targets) and the principles of responsibility for these crimes. Consequently, it can impact the interpretation of the fundamental notions of IHL and IHRL.

1.1.1 *International Humanitarian Law*

International humanitarian law was specifically designed to determine who and what is protected in armed conflict. *A contrario*, it therefore indicates which targets are legitimate. Among the treaties that constitute the core of IHL, the primary role is definitely played by the four Geneva Conventions for the Protection of War Victims of 1949 and their Additional Protocols of 1977. More states are parties to the GCs (196) than to the UN Charter of 1945 (193).[4] This universal acceptance means that all the regulations of these conventions qualify as customary law.[5]

As regards legitimate targets, the GCs did not supersede, but only complemented (and even that to a fairly small extent) the regulations of, for example, the Convention respecting the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land, both of 1907.[6] Consequently, in this area the APs are much more important than the GCs, because they contain both the norms on protection of specific categories of persons and objects, and the law on legitimate attacks.

Compared to the GCs, the APs have significantly fewer ratifications: 174 for AP I and 169 for AP II, respectively. Several states that currently are or recently have been involved in an armed conflict (and thus they can be qualified as *States whose interests are specially affected*[7] with regard to the emergence of

[4] The following subjects are parties to the GCs and at the same time they are not members of the UN: Cook Islands, the Holy See, Palestine.

[5] ICJ, Military and Paramilitary Activities in and against Nicaragua (1986) § 218; Legality of the Threat or Use of Nuclear Weapons (1996) § 79; see also Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Ethiopia's Claim 4, between the Federal Democratic Republic of Ethiopia and the State of Eritrea (2003), (2009) 26 RIAA 75, § 32, where the Commission stated: 'hat the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949 … Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.'

[6] Article 135 GC III; Article 154 GC IV.

[7] See ICJ, North Sea Continental Shelf (1969) § 73–74. Cf. ILC, *Text of the Draft Conclusions on Identification of Customary International Law*, A/71/10 (2016), where there is no reference to this notion.

customary norms of IHL) have not ratified the AP I or II.[8] Importantly, there are often discrepancies between the practices of these states and the norms codified in the APs. This is crucial, because the case law of the International Court of Justice suggests that it is precisely the practice of states, not parties to a given treaty, that has particular impact on the assessment of whether or not the treaty regulations can be considered part of customary law.[9] It is therefore arguable whether the regulations of the APs in their totality now have the status of customary law, and, in my opinion, there are good reasons to believe that it is not the case.

As a result, while a large proportion of the regulations in the APs is considered customary law,[10] the APs in their totality are not applicable to all subjects of international law as customary law.[11] This is particularly true with regard to AP I,[12] because many states that have decided to ratify it have submitted reservations or declarations of interpretation concerning, for

[8] For example, the following states are not parties to AP I: Iran, Israel, Pakistan, Somalia, Turkey, USA. In case of AP II, none of the above-mentioned states, nor Syria, are parties to it.

[9] ICJ, North Sea Continental Shelf (1969) § 73.

[10] The list of norms with clear customary status and with relevance to legitimate targeting includes: prohibition to use methods and means of warfare of a nature to cause superfluous injury or unnecessary suffering (Article 35 AP I), prohibition to order that there shall be no survivors (Article 40 AP I), prohibition of perfidy (Article 37 AP I), prohibition of attacks directed against civilian population (Articles 48 and 51(2) AP I) or civilian objects (Article 52(2) AP I), prohibition of attacks against person parachuting from an aircraft in distress (Article 42 AP I), prohibition of attacks against non-defended localities (Article 59 AP I) or demilitarized zones (Article 60 AP I), obligation of effective advance warning of attacks which may affect the civilian population (Article 57(2)(c) AP I), partially definition of a combatant (Articles 43 and 47). It is disputed to what extent definition of civilian population (Article 50 AP I) and precautions in attack and against the effects of attacks (Articles 57 and 58) achieved customary law status. See Fausto Pocar, 'To what extent is Protocol I customary international law?' (2002) 78 ILS 337, 344 ff; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989), 64 ff; Michael Schmitt, 'The principle of distinction and weapon systems on the contemporary battlefield: A US perspective on challenges for a military commander' (2008) 37 Collegium 53; Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' in Anthony Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force* (Naval War College 2006) 37 ff.

[11] The purpose behind AP I was not only to codify the existing customary law but also to introduce new principles (see its preamble: *Reaffirm and Develop*).

[12] There is no doubt as to the customary character of AP II, given the rudimentary nature of its provisions. For instance, the United States has been declaring its intention to ratify AP II for decades, and applies it in the armed conflicts to which Article 3 GCs applies (i.e. in a wider range of conflicts than strictly required by Article 1(1) AP II); see more in Michael Meier, 'A treaty we can live with: The overlooked strategic value of Protocol II' (2007) Sept. AL 28, 37. However, the US Senate continues to refuse to ratify AP II, despite requests to do so made by several US presidents: see Letter of Transmittal of Protocol II by President Reagan to the Senate (1987); Letter of Transmittal from President William Clinton, Hague Convention for

example, the definition of combatant (status of members of irregular forces and the obligation to distinguish themselves from the civilian population), the presumption of civilian status of a person or object, the definition of a mercenary, the prohibition of reprisals, the principle of proportionality, and the obligation to undertake relevant precautionary measures before and during attack.[13] The same issues have prevented some states from ratifying AP I.[14]

As a result, it is still important to consider whether an armed conflict should be viewed through the lens of the GCs and the AP I or II, or whether the GCs alone apply. This is particularly important with regard to non-international armed conflicts, which – depending on the circumstances – either fall solely under the regulation of Article 3 GCs, or are also governed by the norms of AP II. It should be noted that AP II is quite modest in extent, having only twenty-eight articles, of which ten are final provisions. This is hardly impressive compared to GC IV on the protection of civilian persons in time of war, with its 159 articles (of which 10 are also final provisions) – and this is not counting the annexes. To recapitulate: in a great majority of situations that qualify as armed conflict,[15] the only applicable laws are the select few provisions of IHL treaties, modest as they are in both volume and content.

Beside treaty provisions proper, customary norms of IHL apply in each armed conflict.[16] Customary law is particularly important when it comes to non-international armed conflict, due to the above-mentioned scarcity of treaty regulations in this regard, and in armed conflict where international

the Protection of Cultural Property in the Event of Armed Conflict, and reiterating support for Protocol II (1999).

[13] See more in: Julie Gaudreau, 'The reservations to the protocols additional to the Geneva Conventions for the Protection of War Victims' (2003) 849 IRRC 143; Pocar (2002) 345 ff. Text of reservations to the GCs and APs is available at www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

[14] Letter of Transmittal of Protocol II by President Reagan to the Senate (1987) III, where it is stated: *Protocol I is fundamentally and irreconcilably flawed*. See also Amanda Alexander, 'A short history of international humanitarian law' (2015) 26:1 EJIL 109, 127.

[15] Since World War II, the great majority of armed conflicts have been non-international in nature: see statistics on Armed Conflict Database – International Institute for Strategic Studies; Data on Armed Conflict – PRIO, www.prio.org/Data/Armed-Conflict/; and Department of Peace and Conflict Research, Uppsala Universiteit, www.pcr.uu.se/research/ucdp/charts_and_graphs/.

[16] International custom is listed in Article 38(1) ICJ Statute (1945) on a par with international conventions and 'the general principles of law recognized by civilized nations' as a basis for the Court's rulings. The same provision reads that the function of the Court is to decide in accordance with international law such disputes as are submitted to it. As a result, the list in Article 38(1) is considered the fundamental catalogue of formal sources of international law.

organizations are involved, taking into account the way non-state parties to armed conflicts are bound by IHL.

Customary law on the conduct of hostilities in armed conflict is not itself fragmented. There is just a single body of norms, although it is influenced by many branches of international law. Custom emerges where a general uniform practice (*usus*) is accepted as law (*opinio juris*).[17] This is why, in my opinion, customary norms regarding the use of lethal force in armed conflict cannot vary depending on the lens of a specific branch of law applied to their analysis.[18] In other words, no customary norms on legitimate targets and methods of attack can exist that would be contradictory to one another.

The International Committee of the Red Cross (ICRC) undertook the task of identifying customary international norms of IHL in its 2005 *Study on Customary International Humanitarian Law* (hereinafter: *Study on Customary IHL*).[19] The ICRC regularly updates the database on state practice to enable the verification of the status of each norm.[20]

A lot of criticism has been directed at the *Study on Customary IHL*, focusing mostly on the methodology that underlies the document.[21] The problematic issue is that the ICRC, when it accepted that there is sufficient *opinio iuris* to attest to the existence of the norms, did so in reliance on documents adopted by international organizations (including non-governmental organizations) and declarations of non-state armed groups. Furthermore, the decisive factor in the ICRC's assessment of state practice is official declarations of states and documents such as military manuals (often comprising both legal and political elements), rather than actual conduct of states' organs during armed

[17] See ICJ, North Sea Continental Shelf (1969) § 77; ILC A/71/10 (Conclusion no. 2).

[18] Marco Sassòli, Laura Olson, 'The relationship between international humanitarian and human rights law: where it matters: admissible killing and internment of fighters in non-international armed conflict' (2008) 90:871 IRRC 599, 605; Marco Sassòli, 'The role of human rights and international humanitarian law in new types of armed Conflict' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011b) 72.

[19] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law*, Volumes I–III (ICRC, Cambridge University Press 2005).

[20] See www.icrc.org/customary-ihl/eng/docs/home.

[21] See, for example, Timothy McCormack, 'An Australian perspective on the ICRC customary international humanitarian law study' in Helm (2006) 88 ff; Yoram Dinstein, 'The ICRC customary international humanitarian law study' in ibid. 99 ff; Michael Bothe, 'Customary international humanitarian law: Some reflections on the ICRC study' (2005) 8 YIHL 143 ff; Elizabeth Wilmshurst, Susan Breau (ed.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) passim; John Bellinger III and William Haynes II, 'A US government response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89:866 IRRC 443.

operations.[22] On the one hand, it must be noted that the *custom is built up . . . by practice, and not only by a promise of practice or by opinions as to its necessity*.[23] On the other hand, in certain situations the existence of the norm is not challenged even when the norm itself is breached.[24] In my opinion, both the practice and the official statement(s) of the state commenting on its practice must be analysed in order to clearly indicate a particular customary norm.

Finally, according to the *Study on Customary IHL*, the norms applicable to international and non-international armed conflict appear to be nearly identical, a claim that is vigorously rejected by several states and by part of the doctrine.[25]

In view of the criticism of the *Study on Customary IHL*, its conclusions must be approached with caution – but they should not be disregarded. There are many years of work behind this document, numerous highly regarded experts have made their contributions to this effort, and it is supported by the ICRC, an independent humanitarian organization with special status under international law. Under the Statutes of the International Red Cross and Red Crescent Movement, it is the responsibility of the ICRC to work for the faithful application of international humanitarian law applicable in armed conflict and to take cognizance of any complaints based on alleged breaches of that law, and to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflict and to prepare any development thereof.[26]

The ICRC exercised these rights, for example, by launching an effort to develop more precise definitions of the notions used in the GCs and APs, such as 'direct participation in hostilities' (Article 3 GCs, Article 51(3) AP I, Article 13(3) AP II) and 'civilian' in non-international armed conflict (Article 13 AP II). After years of consultations with experts, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under*

[22] Michael Schmitt, 'Military necessity and humanity in international humanitarian law: Preserving the delicate balance' (2010b) 50:4 VirJIL 796, 830. The author also notes that there are too few examples of such practice of states to conclude that a customary norm has emerged, and that too little consideration has been given to the arguments made by states whose interests are specially affected. As a result, the practice of states with little experience of involvement in armed conflict has been given the same weight as that of states which are engaged in armed conflict on a larger scale.

[23] Karol Wolfke, *Custom in Present International Law* (Prace Wrocławskiego Towarzystwa Naukowego, Seria A, No. 101, 1964) 79.

[24] Pocar (2002) 345.

[25] Among 161 rules identified in *Study on Customary IHL*, 146 rules are applicable in IACs and NIACs, 2 are applied only in NIACs and 13 only in IACs.

[26] Article 5(2)(g) Statutes of the International Red Cross and Red Crescent Movement (1986 with amendments of 1995 and 2006). On the role of the ICRC in interpretation and reaction to IHL violations, see more in François Bugnion, *Le Comité International de la Croix-Rouge et la Protection des Victimes de la Guerre* (CICR 1994) 1067 ff.

International Humanitarian Law (hereinafter: *ICRC Interpretive Guidance*).[27] The document is not binding and falls under the umbrella of soft law, with all its attendant consequences.

ICRC Interpretive Guidance has been wildly controversial, to the point that allegedly some of its authors, after having invested years of work (2003–8) in the effort, have opted not to have their authorship acknowledged in the document.[28] Yet again, given the unique status of the ICRC and the uncontested significance of the analytical insights and arguments presented in the *ICRC Interpretive Guidance*, it is necessary to invoke it when interpreting the notions that are crucial for consideration in this monograph.

Other soft law instruments that may have an impact on the status and scope of application of IHL norms include the resolutions of intergovernmental organizations,[29] as well as resolutions and guidelines issued by recognized expert institutions, for example the Institute of International Law[30] and the International Institute of Humanitarian Law.[31]

1.1.2 *International Human Rights Law*

Nowadays, it is widely accepted that in an armed conflict, IHRL[32] applies beside IHL.[33] IHRL is designed to safeguard rights (generally) vested in

[27] Guidance was adopted by Assembly of the International Committee of the Red Cross on 26.02.2009. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

[28] Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" study: No mandate, no expertise, and legally incorrect" (2010) 42 NYU JILP 769, 784–5; William Fenrick, 'ICRC guidance on direct participation in hostilities' (2009b) 12 YIHL 287, 288; Charles Garraway, '"To kill or not to kill?" – Dilemmas on the use of force' (2009) 14 JC&SL 499, 505, wherein the author states 'To some extent, the process ended in failure'.

[29] See also ILC, A/71/10 (Conclusion 4.2).

[30] For example, Resolution of IIL: The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, 1969 (hereafter: IIL, Edinburgh Resolution (1969)).

[31] See, for example, *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (1994), https://ihl-databases.icrc.org/ihl/INTRO/560; *San Remo Manual relating to Non-International Armed Conflict* (2006), www.legal-tools.org/doc/ccf497/pdf/.

[32] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966) are basic human rights treaties of general nature. In addition, there is a number of regional conventions of general nature, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR); conventions dealing with protection of particular categories of persons like Convention on the Rights of the Child (1989); or conventions on particular rights/freedom, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

[33] Interestingly, codification of IHL was originally commenced outside the UN (ILC), because the UN took the view that in the face of delegalization of war, further development of IHL

natural persons[34] and protect these persons vis-à-vis organs of a state and, in some cases, against organs of international organizations.[35] It protects natural persons from legally unjustified interference in specific spheres, but also forces the organs to take active steps to protect human rights.

Certain human rights – freedom from torture, for example – while also enshrined in specific treaties, have gained the status of customary laws and even peremptory norms.[36] Given that numerous states have not ratified the fundamental human rights conventions, this is vital because it means that certain prohibitions of violating human rights are binding on these states by virtue of their status as customary law.

While IHRL allows for the suspension of certain norms in extraordinary circumstances, certain rights – the right to life,[37] and the prohibition of torture and inhuman treatment[38] – are non-derogable. Incidentally, in my opinion, they are also crucial in the determination of legitimate targets as even during an armed conflict, the states may not suspend their obligation to uphold these rights.[39]

would no longer be necessary. The breakthrough came at the human rights conference in Tehran in 1968, where the similarities between IHRL and IHL were noted. See more in: Sydney Bailey, *Prohibitions and Restraints in War* (Oxford University Press 1972) 91 ff; Katharine Fortin, 'Complementarity between the ICRC and the United Nations and international humanitarian law and international human rights law, 1948–1968' (2012) 94:888 IRRC 1433, 1434.

34 Beyond the rights vested in individual persons, for decades there has been a discourse of human rights vested in groups, such as the right to development, the right to peace, the right to a healthy environment, and the right to participate in cultural heritage. These are referred to as solidarity rights: see Carl Wellman, 'Solidarity, the individual and human rights' (2000) 22:3 HRQ 639; cf. Article 1 ICCPR and ICESCR confirming the right of peoples to self-determination

35 Article 51 Charter of Fundamental Rights of the European Union (2000).

36 See, ICJ, Questions relating to the Obligation to Prosecute or Extradite (2012) § 99.

37 Article 6 ICCPR; Article 2 ECHR; Article 2 EUChFR; Article 4 ACHR; Article 5 ArChHR; Article 4 AfrChH&PR.

38 Article 7 ICCPR; Article 3 ECHR; Article 4 EUChFR; Article 5 ACHR; Article 8 ArChHR; Article 5 AfrChH&PR.

39 Situations which allow for the derogation of certain human rights are described in the following manner: Article 4 ICCPR and Article 4 ArChHR – 'public emergency which threatens the life of the nation'; Article 27 ACHR – 'war, public danger, or other emergency that threatens the independence or security of a State Party'; Article 15 ECHR – 'war or other public emergency threatening the life of the nation'. Interestingly, Article 2(2)(c) ECHR does not consider deprivation of life 'in action lawfully taken for the purpose of quelling a riot or insurrection' as inflicted in contravention of the right to life; Bartłomiej Latos stresses that civil war is covered by the definition of 'other public emergency' and Article 2(2) ECHR implies that IHL must be taken into account in the assessment of the legality of deprivation of life in this kind of situation. Bartłomiej Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności* (Wydawnictwo Sejmowe 2008) 67, 104.

The International Court of Justice,[40] the European Court of Human Rights,[41] the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights[42] all have confirmed that human rights protection standards must be upheld even in armed conflict situations, and have noted on several occasions that states must uphold human rights when they are engaged in hostilities outside of their own territory.[43]

Nonetheless, several states – notably the United States and Israel – maintain that they are not bound by IHRL in armed conflict, especially when the conflict is taking place beyond their borders.[44] This is an attempt on the part of these states to prevent the emergence of a customary norm upholding the exterritorial application of human rights in armed conflict, or, failing that, to secure the status of persistent objectors should the norm ultimately emerge.[45]

This position is quite understandable: IHL and IHRL appear to be so different that their simultaneous application appears impossible (or very difficult, at best), especially with regard to the selection of legitimate targets and the manner of attack in armed conflict. While 'how to kill your fellow human beings in a nice way' is a catchy, tongue-in-cheek phrase describing the role of IHL, such considerations are in fact completely inadmissible in any discussion

[40] See ICJ, Legality of the Threat or Use of Nuclear Weapons (1996) § 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) § 106; ICJ, Armed Activities on the Territory of the Congo (2005) § 216.

[41] See, for example, *ECtHR, Al-Skeini et al.* v. *United Kingdom* (2011) § 164; *ECtHR, Hassan* v. *United Kingdom* (2014) § 35–9, 77; *ECtHR, Esmukhambetov et al.* v. *Russia* (2011) § 138 ff; *ECtHR, Isayeva* v. *Russia* (2005) § 209 ff; *ECtHR, Isayeva et al.* v. *Russia* (2005) § 168 ff.

[42] See, for example, *IACtHR, Bàmaca Velásquez* v. *Guatemala* (11/129) (2000) § 203–9.

[43] See, for example, ICJ, Armed Activities on the Territory of the Congo (2005) § 216; *ECtHR, Hassan* v. *United Kingdom* (2014) § 77; ECtHR, *Cyprus* v. *Turkey* (1996) § 52. On the extraterritorial application of human rights in armed conflicts, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) passim; Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 80 ff.

[44] Since 1995 the Human Rights Committee has noted with regularity that the United States upholds the opinion to the effect that the ICCPR does not apply with regard to persons under its jurisdiction but outside its territory (CCPR/C/USA/CO/4 (2014) § 4), as well as in situations of war (CCPR/C/USA/CO/3/Rev.1 (2006) § 10). See also A/50/40 (1995), § 284. However, even within the United States' own administration doubts have been voiced as to whether there is truly no obligation to respect human rights exterritorially in armed conflict; see Gloria Gaggioli, 'Lethal force and drones: The human rights question', in Stephen Barela (ed.), *Legitimacy and Drones. Investigating the Legality, Morality and Efficacy of UCAVs* (Ashgate 2015) 96. See also the similar position of Israel about non-application of the ICCPR outside its territory and in situations to which IHL is applied: for example, CCPR/C/ISR/CO/4 (2014), § 5.

[45] Hansen (2007) 14; See also postulates concerning the UK in Richard Ekins, Jonathan Morgan, Tom Tugendhat, *Clearing the Fog of Law: Saving our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange 2015).

of human rights.[46] IHRL is immensely restrictive with regard to killing human beings[47] and only allows for this option in extraordinary circumstances when it is *strictly unavoidable in order to protect life*.[48] In effect, IHRL precludes the option of killing a person or destroying an object purely on the basis of their status,[49] and any operation must be planned to minimize the risk of death, injury, or destruction.[50] Compared to IHRL, IHL gives combatants a relatively free hand in destroying certain specific objects (Article 52(2) AP I) and killing persons who fit into certain specific categories (e.g. Article 43 AP I). Furthermore, the underlying belief in IHL is that the reason for the use of force is immaterial to the assessment of whether a particular attack is lawful.[51] In contrast, such assessment under IHRL must involve the question of legitimacy of the use of force.[52]

Given the manifest discrepancies between the principles governing these two branches of law, it is necessary to determine which norms apply to a specific situation[53] and how their implementation will play out in practice.[54] Yet it is crucial to bear in mind while engaging in this process

[46] G. I. A. D. Draper, 'Human rights and the law of war' (1971–2) 12 VirJIL 326, 335; Jens Ohlin, 'The Duty to Capture' (2013) 97:4 Minn. L. Rev. 1268, 1316.

[47] For instance, Article 6 ICCPR, when determining the lawfulness of depravation of life, stipulates that it must not happen *arbitrarily*. Article 2 ECHR clearly lists situations in which it is lawful to deprive a person of their life: in the execution of a sentence of a court following a conviction for a crime for which this penalty is provided by law; when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and in action lawfully taken for the purpose of quelling a riot or insurrection.

[48] Point 9 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990); cf. Article 3 Code of Conduct for Law Enforcement Official, A/RES/34/169, (1979), where it is stressed 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.'

[49] Karima Bennoune, 'Toward a human rights approach to armed conflict: Iraq 2003' (2004–2005) 11 U.C. Davis J. Int'l L. & Pol'y 171, 186–7, 193, 205.

[50] Droege (2007) 344–5.

[51] Preamble AP I, sec. 3 and 4.

[52] *ECtHR, Isayeva* v. *Russia* (2005) § 191; William Schabas, 'Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of ius ad bellum' (2007), 40 IsrLR 592, 606.

[53] On relation between IHL and IHRL, see Françoise Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body' (2008) 90:871 IRRC 549, 559 ff; Hans-Joachim Heintze, 'On the relationship between human rights law protection and international humanitarian law' (2004) 86:856 IRRC 789 ff.

[54] Dagmar Richter, 'Humanitarian law and human rights: Intersecting circles or separate spheres' in Thomas Giegerich (ed.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Duncker & Humblot 2009) 261.

that most states ratified the fundamental conventions of both IHL and IHRL,[55] and thus it stands to reason that they neither perceived them as fundamentally irreconcilable nor wished to deprive any of them of their impact.

The case law of the International Court of Justice suggests that a decision to attack a person in an armed conflict must be governed by IHL before IHRL, as evidenced by the 1996 advisory opinion on the legality of the threat or use of nuclear weapons, which includes the following passage:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant [International Covenant on Civil and Political Rights – P. G.], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[56]

I think that this wording does not suggest that the legitimacy of killing a specific person is determined solely by IHL, but rather that IHL cannot be disregarded in this determination. Article 15(2) ECHR should be interpreted in a similar manner. While the Convention stipulates that a state of public emergency is not a sufficient reason to derogate from the obligation to protect the right to life, in Article 15(2) it makes the reservation that 'deaths resulting from lawful acts of war' are an exception to this rule. Formal declarations of derogation are very rare with regard to this norm of the Convention.[57] Yet, in my opinion, this is not an argument against using the norms of IHL in the assessment of certain actions.[58]

[55] There are 173 state parties to ICCPR, including a number of the states that have not ratified AP II (for example, Iran, Israel, Pakistan, Somalia, Syria, Turkey, USA).

[56] ICJ, Legality of the Threat or Use of Nuclear Weapons (1996) § 25; see also IACHR, Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures, 12.3.2002 (2002) 41:3 ILM 532, 534.

[57] See, for example, Declaration of Government of Ukraine, ECtHR, Communication no. 296 (2015). Declarations of derogation are submitted quite rarely, because states are reluctant to admit to being engaged in armed conflict (in particular if it is non-international). Doing so might constitute a de facto acknowledgement of the existence of the non-state party to the conflict and thus suggest that the status of non-state armed groups is equal to that of armed forces. Furthermore, states are wary that submitting a declaration might be interpreted as evidence that they are not in control of the situation.

[58] Cf. ECtHR, Georgia ECtHR (2021) § 137–40, where the Court emphasized that the practice in not derogating under Article 15 ECHR in case of engagement in an international armed conflict outside a state's own territory may be considered as evidence that states do not exercise jurisdiction within the meaning of Article 1 of the Convention, and thus they are not obliged to apply IHRL in the active part of hostilities.

Interestingly, the International Court of Justice in its subsequent rulings steered clear of the term *lex specialis*, the use of which had been justly criticized.[59] A single armed conflict may involve a range of situations that require the application of differing standards of the use of force. For instance, there is no doubt that IHL applies to attacks against specific categories of persons in direct hostilities, but in a territory under a state's control the use of force should be governed by the principles that apply to use of force by law enforcement – that is, in the spirit of IHRL.[60] In consequence, soldiers must be able to apply different standards depending on the specific situation.[61] Even so, borderline scenarios are unavoidable, for example when social unrest and protests against the occupying power turn into regular hostilities.[62]

It is therefore impossible to determine *in abstracto* which branch of international law – IHL or IHRL – should serve as *lex specialis*, and which as *lex generalis*, and thus which should apply to each and every situation arising during an armed conflict.[63] The standards that apply in a given situation always depend on the specific circumstances of that situation. The two branches of law are complementary,[64] a claim which is further supported by the direct interreferences in the fundamental treaties of IHL and IHRL.[65] Furthermore, IHRL has an impact on the interpretation of the norms of IHL and vice versa,[66] which is in line with the general rules of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties of 1969, according to which in a process of interpretation of a treaty 'any relevant rules of international law applicable in the relations between the parties' should be taken into account.

1.1.3 *International Criminal Law*

Norms of ICL criminalize the violations of the norms of IHL and IHRL, and lay down precise principles of responsibility for these violations. It thus stands

[59] Droege (2007) 335; Bill Bowring 'Fragmentation, lex specialis and the tensions in the jurisprudence of the European Court of Human Rights' (2010) 14:3 JC&SL 485, 486 ff.

[60] Noam Lubell, 'Applicability of human rights law in situations of occupation' (2006) 34 Collegium 50, 51; see also CCPR/CO/78/ISR (2003), points 11, 15.

[61] Geoffrey Corn, 'Mixing apples and hand grenades. The logical limit of applying human rights norms to armed conflict' (2010) 1 JIHLS 52, 83.

[62] Louise Doswald-Beck, 'The right to life in armed conflict: Does international humanitarian law provide all the answers?' (2006) 88:864 IRRC 881, 894.

[63] A/CN.4/L.682 (2006) § 112.

[64] CPR/C/21/Rev.1/Add.13 (2004) § 11.

[65] See AP II (Preamble): 'Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person'; Article 15(2) ECHR: 'deaths resulting from lawful acts of war'.

[66] Droege (2007) 314; differently, Bowring (2010) 497.

to reason that criminal courts would invoke the relevant provisions of IHL and IHRL when interpreting the regulations that apply to specific international crimes. After all, no war crime can be committed without violating IHL. Yet an analysis of statutes and judgments of international criminal tribunals indicates that, often, the norms expressed therein differ from the norms enshrined in the GCs and APs.[67]

These differences often arise from the specific purposes for which criminal tribunals are established, which is to assign criminal responsibility to individual persons and to hold these persons culpable beyond any doubt. This requires sharper formulations to remove any doubt that, for example, there was an armed conflict in a given situation, or that a specific person was fully aware of the consequences of their actions.

The proviso must be made here that the status of customary law as a source of ICL is debatable in view of the principle of legality, and this prevents customary law from being accepted as a sole basis for individual criminal responsibility due to its insufficient precision.[68] Interestingly, the Rome Statute does not directly list customary law among the laws the ICC applies, but at the same time allows for the application of 'principles and rules of international law, including the established principles of the international law of armed conflict' and, in the context of investigating general principles of law derived from national laws of legal systems of the world, 'international law and internationally recognized norms and standards'.[69] On the one hand, this wording may be read as a reference to customary law. On the other hand, and more convincingly in my opinion, it may be viewed as evidence of a very cautious approach to customary law as a source of international individual criminal responsibility. This is one of the reasons why (despite the general statement in Article 8(2)(e) concerning penalization of 'other serious violations of the laws and customs applicable in armed conflicts not of an international character') efforts were undertaken to adopt amendments to the Rome Statute to criminalize violation of prohibitions of use of certain types of weapons (e.g. poison) and methods of warfare (starvation) in non-international armed conflict (even though these prohibitions, according to

[67] Adil Haque, 'Protecting and respecting civilians: Correcting the substantive and structural defects of the Rome Statute' (2011) 14 New Crim. L. Rev. 519.

[68] Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers 2013) 9; Władysław Czapliński, 'Customary international law as a basis of an individual criminal responsibility' in Bartłomiej Krzan (ed.), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill 2016) 53 ff.

[69] Article 21(1) Rome Statute.

the *Study on Customary IHL*, were already in force by virtue of customary law).[70]

The norms enshrined in statutes of international criminal tribunals, as well as the case law generated by these tribunals (alongside the case law coming from national courts) may shape customary law on legitimate targets and methods of attacks. This is vital with regard to non-international conflict, considering the scarcity of treaty regulations that apply to such conflict.

In view of the fragmentation of treaty law regulating targeting, I believe that criminal tribunals have a crucial role to play. By their very nature, they draw on the regulations of various areas of law, and by referencing the case law of other courts and tribunals they work towards the development of uniform standards and elimination of discrepancies.[71]

1.2 SCOPE OF INTERNATIONAL HUMANITARIAN LAW

1.2.1 *Material Scope*

International humanitarian law only applies during armed conflict. Recently, an approach has emerged that argues against distinguishing between international and non-international conflicts.[72] Yet the distinction continues to matter, because different treaty norms apply depending on the type of conflict. This includes treaty norms related to legitimate targets and methods of attack.[73]

In international conflicts, the GCs and AP I apply. All armed conflicts between at least two states qualify as international armed conflicts. This includes occupation – that is, a situation when a certain territory is under

[70] See, for example, amendment (2010) based on which: employing poison or poisoned weapons [Article 8(2)(e)(xiii)] was included in the list of war crimes prohibited also in NIAC, and compare with rules 72, 74, 77 *Study on Customary IHL*.

[71] Robert Cryer, 'The relationship of international humanitarian law and war crimes: International criminal tribunals and their statutes' in Caroline Harvey, James Summers, Nigel White (eds.), *Contemporary Challenges to the Laws of War Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014) 144.

[72] Antonio Cassese, 'Should rebels be treated as criminals? Some modest proposals for rendering internal armed conflicts less inhuman', in Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 520; Lindsay Moir, 'Towards the unification of international humanitarian law?' in Richard Burchill, Nigel White, Justin Morris (eds.), *International Conflict and Security Law Essays in Memory of Hilaire McCoubrey* (Cambridge University Press 2005) 108 ff.

[73] See Yoram Dinstein, 'Concluding remarks on non-international armed conflicts' (2012a) 42 IsrYHR 153, 163.

control of the adversary's army (Article 42 HR), even if it encountered no armed resistance (Article 2 GC and Article 1(3) AP I).

In non-international armed conflicts (NIACs), Article 3 GC applies, as does AP II, if the armed conflicts take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which are under responsible command and which exercise such control over a part of the state's territory as to enable them to carry out sustained and concerted military operations and to implement AP II. If the group has no such control over territory, or when hostilities involve no armed forces, only Article 3 GC applies.

Whether or not there is an IAC is quite easy to observe; any resort to armed force between states suffices.[74] Yet the case law of the International Criminal Tribunal for the former Yugoslavia suggests that a certain level of intensity of military operations must occur for the situation to qualify as an IAC.[75] Furthermore, the deployment of armed forces must be deliberate. If the armed forces of one state enter another state by mistake – as was the case in 2007 when Swiss troops entered the territory of Liechtenstein – no armed conflict exists.

Under Article 1(4) AP I, the category of IAC also includes 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.[76] This wording was introduced with specific conflicts in mind,[77] and the emotionality of the language was to serve as a guarantee that Article 1(4) AP I would find application very rarely, if at all.[78]

[74] Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations' (2009) 91:873 IRRC 69, 72–73; Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 32.

[75] ICTY, *Prosecutor* v. *Dusko Tadić* (1995) § 70. See also Andreas Paulus, Mindia Vashakmadze, 'Asymmetrical war and the notion of armed conflict – a tentative conceptualization' (2009) 91:873 IRRC 95, 101.

[76] A/RES/3103 (1973). See also Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica 1979–80).

[77] Article 1(4) AP I was formulated with specific states in mind: Israel, Portugal, and South Africa; see. 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 1979) 147–8.

[78] Tellingly, states accused of racism simply decided not to ratify or not to become a party to AP I. See: Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime. A Study of the South Moluccas and Aceh* (Martinus Nijhoff Publishers 2010)

The expanded understanding of IAC under AP I was heavily criticized because it introduces a subjective element that belongs to *ius ad bellum*;[79] the classification of a conflict is predicated upon a specific objective of the hostilities. It is therefore unsurprising that many states submitted declarations on interpretation regarding Article 96(3) AP I, under which AP I applies automatically to a conflict defined in Article 1(4) AP I if the authority representing a people involved in the hostilities submits a unilateral declaration addressed to the depositary of the Protocol. These declarations on interpretation pertain to the following issue: who can be recognized as 'the authority representing a people' (typical restrictions refer to the need for prior recognition by an intergovernmental regional organization or true representation of a people),[80] They serve to limit the possibility of the application of Article 1(4) AP I or, failing that, to have predominant influence on how this regulation is applied. Yet characteristically, the sole unilateral declaration submitted so far to Switzerland (the depositary of both the GCs and the APs) under Article 96(3) AP I is a declaration by the Polisario Front dated 21 June 2015.

In the case of NIAC, a distinction must be made between armed conflicts and 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature', which are not considered armed conflict.[81] Paradoxically, the bar for application of NIAC law is therefore set higher than for application of IAC law,[82] even though the absence of definition of NIAC in Article 3 GCs was specifically designed to maximally broaden the scope of its application.[83]

The ICTY's case law suggests that a NIAC exists when there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[84] Several conclusions can be

112; Stephen Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005) 374–5.

79 See the Letter of Transmittal of Protocol II by President Reagan to the Senate (1987); N. Higgins (2010) 113, 126.

80 See declarations of Belgium, Canada, France, Germany, and Ireland.

81 Article 1(2) AP I. See also Article 8(2)(f) Rome Statute and the reservations/declarations to AP I submitted by France, the Philippines and the UK, where it was noted that the term "armed conflict" excludes common crimes and acts or terrorism, whether committed individually or collectively.

82 Cf. IACHR, *Juan Carlos Abella* v. *Argentina* (1997) § 156 (OEA/Ser.L/V/II.98, doc. 6 rev., 13.4.1998). In this decision, the Commission ruled that IHL applied even though the events concerned a brief (30-hour) armed confrontation on 23 and 24 January 1989 in La Tablada, involving the Argentinian armed forces and "attackers".

83 Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia 1966) 85.

84 ICTY, *Prosecutor* v. *Dusko Tadić* (1995) § 70; ICTY, *Prosecutor* v. *Fatmir Limaj* (2005) § 170. Cf. Article 8(2)(e) and (f) Rome Statute; Iris Müller, 'Non-international Armed Conflict under

drawn from this statement. Firstly, a NIAC can take place not only between armed forces and an armed group, but also in a situation that does not involve armed forces at all and the hostilities take place solely between non-state actors.

Secondly, the intensity of hostilities should be assessed taking into account their duration – since the Tribunal used the wording 'protracted armed violence'.[85] This renders it difficult to determine the starting point of a NIAC. Other factors that are cited in case law and literature as determinants of the existence of armed conflict include, for example, use of armed forces rather than the police; number of troops involved in the conflict; collective character of hostilities; their frequency and seriousness; number of casualties; scale of displacement of civilians and of detention of fighters; the extent of destruction; use of heavy weaponry; spread of hostilities over territory; whether the conflict has attracted media, NGO's and the UN SC's attention and if any resolution on the matter has been passed; whether those fighting considered themselves bound by IHL; and signing of ceasefire agreements.[86] If a certain level of intensity of hostilities is required, single targeted attacks (e.g. the practice of targeted killings)[87] are precluded from triggering the application of IHL. However, it can also be convincingly argued that a series of attacks carried out by one group should be treated as a whole, which would qualify the level of conflict as sufficient across the areas where hostilities took place (or are taking place), even if these areas are located at a considerable distance from one another.[88]

Thirdly, a non-state actor involved in hostilities must be sufficiently organized to be considered a party to the conflict, since Article 3 of the GCs refers to

Article 1(1) AP II and 8(2)(f) ICC Statute' (2010) 40 Collegium 34, 39; Anthony 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)' (2007) 12 JC&SL 419.

85 ICC, *Prosecutor* v. *Jean Pierre Bemba Gombo* (2016) § 139–40, 663; Cf. ICTY, *Prosecutor* v. *Ramush Haradinaj et al.* (2008) § 40, where the term "protracted" referred to intensity rather than time.

86 ICTY, *Prosecutor* v. *Ljube Boškoski, Johan Tarčulovski* (2008) § 177–8; ICTY, *Prosecutor* v. *Ramush Haradinaj et al.* (2008) § 49; ICC, *Prosecutor* v. *Jean Pierre Bemba Gombo* (2016) § 137, 662; ICC, *Prosecutor* v. *Bosco Ntaganda* (2019) § 716, 723; cf. ICC, *Prosecutor* v. *Al Faqi Al Mahdi* (2016) § 49, where the Court lists control over a large area as sufficient evidence of the intensity of the conflict.

87 The killing of Osama bin Laden is often cited as a typical targeted killing example: see, for example, Beth Van Schaack, 'The killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted legal territory' (2011) 14 YIHL 255 ff. The assessment of targeted killings will be different depending on the circumstances in which they were executed (within or outside an armed conflict).

88 See critical remarks on this approach in Katja Schöberl, 'Boundaries of the battlefield: The geographical scope of the laws of war' in Barela (2015) 78.

'each Party to the conflict'.[89] This means the ability to plan and carry out military operations.[90] The following factors may reflect sufficient organization: a clear command structure; the ability to impose and enforce discipline; a command headquarters; operations that involve a larger number of units; recruitment and training of combatants; control over territory; speaking on behalf of a group; working strategy and tactics; acquisition, transportation, and distribution of weapons; adoption of formal codes of conduct inside the group; and negotiation and execution of agreements.[91] This also implies, in my opinion, that cases of one-sided violence against civilians – whether perpetrated by armed forces or non-state armed groups – never qualify as armed conflict, regardless of type, due to the absence of another party to the conflict. It is only when state authorities commence hostilities against a non-state armed group, or when two or more non-state armed groups take up hostilities against each other, that the possibility of escalation to an armed conflict arises, and such conflict may be determined to exist due to the existence of at least two clear parties thereto.

Case law suggests that objective reasons, rather than subjective opinions of the parties to the (alleged) conflict, determine whether a conflict as such exists.[92] The motivations and goals of the belligerents have no bearing on the application of IHL. As a result, situations where hostilities fall into the category of terrorism may still qualify as armed conflict, with the consequent application of IHL.[93] In general, IHL attempts to render the conditions that qualify certain events as armed conflicts as objective as possible, although in borderline cases the opinion of the parties may prove decisive in the determination of whether a conflict in fact exists.

It is possible to recognize, either explicitly or silently, a non-state party as a belligerent, which triggers the application of the entire international law of armed conflict.[94] This recognition, however, is very rare, because it is

[89] Jens Ohlin emphasizes that 'The law of armed conflict is a species of public international law, which traditionally governs the relationship between collectives'; Ohlin (2013) 1337.

[90] ICC, *Prosecutor* v. *Thomas Lubanga Dyilo* (2007) § 234.

[91] ICTY, Prosecutor v. Ramush Haradinaj et al. (2008) § 60; ICTY, Prosecutor v. Fatmir Limaj et al. (2005) § 94–134; ICC, Prosecutor v. Jean Pierre Bemba Gombo (2016) § 134–6; ICC, Prosecutor v. Germain Katanga (2014) § 1186; ICC, Prosecutor v. Bosco Ntaganda (2019) § 704; Jelena Pejić, 'The protective scope of Common Article 3: More than meets the eye (2011) 93:881 IRRC 189, 192.

[92] ICTR, *Prosecutor* v. *Jean Paul Akayesu* (1998) § 603.

[93] Vité (2009) 78. See also ICTY, *Prosecutor* v. *Fatmir Limaj et al.* (2005) § 170.

[94] Castrén (1966) 144–5; Dawn Steinhoff, 'Talking to the enemy: State legitimacy concerns with engaging non-state armed groups' (2009) 45 TexILJ 297, 309; Rosalyn Higgins, 'International law and civil conflict', in Evan Luard (ed.), *The International Regulation of Civil Wars* (Thames and Hudson 1972) 170–1.

(wrongly, in my opinion) perceived by states as a symptom of weakness and a concession.[95] Also, it might encourage (or even provoke) external support for the non-state party.[96] From the perspective of the state, another drawback is that recognition of belligerency means that members of the non-state armed group cannot be brought to justice only for their participation in hostilities. However, there is a mutual benefit to recognizing a non-state party to an armed conflict as a belligerent. Namely, it renders the persons participating in the conflict on either side eligible for prisoner-of-war status. Failing that recognition, even members of the armed forces cannot claim this status when captured, which means that either party tends to fight until the end, knowing that no one can expect any mercy if captured.

Another controversy involves the status of a conflict taking place in the territory of one state between the armed forces of another state and a non-state party. In my view, as long as the intervention is directed not against the armed forces of the state but rather against a non-state armed group, the conflict is non-international, despite occurring in the territory of another state.[97]

In contrast, in its commentary on Article 2 GCs, the ICRC posits that the use of armed force against the territory of another state, its civilian population, or its civilian objects, should be treated as an IAC.[98] Moreover, even if the hostilities are directed against a non-state armed group, but with no clear consent from the state's authorities, the situation qualifies as an IAC in terms of protecting the civilians and at the same time as a NIAC in terms of operations directed against the non-state participant of the conflict.[99] The

[95] The last time belligerency was formally recognized was during the 1902 Boer War; see Hans-Peter Gasser, 'International humanitarian law', in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute, Paul Haupt Publishers 1993) 559. Therefore, Jelena Pejić emphasizes that 'this practice may probably be said to have fallen into desuetude': Pejić, 'Status of armed conflicts' in Wilmshurst, Breau (2007) 84.

[96] Castrén (1966) 144 ff.

[97] See, for example, Supreme Court of the United States, *Hamdan* v. *Rumsfeld* (2006), where it was stressed that a non-international armed conflict to which Article 3 GCs refers must be understood 'in contradistinction to a conflict between nations' (available at https://supreme.justia.com/cases/federal/us/548/557/). See also point 1.1.1 *San Remo Manual Relating to Non-International Armed Conflict*. Cf. Dapo Akande, 'Classification of armed conflicts: Relevant legal concepts', in Elisabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 73, where he argues that each intervention in the territory of a third-party state without that state's consent the situation should be considered an IAC (and not a NIAC).

[98] Tristan Ferraro, Lindsey Cameron, *'Article 2 Application of the Convention', in Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Cambridge University Press 2017) § 224.

[99] Ibid. § 257–61.

ICRC is not a proponent of creating a new category of transnational conflicts – that is, conflicts that become internationalized by the very fact of outside intervention[100] – but it accepts that it is possible for several conflicts of different natures to occur simultaneously in the territory of one state.[101]

In my opinion, the ICRC's approach is rooted in the inaccurate belief that the laws applicable to IAC protect the civilian population better than those applicable to NIAC. However, an even better standard of protection is offered by international human rights law used as an instrument of interpretation of the norms of IHL that pertain to NIAC. As was pointed out earlier, IHRL is much more restrictive than IHL as regards attacks against persons.

Furthermore, the solution proposed by the ICRC is in my view impractical. The principles on attacking military targets are closely tied to the principles of protection of specific categories of persons and objects. The definition of a civilian person is different depending on the type of conflict (an international or a non-international one) and it is constructed in opposition to the notions of combatant (IAC) or member of the armed forces and member of an organized armed group (NIAC) respectively. Similarly, the definition of a civilian object is negative as it encompasses all goods which cannot be qualified as military objectives, a notion that can be understood slightly differently depending on classification of the conflict. It is therefore hardly possible to apply at the same time the norms of IAC to protect civilians and the norms of NIAC to determine the legitimacy of targets and attacks.

Application of the current IHL is clearly limited to armed conflicts. Therefore, in my judgement, its norms cannot be applied to singular crimes or acts of terrorism,[102] which is noted in some of the declarations/reservations submitted by states upon ratification of the GCs and APs.[103] It is therefore very surprising that states are now making references to IHL (rather than IHRL)

[100] This solution was proposed by, for example, Ohlin (2013) 1276; Geoffrey Corn, 'Hamdan, Lebanon, and the regulation of hostilities: The need to recognize a hybrid category of armed conflict (2006) 40 VandJTL 295, 300.

[101] ICJ, Judgment concerning Military and Paramilitary Activities in and against Nicaragua (1986) § 219. Cf. ICC, *Prosecutor* v. *Jean Pierre Bemba Gombo* (2016) § 129.

[102] IHL does not apply when the terrorist acts and the response to these acts fail to qualify as armed conflict. However, when an armed conflict is already taking place, acts of terror against the civilian population are prohibited by IHL (see Article 33 GC IV, Article 51(2) AP I, Article 4(2) (d) AP II and rule 2 *Study on Customary IHL*; for example, ICTY, *Prosecutor* v. *Jadranko Prlić et al.* (2013) § 424).

[103] For example, declaration to the AP I of the UK (2002). See also William Bradford, 'Barbarians at the gates: A post September 11th proposal to rationalize the laws of war (2004) 73 Mississippi Law Journal 639, 669; Thomas Bogar, 'Unlawful combatant or innocent civilian? A call to change the current means for determining status of prisoners in the global war on terror' (2009) 21:1 Fla. J. Int'l L. 29, 68.

when discussing the principles by which they are bound when engaging in anti-terrorist or police operations.[104]

1.2.2 *Geographical Scope*

In terms of geographical scope of conflict, in international conflicts IHL applies throughout the territory of each state involved in the conflict (Article 49(2) AP I) as well as in the territories within the jurisdiction of other states (with the exception of neutral states, as long as they continue to meet the relevant requirements)[105] and outside the jurisdiction of any state (e.g. in the open sea and in space),[106] if this is where hostilities take place.

Article 49(2) AP I stipulates that its provisions 'apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party'. The application of IHL is therefore not limited to the combat zone.[107]

It is immaterial 'where' hostilities are taking place; instead, it is the 'when' that matters.[108] This is interesting to note, for example, regarding the armed conflict that began in 2001 between the USA and its allies against Afghanistan, as well as the conflict that began in 2003 between the USA and its allies against Iraq: the impact of involvement in the armed conflicts was hardly felt at all in the territory of the USA and most allied states. Yet Afghani/Iraqi forces had the rights under IHL to conduct attacks in those territories, and the reason they did not was technical difficulty and not legal obstacles.

In the case of NIAC, Article 3 GCs only requires the conflict to begin ('occur') in the territory of a state that is party to the GCs; there is no requirement for the conflict to be limited to one state.[109] Conflict with an armed group may – and indeed nowadays often does – take place across the territories of several states.

[104] David Benjamin, 'International humanitarian law – weapon of choice for the lawless' (2011) 3 Regent J. L. & Pub. Pol'y 47.

[105] See more in Michael Schmitt, Eric Widmar, 'The law of targeting' in Ducheine, Schmitt, Osinga (2016) 142; Peter Hostettler, 'Reflections on the law of neutrality in current air and missile warfare' (2014) 44 IsrYHR 145, 155–66.

[106] Cf. William Boothby, *The Law of Targeting* (Oxford University Press 2012) 360 ff, where the author expresses doubts concerning the application of IHL in outer space.

[107] See a different opinion expressed in Ohlin (2013) 1287. The notion of a 'combat zone' is used, for example, in Article 5(2)(c) AP II, Article 19 GC III, while the term 'zones of military operations' is used in, for example, Article 20 GC IV and the notion of 'battlefield areas' in Article 33(4) AP I.

[108] Michael Schmitt, 'Future war and the principle of discrimination' (1998) 28 IsrYHR 51, 70–1.

[109] Cf. 1.1.1, *San Remo Manual Relating to Non-International Armed Conflict*.

In a NIAC, IHL applies throughout the territory of the state party to the GCs or AP II in which the conflict occurred.[110] There have been voices suggesting that the application of IHL should be limited to the combat zone.[111] Yet in any armed conflict, given today's technical progress, hostilities may move quite quickly into another region, in which IHL should then apply. Furthermore, in a specific limited area, force may be used not against the members of the party to the conflict but, for example, against protesters or common criminals, in which case IHL is not applicable due to the absence of hostilities that trigger its application. The case is similar in IAC where an occupied territory can be the arena of both hostilities (if fighting with the opposition breaks out) and of police operations (to quash unrest). Thus, if hostilities occur in the territory of a state, in my opinion, IHL applies throughout this state, and temporary absence of hostilities in a specific limited area has no impact on the geographical scope of IHL's application.[112]

If a conflict spills over to the territory of a neighbouring state, IHL applies across the area controlled by the parties to the conflict (i.e. not necessarily across the entire territory of the state into which the hostilities moved in whole or in part).[113] In theory, this means that the geographical scope of IHL might spread across the entire world if an armed group operates in many states. This is precisely the justification for the above-mentioned practice of targeted killings. It is argued that the armed conflict with Al-Qaeda and its allied forces triggers the application of IHL to targeting persons, and, in consequence, persons can be eliminated on the basis of their status rather than conduct, as stipulated by IHRL.[114] This leads to abuse of law, for example circumventing the limitations of IHRL or the ban on the use of force in international relations, and thus attempts have been made to curb this application of IHL by emphasizing the need to show the connection between the target and the armed conflict. This connection may be demonstrated by proving geographic proximity of the target to the theatre of operations, level and nature of the military operations in the targeted area, and the connection between the target and the conflict.[115]

[110] Both common Article 3 GCs and Article 1 AP II refer to 'the territory of one of the High Contracting Parties'. See also ICTY, *Prosecutor* v. *Dusko Tadić* (1995) § 70; ICTY, *Prosecutor* v. *Dragoljub Kunarac et al.* (2001) § 568; ICTR, *Prosecutor* v. *Jean Paul Akayesu* (1998) § 635–6; ICTR, *Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda* (1999) § 102.

[111] Noam Lubell, Nathan Derejko, 'A global battlefield? Drones and the geographical scope of armed conflict' (2013) 11 JICJ 65, 71–4.

[112] ICTY, *Prosecutor* v. *Dusko Tadić* (1995) § 69; ICTY, *Prosecutor* v. *Dragoljub Kunarac et al.* (2002) § 57.

[113] Lubell, Derejko (2013) 69.

[114] Schöberl in Barela (2015) 78.

[115] Lubell, Derejko (2013) 74 ff.

As regards the protection of objects, it should be noted that their location in the arena of military operations alone does not mean that they can be destroyed. IHL requires verification in each case of whether the object is a military objective, and allows the object's destruction/capture/neutralization only once this verification proves positive.

1.2.3 *Temporal Scope*

Application of IHL begins at the moment the armed conflict comes into existence (Article 6 GC IV; Article 3(a) AP I; Article 3 GCs). As regards IAC, which is taken to occur when any hostilities at all take place between states, IHL should apply from the moment the first shot is fired, the first person is detained, or the first part – however tiny – of the territory of another state party to the conflict comes under occupation.[116] As regards NIAC, hostilities must reach a certain level of intensity to become recognized as an armed conflict, and thus for the application of IHL to be triggered. There may be, for a time, a certain lack of clarity as to whether IHL should apply.

Application of IHL in general, and of its principles on attacking military objectives in particular, in an IAC should end with the 'general close of military operations' (Article 6(2) GC IV; Article 3(b) AP I).[117] In a NIAC, it should end with 'the end of the armed conflict' (Article 2(2) AP II). Today armed conflicts rarely end with a formal peace accord or ceasefire, which (in theory) could indicate a specific date and time that end the application of IHL.[118] The conflicts of today percolate over time; they die down and then flare up again. This creates an ever-spreading grey zone in which it is unclear whether or not IHL continues to apply.

As regards the IHL norms that indicate potential legitimate targets and methods of attack, it is noteworthy that they apply only until the moment of

[116] Marco Sassòli, Antoine Bouvier, Anne Quintin, How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume I Outline of International Humanitarian Law, Third Edition (ICRC 2011) ch. 2, 34; Robert Kolb, Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 101.

[117] Cf. Articles 6(3) GC IV, 3(b) AP I referring to the occupied territories. However, provisions concerning occupation are of less importance in the case of targeting as occupation means that the occupying power controls the territory to the extent that excludes (in principle) threat of attacks.

[118] ICC, *Prosecutor* v. *Jean Pierre Bemba Gombo* (2016) § 141, where the tribunal stressed that 'the meaning of a "peaceful settlement" does not reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire'. Therefore, in my opinion, it is necessary to assess whether hostilities have genuinely ceased.

gaining actual control of an area, at which point it is no longer necessary to determine what should be destroyed and who should be eliminated from fighting. In theory at least, from that point onward the party to the conflict has enough power in this area to requisition buildings and equipment of military significance if needed (e.g. Article 46 HR), and to intern the persons who are considered a threat (Article 79 GC IV).

1.2.4 *Personal Scope*

In light of the norms on individual criminal responsibility laid down in the GCs (Articles 49 GC I, 50 GC II, 129 GC III, 146 GC IV) and AP I (Articles 85–8), it appears that the obligation to respect IHL is incumbent not only on states but also on their citizens (whom the states bind to these norms by ratifying the treaty). [119] Whether or not IHL is binding on non-state armed groups and intergovernmental organizations – and, if so, to what extent – is unclear.

As for non-state armed groups, their obligation to respect IHL is mentioned in Article 3 GCs ('each Party to the conflict') but not in AP II.[120] Several other treaties (for instance, the 1954 Convention for the Protection of Cultural

[119] Typically, discussions of the personal scope of IHL focus on the categories of person protected by IHL norms, namely 'protected persons' – a term used throughout the GCs (Article 5 GC I; Article 13 GC II; Article 4 GC II; Article 4 GC IV). Yet this term applies to persons in the hands of the enemy (as is typical for the law of Geneva); see more in Heike Krieger, 'Protected Persons' MPPEPIL, OPIL, online edition (2011) § 14–16. In consequence, the status of 'protected persons' in terms of the controversies related to whether and how this term relates to a party's own citizens is irrelevant for the purposes of this monograph (ICTY, *Prosecutor* v. *Dusko Tadić* (1999) § 96, § 168; ICTY, *Prosecutor* v. *Zejnill Delalić et al.* (1998) § 263–6 and in the same case (2001) § 83, 98; ICTY, *Prosecutor* v. *Tihomir Blaškić* (2004) § 170–82; ICTY, *Prosecutor* v. *Zlatko Aleksovski* (2000) § 150–1; ICC, *Prosecutor* v. *Bosco Ntaganda* (2017) § 21). However, it is important to note that attacks against the state's own citizens for which attempts are made to justify them using IHL are controversial. An example is criticism attracted by the USA after it killed its own citizen, Amwar al-Awlaki, in September 2011 in the territory of Yemen. It was argued that al-Awlaki had the right to due process under the 5th Amendment to the US Constitution. Nonetheless, the United States claimed that al-Awlaki was a legitimate target in an ongoing armed conflict and that there was no option of capturing him and bringing him to a court of law. See Remarks of US President Barack Obama, National Defense University, Fort McNair, Washington (2013); Ahmed Buckley, *Smiting Spell: The Legality of Targeted Killings in the War against Terrorism* (2012) V:2 J. East Asia Int. Law. 439, 453.

[120] The choice was made not to use wording in AP II that would be similar to Article 3 GCs with regard to each party to the conflict to avoid creating an impression that such parties all have equal status; see Robin Geiss, 'Humanitarian law obligations of organized armed groups' in Marco Odello, Gian Luca Beruto (eds), *Non-state Actors and International Humanitarian Law. Organized Armed groups: A Challenge for the 21st Century. 32nd Round Table on Current Issues of International Humanitarian Law Sanremo, 11–13 September 2009* (Franco Angeli 2010) 94.

Property in the Event of Armed Conflict – Article 19(1)) impose obligations not only on states but also on non-state parties to a conflict.[121]

The following arguments are used in support of the view that non-state armed groups are indeed bound by IHL.[122] Firstly, if non-state armed groups conduct military operations in the territory of a state, they are subject to that state's sovereign power (even if this is precisely what they are opposing) and thus they are bound by the law applicable in that state, including international law.[123] The same holds true for citizens of a state party to IHL treaties who are involved in armed operations outside the territory of their state, including operations orchestrated by intergovernmental organizations (the principle of nationality). This argument has at least two shortcomings. It assumes that non-state armed groups recognize their obligation to respect the law of the state against which they are fighting. Furthermore, this assumption is debatable in light of the obligations that result from IHL but that are interpreted through the lens of IHRL. This is because IHRL (which may have an impact on the principles that apply to identifying and attacking targets in armed conflicts) is not generally horizontal in effect, meaning that there is no obligation to apply it in relations between individuals or other entities.

Secondly, non-state armed groups are bound by IHL (as well as IHRL and ICL) because these branches of law draw heavily from customary law and general principles of law, and thus are binding on any subject of international law.[124] While non-state armed groups are not strictly recognized as such, they are still supposed to meet the requirement of observing customary law, even if they have no opportunity to actively shape it.[125]

[121] Tilman Rodenhäuser, 'Human rights obligations of non-state armed groups in other situations of violence: The Syria example' (2012) 3 IHLS 263, 271.

[122] Daragh Murray, 'How international humanitarian law treaties bind non-state armed groups' (2015) 20:1 JC&SL 101; Orla Buckley, 'Unregulated armed conflict: Non-state armed groups, international humanitarian law, and violence in Western Sahara' (2012) 37 NCJIL&CR 793, 813 ff; Jann Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93:883 IRRC 443 ff. See also SCSL, *Prosecutor* v. *Sam Hinga Norman* (2004) § 22; ICJ, Judgment Concerning Military and Paramilitary Activities in and against Nicaragua (1986), § 218–19.

[123] Richard Baxter, 'Ius in bello interno: The present and future law', in John Moore (ed.), *Law and Civil War in the Modern World* (The John Hopkins University Press 1974) 527 ff.

[124] SCSL, Decision on challenge to jurisdiction: Lomé Accord Amnesty (2004) § 47. Cf. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005) § 172, where the Commission concluded that this binding status of IHL is a consequence of having the status of an international subject due to sufficient organization, stability and effective control over territory. For a critical view on so-called functional subjectivity of non-state armed groups, see Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 65.

[125] Traditionally, among subjects of international law, insurgents and belligerents are mentioned; see, for example, Malcolm Shaw, *International Law* (Cambridge University Press 2008) 197.

Thirdly, when a non-state armed group forms a new state, it can be argued that succession takes place with regard to IHL, IHRL, and ICL treaties. This, however, is also debatable, because the principles of treaty succession are not unequivocally clear. There are only twenty-three states parties to the 1978 Vienna Convention on the succession of states in respect of treaties, meaning that the principles enshrined in that convention failed to find general recognition.

Fourthly, an argument can be made that IHL treaties create privileges – which are closely tied to obligations – with regard to third parties whose consent to these privileges and obligations is presumed, meaning that these third parties are expected to observe these treaties. Again, this is debatable. Article 35 VCLT only allows obligations to be imposed on third-party states with their consent expressed in writing. However, the convention only refers to states, and so it may be argued that other principles should apply to non-state actors.

It is also true that few non-state armed groups negate the application of IHL, because it offers them certain favourable solutions.[126] There is a fairly common practice of non-state armed groups issuing unilateral declarations (deeds of commitment) and codes of conduct, or signing agreements dedicated to this issue, in order to express their adherence to the principles of IHL.[127]

Each of these theories has consequences in terms of the scope of the applicable law. Customary law and general principles of law are less precise than treaty norms, and thus the obligation to abide by specific rules – those on the legitimacy of attacks, for instance – may be challenged. Succession only makes sense if a new state is actually created in the territory of a state that was party to the GCs or the APs. However, it is accepted consensus today that non-state armed groups are actually bound by IHL and also by IHRL, although the latter only to a limited degree.[128] While there may be doubts as to the technical ability of the non-state party to observe fair trial rules or rules on the conditions of detention,[129] there is no room for doubts as far as the application of the principle of distinction is concerned – and this principle is crucial in terms of deciding on the legitimacy of potential targets in armed conflict.[130]

[126] Murray (2015) 129–30; Elisabeth Warner, 'Characteristics and motivations of organized armed group' in Odello, Beruta (2010) 59 ff.

[127] Cedric Ryngaert, Anneleen Van de Meulebroucke, 'Enhancing and enforcing compliance with international humanitarian law by non-state armed groups: An inquiry into some mechanisms' (2011) 16:3 JC&SL 443, 445 ff.

[128] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 271 ff.

[129] Marco Sassòli, 'Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?' (2011a) 93:882 IRRC 426, 431.

[130] Yuval Shany, 'A rebuttal to Marco Sassòli' (2011) 93:882 IRRC 432, 433.

As for intergovernmental organizations, the same argument can be made: as subjects of international law (and, in contrast to non-state armed groups, the fact that intergovernmental organizations have this status is undisputed),[131] they are also bound by the norms of IHL and IHRL under customary law[132] and the general rules of international law.[133] Additionally, certain intergovernmental organizations have adopted internal regulations to ensure adherence to IHL; this is the case with the United Nations[134] and the European Union, for example.[135] These documents were intended to promote clarity as to the scope of obligations under international law of the armed forces of these organizations (or, more precisely, the armed forces put at the disposal of these organizations), in case an armed conflict should arise. However, no such clarity has been achieved because the regulations are quite general: they include no complete list of obligations that can be derived from customary law, not to mention that the treaties that are binding on specific states.[136] Consequently, the degree to which the norms not specifically listed in the documents adopted by these organizations are binding on them remains open to debate.

When a military operation is launched by a coalition of states, it is extremely difficult to determine which norms on target legitimacy apply.[137] In view of IHL itself, this is not really complicated: according to Article 2 GCs and Article 2(b) AP I, whatever regime is shared by all the participants of the operation will apply.[138] If the USA is party to the GCs but not the APs, and its ally Canada is party to both the GCs and the APs, their joint military operation

[131] ICJ, Reparation for Injuries Suffered in the Service of the United Nations (1949) 185.

[132] Ola Engdahl, 'Panel Discussion: Applicability/Application of Human Rights Law to IOs involved in Peace Operations' (2011) 42 Collegium 66, 68; Katarina Grenfell, 'Panel Discussion: Applicability/Application of Human Rights Law to IOs involved in Peace Operations' (2012) 42 Collegium 57, 59; cf. Françoise Hampson, 'Responsibility in the Human Rights framework' (2007) 36 Collegium 34, 36.

[133] ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (1980) § 37.

[134] See *Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law*, ST/SGB/1999/13 (1999).

[135] See *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009).

[136] See, for example, § 40 Regulations for the United Nations Force in Cyprus (1964), where there is a reference not to specific provisions of specific conventions, but rather to a general (not defined, abstract) spirit of general conventions.

[137] Charles Garraway, '"England does not love coalitions" Does anything change?' in Helm (2006) 234 ff; Dale Stephens, 'Coalition Warfare: Challenges and Opportunities' in ibid. 245 ff; Chris de Cock, 'Targeting in Coalition Operations' in Ducheine, Schmitt, Osinga (2016) 231.

[138] Articles 2 GCs; 2(b) AP I.

will only be governed by the GCs and customary law. In practice, Canadian troops will apply the appropriate AP in its entirety as well, because this is what they have been trained to do (but they will not be held responsible for violations of the APs, should they occur). A greater problem arises when one of the members of the coalition categorically eschews the application of IHRL to its armed operations and another one makes it a requirement that IHRL be applied.[139] The dilemma is solved, in my view, by the application of customary law (which is also shaped by IHRL) as long as the state in question is not a persistent objector with regard to a specific customary norm involved.

1.3 PHILOSOPHY OF CREATION AND APPLICATION OF IHL

1.3.1 *Humanity versus Military Necessity*

IHL rejects the option of total war (which posits that during armed conflict entire societies are involved in fighting one another, and thus everything and everyone must be destroyed if this appears necessary to ensure final victory).[140] IHL rejects the assumption that the purpose of the conflict is the total destruction of infrastructure, industry, transportation systems, etc., of the enemy, or the annihilation of the population on the other side of the conflict. Instead, it posits that the purpose is to weaken the military forces of the enemy.[141] In consequence, IHL does not prohibit attacking anybody actually involved in military operations and anything that directly serves to support these operations.[142] This stems from the principle of military necessity. As defined by Article 14 Lieber Code of 1863, military necessity consists in 'the necessity of 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'.[143] If the range of potential legitimate targets were set too narrowly, state

[139] Kirby Abbott, 'A brief overview of legal interoperability challenges for NATO arising from interrelationship between IHL and IHRL in light of the European Convention on Human Rights' (2014) 96:893 IRRC 107 ff.

[140] This practice was in accordance with the Prussian military doctrine of 1870 known as *Kriegsräson geht vor Kriegsmanier*. On the logic of total war, see Hays Parks, 'Air War and the Law of War' (1990) 32 AFLR 1, 7.

[141] See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (The Saint Petersburg Declaration) (1868).

[142] See Preamble HC IV: 'these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit'.

[143] See also *USA* v. *Wilhelm List et al.* (1948), where the tribunal stressed: 'Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time,

security would be threatened and the law would be ignored. If it were too broad, there would be practically no limitations and thus no part of the population would enjoy protection.[144] The dilemma is as follows: can any person or object not explicitly protected by IHL be targeted, or should each attack on a lawful target be also assessed in terms of military necessity?

On the one hand, the military necessity is already incorporated in the provisions of the GCs and APs. In these treaties, military necessity appears as a reason to take actions towards persons and objects that are in principle afforded protection,[145] and not towards persons and objects that against whom IHL issues no bans on attacks. Thus, there is no need to additionally contemplate the military usefulness of attacking legitimate targets such as combatants or important transport routes.[146]

On the other hand, the humanitarian aspect of IHL could be emphasized: in each and every case, it merits consideration whether destruction and casualties are absolutely necessary in view of military gains.[147] The fact that the GCs and the APs include references to military necessity and military advantage does not mean that in other cases where no such references are made these considerations can be disregarded.[148] On the contrary, it means that military necessity should be taken into account in every case, even when the contemplated target is lawful.[149] This is emphasized in the Martens Clause, which stipulates that both 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'.[150]

life, and money', in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. XI (United States Government Printing Office, Washington 1950) 1253. Cf. Andrzej Górbiel, *Konieczność wojskowa w prawie międzynarodowym* (Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1970) 48–50, who indicates three requirements in order to invoke military necessity: the action must be 1. genuinely and directly necessary; 2. proportional in terms of means; 3. cannot violate IHL.

144 Martijn Keeman, 'Is formalism a friend or foe? Saving the principle of distinction by applying function over form (2013) 4 JIHLS 354, 357.

145 See, for example, Articles 8, 12 GC I; 28 GC II; 42, 49, 53, 55, 78 GC IV; 54(5), 62(1), 67(4), 70(3), 71(3) AP I; 4 and 11 HC (1954).

146 Ohlin (2013) 1301.

147 Samuel Jones, 'Has conduct in Iraq confirmed the moral inadequacy of international humanitarian law? Examining the confluence between contract theory and the scope of civilian immunity during armed conflict (2006) 16 DJC&IL 249, 296. Cf. Michael Reisman, 'Some reflections on international law and assassination under the Schmitt Formula' (1992), 17:2 Yale J. Int. Law 687, 689. See also A/HRC/14/24/Add.6 (2010) § 30.

148 ICTY, *Prosecutor* v. *Dario Kordić & Mario Čerkez* (2004) § 686.

149 Melzer (2009) 77.

150 Article 1(2) AP I; Preamble AP II; Articles 63 GC I; 62 GC II; 142 GC III; 158 GC IV. See also Rupert Ticehurst, 'The Martens Clause and the laws of armed conflict' (1997) 317 IRRC 125;

Because the Martens Clause stipulates that the principle of humanity applies in every situation, in my opinion it can be read as prohibiting the unnecessary killing of combatants. Thus, the prohibition enshrined in Article 35(2) AP I of causing unnecessary suffering should be understood to cover, for example, causing anybody pain without military necessity to do so.

In consequence, since total annihilation of the enemy is not the purpose, any plans for attacks against legitimate targets that are possible and allowed but not militarily necessary should be abandoned.[151] After all, combatants are human beings whose loss will be grieved by their families; destroyed facilities will have to be rebuilt when the hostilities are over. Military necessity justifies the measures that are necessary to accomplish the ultimate objective of the conflict, namely to defeat the enemy – but nothing beyond that objective.

Neither the GCs nor the APs impose an explicit obligation to use the method of fighting that causes least harm, but also neither authorizes killing for no military advantage. Any other interpretation, in my view, would amount to an endorsement of cruelty and a violation of the principle of humanity, which is as fundamental a principle as that of military necessity.[152] Not only is this the sole acceptable interpretation of IHL norms in view of IHRL; it is also reasonable given that the military never has unlimited resources to destroy each and every single military objective, regardless of where it is located or how useful it is.

This conflict between military necessity and humanity is sometimes described as the conflict between common sense and idealism.[153] This is very misleading. What the principle of humanity represents is not an unachievable ideal. In fact, it has its roots in part in common sense, and specifically in the self-preservation instinct which discourages people from pushing for endless war that would lead to complete destruction, making way for the annihilation of humanity.

In general, military necessity should not be used to justify violations of IHL, because this undermines its foundations in result.[154] However, this view is challenged by the opinion of the International Court of Justice dated 8 July 1996, on the legality of the threat or use of nuclear weapons, which stipulated that in cases where the existence of a state is at risk, the use of

Theodor Meron, 'The Martens Clause, principles of humanity, and dictates of public conscience' (2000) 94:1 AJIL 78.

[151] Philip Alston, 'The CIA and targeted killings beyond borders' (2011) 2 HNSJ 283, 301–2.

[152] Ohlin (2013) 1298 ff.

[153] Keeman (2013) 358.

[154] Cf. ICTY, *Prosecutor* v. *Tihomir Blaškić* (2004), § 109; *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (Chiefs of Staff 2004) § 2.3.

weapons (in the scenario contemplated by the Court, nuclear weapons) in violation of fundamental principles of IHL is not ruled out.[155]

It bears underscoring here that IHL by design never requires more than can be realistically achieved. This is of particular importance with regard to requirements concerning non-state parties. If non-state parties were faced with requirements that were impossible for them to meet, it would likely lead them to disregard this body of law in its entirety (rather than just these impracticable requirements).[156]

1.3.2 *Between Prohibition and Authorization to Use Force*

The purpose of IHL is to limit the casualties among those not participating in hostilities and to protect the objects which offer no military advantage if destroyed. The question at the heart of the matter, however, is this: should the absence of an explicit ban on attacks against specific categories of persons and objects be understood as direct IHL-based authorization to pursue these attacks? There is a lot of gravity attached to the answer to this question, particularly in view of the fact that recently states have rediscovered the usefulness of IHL and started invoking it to justify practices such as targeted killings, at the same time categorically objecting to the application of IHRL.[157]

Allegedly, neither the GCs nor the APs explicitly authorize the use of force towards any category of persons, including combatants. Article 48 AP I requires that the distinction be made between civilians and combatants, but never stipulates directly that operations should be directed against the latter as it is in the case of 'military objectives'. Furthermore, neither the GCs nor the APs articulate a legal obligation to kill the enemy and/or to destroy the enemy's objects. On the other hand, it is explicitly articulated – if only to cite the Saint Petersburg declaration of 1868 again – that the object is to weaken the enemy's armed forces (and thus not to kill the enemy's troops). The role of IHL was to prohibit certain categories of actions towards certain categories of persons and objects, and not to create a clear authorization. Moreover, the Martens Clause underscores that the absence of an explicit prohibition in treaty law is not

[155] ICJ, Legality of the Threat or Use of Nuclear Weapons (1996) § 78. See also Dapo Akande, 'Nuclear weapons, unclear law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1997) 68 BYIL 165, 209.

[156] Nelleke van Amstel, 'In search of legal grounds to detain for armed groups' (2012) 3 IHLS 160, 162.

[157] Patrycja Grzebyk, *Authorising Attacks in Response to Terrorist Attacks* in George Ulrich, Ineta Ziemele (eds.), *How International Law Works in Times of Crisis* (Oxford University Press 2019) 21 ff.

automatically equal to authorization in IHL.[158] Therefore, it could be argued that to use IHL to give legitimacy to certain types of attacks is a kind of legal perversion.[159]

On the other hand, the absence of a clear prohibition of killing persons within a specific category could mean the absence of a requirement to demonstrate that the authorizing norm exists (*in dubio pro libertate*)[160]. Also, Article 52(2) AP I reads 'Attacks shall be limited strictly to military objectives'. The category of 'military objectives' includes not only objects but also persons with a specific status – for instance, members of the armed forces who qualify as combatants. This is further supported by the fact that phrasing '[i]n so far as objects are concerned' only appears in the second sentence of that section. Moreover, Article 48 AP I stipulates that parties to the conflict '*accordingly* shall direct their operations only against military objectives' (i.e. against combatants and military objectives). It is true that the above-mentioned Martens Clause underscores that the principles of IHL must always be respected. However, on its own, it cannot serve as a basis for declaring certain actions to be unlawful.

IHL imposes restrictions on armed operations, but is rooted in compromise between the principles of humanity and military necessity, and as such is not intended to preclude the option of armed operations in general. Therefore, in my opinion, certain categories of persons and objects must remain designated as potential targets of deadly force. IHL uses negative definitions to reference civilians (Article 50 AP I) and civilian objects (Article 52 AP I) in IAC, because this determines both whom and/or what is protected and who and/or what can be attacked. Restriction and authorization of attacks really are two sides of the same coin.[161] If attacking objects in a certain category is clearly acceptable under the law, this means that attacking objects in other categories is prohibited. If the legally allowed options are limited, but armed operations as such are not outlawed, in my view these restrictions must serve as a basis for concluding who and what can be lawfully targeted and attacked.

In consequence, if both in IAC (Article 51(2) AP I) and in NIAC (Article 13(2) AP II) it is prohibited to attack civilians, a contrario it could be concluded

[158] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Martinus Nijhoff 1987) 39.

[159] Richard Baxter, Hamilton De Saussure *Comments* in Peter Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (The University of North Carolina Press 1975) 63 ff.

[160] Cf. PCIJ, S.S. "Lotus" (1927) 19–20; Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff Publishers 2009) 39.

[161] Ohlin (2013) 1304.

that other persons may be attacked.[162] If Article 3 GCs and Article 4 AP II stipulate that only those who are not actively involved in the hostilities are protected, then those that do take active part in hostilities have no such protection and therefore may be targeted.

1.3.3 *Equality*

In IAC, the parties to the conflict have equal rights; in NIAC, that is not the case. For centuries, states have been unwilling to accept any obligations when an internal conflict arises. Any suggestion to regulate armed operations in NIAC was perceived as interference with issues that are by their very nature internal.[163] Rebels were treated as criminals, and therefore – as is traditional – were prosecuted under national rather than international law.[164] As a result, the IHL regulations on internal conflicts that were ultimately adopted are hardly numerous and their regulations are general (rather than precise).

It is noteworthy that Article 3 GCs covers the protection of persons taking no active part in the hostilities, and just like AP II it essentially ignores the issue of conducting hostilities against potential lawful targets. This suggests two conclusions. Firstly, states may have wanted to guarantee themselves as much freedom as possible in fighting with non-state armed groups to quash a rebellion as fast as possible.[165] In practice, states tend to refer to the opponent not as a party to the conflict, an armed group, or as combatants, choosing instead to call them bandits, terrorists, or criminals.[166] This served to discourage the qualification of the situation as armed conflict and thus to prevent the application of IHL.

Secondly, the intention of the states was to limit the lawful options of attacking state targets. This is why the rights of combatants were not afforded to members of non-state armed groups, who in consequence have no clear right to participate in hostilities and no right to PoW status. Furthermore, the states decided against affording the status of combatants to members of their own armed forces, so as not to encourage potentially lawful attacks against them. The same reasons, in my view, stand behind the decision not to define a military objective in AP II. The idea was to prevent any provision of the law

[162] Geoffrey Corn, Chris Jenks, 'Two sides of the combatant coin: Untangling direct participation in hostilities from belligerent status in non-international armed conflict' (2011–12) 33 UPaJIL 313, 330.
[163] Pictet (1952) 39.
[164] Howard Taubenfeld, 'The applicability of the laws of war in civil war' in Moore (1974) 503.
[165] Pictet (1952) 57.
[166] Castrén (1966) 97.

from suggesting encouragement to attack military personnel or public service officials, as well as, for example, military buildings and equipment.[167] While IHL contains no prohibition for the non-state party to take part in hostilities, it allows the states to make it punishable under national law (Article 6(2) AP II).

In NIAC, the law always sides with the armed forces because they are an organ of the state, and the state shapes the law – and so, naturally, the law promotes the interests of the state.[168] States have blocked the option of granting non-state armed groups the same rights and duties that states enjoy, even if the degree of organization of the non-state group, the designation of its members, and the implementation of IHL is comparable to a state's armed forces.[169] Granting rights to the non-state party is perceived as undue legitimization.[170] Public opinion is apparently accepting of this imbalance and is even willing to accept violations of the few IHL norms that apply to NIAC by armed forces for the sake of effectiveness of operation.[171]

However, in my opinion, at the heart of modern international law is not the state and its traditionally understood sovereignty; rather, the focus is on the human being and humanity as such.[172] Therefore, it should be considered if it would not be in the interest of humanity – and certainly its civilian population – to ensure equal treatment of all parties to the conflict, both in IAC and NIAC. When a group of people in a state rises against that state, and thus clearly feels that they are not represented by that state properly, why should that group of people be barred from enjoying equal treatment under international law when it comes to the rules of conduct of hostilities? The question is now asked more and more frequently: is the state-centric approach to creating IHL still

[167] Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge 2015) 35.

[168] Zakaria Daboné, 'International law: Armed groups in a state-centric system' (2011) 93: 882 IRRC 395, 398.

[169] See Argentina's declaration to the APs.

[170] A. Buckley (2012) 450.

[171] A good example is the operation of the armed forces of Colombia on 2.07.2008 intended to liberate hostages held by Fuerzas Armadas Revolucionarias de Colombia. The soldiers wore garments styled to resemble journalists and humanitarian personnel (with one of them bearing the Red Cross emblem). Thus, the armed forces failed to observe the principle of distinction. Satisfaction with the operation was expressed, for example, by the UN SG (Press Statement, 2.07.2008, www.un.org/sg/en/content/sg/statement/2008-07-02/statement-attributable-spokesperson-secretary-general-liberation). See also John Dehn, 'Permissible perfidy? Analysing the Colombian hostage rescue, the capture of rebel leaders and the world's reaction' (2008) 6 JICJ 627.

[172] ICTY, *Prosecutor* v. *Dusko Tadić* (1995) § 97. Antônio Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium*, second revised edition (Martinus Nijhoff Publishers 2010) 275 ff.

legitimate,[173] or should the armed groups which are expected to implement IHL be able to contribute to its creation?[174]

1.4 TARGET ELIMINATION

1.4.1 *Definition of an Attack*

When a person or object is classified as a lawful (potential) target, it might become subject to attack. To be clear, what is contemplated here is not accidental damage but rather deliberate and direct attack against this person or object, intended to kill/wound/capture the person or destroy/capture/neutralize the object.[175]

Article 49(1) AP I defines attacks as 'acts of violence against the adversary, whether in offence or in defence'.[176] While AP I only applies in IAC, the definition holds for NIAC too, as the letter of Article 13(2) AP II also refers to the notion of 'acts of violence'.[177] ICRC notes that from the very beginning of the diplomatic conference where both the additional protocols were negotiated, the states understood and agreed that the notion of an attack must be understood consistently regardless of the type of conflict.[178]

The definition emphasizes that the current situation of the party (i.e. whether it is engaging in offensive or defensive operations) is irrelevant; if the decision to use force is made against a specific person or object, this use of force is classified as an attack and consequently is subject to all restrictions as to the scope, methods, and means of warfare. The use of the plural in Article 49(1) AP I ('attacks') indicates that an operation is not assessed as a whole. Rather, restrictions apply to each element of each operation (in other words, to each shot fired, or to each instance of use of kinetic force towards a target). The restrictions apply to attacks from the ground, from the air, and from the sea (Article 49(3) AP I).

The APs use the phrase 'acts of violence', which prompts questions as to the types of permissible violence and the intended consequences of its use. If no

[173] Daboné (2011) 396.

[174] Marco Sassòli, 'Involving organized armed groups in the development of the law' in Odello, Beruto (2010a) 213 ff.

[175] See Sandoz, Swinarski, Zimmermann (1987) 482.

[176] See also ICTY, *Prosecutor* v. *Milorad Krnojelac* (2002) § 54; ICTY, *Prosecutor* v. *Dragoljub Kunarac* (2001) § 415; ICTY, *Prosecutor* v. *Stanislav Galić* (2003) § 52.

[177] ICC, *Prosecutor* v. *Bahar Idriss Abu Garda* (2010) § 65; ICC, *Prosecutor* v. *Bosco Ntaganda* (2019) § 916.

[178] Sandoz, Swinarski, Zimmermann (1987) 1452. See also point 1.1.6 *San Remo Manual Relating to Non-International Armed Conflict*.

violence is used, then the actions are not an attack under IHL, even if their consequences for the other party are dire (e.g. if money in the accounts of an armed group is confiscated, rendering the group unable to purchase arms necessary to continue participating in the hostilities). The purpose of IHL is to regulate hostilities rather than economic or ideological operations, and so, in my view, the term 'violence' as used in Article 49(1) AP I should be understood in principle as armed violence, or more precisely as physical violence (regardless of the use of any weapons). The intended consequence of the use of violence is understood as killing or wounding a person (be it a person with a protected status or not) or destroying or damaging objects.[179] The principles of IHL apply whether the attack consists of a single shot fired by a sniper or massive shelling by artillery.[180]

Beside traditional hostilities conducted on land, on sea, and in the air, IHL is also relevant when assessing actions taken in cyberspace.[181] This is somewhat controversial in that cyberwarfare is conducted without the use of kinetic force. However, there is no doubt that the use of biological or chemical weapons, also not necessarily involving kinetic force, falls under IHL regulations. Cyberattacks targeting infrastructure (computer network attacks) can cause damage comparable to conventional attacks, for example destruction of servers or military equipment, and can, for instance, lead to changes in drug dosage, thus killing patients, giving control of weapons to attackers, etc. Sometimes, the scale of damage can even be comparable to weapons of mass destruction, such as interference with software that controls dams or nuclear power plants.[182]

Another argument that has gained traction recently is as follows: it is accepted that the consequence of an attack against a military objective is not necessarily, in so far as an object is concerned, its destruction; capture or neutralization are other possible outcomes. By the same token, cyberattacks need not necessarily lead to destruction, wounding, or killing to qualify as attacks under IHL. For instance, if feeding false data to a computer system

[179] Yoram Dinstein, 'The principle of distinction and cyber war in international armed conflicts' (2012b) 17:2 JC&SL 261, 264.

[180] Yoram Dinstein, 'Legitimate military objectives under the current ius in bello' (2001) 31 IsrYHR 1, 2–3.

[181] Sean Watts, 'Combatant status and computer network attack' (2010) 50:2 VirJIL 391, 392 ff. See also Michael Schmitt (ed.), *Talinn Manual on International Law Applicable to Cyber Warfare* (Cambridge University Press 2013a) 75 ff.

[182] Noam Lubell, 'Lawful targets in cyber operations: Does the principle of distinction apply?' (2013) 43 IsrYHR 23, 24 ff; Oliver Kessler, Wouter Werner, 'Expertise, uncertainty, and international law: A study of the Tallinn manual on cyberwarfare' (2013) 26 LJIL 793, 799–800.

(computer network exploitation) disables an entire defence system, this action is an attack under IHL. As a result, operations in cyberspace are increasingly viewed through the lens of Article 49(1) AP I, with all the consequences thereof – for example, the application of the principles of distinction and proportionality.[183]

1.4.2 *Permissible Degree of Force*

Article 49(1) AP I offers no specific indication of the degree of force that can be used when launching an attack against a person or object. This prompts the crucial question: does attacking under IHL mean that the tactic of shooting to kill is allowed, or is the only permissible tactic to first attempt to capture the person; if impossible – wound, and only if that proves impossible – kill? As regards objects, the dilemma would be: should total destruction be the objective from the start, or should an effort be made to preserve the object as much as possible, or at least to limit the damage? There are no definite answers to those questions as both sides in the dispute use convincing arguments.

In section IX, the *ICRC Interpretive Guidance* stipulates that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.[184] In line with this recommendation, when wounding a person is sufficient to put that person out of action, the person should be wounded and not killed. If capture is an option, the person should be captured rather than wounded or killed.[185]

The crucial issue was that nowhere in the GC and APs is it stipulated that the least harmful method of attack must be used.[186] If a person is a lawful target under IHL, killing is allowed whether or not it was physically possible to capture or wound that person because, for instance, they were eating or sleeping at the moment of the attack.[187] However, cold-blooded slaughter of

[183] Michael Schmitt, 'Rewired warfare: Rethinking the law of cyber attack' (2014) 96:893 IRRC 189, 204–5.

[184] Melzer (2009) 77.

[185] See also Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers 1985) 75; ICRC, Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects. Report on the Work of Experts, 1973, § 23; See also Ryan Goodman, 'The power to kill or capture enemy combatants' (2013) 24:3 EJIL 819, 839 ff; Nils Melzer, 'Keeping the balance between military necessity and humanity: A response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities' (2010) 42 IL&Pol 831, 896.

[186] Ohlin (2013) 1270.

[187] Henderson (2009) 79.

a person who is a lawful target if the circumstances would have allowed for easy capture is difficult to reconcile with the principle of humanity.[188] Furthermore, the need to seek the least harmful method may result from Article 35 AP I, which reads 'the right of the Parties to the conflict to choose methods or means of warfare is not unlimited'.[189] The wording focuses not only on the different kinds of weapons (means) but also on the way they are used (methods), including the degree of force to be used in an attack. This is a great development of constraints on the conduct of hostilities in comparison to Article 22 HR, for example, which referred only to the means of warfare.

Under Article 35 AP I it is prohibited to employ methods of warfare that cause 'superfluous injury or unnecessary suffering', which in my opinion also means – contrary to some voices in literature on the subject[190] – a prohibition of unnecessary deaths.[191] To use *argumentum a minori ad maius*, if no unnecessary injury and suffering is allowed, the same is also true with regard to unnecessary deaths.[192]

A permissible military purpose under IHL is to weaken the adversary; this does not necessarily mean killing the enemy's soldiers.[193] The same purpose may be accomplished by taking them prisoner or by wounding them and thus putting them out of action. However, it has been argued that wounding an enemy rarely actually eliminates the person from combat. Brutal as it sounds, studies have demonstrated that really only a hit to the brain or upper spinal cord eliminates the risk of a counterattack.[194] Moreover, under specific circumstances killing a person may actually be more humane than wounding them.[195]

Jean Pictet argued that killing a combatant if capture was a viable option violates the principle of proportionality given that the only permissible

[188] Melzer (2009) 82.
[189] ICJ, Legality of the Threat or Use of Nuclear Weapons (1996) § 78–79.
[190] See, for example, Corn, Jenks (2011–12) 346.
[191] This is also reflected in the wording of the Saint Petersburg Declaration, which stipulated: 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war'. The fact that Article 23 of the Regulations only referred to 'superfluous suffering' was, as Henri Meyrovitz aptly points out, a result of mistranslation of the term 'maux supeflus' used in the French version of the Regulations (which refers not only to wounding but also to killing). Henri Meyrowitz, 'The principle of superfluous injury or unnecessary suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977' (1994) 34 IRRC 98.
[192] Ibid. 99.
[193] Goodman (2013) 826–7.
[194] Parks (2010) 811.
[195] Michael Schmitt, 'Wound, capture, or kill: A reply to Ryan Goodman's "The power to kill or capture enemy combatants"' (2013b) 24:3 EJIL 855, 857.

objective is to weaken the adversary.[196] However, the proponents of the shoot-to-kill tactic note that AP I contemplates the issue of proportionality solely in the context of civilian losses and not lawful targets.[197] There is actually no consensus on that issue; certainly not everyone agrees that proportionality is irrelevant when it comes to lawful targets.[198] Each IHL principle should be interpreted in light of its other principles. Whether or not the principles of proportionality, humanity, military necessity, prohibition of unnecessary suffering, etc., are directly invoked, the fact remains that murder without a clear need for it is not allowed. It would be paradoxical if the military necessity of attacking objects would have to be contemplated before the attack (Article 52(2) AP I requires an assessment of whether the destruction of the object will bring a definite military advantage), but no similar considerations are required when it comes to taking a person's life.

It cannot be ignored that when conducting hostilities, the element of surprise may be of the utmost importance. As there is no prohibition in IHL of ruses of war (Article 37(2) AP I),[199] a requirement to offer a chance to surrender in each case would be irreconcilable with surprise attacks. Thus, it can be argued that as long as the armed conflict continues, killing persons who are legitimate targets must remain lawful.[200]

On the one hand, it is unreasonable to expect a soldier to consider in each situation which method is the most fitting, and to choose the approach that is least harmful to the enemy depending on the prevailing circumstances. To cite Frits Kalshoven's analogy, a soldier is not a golfer on a golf course, free to deliberate which golf club to use for each strike.[201] Quite the opposite: a soldier is expected to accomplish an objective as time- and resource-effectively as

[196] Pictet (1975) 31–2.

[197] See, for example, Geoffrey Corn, Laurie Blank, Chris Jenks, Eric Jensen, 'Belligerent targeting and the invalidity of a least harmful means rule' (2013) 89 ILS 536, 579.

[198] Sassòli, Olson (2008) 606.

[199] On the difference between perfidy and ruses, see Voislav Vasileski, *International Law in Armed Conflicts with Special View to the Contemporary Armed Conflicts in the Balkans* (Military Academy 'General Michailo Apostolski' Skopje 2003) 181–5; Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 318 ff.

[200] In this context, it is worthwhile to consider what the media referred to as the Highway of Death, namely incidents during the intervention against Iraq in 1991 involving the killing of Iraqi soldiers withdrawing from Kuwait 24 hours before ceasefire was declared. See more in Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 J. Legal Analysis 115, 116; C. B. Shotwell, 'Economy and humanity in the use of force: A look at the aerial rules of engagement in the 1991 Gulf War' (1993) 4 USAFAJLS 15, 38; Henderson (2009) 87–8: the author notes that in military terms, it is better to target an enemy in retreat than an enemy who is actively resisting.

[201] Frits Kalshoven, 'The Soldier and His Golf Clubs' in Frits Kalshoven (ed.), *Reflections on the Law of War: Collected Essays* (Martinus Nijhoff Publishers 2007) 359 ff.

possible. Capture instead of killing is less effective in terms of money, time, duration for which the enemy is put out of action,[202] and risk to soldiers on the same side of the conflict.[203] Thus, if enemy members of armed forces or of armed groups are captured rather than killed, the conflict may be prolonged and cause the overall death toll to rise.[204]

On the other hand, while a soldier may not be expected to deliberate on the choice of means of each and every attack, such expectation stands to reason with regard to the command. For instance, while air strikes are generally permissible (even though they offer very little choice of capture or wounding the adversary's soldiers), in certain specific circumstances they could be considered illegal due to their impact. The argument that effectiveness of operations depends on the speed of operations no longer holds true; many conflicts today are inherently long term. Often the official end of military operations is followed by a stabilization mission, which in theory involves no significant combat components but in practice tends to encompass a lot of fighting. Examples include the interventions in Iraq in 2003 and in Afghanistan after 2001. The conflicts drag on not due to the prevalence of capture instead of killing; in my opinion, quite the opposite is true: preference for capture over killing may paradoxically promote ultimate victory, because they help to 'win the hearts and minds' of the local population.

As regards attacks against objects, Article 52(2) sentence 2 AP I reads '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.' This wording clearly indicates that there are various ways in which an attack can be structured. An object that is a military objective may be destroyed, in which case the attack will render it useless for any of the parties. It may be captured – that is, physical control of it may be taken over – and thus the adversary will no longer be able to use it. Finally, it may be neutralized, meaning that the object will cease to be a military asset for the adversary, but will not be physically taken over.[205] The overall objective is to weaken rather

[202] David Luban, 'Military necessity and the cultures of military law' (2013) 26 LJIL 315, 342.
[203] Melzer (2009) 81; Ohlin (2013) 1301.
[204] Ohlin (2013) 1300.
[205] Examples include establishing and patrolling a no-fly zone without taking power as occupant. As a result, the enemy is unable to use an object even though the object in question is not destroyed. Another example is firing to destroy military objectives and prevent the placement of further military objectives, but without troops entering the relevant area. See also ICTY, *Prosecutor* v. *Radovan Karadzić* (2016) § 4093.

than totally destroy the enemy – for example, if the enemy's progress can be blocked using anti-tank mines, it is unnecessary to destroy the entire road network (used not only by the military personnel but also by civilians). Recent practice of states – such as the use of graphite bombs to temporarily disable electrical power systems – suggests that neutralization is becoming the tactic of choice in relation to objects that may easily become military objectives due to their possible future use or location.[206]

Another argument in favour of using the least harmful degree of force is the need to take into account the norms of IHRL, which only allow physical force to be used if and when absolutely necessary.[207] It has been argued that this standard should only apply in NIAC (and not in IAC), because only in the context of NIAC is the issue of use of force against specific categories of persons and objects not explicitly regulated.[208] However, I think that a differentiation of standards of the use of force in IAC and NIAC is completely impracticable: the training of troops must be consistent regardless of the type of conflict.[209] Furthermore, while international courts have not so far questioned the legality of attacks against legitimate targets,[210] national courts have in some cases enforced the standard of graduated use of force.[211] Interestingly, even the practices of states that have opposed the principle of graduated use of force against military objectives demonstrate a certain willingness on the part of these states to comply with this rule and thus limit the impact of the use of force to the extent to which it is possible.[212]

In my opinion, bearing in mind the specific provisions of IHL concerning limitations of not only the means but also of the methods of warfare, the understanding or interpretation in bona fide of general principles (i.e. principle of humanity and of military necessity which aim is to limit any kind of losses to the minimum necessary to accomplish military aims), and the impact of IHRL on the interpretation of IHL, the standard of using the lowest degree

[206] Marco Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54 I&CLQ 411, 443.
[207] Gaggioli (2015) 100.
[208] Doswald-Beck (2006) 890.
[209] Sassòli, Olson (2008) 609.
[210] ECtHR, *Isayeva* v. *Rosja* (2005) § 180; ECtHR, *Isayeva et al.* v. *Rosja* (2005) § 178.
[211] Israeli High Court of Justice, *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment* v. *The Government of Israel et al.* (2006) § 40.
[212] Remarks of the US President Barack Obama, National Defense University, Fort McNair, Washington (2013). See also Trevor 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' (2012) 211 MLR 115, 176.

of force should be implemented in any kind of an armed conflict if circumstances are allowing for this. Importantly, the application of this standard is not equivocal to the obligation to take on an additional risk to the troops on the part of the party launching the attack.[213]

1.4.3 *Restrictions on the Means and Methods of Warfare Used against Legitimate Targets*

Beyond addressing the issue of the permissible degree of force to be used against lawful targets, IHL is also explicit as regards specific means and methods of warfare in this context. It is prohibited to kill, injure, or capture an adversary by dishonestly leading him 'to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict' (Article 37(1) AP I).

AP I specifies that perfidy can take the following forms: the feigning of an intent to negotiate under a flag of truce or of a surrender; the feigning of an incapacitation by wounds or sickness; the feigning of civilian, non-combatant status; and the feigning of protected status by the use of signs, emblems, or uniforms of the United Nations or of neutral or other states not parties to the conflict.

Ruses of war are not prohibited under IHL. The difference between ruses and perfidy is that the former may mislead the adversary and encourage the abandonment of caution, but it is accomplished without a breach of confidence related to the status of a person or object. It is therefore perfectly legal (and explicitly listed as such in Article 37(2) AP I) to use camouflage, decoys, mock operations, and misinformation. If a person sneaks into a camp at night, wearing garments that are not suggestive of having a protected status, and kills a sleeping soldier with a knife, this is completely acceptable under IHL,[214] as is, for example, hiding in a bush and launching a surprise attack. In cyberspace, it is considered impermissible, for instance, to report that hostilities have ended when in fact hostilities are still underway.[215] Interestingly, because IHL prohibits methods of warfare that cause superfluous injury or unnecessary suffering (both physical and psychological), the argument has even been made that using a computer virus to disrupt communication may be illegal under its regulations.[216]

[213] Melzer (2009) 81.

[214] Chris Anderson, 'Assassination, lawful homicide, and the butcher of Baghdad' (1992) 13 Hamline J. Pub. L. & Pol'y 291, 304; Joseph Kelly, 'Comment, assassination in war time' (1965) 30 MLR 101, 102.

[215] Michael Gervais, 'Cyber attacks and the laws of war' (2012) 1 JL&CW 8, 89.

[216] Lubell (2013) 35.

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Whether a specific type of weapon indisputably qualifies as causing superfluous injury or unnecessary suffering is determined (only with regard to states parties) by an explicit treaty prohibition,[217] as is the case, for example, with regard to small-calibre explosive projectiles,[218] bullets which expand or flatten easily in the body,[219] poison or poisoned weapons,[220] naval mines and torpedoes,[221] anti-personnel mines and booby-traps,[222] chemical weapons,[223] biological weapons,[224] weapons that cause environmental modification,[225] weapons that leave fragments not detectable in the human body by X-rays,[226] incendiary weapons,[227] blinding laser weapons,[228] weapons that leave explosive remnants,[229] and cluster munitions.[230] It is worth noting that there is no obligation to use only the most precise weapon available to a party.[231]

[217] Cf. rules 70–86 *Study on Customary IHL*.
[218] Saint Petersburg Declaration.
[219] Hague Declaration No. 3 (1899).
[220] Article 23(a) HR.
[221] Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines (1907).
[222] CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the (1980); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997).
[223] Declaration concerning Asphyxiating Gases (1899); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) (Geneva Protocol); Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (1992/1993).
[224] Geneva Protocol; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972).
[225] Convention on the prohibition of military or any hostile use of environmental modification techniques (1976).
[226] CCW Protocol on Non-Detectable Fragments (1980).
[227] CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980).
[228] CCW Protocol on Blinding Laser Weapons (1995).
[229] CCW Protocol on Explosive Remnants of War (2003).
[230] Convention on Cluster Munitions (2008).
[231] John Murphy, 'Some legal (and a few ethical) dimensions of the collateral damage resulting from NATO's Kosovo campaign' (2001) 31 IsrYHR 51, 53; Michael Schmitt, 'Targeting and international humanitarian law in Afghanistan' (2009) 85 ILSSUSNWC 307, 312; James Lisher II '"Shock and awe": Should developed states be subject to a higher standard of care in target selection?' (2005–6) 2 IDFLR 149, 167. Cf. Eric Jaworski, '"Military necessity" and "civilian immunity": Where is the balance?' (2003) 2 ChJIL 175, 201.